

Principles to Expedite the Foreclosure Process for Vacant and Abandoned Properties

Our nation's recent financial crisis had a damaging effect on the residential housing market, and while the market is beginning to show tangible signs of recovery — with sales, new construction, and home values all gradually improving from the lows experienced in the recession — many communities continue to “carry scars from rampant foreclosures and vacant properties.”¹

The recovery of the residential housing market is an ongoing process and one that requires wise solutions for the nation's foreclosure inventory — particularly the current backlog of vacant and abandoned properties — to continue successfully. These vacant and abandoned properties cause numerous harms, as they devalue neighboring properties when they fall into disrepair and escalate maintenance and administrative costs for local officials, communities and mortgage servicers. It is also very difficult for neighborhoods or communities that have suffered significantly to recover, as the limbo status of these properties prevents new ownership opportunities and offers difficult to control locations that attract criminal activity.

It is clear that vacant and abandoned properties are impeding a full economic recovery and neighborhood revitalization efforts. To address this, state legislators across the country are considering expedited foreclosure legislation as a promising solution. To lend our voice to the process, the Mortgage Bankers Association's² Vacant and Abandoned Property Working Group and the New York Mortgage Bankers Association have formulated and vetted the following “Principles” as a starting point for our state legislators and policymakers. These Principles and the concepts they embody will aid legislators from all backgrounds in crafting legislation that respects the rights of homeowners, while allowing vacant and abandoned properties to be rehabilitated for the benefit of communities, potential future homeowners, and the economy at large.

PRINCIPLE ONE

A statutory definition is needed for “vacant and abandoned” property

The first step to expedite the foreclosure process is establishing, by reliable statutory amendments, a clear and objective method to identify vacant and abandoned properties. An unambiguous and easily understood definition greatly mitigates the risk that properties used less frequently or seasonally might inadvertently be classified as vacant and abandoned, and provides

¹ “Policy Considerations for Improving Ohio's Housing Markets,” A Staff Report of the Federal Reserve Bank of Cleveland (May 22, 2013), available at http://www.clevelandfed.org/Community_Development/publications/special_reports/20130522.pdf.

² The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, DC, the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, please visit MBA's website: <http://www.mba.org>.

necessary protection from possible challenges for those seeking to utilize an expedited foreclosure process.

The following language is suggested as a starting point for a legislative draft; it may not be practical to incorporate it into statute verbatim:

- I.** Residential mortgaged property shall be presumed vacant and abandoned if (a) or (b) apply, but not if (c) or (d) apply:
- (a)** At least one of the following conditions exists:
- (1)** A government agency or actor on their behalf, or a court of competent jurisdiction, has determined that the property is abandoned;
 - (2)** A written and signed statement issued by the property's mortgagor expresses their clear intent, and the intent of all interested parties, to abandon the property; or
 - (3)** A government agency or actor on their behalf, or a court of competent jurisdiction, has issued an order or finding declaring the property unfit for occupancy, or constituting a serious threat to the health, welfare or safety of adjoining properties, adjacent properties and/or the public at large.
- (b)** At least two of the following conditions exist:
- (1)** Multiple windows, doors and/or entrances on the property are boarded up, unhinged, closed off, smashed in, or are continuously unlocked;
 - (2)** The residential property has been stripped of copper and/or other metals;
 - (3)** Interior furnishings, personal items, appliances and/or fixtures have been removed from the property; interior furnishings shall include window treatments, such as blinds, curtains or shutters;
 - (4)** Utility services (gas, electric, and/or water) have been terminated to the property, or are established in the name of the mortgage servicer or an actor on their behalf to preserve the property;
 - (5)** Newspapers, circulars, flyers and/or mail have accumulated on the property, or the United States Postal Service has discontinued delivery to the property;
 - (6)** Rubbish, trash, debris, neglected vegetation and/or natural overgrowth has accumulated on the property;

- (7) Multiple municipal building and/or housing code violations exist for the property, which have been documented as being uncorrected during the preceding year;
 - (8) Written and signed statements have been issued by the property's adjoining neighbors, adjacent neighbors, delivery persons and/or [insert an applicable government official], indicating that the property is abandoned;
 - (9) Hazardous, noxious and/or unhealthy substances or materials have accumulated on the property; or
 - (10) There exists other credible evidence indicating the intent of the mortgagor to vacate and abandon the property.
- (c) The residential property is the subject of a probate action, action to quiet title, or other litigation where its ownership is contested.
 - (d) The residential property consists of an unoccupied building that is undergoing construction, renovation, or rehabilitation, and the building is in compliance with all applicable permitting requirements, regulations and statutes.

Thus, a high level of protection is afforded to the homeowner by this model language. Properties that are under construction or have contested ownership being litigated are automatically excluded, and two avenues for a property to meet the definition of vacant and abandoned exist — through a credible attestation (Subsection a) or the evidential presence of two or more verifiable conditions (Subsection b). Moreover, until appropriately confirmed, a property's vacant and abandoned status is merely what the model language suggests — a presumption. And once this status is confirmed, additional evidence and processes (*e.g.* verification that the homeowner is in default on the mortgage loan) will also be necessary to secure a foreclosure determination. These aspects are detailed in Principles II and III.

PRINCIPLE TWO

Once a property is considered vacant and abandoned in a judicial foreclosure jurisdiction, an efficient court procedure should be available to make a determination of this status, one that then allows a foreclosure to take place in a truly expedited manner

Through the creation of a statutory definition of vacant and abandoned property in Principle One, the party seeking to foreclose may begin building its case that a residential property fits this definition. Equally as important, there must also be a method for courts in judicial foreclosure jurisdictions to declare it vacant and abandoned — and then allow for an expedited foreclosure process to take place. Principle Two aims to address this by incorporating starting points for model language, along with suggestions and thoughts to consider when drafting legislation. As a top level priority, any legislation that is produced must balance a multitude of interests, ensuring that due process protections are firmly in place for homeowners and that sensible procedures are available to the party seeking to utilize the expedited foreclosure process.

An Efficient Court Procedure Should Operate Separately from the Current Foreclosure System:

An overarching point about vacant and abandoned property must be stressed from the start — even if a court holds that a property is vacant and abandoned by motion under a judicial foreclosure system, this does not automatically constitute a completed foreclosure claim, allowing for judgment and sale. In actuality, vacant and abandoned properties still have to undergo the state’s statutory procedures for determining a foreclosure, including its noticing standards and timing requirements. These judicial procedures make foreclosure determinations lengthy endeavors, and there are few compelling reasons for requiring vacant and abandoned properties to undergo this — given the homeowner’s absence and the property’s troublesome effects on the surrounding community.

It is true that a vacancy and abandonment motion, conducted concurrently or shortly after a foreclosure judgment is rendered, could be designed to improve the property’s sale timeline or reduce any applicable redemption period, possibly expediting the process at large by a few months. However, we believe there is a method that will make a larger improvement: a “special statutory proceeding” should be established through legislation for the consideration of vacant and abandoned properties, which would operate separately from the state’s Civil Procedure Rules that govern general foreclosure.

The solution would leave all Civil Procedure Rules unchanged, able to continue overseeing general foreclosure claims, but would recognize the need for expedited action on these empty, stagnant homes by allowing for more logical due process timelines and requirements to be implemented.

Proper Notice Provisions are Needed for the Vacancy and Abandonment Motion:

Importantly, the filing of a motion to determine vacancy and abandonment should be the action that statutorily triggers use of this “special statutory proceeding.” With the state Civil Procedure Rules no longer controlling by design of legislation, this bill draft must also include noticing provisions to ensure that Constitutional requirements are incorporated in the process.

The following language is suggested as a starting point for a legislative draft; it may not be practical to incorporate it into statute verbatim:

- II. If a residential first mortgage loan is secured by residential property containing four or fewer dwelling units that is presumed to be vacant and abandoned pursuant to Section I, the party seeking to foreclose on the mortgage loan may move for a determination that the residential property is vacant and abandoned before a court of competent jurisdiction.
 - (a) The moving party shall promptly send to the last known address of each known homeowner, obligor, and mortgagor a notice that contains the following:
 - (1) A copy of all documents in support of the motion for vacancy and abandonment, pursuant to Section I and demonstrated by photographic

or other documentary evidence, which shall be promptly submitted to the court as evidence;

- (2) A description of the consequences that may follow from a vacant and abandoned determination, including the possibility of a contemporaneous foreclosure hearing following a determination that the residential property is vacant and abandoned; and
- (3) A statement that the homeowner, obligor, or mortgagor may contact [insert appropriate court contact] to obtain further information, or to object on record to the requested determination of vacancy and abandonment, which shall be admissible as evidence at the hearing.

A Hearing is Needed to Consider Evidence for the Vacancy and Abandonment Motion:

Any legislation drafted must include a hearing, to ensure that anyone lawfully allowed to challenge the vacancy and abandonment motion may do so. To ensure fairness and court efficiency, the model language below provides that denial of a vacancy and abandonment motion does not preclude the property from being subject to a general foreclosure claim — whether currently in progress or to be brought in the future. Even if a property cannot be labeled vacant and abandoned, it should not necessarily be exempted from a general foreclosure claim. Also, we drafted a hearing timeframe that we believe is expeditious, yet realistic.

The following language, building on the Section II draft above, is suggested as a starting point for legislation; it may not be practical to incorporate it into statute verbatim:

- (b) When a motion for vacancy and abandonment is filed under Section II, the court shall schedule a hearing on the motion, to be held not less than 15 and not more than 25 calendar days after a notice of the hearing is promptly sent by the court to all interested parties.
 - (1) If the court determines the residential property is vacant and abandoned by a preponderance of the evidence, a declaratory judgment shall be rendered by the court in favor of the moving party’s motion for vacancy and abandonment.
 - (2) If the court determines the residential property is not vacant and abandoned, the motion for vacancy and abandonment shall be denied; this denial shall not preclude the property from being the subject of a concurrent or future foreclosure claim under [insert applicable state statute for general foreclosure claims].

At the Hearing, Other Foreclosure Requirements Should be Immediately Addressed Upon A Determination of Vacancy and Abandonment:

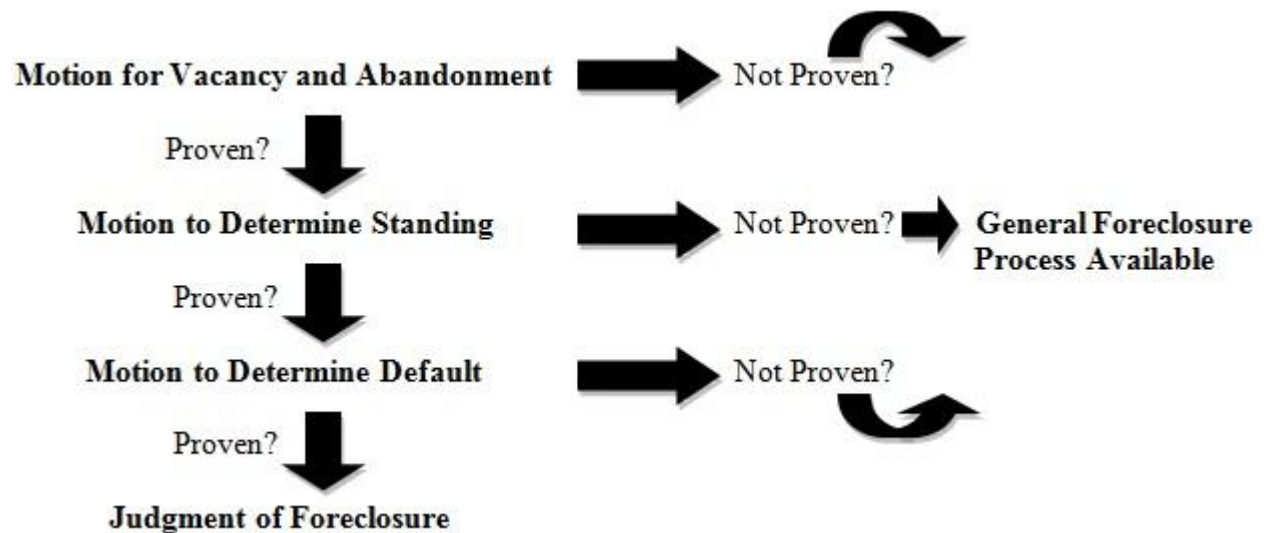
Again, even if a court determines a property is vacant and abandoned under a judicial foreclosure system, this does not automatically constitute a completed foreclosure claim. This remains true even under the “special statutory proceeding” we suggest, as other determinations must still be

made in line with Constitutional protections — namely whether the party seeking foreclosure has standing to foreclose, whether the mortgagor is in default on the property’s mortgage loan, and whether the totality of this foreclosure claim should merit a judgment of foreclosure from the court.

Importantly, this new “proceeding” will also allow for modification of the process and timelines for these foreclosure determinations when vacant and abandoned properties are at stake. As alluded to in Section II (a) (2) above, we believe that these additional determinations should be made immediately after a court finds a property to be vacant and abandoned, in the same hearing. By combining all necessary motions into one hearing and requiring each of them to be individually granted in order to continue forward with the expedited foreclosure claim, efficiency is promoted without removing important homeowner protections.

Thus, legislative language should be drafted to create this new, combined procedure. More specifically, once a property is found to be vacant and abandoned by the court, proof of legal standing by the party seeking to foreclose will need to be evidenced. If the evidence is sufficient for the court, the party will next have to prove the mortgagor’s default on the mortgage loan, and if the evidence is sufficient the court could then render a judgment of foreclosure for the claim. Please note, for these determinations it may be practical to utilize existing understandings of the definitions for “default” and “standing” that are already in use for general foreclosure claims.

The following diagram outlines our suggested one-day, single-hearing foreclosure complaint process for vacant and abandoned properties:



Moreover, it will be necessary to add requirements to the notice provisions drafted above in Section II (a) — to require that copies of the motion for standing, the motion for default, and the motion for judgment of foreclosure also be sent to every known homeowner, obligor, and mortgagor, along with any related materials the legislature deems necessary to provide in protection of the homeowner’s rights. And it may be needed for Section II (a) (2) to more

adequately require educating the homeowner on the fact that the property may be foreclosed upon in the same hearing as the vacancy and abandonment motion.

A Judgment of Foreclosure for a Vacant and Abandoned Property Should Trigger an Expedited Sale and Limited Window for Redemption:

If the court renders a judgment of foreclosure under this “special statutory proceeding,” a public sale of the vacant and abandoned property should take place within a reasonable, expedited timeframe — we recommend 40 days following judgment, at most. Judicial foreclosure systems often have lengthy timeframes between foreclosure judgments and property sales which favor homeowners, but with a vacant and abandoned property these considerations are less relevant. In fact, the passage of time only creates more harm to the community and limits new homeownership opportunities. The same reasoning applies to the availability of a redemption period, where a homeowner could pay off or bring their mortgage loan current and avoid completion of the foreclosure. A limited period may be made available as a final safeguard, but we recommend no more than a 14 day period, given the property’s vacant and abandoned status.

Finally, any legislation drafted should also consider a direct transfer of the property to the foreclosing first mortgage party if there is no equity in the mortgage property available to satisfy the interests of subordinate creditors, and this transfer should extinguish all subordinate interests. This approach will save on state costs associated with a public sale, should this be relevant.

PRINCIPLE THREE

Once a property is considered vacant and abandoned in a non-judicial foreclosure jurisdiction, a practical “rebuttable presumption” should be available for the moving party to evidence, so they may confidently expedite the foreclosure process

As in a judicial foreclosure jurisdiction, there should be an opportunity for properties that are vacant and abandoned to undergo an expedited foreclosure in a non-judicial jurisdiction. However, asserting this action under a non-judicial system will generally be more challenging, given that a binding court order is only sought in judicial foreclosure systems. To elaborate, a key component of mortgages in non-judicial jurisdictions is that the homeowner signs a deed of trust when they take on a mortgage loan, giving a third party trustee the right to sell the property without involvement of the courts in the event they do not make their payments. In other words, there must be a robust “rebuttable presumption” with clear evidentiary requirements that demonstrates a property is vacant and abandoned, in order to create an environment where mortgage lenders/servicing parties would be confident conducting, in good faith, an expedited foreclosure in accordance with the law. Moreover, when this “rebuttable presumption” is approved by a designated government official, it should trigger expedited foreclosure timelines and remove enough requirements that make acting on it worthwhile for the party seeking foreclosure.

In light of these concerns, the suggested model language below encourages mortgage lenders/servicing parties to secure the same strong evidence to determine vacancy and abandonment that is suggested under Principle One. Moreover, other consumer-focused safeguards exist, as the model would require the property’s mortgage loan to be in default, and it would prohibit an expedited non-judicial foreclosure from taking place if any objection is

received from the homeowner when provided notice, to guarantee that controversies are at an absolute minimum.

Again, the following language is suggested as a starting point for a legislative draft; it may not be practical to incorporate it into statute verbatim:

- III. (a)** A residential first mortgage loan secured by residential property containing four or fewer dwelling units may be considered vacant and abandoned if:
- (1) The requirements of Section I (a) and (b) are demonstrated by photographic or other documentary evidence; and
 - (2) The residential property's first mortgage loan is in default, pursuant to [insert applicable state law].
- (b)** A party seeking to foreclose on a residential property considered vacant and abandoned under Section III (a) shall promptly send to the last known address of each known homeowner, obligor, mortgagor, the residential property's third party trustee, and [insert applicable government official] a notice that contains the following:
- (1) A copy of all documents in support of a residential property's vacant and abandoned status, pursuant to Section I and demonstrated by photographic or other documentary evidence;
 - (2) Evidence that the residential property's first mortgage loan is in default, pursuant to [insert applicable state law];
 - (3) A description of the consequences that may follow from a vacant and abandoned determination;
 - (4) A statement that the homeowner, obligor, or mortgagor may contact [insert applicable government official] to obtain further information; and
 - (5) A statement that the homeowner, obligor, or mortgagor may contact [insert applicable government official] to object to the presumption that the residential property is vacant and abandoned, by sending in writing a notification of objection to the [insert official] within 14 calendar days from the date notice was sent under Section III (b).
- (c)** Upon expiration of the timeframe established under Section III (b) (5), if no objection is made by the homeowner, obligor, or mortgagor pursuant to the same Subsection, and the [insert applicable government official] has determined that the residential property is vacant and abandoned in accordance with the moving party's Section III (b) notice, the third party trustee shall be

instructed to promptly send a notice of sale to the [insert official], moving party, and each known homeowner, creditor, and mortgagor.

- (d) The residential property's third party trustee shall offer the residential property at a public sale within 10 calendar days after sending a Section III (c) notice of sale, if the homeowner, obligor, or mortgagor is unable to pay off or bring the residential property's first mortgage loan current in this timeframe; this information shall be included in Section III (c)'s notice of sale.
- (e) No redemption period shall be available to the homeowner, obligor, or mortgagor once a sale has been conducted for the residential property, pursuant to Section III (d); nor shall a redemption period be available if the residential property does not sell at this sale.
- (f) If a Section III (b) (5) objection is made to the vacant and abandoned status of a residential property, the property shall not have its foreclosure process expedited; this objection shall not preclude the property from being the subject of a concurrent or future foreclosure action under [insert state's applicable non-judicial statute].

It is important to highlight additional ways that the language above would expedite a typical non-judicial foreclosure, making the process a worthwhile pursuit. Foreclosure notices and the time allotted for a homeowner to respond/act can vary under non-judicial jurisdictions — from numerous weeks to a few months. Again, extended timeframes serve no homeowner benefit with homes that are vacant and abandoned, and shortening this period to 24 days collectively under Section III (b) (5) and (d) is certainly an incentive for a moving party to consider an expedited foreclosure process. Parallel logic was also used when modeling the language's lack of a redemption period after the residential property stands for a public sale, and if mediation or counseling requirements exist in the state's foreclosure process any legislation drafted should make sure to remove these procedures when vacancy and abandonment is determined.

Finally, language was included to ensure that existing or future foreclosure claims for a property are not impeded in the event that vacancy and abandonment is asserted and rebutted by the homeowner — to guarantee that consideration of the vacant/abandoned route does not lead to further backlogs.

PRINCIPLE FOUR

In order to ensure that the aforementioned Principles are effective, local laws or ordinances must be preempted at the state level to avoid conflict or divergence

In many states today there exist municipal standards for real estate loans that can have a disruptive effect on any state-level laws enacted to improve the foreclosure process for vacant and abandoned properties. The following Principle would broadly prevent this conflict, while streamlining standards for both mortgage lenders/servicing parties and homeowners. More specifically, the model language below would prevent municipal authorities from enacting or enforcing local laws or ordinances that control the enforcement and servicing of real estate loans

— which would safeguard foreclosure standards like those in Principles I – III. This approach would not prevent local governments from enforcing state or applicable federal laws or carrying out their statutory duties in these areas, it would merely prevent them from determining their own individualized standards. Additionally, it must be noted that the state constitution should be reviewed before legislation is drafted for this Principle, as legislative action in this manner may be prohibited. Please see below a sample of legislative language to consider:

- IV.** The enforcement and servicing of residential property containing four or fewer dwelling units secured by a mortgage or deed of trust or other security instrument shall be pursuant only to state and applicable federal law, and no county, municipality, local government entity, homeowners association or cooperative may enact or enforce any related resolution, ordinance, or rule that would add to, change, delay, or interfere with any real estate loan agreement, security instrument, mortgage or deed of trust associated with the residential property.

CONCLUSION

We encourage our state legislators and policymakers to consider drafting expedited foreclosure legislation to improve our state’s vacant and abandoned property processes. These properties are a universal concern — one that must be solved through practical solutions to help communities recover from one of the greatest financial crises in our history, while not obstructing the important consumer protections embodied in the law. We hope our ideas will spark a broader discussion, and we remain available as a resource should you seek to examine next steps:

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