



July 26, 2011

The Honorable Rahm Emanuel  
Mayor of Chicago  
121 N. LaSalle St.  
Chicago City Hall, 4<sup>th</sup> Floor  
Chicago, IL 60602

The Honorable Susana Mendoza  
City Clerk of Chicago  
121 N. LaSalle St.  
Chicago City Hall, Room 107  
Chicago, IL 60602

Alderman Pat Dowell  
121 N. LaSalle St.  
Chicago City Hall, Room 300, Office 03  
Chicago, IL 60602

CC: Alderman of the City Council of Chicago

**Re: Amendment of Chapter 13-12 of the Chicago Municipal Code Concerning Owner and Minimum Requirements for Vacant Buildings**

Ladies and Gentlemen:

The American Securitization Forum (“ASF”)<sup>1</sup> submits this letter to voice its strong concerns related to the proposed amendment to Chapter 13-12 of the Chicago Municipal Code to broadly define “owner” as it relates to vacant buildings. While well-intentioned to reduce the overall stock of vacant homes in the Chicago area, this legislation would, if enacted, impose substantial costs and reduce availability of affordable mortgage credit to Chicago residents.

In particular, ASF believes the proposed definition of an owner, to the extent that it would include a mortgagee, or an agent or assignee of the mortgagee, is misguided and contrary to established property law nationwide. We believe the adoption of the proposed amendment to Section 13-12-125(e), particularly the inclusion of clause (4) defining “owners” to include lenders and their agents

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<sup>1</sup> The American Securitization Forum is a broad-based professional forum through which participants in the U.S. securitization market advocate their common interests on important legal, regulatory and market practice issues. ASF members include over 330 firms, including issuers, investors, servicers, financial intermediaries, rating agencies, financial guarantors, legal and accounting firms, and other professional organizations involved in securitization transactions. ASF also provides information, education and training on a range of securitization market issues and topics through industry conferences, seminars and similar initiatives. For more information about ASF, its members and activities, please go to [www.americansecuritization.com](http://www.americansecuritization.com).

and assignees, presents significant public policy and legal concerns, and will likely trigger unintended consequences that will further limit mortgage financing options for the residents of Chicago.

Fundamentally, if those providing mortgage credit incur retroactively the additional costs of liability of being an “owner” of a building even though property law is very clear that they are not the current legal owner, lenders and investors in mortgage-backed securities will shy away from extending credit under these circumstances. Ultimately, reduced access to credit for first-time home buyers and other prospective purchasers of vacant homes will have the unintended consequence of further damaging Chicago neighborhoods, rather than bringing permanent residents back to those vacant properties.

The ASF and its members fully appreciate the City Council’s concerns related to problems caused by vacant buildings. Our members are keenly aware of the impact that vacant properties present to a community, and the costs to local governments of enforcing building codes and policing neighborhoods containing unmaintained vacant properties. The “owner” of real estate should obviously be fully responsible for adhering to all applicable building codes, regulations and laws relating to the maintenance, safety and security of a property from becoming public nuisances. Only the owner with possessory rights, however, has the ability to meet those obligations. Therefore, a lender assumes the responsibility of a property owner only after a default has occurred on the underlying indebtedness and the lender has succeeded to ownership of legal title through foreclosure or other lawful means. Until the lender has succeeded to ownership, the borrower/owner has those legal responsibilities.

We strongly object to the proposition that a lender can or should be considered an owner and required to undertake property maintenance responsibilities prior to assuming title to the property. Among other concerns, a lender may be precluded by trespass laws or by borrower bankruptcy protections or redemption rights from asserting control over a property prior to completion of foreclosure and conveyance of legal title. A lender under a mortgage loan or a subsequent assignee does not own the property securing a mortgage loan. Rather, the borrower owns the property and has granted a lien on the property to the lender to secure the borrower’s loan payment obligations. The owner of the property, even a defaulting borrower, retains all elements of legal title to the property and the associated legal rights of possession and responsibilities for maintaining the property and complying with applicable laws and regulations with regard to the property.

Clause (4) of the proposed definition of “owner” raises significant legal and constitutional concerns because it forces lenders to take actions and incur costs as if they were owners of the subject properties prior to completion of a legal foreclosure. Imposing such duties and obligations on lenders, without possessory rights, contradicts established legal and constitutional property rights’ principles and the existing statutory framework governing the rights and obligations of lenders and property owners. Municipal ordinances that purport to alter the rights of real property owners can be subject to significant legal challenges, including: (i) whether the ordinance results in an unconstitutional taking in violation of the Fifth Amendment of the U.S. Constitution and applicable provisions of the Illinois Constitution; (ii) whether the ordinance’s retroactive effect constitutes an unconstitutional imposition of retroactive liability; and (iii) whether imposition of the ordinance,

which affects substantially the rights of borrowers and lenders, violates those parties' substantive due process rights.

In particular, Clause (4) of the proposed definition of "owner" conflicts directly with Illinois state law by attempting to impose the duties of a mortgagee in possession upon a mortgagee who is not in possession of the premises. In recent years, the Illinois Legislature has enacted legislation, embodied in the Illinois Code of Civil Procedure, comprehensively governing the procedural and substantive rights and responsibilities of mortgagors and mortgagees prior to the consummation of a foreclosure: "[t]he provisions of this Article shall govern the right to possession of the mortgaged real estate during foreclosure."<sup>2</sup> Balancing the rights of borrower/mortgagors and lender/mortgagees, the State Legislature imposed clear procedural rules to determine when a mortgagee becomes a "mortgagee in possession" and is, by that status, given certain powers and charged with certain duties, such as the duty of a receiver to maintain property.<sup>3</sup> Notably, the Legislature unambiguously decreed that "[n]o mortgagee shall be required to take possession of mortgaged real estate, whether upon application made by any other party or otherwise," thus reinforcing the voluntary nature lenders' right to seek possession of real property collateral.<sup>4</sup> Moreover, the Legislature mandated certain procedural safeguards—including the requirement that a court of competent jurisdiction make specific determinations—as a condition precedent to vesting possessory rights and duties on a foreclosing mortgagee.<sup>5</sup>

As such, the broad definition of "owner" in the proposed amendment to Chapter 13-12 of the Municipal Code crosses the line of established principles regarding obligations of a lender and a property owner. We believe the inclusion of such a broad provision will have a chilling effect on the willingness of lenders to provide mortgage financing to homeowners in the City of Chicago and will drive up the cost of such lending to residents in Chicago. The ability to sell mortgage loans into the secondary market has a profound effect on the availability and pricing of mortgage loans. The potential added costs, obligations and liabilities that would be imposed on a lender or its assignees as a result of the amendment would greatly deter lenders and other secondary market participants from participating in mortgage lending in Chicago, further exacerbating the challenging real estate market conditions and the ability of Chicago residents to secure mortgage financing on favorable terms.

By way of example, we note that, in 2002, the State of Georgia enacted an anti-predatory lending statute that imposed certain liabilities on mortgagees and assignees. As a result, Georgia mortgage loans were no longer eligible for inclusion in securitization trusts, because the nationally-recognized statistical rating organizations could not assign ratings to the related securities due to the uncertainty of liability and cost of compliance with the Georgia anti-predatory lending statute. The lack of secondary market financing options for Georgia loans resulted in a significant contraction of mortgage lending and a dramatic increase in mortgage rates for Georgia borrowers. The assignee liability provisions of the Georgia statute ultimately were repealed many months later under substantial political pressure from Georgia voters who were unable to access the mortgage credit markets.

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<sup>2</sup> See 735 ILCS 5/15-1701(a)

<sup>3</sup> See 735 ILCS 5/15-1701-1703

<sup>4</sup> See 735 ILCS 5/15-1702(a)

<sup>5</sup> See 735 ILCS 5/15-1701(b)

In addition to the various legal concerns outlined above, the proposed amendment presents many administrative and practical challenges of compliance. For example, it may be administratively impossible for a lender or servicer to determine whether a property is “vacant” as defined under the ordinance, which requires a determination if a property “has been used as a residence by a person entitled to possession for a period of at least three months within the previous nine months and a person entitled to possession intends to resume residing at the property.” Lenders and servicers have limited ability to confirm the occupancy of specific properties and cannot determine the subjective intent of a borrower with regard to continued residency. There are also questions of whether compliance with the Chicago ordinance, as amended, would conflict with state criminal laws regarding trespass or wrongful entry.

It is important to note that the Illinois legislature has provided municipalities with the ability to obtain a lien on a property for which it incurs removal or other security costs with respect to abandoned properties, which lien would be senior to any lien held by a mortgage lender and would allow for the municipality to recover such costs from proceeds from the sale of the property prior to the lender being paid amounts due on the mortgage loan.<sup>6</sup> This is similar to the procedures in place for the recovery of unpaid real estate taxes on properties that allows the municipality to obtain a lien senior to that of the lender’s lien on the property, and to recover unpaid taxes from proceeds of the sale of the property prior to unpaid loan amounts being paid to the lender. There may be sound public policy reasons for providing a municipality with a superior lien on real estate to protect the public interest in either collecting real estate taxes or taking appropriate security measures with respect to abandoned property.

In addition, we are aware that the City of Chicago is working with the local judiciary and certain servicers to design and implement “fast track” foreclosure procedures for vacant properties. We believe that these efforts may make a meaningful difference in accelerating the time in which a lender (or its servicer) can obtain possession of the property and, as property owner, then undertake the needed actions to secure the property. The ASF and its members fully support legislative and judicial measures to accelerate the foreclosure timeline and property ownership transfer to the lender. Then, as owner, the prior lender can implement the property maintenance directives that the ordinance addresses.

In sum, the ASF and its members recognize the interest of municipalities to address safety, economic and other public interest concerns related to vacant property. We support existing Illinois statutory provisions allowing municipalities to obtain liens on mortgaged properties giving them superior rights to lenders in recovering the cost incurred by the City in addressing these concerns. However, we object, on behalf of our members, to any legislation that would unfairly and inappropriately require lenders to take actions and incur costs that are rightly attributable to the property owners. We believe that characterizing lenders as owners of property prior to transfer of title through foreclosure or similar legal process presents significant constitutional and legal concerns. We believe that the adoption of the proposed amendment to the ordinance, and particularly the proposed clause (4) of the definition of “owner”, will have long-term negative

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<sup>6</sup> S.B. 1894, 96th Gen. Assem., 2009 Legis. Serv. P.A. 96-856 (Ill. 2009); S.B. 3739, 96th Gen. Assem., 2010 Legis. Serv. P.A. 96-1419 (Ill. 2010).

effects on the desire and ability of lenders and other secondary market participants to provide competitive and attractive mortgage financing options for properties located in the City of Chicago.

This increased risk, and the resulting increased costs of borrowing would be felt even more keenly in areas of Chicago where home prices are declining, local economic conditions are poor, or a borrower tends to have a riskier credit profile. Given the current conditions in the mortgage market with tight lending conditions, it is already difficult for some borrowers to access mortgage credit at all. The changes proposed in the bill will exacerbate this problem and will harm those Chicago neighborhoods it intends to help by making it even more difficult and expensive for new borrowers to obtain affordable new financing to fill vacant homes.

For the foregoing reasons, we oppose the proposed amendment to Chapter 13-12 of the Chicago Municipal Code to the extent it includes clause (4) of the definition of “owner” or any other provisions intended to characterize mortgagees (or their assignees or agents) as “owners” of the property. We thank you for your consideration of our views on this important legislation. For additional information on this issue or our members’ views, please feel free to contact me at 212.412.7107 or at [tdeutsch@americansecuritization.com](mailto:tdeutsch@americansecuritization.com).

Sincerely,

A handwritten signature in black ink that reads "Tom Deutsch". The signature is written in a cursive, flowing style.

Tom Deutsch  
Executive Director  
American Securitization Forum