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# ABSTRACT

American College of Mortgage Attorneys

## CONTENTS

- 1 President's Column
- 2 Editor's Notes
- 3 Executive Director's Column
- 4 Mortgage Transfers and MERS in California and Elsewhere Last Year
- 10 ACMA Fellows in the News
- 11 Enforceability of Carveouts to Nonrecourse Loans: Recent Cases
- 15 ACMA Upcoming Meetings
- 16 Important Considerations Before Foreclosing on Condominium Units
- 18 Land Banking: A Sharper Tool in the Distressed Property Toolkit
- 21 ACMA Committees



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## President's Column

by Darlene T. Marsh

It is quite an honor to serve as President of the College this year and I am glad to report that signs of continued economic recovery are steadily increasing. Anecdotal reports from many of our Fellows marked the 2011 year end with a flurry of deal activity that has been largely absent in recent years. Conversations with brokers, bankers and builders are also encouraging. What a wonderful change from the recent deluge of foreclosures, bankruptcies and workouts.

The recent announcement of a joint state and federal settlement of foreclosure fraud allegations against five of the nation's largest lenders will hopefully accelerate market improvements. The fact that no single group seems particularly satisfied with the terms of the settlement is an indication that it probably represents the best available compromise.

The College has remained strong and is well-positioned to continue its mission while also pursuing geographic expansion. We have a new logo and a new website. Many thanks to our Technology Committee. The meeting last fall in San Diego was top-notch, both in content and amenities, and the efforts of the Programs Committee are greatly appreciated. If you were not able to attend, please mark your calendars for both the upcoming Regents Meeting at The Royal Palms in Phoenix on April 19–21, as well as the Annual Meeting at The American Club in Kohler, Wisconsin on October 11–13. Rob Krapf has made an excellent selection for our meeting venue and it promises to be a memorable occasion.

ACMA's participation and affiliation with other professional groups continues to be a great benefit to our organization. The Synergy Group, composed of representatives of several professional associations (including the ABA's Real Property, Probate and Trust and Business Law Sections, ACREL, the American College of Commercial Finance Attorneys, the Association of Commercial Finance Attorneys, Commercial Real Estate Women and the International Council of Shopping Centers), is monitoring developments with the FATF (Financial Action Task Force) regulations to combat money laundering and terrorist financing. The College's seat on ULC's Joint Editorial Board for Uniform Real Property Acts has been a conduit for valuable exchange of information on a variety of topics, most recently exploring the possibility of a federal foreclosure law. We appreciate the efforts of all our Fellows involved in these ongoing relationships.

*[continued on page 3]*

# Land Banking: A Sharper Tool in the Distressed Property Toolkit

by Sorell E. Negro and Dwight H. Merriam

## Introduction

Vacant, abandoned, and foreclosed properties pose growing problems for communities throughout the United States and complex challenges for mortgage attorneys. With over 18 million vacant housing units per year in 2008, 2009, and 2010,<sup>1</sup> the housing crisis is not letting up. Such distressed properties lower the value of surrounding properties, reduce tax revenue, make neighborhoods less safe, and deter investment.<sup>2</sup> Municipal costs to maintain them, including clean-up, landscaping and policing costs, are also significant.<sup>3</sup>

Repurposing abandoned or foreclosed properties requires an orchestration of legal tools. Mortgage attorneys should be familiar with several approaches. Municipal blight ordinances, for example, can generally be enacted to help promote public safety and welfare. Some can also protect property values. For example, a Connecticut statute authorizes municipalities to define and address blight.<sup>4</sup> A municipality may prohibit causing blight or failing to remedy blight by imposing fines. Another important tool is requiring the registration of vacant properties. Many local governments throughout the country are enacting ordinances requiring that vacant properties be registered in order to hold owners responsible for maintaining their properties. For example, in December 2011, Cook County, Illinois passed such an ordinance requiring owners or mortgage holders to annually register vacant buildings

and adhere to property maintenance guidelines.<sup>5</sup> Owners will be fined \$500-1000 per day for failing to comply, such as failing to secure doors and windows, repair broken windows, keep the grass and weeds below 10 feet, clear snow from the main walkway and sidewalks, remove debris and trash from the yard, and maintain fences, gates, and stairs.<sup>6</sup>

In addition to these mechanisms, land banking has developed in recent years to successfully deal with systemic problems of vacant or foreclosed properties.

## Land Banking

### Overview

Land banks acquire vacant and abandoned properties, primarily through tax foreclosure, and then hold and manage the property for future use or resale. Properties may also be acquired through mortgage foreclosure, foreclosure of government liens from code violations or from third parties depositing property in the bank.<sup>7</sup> Through land banks, municipalities demolish the properties or rehabilitate them for resale or future use, depending on the plan for the community's development.

Land banks first developed in the 1970s in St. Louis and Ohio, followed by Atlanta and Louisville over a decade later, to deal with abandoned properties in tax foreclosure.<sup>8</sup> While these rudimentary land banks dealt with repurposing some properties, they lacked the capacity to effectively deal with the system problem of abandoned properties

that each city faced.<sup>9</sup> Funding was lacking, and the tax foreclosure laws did not allow the land banks to efficiently acquire title or make the properties marketable.<sup>10</sup> Land banks have since evolved to become more efficient and capable.

There are many different organizational structures of land banks. Municipalities are creatures of the state and, thus, their authority is granted from state constitutions and enabling statutes, including the authority to create land banks. Some states have state statutes that expressly authorize municipalities to create land banks and enable intergovernmental cooperation for regional goals such as redevelopment and affordable housing. Although enabling legislation is generally required, in certain states, municipalities may have the authority to develop a land banking scheme without express statutory authority, such as through eminent domain powers. A redevelopment authority or municipal housing development department may perform similar functions as land banks, but their authority to acquire and dispose of property is more limited, and their approach is often confined to a specific district or area.<sup>11</sup>

States can enable land banking by streamlining and shortening foreclosure processes and authorizing funding mechanisms, such as authorizing issuance of tax-free bonds or tax-increment financing. States can also allow land banks to waive back taxes or sell properties at below market value, emphasizing

community development over profit, and provide funding and tax incentives for land banks.

Generally, following the state enabling statute, local governments adopt an ordinance to create a land bank authority. Land banks are often nonprofit organizations or government entities and are run by a board of directors that is elected or appointed by the local government. Once the property is acquired, land banks may have the authority to waive back taxes and clear titles. They rehabilitate the property—through improvements, redevelopment, or demolition—or maintain it for future use or resale.<sup>12</sup> Land banks generally look at the property's characteristics—including geography, relationship to the community, reason for vacancy or abandonment, condition, and environmental contamination—to determine potential re-uses.<sup>13</sup>

The federal government has provided significant funding for land banks following the housing crisis. The Housing and Economic Recovery Act of 2008 provided \$4 billion to states and local governments, which could be used to establish land banks and to purchase and rehabilitate properties in mortgage foreclosure.<sup>14</sup> This was part of the Neighborhood Stabilization Program, which was further funded by \$1 billion through the American Recovery and Reinvestment Act of 2009.<sup>15</sup> Another \$1 billion in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to states and local government with neighborhoods facing the highest rates of foreclosure and subprime mortgages.<sup>16</sup>

### Successful Land Banks

As towns and cities throughout the country have differing needs and goals,

land banks vary in their creation and functions to serve their varied purposes. For example, Michigan enables local jurisdictions to create land bank authorities with broad powers and provides tax breaks to land banks to encourage land banking. The Genesee County Land Reutilization Council was created in 2002 from an inter-local agreement between the county and Flint, and in 2004, it became the Genesee County Land Bank Authority ("GCLBA"). This land bank became a remarkable success and a model for other communities seeking to set up land banks in response to the mortgage crisis. It acquires most of its properties through tax foreclosures, and between 2004 and 2009, it successfully repurposed 1500 properties.<sup>17</sup>

Michigan's Delinquent Property Tax Foreclosure Act of 1999 paved the way for the successful land bank.<sup>18</sup> The law authorized counties to acquire properties through tax foreclosure and to create a fund from the sale of the properties to manage its inventory.<sup>19</sup> It stopped the practice of selling tax liens to private third parties, who were not incentivized to put the property back to use, and streamlined the foreclosure process by allowing a county to consolidate all of its tax-delinquent properties into one foreclosure proceeding.<sup>20</sup> The 2003 Land Bank Fast Track Act authorized land banks to acquire all tax foreclosed properties and quiet title, and it established a state land bank—the Michigan Land Bank Fast Track Authority.<sup>21</sup> Land banks may be created by a county or qualified city through an intergovernmental agreement with the state land bank.<sup>22</sup> Michigan land banks have a variety of funding mechanisms including borrowing money, issuing bonds or notes (which are tax exempt), tax-increment financing for clean-up and demolition, and receiving

the interest and penalties on delinquent tax liens.<sup>23</sup> Property of land banks in Michigan and their income are exempt from all state and local taxes and special assessments.<sup>24</sup>

Cuyahoga County, Ohio, facing approximately 13,000-15,000 foreclosures per year since 2005,<sup>25</sup> followed GCLBA as a model to set up its own land bank, upon state legislation authorizing a land bank in that county. The Cuyahoga County Land Reutilization Corporation ("CCLRC") was established in 2009 as a non-profit community corporation. CCLRC has entered into over a dozen Memoranda of Understanding with different cities, setting forth means of maintaining, developing or demolishing properties, and prioritizing the disposition of properties.<sup>26</sup> It acquired nearly 500 properties in its first year.<sup>27</sup> Following the CCLRC's trial period, Ohio enacted a statewide land banking enabling statute in 2010.<sup>28</sup>

CCLRC benefits from Ohio's streamlined tax foreclosure proceedings, which allow foreclosure of vacant or abandoned properties to proceed through an administrative hearing rather than a less efficient judicial proceeding.<sup>29</sup> In addition, any interest in a property is extinguished upon transfer to the land bank from tax foreclosure.<sup>30</sup> CCLRC has public and corporate powers, including the powers to: acquire, manage, and transfer property; enforce codes; purchase certificates for delinquent tax liens; abate taxes and clear title; issue bonds; and borrow and lend.<sup>31</sup> Uniquely, CCLRC primarily acquires properties through bulk agreements with HUD, Fannie Mae, or major lenders.<sup>32</sup> For example, since 2009, Fannie Mae has transferred distressed properties to CCLRC for \$3,500.<sup>33</sup> CCLRC is primarily financed

through the payment of interest and penalties on delinquent property taxes and assessments and has a reliable and significant funding stream of approximately \$7 million per year.<sup>34</sup>

## Conclusions

Land banking is not a silver bullet to the economic crisis, but, as Winton Churchill said, “Perfect solutions of our difficulties are not to be looked for in an imperfect world.” Importantly, land banks are not one-size-fits-all mechanisms, and that can be a good thing. Communities have important differences that influence how they may structure land banks, including the jurisdiction of local governments, the amount of inventory, and the political will to tackle blight. However, the inherent flexibility present in setting up land banks allows communities to define a land bank’s scope, role, and capabilities to suit their particular needs and priorities. ♦

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## (Endnotes)

1. See Table 982, Total Housing Inventory for the United States: 1990 to 2010, U.S. Census Bureau (2012), available at <http://tinyurl.com/82d7v2p> (this number includes both year-round and seasonal homes).
2. See, e.g., Econsult Corporation, Penn Institute for Urban Research & May 8 Consulting, *Vacant Land Management in Philadelphia: The Costs of the Current System and the Benefits of Reform* 6-8 & 10-12 (Nov. 2010) (vacant properties in Philadelphia reduce property values by 6.5% throughout the city, and by up to 20% in certain neighborhoods, and owe at least \$2 million in uncollected property taxes each year).
3. See, e.g., *id.* at 9-10 (although the city controls a minority of Philadelphia’s vacant properties, maintenance costs add up to over \$20 million each year).
4. See Conn. Gen. Stat. § 7-148(7) (h) (2011).
5. See Cook County Code, 102 Buildings and Building Regulations §§ 102-2 through 102-24 (2011).
6. *Id.* at §§ 102-13, 102-15, 102-19(b).
7. Frank S. Alexander & Leslie A. Powell, *Neighborhood Stabilization Strategies for Vacant and Abandoned Properties*, Zoning & Planning Law Report 8 (2011).
8. Frank S. Alexander, *Land Banks and Land Banking*, Center for Community Progress 18 (June 2011).
9. *Id.* at 18-19.
10. *Id.* at 19-20.
11. *Id.* at 22.
12. HUD, *Revitalizing Foreclosed Properties with Land Banks*, 4 (2009) (depiction of general creation and functions of land banks).
13. Alexander, *supra* note viii, at 28-29.
14. Julie A. Tappendorf & Brent O. Denzin, *Turning Vacant Properties into Community Assets Through Land Banking*, 43 Urban Lawyer 807-08 (2011); EPA, Land Revitalization Fact Sheet, Land Banking 1, <http://tinyurl.com/8yawr82> (hereinafter EPA Fact Sheet) (last visited Jan. 4, 2012).
15. See Tappendorf & Denzin, *supra* note xiv, at 807-09.
16. *Id.* at 810.
17. HUD, *supra* note xii, at 10.
18. See 1893 Mich. Pub. Act 206, as amended by 1999 Mich. Pub. Act 123.
19. HUD, *supra* note xii, at 9.
20. Alexander, *supra* note viii, at 20.
21. See 2003 Mich. Pub. Act 258 §§ 124.754(1)(l)(4), 124.765.
22. *Id.* at § 124.773(4)-(5); see *id.* at § 124.753(n) (defining “qualified city” as “a city that contains a first class school district and includes any department or agency of the city.”).
23. See 2003 Mich. Pub. Act 258 §§ 124.763 & 124.769(1); Alexander, *supra* note viii, at 51; EPA Fact Sheet, *supra* note xiv, at 2.
24. 2003 Mich. Pub. Act 258 § 124.763.
25. See W. Dennis Keating, Ph.D., *Cuyahoga County Land Reutilization Corporation: The Beginning, the Present, and Beyond, 2009-2011*, Cuyahoga Land Bank 4 (2011), available at <http://tinyurl.com/7cz24xd>; Sandra Livingston, *New Foreclosure Filings in Cuyahoga County Remain High and Advance in the Suburbs* (Feb. 1, 2010), <http://tinyurl.com/7g4venp> (noting almost 14,800 foreclosures for the county in 2009, “the fourth year in a row that new filings topped 13,800”).
26. Keating, *supra* note xxv, at 13.
27. *Id.* at 16.
28. Ohio H.B. 313, 128<sup>th</sup> Leg. Gen. Assem. (2010).
29. Ohio H.B. 603 (1988); Ohio S.B. 294 (2006).
30. Thomas J. Fitzpatrick IV, *Understanding Ohio’s Land Bank Legislation*, Federal Reserve Bank of Cleveland 8 (Jan. 2009), available at <http://tinyurl.com/7jvqv8u>.
31. Keating, *supra* note xxv, at 9; Fitzpatrick IV, *supra* note xxxi, at 9-10.
32. EPA Fact Sheet, *supra* note xiv, at 2.
33. Keating, *supra* note xxv, at 13 & 15; EPA Fact Sheet, *supra* note xiv, at 2.
34. Keating, *supra* note xxv, at 13.