Chicago's Misguided Effort to Assist Renters has been Revised – Now it is worse!

The Chicago version of Protecting Tenants in Foreclosure (CPTFA) became effective Sept 2013. The intention of the City Council was quite clear from the title they gave the Ordinance: “Keep Chicago Renting” (KCR). The City Council amended the KCR Ordinance on April 15, 2015 and the amendments will be effective 90 days after publication.

IMPACT TO THE INDUSTRY

Compliance was near impossible before - it is not any better now! Without having any information regarding lease terms, the owner of the foreclosed property must, in many cases, make an offer to the tenant to relocate, extend/renew a lease, or give a lease in a replacement unit within 42 days of the OAS. There is no penalty for the tenant failing or refusing to provide the lease terms or information necessary to make the cost benefit analysis necessary to decide which option to offer. The coordination of knowledge between the property preservation feet on the street, the servicer, the reo broker, the foreclosure firm and eviction firm (if different) will be key in reducing risk. The knowledge of all of these owner’s agents will of course be imputed to the investor entity to whom the asset is conveyed.

SUMMARY OF CHANGES

The substance of the amendments are discussed in greater detail below, but in summary they are:

I. Changes to the 4 Language Notice REO owners are required to give tenants. Tenants are referred to the City Department of Business Affairs and Consumer Protection for inquiries and to lodge complaints.

II. Attachment to the 4 Language Notice of a Tenant Information Disclosure Form. The content of this form has not yet been disclosed. Hopefully it will include at a minimum: disclosure of tenant’s names, unit number, lease term rent, and security deposit. However, regrettfully, a tenant’s failure to comply with this provision has no remedy.

III. Tenants residing in two categories of newly defined unlawful units must either be paid relocation assistance or “offered a replacement unit.” Ostensibly putting REO owners in the residential property management business.

IV. Certain timelines for responses to notices and offers are now set forth, whereas none were provided in the original ordinance.

Unfortunately, there are more questions now than there were before, and there are no good answers.

SUMMARY OF TENANT PROTECTIONS UNDER ORIGINAL KCR

KCR provided the following protections to bona fide tenants: (i) they could remain in possession and have their leases extended with not more than a 2% annual increase in rents and such right to renew continuing until the REO is sold to a third-party purchaser; (ii) unless the REO owner offers tenants lease renewal on such terms tenants are to be paid relocation assistance in a fixed amount of $10,600 per unit; (iii) require REO owners to provide tenants with local contact information to request repairs; (iv) require REO owners to refund to tenants security deposits they had paid to landlords; and (iv) provide tenants with the ability to enforce payment of the relocation assistance by providing for recovery of double damages, a private right of action and recovery of
attorneys’ fees.

SUMMARY OF KCR PROVISIONS ON POST-FORECLOSURE REO OWNERS

KCR presented the REO owner with a laundry list of new performance obligations: (i) building registration supported by affidavit; (ii) service and posting of required notices in four languages (English, Spanish, Polish and Chinese); (iii) hiring local property managers to process repair calls and requests; (iv) designation of persons to receive payment of rents; (v) documentation of occupants' names and addresses to ensure that as additional occupants become known, new notices are issued specifically addressed to such persons and timely served and posted; (vi) processing demands to refund security deposits allegedly paid to prior landlords with clear legal right to require proof of payment or verification of amount; (vii) processing demands for payment of relocation assistance; and (viii) potential significant liabilities tenants having a private right of action to cover double the relocation assistance amount plus attorney’s fees.

IMPEDIMENTS TO KCR COMPLIANCE

Significant practical hurdles and obstacles to compliance existed before and remain now; chief among those being the absence from the original KCR Ordinance of any provision imposing any obligation on a tenant to provide the REO owner with any information regarding the interest of the tenant(s) or occupant(s).

The original Ordinance, much like the Protecting Tenants in Foreclosure Act, did not require the tenant to take any action in response to a Notice. First and foremost, there is no obligation on tenants to even disclose the identities of the adults who occupy a dwelling unit. Without knowing the identities of the tenants how does an owner’s agent determine:

➢ To whom do they issue a refund of a security deposit? Who was the remitter? How many signatories are on the lease? Might another tenant later surface and also demand a refund?

➢ Who is entitled to demand or receive a relocation assistance payment? The $10,600 relocation payment is per unit. What if another person makes a subsequent demand and produces a written lease, or utility bills in their name?

Yet failure to timely accede to demands for payment can result in double damages plus attorneys’ fees.

Secondly, there is no obligation on tenants to produce a copy of the written lease, if any; or if no written lease exists, to disclose any terms of the rental arrangement: term, rent, security deposit, responsibility for utilities, or otherwise.

Thus, with no obligation to provide any information tenants could (and the vast majority did) simply remain mute, remain in possession, and fail to remit any rents.

THE QUALIFIED TENANT CONUNDRUM

While all occupants are to receive the required notices, all of the rights and remedies under KCR are available only to “qualified tenants.” A qualified tenant was defined in the original Ordinance as (i) a person in possession of the unit on the day the REO owner becomes the owner; and (ii) having a bona fide rental agreement. A rental agreement is only bona fide if (a) mortgagor, spouse, children and parents of mortgagor are not the occupants; (b) the rental agreement is arms-length at rents not substantially less than fair market rents.

Clearly if the identities of the occupants and the rents are unknown and disclosure cannot be required, it is not possible to determine if a tenant is a “qualified tenant.” So owner’s agents cannot determine who is entitled to receive a refund of a claimed security deposit, relocation assistance, or renewal.

CONFLICT WITH OTHER LAWS
The absence of any obligation in the Ordinance for tenants to provide information becomes particularly problematic when interpreted with other applicable laws. The Illinois Mortgage Foreclosure Act was amended to prohibit evicting tenants solely based upon the fact that the mortgagee has become the new owner. There needs to be an independent default under the lease or occupancy arrangement if no lease. REO owners, of course, want counsel to evict unidentified occupants who typically pay no rents for months on end. Under the Illinois Forcible Entry and Detainer Act the issuance of a Landlord’s Notice is jurisdictional; meaning that an eviction suit is subject to dismissal unless counsel can demonstrate that the tenants were given notice and an opportunity to cure. However, if the occupants do not disclose the amount of their monthly rent what is the demand to cure, reasonable rental value? (Assuredly that is what counsel is instructed to demand). Demanding payment of “reasonable rental value” for a unit is an FDCPA violation since what may be a reasonable amount is nevertheless not a legal binding debt for which payment is demanded. This illustration only scratches the surface of the layers of complexity and confusion surrounding KCR compliance, liability and REO owner’s rights; but it becomes readily apparent why post-foreclosure REO owners were paralyzed and struggled to implement process to gain possession of units, liquidate REO assets, and minimize risk and liability under KCR.

DISCUSSION OF AMENDMENTS

I. CHANGES TO THE NOTICES TO TENANTS

The required “4 Language Notice” must now also:

A. Reflect the date the Notice was sent or posted;
B. Include a notification to occupants that they may contact the City to determine their rights or file a consumer complaint by inclusion of the following required language:

“You may go to the City of Chicago Department of Business Affairs and Consumer Protection’s website for additional information regarding your rights and obligations under the Ordinance or phone the City of Chicago’s 311 Service Center to file a complaint.”

C. Include as an attachment a to-be-developed Tenant Information Disclosure Form which “the tenant shall complete and return” to owner’s designated agent within 21 days.

II. TENANT INFORMATION DISCLOSURE FORM

The requirement of including as an attachment to the 4 Language Notice the Tenant Information Disclosure Form implies that tenants will now be obligated to provide certain information to the REO owner. However, this requirement in the amendment is only illusory since the amendment also provides that the failure of a tenant to complete and return the form does not relieve the owner of any of its obligations.

A. TENANT TO RETURN THE FORM WITHIN 21 DAYS. The Amended CPTFA (KCR) requires that the tenant return the form within 21 days of receipt. There is no mention in the Ordinance of whether the form must be completed, simply that it be returned.
B. OWNER REQUIRED TO MAKE OFFER. Although the tenant has 21 days to return the form, the failure to return the form does not relieve owner of fulfilling its obligations under the ordinance. As a result, even if the tenant fails to return the form, the new owner must still offer to either extend the lease or offer $10,600 in relocation funds.

III. TENANTS IN OCCUPANCY OF “UNLAWFUL” UNITS

The most troublesome of the amendments to the Ordinance are the new requirements that if a tenant-occupied unit is either an unlawful conversion (meaning or otherwise without proper permitting) or a hazardous unit, then the owner must either pay tenants the $10,600 relocation fee or relocate tenants into a “replacement rental unit” at rental rates not to exceed 102% of the tenants’ then existing rent. The requirements to offer to extend the leases,
or make the relocation allowance payment now expressly applies to unlawful units. We note most servicers had interpreted KCR in this fashion previously.

An “unlawful conversion” is a rental unit created by illegally subdividing or improving space without proper permitting; typically a rental unit in a basement, attic, over the garage, or subdividing a larger unit into smaller units. An “unlawful hazardous unit” is a rental unit deemed to be “hazardous based upon life safety or sanitation conditions” which, again, are to be prescribed in the future by rules to be enacted by the Commissioner of Business and Consumer Affairs.

PRIOR SAFE HARBOR UNDERCUT

Under the original KCR Ordinance even without knowing the identity of the tenants or the amount of rent an REO owner could make a qualified protective offer to unknown tenants and occupants and avoid the potential liability for payment of relocation expenses. Making an offer to honor the current lease and extend the lease at maturity was a safe harbor under the Ordinance because merely extending the offer cut-off a tenant’s right to seek payment of the $10,600 relocation assistance.

Therefore many servicers made a protective offer qualified by the proviso “… if you are a qualified tenant as defined in 5-14-020 of the City of Chicago Municipal Ordinances, we will honor your lease at current rents and we hereby offer to extend your lease at 102% of the current rent upon the expiration of the current lease term…”

By so doing the owner reserved the right to later challenge whether or not the tenant proved to be “qualified.” A tenant could be disqualified by taking possession after the owner took title, being a spouse, child or parent of any mortgagor, or the rents being substantially below fair market rent.

However, as amended, KCR eliminates the effectiveness of making a qualified protective offer because the tenants may not continue to occupy an “unlawful unit” as defined.

MORE QUESTIONS…

- If an REO owner makes a qualified protective offer and tenants within an unlawful unit accept – is the owner obligated to move the tenants? The amendments to KCR create the potential for the owner to have to pay additional relocation amounts for each individual illegal or unsafe unit within a dwelling.

- What if the tenants accept – but fail and refuse to move? It can reasonably be anticipated that the City will file suit in the form of a code enforcement action and seek entry of an order directing that the premises be vacated, thus putting the owner in the position of facing contempt of court penalties.

- Once the 4 Language Notice has been given, the owner must, within 21 days of receiving the Tenant Information Disclosure Form, or 21 days of when the tenant should have returned the form, make either an offer to pay the $10,600, extend the lease, or in the case of illegal/unsafe apartments, offer a rental agreement for a replacement unit.

- Does that preclude the making of a qualified protective offer? No. The Ordinance as amended does not require the owner to wait until the tenants return the Tenant Information Disclosure Form before making an offer to extend.

- Can the owner extend a qualified protective offer and later elect to pay the relocation fee if the unit is determined to be “unlawful?” Logically that must be the case since the tenant cannot remain in possession and the owner must elect to pay the relocation allowance or to provide a replacement unit.

- How can the owner elect if there has not been a sufficiently detailed communication from the tenants such that the tenants’ status as “qualified tenants” can be determined? The owner’s election must be a qualified election: “If you are a qualified tenant, owner elects to….”
THE STRUGGLE TO OBTAIN THE BEST KNOWLEDGE OF QUALIFIED TENANTS WHO MAY HAVE PROTECTED RIGHTS REMAINS UNRESOLVED BUT SQUARELY ON THE SERVICER

The concept of a Tenant Information Disclosure Form being “required” but offering no relief or remedy if it is not returned or completed – does little to resolve the knowledge gap concerning tenancy status. The onus remains squarely on the owner and the potential liability for improper notices remains due to sequestration of knowledge among various agents of the owner:

- The foreclosure firm may have knowledge of occupants.
- The property preservation company which conducts the initial post-foreclosure inspection and registers the property as tenant occupied swears out an affidavit required to be attached to the registration.
- The REO broker will acquire knowledge of additional occupants’ identities upon making multiple site visits.
- The eviction law firm (often selected by an eviction or REO outsourcer – not the servicer) will acquire knowledge of persons in possession.
- The owners designated agents for collection of rents and for making repairs will have communications with occupants and parties in possession.

The risks of having all of this knowledge imputed to the REO owner becomes quickly apparent when the Ordinance gives the Commissioner the power to demand production of “any information, receipt, notice, or other communication required… at any reasonable time.”

IV. POTENTIAL PROHIBITION AGAINST COLLECTION OR RENT - UNCHANGED

If the foreclosing owner failed to deliver the Notice in a timely fashion, the owner may cure the deficiency and deliver the Notice after the 21 days, but the KCR Ordinance prohibits the collection of rent, or back rent, during the period of time of non-compliance. (Similar to the current IMFL). Curing the deficiency does not take away an occupant's right to remedies for the violation.

The Ordinance provides that a foreclosing owner pay a relocation fee to tenants ($10,600), unless the owner offers an option to renew or extend the current written or oral lease with an annual rent that does not exceed 102% of the current annual rent. The ordinance provides that rent increases may not exceed 102% of the previous year's rent, for any successive rental year. The Ordinance places no burden on the tenant to prove the lease. If the lease renewal is not offered, and the tenant vacates the property, the owner has 7 days to pay the relocation fee in certified funds or a cashier's check. Every day that the amount is not paid would be another violation.

V. PROVISION FOR PRIVATE RIGHTS OF ACTION - UNCHANGED

A. Tenant/Occupant Private Rights. The qualified tenants now have a private right of action against the foreclosing owner for any violation of the notice, or relocation fee provisions. Allows for recovery of twice the relocation amount, and, much like other consumer oriented statutes, i.e., the Fair Debt Collection Practices Act, there is a fee shifting provision allowing the "prevailing plaintiff" to recover attorney's fees.

B. Other Penalties

1. Failing to register the property results in the property owner agreeing to receive, by posting at the foreclosed rental property, any and all notices of code violations or process in an administrative proceeding brought to enforce code provisions concerning the property.

2. The Ordinance sets the damages per violation at $500-$1000/day per violation.