Long Island Housing Services, Inc.

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Protecting Civil Rights for Long Islanders since 1969

February 4, 2022

MEMORANDUM IN SUPPORT

BILL NUMBER: A.3081/ S.3933

SPONSORS: Assembly Member Peoples-Stokes/Senator Kennedy

TITLE OF BILL: AN ACT to amend the real property actions and proceedings law, in relation to prohibiting the registration of mortgages in default prior to the filing of a notice of pendency

SUMMARY OF BILL: Adds a new section to the real property actions and proceedings law to prohibit municipalities from creating a registry of residential mortgages in default prior to a mortgagee filing a notice of pendency in a court of competent jurisdiction, and to put in place sensible rules, including prohibiting the passing along of excessive and disparate fines to mortgagors in default who are subject to such registries when they are enacted as local ordinances.

Long Island Housing Services, Inc. (LIHS) is a is a private, not-for-profit 501(c)(3) corporation, and Long Island's only private fair housing advocacy and enforcement agency serving Nassau and Suffolk counties. LIHS's mission is the elimination of unlawful housing discrimination and promotion of decent and affordable housing through advocacy and education. Our founding objectives are to promote racial and economic integration and equal housing opportunity throughout Long Island, to reduce and eliminate unlawful housing discrimination, to encourage the development of low-income and affordable housing, and to educate and assist the public regarding housing rights and opportunities in the region. As part of our efforts to meet these objectives, LIHS provides housing counseling and legal services to homeowners facing mortgage default and foreclosure.

LIHS believes that mortgage in Default Registries may sound appealing to municipal officials budgeting in the wake of the COVID-19 pandemic, but they are really costing our communities more. These registries, if left unchecked, will disproportionately affect historically redlined neighborhoods, will impose extra economic burdens on those impacted by COVID-19, and will stifle economic growth and consumer spending.

Like any tool, mortgage in default registries require rules to serve users best. To allow these registries to operate unregulated would serve only to punish New York State residents who have fallen on hard times. We are asking for your support of S.03933 (Kennedy)/A.03081 (Peoples-Stokes), which would limit "mortgage in default registries" to avoid the financial harm and loss of home that the current versions of these registry-enabling laws produce.

By way of background, mortgage in default registries were developed as a way for municipalities to track "zombie properties" – vacant and abandoned properties with defaulted mortgages – as soon as possible. The registries are enabled by local ordinance, and require that mortgagees (banks and servicers) register the properties as soon as the mortgagor (homeowner) defaults on any portion of the mortgage agreement. Most registry-enabling ordinances use "default" broadly, require prohibitively expensive registration fees, and require registration even from non-bank, private, or non-for-profit mortgagees.

In January 2019, hundreds of thousands of New Yorkers were on the brink of foreclosure. That number is significantly larger as a result of the COVID-19 pandemic, but we will not see the true severity of impact until mortgage holders begin sending out 90-day notices following the end of the moratoria. Mortgagees and their servicers send these notices to homeowners who are more than 90 days delinquent in their mortgage payments.

We understand that municipalities are facing cash shortages and looking for any way to balance the budget woes brought on by COVID-19. We also understand that municipalities want an easier way to identify and track potential problem properties as early as possible. This memo explains why, despite the shiny veneer of revenue generation, registries as they currently exist will do more harm than good unless they are tempered by the proposed legislation. This memo will detail the problems with the current local ordinances, and explain how S03933/A03081 will mitigate those issues when implemented.

I. Homeowners will be held responsible for the costs of the Mortgage in Default Registries, as banks will pass the costs of registration onto homeowners in the usual course of business.

Although mortgage in default registries, as written, intend that registration fees will be paid by banks or servicers, the reality is that those costs will ultimately be passed on to homeowners. This is not mere speculation, and has been confirmed by contact from the mortgage banking industry. Most Mortgages contain language that allows banks and servicers to pass along reasonable fees and costs along to the homeowner. Although some mortgage in default registries allow for refunds for homeowners forced to foot the bill, banks are not required to itemize such "corporate advances," so homeowners will not know where these fees originated. Because the costs can be passed on, they absolutely will be, and banks and servicers will not be under any additional pressure to complete foreclosures. The banks will not be paying registration fees; the costs will be entirely borne by the homeowners.

In its report concerning the COVID-19 pandemic, the Consumer Financial Protection Bureau (CFPB) estimates that "those who have fallen behind at least three months on their mortgage increased 250%. That is more homeowners behind than during the peak of the Great Recession.

These families already owe deferred principal, interest, taxes, and insurance payments. Many are facing the choice between paying their mortgage and affording food, medicine, or heat. The proposed bill will help by prohibiting banks from passing on registration costs to homeowners.

II. The costs of compliance are inconsistent, and far too severe in disadvantaged communities.

There are approximately 16 municipalities in New York with mortgage in default ordinances, 11 of which require a registration fee. The costs vary from $400 annually to $6,000 annually, with no regard to the financial profit of the community.

The least expensive starting fee is in the Town of Babylon, at $200 semiannually, and the most expensive starting fee is tied between the City of Buffalo, the Village of Babylon, and the Town of Hempstead, at $500 semiannually. Yet, as of the 2017 American Community Survey, Buffalo's median annual income is only $34,268 per household compared to the Town of Babylon's $86,339 per household. Although Buffalo has less than half the income, its residents are paying over twice the fees.

Further increasing the disparity, the City of Buffalo Mortgage in Default Registry costs an additional $500 every six months that a property is vacant, capping at $3,000. In comparison, the Town of Babylon's Mortgage in Default Registry requires payment of only $200 every six months, with additional yearly fees for vacant buildings, starting at $100, then $500, then only finally overtaking Buffalo's ordinance after five years of vacancy.

It is the early costs that matter most to families in foreclosure, and Babylon's early costs are significantly lower than those listed in Buffalo's ordinance. Early costs, those within the first year and half of foreclosure, are the costs most likely to keep families in foreclosure from affording loss mitigation. Other municipalities' ordinances also contribute to these early costs, such as Ogden, Greece, and Penfield by requiring a steep $10,000 bond, including yearly bond renewals. Fortunately, they at least exclude most properties with Federally-backed loans.

The City of Buffalo also differs from the Town of Babylon in racial makeup. While Babylon, with lower fees and high incomes, has a black population of 16%, Buffalo, with higher fees and lower incomes, has a black population of 37.23%. The Town of Hempstead also charges $500 semiannually, and has a black population of 44.6%. CFPB's COVID-19 report noted such disparities as well: "We also know that many, particularly in Black and Hispanic communities, have still not recovered from the last financial crisis, more than a decade ago. And those same communities are once again bearing a disproportionate financial and health burden during the pandemic, through no fault of their own." The report follows up by stating that "Black and Hispanic families are more than twice as likely to report being behind on their housing payments than White families." We cannot allow such a disparate impact to continue into another foreclosure crisis. This bill to limit mortgage in default registries will help eliminate that disparity by ensuring that fees cannot be passed on to homeowners.

III. The costs of compliance and increased risk associated with defaults will discourage banks from investing in historically redlined communities.

Even if the extraordinary costs of mortgage in default registries were only passed on to the banks, there would still be a disproportionate effect on black New Yorkers. The registries and their associated fees create risk for lenders. Any historically delinquent neighborhood will suffer from disinvestment by bankers afraid to take on additional risk. We know these neighborhoods are historically delinquent because of disparate treatment of black communities, including redlining and subprime mortgage lending. We cannot continue to punish these neighborhoods by allowing mortgage in default registries, as they are currently written, to disincentivize investment in these same communities.

In a 2020 report on mortgage lending in the City of Buffalo, the New York State Department of Financial Services (DFS) found "a distinct lack of lending by mortgage lenders, particularly non-depository lenders, in Buffalo neighborhoods with majority-minority populations and to minority homebuyers in general." This will continue as long as there are disparities in the cost of doing business in different communities.

As a report by the Urban Institute points out, homeownership is a wealth-building tool. The idea is to store wealth in the home, a typically appreciating asset, and pass the home and its equity down to future generations. However, there are many more obstacles to home retention and wealth transfer between generations for black people of color. The Institute warns: "If current policies stay the same, the Black homeownership rate will fall well below the rate of previous generations at the same age." New York needs to do as much as it can to ensure that that prediction does not come to pass, and this bill will contribute towards that effort by eliminating an obstacle to equal lending opportunities.

IV. Some ordinances fail to designate only the first mortgage lien-holder, thus every mortgagee is equally responsible for registration. This will double the financial burden to any homeowner with more than one mortgage.

For homeowners who have multiple defaulted mortgages, the costs of compliance will double (or worse), as mortgage in default registries often do not specify which mortgage lienholder to hold accountable. As previously stated, mortgage companies will undoubtedly pass on the expenses of compliance to the defaulting homeowner. This is an industry norm, and considered a usual part of doing business. As a result, homeowners with home equity lines of credit, or other types of junior mortgages on their property will have to pay double or triple in reimbursement costs to their lienholders. This will push homeowners deeper into default and will further diminish any chance the homeowner has of reinstating their mortgages or modifying their existing loan agreements, turning a single event of hardship into a catastrophic loss of home and equity. The enormous financial burden will result in a loss of homeownership, equity, and buying power.

The statutes also fail to differentiate between mortgagee, servicer, and any other agent of the creditor. This is legally imprecise, and is certain to cause compliance issues. It is unclear which lender entities have a responsibility to register, and could result in two or more entities registering and passing on double the costs to the homeowner. For example, a mortgage servicer and a mortgage note holder could interpret the ordinance as requiring both to register the property, and both might immediately register. The registration fees are non-refundable, so the only way to make the companies whole again would be to charge the homeowner the double fee.

The proposed legislation seeks to solve both issues by precisely stating registration is the burden of only the first lienholder, and by designating which party is responsible for registration.

V. The ordinances will harm loss-mitigation efforts, and increase the number of zombie homes.

Mortgage in default registries may be designed to push foreclosures through, but in fact, such registries will cause more homeowners in foreclosure to walk away from underwater homes. The costs of the registries, passed on to the homeowner, will compromise homeowners' ability to modify existing loans, enter into payment plans, and reinstate mortgages. The fees will result in greater debt to income ratios that will disqualify many homeowners from loan modification programs. Even if a homeowner is able to enter into a repayment plan, the home will remain on the local mortgage in default registry until the payment plan is completed and the loan is reinstated. This means that any payment plan will cost a homeowner $1,000 extra per mortgage each year, at a time when they may not have money for groceries, medicine, or heat.

Zombie properties cause significant problems for our neighborhoods, and keeping track of them is the very reason for implementing mortgage in default registries. These abandoned homes invite crime, lower property values, attract pests, and burden local governments. If mortgages in default registries, as they are currently written, are only going to increase the number of zombie homes, then they are exacerbating the very issue they are meant to solve. The proposed bill fixes that issue by keeping money in homeowner's pockets for use in loss mitigation efforts so they can stay in their homes, and not contribute to blight.

VI. Requiring registration upon default is an invasion of privacy, and holds homeowners under a stricter standard than the major credit bureaus.

Banks are required to follow FDCPA regulations regarding privacy, and those laws preempt municipal ordinances. Yet under most existing mortgage in default ordinances, the registry information can be requested by anyone via freedom of information laws well before a lis pendens is filed. This undermines Federal law, and leaves homeowners vulnerable to investors much earlier in the default and foreclosure process. Although homeowners can turn down investor offers, the stress and fear of foreclosure often pushes homeowners to sell early and under coercive forces. In doing so, homeowners lose the majority of equity built up in their properties. Without that equity, former owners will have fewer financial resources to find new housing, or to spend in their local economy.

The definition of "default" in most ordinances is so broad that a servicer would be required to pay $500 to register a property within only a single day of a borrower missing a payment, even if that borrower paid again the next day. The definition of "default" under most mortgage in default registries is stricter than that of the major credit bureaus, which only record late payments of 15 days or later.

The proposed legislation will solve these issues by prohibiting registration before a lis pendens is filed publicly. This will avoid unnecessary expenses, invasion of privacy, and exposure to predatory investors.

VII. These ordinances will harm nonprofits, community-oriented for-profit organizations, and others that lend money to low to moderate income homeowners.

Nonprofit and community-oriented for-profit organizations that offer mortgages to low- or moderate-income families are considered mortgagees, just like any bank. They would be responsible for paying default registration fees as well. However, grant money is not intended to pay such fees, and such fees will have the effect of disincentivizing nonprofits from operating within municipalities with mortgage in default registries. Without an exception for nonprofits, mortgage in default registries will either significantly increase operating costs for these organizations, or the costs will be passed on to the very homeowners who need assistance from these organizations to make homeownership a reality. The proposed bill will require exceptions be granted to these important organizations.

VIII. The definition of "vacancy" is also too broad. As written, it is harmful to seasonal residents, owners in nursing homes, and owners of homes undergoing restoration.

These homes may be vacant, but they are not abandoned. Such temporary vacancies should not be included within the ordinance definition. The broad definition also raises additional concerns about privacy that might cause lender organizations to face liability if inspection and registration procedures are followed based on a non-abandoned vacancy. Those owners also should not face the additional $500 per registration renewal for those types of vacancies. The proposed legislation tightens the definition of "vacancy" to account for these special cases.

IX. Vacancy can be difficult to prove.

Some mortgage in default registries require registration of a vacant property after only one inspection. This is far too susceptible to error. New York is home to many "snowbirds" who live elsewhere for half the year. Add in vacations, variable work hours, homeowners hospitalized or in nursing facilities, and the accuracy of just one inspection is highly questionable. This is why the New York Real Property Actions and Proceedings Law requires 3 inspections before determining vacancy.

X. There is no mechanism for refund in the event of error.

In fact, several of the ordinances are clear that registration fees are "non-refundable." If a mortgage lender and servicer both register the same property, or if a mortgage payment was not property recorded and the mortgagee registers the property before realizing the error, that is $500 that the bank cannot get back, even despite immediate correction of the error. That money will likely be passed on to the homeowner, regardless of responsibility for the error.

XI. The registries are redundant. The New York State Abandoned Property Act of 2016, found in Real Property Actions and Proceedings Law Sections 1308-1310, gave municipalities the tools to enforce maintenance requirements on mortgage servicers that are holding onto these zombie properties, and provided a tool for mortgagees to expedite foreclosures to return these properties back to the open market sooner.

The New York State Abandoned Property Act of 2016 created a mechanism for municipalities to hold mortgage servicers accountable for "zombie properties." While we understand the municipalities' reasoning for adopting mortgage in default registries, we believe the unintended consequence will result in more homeowners losing their homes and an overall increase in vacant and abandoned properties, thus warring with the core purpose of the registries to aid in zombie prevention and management.

We ask that you consider these points as you review the bill under consideration. It is not too late to reassess the impact of mortgage in default registries, and to make changes that will protect both homeowners and lending institutions. Please support S.03933 (Kennedy)/A.03081 (Peoples-Stokes), which would limit "mortgage in default registries" to avoid the financial harm and loss of home that the current versions of these registry-enabling laws produce.

Thank you for your time and attention to this matter.

Sincerely,

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