



# SENATE URBAN AFFAIRS & HOUSING COMMITTEE

SENATOR SCOTT WAGNER, CHAIRMAN

ROBERT RIBIC III, EXECUTIVE DIRECTOR

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## Joint Committee Informational Hearing Notice

TO: All Members of the Senate Urban Affairs and Housing Committee

FROM: Senator Scott Wagner, Chairman 

SUBJECT: Pennsylvania Foreclosure Informational Hearing

DATE: October 26, 2015

Please be advised that the Senate Urban Affairs and Housing Committee and the House of Representatives Urban Affairs Committee will hold a joint informational hearing on the Pennsylvania Foreclosure process, in the **Senate Majority Caucus Room** on **Tuesday, October 27, 2015 at 10:00am**. The Committees will discuss issues with vacant and abandoned real estate in foreclosure with the following panels:

### 1<sup>st</sup> Panel

**KML Law Group** - Michael McKeever, Founding Shareholder  
**ACNB Bank** - C.L. Pete Ricker, Senior Vice President of Retail Lending  
(*Pennsylvania Bankers Association*)

### 2<sup>nd</sup> Panel

**Shumaker Williams P.C** - Paul Adams, General Counsel  
(*Pennsylvania Association of Community Bankers*)

### 3<sup>rd</sup> Panel

**Federal Housing Finance Agency** - Al Pollard, General Counsel  
(*Fannie Mae & Freddie Mac*)

### 4<sup>th</sup> Panel

**Housing Alliance of Pennsylvania** - Cindy Daley, Policy Director  
**Community Legal Services** - Michael Froehlich, Managing Attorney

Please contact Robert Ribic of my office at 717-772-2311 or at [rribic@pasen.gov](mailto:rribic@pasen.gov) if you have any questions.



**KMLLAWGROUP**<sup>PC.</sup>

PENNSYLVANIA AND NEW JERSEY

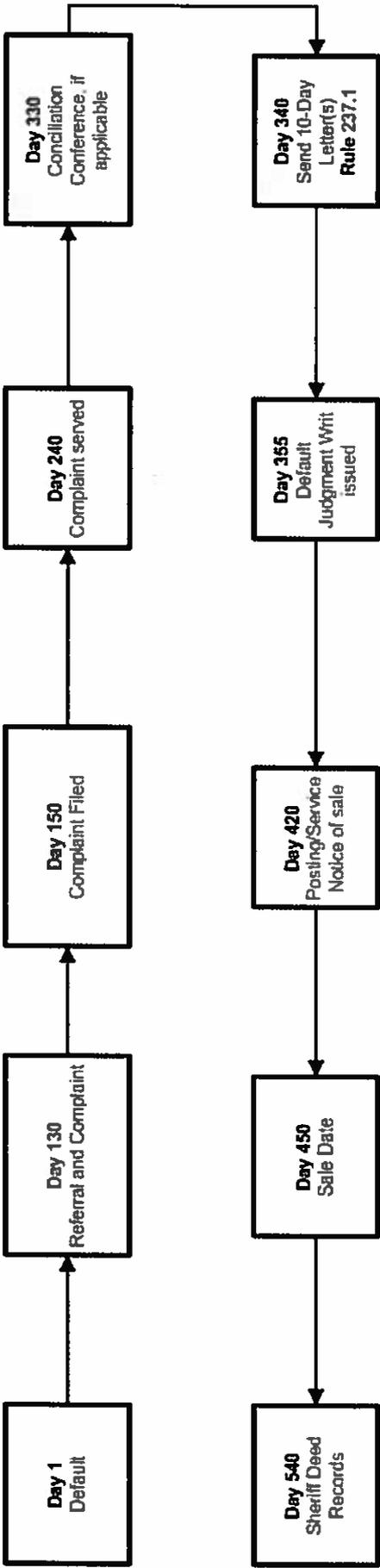
**MICHAEL T. MCKEEVER**

[Mmckeever@kmlawgroup.com](mailto:Mmckeever@kmlawgroup.com)

**610-662-4798**

**KML Law Group** Pennsylvania

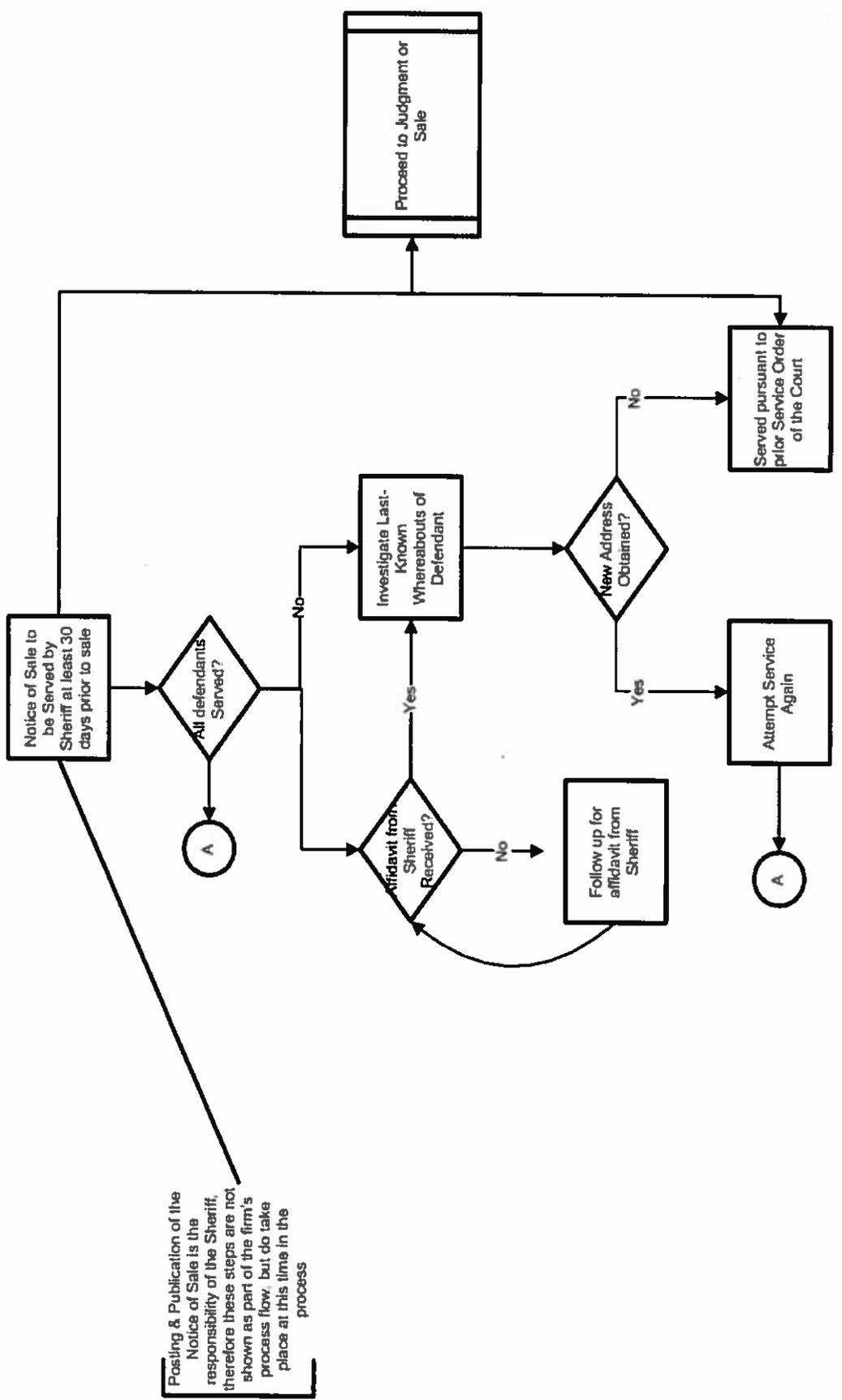
**CURRENT Pennsylvania Foreclosure If Property Vacant and Abandoned**



**KML Law Group**

**Pennsylvania**

**Service of Complaint and Notice of Sale**



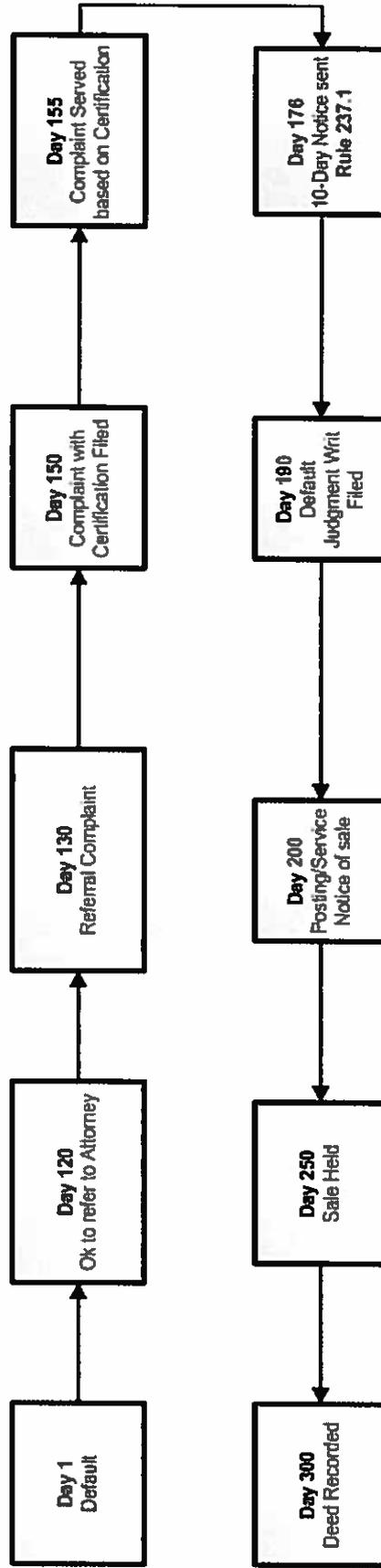
**60-180 Day Delay**

Posting & Publication of the Notice of Sale is the responsibility of the Sheriff, therefore these steps are not shown as part of the firm's process flow, but do take place at this time in the process

KML Law Group

Pennsylvania

## PROPOSED Pennsylvania Foreclosure If Property Vacant and Abandoned



Current Foreclosure  
Proposed Foreclosure

540 days  
300 days

Total days saved

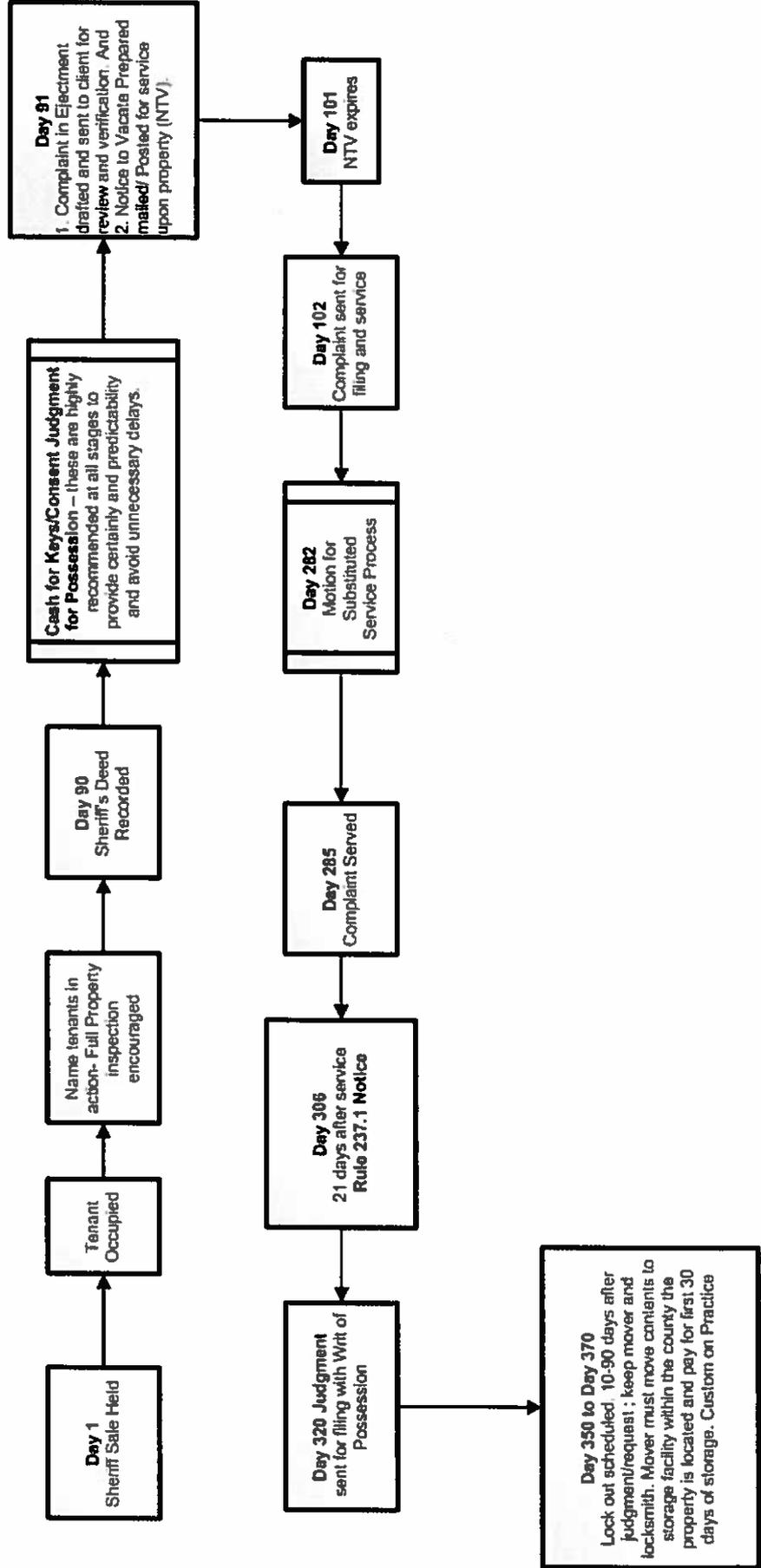
240 days

Pennsylvania

KML Law Group, P. C.

## CURRENT POSSESSORY

**Current Pennsylvania Possessory For Vacant & Abandoned – An Overview** - An action following acquisition of title pursuant to a foreclosure sheriff's sale is a separate legal action filed only after the Sheriff's Deed is recorded. The correct name for an eviction or possessory action following a foreclosure action in Pennsylvania is an Action in Ejectment. It is filed in the Court of Common Pleas for the county in which the property is located.

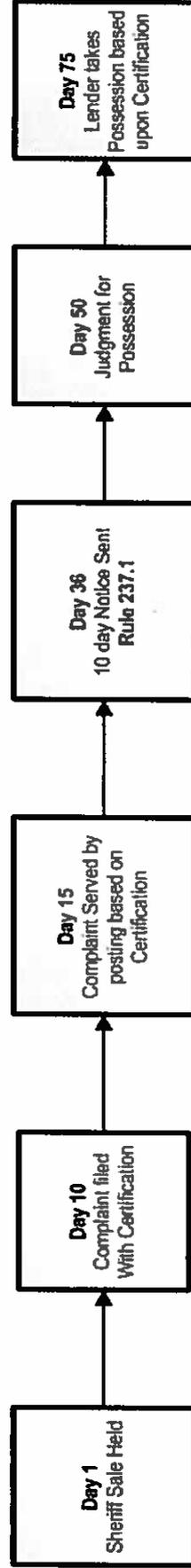


**KML Law Group, P. C.**

**Pennsylvania**

## **PROPOSED POSSESSORY**

### **Proposed Ejectment Process for Vacant and/or Abandoned Properties With Certification Process**



KML Law Group, P. C.

Pennsylvania

### Current Vacant & Abandoned

Current Foreclosure	540 days
Current Possessory	370 days
Total	910 days

### Proposed Vacant & Abandoned

Proposed Foreclosure	300 days
Proposed Ejectment	75 days
Total	375 days

Property Reverts to a New, Responsible Owner 535 days faster.

**The Certification of vacancy or abandonment shall**  
allege that:

1. the real property is the subject of a pending action of mortgage foreclosure, a pending action for possession or quiet title or similar action to enforce an security interest in real property, or
2. that a mortgage obligation or security instrument which is secured by the real property is at least 60 days delinquent; and it further must state that
3. At least two or more of the following criteria have been met, with information gained from statements and/or communications from neighbors, delivery persons, government employees or employees or contractors/vendors of the plaintiff:

- The property involves an uncorrected violation of a municipal building, housing or similar code which has gone uncorrected for the preceding year, or an order has been issued by municipal authorities declaring the property to be unfit for occupancy and to remain vacant and unoccupied. A copy of the violation(s) violation correction demand(s) or orders(s) shall be attached to the certification.
- There is overgrown or neglected vegetation on the property.
- There is an accumulation of newspapers, circulars, flyers or mail on the property.
- There is disconnected gas, electric or water utility services to the property.
- There is an accumulation of hazardous, noxious or unhealthy substances or materials on the property.
- There is an accumulation of junk, litter, trash or debris on the property.
- There is an absence of interior window treatments such as blinds, curtains or shutters.
- There is an absence of furnishings and items of personal property.

- There are statements from neighbors, delivery persons, government employees or employees or contractors of the plaintiff indicating that the property is vacant and unoccupied.
- There are windows or entrances to the property that are boarded up or closed off or multiple window panes that are damaged, broken and unrepaired.
- There are doors to the property that are smashed through, broken off, unhinged or continuously unlocked.
- There is a risk to the health, safety or welfare of the public, or any adjoining or adjacent property owners due to acts of vandalism, loitering, criminal conduct or the physical destruction or deterioration of the property. A description thereof shall be attached to the certification.
- The mortgagee or other authorized party has secured or winterized the property due to the property being deemed vacant and unprotected or in danger of freezing.

- There is a written statement issued by any mortgagor expressing the clear intent of all mortgagors to abandon the property. A copy of the statement shall be attached to the certification.
- There are other reasonable indicia of abandonment which shall be described in the certification.
- The property is in need of substantial rehabilitation as established by photos or affidavits of persons with knowledge based upon exterior or interior inspections.
- There is documentation consisting of photos or affidavits of persons with knowledge establishing that the building is unfit for human habitation, occupancy or use.
- There is documentation showing that the property increases the risk of fire to adjacent properties. If there have been previous fires in the property proof of the same shall be attached to the certification either from the Fire Department or affidavits from neighbors.
- There is documentation showing that unauthorized entry of the property is possible.

- There are photos showing that the property is an attractive nuisance to children or there are affidavits from neighbors indicating that children have been seen illegally entering the property.
- There are police reports showing that police have been called about illicit activity at the property. If no police reports there are affidavits from neighbors, community groups or others knowledgeable about such illicit activities at the property.



**PACB TESTIMONY TO PENNSYLVANIA HOUSE SENATE URBAN  
AFFAIRS AND HOUSING COMMITTEE ROUNDTABLE 10/27/15**

Written testimony of Paul Adams, General Counsel, Pennsylvania Association of Community Bankers; Attorney, Shumaker Williams P.C.

Chairpersons and Members of the Committees, the Pennsylvania Association of Bankers thanks you for the opportunity to participate in this hearing today on the draft proposal, the Vacant and Abandoned Real Estate Foreclosure Act, Neighborhood Blight Reclamation and Revitalization Act and submit this written statement. We thank you for including the PACB in this discussion and commend you for having the conversation on blighted property in the Commonwealth.

We have had informal discussions over the years with the Housing Alliance of Pennsylvania and previously have provided testimony to the House and Senate on the topic of blighted property.

Prior to discussing the legislation and sharing some concerns we have with you regarding the legislation, we believe it's important to share with you PACB's history and the essence of community banking. PACB is the oldest financial services association in the nation, dating back to 1877, and currently represents nearly 200 community banks across this Commonwealth. PACB is proud to be the voice of community banking in Pennsylvania. Our member banks serve as the epicenter of community activity, providing key financial services to citizens and funding community-based businesses and programs. Community bankers are dedicated to serving their communities and take great pride in the positive impact we contribute by re-investing in the community through residential mortgages, small business loans, and agricultural and student loans. As you know, Mr. Chairman and members of the Committee, community banking is about relationships and trust with our customers which in some cases dates back decades. Many of our institutions are celebrating their 75<sup>th</sup>, 100<sup>th</sup> and 125<sup>th</sup> anniversaries. Prior to any federal or state regulations and mandates, community banks were doing community investment as their principal stock in trade. That continues to be the case today. We have survived wars, depressions, recessions, boom markets and bust markets and continue to be anchors on the Main Streets of Pennsylvania towns and cities.

Our members live by the motto, Pennsylvania FIRST, for we truly are the Financial Institutions Reinvesting in the State. This not mere rhetoric, but the very reason our members exist. Our combined assets of over \$110 billion are



almost entirely reinvested in the Commonwealth and its citizens. Collectively we have been serving Pennsylvania's communities for over 200 years with the majority of our members in existence for over 100 years.

Because of the unique role we play in our communities and unique relationship we have with our customers, we are sensitive to blighted properties and the need to ensure these properties are rehabilitated and made useful again to the community. Blighted properties hurt the communities we serve, so we share the legislative goal of identifying potential blighted properties and streamlining the foreclosure process consistent with due process under the law. Strong neighborhoods without blighted properties help to maintain property values, which in turn better support the economic wellbeing of those families living in those neighborhoods. That in turn provides a stable tax base for the municipalities as well as stable values for the collateral supporting those loans secured by that real estate.

Community bankers take pride in knowing their customers and identifying problems a borrower may have. Being close to one's community and its borrowers provides an early warning system which can help prevent a borrower with a problem from turning a property into an abandoned property, and then potentially into a blighted property. By working with a borrower, alternative arrangements may be possible, thus avoiding the abandoning of a property in the first place.

In the event a property does become abandoned, then there may be a public purpose to accelerate the foreclosure process, consistent with due process so the lender may take title to the property through a sheriff's sale. This is the starting point for the lender using its own procedures which are subject to regulatory requirements, to address any issues that may be unique to a particular property.

While acknowledging this public purpose PACB is concerned about the law of "unintended consequences." Therefore, any legislative solution needs to be mindful of a borrower's due process rights so that any lender utilizing whatever legislative solution may be adopted does not subject the lender to judicial challenges to any new procedure.

PACB looks forward to participating in today's hearing on this important topic.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

**Section 1. Short Title.**

This Act shall be known and may be cited as the "Vacant and Abandoned Real Estate Foreclosure Act".

**Section 2. Legislative Findings and Purpose.**

The General Assembly finds and declares that:

- (1) Abandoned and vacant real estate is likely to become blighted and dangerous if the foreclosure process takes a very long time to complete.
- (2) Most vacant and abandoned real estate cannot be returned to productive use until the primary lienholder can foreclose on the real estate, secure and protect it from the elements and clear abandoned personal property from the Real estate.
- (3) An accelerated procedure is needed to more timely complete an action in mortgage foreclosure, an action for possession or similar actions to recover real estate and allow an owner to remove abandoned personal property.

**Section 3. Definitions.**

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Action for Possession" means an action pursuant to 231 Pa. Code Rule 1051 et seq., filed after an Owner has purchased a property at Sheriff's sale and the owner has determined that the property is vacant, ~~blighted or~~ and abandoned and the Owner or its agent has inspected the property and thereafter files a Certification of Vacancy and Abandonment, pursuant to Section 4.

"Former Owner" means the prior or current owner of the real estate whose interest in the property was or is being foreclosed, terminated and/or divested by a Sheriff's sale conducted pursuant to an action of Mortgage Foreclosure or similar action and all tenants and or occupants whose interest is under and subject to that of the Former Owner.

"Owner" means the purchaser of a property at a Sheriff's sale conducted pursuant to an action of Mortgage Foreclosure or similar action, or an assignee of the purchaser, who has made settlement with the Sheriff following the Sheriff's sale or the owner under a recorded Sheriff's deed to the property.

"Real Estate" means any fee, leasehold or other estate in, over or under land, which contains structures, fixtures and other improvements and interests which by custom, usage or law pass with a conveyance of land. "Real Estate shall include, residential, commercial, industrial, or other uses.

"Vacant and Abandoned" means that the property is unoccupied by a lawful owner or lawful tenant and tha a certification of vacancy and abandonment has been filed pursuant to Section 4.

Section 4. Certification of Vacancy and Abandonment. The plaintiff, or entity with the right to enforce, in an action in Mortgage Foreclosure or for Possession, quiet title or similar civil action to enforce a security interst in real property, may file a Certification of Vacancy and Abandonment in such action, which shall be sufficient evidence that the property is vacant and abandoned, ~~and that any remaining items of personal property are deemed to be abandoned by the former owner.~~ The Certification must be signed by a competent adult with personal knowledge of the condition of the property and subject to 18 Pa.C.S. § 4904 and must be served upon the Defendants in the action by regular mail. The Certification must allege that 1. the real property is the subject of a pending action of mortgage foreclosure, a pending action for possession or quiet title or similar action to enforce an security interest in real property, or 2. that a mortgage obligation or security instrument which is secured by the real property is at least 60 days delinquent and at least two or more of the following criteria have been met, with information gained from statements and/or communications from neighbors, delivery persons, government employees or employees or contractors/vendors of the plaintiff:

- a. The property involves an uncorrected violation of a municipal building, housing or similar code which has gone uncorrected for the preceding year, or an order has been issued by municipal authorities declaring the property to be unfit for occupancy and to remain vacant and unoccupied. A copy of the violation(s) violation correction demand(s) or orders(s) shall be attached to the certification.
- b. There is overgrown or neglected vegetation on the property.
- c. There is an accumulation of newspapers, circulars, flyers or mail on the property.
- d. There is disconnected gas, electric or water utility services to the property.
- e. There is an accumulation of hazardous, noxious or unhealthy substances or materials on the property.
- f. There is an accumulation of junk, litter, trash or debris on the property.

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- g. There is an absence of interior window treatments such as blinds, curtains or shutters.
- h. There is an absence of furnishings and items of personal property.
- i. There are statements from neighbors, delivery persons, government employees or employees or contractors of the plaintiff indicating that the property is vacant and unoccupied.
- j. There are windows or entrances to the property that are boarded up or closed off or multiple window panes that are damaged, broken and unrepaired.
- k. There are doors to the property that are smashed through, broken off, unhinged or continuously unlocked.
- l. There is a risk to the health, safety or welfare of the public, or any adjoining or adjacent property owners due to acts of vandalism, loitering, criminal conduct or the physical destruction or deterioration of the property. A description thereof shall be attached to the certification.
- m. The mortgagee or other authorized party has secured or winterized the property due to the property being deemed vacant and unprotected or in danger of freezing.
- n. There is a written statement issued by any mortgagor expressing the clear intent of all mortgagors to abandon the property. A copy of the statement shall be attached to the certification.
- o. There are other reasonable indicia of abandonment which shall be described in the certification.
- p. The property is in need of substantial rehabilitation as established by photos or affidavits of persons with knowledge based upon exterior or interior inspections.
- q. There is documentation consisting of photos or affidavits of persons with knowledge establishing that the building is unfit for human habitation, occupancy or use.
- r. There is documentation showing that the property increases the risk of fire to adjacent properties. If there have been previous fires in the property proof of the same shall be attached to the certification either from the Fire Department or affidavits from neighbors.
- s. There is documentation showing that unauthorized entry of the property is possible.
- t. There are photos showing that the property is an attractive nuisance to children or there are affidavits from neighbors indicating that children have been seen illegally entering the property.
- u. There are police reports showing that police have been called about illicit activity at the property. If no police reports there are affidavits from neighbors, community groups or others knowledgeable about such illicit activities at the property.

**Section 5. Effect of the filing of a Certification of Vacancy and Abandonment in an Action in Mortgage Foreclosure.**

In an action in Mortgage Foreclosure or similar action to transfer real property in enforcement of a lien, the filing of a Certification of Vacancy and Abandonment pursuant to Section 4 shall have the following effects:

- a. ~~The Plaintiff shall not be required to send the~~ ~~It shall be conclusive proof that a~~ Notice of Intention to Foreclose ~~shall not be required to be sent~~ pursuant to the Homeowner's Emergency Mortgage Assistance Act, Act 91 of 1983.
- b. The action ~~shall be is~~ exempt from any mediation, conciliation, diversion or other program which has been or will be established to encourage resolution of owner occupied residential mortgage foreclosures.
- c. If Plaintiff in such action is not able to complete service of the Complaint and/or Notice of Sale by personal service at the property or last known address of the Defendants, Plaintiff may file an affidavit of due and diligent investigation substantially in compliance with Pa.R.C.P. 430 with the Certification of Vacancy or as a supplement to that Certification at any time after it is filed and thereafter ~~as a matter of right, and without an Court Order for~~ service pursuant to special order of Court, special service, serve the Complaint and/or Notice of Sale and the Certification of Vacancy and Abandonment upon the Defendants by posting the property and by sending by regular and certified mail to the property and to the last known address of the Defendants. Service is complete upon such mailing and posting.

Section 6. Effect of the filing of a Certification of Vacancy and Abandonment in an Action for Possession and Disposition of Abandoned Personal Property.

- A. When a Former Owner relinquishes possession of the real property, the Former Owner shall remove from the property all items of personal property. For the purposes of this section, a Former Owner shall be deemed to have relinquished possession of the property when the Former Owner has physically vacated the premises, removed substantially all of the Former Owner's personal property, or provided a forwarding address or written notice stating that the Former Owner has vacated the premises, or otherwise communicated to the Owner or its agent that the Former Owner has vacated and abandoned the real and personal property.
- B. Concurrent with the filing of an Action or Writ for Possession, or at any time after the Action or Writ for Possession is filed, the Owner may file and serve by regular mail addressed to the property and to the last known address of the Former Owner and post upon a conspicuous location on the property a Certification of Vacancy and Abandonment pursuant to Section 4. The Certification may be served separately or with the Complaint or Writ. Plaintiff shall file and serve by regular mail an affidavit of due and diligent investigation substantially in compliance with Pa.R.C.P. 430 with

the Certification of Vacancy or as a supplement to that Certification at any time after it is filed and thereafter.

1. If personal property of the Former Owner remains on the property and if the Owner has filed a Certification of Vacancy and Abandonment, the Owner shall post a Personal Property Removal Notice which shall include the following information:

- i. The Notice must be dated;
- ii. The address of the property;
- iii. The date of the Sheriff's sale or the date that title was acquired by the Owner;
- iv. The personal property that remains on the property and must be retrieved by the Former Owner;
- v. That the Former Owner has ten days from the date of the Notice to notify the Owner that the Former Owner will be retrieving the personal property;
- vi. That if the intent to retrieve is conveyed to the Owner, the personal property shall be retained by the Owner at the property or a site of the Owner's choosing for thirty days from the date of the Notice;
- vii. That if no communication is made to the Owner within ten days, the property may be disposed of at the end of the ten days at the discretion of the Owner;
- viii. A telephone number, email and/or facsimile number and address for the Owner or its agent where they can be contacted and the location where such property can be retrieved, if not at the property, and that retrieval of the property after ten days will require the Former Owner to pay for costs related to the storage of the personal property after ten days.

~~C. the following shall apply:~~

~~1.2. If no writ of possession has been issued or order for possession entered, the Owner, at any time after the filing of the Complaint, shall may serve the Personal Property Removal Notice upon the Former Owner and the Owner may proceed to dispose of the property as set forth in this Section.~~

~~2.3. If a writ of possession has been issued or an order of possession has been filed of record, the Owner shall serve send the Personal Property Removal Notice upon to the Former owner and the Owner may proceed to dispose of the property as set forth in this Section.~~

~~3. The Personal Property Removal Notice shall include the following information:~~

- i. ~~The Notice must be dated;~~
  - ii. ~~The address of the property;~~
  - iii. ~~The date of the Sheriff's sale or the date that title was acquired by the Owner;~~
  - iv. ~~The personal property that remains on the property and must be retrieved by the Former Owner;~~
  - v. ~~That the Former Owner has ten days from the date of the Notice to notify the Owner that the Former Owner will be retrieving the personal property;~~
  - vi. ~~That if the intent to retrieve is conveyed to the Owner, the personal property shall be retained by the Owner at the property or a site of the Owner's choosing for thirty days from the date of the Notice;~~
  - vii. ~~That if no communication is made to the Owner within ten days, the property may be disposed of at the end of the ten days at the discretion of the Owner;~~
  - viii. ~~A telephone number, email and/or facsimile number and address for the Owner or its agent where they can be contacted and the location where such property can be retrieved, if not at the property, and that retrieval of the property after ten days will require the Former Owner to pay for costs related to the storage of the personal property after ten days.~~
4. The Personal Property Removal Notice shall be erved sent by regular mail to the Former Owner or occupant's last known address forwarding address, if provided, or, if no forwarding address is provided, then to the property ;property; or by personal delivery to the Former Owner or occupant; and or by posting the notice on a conspicuous part of the property.
5. At all times between posting of the Persoanl Property Removal Notice acceptance of the property by the Owner and the expiration of the ten or thirty day periods, the Owner shall exercise ordinary care with regard to any personal property that the Former Owner or occupant has left in or on the real property.
6. After the appropriate time period under this Section has expired, the Owner shall have no further responsibility to the Former Owner with regard to the personal property and may, in the Owner's discretion, dispose of the property. If the personal property is sold and proceeds exceed any outstanding obligations owed to the Owner, the proceeds shall be forwarded to the Former Owner by certified mail. If no forwarding address has been provided to the Owner by the

Former Owner, the Owner shall hold the proceeds for thirty days and, if unclaimed, may retain the proceeds.

7. If the Owner has issued the Personal Property Removal Notice to the Former Owner, the Owner may choose to store the Former Owner's personal property at another location within reasonable proximity to the property. If the Owner elects to have the property stored at another location, the Owner may remove the personal property from the property by any means reasonably calculated to safeguard the personal property for the time period required under this Section. A Former Owner shall not be required to pay any costs related to the removal or storage of the property by the Owner if the Former Owner retrieves the personal property within ten days of the date of the notice.
8. If the Former Owner or occupant retrieves the personal property after ten days of the date of the notice but before thirty days, the Former Owner or occupant shall be required to pay any reasonable and actual costs related to the removal or storage of the personal property by the Owner for that time period.

#### Section 7. Additional Sheriff Fees Associated with Scheduling Accelerated Sale Date of Vacant and Abandoned Residential Properties.

In addition to the fees set forth in the Act of 1984-127, known as the Sheriff's Fee Act, the Sheriff shall be entitled to an additional fee as set forth in this Section, where the Plaintiff has filed a Certification of Vacancy and Abandonment pursuant to Section 4 as follows:

- i. Upon request of the Plaintiff, the Sheriff shall be entitled to an additional fee of \$400.00 to accelerate the scheduling of a Sheriff sale of a vacant and abandoned residential property.
- ii. To be entitled to the fee, the Sheriff must schedule the Sheriff sale to be initially held sixty (60) days following the filing of the writ of execution and the Sheriff's deed must be recorded no later than thirty (30) days following the sale.
- iii. The additional fee shall be payable at the time of the filing of the writ of execution, but immediately refunded if the time frames set forth above are not complied with, or if the expedited sale date is postponed or continued by any party other than the Plaintiff, is rescheduled.
- iv. The Certification of Vacancy and Abandonment may be filed by the Plaintiff at the commencement of the foreclosure action or at any time during the pendency of the action, prior to the writ of execution.
- v. Upon request of the Plaintiff at the time a writ of possession is filed, in addition to the fees provided for by law, the Sheriff shall be entitled to an

additional fee of \$150.00 to accelerate the scheduling of service and execution of the writ of possession. To be entitled to the additional fee, the Sheriff must schedule the lockout on the property to be held within forty five (45) days or less following the filing of the writ of execution.

- vi. This section shall be applicable to writs of execution for the sale of real property sheriff sales scheduled and writs of possession filed on or after the effective date of this act.

#### Section 8. Miscellaneous Provisions.

- A. Elimination of Sheriff's Commission/Poundage in Residential Mortgage Foreclosure Actions: For any residential mortgage obligation, The Sheriff shall not receive, assess, charge or be entitled to the fee authorized by 42 P.S. Section 21104 unless the real property is sold at the execution sale conducted by the Sheriff. If the execution sale of the property is stayed, cancelled, withdrawn, or postponed due to bankruptcy, reinstatement of the loan, payoff of the loan, a loan resolution or any other reason, the Sheriff shall not be entitled to a commission.
- B. Attorneys Fees Collectible prior to initiation of foreclosure: Prior to commencement of a foreclosure or other legal action attorneys' fees may be charged which are reasonable and actually incurred but not in excess of 0.3% of the amount of the "Base Figure" as that term is defined and set forth in Section 101 of the Act of January 30, 1974 (P.L. 13, No. 6) 41 P.S. Section 191) known as the Loan Interest and Protection Law. The attorney fee limitation set forth in this section shall adjust annually as the base figure is adjusted by the Department of Banking.

#### Section 9. Effective date.

This act shall take effect immediately.



# Federal Housing Finance Agency

Statement  
of  
Alfred M. Pollard  
General Counsel  
Federal Housing Finance Agency

**Vacant and Abandoned Properties in Relation to Foreclosure Proceedings**

**Joint Roundtable Discussion  
General Assembly State of Pennsylvania  
Senate Urban Affairs and Housing Committee & House of Representatives Urban Affairs  
Committee  
October 27, 2015**

Chairman Wagner, Chairman Petri, Members of the Committees, thank you for the opportunity to meet with you today to discuss a significant topic to all who care about housing and about the status of our neighborhoods not only here in Pennsylvania but across the country. I serve as General Counsel for the Federal Housing Finance Agency (FHFA). FHFA oversees, as regulator, the eleven Federal Home Loan Banks, including the Pittsburgh Bank, and Fannie Mae and Freddie Mac.

At the same time as being a regulator, the Agency acts as conservator for Fannie Mae and Freddie Mac. The conservatorships involve more direct involvement in the affairs of these regulated entities and a \$187 billion investment by the government and, therefore, taxpayers. That investment has permitted these firms to meet their mission of providing a liquid and stable housing finance system. At the same time, the conservator is charged with preserving and conserving Enterprise assets. The conservatorships of these congressionally-chartered entities also entail certain additional legal responsibilities and authorities for the Agency.

Due to their more direct relationship to the purchasing and securitizing of home mortgages, my comments focus on Fannie Mae and Freddie Mac.

## **Foreclosure Avoidance**

Before addressing vacant and abandoned properties in relation to foreclosure proceedings, I must let you know that avoiding foreclosure is the first priority of the Federal Housing Finance Agency. Keeping homeowners in their homes is the best way to maintain stability in communities, avoid losses to the regulated entities and produces a long term benefit to neighborhoods.

*Loan Modifications.* The Enterprises have been part of over 5 million special loan modifications. They serve as the agents for implementing the Treasury Department Home Affordable Modification Program (HAMP) and have their own Home Affordable Refinance Program (HARP). Through these programs, homeowners have been able to lower their monthly costs and remain in their homes. Earlier this year FHFA Director Watt announced that these programs, due to expire in 2015, have been extended through 2016 and many homeowners can and should take advantage of them.

*Diversity and Inclusion.* In the area of sales of non-performing loans, Director Watt has stated that the Enterprises are now making efforts to get minority-, women- and disabled-owned businesses and non-profit organizations involved in their non-performing loan (NPL) sales. These sales provide a means for the Enterprises to sell severely delinquent loans to new buyers using new servicers who will work aggressively with borrowers to help them avoid foreclosure. Conducting the right kind of outreach to entities that will maximize borrower engagement and neighborhood-based solutions is a critical component of successfully executing these sales in ways that will help keep more borrowers in their homes and help stabilize neighborhoods. Information on this program is on the Enterprise websites.

*Affordable Rental Housing.* Another tool that assists in foreclosure avoidance and benefits neighborhoods is support for affordable rental housing. Director Watt recently summarized a key issue—expanding access to credit and, at the same time, seeking to continue providing liquidity in the multifamily market and especially for support of affordable rental housing. Households across the country are paying more of their income for rent, with half of all renters spending more than 30 percent of their income on housing and 26 percent of renters expending more than 50 percent. The Enterprises offer affordable, long-term, fixed-rate loans that enable property owners to have a stable, sustainable mortgage payment and reduce the need to increase rents charged to tenants; over 70 percent of rental units financed by the Enterprises over the last few years have been affordable to low-income households. All of this has been accomplished with strong underwriting standards and correspondingly strong performance, which they sustained throughout the economic crisis. In other words, helping property owners and having good underwriting standards puts renters as well as homeowners in the most sustainable position.

To further this effort, Director Watt has created exclusions to the FHFA cap on Enterprise multifamily purchases. The cap will not apply to loans for affordable properties, including those in higher-cost areas, and excludes certain loans for manufactured housing communities as well as seniors housing and small multifamily properties affordable to low-income tenants. Further exclusions are anticipated.

### **Vacant and Abandoned Properties**

Vacant and abandoned properties clearly remain problems for many communities, large and small. FHFA has heard from some of the largest cities as well as from smaller municipalities of the pressures they feel. It should be noted that not all vacant or abandoned properties are in the hands of the private sector. You may have seen reports that cities such as Chicago and Baltimore hold double digit thousands of properties and many vacant lots. As such, this issue confronts both governments and the private sector.

**Note on NSI.** Briefly I will mention a project that is addressing some of the issues that involve vacant or abandoned properties. Last year Director Watt announced the Neighborhood Stabilization Initiative. This is a pilot program designed to stabilize neighborhoods that have been hardest hit by the housing downturn. It was jointly developed by FHFA, Fannie Mae and Freddie Mac and includes strategies for helping delinquent borrowers avoid foreclosure and strategies for disposing of the inventory of real estate owned (REO) properties held by Fannie Mae and Freddie Mac. The number of REO properties owned by Fannie Mae and Freddie Mac is declining, however,

in some areas of the country REO inventory continues to increase or remain near historic highs. Certain markets have large concentrations of distressed and low-value REO properties as well as large volumes of loans that have been delinquent for one to two years that are likely to become REO.

Given the unique challenges presented by these markets—high vacancy rates, weak for-sale markets, steep home-price declines—Fannie Mae and Freddie Mac are partnering with the National Community Stabilization Trust, a national non-profit organization experienced in stabilization efforts for distressed communities. Working together, they will leverage their ties to “boots on the ground” community organizations and local non-profits and work closely with local governments to make timely and informed decisions about the best treatment of individual properties. These may include sales to nonprofits, rehabilitation of homes, loan modifications and, in some instances, demolitions.

As to vacant and abandoned residences in general, there are two elements to addressing these properties—maintaining them and moving them to sale.

*Property Maintenance.* Fannie Mae and Freddie Mac have formal property maintenance programs and these are administered by their servicers normally through full time property maintenance companies. It should be noted that lenders and mortgagees are in different legal positions before and after they assume title to a property. The Enterprises set national standards and there are required reviews of service provider performance. Key elements of property maintenance include training for property maintenance vendors, seeking to find homeowners, conducting inspections, securing and stabilizing a home, keeping trash removed and lawns cut and undertaking random inspections to assure that standards are being met. Standards are available on Enterprise websites.

*Property Sale or Disposal.* In many instances, homeowners may remain in their homes as Freddie Mac and Fannie Mae focus on selling their portfolio of vacant homes to owner occupants to promote community stabilization. Their respective First Look Programs allow an exclusive time period at initial listing of a home where owner occupants and nonprofits can submit offers without competition from investors. If a homeowner cannot remain in a home, then it is in the interest of the homeowner to exit in an appropriate manner. This can be through a short sale, deed in lieu, cash for keys or other transaction. Also, it is in the interest of local governments and of neighbors to see a property returned to productive use and occupancy, particularly if the homeowner has vacated or abandoned their home. To return these homes to productive use and occupancy as quickly as possible, I highlight the following considerations for you regarding the treatment of vacant or abandoned properties:

#### 1. Accelerated Foreclosure of Vacant or Abandoned Properties

Several states have enacted laws that abbreviate what can be very long foreclosure timelines to permit faster movement to foreclosures if a property is vacant or abandoned. Timelines can be as short as 45 days. Included in these laws are safeguards or safe harbors that protect city officials or private parties from taking an action based on certain factors that may later be reversed. It is significant, therefore, that a government official indicate that a residence has been determined to be vacant or abandoned pursuant to a published checklist. Such a statute should assure as well that any

review or final approval of the accelerated foreclosure is also timely and not put through a process—judicial or otherwise—that vitiates the benefits of an accelerated foreclosure law.

## 2. Streamlined Rules

Another approach is to streamline rules for dealing with vacant or abandoned properties. Municipalities and counties can be authorized to accelerate permitting and other procedures to deal with such properties. For example, in many instances demolition is an appropriate action for certain properties. In such cases, local authorities should act to provide early inspections, quick approvals and determine if any other normal procedures can be abbreviated to facilitate a properly conducted demolition. Other rules affecting vacant and abandoned properties may be considered appropriate for waivers or faster approvals as well.

## 3. Neighborhood-Based Programs

Where possible, municipalities can focus on neighborhood approaches that include helping homeowners remain in their homes while addressing vacant or abandoned properties that exist in their neighborhoods. Putting together a plan for outreach to community organizations, to local government agencies and to all affected lenders could result in a comprehensive approach and a beneficial outcome. Addressing as many units as possible should provide a better outcome. This, as I noted earlier, is the direction of the Neighborhood Stabilization Initiative.

## 4. Uniformity

While much of what I have noted above suggests action by localities, it should be accompanied by appropriate uniformity. A roadmap for certain actions makes it much easier for lenders and localities to proceed. Because all 67 Pennsylvania counties regulate the foreclosure process independently, the state may wish to consider areas where uniformity could be achieved—vacant and abandoned properties would seem to fit well within that framework in line with the ideas above.

## 5. Vacant Property Registration

For mortgagees, the relationship to vacant properties is at times a difficult one. The party moving for a foreclosure is not the owner of the property and does not have the rights of an owner. So even for a vacant property, there could be problems such as trespass allegations or other liability.

In Pennsylvania the foreclosure timeline of 810 days creates significant losses for lenders who are not being paid on their mortgage, but cannot act to sell the property. At the same time, counties have sought to require registration and property maintenance standards. In some cases the fees charged are so high that they represent taxes, not fees and, for Fannie Mae and Freddie Mac, they do not pay such taxes. Further, as noted, for property maintenance, Fannie Mae and Freddie Mac have national programs that benefit local communities and their property maintenance standards are national in scope.

I hope this information has been helpful and I am happy to answer any questions you may have.



**Testimony of the Housing Alliance of Pennsylvania  
Senate Urban Affairs and Housing Committee  
House Urban Affairs Committee  
November 27, 2015**

Good morning. My name is Cindy Daley and I am the Policy Director at the Housing Alliance of Pennsylvania. The Housing Alliance is a statewide nonprofit organization that works to increase the availability of homes within reach of all Pennsylvanians, especially those with low incomes. We also advocate for policies to advance community revitalization efforts.

The Housing Alliance has worked for more than a decade to promote sound policies for remediating blighted properties, preventing blight and abandonment, and getting vacant and abandoned properties back into productive use as quickly as possible. Fast track foreclosure for vacant and abandoned houses can be another effective tool for getting properties into responsible hands before they become a drain on the community.

While fast track foreclosure can be useful, it is worth noting what it cannot do. The procedure will not address properties that have already been through foreclosure and are sitting vacant. It will not address those vacant and abandoned properties that do not have mortgages. Nor will the procedure guarantee that lenders will take all eligible properties to foreclosure, as they often make business decisions not to proceed with low value properties. But in the right circumstances, fast track foreclosure can be a worthwhile addition to the toolbox.

What are the right circumstances? As the name indicates, the property must be both vacant and abandoned. Vacancy alone is not enough since the owner may be away for any number of reasons or may be readying the property for sale. Abandonment – failure to pay bills, failure to maintain the property – is also not enough by itself as the property might be tenant occupied. In order to expedite the foreclosure, the property must be both vacant and abandoned.

How do we know if the property is vacant and abandoned? A number of indicators can be taken together to paint a picture of vacancy and abandonment: substantially all personal property has been removed, utilities have been shut off, mail is accumulating or being forwarded, windows or doors are broken. It is a combination of things. Blight may be a factor but it is not, in and of itself, proof of vacancy and abandonment. We all know of blighted houses that are occupied.

It is also important for the state to ensure that a lender will not encourage or force a homeowner to vacate the property just so the lender can use an expedited process. To that end

we propose that if a property becomes vacant during the pendency of a foreclosure action, the lender becomes responsible for maintaining the property. New Jersey and New York have already enacted such laws. In addition, lenders subject to Fannie Mae's Servicing Guide should already be maintaining the properties, so this would not create an additional burden.

A maintenance requirement would also address the issue of "zombie titles" – a situation that arises when a lender begins the foreclosure process but does not complete it. In these cases the lender files in court, the homeowner leaves believing he or she has lost the property in foreclosure, but the lender never requests a sheriff's sale and never takes title. The title remains in the name of the former homeowner and comes back to haunt him or her years later when the homeowner is called into court for delinquent taxes or code violations.

We hear of this problem all across the state. It can be addressed by holding the lender responsible for maintaining the property while it is vacant and giving the lender the incentive to either keep the original homeowner in place or quickly transfer the property to a new owner.

Turning back to fast track foreclosure, the next question is, Who decides whether the property is vacant and abandoned? This decision must rest with the court. The loss of property is too great a consequence to allow a unilateral decision by the foreclosing lender to control.

Related to the question of who decides is the matter of adequate notice. The property owner must receive all of the currently required notices of a foreclosure action as well as a notice that the lender is filing a motion to have the property declared vacant and abandoned. Notice and an opportunity to be heard in court – due process – is the foundation of our legal system.

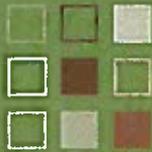
Other states have answered the question by requiring notice beyond what is required by the state's court rules. It is the time to judgment that is shortened, not the time for notice.

However, following this principle of shortening the time to judgment rather than the time for notice raises a question as to whether the Pennsylvania General Assembly can enact an expedited foreclosure law. In Pennsylvania the foreclosure process is almost exclusively governed by court rules. The exceptions are Act 6, which provides homeowners with information about the default and an opportunity to cure, and Act 91 which provides the homeowner with information about the Homeowners Emergency Mortgage Assistance Program. Beginning with the filing of a complaint in foreclosure, the process is governed by the courts. The Pennsylvania Constitution vest the power to establish "rules governing practice, procedure and the conduct of all courts" solely in the Supreme Court. Altering those rules is not within the purview of the General Assembly. I leave it to others to determine whether any aspect of the foreclosure process can be addressed through legislation.

Our hope is to learn from other testifiers today and to continue to work with you and other stakeholders create a foreclosure process that works for lenders, property owners facing foreclosure, and the communities at large. Finding the right solution will be a step forward for all of Pennsylvania.

**Also submitted:**

- **Fannie Mae servicing Guide, section E-3.2.12**
- ***Estimating the Impact of Fast-Tracking Foreclosures in Ohio and Pennsylvania*, Federal Reserve Bank of Cleveland**
- ***Fast Track Foreclosure Laws: Are they Headed in the right Direction?*, National consumer Law Center**



## Estimating the Impact of Fast-Tracking Foreclosures in Ohio and Pennsylvania

Kyle Fee and Thomas J. Fitzpatrick IV

All the signs in the housing market seem to be pointing the right way, except the amount of time loans are spending in the foreclosure process. Foreclosure fast-tracks for vacant homes in foreclosure may help reverse that trend.

In recent months housing markets have shown real signs of life: home prices, home purchases, and housing starts are up, while foreclosure inventories, foreclosure starts, and loan delinquencies are down. But in states that handle foreclosure through the courts (rather than nonjudicial trustee's sales), the lingering effects of the foreclosure crisis may be costing taxpayers money and dragging down the recovery. In those states, the amount of time loans are delinquent before they enter foreclosure and the amount of time loans spend in the foreclosure process are rising.

Anecdotally, many explanations have been offered as to why this is happening. Loan modification programs may explain some of the increase in duration, as lenders work with borrowers in an attempt to modify the loan while the borrowers are delinquent or in foreclosure instead of proceeding to judgment. State-specific requirements, such as the lender having to produce the original note and mortgage may delay or prevent some foreclosures on delinquent loans. Shrinking budgets may be making it difficult for the courts overseeing the cases or the sheriff's offices overseeing the property auctions and deed transfers to process foreclosures in a timely way. Selective foreclosure, which avoids low-value properties, may also be a contributing factor, shifting the costs of those properties from the lender to communities and taxing districts.

These problems are intensified when a home that is in the judicial foreclosure process is vacant. States with judicial foreclosure have longer foreclosure timelines than nonjudicial states. When the home is vacant, the cost of the extended judicial foreclosure process has no corresponding benefit, generating deadweight losses.

Recently, some judicial foreclosure states have passed laws that attempt to "fast-track" foreclosures if the property has been abandoned by the homeowner, and others have begun considering similar fast-track laws. This *Commentary* explores the economic reasoning behind fast-tracking and estimates

the size of the deadweight loss that could be eliminated by creating an effective foreclosure fast-track in Ohio and Pennsylvania, two states in the Federal Reserve Bank of Cleveland's District.

### The Judicial Foreclosure Process

Requiring that foreclosures be conducted through the courts is a policy decision that has passionate advocates on both sides of the issue. Those that do require it—judicial foreclosure states—have decided that certain safeguards are required before real property can be taken from an owner by a creditor because of a default on a secured loan or by a taxing authority for failure to pay property taxes. In these states creditors and taxing authorities must proceed through the courts, which make sure they have the right to foreclose and the borrower has no legal defenses to foreclosure.

Legislatures have decided that protecting the rights of property owners is worth the higher cost of judicial foreclosure relative to nonjudicial foreclosure. These costs may change depending on whether homes stay occupied or are vacated by the owners during the foreclosure process. When a home in foreclosure remains occupied, the costs may only include the lost value of the creditor or taxing authority's capital investment in the property (which does not earn a return during the foreclosure process), the litigation costs of all parties to the foreclosure, and the court's time. But when a residential property in foreclosure is vacant, this calculation may change.

When the foreclosure sits vacant, there are additional costs to the creditor or taxing authority due to the accelerated depreciation of unoccupied homes, which are less well maintained and more likely to be vandalized or, in some cases, stripped of metal to sell for scrap. There are additional costs to the community when unoccupied homes create health and safety hazards and cause surrounding homes to lose value. In states that allow deficiency judgments such as Ohio and Pennsylvania, there are potentially further costs to the

vacated homeowners, who will be liable for the difference between the price the creditor or taxing authority eventually receives for the home and the unpaid loan amount. Finally, any loss in property values will hurt municipalities or school districts funded in whole or in part by taxes on the value of real property.

Who bears these costs, in the end, depends on whether the foreclosure is completed. When the foreclosure is abandoned, costs are imposed on the community and taxing districts. The abandoned property is not easily rehabilitated due to the lender's lien on the property. When abandoned properties are taken through foreclosure and sold, these costs are born primarily by the lender through rehabilitation costs or lower sales prices.

Most importantly, there is no obvious beneficiary of these costs. Communities and taxing districts face the externalities associated with vacant property: lower surrounding home values, increased crime, and reduced property tax collections. Homeowners who leave properties vacant are essentially resigned to the fact that they cannot dispute the right of the creditor or taxing authority to take the home through the foreclosure process, and as such gain no benefit from its use. Lenders receive no benefit from the judicial foreclosure process above the benefits they would receive through a nonjudicial process.

These deadweight losses—costs without corresponding benefits—are what legislatures in judicial foreclosure states have attempted to address by creating foreclosure fast tracks. At least five states have created foreclosure fast-tracks for private mortgage foreclosure on abandoned property since 2010.<sup>1</sup> Ohio created a private mortgage foreclosure fast-track for tax-foreclosure in 2006,<sup>2</sup> and the Ohio legislature is considering a pilot foreclosure fast-track for properties abandoned by the homeowner.<sup>3</sup> But there has been no economic analysis to determine the potential impact of a well-designed foreclosure fast-track.

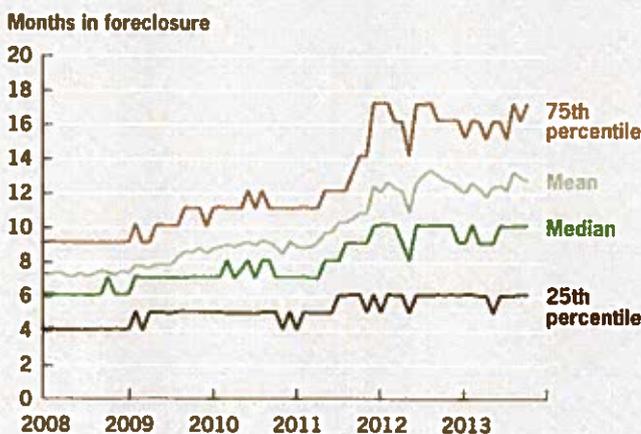
### Assuming a Close-to-Ideal Foreclosure Fast-Track

We estimate the potential for savings that an efficient and effective foreclosure fast-track could provide in Ohio and Pennsylvania. The savings would come from shortening the amount of time that vacant properties spend in foreclosure and eliminating the deadweight losses lenders suffer. To estimate these savings, we need to know three things: how many foreclosures might be affected (the number of homes in foreclosure that sit vacant), the daily deadweight losses associated with these homes, and time that could be shaved by fast-tracking.

Unfortunately, there is no single database that has all this information, so constructing our estimate is a multi-step process. We start by making several assumptions. We assume that an ideal fast-track for private mortgage foreclosure would only apply to homes in foreclosure that owners have vacated, it would be used on 100 percent of those properties, and it would cut the total foreclosure time—specifically, from the time the foreclosure is filed with the court to the point where the lender takes ownership of the property—down to two months.

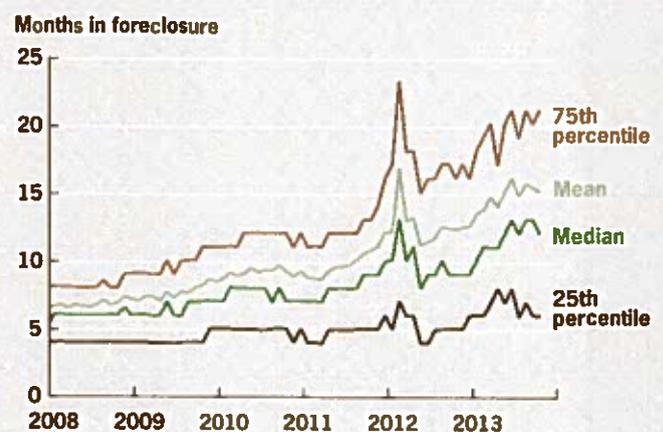
The validity of these assumptions depends entirely on how the law is written. Typically, foreclosure fast-track laws require more than simple vacancy in order to qualify for the fast-track, which protects against the fast-track being misused but may prevent all vacant foreclosures from being eligible for fast-tracking. In some cases, qualification is based on criteria that would correlate with a vacated home (shut-off utilities and housing code violations, for example), so generally there should be a high correlation between vacancy and fast-track qualification. Additionally, once a foreclosure judgment is issued, the fast-track would have to transfer the property to the lender directly, or an expedited foreclosure auction and deed transfer process would be required.

**Figure 1. The Quickest Foreclosures Take about 6 months in Ohio**



Source: Lender Processing Services.

**Figure 2. The Quickest Foreclosures Take about 5 months in Pennsylvania**



Source: Lender Processing Services.

A 100 percent utilization rate of a foreclosure fast-track also depends on how efficiently the process is designed: the faster and easier it is to use, the more it will be used. It is worth noting that a common anecdotal complaint by creditors' counsel is that recently-passed foreclosure fast-tracks are difficult to use.

Another practice that may prevent 100 percent utilization is strategic foreclosure. Strategic foreclosure refers to foreclosures that are started but never completed or foreclosures that are never started because the lender determines that the home has little value. They usually occur when the home sits vacant and depreciates to the point that it would cost more to foreclose upon and maintain than could be recovered by selling the property. There is some empirical evidence suggesting that this has occurred in very weak markets.<sup>4</sup> And anecdotally, local governments and communities have reported an increase in foreclosures that start but are never completed. A foreclosure fast-track does not completely address strategic foreclosure. It may lower the cost of foreclosure for lenders, but if the property has an extremely low net present value, lowering the cost of foreclosure may still not be enough to make completing the foreclosure worthwhile. A fast-track law could be constructed with features that ensure foreclosures that have started are completed, but the response to that might be to not initiate foreclosure on low-value properties, in which case the problem will persist.

Finally, bringing the fastest foreclosures down to two months also seems possible. The quickest foreclosures in Ohio and Pennsylvania are completed typically in five to six months (figures 1 and 2). This is a measure of the time that loans spend in foreclosure before they enter the lender's real estate owned portfolio or are sold. In the case of vacant foreclosures, a fast track could move the process down to a single hearing, and if the homeowner does not respond to

the foreclosure filing, the property could be directly transferred to the lender or move to an accelerated sale. This process would be similar to the fast-tracked property tax foreclosure framework currently used in Ohio.

### Estimating the Number of Vacant Foreclosures

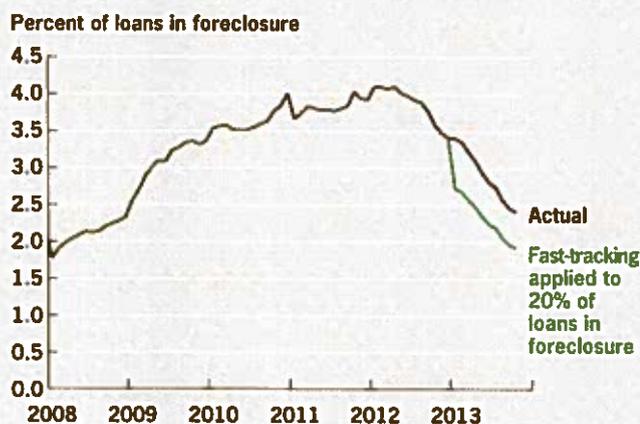
To determine the number of vacant homes in foreclosure in Ohio and Pennsylvania, we have to combine data from two different sources. Lender Processing Services (LPS) provides an estimate of the share of first-lien *loans* that are in foreclosure in each state. RealtyTrac provides an estimate of the share of *homes* in foreclosure that are vacant in each state. Combining the two estimates will give us an idea of how many foreclosures might be affected by fast-tracking. We also use LPS data to calculate the average duration of the foreclosure process, which we need to estimate the amount of time that fast-tracking could save in the foreclosure process (average duration minus our two-month assumption).

RealtyTrac determines the share of vacant foreclosures by cross-referencing the addresses of properties in foreclosure with US postal data. Those foreclosed properties that have left forwarding addresses or have been designated as vacant by the postal service are considered vacant foreclosures by RealtyTrac. In Ohio, roughly 20 percent of homes are vacant while they are in foreclosure according to this estimate, while in Pennsylvania the ratio is closer to 16 percent (table 1).

To calculate the average duration of the foreclosure process, we start by identifying all loans that exit the foreclosure process by entering into a creditor's real estate owned portfolio or by being sold by the creditor. Then we count how many consecutive months those loans were marked as "in foreclosure" by the creditor.

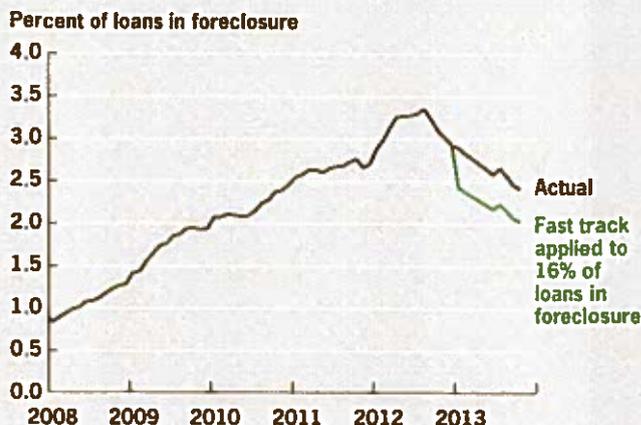
One challenge of our approach is that RealtyTrac counts the number of homes in foreclosure, while LPS counts the

**Figure 3. Fast-Tracking Could Reduce Foreclosure Inventory in Ohio**



Source: Lender Processing Services.

**Figure 4. Fast-Tracking Could Reduce Foreclosure Inventory in Pennsylvania**



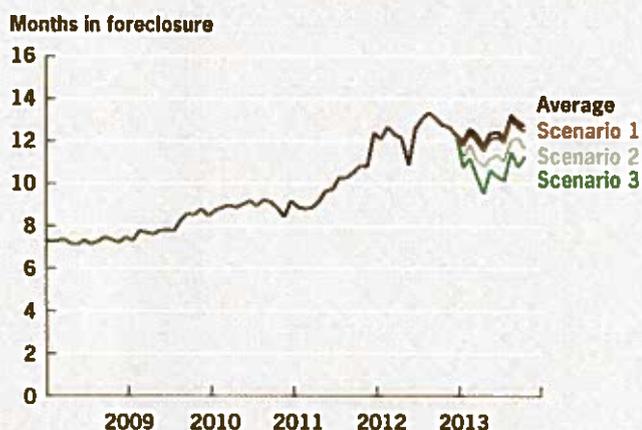
Source: Lender Processing Services.

number of first-lien loans in foreclosure. These sets will not correlate perfectly for a few reasons. First, they count foreclosure slightly differently—LPS relies on monthly self-reporting from servicers, while RealtyTrac counts a home in foreclosure from the day the notice of default is issued through the day the notice of sale is issued. The RealtyTrac set also focuses on homes, so it may include foreclosures that do not have an associated mortgage loan (property tax foreclosures, for example). Despite these minor differences, we feel the sets are similar enough to export the rate of vacant foreclosures from one to the other.

### Estimating the Impact

Using the vacant foreclosure rate of 20 percent for Ohio and 16 percent for Pennsylvania, we estimate that both states would likely experience a substantial reduction in foreclosure inventories if they had had a fast-track in place at the end of 2012. If Ohio had passed a foreclosure fast-track, the foreclosure inventory in Ohio would be about 0.5 percentage points lower—less than 2 percent instead of just under 2.5 percent (figure 3). Pennsylvania would see similar results (figure 4).

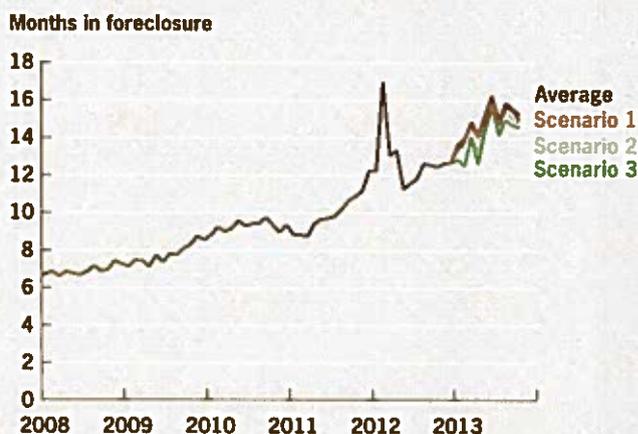
**Figure 5. Fast-Tracking Could Shave 8-43 Days off Foreclosure Process in Ohio**



Notes. Scenario 1 is fast-tracking applied to loans in the 0 to 20th percentile of months' duration. Scenario 2 is fast tracking applied to loans in the 40th to 60th percentile of months' duration. Scenario 3 is fast tracking applied to loans in the first 5 percentiles of months' duration for each quartile.

Source: Lender Processing Services.

**Figure 6. Fast-Tracking Could Shave 9-20 Days off Foreclosure Process in Pennsylvania**



Notes. Scenario 1 is fast track applied to 0 to 16 percentile of months' duration. Scenario 2 is fast track applied to 42 to 58 percentile of months' duration. Scenario 3 is fast track applied to first 4 percentile of months' duration for each quartile.

Source: Lender Processing Services.

**Table 1. Around 20 Percent of Homes in Foreclosure Are Vacated by Owners in Ohio, 16 Percent in Pennsylvania**

	Percent owner vacated			
	Q1	Q2	Q3	Q4
Ohio	21	19	19	19
Pennsylvania	17	17	16	15

Source: RealtyTrac. This data can be purchased at <http://data.realtytrac.com/>.

**Table 2. Fast-Tracking Could Have Saved Creditors \$24 Million-\$129 Million in 2013**

Scenario	Days saved (A)	Daily carrying costs, dollars (B)	Number of loans in foreclosure (C)	Total cost savings, dollars (AxBxC)
Ohio				
1	8	75	40,000	24,000,000
2	31	75	40,000	93,000,000
3	43	75	40,000	129,000,000
Pennsylvania				
1	9	75	36,000	24,300,000
2	14	75	36,000	37,800,000
3	20	75	36,000	54,000,000

Source: RealtyTrac; Lender Processing Services; authors' calculations.

Calculating the impact a fast-track would have on the amount of time loans spend in foreclosure in each state is not as straightforward. We do not know which loans would be eligible for a fast-track, so we created three scenarios.

**Scenario 1.** We applied the fast-track to the loans in each state that are already moving through the process most rapidly.

**Scenario 2.** We applied the fast-track to the loans closest to the average durations without the fast-track (40th to 60th percentile in Ohio and 42nd to 58th percentile in Pennsylvania).

**Scenario 3.** We applied the fast-track to the fastest loans in each quartile or the first five percentiles of each quartile (0-5, 26-30, 50-55, 76-80) in Ohio and the first four percentiles in Pennsylvania (0-4, 26-29, 50-54, 76-79).

In Ohio these scenarios shave between 8 and 43 days off of the average duration (figure 5). In Pennsylvania durations are lower overall, and the scenarios create a narrower range of 9 to 20 days shaved off of the average foreclosure duration (figure 6).

It is worth noting that this simple method may underestimate the impact a fast track would have on durations, because it assumes that all noneligible loans would continue to move through the process at their current pace. That seems unlikely, as freeing up judicial resources via the fast-track should help reduce the time even non fast-tracked loans spend in foreclosure.

Finally, we attempt to put a dollar figure on the deadweight loss eliminated by the use of a foreclosure fast-track. This is by far the most challenging part of this analysis because these costs cannot be observed directly in the data we have.

The cost to homeowners, communities, and taxing authorities cannot be reasonably estimated because we do not observe them directly or indirectly in either of the data sets used in this analysis. Other research suggests that the savings to these entities would be substantial. Whitaker and Fitzpatrick (2013)<sup>5</sup> find that in Cuyahoga County, Ohio, each vacant property lowers the sale prices of surrounding homes by \$1,300 to \$2,300. If a fast-track was able to reduce the amount of time homes spend vacant by speeding them through the foreclosure process and eventually to new owners, they would no longer be vacancies that reduce the sales prices of surrounding homes.

Similarly, if a fast track could prevent vacant foreclosures from depreciating to the point of abandonment in the foreclosure process, those abandoned homes would not lower the sale price of surrounding properties by \$700 to \$6,000. But exact estimates would require different data to allow us to view the spatial distribution of vacant foreclosures in Ohio and Pennsylvania, the strength of the housing submarkets they are in, and the housing density in those markets.

Additionally, Cui (2010)<sup>6</sup> estimates that spells of residential vacancy in Pittsburgh exceeding six months result in significantly higher rates of violent crime in their immediate vicin-

ity. It follows that reducing the time homes spend vacant in the foreclosure process to less than six months could reduce the instance of violent crime in the surrounding area, but no dollar figure can easily be placed on this effect, and it cannot be measured with precision.

We do not directly observe the costs to creditors, but they can be estimated by looking at creditors' daily carrying costs for the property they own. These carrying costs are calculated for creditors' REO portfolios and include ongoing maintenance, taxes, repairs, and code-violation citations for the residential properties they own. They include some fixed costs that are averaged over the few months lenders typically own properties after foreclosure. While not a direct observation, they likely reflect the extra attention creditors must pay to vacant foreclosures to maintain them, or the depreciation of vacant properties (resulting in lower sale prices) that are unmaintained. Nationally, creditors' carrying costs are estimated to be between \$25-\$100 a day.<sup>7</sup> Conversations with loan servicers working in Ohio and Pennsylvania suggest costs in those areas are closer to \$50-\$100 a day.

Taking the average of the daily carrying cost range for Ohio and Pennsylvania, multiplying it by the average time saved under each scenario and the number of loans in foreclosure in each state brings us to an estimated annual savings for each state, had a foreclosure fast-track been in place at the end of 2012. In Ohio, the annual savings from a foreclosure fast-track is estimated to be between \$24,000,000 and \$129,000,000 (table 2). In Pennsylvania, the annual savings from a foreclosure fast-track is estimated to be between \$24,000,000 and \$54,000,000 (table 2). It is important to emphasize that this is an elimination of deadweight losses, rather than a shifting of costs. That is, these costs already exist and benefit no one.

These savings to creditors raise the question of why creditors do not simply fund adequate staffing in the proper local government offices and hire additional attorneys of their own to move vacant homes through the foreclosure process faster. There are two reasons why this does not happen, one economic and one legal.

Economically, these savings are spread over a large number of lenders prosecuting a large number of foreclosures in a large number of courts throughout the states of Ohio and Pennsylvania. Determining where lenders need additional attorneys, and which courts require additional staff, would be an expensive proposition. It creates a classic collective-action problem, where no one lender would save enough to return their investment. Even in the absence of this collective-action problem, there are legal barriers (statutorily prescribed notice and hearing requirements and accompanying periods laid out by rules of civil procedure) that would prevent homes from being accelerated through the foreclosure process. Even if it were feasible for creditors to fund adequate staffing in the proper local government offices, it would not be a substitute for an act of the legislature creating a usable foreclosure fast-track for vacant foreclosures.

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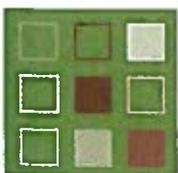
## Conclusion

All the signs in the housing market seem to be pointing the right way, except the amount of time loans are spending in the foreclosure process. Foreclosure fast-tracks for vacant homes in foreclosure may help reverse that trend.

The data suggest that the foreclosure rate could be substantially lowered and tens of millions of dollars of annual deadweight losses could be eliminated in Ohio and Pennsylvania annually by creating efficient, effective foreclosure fast-tracks for vacant properties. Crafting legislation that adequately balances the interests of creditors and homeowners while meaningfully fast-tracking foreclosures is no simple task, and would likely require the input of creditors, communities, foreclosure attorneys, and the judiciary.

## Footnotes

1. See "Policy Considerations for Improving Ohio's Housing Markets," Federal Reserve Bank of Cleveland Staff Report, 2013.
2. Ohio Revised Code §323.65 et seq.
3. Ohio House Bill No. 223, 130th General Assembly, 2013-2014.
4. Stephan Whitaker and Thomas J Fitzpatrick IV, 2013. "Deconstructing Distressed-Property Spillovers: The Effects of Vacant, Tax-Delinquent, and Foreclosed Properties in Housing Submarkets," *Journal of Housing Economics*, 22(2): 79-91.
5. See footnote 4.
6. Lin Cui, 2010. "Foreclosure, Vacancy, and Crime," University of Pittsburgh Department of Economics, working paper.
7. Andrew Jakobovics, 2012. "What Sells When: Analyzing Price and Time Patterns for Single-Family Homes to Identify Best Practices for Aggregating REO Properties for Bulk Sales," Enterprise Community Partners, working paper.



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# **Fast Track Foreclosure Laws: Are They Headed in the Right Direction?**

January 2014

Geoffry Walsh  
National Consumer Law Center<sup>®</sup>

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The findings and conclusions presented in this report are those of the author alone.



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## I. INTRODUCTION

The ongoing foreclosure crisis has involved more homes going through state foreclosure procedures than at any other time in United States history. Since 2008, over four million homes have been foreclosed. Before the crisis is over, millions more are likely to follow. The unprecedented volume of cases has produced delays in the foreclosures process in certain areas, primarily in states that require court approval of foreclosure sales. Delays of two years or more are common in some judicial foreclosure states. Not surprisingly, these delays have produced demands from the mortgage lending industry for ways to speed up foreclosures. Much of the industry's attention has focused on laws to create short cuts through judicial foreclosure systems.

In response to these concerns, new state "fast track" foreclosure laws have begun to appear. At least seven state legislatures have enacted such laws since 2009. In most instances, these laws tie a right to fast track foreclosure to a mortgage holder's claim that a property is "abandoned." Proponents of the new laws focus upon the futility of delaying foreclosure while a property remains empty and becomes an increasingly grave threat to its community. There is clearly no benefit to delaying foreclosure in these circumstances, and no one would claim otherwise.

This report examines seven recently enacted fast track foreclosure statutes: those in Michigan, Oklahoma, Kentucky, Indiana, New Jersey, Nevada, and Illinois. The report also considers a draft fast track foreclosure law prepared by the National Conference of Commissioners of Uniform State Law (NCCUSL). The report concludes that several of these laws contain provisions that work effectively to achieve the twin goals of prompt completion of foreclosures of properties that are truly unoccupied and abandoned. Other statutes, however, have been drafted broadly and are clearly over-inclusive in their reach. Several laws expressly apply to occupied properties and others are vague in defining when they apply. Nearly all set up new and burdensome procedural requirements for homeowners. The overwhelming majority of homeowners facing foreclosure today lack access to legal assistance. Under certain fast track laws, homeowners face loss of substantial rights under state property laws if they do not meet new procedural deadlines, submit paperwork promptly, appear for hearings, and rebut evidentiary presumptions. Finally, beyond speeding up foreclosure sales in selected cases chosen by mortgage servicers, these laws generally fail to coordinate a response to the problem of deteriorated and abandoned properties in foreclosure.

There are ways to deal with the problems of abandoned properties in foreclosures that protect communities, preserve existing property rights of borrowers, and allow lenders to minimize losses. After reviewing fast track foreclosure laws now in effect and proposed by the NCCUSL, this report makes nine recommendations for improvement of fast track foreclosure laws.

These are:

- Fast track foreclosure laws must operate in conjunction with statutory requirements that mortgagees inspect properties in foreclosure on a regular basis and report to local authorities on the each property's status. Mortgage servicers should not be allowed to pick and choose which abandoned properties they would like to sell on an expedited basis.
- In addition to requirements to inspect and report on property condition, the fast track laws must require that mortgagees maintain abandoned properties in safe condition while they pursue a foreclosure and eventual re-sale of the property.
- Fast track foreclosure laws must never apply to occupied properties. Borrowers who reside in their homes must have simple and effective means to declare occupancy and stop an attempted fast track foreclosure of an occupied dwelling.
- Once a property has been determined abandoned through a fair and accessible proceeding, mortgagees must not have the option of indefinitely delaying foreclosure.
- The right to use a fast track foreclosure procedure should not be determined through presumptions or a "prima facie" standard applied in summary proceedings. A court or administrative body must make findings of abandonment based on clear and convincing evidence.
- Procedural protections for borrowers must include attempts at personal service of essential documents in the proceeding, clear notices of rights, a hearing, and ease of registering objections based on occupancy.
- A right to fast track foreclosure must not be triggered by claims that a borrower did not allow an inspector inside a home.
- Judgments in fast-track foreclosure proceedings must not have preclusive effect on questions of a borrower's personal liability. A judgment of foreclosure or eviction entered in a fast track proceeding must be subject to being set aside based on evidence that the property was occupied when the judgment was entered.
- When a property has been determined to be abandoned, the mortgagee must bear the cost of maintenance. A borrower must not be charged for maintenance after the abandonment determination and must not be assessed the cost of a bond that a mortgagee posts under a registration law requirement.

If incorporated in a vacant property foreclosure statute, these elements will ensure that any abridgement of standard foreclosure procedures is based on a valid finding of abandonment. All foreclosures of occupied properties should proceed with oversight over loss mitigation reviews. Mortgage servicers' failure to conduct appropriate reviews for loss mitigation leads to unnecessary foreclosures. Unnecessary foreclosures of occupied homes also present a risk of harm to communities, a risk that is at least as great as that posed by delays during foreclosure. Appropriate intervention through mediation programs and other state laws designed to prevent foreclosures through effective oversight of loss mitigation should be the central focus of state legislative activity during the current foreclosure crisis.

## II. FAST TRACK FORECLOSURE LAW: THE CONTEXT

Since 2009, seven states have enacted new “fast-track” foreclosure laws. While these laws take on varied forms, they have certain features in common. They focus on properties that are considered abandoned by the borrower or that may still be occupied but show signs of poor maintenance. If a foreclosure involves one of these properties, these statutes authorize mortgagees to skip over considerably longer time frames that would otherwise apply under the state’s general foreclosure laws. When applicable, these laws significantly reduce periods for notices, cure rights, and the exercise of redemption rights.

Enactment of fast track foreclosure laws has been a major goal of mortgage industry advocacy in recent years. The laws further a broader industry strategy to promote speedier foreclosures. To encourage enactment of these laws, financial institutions routinely publicize disparities in foreclosure times between states that require judicial foreclosures and those that use primarily non-judicial foreclosure systems. The publicity typically features charts and graphs comparing groups of judicial foreclosure states (e.g. New York, Florida, Illinois, and New Jersey) compared to non-judicial states (e.g. Georgia, Texas, Virginia, or Tennessee).<sup>1</sup> The judicial states show average foreclosure time frames of one or more years. In the non-judicial states, foreclosures may be completed within three or four months. These charts are often accompanied by conclusory statements to the effect that the long foreclosure time frames in judicial foreclosure states are impeding recovery of the national housing market and contribute to neighborhood blight.<sup>2</sup> The industry talking points have been widely disseminated through media reports. These reports dutifully pass on the view that the mortgage lending industry is being victimized by unreasonable state laws that require court approval of foreclosures and that the solution is to minimize judicial oversight of foreclosures.

There is some truth in parts of these industry claims, but there is no simple explanation and many factors other than state foreclosure laws have contributed to delays in the foreclosure process. Judicial foreclosures have traditionally taken longer than non-judicial foreclosures. The longer foreclosures take, the more likely the homeowner will move out of the property before the foreclosure is completed. Over the past two years, the inventory of properties listed for foreclosure sales or owned by lending institutions after foreclosure sales has decreased. As of early 2013, the number of properties scheduled for foreclosure sales or bank-owned was at its lowest in five years, down 39 percent from its peak in 2010.<sup>3</sup> However, this decline in the foreclosure inventory resulted primarily from disposition of bank-owned properties. At the same time in early 2013, the inventory of properties in the foreclosure pipeline (foreclosure commenced but no auction scheduled) had increased nearly 60 percent from a year earlier.<sup>4</sup> These properties comprise a “shadow” inventory of homes languishing in long-term foreclosure status. The properties are located overwhelmingly in judicial foreclosure states. Thirty-five percent of the homes in this shadow inventory are estimated to be vacant. In some states, the vacancy rate for homes in the foreclosure pipeline exceeds fifty percent.<sup>5</sup>

While it is clear that foreclosures in judicial foreclosure states have been delayed in recent years, the cause for those delays cannot be simply stated. Mortgage servicers' own conduct has definitely contributed to the delays. In particular, the media attention focused on servicers' use of robo-signed documents led to suspension of much foreclosure activity in judicial foreclosure states over several years.

Robo-signing tends to bypass scrutiny in non-judicial foreclosure states. However, the threat of court oversight in judicial foreclosure states had the opposite effect. During 2010-2011, with negotiations underway between mortgage servicers and government enforcement agencies to fashion remedies for robo-signing abuses, many servicers delayed completion of foreclosures in judicial foreclosure states. In New York, for example, large shadow dockets built up of cases in which foreclosure complaints were filed but never moved toward judgment or other forms of judicial intervention.<sup>6</sup>

Limited judicial resources have likely played a role in delaying foreclosures in certain judicial foreclosure jurisdictions, such as Florida, where the volume of loans in default reached unprecedented levels after 2008. It is also unclear to what extent decisions to delay foreclosures were based on industry calculations that home prices in certain areas might increase over time and that the potential for more lucrative sales in the future might justify delays.

What is clear is that the extraordinarily long delays occurring in judicial foreclosure states from 2010 through 2012 were not something inherent in the statutory procedures and court rules of those states.<sup>7</sup> The delays were exponentially greater than typical time frames seen during the decades before the foreclosure crisis.<sup>8</sup> Beginning in 2008, the volume of mortgages in foreclosure reached levels never seen before in the United States. This volume undoubtedly strained judicial resources. Whatever its causes, this crisis-driven bulge in foreclosure numbers should not be the basis for institutionalizing long-term changes to state foreclosure laws, changes that would last long after the crisis subsides.

The next section summarizes the seven recently enacted fast track foreclosure statutes and one proposed model law on the subject. These laws present a range of approaches. Some are clearly targeted to avoiding deterioration of abandoned properties. Others, however, have been structured in a way that will affect a much broader group of properties and the families residing in them.

### III. THE EXISTING STATE LAWS

#### A. Michigan

Michigan is a non-judicial foreclosure state. Michigan law gives the typical borrower a period of six months after the date of a foreclosure sale to remain in possession of the home and attempt to redeem. Prior to 2013, mortgage industry groups in Michigan proposed legislation that would have shortened the post-sale redemption time frame. One proposal would have significantly shortened the redemption period in cases in which the borrower participated in pre-foreclosure mediation. These efforts failed. However, in mid-2013, the Michigan legislature approved new fast-track foreclosure legislation. The new law (effective in January 2014) amends M.C.L.A. 600.3240 to add a provision shortening the post-sale redemption period from six months to thirty days in certain situations.

The new Michigan statute makes no pretense of applying solely to abandoned or vacant properties. A state law in effect for several years had already allowed for a shortened thirty-day redemption period after the foreclosure sale of an abandoned property.<sup>9</sup> Instead, the new law focuses on the concept of “damaged” property. Under the law, the purchaser at a foreclosure sale who contends that a property is damaged may bring an immediate action to evict the borrower, using the summary procedures available to evict a tenant from rental property.<sup>10</sup> A judgment for eviction in the summary proceeding terminates the borrower’s redemption rights. Under the Michigan law, once a foreclosure sale has been completed, the purchaser may demand to inspect the interior and exterior of the property. If the borrower “unreasonably” refuses to allow an inspection, the purchaser can file a summary eviction action and recover possession.<sup>11</sup> If the inspection takes place and shows any basis for claiming that the property is “damaged,” the sale purchaser can also proceed with a summary eviction and terminate redemption rights. The statute defines the requisite “damage” to include a broken window, an unhinged door, accumulated trash, missing fixtures and any condition not complying with local ordinances.<sup>12</sup> The damage may be actual or “imminent.”<sup>13</sup> If the borrower appears in the eviction proceeding and contests the entry of a judgment for possession, the court may still order eviction unless the borrower repairs all damaged items.

In a July 3, 2013 signing statement, Michigan’s governor noted several problematic features of this legislation.<sup>14</sup> He expressed the hope that the legislature would take up amendments in its next session. The governor’s signing statement noted in particular that the law contains no provision for advance notice of inspections and makes no distinction between deliberate damage caused by an occupant and other maintenance problems that represent no real harm to the property or the community.

## B. Oklahoma

Foreclosures in Oklahoma typically follow a judicial procedure. Under a fast-track foreclosure law in effect since November 2011, borrowers may be evicted through a summary process judgment based on judicial findings that a property has been abandoned and is at risk of harm due to abandonment.<sup>15</sup> Oklahoma's general foreclosure law allows redemption up to the time of the confirmation of a sheriff's sale. Under the fast-track law, a mortgagee may file a motion to "preserve and protect" the collateral property at the same time the foreclosure complaint is filed. Filing the motion to preserve and protect triggers a sheriff's visit to the property. The sheriff makes a determination of vacancy status and posts a hearing notice for a date that may be as soon as fifteen days from the posting date. At the hearing, if the court finds that the property is vacant and abandoned based on the sheriff's report and that there are additional risks of harm due to abandonment, the court may enter a judgment of possession in favor of the mortgagee. Upon entry of a judgment of possession, the mortgagee must take possession of the dwelling and inventory the personal property on the premises. If the borrower fails to appear at the hearing, the property is deemed abandoned. If the borrower appears and rebuts the sheriff's determination of abandonment, the court may still enter an order that the borrower protect and preserve the property.<sup>16</sup> In the event of non-compliance, the borrower will be subject to contempt of court sanctions.<sup>17</sup> The risks of harm that may lead to entry of orders for possession or contempt include unpaid property taxes and unsatisfied liens on the property.<sup>18</sup> A borrower who failed to appear at the motion hearing may later provide evidence of continued occupancy and seek to vacate the order for possession. However, even if the court vacates the order, it may still order the borrower in possession to maintain the property free of risks of harm. The statute provides explicitly that the orders for possession and maintenance do not affect title to the property or otherwise modify the foreclosure process.<sup>19</sup> Presumably, legal title and ultimate liability for matters related to the property's condition remain with the borrower until the transfer of title upon completion of foreclosure. At the same time, the statute authorizes a court to order the mortgagee in possession to maintain the property pending completion of foreclosure. However, the explicit reference to contempt sanctions appears only in relation to orders against borrowers.

## C. Kentucky

Kentucky is a judicial foreclosure state. Kentucky statutes provide for a one-year redemption period after most foreclosure sales. In 2012, the Kentucky legislature enacted a new foreclosure law that speeds up the foreclosure process in certain situations.<sup>20</sup> Under the new law, during the pendency of a foreclosure proceeding, a mortgagee may file a motion for an expedited sale of an abandoned property. Presumably, the courts' standard motion practices and burdens of proof apply to these motions. A judgment directing an expedited sale may be granted upon affidavits. The court must make two findings in order to authorize an expedited sale. First, there must have been no lawful occupant of the property for 45 consecutive days. Second, the court must find that two or more conditions or indicia of abandonment, as listed in the statute, exist.<sup>21</sup> Upon entry of the order, the foreclosure sale may take place within 70 days and

confirmation of the sale twenty days thereafter.<sup>22</sup> Upon confirmation of the sale, the property may be conveyed. Under pre-existing state law, a finding of abandonment would terminate the borrower's right to possession. The fast track law does not expressly address the effect of the court's abandonment finding on the borrower's post-sale redemption rights. It appears that the redemption rights remain in effect, even though the borrower loses the right to live in the property during the redemption period.

#### *D. Indiana*

Indiana is a judicial foreclosure state. Under Indiana foreclosure law, the lender must wait three months after the filing of a foreclosure complaint before a sale may take place. There is no post-sale redemption period. Indiana's fast track foreclosure law went into effect in March 2012.<sup>23</sup> The new law allows a mortgagee to file a petition during the pendency of a foreclosure case in order to have a property determined to be abandoned. When the motion is filed, the court issues an order to show cause as to why the property should not be deemed abandoned.<sup>24</sup> The mortgagee's motion filing shifts to the borrower the obligation to appear in the court proceeding and carry a burden of proving that the property is not abandoned. The borrower's appearance must take place within 15-25 days of the show cause order. The borrower's failure *either* to present written evidence in objection to an abandonment finding *or* to appear for the hearing constitutes *prima facie* evidence that the property is abandoned.<sup>25</sup> If the borrower complies with the appearance requirements, the court may still find abandonment based upon a finding that at least one of ten enumerated conditions or indicia of abandonment exist on the property. These ten conditions are set out in the statute.<sup>26</sup> The listed conditions include broken or boarded up windows and doors, terminated utilities, the presence of trash, general deterioration of the property, and other evidence of an intent to abandon, such as written statements of the borrower.<sup>27</sup> The court's finding of abandonment, whether based on the borrower's procedural default or on a finding that one of the listed conditions exists, permits the court to order an immediate foreclosure sale. This order for immediate sale supersedes the three-month delay before a sale may be scheduled under the general statute. If the mortgagee's motion is filed with the complaint, the expedited order for a sale could issue almost simultaneously with the deadline for the borrower to file an answer to the complaint.

#### *E. New Jersey*

New Jersey enacted a fast track foreclosure law that went into effect in December 2012.<sup>28</sup> New Jersey is a judicial foreclosure state. The new law creates a summary foreclosure procedure for vacant and abandoned properties. Under the law, the mortgagee may either commence a lawsuit as a summary foreclosure proceeding or convert a regular foreclosure proceeding to a summary foreclosure.<sup>29</sup> In order to obtain a summary foreclosure judgment, the mortgagee must establish two conditions by clear and convincing evidence. First, the property must not be occupied by a mortgagor or tenant. Second, at least two of fifteen listed conditions related to the

property must exist.<sup>30</sup> These conditions include overgrown grass, accumulated flyers or trash, uncorrected housing code violations, and statements from neighbors. If the mortgagee cannot establish both prongs of this test, the summary foreclosure will not be permitted and the court will not enter a final judgment of foreclosure. The statute expressly provides that a judgment will not enter on an expedited basis if the property is not vacant and abandoned or if the borrower has alleged defenses to foreclosure.<sup>31</sup> The law requires documentation of efforts at personal service of the motion for expedited judgment. The mortgagee must provide the borrower with a specific notice that it is proceeding under the summary foreclosure alternative. The statute is not clear on the question of whether the court may enter a summary order based on papers alone. One New Jersey commentator has noted the potential conflict between the new law's requirement for clear and convincing evidence and the use of evidentiary presumptions.<sup>32</sup>

#### F. Nevada

In order to start a non-judicial foreclosure in Nevada, the servicer must record a notice of default and intention to sell at least three months before a foreclosure sale date. An amendment to Nevada's foreclosure statutes, effective July 1, 2013, allows for the shortening of this waiting period to sixty days for properties meeting an abandonment definition.<sup>33</sup> In order to shorten the foreclosure time frame, the mortgagee must record two documents: (1) the mortgagee's affidavit setting forth facts showing abandonment; and (2) a certification from a government official who conducted an inspection at the property.<sup>34</sup> The law requires that a local government agency keep a registry of properties that are abandoned or in danger of being abandoned. A mortgagee seeking to use the expedited procedure must request that the local agency conduct an inspection. The certifications from the servicer and from the government agency must show that two conditions exist. First, the property must be physically abandoned. This means that, *inter alia*, utilities are off and there are no recent records of certain mail delivery (including government benefits) to the property. Second, the certifications must establish that the property meets at least two of eight additional indicia of abandonment listed in the statute. These indicia are factors showing some additional public harm or danger beyond the vacancy itself. Thus, an unoccupied but properly maintained property would not meet the statutory standard for abandonment; nor would an occupied property regardless of its condition. The new statute limits how property inspections may be conducted. Neither the servicer nor the government official may enter inside the dwelling to conduct an inspection. The law authorizes entry only upon the real property itself for an exterior inspection, and only when the servicer has a reasonable belief that the property has been abandoned. The law absolves individuals making these limited encroachments on the real property from liability for trespass. The certifications of inspection must include facts and documents to support any findings of abandonment. In addition, the agency official must give the borrower notice of a proposed determination of abandonment. The borrower has thirty days to object to the determination. The law explicitly provides for the borrower's right to record an objection at any time before a foreclosure sale under the expedited procedure. The borrower's filing of the objection has the effect of withdrawing the mortgagee's request for an expedited sale.<sup>35</sup> If the servicer files

certifications for an expedited sale, but fails to conduct the sale within six months of the filing, the certifications are deemed withdrawn and the servicer is subject to a \$500 penalty.<sup>36</sup>

### *G. Illinois*

Under Illinois' judicial foreclosure statutes, the borrower may cure a default for ninety days from the date of service of the foreclosure complaint. In addition, the borrower's redemption right extends until the later of seven months from service of the complaint or three months after entry of judgment of foreclosure. The state's new statute authorizing expedited foreclosure judgments and sales significantly alters these time frames.<sup>37</sup> The law went into effect in June 2013. Under the law, a mortgagee may file a motion to expedite judgment and sale. This motion may be filed either together with the foreclosure complaint or any time after the complaint is filed. The motion must be supported by an affidavit of abandonment. The court must conduct a hearing within 21 days after the motion is filed, and this date must be at least 21 days after the borrower's answer to the complaint is due.<sup>38</sup> If the court finds that the property is abandoned, it may enter judgment of foreclosure immediately. The redemption period ends 30 days after the date of judgment.<sup>39</sup> Any right to reinstatement ends at the same time as the expiration of the redemption period. The new statute requires that the court make two findings to support a determination of abandonment. First, the property must not be occupied by the mortgagor or a lawful occupant. Second, two of eleven listed conditions must exist on the property.<sup>40</sup> The eleven conditions do not include factors common to other state fast track foreclosure laws. They do not include minimal defects such as uncut grass, accumulated flyers, or neighbor hearsay. They do include serious defects such as stripped plumbing, multiple missing windows, no utility service, documented code violations and law enforcement involvement, significant danger of further damage, and signed statements of the mortgagor confirming a clear intent to abandon.<sup>41</sup> The notice of the motion for abandonment may be served by posting. The notice can be posted fourteen days before a hearing. The statute does not set out specific requirements that the notice explain the consequences of the procedure. Nor does the law require a more stringent burden of proof for obtaining an expedited judgment. If the borrower or lawful occupant "appears in the action in any manner", either before or after the hearing and objects, the expedited foreclosure may not proceed. The borrower may also appear before confirmation of a sale and present evidence of non-abandonment.

### *H. Uniform Law Commission Draft Proposal (November 2013)*

The National Conference of Commissioners on Uniform State Law (NCCUSL) is in the process of developing a model "Home Foreclosures Procedures Act."<sup>42</sup> NCCUSL does not intend that its model law serve as a comprehensive replacement for existing state judicial and non-judicial foreclosure systems. Instead, it proposes to draft discrete statutory provisions that will address common topics under most state foreclosure systems. One set of provisions in the proposed uniform law deals with foreclosure of abandoned properties.<sup>43</sup> An introductory definition section applicable to all provisions of the model law defines "abandoned property." The

definition requires that for a property to be deemed abandoned, “the homeowner and persons claiming through the homeowner, including tenants,” must have “relinquished possession” of the property.<sup>44</sup>

Later sections of the model law outline procedures for expedited foreclosure of abandoned properties in judicial and non-judicial jurisdictions. The law authorizes a prompt foreclosure sale after a determination that a property is abandoned.<sup>45</sup> In a judicial foreclosure jurisdiction a court makes the determination of abandonment. When the court makes this determination, the creditor must then “take necessary and appropriate action” to cause the sale to be completed “within a reasonable time.”<sup>46</sup> In a non-judicial jurisdiction, a governmental agency must determine whether the property is abandoned. If the agency finds that the property is abandoned, a sale may then take place not earlier than 30 days and not longer than 60 days after the agency determination.<sup>47</sup> In either type of jurisdiction, the final determination that a property is abandoned terminates all the borrower’s pre-sale and post-sale redemption rights.

In a non-judicial foreclosure state, the governmental agency’s determination that a property is abandoned triggers the mortgagee’s right to use the expedited procedure. The agency inspector must enter the dwelling and prepare an affidavit setting forth the facts supporting an abandonment determination. The agency inspector and the mortgagee must provide copies of the determination to the borrower before seeking to expedite proceedings.

In a judicial jurisdiction, a court may either defer to a government agency’s finding of abandonment, or it may find that at least three of eight conditions enumerated in section 505(a) of the uniform law are present. The eight conditions include accumulated trash and debris, broken doors or windows, and “extremely low” utility consumption. The existence of three of the conditions establishes a presumption that the property is abandoned.<sup>48</sup>

The draft uniform law requires that the mortgagee undertake limited maintenance obligations once a property has been determined to be abandoned. The mortgagee’s obligations focus on conditions affecting the outer appearance of the property.<sup>49</sup> The vacancy of a property during foreclosure in and of itself does not create a maintenance duty for the mortgagee.<sup>50</sup> According to the Reporter’s Note, “it would clearly be inappropriate to impose an obligation on a creditor to repair the property subject to the mortgage before the creditor has taken possession or an official determination is made that the property is abandoned.”<sup>51</sup>

The requirement that the expedited sale take place within a short time after a determination of abandonment limits the duration of the mortgagee’s duty to perform limited maintenance. Mortgagees must release their liens rather than extend foreclosures sales of abandoned properties indefinitely.<sup>52</sup> The statute states expressly that a creditor does not become a mortgagee in possession by virtue of performing maintenance duties on abandoned properties.<sup>53</sup> The text creates broad immunity for servicers and agents that enter property determined to be abandoned, subject only to negligence or willful misconduct claims.<sup>54</sup>

## IV. ANALYSIS: THE NINE MAJOR ISSUES RAISED BY FAST TRACK FORECLOSURE LAWS

**Issue #1: Fast track foreclosure and the mortgagee's duty to report on the status of properties in foreclosure.**

The premise behind fast track foreclosure laws is that properties abandoned during foreclosure represent a public problem. When it comes to abandoned properties, banks are not the only stakeholders. In fact, banks have not hesitated to emphasize this public concern when they seek to expedite abandoned property foreclosures. The public impact includes the negative effect on neighboring property values, loss of tax revenue, blight, vandalism, heightened crime, and other threats to public safety.<sup>55</sup>

In response to the problems that abandoned properties have created since the foreclosure crisis began, hundreds of municipalities enacted ordinances that require mortgagees and their servicers to register the commencement of foreclosures within a city's limits. These ordinances typically charge a registration fee in order to finance a database of properties in foreclosure. A common feature of these ordinances is the requirement that mortgagees conduct regular inspections of a property while a foreclosure is pending. Reports of the inspections must be filed with the municipality. As part of their inspection obligations, the mortgagees must report vacancies occurring during foreclosures. All reports must include contact information identifying local representatives of the mortgagee. These representatives must be available to respond to concerns about the property's condition. Mortgagees that do not comply with these ordinances may be subject to fines and other penalties.

Several hundred municipal and county ordinances now in effect around the country include many of these standard features.<sup>56</sup> At the state level, a New Jersey statute also mandates that mortgagees provide registration information whenever they commence a judicial foreclosure in that state.<sup>57</sup>

Notably absent from all the enacted fast track foreclosure statutes discussed above is any reference to an obligation for mortgagees to inspect and report on the condition of properties in foreclosure, such as the duties created under the multitude of existing local ordinances. While a few of the laws, such as the Nevada statute and the draft NCCUSL law, permit consideration of abandonment determinations made by local code enforcement agencies, none of the laws require that servicers report abandoned properties on their own initiative. None of the fast track laws obligate mortgagees to inspect properties in foreclosure regularly and report on the inspection results. The laws allow mortgagees and their servicers to cherry pick the properties they wish to fast track.<sup>58</sup>

In many areas of the country, local housing code enforcement agencies are underfunded and overburdened. The fast track laws tend to give mortgagees complete discretion to direct

government officials to perform inspection and other enforcement tasks when the mortgagees choose. At a minimum, the state statutes should require that mortgagees register all properties subject to foreclosure with local code enforcement agencies. The mortgagees must then arrange for regular inspections and report results of inspections, including abandonment, to the local agencies. Finally, mortgagees must provide local agencies with up-to-date contact information for matters related to the property condition. The inspection requirement does not create a significant new burden for mortgagees and servicers. An array of national companies provides property inspection services to the mortgage servicing industry. Servicers routinely pay for these services during foreclosures (and pass on costs to borrowers). A burgeoning industry of default servicers now specialize in cataloguing local laws on these topics and assisting mortgagees with compliance. Including registration and inspection requirements in a statute of statewide applicability promotes uniformity while still allowing a primary enforcement role for local government.

**Recommendation #1. A fast track foreclosure law for abandoned properties must work in tandem with a comprehensive statutory scheme that obligates mortgagees to register commencement of all foreclosures with local government entities and regularly submit inspection reports to these entities.**

#### **Issue #2: Fast track foreclosures and the mortgagee's duty to maintain vacant properties during foreclosure.**

A common feature of many ordinances mandating registration and inspection of properties in foreclosure is a requirement that mortgagees perform minimal maintenance on abandoned properties until foreclosure is completed. For example, in 2011 the City of Chicago implemented an ordinance that requires mortgagees to register vacant properties in foreclosure and to secure and maintain them until they are conveyed to a foreclosure sale purchaser.<sup>59</sup> Numerous cities and counties around the country have implemented similar laws. At the state level, New York and New Jersey enacted statutes in 2009 that required the foreclosing plaintiff in a foreclosure action to maintain vacant and abandoned properties until the transfer of ownership after foreclosure sale.<sup>60</sup> These local and state laws typically amend the existing housing code definition of an "owner" responsible for maintaining properties to include a foreclosing mortgagee with an interest in an abandoned property. Rules requiring maintenance of collateral property during the period between commencement of foreclosure and a foreclosure sale are common in the mortgage industry. The Government Sponsored Enterprises (GSEs) Fannie Mae and Freddie Mac, as well as the Federal Housing Administration (FHFA) have issued detailed rules requiring that their servicers inspect and preserve properties during foreclosure.<sup>61</sup>

To date, the validity of state and local laws imposing maintenance duties on mortgagees has not been litigated extensively. Shortly after the Chicago ordinance went into effect, the Federal Housing Finance Agency (FHFA) sued the City of Chicago on its own behalf and on behalf of

the GSEs Fannie Mae and Freddie Mac. FHFA contended that the federal statute that authorized FHFA to exercise conservatorship over the two GSEs precluded state and local government entities from all regulation of FHFA and the GSEs, including enforcement of municipal housing codes.<sup>62</sup> FHFA also contended that the registration fee and potential penalties for non-compliance with the Chicago ordinance constituted impermissible taxes on FHFA and the GSEs, barred by a federal immunity statute.<sup>63</sup> The U.S. District Court for the Northern District of Illinois agreed with FHFA's arguments and entered an order barring enforcement of the Chicago ordinance against FHFA and the GSEs.<sup>64</sup> ([\*Federal Housing Financing Agency v City of Chicago\*](#)) The district court's decision rested exclusively on the federal HERA statute and its immunity provisions for FHFA. The court did not reach the issue of whether a local law could direct a mortgagee to incur costs to secure and maintain abandoned collateral property before title passes to a new entity upon the completion of a foreclosure. The district court decision did not affect enforcement of the Chicago ordinance against non-GSE mortgagees.

Litigation over another municipal ordinance requiring mortgagees to maintain properties in foreclosure is ongoing. In 2011, the City of Springfield, Massachusetts implemented an ordinance to regulate mortgagees who initiate foreclosure of residential properties in the City. The ordinance requires mortgagees to post a cash bond of \$10,000 with the City, with a small part of the bond to be used for administrative expenses and the rest to be returned to the mortgagee after completion of foreclosure (if not needed to reimburse the City for costs the City incurred in maintaining the property during foreclosure). The Springfield law requires that mortgagees preserve and maintain properties in accordance with minimal standards of state and local codes. The ordinance does not require rehabilitation or major repair work. Nor does it limit or impair foreclosure remedies. Several banks are challenging the validity of the Springfield ordinance. The banks have raised primarily state preemption arguments, contending that state legislation on property maintenance and foreclosures occupies the field regulated by the City ordinance. The banks also contend that the ordinance violates the Contracts Clause of the U.S. Constitution because it alters terms of the existing mortgage documents. The U.S. District Court for Massachusetts addressed all of the banks' arguments and rejected them.<sup>65</sup> ([\*Easthampton Savings Bank v City of Springfield\*](#)) The court found that the local ordinance did not conflict with any state statutes and imposed no significant impairment of contractual rights of mortgagees. The banks appealed the ruling to the Court of Appeal for the First Circuit. The First Circuit has referred the matter to the Massachusetts Supreme Judicial Court (the highest Massachusetts state court) for rulings on the state law issues.<sup>66</sup> [\*Easthampton Savings Bank v. City of Springfield\*](#).

The mortgagees' objections in the *City of Springfield* and *City of Chicago* cases rest in part upon their view that a "mortgagee" and an "owner" of property are fundamentally different legal entities. In their view, a governmental agency cannot require that a "mortgagee not in possession" enter into collateral property and perform work on the premises. It is certainly true that under the laws of many jurisdictions a mortgage creates only a security interest in real property. A mortgagee with only a security interest in real property typically has no right to

possession. However, under a recognized exception to this rule, the mortgagee who takes possession after the mortgagor has abandoned the property may take possession and retain possession through the foreclosure.<sup>67</sup> Therefore, the possession issue is not a significant barrier to abandoned property legislation, particularly if care is taken in drafting the statutory test for abandonment. In addition, form mortgages almost invariably give the mortgagee the right to enter the collateral property in order to preserve it, particularly when the mortgagor has abandoned the premises.<sup>68</sup> Even in the case of an occupied property a statute could set out requirements for a mortgagee to give notice and have access for maintenance. In terms of possessory rights in real property, landlords of residential properties are in much the same position as mortgagees. Many states have enacted statutes that regulate how and when a landlord may access rental dwellings for inspections and repairs. There are thus many ways to address mortgagees' concerns that their agents will be accused of trespass if they enter a property under an incorrect belief that the mortgagor had abandoned it.

An objective of most fast track foreclosure statutes is to define "abandonment" in the context of mortgages in default. The laws can give a court or administrative body the authority to determine whether a statutory definition of abandonment has been met in a particular case. If these determinations are made with proper procedural protections, they will not impair the borrower's rights. At the same time, compliance with the statutory procedures to determine whether a property is abandoned can safeguard the mortgagee from trespass and related claims.

As the court in *City of Springfield* recognized, mortgagees' Contracts Clause objections to maintenance laws have little merit. The laws apply to mortgagees that have formally declared an intention to foreclose upon and sell the properties through a public auction. The laws require the mortgagee to disclose to a public agency some basic facts about the condition of the property and to ensure that the property does not cause harm to the public while awaiting the foreclosure sale. Requiring the mortgagee to take some minimal steps to preserve the condition of its collateral is not the type of substantial impairment of rights that the Contracts Clause would preclude.

Among the existing fast track laws, the Oklahoma statute and the NCCUSL draft law address this maintenance duty to a limited extent. The Oklahoma statute requires that a mortgagee commence proceedings for expedited foreclosure when it is aware that a property has been abandoned. The law authorizes courts to direct the mortgagee to maintain a property determined to be abandoned until the foreclosure is completed.<sup>69</sup> The NCCUSL law also requires mortgagees to preserve and secure properties that have been determined abandoned by a court or government agency. While its Reporters Note and text create some ambiguity on the point, the NCCUSL draft appears to require that mortgagees perform some maintenance work on collateral property before a formal determination of abandonment has been made. This obligation would be limited to instances where a public agency found a health or safety risk in the property's condition.<sup>70</sup>

**Recommendation #2. A fast track foreclosure law must require that the mortgagee perform minimal maintenance work to ensure that the collateral property does not cause harm to the public while awaiting sale.**

### Issue #3: Application of fast track foreclosure to occupied properties.

A questionable aspect of several fast track foreclosure statutes, notably those enacted in Michigan and Oklahoma, is their application to occupied properties. The Michigan and Oklahoma statutes allow mortgagees to circumvent significant requirements of each state's traditional foreclosure procedure and evict borrowers summarily based on the alleged condition of occupied properties. The conditions that trigger the mortgagee's right to fast track foreclosure can be insubstantial, such as uncut grass, accumulated flyers, or hearsay statements from neighbors. These conditions could be just as indicative of a temporary absence or illness. Under other statutes, such as those of Indiana and New Jersey, the mortgagee's allegation that certain conditions exist on the property triggers a presumption of abandonment. This presumption sets in motion obligations of the borrower to comply with certain new procedural burdens. Borrowers who reside in their homes, and who therefore should not be subject to summary foreclosure, may fail to comply with these additional procedural demands. They will then be subject to fast track foreclosure.

Allowing fast track foreclosures for occupied properties is inappropriate. Abandoned properties are a hot button issue, and banks freely use the stereotype of a non-paying borrower deliberately trashing a home in foreclosure as a supporting anecdote for these laws. In reality, to the extent that the stereotype of the destructive deadbeat borrower ever truly exists, such a borrower is legally responsible for these actions. Current state and local laws can adequately address the problem. If the dwelling is truly occupied, the borrower, as title owner of the property, must answer to enforcement of existing housing codes. The mortgagee would also have remedies against a destructive borrower in the nature of an action to restrain waste. On the other hand, when the property is abandoned, the mortgagee has traditionally had the right to enter the collateral property and preserve it. There is simply no need to subject occupied properties to fast track foreclosures as if they had been truly abandoned.

The NCCUSL draft foreclosure law appears to limit fast track foreclosure to vacant properties. The statutory definition of "abandoned property" requires that the homeowner have relinquished possession of the property.<sup>71</sup> Section 505 of the NCCUSL draft specifically addresses fast track foreclosures. The main text here is not as clear on the point. The accompanying Reporter's Note is consistent with the statutory definition of abandoned property and applies the procedures only to unoccupied properties.<sup>72</sup> On the other hand, none of the eight presumptive criteria for abandonment listed in section 505(a) require a court to make a specific evidentiary finding that the property is vacant.

The Nevada and Illinois statutes address the question of actual vacancy in a clear and more effective way. The Nevada statute expressly declares that occupancy is a defense to a fast track foreclosure.<sup>73</sup> The Nevada statute prescribes a simple procedure for the borrower to record a statement objecting to the fast track foreclosure, and the procedure must stop. Illinois is a judicial foreclosure state, and under the Illinois law the borrower need only “appear in the action in any manner” either before or after the hearing on a motion for expedited foreclosure and object to a finding of abandonment.<sup>74</sup> This objection stops the fast track proceeding. The Illinois borrower may also appear before confirmation of a foreclosure sale that was conducted under the expedited procedure and present evidence of non-abandonment. The court must vacate the expedited foreclosure judgment upon the presentation of evidence showing the property was not abandoned.<sup>75</sup> The Nevada and Illinois statutes make clear that an expedited foreclosure process is available only for situations in which legitimate abandonment of the property occurred and the property is vacant.

As discussed (see Issue #5), the use of presumptions can increase the likelihood that occupied properties will be deemed abandoned. The Indiana statute deems a property abandoned either on the basis of a borrower’s procedural default (failure either to file written objection or appear for a hearing) or on the basis of a finding that one of ten listed conditions exist on the property.<sup>76</sup> On the other hand, under New Jersey’s statute the court must find by clear and convincing evidence that at least one of fifteen listed conditions exists. In addition, the court must separately find by clear and convincing evidence that the property is vacant and abandoned. Unlike the Indiana statute, the New Jersey law requires a distinct finding of vacancy that trumps all other considerations, including any presumptions of abandonment that would otherwise be determinative.<sup>77</sup>

**Recommendation #3. The statute must apply only to vacant and unoccupied properties, and include a simple method for the borrower to bar fast track foreclosure by asserting occupancy.**

#### **Issue #4: The duty to complete fast track foreclosures of abandoned properties promptly.**

To the extent that any fast track foreclosure procedure is created, the remedy must exist as a narrow exception applicable only to properties determined to be vacant. Blight prevention has been one of the mortgage industry’s major rationales in support of enactment of the laws. The mortgagees’ policy argument is that the expedited procedure is necessary to speed up transfer of the properties to new owners who will see that the properties are occupied and maintained in the future. Mortgagees should be held to this agenda. In return for the privilege of using the fast track procedure for a vacant property, the mortgagee must agree to be held accountable for an expeditious completion of foreclosure.

Municipalities have implemented registration and maintenance ordinances applicable to properties in foreclosure out of concern, in part, for bank walk-aways. Particularly in hard pressed urban areas such as Detroit, Cleveland, and Chicago, mortgagees have engaged in the practice of initiating foreclosures, then abandoning them when the properties appear to be of little value, or turn out to be net liabilities.<sup>78</sup> Traditionally, mortgage servicers have not informed borrowers that the foreclosures are being abandoned and the loans written off. Borrowers often move out without knowledge of the lender decision to walk away. As a result, title to the vacant properties remains in the borrowers' names. The borrowers remain liable for taxes and other costs associated with the property, including code compliance. The mortgagees walk away, dumping the costs of dealing with the abandoned properties on neighbors and taxpayers.

Allowing a fast track foreclosure, particularly where it involves a summary eviction from an occupied property, and then permitting delay once the property is vacant would run contrary to the stated goal of the expedited procedures. The Nevada statute addresses this issue by mandating a \$500 penalty in instances where the mortgagee files documents for an expedited sale, but fails to conduct the sale within six months of recording the request.<sup>79</sup> In addition to assessment of the penalty, the mortgagee's request for expedited foreclosure is deemed withdrawn. This penalty amount is likely to be too low to deter bank walk-aways and misuse of the fast track procedures. A significantly higher penalty would be more effective.

Several other fast track foreclosure statutes set out a required time line for the completion of a foreclosure sale after a determination of abandonment. For example, New Jersey's law requires that the sale must occur within 60 days of the court's expedited foreclosure judgment.<sup>80</sup> The Kentucky statute requires the sale to be within 70 days of the order finding abandonment.<sup>81</sup> The NCCUSL draft model law recognizes a public interest in the prompt completion of foreclosure sales of abandoned properties.<sup>82</sup> However, the details and time limits are not clearly set out in the most recent NCCUSL's draft, and the draft does not provide for sanctions for mortgagee misuse of the procedures.

Because of the potential for misuse of fast track foreclosure authority, monitoring of foreclosure activity is essential. This is another reason why it is important that the oversight system (described in Issue #1) be in place in any jurisdiction that enacts a fast track foreclosure law. When properties are clearly abandoned and are causing harm to communities, mortgagees should not have the discretion to delay foreclosures indefinitely. Allowing title to remain in former occupants' names while avoiding responsibility for the property's deterioration should not be an option for mortgagees. FHFA's position that the GSEs are exempt from state and local housing code enforcement is troubling. *See, Federal Housing Finance Agency v. City of Chicago.*<sup>83</sup> To the extent that the GSEs attempt to benefit from the provisions of a state's fast track foreclosure law, they must be held to comply with all requirements integral to these special foreclosure procedures, including compliance with housing codes.

**Recommendation #4. Access to fast track foreclosure for vacant properties must be conditioned upon compliance with housing codes during the foreclosure process and prompt conveyance of the property to a new title owner.**

**Issue #5: The use of presumptions to determine the mortgagee's right to use fast track foreclosure.**

The existing fast track foreclosure laws raise a number of concerns about burdens of proof and standards of proof in foreclosures. These concerns come into play for laws that apply in both judicial and non-judicial foreclosure systems.

The mortgage industry's demand for speedier foreclosures has focused on judicial states. Fast track foreclosures could have a significant effect on how borrowers participate in a judicial foreclosure. One aspect of judicial foreclosures that is often overlooked is that the overwhelming majority of judicial foreclosures proceed by default. In most judicial foreclosure states from 80 to 90 percent of borrowers do not enter an appearance and do not participate in any meaningful way in the proceedings.<sup>84</sup> Access to legal representation and lack of understanding of the court procedures contributes heavily to these high default rates. Nevertheless, many basic substantive rights, such as statutory time frames for cure and redemption, apply to borrowers even when they default by not filing an answer to a complaint.

The fast track laws can drastically change the structure of a judicial foreclosure. Borrowers stand to lose important protections associated with cure and redemption rights. They may lose these protections based on the operation of presumptions or "prima facie" case standards defined by the fast track statutes. Many of these presumptions are based on mortgagee averments regarding property condition. As described in Issue #3, these property condition checklists should never be used to trump the requirement that the properties be unoccupied and vacant.

Presumptions and "prima facie" case standards in a judicial foreclosure proceeding have the effect of shifting from the plaintiff to the defendant the burden of proof that is standard for a judicial proceeding. The use of rule to show cause hearings, as under the Indiana statute, has the same effect of shifting to the borrower the burden to show entitlement to basic elements of the state foreclosure laws that had always been intended for the benefit of borrowers. The overwhelming majority of defendants in judicial foreclosures, because they do not file any court papers, stand to lose important rights based on the use of these presumptions. A comment to New Jersey's new fast track foreclosure statute noted this problem.<sup>85</sup> The New Jersey statute requires that the mortgagee establish its right to proceed with an expedited foreclosure by clear and convincing evidence. This is an appropriate standard to apply. However, at the same time the statute authorizes the use of presumptions (a laundry list property conditions) to determine whether a particular property is abandoned. There is a clear conflict between a standard for judgment that requires that a court make express findings by clear and convincing evidence on

the one hand, and the use of presumptions created by documents submitted by the plaintiff on the other hand.

In Michigan, a non-judicial foreclosure state, the fast track foreclosure law requires that the borrower rebut the presumption of abandonment in a summary eviction proceeding. The statute lists nine general property conditions that constitute “damage.” The foreclosure sale purchaser need only allege one of these as the basis for filing a summary eviction complaint against the borrower.<sup>86</sup> The conditions defined as “damage” under the Michigan law require no showing of causation or severity. The Indiana statute contains a similar list of ten conditions,<sup>87</sup> and the Kentucky statute lists six.<sup>88</sup> The NCCUSL draft statute includes a list of eight conditions that may give rise to a presumption of abandonment.<sup>89</sup> The NCCUSL text relies on a determination by a local governmental agency that a property is abandoned. This structure may prove problematic both for mortgagees and for mortgagors. While Nevada appears to have brought local government agencies on board for an inspection system tied directly to its fast track foreclosure law, not all non-judicial states will have such a system in place. Mortgagees are likely to find a certification system relying on government agencies cumbersome. From the borrowers’ perspective, the NCCUSL model limits the ability to challenge an abandonment determination in non-judicial foreclosures. The borrower must challenge such a determination through the state or local government procedures for appeal of code enforcement decisions. These procedures are likely to be confusing and intimidating for borrowers, and often require a party to initiate court proceedings. Thus, under the NCCUSL proposal, borrowers in a non-judicial foreclosure may have to initiate a legal proceeding in order to challenge a presumption. The Nevada statute provides the simplest procedural option for the borrower. In Nevada, the borrower need only file an objection in writing opposing the fast track foreclosure and indicating that the property is occupied. The Nevada statute achieves the purpose of selecting abandoned properties for fast track foreclosure without creating unnecessary judicial or administrative hurdles for borrowers to overcome in order to rebut a presumption.

**Recommendation # 5. Courts must make findings regarding abandonment based on clear and convincing evidence and not presumptions or “prima facie” standards developed for a fast track foreclosure statute.**

#### **Issue #6: The borrower’s procedural rights in fast track foreclosure.**

There is basic merit to the point that delays in foreclosure of an unoccupied property benefit no one. The challenge is to draft a statute that accurately identifies properties that are unoccupied and abandoned. Few individual consumers encounter a mortgage foreclosure more than once in a lifetime. The lack of clear knowledge about foreclosure procedures among homeowners is pervasive, and access to affordable legal assistance very limited. Therefore, a fast track system that relies on pro se homeowners making informed decisions about the preparation and filing of legal documents raises substantial fairness concerns. A requirement that borrowers take specific

legal action within a short time frame and the use of evidentiary presumptions adds to these concerns.

The fast track foreclosure laws considered here generally do not mandate clear notices that inform borrowers of the nature of the proceedings and what they must do to protect their rights. The Illinois law, for example, mandates a form notice that is incorporated into the statute. The notice, however, repeatedly refers to an “abandonment” determination, without stating the significant legal consequences flowing from the term.<sup>90</sup> The borrower may have as little time as fourteen days to respond to the Illinois notice. Under other similar laws, borrowers must often act within short time frames to protect their rights. The Indiana law requires that the borrowers both file a written objection and appear for a hearing, otherwise the property will be deemed abandoned. The show cause hearing under the Indiana procedure may take place as soon as fifteen days from service of the notice. Under the Oklahoma statute, the borrower must respond to an agency determination of abandonment in fifteen days. The NCCUSL draft can require that borrowers appeal local government agency determinations in order to avoid a conclusive finding of abandonment. Perhaps the most unusual requirement is under the Oklahoma statute. Under the Oklahoma law a court may require that a borrower complete home repairs as a condition to obtaining the benefit of basic protections under the state’s foreclosure law.

Under any state law, the notices related to fast track foreclosures must give borrowers accurate information about steps they must take to preserve their rights. Notices must inform them not only of the fast track procedures, but also of the rights under the standard foreclosure laws that will be lost or diminished if the borrowers fail to take specified actions.

Establishing personal service for a proceeding that may involve an abandoned dwelling poses an obvious difficulty. A system that leads to the borrower’s forfeiture of significant legal rights based solely on posted service is unacceptable. The U.S. Supreme Court has held that posted service cannot be the sole basis for personal jurisdiction to evict a residential tenant.<sup>91</sup> The basic requirements for documented attempts at personal and other alternative forms of service that satisfy service of process requirements for a civil action under state law should apply in connection with any judicial proceeding that determines whether a foreclosure should be fast tracked. The New Jersey statute addresses service of process most clearly, expressly stating that in addition to regular service of process, a motion for expedited foreclosure must meet additional requirements. The documentation must show at least two attempts at personal services under defined circumstances and other steps to achieve actual notice.<sup>92</sup>

Hearings on expedited foreclosure rulings should be scheduled automatically, as under the Indiana statute. However, unlike in Indiana, the mortgagee should have the burden of going forward and bear the burden of proof to establish entitlement to use the fast track procedures. The court should make findings and apply a clear and convincing evidence standard in making its ruling.

Any burden placed on the borrower to assert occupancy should be slight. Whether the determination is made in a judicial or administrative forum, the burden on the mortgagee to override the borrower's claim of occupancy should be a strict one. The Nevada approach of allowing any statement by the borrower in objection to be sufficient to terminate the fast track process is reasonable and efficient. Similarly, the provision under the Illinois statute requiring only an appearance by the borrower in any form to stop the fast track proceeding is appropriate.

**Recommendation #6. Procedural protections for borrowers under fast track foreclosure laws must include documented attempts at personal service, clear notices to borrowers of their rights and the consequences of the laws, a hearing, and ease of registering an objection that stops the process.**

#### **Issue #7: The protocol for mortgagee's inspections and immunity from trespass and conversion.**

Mortgagees often object to laws requiring that they inspect and maintain properties in foreclosure by citing the risk that they may be subject to liability for trespass if they attempt to carry out these duties. The issue of potential trespass claims also comes up in the context of fast track foreclosures. These laws require that mortgagees ascertain whether a property has been abandoned by lawful occupants. Several existing fast track foreclosure statutes include rules on access for inspections. They often include provisions that exempt mortgagees and their agents from liability for trespass in connection with their performance of inspections and maintenance during foreclosures.

A well-established industry of specialized contractors routinely performs property inspections and maintenance work for mortgage servicers. While there have been instances when borrowers have sued these default servicers for trespass, these cases typically involved gross misconduct, such as the forcible eviction of families clearly occupying a home and destruction of their personal property. It is important to keep in mind that approximately one-third of American households live in rental dwellings. Under residential leases, a tenant holds the possessory interest in the property while state laws require the landlord to maintain the property in habitable condition and in compliance with codes. State statutes and common law have been able to come up with reasonable guidelines governing a landlord's access to rental properties for inspections and repairs. State and local laws that require a mortgagee not in possession to inspect and perform limited maintenance for collateral properties do not impose an unreasonable burden on mortgagees. Similarly, many state laws have well-developed doctrines governing rights and liabilities of mortgagees in possession. When properties have been determined to be abandoned, mortgagees can take possession under existing state law. Mortgagees can perform maintenance and related tasks consistently with those rules.

The industry's exaggerated claims for special protections related to inspections have led to some troubling developments in fast track foreclosure statutes. For example, under Michigan foreclosure law the homeowner always had the right to retain possession during the standard six-month post-sale redemption period.<sup>93</sup> Under the state's fast track foreclosure statute effective in January 2014, the purchaser at the foreclosure sale (whether the mortgagee or a third party bidder) "may inspect the exterior and interior of the property and all ancillary structures."<sup>94</sup>

The sale purchaser may bring a summary action for eviction at any time during this redemption period "if inspection is unreasonably refused." *Id.* The new Michigan law places no clear limits on the timing and frequency of inspections. It does not require that there be any particular reason for an inspection, and it does not require advance notice in any form to the occupants. The NCCULC draft model law requires that public officials conducting abandonment inspections enter dwellings.<sup>95</sup> Such a requirement is unnecessary, as the Nevada statute discussed below indicates. The Nevada statute allows a mortgagee or government official to inspect a mortgaged residential property when there is a "reasonable belief that the real property may be abandoned."<sup>96</sup> However, this inspection is limited to the exterior of the property, with the law stating expressly that a mortgagee's agent or a government official "may not enter any dwelling or structure, to investigate whether the real property is abandoned residential property." *Id.* The Nevada law exempts an inspector from trespass liability to the extent that the individual acts in compliance with these restrictions (i.e. has a reasonable belief that the property is abandoned and limits the inspection to the exterior of a dwelling).

Allowing mortgagees access to properties after there has been a judicial or administrative determination of abandonment should not be controversial, so long as the borrower has been afforded adequate procedural protections. The NCCUSL text, for example, allows for the mortgagee's access for maintenance after the abandonment determination and provides for immunity from trespass claims.<sup>97</sup> An immunity provisions for entry into dwellings should be carefully drafted to apply only to mortgagees who have obtained formal declarations of abandonment. The Illinois statute is careful to include within the scope of its waiver of trespass liability only parties who were named in the legal proceeding.<sup>98</sup>

**Recommendation #7: To the extent that a fast track foreclosure law addresses inspections, the law must limit inspectors' entry on the property to the exterior of dwellings and only when the mortgagee has a reasonable belief that the property is abandoned. The mortgagee should be permitted to enter the dwelling to perform maintenance only after a court or final administrative agency decision has determined that the property is abandoned.**

#### **Issue #8: The effect of fast track foreclosure on parties' legal claims.**

Fast track foreclosure statutes may allow entry of a final judicial determination, either in the form of a judgment of foreclosure in a judicial foreclosure or a judgment of possession (eviction) after a non-judicial foreclosure. These judgments are entered on an expedited basis and may be based on affidavits incorporating special statutory presumptions created under the fast track

laws. Because the laws address properties that the residents have likely abandoned, there is a great potential for entry of judgments against parties were never personally served with process and had no actual notice of the proceedings.

Given these considerations, it is important to limit the effect of judgments entered in fast track proceedings. The judgments should be limited solely to *in rem* property rights, the enforcement of the mortgage or lien affecting the property, or the right to possession. The statutes should expressly provide that these judgments have no effect on personal liability of the borrowers as to any monetary claims. This includes deficiency claims and any claims related to costs and fees.

Existing statutes vary in how they address the conclusive effect of judgments in fast track proceedings. For example, while not expressly stating so, the Indiana and Kentucky statutes appear to allow for entry of a traditional judgment of foreclosure under their state laws, but on an expedited basis. The Illinois statute clearly states that a judgment entered under the expedited procedures has the preclusive effect of a foreclosure judgment entered under the normal foreclosure procedures.<sup>99</sup> On the other hand, the Oklahoma statute expressly limits the preclusive effect of orders entered under its provisions.<sup>100</sup> The New Jersey law states that no judgment may be entered under the fast track process if the borrower has filed an answer asserting a valid defense, even if the property is abandoned.<sup>101</sup>

Because the expedited foreclosure proceedings should be premised on a finding of abandonment, the borrower should be able to vacate a judgment entered under these procedures by offering evidence that the property was in fact not abandoned at the time the proceedings were initiated. As discussed above, the expedited nature of these procedures, the use of presumptions, and short cuts in service of process, can make these proceedings particularly prone to error. For this reason, the burden on an affected borrower to vacate or set aside these proceedings should not be a strict one. Where the borrower seeks to set aside a judgment before a sale takes place, the borrower's objection should effectively terminate the fast track process. While it may be appropriate to set some time limit for filing a motion to set aside a completed sale, the motion should be granted where the borrower has produced verification showing that the property was not abandoned when the fast track proceedings were initiated.

The judgments entered in fast track foreclosure proceedings must have no preclusive effect on monetary claims of borrowers against mortgagees or servicers.

**Recommendation #8. Judgments entered in fast track foreclosure proceedings must have limited preclusive effect, applying only to interests in the property, and must be subject to vacating upon a showing of occupancy.**

## Issue #9: Shifting to borrowers the mortgagee's costs of compliance with fast track foreclosure laws.

Fast track foreclosure and property registration laws address fees-shifting in two ways. One involves fees shifting in general. The other deals with the practical question of accounting for bonds.

The NCCUSL model law text expressly allows a mortgagee to charge the borrower for all costs the mortgagee incurs in using the fast track foreclosure procedures.<sup>102</sup> The proposed text authorizes the fees shifting regardless of contract terms. If the purpose of fast track foreclosure laws is to determine the mortgagee's rights in abandoned properties, such a provision runs counter to that purpose. When mortgagees use these statutes, they seek to treat the borrowers' rights in the property under state law as extinguished. Abandonment confers possession and control over the property to the financial institution that formerly held only a mortgagee's interest in the property. Once this occurs, the former mortgagee cannot proceed to assess fees and costs against a party that has been determined to have relinquished its rights in the property. The NCCUSL text's fees-shifting provision produces a result that is inconsistent with the purpose and general framework of the statute. It simply goes too far in allocating all benefits and no significant burdens to the mortgagee.

Under certain municipal ordinances mortgagees are now required to register foreclosures and post a bond with a local government entity when they begin a foreclosure proceeding. The government entity (a city or county) holds this bond for possible use in the event that it incurs costs to maintain or demolish the property in the future. If the bond is not used by the time title to the property is transferred to a new owner after a foreclosure sale, the municipality returns the bond to the mortgagee. The amounts of these bonds range from a few hundred dollars to \$10,000 in some Massachusetts municipalities. These bond requirements have been the subject of some contention. Mortgagees specifically challenged these provisions in the *City of Chicago* and *City of Springfield* litigation, discussed in Issue #2.

An improper practice related to registration and repair bonds has appeared in several Massachusetts cities. Mortgagees are assessing the full amounts of these registration and repair bonds as foreclosure costs against borrowers as soon as the mortgagees post the bonds with municipalities. The mortgagees do so even though they will likely receive the deposited amounts back upon completion of foreclosure. The funds are tapped only in the event that a city pays to secure a property in foreclosure after the mortgagee refused to do so. The mortgagees ultimately control whether any of the bond funds are ever spent. The practice of imposing the full amount of the bond as a cost on the borrower is clearly improper. However, the practice may go unchallenged because mortgagees often aggregate foreclosure costs in vaguely defined categories when they assess costs against borrowers. State fast track foreclosure laws should expressly bar this type of abusive fees shifting. Municipalities need the funds held for bonds and must assess registration fees in order to fund foreclosure-related code

enforcement. The efficient and fair operation of these local ordinances should be an essential element of a fast track foreclosure law (see Issue #1).

**Recommendation #9. Fast track foreclosure statutes must expressly preclude fees shifting from mortgagees to borrowers for costs associated with compliance with state and local laws related to abandoned properties.**

## END NOTES

<sup>1</sup> Lender Processing Services, Inc., LPS Monthly Mortgage Monitor Reports, including Report of Nov. 1, 2011, discussing "Significant Difference in Inventories, Timelines Between Judicial and Non-Judicial States"; Corelogic National Foreclosure Report April 2013; Federal Housing Finance Agency State Level Guarantee Fee Analysis, <http://www.fhfa.gov/webfiles/25869/StateLevelGfeeAnalysisFinal.pdf> and 77 FR 58991 (Sept. 25, 2012). See also RealtyTrac, Foreclosure Activity on Slow Burn (Oct. 11, 2011) listing the ten states with the longest foreclosure time frames as: New York (986 days), New Jersey (974 days), Florida (749 days), Maryland (594 days), Connecticut (584 days), Pennsylvania (535 days), Illinois (527 days), Massachusetts (517 days), New Mexico (472 days), and Ohio (458 days). All but one (Massachusetts) are judicial foreclosure states. States with the shortest foreclosure times were listed as Texas (86 days), Kentucky (94 days), and Virginia (102 days), all non-judicial states.

<sup>2</sup> See e.g. K. Harvey, "Housing Recovery Quicker in Non Judicial States" Charlotte Observer Dec. 12, 2013 <http://www.charlotteobserver.com/2013/12/12/4540187/housing-recovery-quicker-in-non.html#.Ussa3mwo7cs>; J. Swanson, "Unintended Consequences of Judicial vs. Non-Judicial Foreclosure," Mortgage News May 7, 2013 [http://www.mortgagenewsdaily.com/03072013\\_lps\\_mortgage\\_monitro.asp](http://www.mortgagenewsdaily.com/03072013_lps_mortgage_monitro.asp)

<sup>3</sup> RealtyTrac, Exclusive Report Quarter 1 2013 Foreclosure Inventory Update. p. 1

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at p. 5.

<sup>6</sup> See generally, *State of New York Unified Court System, 2013 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009*. Available at <http://www.nycourts.gov/publications/pdfs/2013ForeclosureReport.pdf> (discussing history of shadow docket of New York judicial foreclosure cases).

<sup>7</sup> In the fall of 2011 the average time frame from commencement of a judicial foreclosure to completion of sale was 748 days in Florida, 974 days in New Jersey, and 527 days in Illinois. Press Release, RealtyTrac, Foreclosure Activity on Slow Burn (Oct. 11, 2011), available at [www.realtytrac.com/content/press-releases/third-quarter-and-september-2011-us-foreclosure-market-report-6880](http://www.realtytrac.com/content/press-releases/third-quarter-and-september-2011-us-foreclosure-market-report-6880).

<sup>8</sup> In 2005, the Federal Housing Administration (FHA) published state-by-state due diligence time frames for servicers of FHA-insured loans to complete foreclosures under a given state's laws. At that time, the reasonable time frame to complete a judicial foreclosure in Florida was 7 months, 14 months for New Jersey, and 12 months for Illinois. HUD Mortgagee Letter 2005-30 (July 15, 2005). [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/administration/hudclips/letters/mortgagee/2005ml](http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/letters/mortgagee/2005ml). Time frames for non-judicial foreclosure states ranged from 3 to 10 months and 6 to 17 months for judicial states. *Id.* On average, the typical non-judicial foreclosure took 5-6 months and the typical judicial foreclosure approximately 10 months. *Id.*

<sup>9</sup> M.C.L.A. 600.3241, 3241a.

<sup>10</sup> M.C.L.A. 600.3240(13).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 600.3240(13)(a)-(i).

<sup>13</sup> M.C.L.A. 600.3240(13).

<sup>14</sup> Copy of July 3, 2013 Governor Rick Snyder signing letter available at <http://foreclosure.cedam.info/files/130703.SigningLetter.pdf>

<sup>15</sup> 46 Okla. Stat. § 302.

<sup>16</sup> *Id.* § 302(H)(1).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* § 302(A)(3).

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<sup>19</sup> *Id.* § 302(J).

<sup>20</sup> Ken. Rev. Stat. § 426.205.

<sup>21</sup> *Id.* § 426.205(2).

<sup>22</sup> *Id.* § 426.205(3),(4).

<sup>23</sup> Amended Indiana Code §§ 32-30-10.6-1 to 32-30-10.6-5.

<sup>24</sup> *Id.* § 32-30-10.6-4(a).

<sup>25</sup> *Id.* § 32-30-10.6-5(b).

<sup>26</sup> *Id.* § 32030-10.6-5(a).

<sup>27</sup> *Id.*

<sup>28</sup> N.J.S.A. 2A:50-73.

<sup>29</sup> *Id.* 2A:50-73(c).

<sup>30</sup> *Id.* 2A:50-73(a).

<sup>31</sup> *Id.* 2A:50-73(e).

<sup>32</sup> 30 N.J. Prac. Law of Mortgages § 27A.3 (2d ed.), referencing New Jersey Court Notice to Bar: Foreclosure of Abandoned Residential Properties – Rule Relaxation Model Pleadings May 23, 2013, at <http://www.judiciary.state.nj.us/notices/2013/n130528a.pdf>.

<sup>33</sup> Nev. Sen. Bill 278 (2013), amending Nev. Rev. Stat. 107.080 – 107.110.

<sup>34</sup> Sen. Bill 278 at sec. 4 (6).

<sup>35</sup> *Id.* at sec. 4(7).

<sup>36</sup> *Id.* at sec. 4(8)(b).

<sup>37</sup> 735 ILCS 5/15-1505.8.

<sup>38</sup> 735 ILCS 5/15-1505.8(c).

<sup>39</sup> 735 ILCS 5/15-1603(b) (4).

<sup>40</sup> 735 ILCS 5/15-1505.8(b), incorporating 735 ILCS 5/15-1200.5.

<sup>41</sup> 735 ILCS 5/15-1200.5.

<sup>42</sup> References herein are to the November 2013 draft, designated as a non-final version released for discussion purposes only, available at

<http://www.uniformlaws.org/Committee.aspx?title=Home%20Foreclosure%20Procedures%20Act>.

<sup>43</sup> NCCUSL Draft Home foreclosure Procedures Act §§ 505-507.

<sup>44</sup> *Id.* § 102(1).

<sup>45</sup> *Id.* § 506(b).

<sup>46</sup> *Id.* § 506(c). Subsection (a) of section 506 requires that in a judicial foreclosure jurisdiction the sale must be ordered for a date not less than 30 days and not more than 60 days from the court's abandonment determination. However, a "Drafter's Note" refers to a four-month deadline to complete a foreclosure sale of an abandoned property in a judicial jurisdiction. Drafter's Section 506 Drafter's Note No. 3. Section 506(c), on the other hand, refers to scheduling the judicial sale "within a reasonable time." It is not clear whether the language in section 506(c) was meant to set a more flexible standard than the 60-day/four-month time limits indicated elsewhere in the statutory text and notes. Presumably these inconsistencies will be clarified in a later draft.

<sup>47</sup> *Id.* § 506(b).

<sup>48</sup> None of the eight conditions require a finding that the property is vacant. However, the vacancy requirement is expressly set forth in the definition of "abandoned property" in section 102 of the NCCUSL draft statute. The Reporter's Note to section 505 recognizes that the finding of actual possession trumps a finding of abandonment based solely on the eight conditions. Section 505 Reporter's Note No. 2. ("If the homeowner or another person holding under the homeowner is in actual possession of the mortgage [sic] property, the property is not abandoned notwithstanding the existence of such conditions.")

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<sup>49</sup> NCCUSL § 507 Reporter's Note No. 2.

<sup>50</sup> *Id.* at Note 1.

<sup>51</sup> *Id.* § 506 Reporter's Note No. 3 and § 507(g).

<sup>52</sup> *Id.* § 506 Reporter's Note No. 3.

<sup>53</sup> *Id.* § 507(i).

<sup>54</sup> *Id.* § 506 Reporter's Note No. 3.

<sup>55</sup> James H. Carr and Katrin B. Anacker, *Long Term Social Impacts and Financial Costs of Foreclosure on Families and Communities of Color: A Review of the Literature*, National Community Reinvestment Coalition (October 2012); California Reinvestment Coalition, *Home Wreckers: How Wall Street Foreclosures are Devastating Communities* (2011); Dan Immergluck, *The Local Wreckage of Global Capital: The Subprime Crisis, Federal Policy and High-Foreclosure Neighborhoods in the US*, International Journal of Urban and Regional Research (Jan. 2011); Joint Economic Committee, Special Report, *Sheltering Neighborhoods from the Subprime Foreclosure Storm* (Apr. 2007) (available at:

<http://www.jec.senate.gov/archive/Documents/Reports/subprime11apr2007revised.pdf>); Urban Institute, Center on Metropolitan Housing and Communities: G. Thomas Kingsley, Robin E. Smith, and David Price, *The Impact of Foreclosure on Families and Communities: A Primer* (July 2009)).

<sup>56</sup> Yun Sang Lee, et al, *New Data on Local Vacant Property Registration Ordinances*, Cityscape: A Journal of Policy Development and Research, Volume 15, Number 2, 2013 Cityscape U.S. Department of Housing and Urban Development Office of Policy Development and Research <http://www.huduser.org/portal/periodicals/cityscape/vol15num2/ch22.pdf>.

<sup>57</sup> N.J. Stat. Ann. § 46:10B-51.

<sup>58</sup> The Nevada and Indiana statutes do recognize that local code enforcement agencies may, if they choose, initiate a process to have a property determined abandoned. Indiana recently enacted a statute that allows municipalities to seek abandonment determinations. Ind. Code 32-30-10.6-3.5. However, none of these statutes obligates a mortgagee to report known abandoned properties to agencies so that they will initiate the proceeding to determine abandonment.

<sup>59</sup> Municipal Code of Chicago § 13-12-126(b).

<sup>60</sup> N.Y. R.P.A.P.L. § 1307; N.J. Stat. Ann. § 46:10B-51.

<sup>61</sup> These rules and practices are discussed in the GAO's 2011 Report, *Vacant Properties: Growing Number Increases Communities' Costs and Challenges*, Report No. 12-34 Government Accountability Office, Nov. 2011, pp. 27-37. (available at: <http://www.gao.gov/new.items/d1234.pdf>)

<sup>62</sup> 12 U.S.C. § 4617(a)(7), part of the Housing and Economic Recovery Act of 2008 ("HERA"), provides that "[w]hen acting as conservator or receiver, [FHFA] shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of [FHFA]."

<sup>63</sup> 12 U.S.C. §4617(j) (4).

<sup>64</sup> *Federal Housing Finance Agency v. City of Chicago*, -- F. Supp. 2d --, 2013 WL 4505413 (N.D. Ill. Aug. 23, 2013).

<sup>65</sup> *Easthampton Savings Bank v. City of Springfield*, 874 F. Supp. 2d 25 (D. Mass. 2012).

<sup>66</sup> *Easthampton Savings Bank v. City of Springfield*, 736 F.3d 46 (1<sup>st</sup> Cir. 2013).

<sup>67</sup> *Restatement 3d Property (Mortgages)* § 4.1(c) (2).

<sup>68</sup> See e.g. Fannie Mae Standard Security Instrument para. 9.

<sup>69</sup> 46 Okla. St. Ann. § 302(H)(2).

<sup>70</sup> NCCUSL Draft § 507(d) and Reporter's Note.

<sup>71</sup> NCCUSL Draft law § 102(1).

<sup>72</sup> *Id.* § 505 Reporter's Note No. 2.

<sup>73</sup> Nev. Sen. Bill 278 (2013) sec. 4(7).

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<sup>74</sup> 735 ILCS 5/15-1505.8 (g).

<sup>75</sup> 735 ILCS 5/15-1505.8 (h).

<sup>76</sup> Ind. Code § 32-30-10.6-5(b).

<sup>77</sup> The Kentucky statute also requires a finding that the property is vacant.

<sup>78</sup> U.S. Govt. Accountability Office, *Vacant Properties: Growing Number Increases Communities' Costs and Challenges* (GAO Report No. 12-34, Nov. 2011); Woodstock Institute, *Deciphering Blight, Vacant Buildings Data Collection in the Chicago Six County Region* (June 2013) and *Left Behind: Troubled Foreclosed Properties and Servicer Accountability in Chicago* (January 2011) both at [www.woodstockinst.org](http://www.woodstockinst.org).

<sup>79</sup> Nev. Sen. Bill 278 sec. 4(8)(b) (2013)

<sup>80</sup> N.J.S.A. § 2A:50-73(j).

<sup>81</sup> Ky. Rev. St. § 426.205(3).

<sup>82</sup> NCCUSL Draft Home Foreclosures Act § 506, Reporter's Note No. 3.

<sup>83</sup> 2013 WL 4505413 (N.D. Ill. Aug. 23, 2013). Here, FHFA took the position that 42 U.S.C. § 4617(a)(7) shielded the GSEs from municipal code enforcement directed at mortgagees not yet in possession of collateral property. In the litigation FHFA asserted that the GSEs would comply with local code enforcement directed at mortgagees who acquire properties at foreclosure sales (an issue not before the court). See *City of Chicago*, *supra* at note 4. FHFA's distinction is inconsistent in view of its contention in the litigation that the immunity statute precluded all forms of municipal and state housing code enforcement against the GSEs.

<sup>84</sup> See Nabanita Pal, Brennan Center for Justice, *Facing Foreclosure Alone, The Continuing Crisis in Legal Representation* (Nov. 4, 2011) (Available at: <http://www.brennancenter.org/publication/facing-foreclosure-alone-continuing-crisis-legal-representation>.); Melanca Clark and Maggie Barron, Brennan Center for Justice, *Foreclosures: A Crisis in Legal Representation* (Oct. 6, 2009) (Available at: <http://www.brennancenter.org/publication/foreclosures-crisis-legal-representation>.)

<sup>85</sup> 30 N.J. Prac. Law of Mortgages § 27A.3 (2d ed.), referencing New Jersey Court Notice to Bar: Foreclosure of Abandoned Residential Properties – Rule Relaxation Model Pleadings May 23, 2013, at <http://www.judiciary.state.nj.us/notices/2013/n130528a.pdf>.

<sup>86</sup> Failure to comply with housing codes; boarded up or closed up windows; broken windows; broken doors; accumulated rubbish or trash, stripped plumbing or wiring; missing fixtures, deterioration below or imminent danger of the property deteriorating below community standards for public safety and sanitation; or a condition constituting waste under state law. MCLA. 600.3240(13).

<sup>87</sup> These include defective windows or doors, lack of utilities, debris and trash, general deterioration, pending code enforcement, locks changed for fifteen days with no demand for entry, and signed statements of the borrower. I.C. 32-30-10.6-5.

<sup>88</sup> Overgrown or dead vegetation; accumulation of flyers, mail, or trash, disconnected utilities; absence of window covering or furniture; uncorrected hazardous conditions or vandalism; statements of neighbors, delivery persons, or government employees that the property is vacant. Ky. R.S. § 426.205(2).

<sup>89</sup> Broken or boarded up windows or doors; low or terminated utility service; trash and debris; general property deterioration under community standards; changed locks for 30 days with no request for entry; written statements of borrower; complaints to law enforcement; and death of the homeowner with no survivor or heir in actual possession. NCCUSL Draft text § 505(a).

<sup>90</sup> 735 ILCS 5/15-1505.8(l).

<sup>91</sup> *Greene v. Lindsey*, 456 U.S. 444 (1982).

<sup>92</sup> N.J.S.A. § 2A:50-73(d).

<sup>93</sup> MCLA 600.3240(8).

<sup>94</sup> MCLA 600.3240(13).

<sup>95</sup> NCCUSL Draft Home Foreclosure Act § 505(d)(2).



**Pennsylvania Foreclosure Informational Hearing**

**Joint Hearing of the Senate Urban Affairs and Housing Committee and House of  
Representatives Urban Affairs Committee**

**Tuesday, October 27, 2015**

**Michael R. Froehlich, Managing Attorney  
Homeownership and Consumer Rights Unit  
Community Legal Services**

Good afternoon, members of the Committees. I am the managing attorney of Community Legal Services' Homeownership and Consumer Rights Unit. I welcome the opportunity to testify today on vacant and abandoned real estate in foreclosure.

Community Legal Services, Inc. was established by the Philadelphia Bar Association in 1966. Since then, CLS has provided legal services to more than one million low-income Philadelphia residents, representing them in court and advocating on their behalf for policies that affect low-income Philadelphians. As the city's largest provider of free legal services, CLS assists more than 11,600 of Philadelphia's poorest residents with their legal problems each year. The Homeownership and Consumer Rights Unit represents approximately 600 homeowners annually facing the loss of their home.

When a mortgage foreclosure complaint is filed against a delinquent homeowner in Philadelphia, the homeowner and the lender attend one or more face-to-face conferences as part of our nationally recognized Mortgage Foreclosure Diversion Program. This extraordinary Program, that my colleague Michael McKeever from KML Law Group was instrumental in helping to start, has saved over 9700 homes. However, when cases cannot be resolved in the Diversion Program, CLS will represent homeowners in the Court of Common Pleas to defend their legal rights under the law. Sometimes we can negotiate modification of the mortgage loan to allow the homeowner to stay in her home. Other times, if a homeowner has been able to get back on her feet and can resume making payments, we will consider representing the homeowner in bankruptcy court in order to give the homeowner a fresh start. Our mission, at all times, is simple: we enforce our client's legal rights in an effort to allow homeowners to keep their homes and avoid homelessness.

CLS shares many of the Committees' concerns about the deleterious effects that vacant and abandoned real estate may have on communities. In fact, as a proud resident of West Philadelphia, I have personally watched as vacant homes in my neighborhood have lingered for years with no prospect of being put back into productive use.

However, CLS is also very concerned that any legislation that seeks to address vacant and abandoned real estate must ensure adequate protections for low-income homeowners. I would



like to testify about several principles that the Committees should keep in mind as members develop potential legislation.

**1. Potential legislation should ensure adequate due process for homeowners.**

It is a fundamental right under our laws that a party receive adequate notice that a lawsuit has been filed against him or her, and that the party be provided the opportunity to respond to the allegations. This is especially true when a party's home may be at risk. Thus, when a homeowner is sued in mortgage foreclosure, the homeowner must be served with a copy of the Complaint. If the homeowner cannot be personally served, the lender may file a Motion for Alternative Service with the Court. This is a fairly standard procedure. If the Court is satisfied that the lender made a reasonable attempt to serve the homeowner, the Court will allow service to be made by other means. Other means typically include regular mail, certified mail, and by posting the Complaint on the home. This is not a particularly onerous standard for a lender to meet, and it ensures that homeowners know that a lawsuit has been filed against them.

Unfortunately, it is not always easy to tell whether a home is vacant or abandoned. Many of the low-income clients that CLS represents, for example, live in homes that need critical, but often expensive repairs. In fact, the Basic Systems Repair Program that funds needed repairs for low-income residents has a waiting list of over three years. We should be very careful not to take away due process for homeowners because a lender believes a home is vacant and abandoned. This is especially true where a party may have an incentive to declare a home vacant or abandoned in order to expedite the legal process.

It is critical that a homeowner be personally served with the Complaint. Only after reasonable but unsuccessful efforts are made to personally serve the Complaint should a party be permitted to serve notice by other means.

I would also note that Article 5 of our Constitution invests the Pennsylvania Supreme Court with the exclusive authority to define the judicial procedures under which our courts operate. Thus, while the legislature may enact substantive laws, it may not enact the judicial procedures to enforce those laws. I would argue, therefore, that legislatively-defined foreclosure procedures, including service, are within the exclusive jurisdiction of our Supreme Court.

**2. A Court, not a party to the litigation, should determine whether a property is vacant and abandoned.**

Potential legislation that seeks to create an expedited path for foreclosing on properties thought to be vacant and abandoned must include a thorough and rigorous process to determine whether these properties are, in fact, vacant and abandoned. This determination should be made by a Court, not a party to the litigation.



As I testified earlier, many of our clients' homes need repair. They may look abandoned to a casual curbside observer. But they are not. A party may have a strong incentive to categorize a property as vacant and abandoned if such categorization permits a cheaper, faster process to move a property to sheriff sale. If legislation is proposed to fast-track foreclosures for vacant and abandoned properties, a judicial determination must be required, not a lender's simple self-certification. A party may provide concrete evidence that a property is vacant and abandoned, but only a judge, after hearing the evidence and any rebuttal to the evidence, should make this determination.

- 3. Pre-foreclosure notices, as required by Act 6 and Act 91, should continue to be sent to delinquent homeowners to allow homeowners the opportunity to save their homes.**

Currently, a mortgage lender or its servicer must send delinquent homeowners a notice permitting the homeowner the opportunity to cure her arrears before a foreclosure is filed. In many cases, this notice must also provide information about the Homeowners Emergency Mortgage Assistance Program (HEMAP) and a list of free housing counselors that could help the homeowner. These notices are required under Act 6 of 1980 and Act 91 of 1983. After a foreclosure complaint is filed, stiff attorneys fees and other costs are typically added to the cure amount making it much more difficult for a delinquent homeowner to bring her mortgage current and save her home. But during a short window after receiving these notices, the fees and costs that a lender may charge a homeowner are limited in order to provide the homeowner the opportunity to save her home. This is why these consumer protections are so valuable to homeowners.

Sending a pre-foreclosure notice does not slow down the foreclosure process. Under federal law, lenders must wait until a homeowner's mortgage is 120 days delinquent before filing a mortgage foreclosure complaint. 12 CFR 1024.41(f)(i). These pre-foreclosure notices can be sent during this 120-day period. Exempting vacant and abandoned homes from the current requirement that they be sent pre-foreclosure notices therefore will not shorten the foreclosure timeline.

Any potential legislation to address vacant and abandoned property must continue to require that these pre-foreclosure notices be sent and limit fees and costs that may be assessed against homeowners prior to the filing of a foreclosure.

- 4. Potential legislation should ensure that homeowners can participate in local diversion or mediation programs.**

As I testified earlier, Philadelphia's Mortgage Foreclosure Diversion Program has been a remarkable success. In the wake of the mortgage foreclosure crisis, many counties across Pennsylvania have adopted similar programs tailored to their own local issues and needs to



address the rise in residential mortgage foreclosures. Any potential legislation from Harrisburg should respect the wisdom of counties to devise local solutions to address these problems.

Importantly, while our Diversion Program had been a terrific help for homeowners, it does not draw out the foreclosure process unnecessarily for unoccupied properties. When a residential foreclosure complaint is filed, a homeowner is given a date to come to Court and meet with the lender's representation and discuss potential solutions to the delinquency. If a homeowner fails to appear at the first scheduled diversion program, the case immediately leaves the Program and the lender may proceed to take judgment. If the homeowner is found to be ineligible for a loan modification because a home is vacant or abandoned, the case will also leave the Program.

Local mortgage foreclosure diversion programs help homeowners, save homes, and have procedures to expedite litigation in cases where a property is vacant and abandoned. State laws should not pre-empt these successful locally-tailored solutions.

**5. The Homeowners Emergency Mortgage Assistance Program (HEMAP) saves homes and should be fully funded.**

Today's hearing focuses on the issue of vacant and abandoned properties. However, I would be remiss if I did not mention the importance of HEMAP for Pennsylvania's low-income homeowners.

The Homeowners Emergency Mortgage Assistance Program (HEMAP), created by Act 91 of 1983, is a revolving loan fund that provides mortgage assistance loans to certain families who experience a short-term drop in their income through no fault of their own. HEMAP loans have prevented thousands of families from losing their homes to foreclosure.

In 2011, HEMAP funding was eliminated, and the program closed. However, in 2012, after bipartisan support in the General Assembly, HEMAP was resurrected with proceeds from the settlement of a lawsuit brought by state attorneys general against leading U.S. mortgage servicing companies in connection with their role in committing widespread mortgage fraud.

Currently, HEMAP receives \$10.8 million per year from this fund and nothing from the general fund. Even today, though, only 20% of HEMAP applications are approved. Additional funding would permit more applications to be approved and more homes to be saved.



Again, thank you for inviting Community Legal Services to testify at today's hearing. We look forward to continue to work with the Committees and other stakeholders on these very important issues.

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address the rise in residential mortgage foreclosures. Any potential legislation from Harrisburg should respect the wisdom of counties to devise local solutions to address these problems.

Importantly, while our Diversion Program had been a terrific help for homeowners, it does not draw out the foreclosure process unnecessarily for unoccupied properties. When a residential foreclosure complaint is filed, a homeowner is given a date to come to Court and meet with the lender's representation and discuss potential solutions to the delinquency. If a homeowner fails to appear at the first scheduled diversion program, the case immediately leaves the Program and the lender may proceed to take judgment. If the homeowner is found to be ineligible for a loan modification because a home is vacant or abandoned, the case will also leave the Program.

Local mortgage foreclosure diversion programs help homeowners, save homes, and have procedures to expedite litigation in cases where a property is vacant and abandoned. State laws should not pre-empt these successful locally-tailored solutions.

**5. The Homeowners Emergency Mortgage Assistance Program (HEMAP) saves homes and should be fully funded.**

Today's hearing focuses on the issue of vacant and abandoned properties. However, I would be remiss if I did not mention the importance of HEMAP for Pennsylvania's low-income homeowners.

The Homeowners Emergency Mortgage Assistance Program (HEMAP), created by Act 91 of 1983, is a revolving loan fund that provides mortgage assistance loans to certain families who experience a short-term drop in their income through no fault of their own. HEMAP loans have prevented thousands of families from losing their homes to foreclosure.

In 2011, HEMAP funding was eliminated, and the program closed. However, in 2012, after bipartisan support in the General Assembly, HEMAP was resurrected with proceeds from the settlement of a lawsuit brought by state attorneys general against leading U.S. mortgage servicing companies in connection with their role in committing widespread mortgage fraud.

Currently, HEMAP receives \$10.8 million per year from this fund and nothing from the general fund. Even today, though, only 20% of HEMAP applications are approved. Additional funding would permit more applications to be approved and more homes to be saved.



Again, thank you for inviting Community Legal Services to testify at today's hearing. We look forward to continue to work with the Committees and other stakeholders on these very important issues.

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