

FINAL BILL REPORT

2ESHB 2057

C 306 L 18
Synopsis as Enacted

Brief Description: Concerning the services and processes available when residential real property is abandoned or in foreclosure.

Sponsors: House Committee on Judiciary (originally sponsored by Representative Orwall).

House Committee on Judiciary
Senate Committee on Financial Institutions & Insurance

Background:

Mortgages and deeds of trust are two forms of security interests in real property used for real estate financing. A mortgage is a pledge of real property as security for a debt owed by the borrower (mortgagor) to the lender (mortgagee). A deed of trust (DOT) is basically a three-party mortgage. The borrower grants a deed creating a lien on the real property to a third party (the trustee) who holds the DOT as security for an obligation due to the lender (the beneficiary). Most loan obligations for residential real property in Washington are secured by a DOT.

Judicial Foreclosure.

A mortgage may be foreclosed only through a judicial proceeding according to statutory requirements. Judicial foreclosure allows the mortgagee to obtain a deficiency judgment if the sale does not satisfy the mortgage obligation. In addition, the judicial foreclosure process allows for statutory redemption rights for the mortgagor and certain junior lien holders. Statutory redemption rights allow the mortgagor and other lien holders a certain period of time after the foreclosure sale to buy the land from the purchaser for the price paid at the sale.

Nonjudicial Foreclosure.

Deeds of trust may be foreclosed either through the judicial process or a nonjudicial trustee's sale. The Deeds of Trust Act imposes detailed notice and process requirements for nonjudicial foreclosure. It is a requisite of nonjudicial foreclosure that no court action have been commenced by the beneficiary to seek satisfaction of an obligation secured by the DOT; however, seeking the appointment of a receiver is an express exception, and does not preclude nonjudicial foreclosure. Nonjudicial foreclosure does not allow for a deficiency judgment or statutory redemption rights.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Foreclosure Fairness Program and Account.

In 2011, as part of changes to the nonjudicial foreclosure process, the Foreclosure Fairness Program (Program) was established. A variety of agencies are involved with the Program. Their roles and responsibilities, and the services they provide, are set forth below:

- The Department of Commerce (Department) is charged with the overall development and management of the Program. The Department is also responsible for training, approving, and maintaining a list of approved foreclosure mediators and assigning them to mediation cases. The Director of the Department authorizes expenditures from the Foreclosure Fairness Account (Account).
- The Housing Finance Commission administers the homeowner counseling program and oversees a toll-free hotline where homeowners in need of foreclosure prevention assistance can call and receive free foreclosure prevention counseling.
- The Office of the Attorney General Consumer Protection Division investigates consumer protection complaints and enforces deed of trust foreclosure laws.
- The Office of Civil Legal Aid contracts with qualified legal aid programs to provide free legal assistance to low-income and moderate-income homeowners in matters related to foreclosure.

Certain beneficiaries must remit \$250 to the Department for every notice of trustee's sale recorded on residential real property, excluding the recording of an amended notice of trustee's sale. Residential real property includes residential real property with up to four dwelling units, whether or not the property or any part thereof is owner-occupied. The remittance requirement does not apply to: any beneficiary or loan servicer that is a federally insured depository institution and that certifies under penalty of perjury that fewer than 50 notices of trustee's sale were recorded on its behalf in the preceding year; or, any homeowners' or condominium association beneficiaries.

Remittance are deposited into the Account and pay for the Program, including mediation, counseling, consumer protection, and legal representation.

Jordan v. Nationstar.

In 2016, in *Jordan v. Nationstar*, a majority of the Washington Supreme Court held found unenforceable a DOT provision agreed to prior to default that allows a lender to enter, maintain, and secure property prior to foreclosure. The majority recognized that, absent post-default consent, a lender may use a statutory receivership to gain access to the property prior to foreclosure, and that this is not the exclusive avenue, but it did not indicate what particular other remedies might be available. The dissent, on the other hand, would have held that a lender may, pursuant to a pre-default agreement, enter, maintain, and secure seemingly abandoned property before foreclosure.

Nuisance Abatement.

Nuisance is defined as unlawfully doing an act, or omitting to perform a duty that:

- annoys, injures, or endangers the comfort, repose, health, or safety of others;
- offends decency;
- unlawfully interferes with, obstructs, or renders dangerous for passage a lake, navigable river, bay, stream, canal, basin, public park, square, street, or highway; or
- in any way renders other persons insecure in life or in the use of property.

A public nuisance is a nuisance that affects equally the rights of an entire community or neighborhood. There are civil and criminal remedies and penalties for creating or allowing nuisances.

Counties, cities and towns may declare what is deemed a nuisance and abate the nuisance. Cities and towns that exercise authority to declare a nuisance, abate a nuisance, or impose fines or costs upon persons who create, continue, or maintain a nuisance are authorized to levy a special assessment on property where a nuisance is situated. The special assessment is for the purpose of reimbursing the city or town for the expense of abatement. The special assessment levied by a city or town is a lien and, after it is recorded, up to \$2,000 of the recorded lien is of equal rank with state, county, and municipal taxes. Counties have the same authority granted to cities and towns, however, the amount of a county lien of equal rank with state, county, and municipal taxes is not capped.

Summary:

Judicial Foreclosure.

Before foreclosing any reverse residential mortgage, the mortgagee must give written notice at least 33 days in advance. The notice must be sent: to the resident mortgagor; or in case of the death of the last surviving mortgagor, to any known surviving spouse or to unknown heirs of the residential mortgagor.

The notice must be in English and Spanish, in a form to be published by the Department of Commerce, and must clearly and conspicuously set forth specified information. It is an unfair or deceptive practice in violation of the Consumer Protection Act for any person to fail to comply with these requirements.

Nonjudicial Foreclosure.

Several changes are made to the Deeds of Trust Act, as follows:

- It is expressly provided that filing a civil case to obtain court approval to access, secure, maintain, and preserve property from waste or nuisance does not constitute an action that would preclude nonjudicial foreclosure.
- A trustee is required to have proof, in the form of a declaration, that the beneficiary is the holder, rather than the owner, of any promissory note secured by the deed of trust (DOT). This declaration must be transmitted to the borrower and the grantor.
- The notice of default (NOD) must include on the top of the first page:
 - the current beneficiary;
 - the current mortgage servicer; and
 - the current trustee.
- Procedures are put in place with respect to deceased borrowers and successors in interest.
- A notice of trustee's sale (NOTS) must include additional indexing requirements.
- A new section governs cases in which a trustee is named as a defendant in an action or proceeding in which the DOT is the subject. A trustee is authorized to file a declaration of nonmonetary status if there are no substantive allegations that seek damages from the trustee or seek to enjoin the foreclosure based on any alleged

unlawful actions or omissions by the trustee. Other parties to the action may file objections to the declaration. Timelines and procedures are specified.

Foreclosure Fairness Program and Account.

For each NOTS on noncommercial loans on residential real property, a beneficiary must remit \$325 to the Department for deposit into the Foreclosure Fairness Account. The Department is authorized to adjust the fee via rulemaking, however, the fee may not exceed \$325.

Entry and Nuisance Abatement Post-Jordan v. Nationstar.

A new chapter is created, providing a process that may be utilized when residential real property is determined by a county, city, or town, to be abandoned, in mid-foreclosure, and a nuisance. This authority is expressly in addition to, and not in limitation of, any other authority provided by law.

The local government may commence the process on its own initiative, or a mortgage servicer may initiate the process with a request that a local government visit a property and make a determination. For purposes of this chapter, property is:

- Abandoned when there are no signs of occupancy and at least three of 13 specified indications of abandonment are visible from the exterior.
- In mid-foreclosure when, pursuant to the Deeds of Trust Act, a NOD or notice of pre-foreclosure options (NOPFO) has been issued or a NOTS has been recorded.
- A nuisance when so determined by a county, city, or town, pursuant to its authority under existing statutory law.

A county, city, or town may notify a mortgage servicer, via certified mail, that a property has been determined to be abandoned, in mid-foreclosure, and a nuisance. The notice must be accompanied by an affidavit or a declaration, made under penalty of perjury, that a property is abandoned, in mid-foreclosure, and a nuisance. The affidavit or declaration must outline at least three indicators of abandonment and be supported with time and date stamped photographs, a finding that the property is a nuisance, and a copy of the NOD, NOPFO, or NOTS.

Alternatively, a mortgage servicer may contact the local government regarding a property it believes to be abandoned and a nuisance and request that such a determination be made. When making such a request, the mortgage servicer must furnish a copy of a NOD, NOPFO, or NOTS applicable to the property. The local government must respond to the request within 15 calendar days and notify the mortgage servicer:

- that a visit has been made to the property and a determination made that the property is not abandoned or not a nuisance;
- that a visit has been made, as well as a determination that the property is abandoned, in mid-foreclosure, and a nuisance. In this case, the notice shall be accompanied by an affidavit or a declaration that meets the requisites set forth above; or
- that the local government does not have adequate resources or is otherwise unable to make the requested determination.

Upon receipt of an affidavit or declaration that a property has been determined to be abandoned, in mid-foreclosure, and a nuisance, a mortgage servicer or its designee may enter

the property for the purposes of abating the identified nuisance, preserving property, or preventing waste and may take certain steps, such as replacing missing windows and performing pest control services, to secure the property. In so doing, the mortgage servicer or designee must: make a record of entry by means of dated and time-stamped photographs; not remove personal items unless the items are hazardous or perishable; ensure that the required statutory notice is posted on the front door; and keep records of entry for at least four years. If, upon entry, the property is found to be occupied, the mortgage servicer or designee must leave the property immediately and notify the local government. Thereafter, entry is not permitted regardless of whether the property constitutes a nuisance or complies with local code enforcement standards. Similarly, if the borrower notifies the mortgage servicer that the property is not abandoned, the mortgage servicer must notify the local government and not enter the property.

Except in instances when the mortgage servicer has found the property occupied or received notice from the borrower that the property is not abandoned, if a mortgage servicer receives notice from a county, city, or town that a property is abandoned, in mid-foreclosure, and a nuisance and fails to abate the nuisance within the time prescribed, the county, city, or town may exercise its authority to abate the nuisance and recover associated costs by levying an assessment on the property to reimburse the local government for the costs of abatement, excluding any associated fines or penalties. This assessment constitutes a lien against the property and is of equal rank with state, county, and municipal taxes. Similar provisions apply to a grantee of a trustee's deed or a sheriff's deed in receipt of a notice from the local governmental entity that a property is a nuisance.

A local government is not liable for any damages caused by any act or omission of the mortgage servicer or its designee.

Votes on Final Passage:

House	98	0	
House	96	0	
Senate	49	0	(Senate amended)
House	96	0	(House concurred)

Effective: June 7, 2018