

HOUSE BILL REPORT

2ESHB 2057

As Amended by the Senate

Title: An act relating to the services and processes available when residential real property is abandoned or in foreclosure.

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).

Brief History:

Committee Activity:

Judiciary: 2/14/17, 2/16/17 [DPS].

Floor Activity:

Passed House: 3/6/17, 98-0.

Floor Activity:

Passed House: 1/18/18, 96-0.

Senate Amended.

Passed Senate: 3/1/18, 49-0.

Brief Summary of Second Engrossed Substitute Bill

- Raises the amount of the required beneficiary remittance, to the Department of Commerce for deposit into the Foreclosure Fairness Account, from \$250 to \$325 for every recorded notice of trustee's sale (NOTS) on a noncommercial loan on residential real property.
- Requires that a NOTS cover sheet clearly indicate the name of the beneficiary and whether the loan is commercial or noncommercial, and requires the auditor to index each NOTS by beneficiary in addition to any other indexing requirements.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Muri, Assistant Ranking Minority Member; Frame, Goodman, Graves, Hansen, Kirby, Klippert and Orwall.

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.

Minority Report: Do not pass. Signed by 3 members: Representatives Rodne, Ranking Minority Member; Haler and Shea.

Staff: Cece Clynch (786-7195).

Background:

Most loan obligations for residential real property in Washington are secured by deeds of trust. In 2011 the Foreclosure Fairness Act was enacted, making changes to the process related to the nonjudicial foreclosure of deeds of trust. As part of those changes, 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 (the 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. For purposes of this section:

- "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.

Monies in the Account pay for the Program, including mediation, counseling, consumer protection, and legal representation.

Summary of Second Engrossed Substitute Bill:

Foreclosure Fairness Program and Account.

For each notice of trustee's sale (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.

Every NOTS must include a cover sheet on which it is clearly indicated the name of the beneficiary and whether the loan is commercial or noncommercial. The auditor is required to index the NOTS by beneficiary, in addition to any other indexing requirements.

References in the Foreclosure Fairness Act to the expired federal Home Affordable Modification Program are stricken.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment:

- retains the provision increasing the amount of the required beneficiary remittance (to the Department of Commerce (Commerce) for deposit into the Foreclosure Fairness Account) from \$250 to \$325 for every recorded notice of trustee's sale (NOTS) on a noncommercial loan on residential real property, and continues to allow Commerce to adjust the amount of the fee, not to exceed \$325, at a sufficient level to defray the costs of the program;
- adds the following provisions:
 - to Chapter 61.24 RCW regarding deeds of trust (DOT)/nonjudicial foreclosure:
 - provides that the filing of a civil case to obtain court approval to access/secure/maintain/preserve property from waste or nuisance does not constitute an action for purposes of determining whether the requisites for nonjudicial foreclosure are met;
 - requires that the trustee 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 DOT, and that this declaration be transmitted to the borrower and grantor;
 - specifies information that must be included on the first page of the notice of default, including the current beneficiary, mortgage servicer, and trustee.
 - sets forth procedures to be utilized with respect to deceased borrowers and successors in interest;
 - requires additional indexing requirements be on notices of trustee's sale (NOTS), which the auditor will index; and
 - adds a new section governing cases in which a trustee under a DOT is named as a defendant in an action or proceeding in which the DOT is the subject. Allows the trustee to file a declaration of nonmonetary status, to which other parties may object, and specifies timelines and procedures;
 - to Chapter 61.12 RCW governing judicial foreclosure:
 - specifies the notice that the mortgagee must provide to the mortgagor of any reverse residential mortgage before any legal action to foreclose is commenced; and
 - to Title 7 RCW (Special Proceedings & Actions), a new chapter, as follows:
 - provides a process that may be utilized when residential real property (consisting solely of a single-family residence, a residential condominium unit, or a residential cooperative unit) is determined by a

county/city/town (local government), in an affidavit or declaration, to be abandoned, in mid-foreclosure, and a nuisance:

- allows either the local government or a mortgage servicer to initiate the process by which the local government makes the determination;
- permits a mortgage servicer or its designee, upon receipt of an affidavit or declaration from the local government, to enter the property for the purposes of abating the identified nuisance, preserving property, or preventing waste and specifies the steps that may be taken to secure the property; and
- permits the local government to take certain action if a mortgage servicer, or the grantee of a trustee's deed or sheriff's deed, does not abate the nuisance on such property and allows the local government to recover its costs of abatement, not including associated fines or penalties.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Over the years, the stakeholder group has spent countless hours negotiating the Foreclosure Fairness Act (FFA). The funding formula for the FFA services was changed last year. It is not bringing in the amount of money that was anticipated. Some of this is due to a decrease in foreclosures, as well as the manner of collection, and this issue must be dealt with this year. In addition, there is a new partnership between local communities, banks, and homeowners to deal with the problem of abandoned properties. There will be ongoing work on these issues and this bill.

The lead attorney in the *Jordan* case has six years of experience and insight on the issue that was at the heart of *Jordan*. There were numerous forcible entries based on uniform contractual provisions in deeds of trust. In *Jordan*, the court said this violated a Washington statute that has been on the books since territorial days that grants exclusive right of possession to the borrower until foreclosure is complete. This bill provides a framework for preforeclosure entry when a house is truly abandoned and truly suffering waste. It contains important definitions. It also assists municipalities that truly suffer when homes are abandoned. Support is still contingent on not changing protections found in the bill. In addition, the bill needs some additions, such as express requirements regarding the licensing of businesses that actually enter the homes. Typically, loans are securitized and held in trust. Servicers administer the loans and handle the default process, too. Servicers, in turn, contract with property preservation companies. National property preservation companies contract with regionals, and then the regionals contract with a local contractor. These are not necessarily licensed contractors, but people found on Craigslist. There have been entries into homes that are not abandoned, and removal of personal property. This is why it is important

that there be a licensing component. Also, there needs to be more direct language that servicers cannot disavow their agency relationship as they have been known to do. Do not include a retroactivity provision. It is unclear that such a provision would even be constitutional.

The bankers want to support this. It is very important for the industry. Inclusion of a retroactivity provision should also be considered. Consideration should be given to clarifying that servicers should not be sued for what has gone before and measures that were taken that were in accord with requirements imposed by Fannie Mae and Freddie Mac and were pursuant to contracts that they had with homeowners. The bankers do not represent government-sponsored entities such as Fannie Mae and Freddie Mac, but banking representatives have spoken to them about this issue because it has the potential to impact them. Retroactivity is not a request made for those who acted in bad faith, but for the others who did not. Also, a provision should be included with respect to successors in interest. There is a need for certainty when the borrower is deceased. The bankers will continue to negotiate in good faith.

A bipartisan group of legislators created the FFA. It isn't perfect, but it is considered a model in the nation. Two important fixes need to be made. First, *Jordan* has led to uncertainty. Second, funding changes are needed so as to ensure counseling and mediation services. *Jordan* invalidated a key provision that has been included in deeds of trust for decades. As a result, banks cannot maintain abandoned properties and cannot preserve the value of the property. The bill will protect homeowners and will regulate property preservation companies. It will allow servicers and agents access to maintain the properties, and it will create a duty to maintain properties, both in foreclosure and post-foreclosure. This effort is complicated, but there is confidence that it will get done. A further change is needed to the funding to make sure that those who should pay are paying. Financial institutions have agreed to raise the fee and pay up front. The smallest will be able to apply for a refund for fees paid upfront. This will allow full funding of the program and tracking.

Cities such as Tacoma, SeaTac, and Spokane Valley have seen increased numbers of vacant and abandoned homes. Cities support the bill. The sponsor's leadership on the issue, and the inclusion of cities as partners in this effort is appreciated. When neighbors notice crime and graffiti, they contact their local city and the city looks into it. Under current law, cities have limited options. Cities try to contact the owner, but who that is can be unclear. One element of the bill increases communication with the locals. This allows the city to know the status of the property. Cities do have nuisance abatement authority, but ideally they would like the lenders and owners to do the work and not impose this cost on taxpayers. There should be a provision added that requires financial institutions to continue to maintain homes that are in mid-foreclosure as well as post-foreclosure. It is recommended that the Oregon model be examined. Cities like Bremerton must keep neighborhoods healthy and fight blight and want to see this move forward.

Much work has been done over the last few years to protect homeowners and make sure there is a fair process. The impetus to work on the issue of abandoned properties comes from an economic justice perspective. Homes that are abandoned and crime-ridden become a problem for the municipalities and the neighbors. For this reason, there is interest in seeing a narrow exception to the longstanding law that says the homeowner has possession until

foreclosure is complete. But, homeowner rights must be protected. There are numerous stories of what clients have faced at the hands of property preservationists who have taken property and replaced locks on doors. Many times in these situations the homeowners think that they cannot come back, and they leave long before they have to. In this state, they have the right to occupy until 20 days after the foreclosure is complete. Columbia Legal Services' support is limited to fixing the funding and providing for prescribed, limited entry into abandoned property.

Although there have been about 12,000 recorded notice of trustee's sales (NOTS), only about 7,000 NOTS' worth of funds have been paid into the account. It is recognized that it is a big, bold request to require that the fee be paid upfront at the time of recording, but it is necessary. The funding problem may be due to exemptions. Some of those on the list that the Department of Commerce kept were not entitled to exemptions. After pushing on this issue, those not entitled to be on the list were removed from the list. This new method will work better.

An attorney in private practice representing a wide range of clients, not just lower income clients, has seen that these issues affect people of all different income levels. Property preservationists have a perverse incentive to break into a house because, if a house is not abandoned, and they don't break in, they don't get paid. There have been instances when: a condo unit was broken into for the purported purpose to winterize, but this condo unit was inside a condo building, and such action, therefore, makes no sense; and a new lock box was put on a home where there was a real estate sales sign up. Retroactivity is a no-go and would be unconstitutional. Homeowners will never agree to it. Homeowners and their representatives want to stop blight but a lot of responsibility falls on banks who are letting properties become blighted.

The trustees support this and hope that all can be resolved. Trustees are third parties in the process. There are other updates that should be included in addition to the *Jordan* fix. One issue is around a beneficiary declaration and when it is provided. Perhaps, this will be provided at the notice of default stage. Another issue being looked at concerns trustees being able to get out of a dispute by saying they have no financial interest. The last component is funding. Trustees float fees during the foreclosure process and don't get paid until the end. This can be a very long wait. Trustees have been asked what they think about paying this fee on NOTS at the time of recording, and they should be responding in the near future.

(Opposed) None.

(Other) Representative Orwall deserves thanks for working on this. The City of Spokane is concerned with over 500 abandoned homes. This weekend there was a fire in a home that had been in foreclosure for two years. A squatter set the house on fire. This bill needs more work. The major item for Spokane is that the city already has in place a registry and fees with respect to abandoned homes and wants to make sure the city can continue to do what it is doing, or that the legislation does at least as good a job. The *Jordan* fix is important to community banks. A standard part of these contracts allows the lender to maintain the property. As to the funding issue, the actions that precipitated the foreclosure crisis were not the actions of community banks. Community banks are not comfortable yet with the way this is structured for payment, but are willing to continue to work on this going forward.

Persons Testifying: (In support) Representative Orwall, prime sponsor; Clay Gatens; Jessica Fortescue, Washington Mortgage Bankers Association; Briahna Murray, Cities of Tacoma, Spokane Valley, and SeaTac; Denny Eliason, Washington Bankers Association; Lili Sotelo, Columbia Legal Services; Melissa Huelsman, Law Offices of Melissa A. Huelsman PS; Holly Chisa, United Trustees Association; and Dino Davis, City of Bremerton.

(Other) Brad Tower, Community Bankers of Washington; and Nick Federici, City of Spokane.

Persons Signed In To Testify But Not Testifying: None.