

HOUSE BILL REPORT

ESSB 5797

As Reported by House Committee On: Judiciary

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: Senate Committee on Financial Institutions & Insurance (originally sponsored by Senators Mullet, Fain and Hobbs).

Brief History:

Committee Activity:

Judiciary: 3/21/17, 3/23/17 [DP].

Brief Summary of Engrossed Substitute Bill

- Puts in place a multi-level process by which a servicer may enter abandoned residential real property to make repairs or remediate problems.
- Specifies new duties with respect to ongoing maintenance.
- Authorizes the Housing Finance Commission (HFC) to issue certificates of abandonment for a fee, and requires the HFC to notify the appropriate city, town, or county.
- Makes changes to the method and amount of beneficiary remittances into the Foreclosure Fairness Account.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Muri, Assistant Ranking Minority Member; Frame, Goodman, Graves, Haler, Hansen, Kirby, Klippert, Orwall and Shea.

Staff: Cece Clynch (786-7195).

Background:

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.

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.

Jordan v. Nationstar.

In 2016 a majority of the Washington Supreme Court held in *Jordan v. Nationstar* that under Washington's lien theory of mortgages and statutory provisions a borrower and a lender cannot, prior to default, enter into a contractual agreement that allows the lender to enter, maintain, and secure the property prior to foreclosure. The majority recognized that, absent postdefault 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 predefault agreement, enter, maintain, and secure seemingly abandoned property before foreclosure.

Summary of 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 \$300 to the county auditor at the time of recording. The auditor retains 3 percent for purposes of operations and maintenance. The remaining funds are remitted to the State Treasurer for deposit into the Foreclosure Fairness Account.

Beneficiaries or loan servicers that are federally insured depository institutions that record fewer than 50 NOTS in a year must make the remittance at the time of recording, but may subsequently request a refund from the Department of Commerce on either a quarterly or an annual basis.

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 county auditors are required to index the NOTS by beneficiary, in addition to any other indexing requirements.

Multi-Level Process for Entry or Maintenance.

The Housing Finance Commission (HFC) is authorized to issue a Certificate of Abandonment (Certificate) for a fee, not to exceed \$100. The HFC is required to notify the appropriate city, town, or county upon issuance. These Certificates are part of the following multi-level process, pursuant to which a servicer may enter abandoned residential real property to make repairs or remediate problems:

1. With the borrower's postdefault written permission, a servicer may enter the premises and inspect, secure, repair, or maintain the premises in accordance with the scope of the permission granted. Similarly, a servicer in possession of a court order may enter to access, secure, maintain, and preserve the premises and act within the scope of the order.
2. Absent permission but after default and a reasonable inspection that provides reasonable cause to believe property is abandoned, a servicer may enter premises and perform reasonable external maintenance such as maintaining landscaping, collecting and disposing of trash, painting over graffiti, and removing hazardous property. Such work can only be done after providing the requisite three-day notice that includes information about the borrower's right to possession, a 24-hour telephone number to call with questions or concerns, the telephone number to find a housing counseling agency, and information about the borrower's or lawful occupant's right to possession. "Reasonable cause to believe the property is abandoned," for this level, means that the property exhibits a lack of evidence of occupancy and at least one of the following:
 - a. overgrown or dead vegetation;
 - b. an accumulation of newspapers, circulars, fliers, or mail;
 - c. past due utility notices, or some or all of the utilities have been disconnected;
 - d. an accumulation of trash, junk, or debris; or
 - e. broken windows.
3. Absent permission but after default, issuance of a Certificate, provision of appropriate notice, and expiration of a 30-day waiting period, a servicer may enter a dwelling to take reasonable steps, which are defined, to secure the property. To be considered abandoned for purposes of issuance of a Certificate, the property must be open and unprotected and in reasonable danger of significant damage resulting from exposure to the elements or vandalism *or* the local police, fire department, or code enforcement

- has requested that the borrower, owner, or any other interested party secure the property because it has been declared an imminent danger *and* at least three of the following are visible from the exterior:
- a. the absence of furnishings and personal items consistent with residential habitation;
 - b. the gas, electric, and water utility services have been disconnected;
 - c. statements by neighbors, passersby, delivery agents, or government employees that the property is vacant;
 - d. multiple windows on the property are boarded up or closed off or are smashed through;
 - e. doors are smashed through, broken off, or continuously unlocked;
 - f. the property has been stripped of copper or other materials, or interior fixtures have been removed;
 - g. law enforcement have received at least one report of trespassing or vandalism or other illegal activities within the immediately preceding six months;
 - h. the property has been declared unfit for occupancy or ordered to remain vacant;
 - i. construction was initiated but discontinued and the building left unsuitable for occupancy for at least six months;
 - j. newspapers, mail, or circulars have accumulated;
 - k. trash has accumulated; or
 - l. other evidence exists of intent to vacate and abandon.
4. Finally, if the requirements of the third level have been met and there is a threat of imminent danger of harm, a servicer need not wait 30 days but may enter immediately and, simultaneous with entry, post the required notice. "Imminent danger of harm" means:
- a. active flooding, including damage to the roof such that water is entering the structure;
 - b. extreme weather conditions exist and immediate and extensive property damage is likely;
 - c. notification by the police, fire department, or code enforcement that there is immediate danger to health, safety, and welfare of the public; or
 - d. broken windows or damaged door that could allow unlawful access.

Certificates are not required for the first or second levels, but the HFC must be informed so that it may notify the appropriate city, town, or county engaged in on-site property preservation.

Beginning 30 days after obtaining written permission of a borrower or a court order allowing entry, or the issuance of a Certificate, and until the later of the recording of the trustee's deed by the purchaser or 15 days after physical delivery of the trustee's deed to the purchaser, a beneficiary or its agent or servicer is under a duty to maintain the property during any period in which the property is vacant. "Maintain" means: securing doors and windows; landscaping; collecting and disposing of newspapers, circulars, and debris; removing hazardous property; securing exterior pools and hot tubs; and eliminating other threats to public health and safety.

If a local government finds a violation of this duty, the local government must notify the servicer and specify a time within which the condition must be remedied. In the event that the condition is not remedied in a timely manner, the local government may remedy or contract with another person to remedy and require the servicer to reimburse the local government for reasonable costs incurred. A local government incurring such costs has a lien on the property for the sum of the unreimbursed costs, and this is prior to all other liens and encumbrances except that it has equal priority with a tax lien.

A servicer is also under an obligation to maintain and may not neglect property during any period in which the property is vacant. For purposes of this section, "neglect" means: to fail or a failure to maintain the buildings, grounds, and appurtenances of property in specified ways; or to fail or a failure to monitor the condition of property by inspecting the property at least once every 30 days with sufficient attention so as to prevent or to identify and remedy specified conditions. Remedies are set forth which a local government may take upon finding a violation, which include allowing the local government to remedy the problem or hire another to do so, requiring the servicer to reimburse for the costs, and ultimately providing a lien to the local government that is prior to all other liens and encumbrances except that it has equal priority with a tax lien.

Servicers and Agents.

The authority of an agent, such as a property preservation entity, to enter abandoned property and to perform any sort of work derives solely from the servicer's authority. A servicer has a duty to supervise and monitor its agents and to make sure that its agents possess the appropriate permit, license, certificate, or registration, and are properly bonded and insured if so required. The servicer must also require that the agent implement stringent background check requirements for all of its employees.

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) There is qualified support for this bill. Thanks are due to all for showing patience with the process, and especially to the sponsor for keeping the group on task. Thus far, there have been over 30 hours of negotiation. The bill does several things: (1) it appropriately protects the rights of homeowners; (2) it allows a servicer to have structured access to property to preserve and maintain it; (3) a duty to maintain is created; and (4) an important funding provision is included for the Foreclosure Fairness Account. There are still two provisions important to the financial industry and trustees that have yet to be agreed upon: (1) a limitation on liability for actions taken by servicers prior to the Jordan case; and (2) trustee protection with respect to nonmonetary interests.

(Opposed) None.

(Other) Thanks are due to all participating in the stakeholder process on this bill. While this group has been meeting for many years around issues relating to foreclosure, cities were brought in for the first time this year to talk about how this fits in with community concerns around abandoned homes. Cities support this as a work in progress. Community members frequently go to their city officials to express concerns about abandoned properties, and cities are currently limited in what they can do. This bill will give more tools to cities. There are still more tweaks that need to be made, but the bill is moving in the right direction.

Persons Testifying: (In support) Denny Eliason, Washington Bankers Association.

(Other) Briahna Murray, Cities of Tacoma, SeaTac, and Spokane Valley.

Persons Signed In To Testify But Not Testifying: None.