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REVISITING MORTGAGE PROCEDURES IN NEW JERSEY

Robert Lorfink

I. Introduction

Tension has always existed in the foreclosure process. On the one hand, there is an interest in allowing the mortgagor to remain in possession as long as possible, hoping to begin making payments again. On the other hand, the mortgagee has an interest in getting the benefit of its bargain in the mortgage payment, and in the case of default, recovering its security interest. In good times, the system generally functions well. A mortgagor may be able to get new financing or a modification to resume payment, and if not, the mortgagee can sell the property to recover its interest. In bad economic times, the process breaks down and may not protect either the mortgagor's or the mortgagee's interest. The mortgagee may not be able to recover its investment at the foreclosure sale, and there may be no hope for the mortgagor to resume payment, and could be forced into homelessness.

Different states have taken different approaches to resolving these tensions. New Jersey's approach has been the exclusive use of judicial foreclosure.¹ New Jersey's system of judicial foreclosure has not worked efficiently since the 2008 housing crisis. New Jersey recently moved up to second among the states when ranked by the rate of homeowners with seriously delinquent loans—those loans ninety or more days late or in foreclosure.² New Jersey's rate of 12.7% ranks only behind Florida at 17.5%, but Florida's rate fell 1.2 points while New Jersey's rate is rising.³ In the fiscal year ending in July 2012, home values increased in forty-two states, while New

¹ Judicial foreclosure is foreclosure that is entirely overseen by the judiciary, beginning with the mortgagee filing a lawsuit.

² John Gittelsohn & Prashant Gopal, *Foreclosure Reviews Stall Housing Revival State's Judicial Process Could Depress Prices for Years*, THE STAR-LEDGER (Newark, N.J.), Sept 19, 2012, at A1.

³ *Id.*

Jersey prices fell 0.8%.⁴ New Jersey appears to be missing out on the beginnings of a nationwide housing recovery.

The current problem seems to have no end in sight for New Jersey. As of February 2012, New Jersey faced a backlog of 50,000 to 100,000 unprocessed foreclosures.⁵ According to Morgan Stanley, there may be a hidden supply of 5.7 million homes either in default or being foreclosed nationwide, more than double the current inventory of 2.4 million homes for sale, and certainly many of these are in New Jersey.⁶ States that have been able to reduce their foreclosure backlogs have begun to see a recovery.⁷ According to the *Star-Ledger*, “[i]n California and Arizona, which have cut their shadow inventories in half in the past two years, investors have flooded the market with cash to buy a diminishing supply of distressed homes, helping housing prices find a floor and reducing the incentive for underwater homeowners to walk away from their debts.”⁸ In western states, distressed homes currently make up 40% of transactions, having peaked at 72% in January 2009, while in the Northeast they make up 17%, never having reached more than 24% in a given month.⁹ Delays in foreclosure have also kept banks from lending in New Jersey, as investors and banks are very reluctant to lend in a state where it is difficult or impossible to foreclose.¹⁰

The most recent financial crisis has generated another serious problem in New Jersey—a glut of abandoned homes. Abandoned homes can draw crime and other problems to a

⁴ *Id.*

⁵ Stacie Servetah, *NJ Has Backlog of Up to 100k Foreclosures*, BLOOMBERG, <http://www.bloomberg.com/news/2012-02-08/nj-has-backlog-of-up-to-100k-foreclosures.html> (Feb. 8, 2012).

⁶ Gittelsohn & Gopal, *supra* note 2, at A6; *but see* Nick Tamiraos, *Shadow Inventory: It's Not as Scary as it Looks*, WSJ BLOGS (Aug. 14, 2012, 9:55 AM), <http://blogs.wsj.com/developments/2012/08/14/shadow-inventory-its-not-as-scary-as-it-looks>.

⁷ *Id.*

⁸ *Id.* *See also* Robbie Whelan, *Firms Flock to Foreclosure Auctions*, WALL ST. J., Sept. 11, 2012, <http://online.wsj.com/article/SB10000872396390443696604577644700448760254.html> (houses in Georgia).

⁹ Gittelsohn & Gopal, *supra* note 2, at A6.

¹⁰ *Id.*

neighborhood, as well as drive down values of nearby homes. When values decline in an area, more homeowners can end up underwater on their mortgages, leading to more homes becoming abandoned. Abandoned properties also put more stress on cities, as property tax receipts can decline because the overall tax base shrinks. These unused homes could be put to more beneficial use if they could be used for affordable housing. The foreclosure crisis has created a need for more affordable housing, and some of these abandoned properties can be utilized to house these people.

This Note analyzes the tensions that exist in foreclosure law and how New Jersey has attempted to deal with those tensions. This Note will examine and propose some ideas for reform that could help aid those in need of housing today and mitigate the backlog of foreclosures from developing again in the future. Part II will look at what the law currently is in New Jersey, part III will discuss some ideas for reform, and part IV will analyze the reforms.

II. Current New Jersey Law

A. Origins of Tension: A Brief Common-Law History of Foreclosure

The mortgage first developed in the fourteenth and fifteenth centuries in England as a conveyance of fee simple ownership subject to a condition subsequent. The condition subsequent was the repayment of the loan.¹¹ The mortgagor would convey the property to the mortgagee on the condition that if the mortgagor made payment on a certain day (“law day”), the mortgagor would have the right to enter the land and terminate the mortgagee’s estate.¹² This condition was gradually replaced by a covenant by the mortgagee to re-convey to the mortgagor after full payment.¹³ If the mortgagor failed to perform on law day, the mortgagee’s estate became

¹¹ GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 6 (4th Ed. 2002).

¹² *Id.*

¹³ *Id.* at 7.

absolute.¹⁴

This rule was very harsh to the mortgagor. The reason the mortgagor failed to make payment was irrelevant. Even if the mortgagor could not find the mortgagee on law day to make payment, the mortgagor forfeited all interest in the property.¹⁵ The English chancery courts stepped in to aid these mortgagors. Equity's first step was "to aid the mortgagor who had failed promptly to perform on law day where the mortgagor could establish such traditional equitable grounds for relief as fraud, accident, misrepresentation, or duress."¹⁶ By the seventeenth century, this system had evolved to the point that the equity allowed all mortgagors to redeem the land if they tendered all sums due and owing within a reasonable time after law day.¹⁷ The mortgagor no longer needed to assert equitable grounds for relief.¹⁸ This right to redeem became known as the mortgagor's equity of redemption, and it was a recognized equitable estate in land.¹⁹ One commentator described this development as "the most magnificent triumph of equity jurisprudence over the injustice of the common law..."²⁰

The equity of redemption created a problem for mortgagees. The mortgagee would never know whether the mortgagor would sue in equity to redeem after a default. As a result, the mortgagee's equitable right to foreclose arose. The mortgagee could request a bill that set forth the details of the mortgage and default, and the equity courts would order the debt paid with a certain time period.²¹ The mortgagee could only take this action after law day, and only if the mortgagor had not sued to redeem.²² If the mortgagor did not comply with the order, he forever

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ NELSON & WHITMAN, *supra* note 11, at 7.

¹⁸ NELSON & WHITMAN, *supra* note 11, at 7; *see also* Sears, Roebuck & Co. v. Camp, 124 N.J. Eq. 403, 407 (1938).

¹⁹ NELSON & WHITMAN, *supra* note 11, at 7 (citing George Osborne, MORTGAGES, § 6 (2d ed. 1970)).

²⁰ *Camp*, 124 N.J. Eq. at 407 (quoting Professor Pomeroy).

²¹ Nelson & Whitman, *supra* note 11, at 8.

²² *Id.*

lost his ability to redeem the mortgage.²³ This process, known today as strict foreclosure, involved no sale of the land; the mortgagor simply forfeited the land to the mortgagee.²⁴

B. Current New Jersey Residential Foreclosure Procedure: The Fair Foreclosure Act

In New Jersey, this process continued largely unchanged until the passage of the Fair Foreclosure Act in 1995. A mortgagee would bring a foreclosure suit in the General Equity part of the Chancery Division to foreclose the mortgagor's equity of redemption. The Fair Foreclosure Act imposed notice requirements and gave mortgagors an opportunity to cure their defaults, all discussed *infra*.

The Fair Foreclosure Act²⁵ ("FFA") applies to all residential foreclosures in New Jersey. When the Legislature passed the Act, it "[found] and declare[d] it to be the public policy of this State that homeowners should be given every opportunity to pay their home mortgages, and thus keep their homes; and that lenders will be benefited when residential mortgage debtors cure their defaults and return defaulted residential mortgage loans to performing status."²⁶ The act has been described as "the most comprehensive change in foreclosure practice in New Jersey since 1820."²⁷ The FFA became effective December 4, 1995.²⁸ The Fair Foreclosure Act is remedial and intends to provide protection for residential mortgage debtors;²⁹ no rights created by the Fair

²³ *Id.*

²⁴ *Id.*

²⁵ N.J. STAT. ANN. § 2A:50-53 *et seq.* (2013).

²⁶ N.J. STAT. ANN. § 2A:50-54 (2013).

²⁷ Myron C. Weinstein, *New Foreclosure Act: More Complexity, Uncertainty*, N.J.L.J., Dec. 4, 1995, at 57.

²⁸ *Id.* At the time the Legislature passed the FFA, New Jersey had the second highest rate of foreclosures in the nation, seeing an increase in the number of foreclosure suits filed rise from 7,288 in 1987 to 23,547 in 1991. Louis Novellino, *Saving the American Dream, Supplement to the New Jersey Law Journal*, N.J.L.J., June 26, 1995, at 60. The FFA was designed to "[level] the playing field" by, *inter alia*, providing for the redemption period discussed *infra. Id.*

²⁹ Spencer Sav. Bank, SLA v. Shaw, 949 A.2d 218, 221 (N.J. Super. Ct. App. Div. 2008); *see also* Atlantic Palace Development LLC v. Robledo, 933 A.2d 48 (N.J. Super. Ct. Ch. Div. 2007). The FFA defines "residential mortgage" as

a mortgage, security interest or the like, in which the security is a residential property such as a house, real property or condominium, which is occupied, or is to be occupied, by the debtor, who is a natural person, or a member of the debtor's immediate family, as that person's residence. This

Foreclosure Act may be waived.³⁰

The FFA imposes specific notice requirements mortgagees must provide a mortgagor before a foreclosure action may be filed. Before a lender can accelerate the mortgage debt and bring a foreclosure or any other legal action to take possession of the mortgaged premises, the lender must give the debtor notice of the lender's intention to accelerate and bring legal action at least thirty days before filing the action.³¹ This notice must be in writing, sent via certified mail, return receipt requested, to the debtor's last known address and also the address of the mortgaged premises, if they are different, but notice is not required if the debtor has voluntarily surrendered the property.³² The notice must clearly and conspicuously make the debtor aware of a number of items.³³

act shall apply to all residential mortgages wherever made, which have as their security such a residence in the State of New Jersey, provided that the real property which is the subject of the mortgage shall not have more than four dwelling units, one of which shall be, or is planned to be, occupied by the debtor or a member of the debtor's immediate family as the debtor's or member's residence at the time the loan is originated.

N.J. STAT. ANN. § 2A:50-55 (2013).

If the mortgagor intends to use the mortgaged property as a residence at time of origination, but then vacates the property and has no intention to return at the time a foreclosure action is filed, the property is not encumbered with a residential mortgage for purposes of the FFA. *Sturdy Savings Bank v. Roberts*, 427 N.J. Super. 27, 38-39, 46 A.3d 632 (N.J. Super. Ct. Ch. Div. 2012).

³⁰ N.J. STAT. ANN. § 2A:50-61 (2013).

³¹ *Id.* § 2A:50-56(a).

³² *Id.* § (b), (d).

³³ *Id.* § (c). The notice must include the following:

- (1) the particular obligation or real estate security interest;
- (2) the nature of the default claimed;
- (3) the right of the debtor to cure the default as provided in section 5 of this act;
- (4) what performance, including what sum of money, if any, and interest, shall be tendered to cure the default as of the date specified under paragraph (5) of this subsection c.;
- (5) the date by which the debtor shall cure the default to avoid initiation of foreclosure proceedings, which date shall not be less than 30 days after the date the notice is effective, and the name and address and phone number of a person to whom the payment or tender shall be made;
- (6) that if the debtor does not cure the default by the date specified under paragraph (5) of this subsection c., the lender may take steps to terminate the debtor's ownership in the property by commencing a foreclosure suit in a court of competent jurisdiction;
- (7) that if the lender takes the steps indicated pursuant to paragraph (6) of this subsection c., a debtor shall still have the right to cure the default pursuant to section 5 of this act, but that the debtor shall be responsible for the lender's court costs and attorneys' fees in an amount not to exceed that amount permitted pursuant to the Rules Governing the Courts of the State of New Jersey;

The debtor has the ability to cure the default, de-accelerate the debt, and reinstate the mortgage by tendering the amount required by the notice that would be the amount of the missed payments to bring payment current.³⁴ This can be done at any time, up to the entry of final judgment by a court.³⁵ A default can be cured in this way once every eighteen months, and the eighteen-month period runs from the date the default is cured and the mortgage is reinstated.³⁶ To cure the default, the debtor must pay all sums that were due in absence of the default at the time of payment,³⁷ perform any other obligations of the mortgage or note, if any,³⁸ pay court costs and attorneys' fees as per court rules, if any,³⁹ and pay all late fees as provided by the note

(8) the right, if any, of the debtor to transfer the real estate to another person subject to the security interest and that the transferee may have the right to cure the default as provided in this act, subject to the mortgage documents;

(9) that the debtor is advised to seek counsel from an attorney of the debtor's own choosing concerning the debtor's residential mortgage default situation, and that, if the debtor is unable to obtain an attorney, the debtor may communicate with the New Jersey Bar Association or Lawyer Referral Service in the county in which the residential property securing the mortgage loan is located; and that, if the debtor is unable to afford an attorney, the debtor may communicate with the Legal Services Office in the county in which the property is located;

(10) the possible availability of financial assistance for curing a default from programs operated by the State or federal government or nonprofit organizations, if any, as identified by the Commissioner of Banking and Insurance. This requirement shall be satisfied by attaching a list of such programs promulgated by the commissioner; and

(11) the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact if the debtor disagrees with the lender's assertion that a default has occurred or the correctness of the mortgage lender's calculation of the amount required to cure the default.

Id.

In *US Bank Nat'l Ass'n v. Guillaume*, 38 A.3d 570 (2012), the New Jersey Supreme Court dealt with the issue of compliance with the notice provisions of the FFA. There, the notice of intent to foreclose contained the name and address of the loan servicer, not the bank that owned the loan. The court held that the FFA requires the inclusion of the name and address of the actual lender. *Guillaume*, 38 A.3d 570, 584-85 (N.J. 2012). The court further held that the equitable doctrine of substantial compliance did not apply to the FFA. *Id.* at 583-84. As a remedy for a defective notice, a court may dismiss the complaint without prejudice, order the service of a correct notice, or impose any appropriate remedy that is appropriate under the circumstances. *Id.* at 585-86.

³⁴ N.J. STAT. ANN. § 2A:50-57(a) (2013). At default, the mortgagee can accelerate the amount due on the mortgage, making the whole amount due immediately. De-acceleration would return the mortgagor to the position he was in prior to the default, that is making their usual monthly mortgage payment. The mortgagor would no longer owe a lump sum payment.

³⁵ *Id.*

³⁶ *Id.*

³⁷ N.J. STAT. ANN. § 2A:50-57(b)(1) (2013).

³⁸ *Id.* § (2).

³⁹ *Id.* § (3).

or mortgage.⁴⁰ This right to cure default is independent of any right of redemption under the common law, state or federal statute, or rule of court.⁴¹

Before applying for final judgment in an uncontested action, the mortgagee again must provide notice, and the notice must include a mention of the right of the mortgagee to redeem and de-accelerate the debt.⁴² The lender shall mail the debtor notice fourteen calendar days before the submission of proofs for entry of judgment.⁴³ Within no more than ten days, the debtor may mail the lender a statement in which the debtor in good faith certifies that there is a reasonable likelihood he can cure default within forty-five days of the date of notice final judgment will be applied for.⁴⁴ A lender who receives this statement cannot submit proofs for final judgment earlier than forty-six days from the lender mailing notice.⁴⁵ The FFA fixes the statute of limitations on foreclosure proceedings as the earliest of six years from the date fixed for making the last payment, thirty-six years from the date of recording, or if not recorded, thirty-six years from the date of execution, or twenty years from the date of the debtor's default.⁴⁶

The FFA also creates an optional foreclosure procedure without sale where the debtor has abandoned the property, the debtor has voluntarily surrendered the property by signing a deed in lieu of foreclosure, or there is no equity in the property.⁴⁷ The lender begins the procedure by filing an affidavit or certification setting forth the facts the lender alleges entitles it to the optional procedure.⁴⁸ The court or the Office will then enter an order fixing the amount, time,

⁴⁰ *Id.* § (4).

⁴¹ N.J. STAT. ANN. § 2A:50-57(f) (2013).

⁴² *Id.* § 2A:50-58(a)(1).

⁴³ *Id.* The notice must provide for 1) The location and contact information for a representative of the lender where payment can be tendered to cure default and 2) Notice that absent a response by the debtor, final judgment will be entered and the debtor will lose the right to cure the default as discussed, *supra. Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* §§ (2-3).

⁴⁶ *Id.* § 2A:50-56.1.

⁴⁷ N.J. STAT. ANN. § 2A:50-63(b) (2013).

⁴⁸ *Id.* § (c).

and place for redemption which shall be not less than forty-five or more than sixty days from the date of the order.⁴⁹ The lender must also provide notice to the debtor's last known address and the address of the property to be foreclosed, if different, by ordinary and certified mail within twenty days of the order being entered.⁵⁰ If a public sale is requested, the defendant must submit a written request to the court or the Office of Foreclosure within thirty days.⁵¹ The Office or court will then enter a judgment of foreclosure providing for a public sale of the mortgaged premises.⁵² To have a public sale, the defendant must post a cash deposit or bond which is 10% of the amount due to secure the lender against any additional costs or interest, as well as a possible deficiency.⁵³ This must be posted prior to the date that the order fixes as the date of redemption.⁵⁴ If there is no redemption, and where there is proof of mailing of the order for redemption or the notice required combined with an affidavit of non-redemption, the plaintiff lender will be entitled to a judgment foreclosing the equity of redemption of the defendants.⁵⁵ Upon entry of judgment, title becomes vested in plaintiff lender, and the debt is deemed

⁴⁹ *Id.* § (g). According to the statute the order must include:

- (1) the redeeming defendant pay to the plaintiff's attorney the amount fixed by the office or the court for redemption, together with interest to the date of redemption, plus all court costs;
- (2) redemption shall be by cash, cashier's check or certified check and made at the office of the plaintiff's attorney, if such office is located in the county where the property is situated, or at such other place as designated by the office or the court, between the hours of 9:00 a.m. and 4:00 p.m. of the date set by the office or the court in the order; and
- (3) in the absence of redemption, the defendants shall stand absolutely debarred and foreclosed from all equity of redemption.

Id.

⁵⁰ *Id.* § (h). This notice must:

- (a) inform the defendants that the plaintiff is proceeding under an optional procedure authorized by section 11 of this act and set out the steps of the optional procedure;
- (b) inform all defendants of the terms and conditions under which a defendant may request a public sale of the mortgaged premises pursuant to subsection i. of this section; and
- (c) clearly state that no request for a public sale made after 30 days from the date of service will be granted, except for good cause shown.

Id.

⁵¹ N.J. STAT. ANN. § 2A:50-63 (i).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* § (l).

satisfied.⁵⁶ If the lender sells the property following judgment, and the resale price exceeds the debt, interest, and reasonable costs of the lender plus carrying costs, the lender shall deposit the excess with the court.⁵⁷ When an excess is deposited with the court, the lender must notify the debtor and any other junior lien holder.⁵⁸ The debtor and any lien holder can apply within six months to receive excess funds.⁵⁹

Once judgment is final and a writ of execution is issued, the sheriff must schedule a sale within 120 days of the sheriff receiving the writ.⁶⁰ The sheriff may adjourn the sale no more than twice, and each adjournment cannot exceed fourteen days.⁶¹ Any further adjournment must come from a court of competent jurisdiction, for cause.⁶² If the sheriff is unable to schedule a sale within 120 days, the plaintiff mortgagee can apply to the Office for an order appointing a Special Master to hold a foreclosure sale.⁶³

C. The Foreclosure Action

All residential mortgage foreclosure pleadings are filed with the Office of Foreclosure (“the Office”).⁶⁴ The Office is a unit of the Administrative Office of the Courts, Civil Practice Division.⁶⁵ The Office’s attorneys review all complaints for compliance with statutory and common law requirements, review answers to determine if they are contesting, review services of process, process orders, and can recommend the entry of default.⁶⁶ If an answer filed with the Office is contesting the foreclosure, the Office will then send the case to the General Equity

⁵⁶ *Id.* § (m).

⁵⁷ N.J. STAT. ANN. § 2A:50-63(e)(3).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ N.J. STAT. ANN. § 2A:50-64(a)(3)(a).

⁶¹ N.J. STAT. ANN. § 2A:17-36.

⁶² *Id.*

⁶³ N.J. STAT. ANN. § 2A:50-64(a)(3)(c).

⁶⁴ NEW JERSEY COURTS, FORECLOSURE OVERVIEW, <http://www.judiciary.state.nj.us/civil/foreclosure/overview.html> [hereinafter “FORECLOSURE OVERVIEW”]. The Office also handles pleadings for multi-family, commercial, tax, and strict foreclosure. *Id.*

⁶⁵ *Id.*; see also N.J. CT. R. 1:34-6 (establishing the Office of Foreclosure).

⁶⁶ FORECLOSURE OVERVIEW, *supra* note 64.

judge in the county of venue.⁶⁷ Once a judge decides the case, it is again referred to the Office to be handled as an uncontested action.⁶⁸ The action is then processed by the Office, which will recommend entry of judgment by the General Equity judge sitting in the Mercer vicinage.⁶⁹

Before filing a foreclosure complaint, the plaintiff must do a title search to identify any lien holders or others with an interest in the property, and plaintiff's attorney must certify that this search has been completed.⁷⁰ Plaintiff's attorney must also attach to the complaint a certification of diligent inquiry confirming that he has communicated with a representative of plaintiff or the loan servicer who has personally reviewed the complaint and supporting documents and confirms their accuracy.⁷¹ The New Jersey Court Rule 4-64 also sets out specific requirements for the contents of the complaint.⁷² The plaintiff shall produce the original mortgage, note, assignment, or any other document on which its claim is based.⁷³ The plaintiff is permitted to produce a legible copy of a recorded or filed document as long as it is certified as a true copy.⁷⁴

The defenses to foreclosure are narrow and limited, and thus many cases will end on summary judgment. The only material issues in the proceeding are the validity of the mortgage, the amount of indebtedness, and the right of the mortgagee to foreclose on the mortgaged

⁶⁷ *Id.*

⁶⁸ *Id.* See *infra* page 14 for discussion of non-contesting answers.

⁶⁹ FORECLOSURE OVERVIEW, *supra* note 64.

⁷⁰ N.J. CT. R. 4-64-1(a)(1). Junior lienholders must be joined to have the opportunity to protect their interests. If a junior lienholder is not joined its rights are not affected by the foreclosure. *Citicorp Mortg., Inc. v. Pessin*, 570 A.2d 481, 484 (N.J. Super. Ct. App. Div. 1990).

⁷¹ N.J. CT. R. 4-64-1(a)(2)(A).

⁷² N.J. CT. R. 4-64-1(b)(1-13). The complaint must include the name of the mortgagor, the amount of the debt, the dates of execution for both the note and mortgage, the recording date of the mortgage, whether it is a purchase money mortgage, a description of the terms of the note and the mortgage, the date of default, the date of the debt's acceleration, any penalties, a recital of all assignments of the debt if plaintiff is not the original mortgagee, a description of the property, the names of all parties holding a junior lien or other interest and a description of that interest, and a statement of compliance with the notice requirements of the FFA and any other law. *Id.*

⁷³ N.J. CT. R. 4:64-2(a).

⁷⁴ *Id.*

property.⁷⁵ If there is no dispute on the execution, recording, and non-payment of the mortgage, the mortgagee has a *prima facie* right to foreclose.⁷⁶

In order to satisfy its burden of proof on a summary judgment motion, plaintiff must show that no genuine issue of material facts exists.⁷⁷ Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial.⁷⁸ In satisfying its burden, the defendant may not rest upon mere allegations or denials in its pleading, but must produce sufficient evidence to reasonably support a verdict in its favor.⁷⁹ All affirmative defenses must be supported by specific facts.⁸⁰ Parties must respond with affidavits setting forth specific facts showing that there is a genuine issue for trial.⁸¹ An “issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.”⁸²

The foreclosure action may be uncontested by the mortgagor. The action will be considered uncontested where a default has been entered because defendant has not entered a pleading or defense, no pleading of the defendant contests the validity or priority of the mortgage or creates an issue of plaintiff’s right to foreclose, or all contesting pleadings have been stricken

⁷⁵ Great Falls Bank v. Pardo, 622 A.2d 1353, 1356 (N.J. Super. Ct. Ch. Div. 1993). *See infra* Part II.D. for a discussion of one of these issues - standing). One of the biggest issues in contested foreclosures is the mortgagee’s right to foreclose, that is if the mortgagee has standing to sue. *See generally* Timothy A. Froehle, *Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements Are Necessary to Prevent Further Loss to Homeowners*, 96 IOWA L. REV. 1719, 1729-40 (2011) (discussing how an inability to show standing can delay foreclosure proceedings). As many mortgages are evidenced by a negotiable instrument, Article 3 of the Uniform Commercial Code applies. N.J. STAT. ANN. § 12A:3-301 (2013). For a discussion of the standing requirements under New Jersey’s enactment of the Uniform Commercial Code, *see* Bank of N.Y. v. Raftogianis, 13 A.3d 435, 438-440 (N.J. Super. Ct. Ch. Div. 2010).

⁷⁶ Thorpe v. Floremoore Corp., 89 A.2d 275, 276 (N.J. Super. Ct. App. Div. 1952).

⁷⁷ Brill v. Guardian Life Ins. Co. of Am., 666 A.2d 146, 150 (N.J. 1995).

⁷⁸ *Id.*

⁷⁹ Triffin v. Am. Int’l Group, Inc., 859 A.2d 751, 755 (N.J. Super. Ct. App. Div. 2004); N.J. CT. R. 4:46-5(a).

⁸⁰ N.J. CT. R. 4:5-4.

⁸¹ *See* N.J. CT. R. 1:6-6, 4:46-2.

⁸² N.J. CT. R. 4:46-2(c); *see also* Brill, 666 A.2d at 153-54.

or rendered non-contesting.⁸³ If the defendant's answer fails to challenge the essential elements of a foreclosure action, plaintiff is entitled to strike the answer as non-contesting.⁸⁴ When a party alleges they are without knowledge or information sufficient to form a belief as to the truth of an aspect of the complaint, the answer shall be deemed non-contesting to the allegation of the complaint to which it responds.⁸⁵

When a foreclosure action is deemed uncontested, the procedure is dictated by Rule 4:64-1(d). At the conclusion of a successful motion for summary judgment or to strike the defendant's answer, the matter shall be referred to the Office to proceed as uncontested.⁸⁶ The Office of Foreclosure is responsible for recommending entry of default in uncontested foreclosure matters pursuant to Rules 4:64-1 and 4:64-7.⁸⁷

III. Reform Proposals

The current state of the housing market in New Jersey illustrates the need to reform the current foreclosure process. The focus of any foreclosure reform effort in New Jersey should be focused around keeping people in their homes and getting abandoned property back into use as quickly as possible. The goal should be a high rate of homeownership. According to Professor Cox, “[h]igher homeownership has been linked to lower crime, better health, and a variety of other social quality measures. Although there is disagreement that homeownership is always beneficial, there is little dispute that policymakers at all levels of government afford homeownership a central place in national housing goals.”⁸⁸

⁸³ N.J. CT. R. 4:64-1(c)(1-3).

⁸⁴ *Old Republic Ins. Co. v. Currie*, 665 A.2d 1153, 1154 (N.J. Super. Ct. Ch. Div. 1995); *Somerset Trust Co. v. Sternberg*, 569 A.2d 849, 851 (N.J. Super. Ct. Ch. Div. 1989).

⁸⁵ N.J. CT. R. 4:64-1(a)(3).

⁸⁶ N.J. CT. R. 4:64-1(d).

⁸⁷ N.J. CT. R. 1:34-6.

⁸⁸ Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 724 (2008) (citing ROBERT D. DIETZ, *THE SOCIAL CONSEQUENCES OF HOME OWNERSHIP* 4 (2003), available at http://www.newtowncdc.org/pdf/social_consequences_study.pdf (“[H]omeownership is positively

In addition to maintaining home ownership, legislators should also work to prevent properties from becoming abandoned. Foreclosed properties that become abandoned can devastate a community.⁸⁹ Properties become unkempt and squatters can move in.⁹⁰ Public works departments in Hillside and Elizabeth have started to maintain properties themselves, placing tax liens on the properties to recover the costs when the property sells.⁹¹ Abandoned properties also lead to an increase in crime.⁹² A study performed in Austin, Texas, found the crime rate to be twice as high on blocks with abandoned properties.⁹³ There can also be health problems caused by trash and rodent infestations.⁹⁴

Abandoned properties also impact municipalities financially. Increased costs can come from more frequent fire and police response, as well as more frequent visits by health inspectors and other municipal officials.⁹⁵ While costs increase, tax receipts may be decreasing for the municipality. As property values decline, so do the assessed values of properties for property taxes.⁹⁶ The major problems caused by abandoned housing affect the entire community, from those living on the street to those who occupy city hall.

A. Lengthen the period between default and filing of a residential foreclosure action

One of the first reforms that could be considered is to lengthen the period before a foreclosure action may be filed. Currently in New Jersey, before filing a foreclosure action, the

associated with physical, mental and emotional health.”); NAT’L ASSOC. OF REALTORS, SOCIAL BENEFITS OF HOMEOWNERSHIP AND STABLE HOUSING 12 (2006), available at [http://www.realtor.org/Research.nsf/files/05 Social Benefits of Stable Housing.pdf/\\$FILE/05Social Benefits of Stable Housing.pdf](http://www.realtor.org/Research.nsf/files/05%20Social%20Benefits%20of%20Stable%20Housing.pdf/$FILE/05Social%20Benefits%20of%20Stable%20Housing.pdf) (“Research on crime and homeownership shows that homeowners are far less likely to become crime victims.”).

⁸⁹ See generally Meredith Mandell, *North Jersey’s Ghost Town*, THE RECORD (Hackensack), May 28, 2009 (discussing an area of Paterson).

⁹⁰ Erin Eileen O’Neill, *Towns Step in to Groom Abandoned Properties Foreclosed Homes Become a Blight on Neighborhoods*, THE STAR-LEDGER (Newark, N.J.), Nov. 15, 2009.

⁹¹ *Id.*

⁹² Cox, *supra* note 88, at 695.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

mortgagee must provide at least thirty-days' notice to the mortgagor of its intent to foreclose.⁹⁷ Some defaulting mortgagors are likely the victim of an unforeseen or unexpected event, such as a job loss or sudden illness.⁹⁸ Providing a longer period of time between default and the filing of a foreclosure action would provide the mortgagor with more time to get back on their feet and resume making payments. One month likely is not sufficient time to find a new job; a longer period such as three months would provide more of an opportunity for mortgagors to reinstate the loan and keep their house. A longer foreclosure period would also provide lenders a greater incentive to negotiate with mortgagors. States with longer foreclosure periods also have lower foreclosure rates.⁹⁹ Basically, the longer the process, the more incentive there is for the lender to avoid having to use the process.¹⁰⁰

Delay can also aid defaulting mortgagors who have equity in the property and wish to sell their property.¹⁰¹ Obviously, the shorter foreclosure period, the less time there will be to market the property and locate a buyer. An impending foreclosure auction will make it much more difficult, if not impossible, to sell a home.¹⁰² Providing three months of notice before the commencement of a foreclosure action would provide a much greater opportunity to the mortgagor to sell, and potentially save their credit from the damage of foreclosure.

B. The New Jersey Residential Foreclosure Transformation Act

Another possibility for reform in New Jersey is the Residential Foreclosure Transformation Act ("RFTA"). The RFTA was introduced in the State Senate on February 9,

⁹⁷ N.J. STAT. ANN. § 2A:50-56(a) (2013).

⁹⁸ See generally Cox, *supra* note 88, at 730 (discussing how a longer foreclosure process can allow the homeowner to rectify the problem).

⁹⁹ *Id.* at 731.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

2012, as S. 1566.¹⁰³ On June 25, 2012, the Senate passed the bill by a 21-18 margin. In turn, it passed the Assembly on June 28, 2012, by a vote of 44-33.¹⁰⁴ The RFTA was then vetoed by Governor Christie on July 26, 2012.¹⁰⁵ It has been reintroduced as S. 2157, and was passed by the Senate with a 22-17 vote.¹⁰⁶ It then passed the Assembly by a 43-32 vote.¹⁰⁷ The RFTA was then conditionally vetoed on January 28, 2013.¹⁰⁸ Essentially, the RFTA provides an expedited process for foreclosing abandoned residential properties.

The RFTA creates the New Jersey Foreclosure Relief Corporation (“the Corporation”), which would be a public body exercising governmental functions as part of the New Jersey Housing and Mortgage Finance Agency.¹⁰⁹ The Corporation would be governed by a seven-member board consisting of the Commissioner of Community Affairs, the Executive Director of the NJ Housing and Mortgage Finance Agency, the Commissioner of Banking and Insurance, the State Treasurer, and three others appointed by the Governor.¹¹⁰ The Corporation has to issue an annual report to the Governor and Legislature about its activities for the preceding year, as well as report on foreclosure activity in New Jersey and any changes from the prior year.¹¹¹

The Corporation would enter into contract with no more than two “qualified community development financial institutions” to negotiate and purchase properties and mortgage assets to

¹⁰³ S. 1566, 215th Leg. (N.J. 2012).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ S. 2157, 215th Leg. (N.J. 2012).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* A conditional veto is “a veto in which the Governor objects to parts of a bill and proposes amendments that would make it acceptable.” NEW JERSEY LEGISLATURE, GLOSSARY OF TERMS, *available at* <http://www.njleg.state.nj.us/legislativepub/glossary.asp>. Governor Christie’s conditional veto essentially deletes most of the text of the RFTA. Letter from Governor Chris Christie to Senate (Jan. 28, 2013), *available at* http://nj.gov/governor/news/news/552013/pdf/20130128_S-2157%20CV.PDF.

¹⁰⁹ S. 1566 § 4(a). The more recent RFTA does not create a corporation, but rather creates the New Jersey Foreclosure Transformation Program within the Housing and Mortgage Finance Agency. S. 2157 § 4.

¹¹⁰ *Id.* § (b).

¹¹¹ S. 1566 §§ 4(h)(1-2).

be used as affordable housing.¹¹² Preference would be given to those institutions with substantial lending experience in New Jersey or knowledge of New Jersey's real estate market.¹¹³

Once one of the institutions purchases a property, the property will be restricted for occupancy as affordable housing by a deed restriction.¹¹⁴ The Corporation can purchase any residential property that is owned by an institutional lender as a result of a foreclosure.¹¹⁵ Once the Corporation has acquired a property, it may "convey the property for occupancy as affordable housing subject to a 30-year deed restriction to another public agency, a community development corporation, a developer, or a qualifying household or the contractors may lease the property for occupancy as affordable housing subject to a 30-year deed restriction."¹¹⁶

As soon as the Corporation enters into a contract to purchase a property, the corporation must provide forty-five days in which a municipality can consent or withhold consent to the purchase of the property, or opt to purchase the property itself.¹¹⁷ Each eligible property purchased by a municipality that is then leased as rental housing would count for two units of credit towards its affordable housing obligation.¹¹⁸ Credits would also be given where the property is used for housing of mentally disabled individuals.¹¹⁹ If the municipality chooses not to exercise the option to purchase, it may pass a resolution authorizing the Corporation to use funds from the municipality's affordable housing trust fund to purchase the property.¹²⁰

The RFTA allows a mortgagee to bring a summary action in Superior Court to foreclose

¹¹² S. 1566 § 7(a)(1).

¹¹³ *Id.*

¹¹⁴ S. 1566 § 7(b)(2).

¹¹⁵ S. 1566 § 3.

¹¹⁶ S. 1566 § 7(d)(4).

¹¹⁷ S. 1566 § 7(b)(1).

¹¹⁸ S. 1566 § 8(c).

¹¹⁹ *Id.*

¹²⁰ S. 1566 § 7(d)(4).

a mortgage.¹²¹ The property must meet a statutory definition of “vacant and abandoned.”¹²² To foreclose using this procedure, the lender must establish that a process server has twice unsuccessfully attempted to serve the mortgagor at the residential property at different times of the day.¹²³ The lender must also, with the order to show cause or motion to proceed in summary manner, serve a notice that the lender is proceeding summarily for entry of foreclosure because the property is vacant and abandoned.¹²⁴ The notice of mortgagor’s right to cure under the FFA must be served as part of the original service of process of the order to show cause.¹²⁵ Judgment may be entered upon a finding, by clear and convincing evidence, that the property is vacant and abandoned, and a review of the pleadings support the entry of a final foreclosure judgment.¹²⁶

The Corporation is to cease operations on December 31, 2017, at which point any assets or funds remaining would transfer to the New Jersey Housing and Mortgage Finance Agency.¹²⁷ The expedited foreclosure process ends on December 31, 2014.¹²⁸

C. Power of sale for commercial and non-owner occupied residential foreclosure

One final possibility, limited use of power of sale foreclosure, could aid in eliminating some of the foreclosure back-up from happening again in the future. Removing some commercial and investor-owned property foreclosures from the judicial system could help the New Jersey judiciary handle cases in a timelier manner.

A majority of jurisdictions in the United States permit power of sale foreclosure.¹²⁹ In

¹²¹ S. 1566 § 12(c).

¹²² *Id.*

¹²³ S. 1566 § (12)(d)(1).

¹²⁴ *Id.* § (2).

¹²⁵ *Id.* § (3).

¹²⁶ S. 1566 § (12)(e).

¹²⁷ S. 1566 § (4)(i).

¹²⁸ S. 1566 § (13).

¹²⁹ NELSON & WHITMAN, *supra* note 11, at 610 n.1.

these states, the most commonly used mortgage instrument is the deed of trust.¹³⁰ The process usually involves the mortgagor-trustor conveying the property to a trustee who will hold the property in trust for the mortgagee-beneficiary until the mortgagor makes full payment.¹³¹ In the event of default, the trustee will exercise the power of sale by holding a public sale of the property.¹³² Usually a court does not supervise this sale.¹³³ Almost no power of sale statute provides for a hearing prior to a foreclosure sale.¹³⁴ The general theory of power of sale foreclosure is that by following statutory requirements, the mortgagee accomplishes the same purposes achieved by judicial foreclosure.¹³⁵ The foreclosure may be completed without the additional costs and burdens that a judicial proceeding entails.¹³⁶ Power of sale foreclosure also takes significantly less time to complete.¹³⁷ The notice requirements are generally less than what is required with judicial foreclosure. Notice may be only a notice of foreclosure, a notice of default, or a combination of the two.¹³⁸ For example, Georgia and Mississippi require only notice of publication.¹³⁹ Some states require published notice combined with mail or personal service to the mortgagor.¹⁴⁰

There are two main problems with power of sale—title problems and constitutional problems. The titles produced by power of sale foreclosure are a little less stable than those produced by judicial foreclosure.¹⁴¹ Court supervision of judicial foreclosure prevents many

¹³⁰ *Id.* at 610.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 611; *but see* NELSON & WHITMAN, *supra* note 11, at 611 n.7 (discussing how North Carolina provides for a hearing, while Colorado requires a court order authorizing the sale).

¹³⁵ NELSON & WHITMAN, *supra* note 11, at 612.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 610.

¹³⁹ *Id.* at 610 n.3.

¹⁴⁰ NELSON & WHITMAN, *supra* note 11, at 610.

¹⁴¹ *Id.* at 613.

defects from arising.¹⁴² The lack of an adversarial proceeding in a power of sale foreclosure can prevent an adverse party from bringing defects in title to a court's attention.¹⁴³ A judicial proceeding also produces a finality that will be insulated from future attack that does not exist in a power of sale process.¹⁴⁴ There have also been some constitutional issues. If mortgagors are not given enough notice and an opportunity to be heard, there can be a violation of the Fifth or Fourteenth Amendments to the U.S. Constitution. It seems that notice needs to be more than just publication.¹⁴⁵ More recently, courts have held that if there is no state action, power of sale is an acceptable way to foreclose.¹⁴⁶

One possible power of sale model for New Jersey could be the Uniform Land Transactions Act ("ULTA").¹⁴⁷ The National Conference of Commissioners on Uniform State Laws enacted the ULTA in 1975, and it was amended in 1977.¹⁴⁸ No state has adopted the ULTA in its entirety.¹⁴⁹ Under the ULTA, once a default occurs, the mortgagee must wait at least five weeks before officially notifying the mortgagor of the mortgagee's intent to foreclose.¹⁵⁰ Once this notice has been made, there is a three-week grace period, and after this period the mortgagee must inform the mortgagor what default remedy the mortgagee wishes to use.¹⁵¹ If power of sale foreclosure is to be employed, the mortgagee must mail notice to the mortgagor and all other parties whose interests would be cut off by foreclosure.¹⁵² The property can then be

¹⁴² *Id.* For some examples of title defects arising in power of sale foreclosures, see Grant A. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1499-1504 (2004) (citing cases).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Federal Deposit Ins. Corp. v. Morrison, 568 F.Supp. 1240 (N.D.Ala. 1983) (power of sale foreclosure); Turner v. Blackburn, 389 F.Supp. 1250 (W.D.N.C. 1975) (same).

¹⁴⁶ NELSON & WHITMAN, *supra* note 11, at 7.27.

¹⁴⁷ UNIFORM LAND TRANSFER ACT (1975) (amended 1977).

¹⁴⁸ *Id.* at 611 n. 8.

¹⁴⁹ *Id.*

¹⁵⁰ UNIFORM LAND TRANSFER ACT § 3-305 (1975) (amended 1977).

¹⁵¹ *Id.* § 3-508.

¹⁵² *Id.* § 3-508(a).

foreclosed and sold by the trustee.

Another model, which includes some judicial involvement, but much less than the current New Jersey model, is the Colorado power of sale statute. Under Colorado law, the holder of a deed of trust can file with the public trustee to sell the property.¹⁵³ The mortgagor still must be notified; this notice must contain the phone number for Colorado's foreclosure hotline and the phone number for the lender's loss mitigation department.¹⁵⁴ This must be done at least thirty days after default, but at least thirty days before filing with the public trustee.¹⁵⁵ The public trustee then sends another notice no more than twenty days after receiving the filing, with an additional notice to be sent no more than sixty nor less than forty-five days prior to the first scheduled date of sale.¹⁵⁶ The mortgagor can cure the default no later than fifteen days prior to the date of sale.¹⁵⁷ Prior to the public trustee foreclosing, the holder of the deed of trust must obtain an order authorizing the sale from a Colorado court pursuant to Rule 120.¹⁵⁸ Rule 120 allows for a hearing to determine if there is a reasonable probability that a default occurred if there is a response filed by the mortgagee.¹⁵⁹ The court can dispense with the hearing and simply examine the motion if there is no response.¹⁶⁰

IV. Analysis

A. In Defense of Judicial Foreclosure

Judicial foreclosure has come under much scrutiny since the most recent housing crisis.¹⁶¹ Much of this criticism is misplaced. Were the system operating as it was intended, it

¹⁵³ COLO. REV. STAT. ANN. § 38-38-101 (2012).

¹⁵⁴ *Id.* § 38-38-102.5(2) (2012).

¹⁵⁵ *Id.*

¹⁵⁶ COLO. REV. STAT. ANN. §§ 38-38-103(1)(a-b) (2012).

¹⁵⁷ *Id.* § 38-38-104(1) (2012).

¹⁵⁸ *Id.* § 38-38-105(2)(a) (2012).

¹⁵⁹ COLO. R. CIV. P. 120.

¹⁶⁰ *Id.* § (e).

¹⁶¹ *See, e.g.,* Gittelsohn & Gopal, *supra* note 2, at A1, A6.

would not take nearly as long as it currently takes to foreclose a residential property in New Jersey.¹⁶² Under current law, it should theoretically be possible to foreclose a mortgage in thirteen months. There would be a one month delay under the FFA before a foreclosure complaint would be filed, followed by twelve months in the courts.¹⁶³ The time period would lengthen to fifteen months under this Note's proposal to increase the amount of time before a foreclosure complaint is filed to three months.¹⁶⁴ Most foreclosure cases would not even take this long, and they would likely end before trial at summary judgment because the defenses to foreclosure are few and narrow.¹⁶⁵

If a mortgagee wishes to bring a foreclosure suit, it must move through the courts as the system intends and not be delayed. Allowing limited power of sale foreclosure for non-owner-occupied residential properties would partly aid this by removing some cases from the docket.¹⁶⁶ It is also time to look at the number of judges currently sitting in the General Equity part of the Chancery Division. Currently, only twenty-one judges sit in the General Equity part.¹⁶⁷ Ten vicinages only have one judge, and Essex has the most with three.¹⁶⁸ Adding additional judges as well as court staff could help to ease the backlog and speed all cases, not just foreclosures, through the system.

B. RFTA

One of the biggest issues with the RFTA is the issue of its cost—one of the reasons it was

¹⁶² See *supra* Part I (discussing how the current New Jersey procedure should operate).

¹⁶³ See N.J. STAT. ANN. § 2A:50-56(a) (2013) (time period before complaint may be filed). The Chancery Division has a goal of resolving all suits within twelve months of filing. Annual Report 2010-2011, NEW JERSEY COURTS, at 18.

¹⁶⁴ See *supra* Part III.A.

¹⁶⁵ See *supra* Part II.C.

¹⁶⁶ See *infra* Part IV.C.

¹⁶⁷ See Order of Chief Justice Rabner (July 3, 2012), available at <http://www.judiciary.state.nj.us/notices/2012/n120710a.pdf>.

¹⁶⁸ *Id.*

vetoed by Governor Christie.¹⁶⁹ The original RFTA included bonding authority.¹⁷⁰ The Corporation was required to enter into a funding agreement with the New Jersey Housing and Mortgage Finance Agency to determine the amount of money to be raised with bonds.¹⁷¹ The RFTA also created a Foreclosure to Affordable Housing Transformation Fund, to be funded by realty transfer fees.¹⁷² The money would only be moved to the fund if the state collected in excess of \$75 million in a year in realty transfer fees.¹⁷³ This fee has only generated an average of \$43.3 million in fiscal years 2009-2011.¹⁷⁴ The Office of Legislative Services stated that it might be years before the state collects more than the \$75 million required to make the transfer.¹⁷⁵ Cost was a very serious issue with the original RFTA. The Office of Legislative Services was unable to determine what the cost would be to the state.¹⁷⁶

The most recent version of the RFTA does not include bonding authority. The remaining financing options remain, including the realty transfer fee and the use of municipal affordable housing funds.¹⁷⁷ Municipalities are also permitted to purchase property to receive credit towards their obligations.¹⁷⁸ This funding plan is much better than the first RFTA. New Jersey is currently in a well-documented financial predicament, and borrowing more money via bonds

¹⁶⁹ See Letter from Governor Chris Christie to Senate *available at* http://www.njleg.state.nj.us/2012/Bills/S2000/1566_V1.PDF.

¹⁷⁰ S. 1566 § 6(c).

¹⁷¹ *Id.*

¹⁷² See S. 1566 § 11.

¹⁷³ *Id.*

¹⁷⁴ OFFICE OF LEGISLATIVE SERVICES, LEGISLATIVE FISCAL ESTIMATE, SENATE, NO. 1566, Aug. 3, 2012, at 4, *available at* http://www.njleg.state.nj.us/2012/Bills/S2000/1566_E3.PDF.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1.

¹⁷⁷ As of June 5, 2012, New Jersey municipalities had \$252,198,588 deposited in the Affordable Housing Trust Fund. STATE OF NEW JERSEY, DEPARTMENT OF COMMUNITY AFFAIRS, AFFORDABLE HOUSING TRUST FUND MONITORING (June 5, 2012) *available at* <http://www.nj.gov/dca/services/lps/hss/transinfo/reports/ahtfmuni.pdf>.

¹⁷⁸ For a discussion on how these obligations are set, see Kirah Addes, *The Fate of Affordable Housing in New Jersey: How Governor Christie's Proposed S-1 Legislation Threatens to Undo the New Jersey Supreme Court Decisions in Mount Laurel I and Mount Laurel II*, 36 SETON H. LEGIS. J. 82, 92-94 (2011). For further discussion on New Jersey's Fair Housing Act, see Julie M. Solinski, *Affordable Housing Law in New York, New Jersey, and Connecticut: Lessons for Other States*, J. OF AFFORDABLE HOUSING & COMMUNITY DEV. L., Fall 1998, at 52-59.

would only make the situation worse.¹⁷⁹ The current RFTA proposal would not cost the state any money.¹⁸⁰ This legislation should be passed by the state legislature and signed by the Governor.

The most recent version of RFTA does not provide for the availability of the use of a summary action to foreclose on an abandoned residential property.¹⁸¹ This proposal from the original RFTA should be added back in to the current proposal, and adopted into law. Allowing lenders to proceed in a summary manner would greatly quicken the foreclosure process for abandoned properties. This would be the quickest possible judicial foreclosure available.¹⁸² The summary process would quickly get the property back into the lender's possession, and then it could be sold and put back into productive use. The state has an interest in putting abandoned housing back into use as quickly as possible, and the summary process can help to accomplish that.

There is also no reason for the Corporation to end operations and sunset in 2017, as there will always be an ongoing need for affordable housing.¹⁸³ New Jersey's problem of a lack of affordable housing likely will not just end; there will always be a need. Likewise, there will also always be foreclosures in good economic times as well as bad. As long as New Jersey both lacks affordable housing and has foreclosed property, there will be a use for the Corporation. The Legislature has not stated a reason for the 2017 end date, but it is likely they see that as a reasonable time for the state to recover from the housing crisis, and there will be no need after

¹⁷⁹ See, e.g., Mary Williams Walsh, *New Jersey's Pension Plan Is Said to Still Be in Trouble*, N.Y. TIMES, Dec. 13, 2012, at A34 (discussing New Jersey's pension shortfall of \$26 billion).

¹⁸⁰ See Kathleen Lynn, *Government*, THE RECORD (Hackensack), Oct. 7, 2012. ("it's been amended so that no state dollars would have to be used").

¹⁸¹ Compare S. 1566 (contains summary procedure) with S. 2157 (no procedure).

¹⁸² See N.J. CT. R. 4:67. In a summary proceeding the case would begin with a complaint presented to the court *ex parte*, and if the court is satisfied with the complaint, it will order the defendant to show cause why judgment should not be rendered for the relief sought by plaintiff. *Id.* 4:67-2(a). The court would then try the matter on the return date of the order to show cause, or on a day the court fixes. *Id.* 4:67-5. If the defendant defaults or there is no issue of genuine fact, a hearing may be dispensed with and the court may try the matter on the pleadings and render judgment thereon. *Id.*

¹⁸³ See S. 1566 § (4)(i); *supra* Part III.B.

that time. By the time the end date arrives, the Corporation may just start to begin to see serious financing come in from the realty transfer fee. And therefore as long as there are still foreclosures and a need for affordable housing, the Corporation should remain in existence.

With the state taking an active role in buying foreclosed properties for use as affordable housing, this act could help to stimulate the housing sector in New Jersey. There does appear to be some demand for foreclosed properties nationwide, but not in New Jersey. The lengthy process may be one factor getting in the way of this, and speeding up the process could bring in private investment looking for high yielding investments in this current environment of extremely low interest rates.¹⁸⁴ The buying of properties by the state and local municipalities could also help to stimulate the housing market. These purchases would increase demand for housing, which assuming the supply remains constant or increasing at a rate lower than demand increases, would increase the price of houses.¹⁸⁵ This, in turn, would have many positive effects on New Jersey, specifically it would lead residents to feel wealthier as their house's value appreciates, leading to more consumer spending, which would in turn increase the state's property tax receipts and possibly employment levels.¹⁸⁶ It could also encourage borrowers who are currently underwater to remain in their home and continue to make their payments, thus preventing further foreclosures. Overall, it is critical to get foreclosed properties on the market as quickly as possible. The increased demand for these properties by investors to rent out will not last forever, and may disappear completely when interest rates rise in the future.¹⁸⁷ New Jersey

¹⁸⁴ See Whelan, *supra* note 6.

¹⁸⁵ See generally JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (Harcourt 1964) (discussing, *inter alia*, the laws of supply and demand).

¹⁸⁶ *Id.* An increase in employment would not necessarily follow, as it is impossible these days for consumers to purchase goods made solely in-state. Any increase in employment likely would be spread not only across the U.S., but also worldwide.

¹⁸⁷ The Federal Reserve stated it will keep interest rates low until mid-2015. Susanna Kim, *Federal Reserve Expects to Keep Interest Rates Low Through Mid-2015*, ABC NEWS (Sept. 13, 2012) available at <http://abcnews.go.com/Business/federal-reserve-interest-rates-low-mid-2015/story?id=17226149#.UGttuPmLuf8>.

risks being left behind on this opportunity.¹⁸⁸

C. Power of Sale

The ULTA model is preferable to the Colorado statute, but the Colorado statute is likely the more realistic option for New Jersey at the moment. New Jersey has always been solely a judicial foreclosure state, and a complete abandonment of judicial participation in foreclosure of all non-owner occupied residential homes is likely further than the Legislature would want to go at this time. Allowing for some power of sale would be a step in the right direction. The Colorado model allows for some, but still limited judicial involvement. The system could operate similar to how it is right now. Instead of all foreclosure proceedings proceeding through the Office of Foreclosure, they could be sent to the newly created Office of the Public Trustee. The main difference would be when there is an adversarial proceeding. All that would be required of this proceeding would be the single hearing to determine if there was a reasonable probability that there was a default by the mortgagor.¹⁸⁹ Requests for this hearing could be made through the Office of Foreclosure, and absent a request, the Office could review the motion as it currently reviews uncontested foreclosure actions. The hearing would only be held in the appropriate vicinage if there were a timely request for the hearing filed by the mortgagor.

This proposal would accomplish two things. First, it would free up the court system. As of June 2011, there was a backlog of over 800 contested foreclosure cases in New Jersey Superior Court.¹⁹⁰ Removing some non-owner-occupied foreclosures from the regular track would help alleviate the burden on the court system by requiring only one hearing on a single

¹⁸⁸ See Gittelsohn & Gopal, *supra* note 2, at A6.

¹⁸⁹ See COLO. R. CIV. P. 120.

¹⁹⁰ NEW JERSEY COURTS, ANNUAL REPORT 2010-2011, at 44. Numbers for 2012 are not yet available.

motion.¹⁹¹ This proposal would also aid lenders. It would provide lenders with a quicker process to recover their security interest, and provide more certainty on how long the process would take. This proposal would also help to balance out this Note's proposal to lengthen the foreclosure process for owner-occupied residential foreclosures.

V. Conclusion

Now that some of the worst of the housing crisis is behind us, it is possible to look back and suggest changes that could help create a better foreclosure process in the future. Two of the biggest problems faced by New Jersey because of the crisis have been a glut of abandoned properties and a court system clogged with foreclosure cases. Lengthening the foreclosure process for owner-occupied homes will help to keep people in their homes, and thus from the potential of becoming abandoned properties in the first instance. Enacting the RFTA with the summary action for abandoned properties will allow abandoned properties to get back on the market more quickly while also providing more affordable housing. This housing would likely become available to many of the people who have lost their homes as a result of the housing crisis. Finally, allowing for some form of power of sale foreclosure will help to remove foreclosure cases from an already clogged court system, alleviating some of the strain. Taken together, these proposals can help ease the tensions of the foreclosure process, while having a better system in place if New Jersey faces another housing crisis in the future.

¹⁹¹ The time goal for a suit filed in the General Equity division, where a foreclosure action would be filed, is 12 months from the date of filing. *Id.* at 18.