

October 25, 2013

William R. Breetz, Jr.
Chairman, Uniform Law Commission Drafting Committee
for Home Foreclosure Procedures Act
University of Connecticut School of Law
Knight Hall Room 202
35 Elizabeth Street
Hartford, CT 06105

**RE: Summary of Proposed Ohio Bill Creating Fast Track Private Foreclosure
Proceeding for Abandoned Properties**

Dear Mr. Breetz,

I am writing you to briefly summarize the key principals behind the Ohio fast-track foreclosure legislation I have recently drafted at the request of Thriving Communities Institute.¹ Thomas Fitzpatrick from the Federal Reserve Bank in Cleveland suggested to me that the Commission may be interested in learning more about some of the ideas found in this proposed legislation. What distinguishes this fast track proceeding from others of its type is that it addresses two key aspects of a foreclosure proceeding that cause the largest delays; namely, the Rules of Civil Procedure and the need for evidentiary hearings and findings as a prerequisite to an expedited foreclosure. This legislation overcomes these delays by incorporating two critical provisions. First, it defines the fast track foreclosure proceeding as a “special statutory proceeding” to which

¹ This legislation should not be confused with recently introduced SB 223 also purporting to provide for expedited foreclosures of vacant and abandoned properties. In my opinion as a practitioner, that bill, as with similar fast track legislation introduced in other states, seems to work on paper, but in practice has flaws that will short circuit their intent and utility.

the Civil Rules do not apply.² Second, the legislation conditionally eliminates the need for hearings to support judicial findings over issues such as abandonment and fair market value by creating rebuttable presumptions set up by an affidavit introduced as evidence with the complaint.

By defining this new fast tract foreclosure proceeding as a “special statutory proceeding,” the proceeding is not controlled by the timing provisions found in the Civil Rules. I am sure you are aware that under the Civil Rules, a judicial foreclosure proceeding can take months if not years to commence and complete. Arguably, this may be a desirable outcome in cases where the property is occupied by an owner or tenant. But in most cases where the property is vacant and abandoned, the Civil Rules only delay the inevitable. It is not necessary to use the same Civil Rules that govern a personal injury, contract, or divorce disputes in cases concerning the foreclosure of vacant and abandoned properties. This delay in a foreclosure decree and ultimate disposition of the property, often contributes to any remaining equity in the property literally being stripped away while the property sits idle awaiting the outcome of a judicial proceeding operating under the Civil Rules. Despite this non-applicability of the Civil Rules as a whole to this fast track foreclosure proceeding, certain aspects of the Civil Rules concerning notice and an opportunity to be heard have been incorporated into the statutorily prescribed proceeding to preserve and protect the owner/borrower’s and any other party with a recorded interest in the property’s substantive and procedural due process or the

² Some State Constitutions limit the ability of a legislature to modify the Civil Rules themselves, without the participation of the Highest Court of the State or its representative committee or other agency. However, this fast track bill does not propose to change any Civil Rules. In fact, Civil Rule 1 forms part of the basis for this “special proceeding” to which the Civil Rules do not apply.

State and Federal Constitutional rights. Further, the legislation provides Courts the discretion to look to the Civil Rules for guidance, so long as the Court's application of the Civil Rules is not inconsistent with the intent and purpose of the fast track foreclosure proceeding.

By creating rebuttable presumptions concerning vacancy, abandonment and fair market value of the property, the time needed for evidentiary hearings on these issues is eliminated. For example, other fast track laws typically state things such as "if a property is 'vacant,' or "if a property is 'unsecured,'" or "if the fair market value of a property is...," or "if the lien holders do this or that," or "if the owner did or didn't do thus and so," then the foreclosure can go real fast. The problem therein is that these conditions (vacancy, abandonment, etc.) beg the question. In other words, there is always an evidentiary predicate, requiring a hearing and finding, to do an expedited foreclosure. So with this fast track procedure, rather than requiring evidentiary hearings, which inquire into factual questions of abandonment, vacancy, etc., we have set up rebuttable presumptions by way of affidavit and public records that are submitted along with the fast track foreclosure complaint. To comply with Constitutional prescriptions requiring notice and opportunity to be heard, these presumptions, which may be rebutted, establish party, vacancy, and abandonment status, as well as the fair market value vs. mortgage balance, default status, etc. as related to the property. More often than not, foreclosure cases concerning vacant and abandoned properties end up being default cases because no interested party has answered, pled or appeared in the case. Here, if an interested party defaults, the case continues because the defaulting party had notice and a chance to be

heard, but the presumptions have not been rebutted. Even if an interested party is not in default, unless they can affirmatively rebut the presumptions the case continues to move forward. And, the concept and use of rebuttable presumptions are common and familiar to Courts charged with managing the evidence in the case.

Here is a brief summary of how the rebuttable presumptions are incorporated into the proceeding. A property is eligible for this fast track proceeding if it is a vacant and abandoned residential structure with four or fewer dwelling units that provides security for a first mortgage. There are two ways in which a property can be determined to be vacant and abandoned and thereby eligible. First, the financial institution and the owner/borrower can file an affidavit along with the complaint that stipulates that the property is a vacant and abandoned and is therefore eligible for an expedited foreclosure. Alternatively, a financial institution can file an affidavit with the complaint that avers that based on the financial institution's knowledge and belief the property is vacant and abandoned. This creates an evidentiary presumption of vacancy and abandonment. The evidentiary presumptions contained in this affidavit can be rebutted to the court by the owner/borrower. If the presumptions are rebutted by the owner/borrower, the action will proceed as a normal mortgage foreclosure under Chapter 2329 of the Revised Code. If not rebutted, or in cases of default, the property is presumed vacant and abandoned without any need for further evidentiary hearings.

Upon the court's finding that the property is vacant and abandoned and that the owner/borrower is in default of the mortgage, the court will issue a decree of foreclosure. Within this decree or as a separate order, the property will be ordered disposed of in one

of several ways. In all cases, a financial institution can choose to have the parcel sold at public auction without appraisal with a minimum bid starting at \$500. If the parcel does not sell at auction after the first sale, the financial institution will be deemed to be the purchaser and must take title to the property and pay all taxes and costs due on the property.

As an alternative to sale, a financial institution may petition the court to order the transfer of the property by directly to the financial institution or to a consenting land bank. This option is available to financial institutions in all cases where the balance due on its mortgage is equal to or greater than the rebuttably presumed market value of the property or all other parties with an interest in the property are in default of the proceeding. To prevent subordinate lien holders from holding the case up by making the fair market value of the property an issue, the presumed property value is the Auditor's value. Again, This presumption may be rebutted if a subordinate lien holder can show affirmatively that the value of the 1st mortgage and the subordinate lien combined are less than the fair market value (so as to suggest equity for the subordinate lien holders). Otherwise, all subordinate lien holders are out if the fair market value of the property is less than the value of the 1st mortgage. With vacant and abandoned properties, the properties are almost always upside-down. Hence no subordinate lien holder will pursue this valuation rebuttal exercise. But the important thing is that the subordinate lien holders have a right to do so, to be heard, and the opportunity to preserve any perceived equity by rebutting the presumption. As a practical matter, if there was truly equity in

these properties, the market would take care of it either by resale, short sale of some mortgage modification.

A financial institution can request that a direct transfer be to the financial institution itself or to a land bank that has agreed in advance of the final hearing to receive the property. When the financial institution receives the property as a direct transfer, it must pay all taxes owed on the property and all costs of the foreclosure proceeding. If the property is transferred to a land bank, the financial institution must only pay for the costs of the proceeding. Any delinquent taxes owed on the property are abated as though the property was forfeited via a deed in lieu of foreclosure under the land bank statutes (Chapter 5722 of the Ohio Revised Code). This extinguishment of delinquent taxes combined with a direct transfer to a consenting land bank is meant to be an incentive for financial institutions to utilize land banks as a repository for these low value assets that may otherwise remain in a legal limbo (commonly referred to as “zombie properties”) after a mortgage default. To my knowledge, this is the first fast track foreclosure legislation that directly and efficiently ties land banks into the proceeding, addresses subordinate liens, addresses evidentiary predicates and truly “fast-tracks” by providing an alternative procedural process to the Civil Rules.

In summary, if enacted in Ohio, this legislation will provide financial institutions with an alternative expedited foreclosure proceeding for use on vacant and abandoned properties that secure a mortgage. In addition to an expedited finding of foreclosure, the financial institution will be able to quickly dispose of the property either by public sale without appraisal or by a direct transfer to the financial institution or to a consenting land

bank. I hope that this brief explanation will be helpful to you and your committee. If you have any questions, or would like to discuss this matter more fully, I would be happy to do so at a mutually convenient time.

Yours truly,

A handwritten signature in blue ink, appearing to be 'Gus Frangos', with a long horizontal stroke extending to the right.

Gus Frangos, Esq.

cc: Lucy Grelle
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