

# FEDERAL RESERVE BANK *of* CLEVELAND

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May 13, 2014

## VIA E-MAIL

Mr. 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: May 6, 2014 draft of the Home Foreclosure Procedures Act (“Act”)

Dear Mr. Breetz:

This letter provides comments on sections 505 and 506 of the Act related to abandoned property. I continue to support the inclusion of these sections in the Act because they would expedite the foreclosure process for abandoned property. For a judicial foreclosure, an expedited sale could occur as early as 45 days after the filing of a foreclosure action. For a non-judicial foreclosure, an expedited sale could occur as early as 60 days after a request for a determination of abandonment. In furtherance of the drafting committee’s efforts to prepare a draft for consideration by the Commissioners this July, I offer the following comments.

First, I recommend adoption of Alternative B for sections 505(d) and (k), which provides for personal service or attempts at personal service, rather than posting on the property, because posting a notice on the property asserting abandonment increases the risk of vandalism, theft, and other illegal behavior.

Second, I recommend “120 days” rather than “a reasonable time” for section 506(c) as the time period within which the creditor or servicer shall take necessary and appropriate action to cause a foreclosure sale to be completed, because a definite time period will be more apt to expedite the foreclosure process for abandoned property.

Third, I ask the drafting committee to consider whether it should add minimum periods of prior notice to homeowners for abandonment determinations and public sales. As drafted, the Act does not set a minimum time for providing notice to homeowners before a hearing in a judicial proceeding or determination in a non-judicial proceeding. For a judicial foreclosure, the Act only specifies a period of 15

to 25 days between the issuing an order to show cause and hearing. For a non-judicial foreclosure, the Act only specifies a minimum time of 30 days between the filing of a request for an abandonment determination and the earliest possible time of such a determination. Furthermore, the Act does not currently specify a minimum time for notice prior to a public sale in either a judicial or non-judicial proceeding. For judicial foreclosures, the Act specifies a period of 30 to 45 days between a determination of abandonment and public sale. For non-judicial foreclosures, the Act specifies a period of 30 to 60 days between a determination of abandonment and public sale. As drafted, it appears that notices provided to homeowners the day before a hearing, determination, or sale would be sufficient. The drafting committee may want to proscribe minimum periods for prior notice or leave these decisions to local rules.

Finally, I ask the drafting committee to consider whether the phrase "service of process is established" in section 505(e) should be changed. I'm not sure what the phrase means. Does it require actual, constructive, or personal service? Does it require service by regular, registered, or certified mail? Does it mean whatever form of service is required by other state law? I'm wondering whether section 505(e) should be changed to read "it is established that the order to show cause has been sent to each homeowner and obligor," so as to be similar to section 505(l) related to a non-judicial determination of abandonment. This change to "sent" rather than "service of process" may be more than what is intended. Perhaps the drafting committee wants to make a distinction between service in judicial and non-judicial foreclosure jurisdictions. If so, no change seems necessary. I'm only asking that the drafting committee adopt language consist with its intentions.

In support of my comments, I provide several attachments. Attachment 1 is a redlined version of section 506 the Act with my suggested changes. Attachment 2 is a flow chart that diagrams the steps leading to a determination that mortgaged property is abandoned property through the judicial and non-judicial foreclosure processes. Attachment 3 is a timeline that compares the processing of an expedited foreclosure through the judicial and non-judicial processes.

Thank you for the opportunity to comment on these important provisions of the Act. I look forward to discussing the abandoned property sections of the Act with the drafting committee during its May 16<sup>th</sup> and 17<sup>th</sup> meetings.

Sincerely,



Mark B. Greenlee  
Counsel

enc.

cc: Ms. Lucy Grelle

1 to the property as vacant. Of course, the homeowner or another person has the right  
2 to challenge the correctness of the governmental determination.

3  
4 With respect to the statutory conditions listed in Subsection (a)(1) through  
5 (a)(8), the presence of [three] or more of such conditions constitutes prima facie  
6 evidence, giving rise to a presumption of abandonment. Such conditions are not  
7 conclusive on the issue of abandonment. Many residential properties will exhibit  
8 at least one such condition, when the homeowner is still in possession of the  
9 property. If the homeowner or another person holding under the homeowner is in  
10 actual possession of the mortgage property, the property is not abandoned  
11 notwithstanding the existence of such conditions. Likewise, mortgaged property  
12 may be abandoned under this Section notwithstanding the absence of any of the  
13 statutory conditions.

14  
15 3. Mortgaged property often becomes vacant, both under standard mortgage  
16 and reverse mortgage transactions, when the homeowner dies. Under Subsection  
17 (a)(8) proof of death of the homeowner is one of the conditions that may give rise  
18 to a presumption that the mortgaged property is abandoned, provided that there is  
19 no evidence that an heir or other beneficiary of the homeowner's estate is in actual  
20 possession. Of course if there are multiple homeowners, this condition is met only  
21 if all the homeowners have died.

22  
23 4. In a nonjudicial foreclosure proceeding, the creditor may treat the  
24 mortgaged property as abandoned only by submitting evidence of abandonment to  
25 an independent third party. Subsection (c) provides for the submission of evidence  
26 to a person, who as part of the decision making process must personally visit the  
27 property. Normally jurisdictions enacting this Act will designate an employee of  
28 local government, such as a building inspector, who is responsible for evaluating  
29 the physical condition of dwelling units.

30  
31 Judicial review of the decision is available to any interested person.  
32 Subsection (c) does not specify the nature of that action, which in many  
33 jurisdictions will be a mandamus action.

### 34 **SECTION 506. FORECLOSURE OF ABANDONED PROPERTY.**

35  
36 (a) In a judicial-foreclosure proceeding, if a court renders an order under Section 505(e f)  
37 finding that mortgaged property is abandoned property and the court has previously rendered or  
38 at the same time renders a judgment of foreclosure, the court shall:

39 (1) order a public sale of the abandoned property not earlier than [30] days but not  
40 later than [45] days after entry of the order; or

1 (2) upon a motion of the creditor, if the court, based on an appraisal or other  
2 evidence, finds that there is no equity in the mortgaged property available to satisfy the interests  
3 of junior creditors, the court shall order a transfer of the abandoned property directly to the  
4 foreclosing creditor without public sale and, upon the transfer, the rights of all interests junior to  
5 the interest of the foreclosing creditor are extinguished.

6 **Drafters' Notes**

7  
8 The alternative of a direct transfer to the creditor is one of the components  
9 set forth in an Ohio bill that would provide expedited foreclosure procedures for  
10 abandoned property. Obviously if the Committee decides that this alternative has  
11 merit, further provisions are necessary dealing with matters such as the termination  
12 of junior interests and the payment of expenses by the creditor. The Ohio bill  
13 requires that a creditor who chooses a direct transfer pay any unpaid taxes and  
14 assessments on the property.  
15

16 (b) In a nonjudicial-foreclosure proceeding, on the issuance of a determination under  
17 Section 505(~~d~~) that the mortgaged property is abandoned property, a creditor, servicer or trustee  
18 may conduct an expedited public sale of the property. The sale may take place not earlier than  
19 [30] days but not later than [60] days after the issuance of the determination, unless judicial  
20 review of the determination is commenced. The creditor or servicer shall comply with the notice  
21 requirements of Section 405, except that [15]-days advance notice of the sale is sufficient.

22 (c) After a judicial order or a determination in a record finding that the mortgaged  
23 property is abandoned property under Section 505(~~e f~~) or (~~d~~), the creditor or servicer shall take  
24 necessary and appropriate action to cause the foreclosure sale to be completed within [~~a-~~  
25 ~~reasonable time~~][120 days] unless the creditor releases its mortgage and files the release in the  
26 [land records]. Unless the creditor releases its mortgage, the creditor may not seek to end its  
27 obligation to maintain the property under Section 507 by dismissing, terminating, or suspending  
28 the foreclosure proceeding.

1 (d) Upon a foreclosure sale ~~or~~ transfer of the mortgaged property to the creditor pursuant  
2 to subsection (a) or (b), any personal property remaining in or upon the abandoned property shall  
3 be deemed to have been abandoned by the owner of such personal property and may be disposed  
4 of by the purchaser or transferee of the property after [60] days of storage at another location. ← unless  
5 No mortgagee or its successors or assigns or purchaser shall be liable for any such storage or claimed by  
6 disposal of personal property. the homeowner

7 (e) The completion of a foreclosure sale ~~or transfer of the mortgaged property to the creditor~~  
8 rights of the homeowner or any other person to redeem the property under other law of this state.

9 **Drafters' Notes**

10  
11 1. This Section provides for an expedited public sale of the mortgaged  
12 property after a determination that the mortgaged property is abandoned. In a  
13 judicial foreclosure, the court must order the sale to take place no longer than \_\_  
14 days after the court enters its order finding the property to be abandoned, unless the  
15 creditor agrees to a later sale date. In a nonjudicial foreclosure, the creditor may  
16 select the date, provided it is no sooner than [ ] days after the written  
17 determination of abandonment.

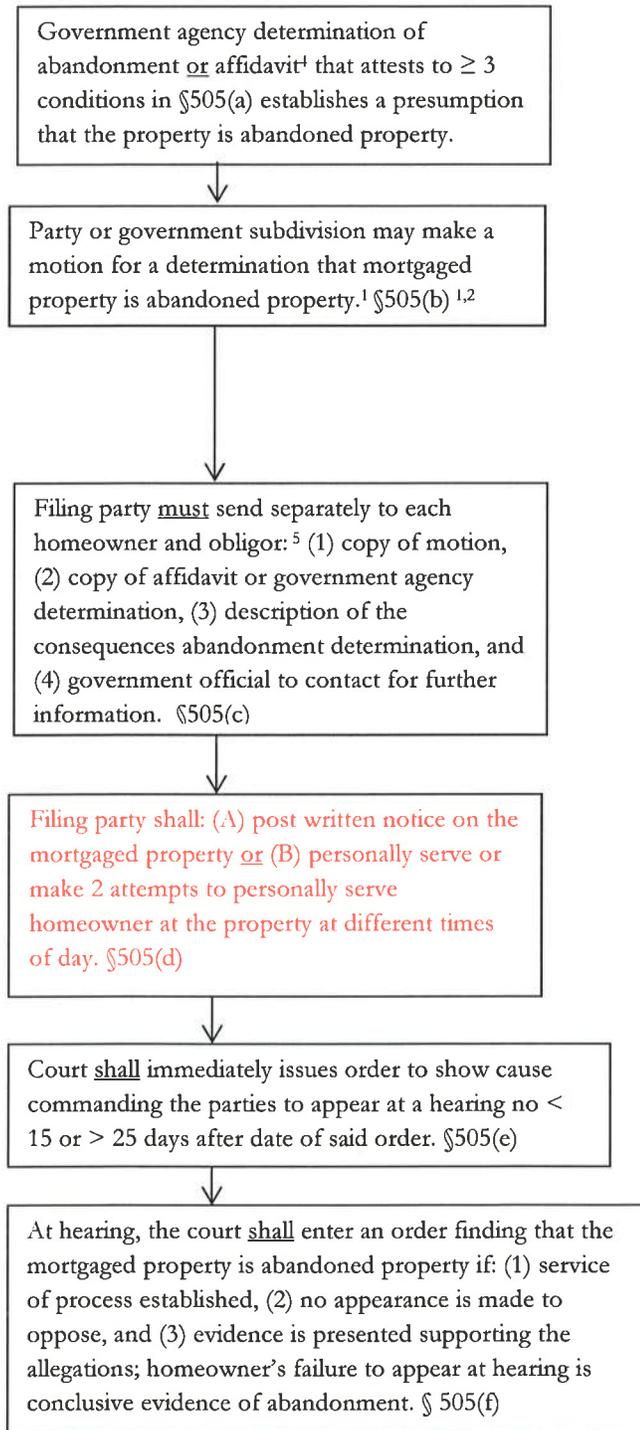
18  
19 2. This Section does not authorize a disposition of abandoned property other  
20 than public sale, but other dispositions are available under other sections of this  
21 Act. For example, the homeowner and creditor may agree to a negotiated transfer  
22 to the creditor in lieu of foreclosure pursuant to Sections 501 to 504 [cash for keys  
23 agreement].  
24

25 3. Once a creditor decides to take advantage of the expedited foreclosure  
26 procedure allowed by this Section, there is a public interest in ensuring that the  
27 property becomes occupied as soon as reasonably possible. For this reason  
28 subsection (c) does not allow the creditor to suspend indefinitely its efforts to  
29 consummate the foreclosure. There may be exceptional circumstances in which it  
30 is not feasible to hold the foreclosure sale within 60 days of the judicial order or  
31 written determination finding the property to be abandoned, as required by  
32 subsection (a) and (b).  
33

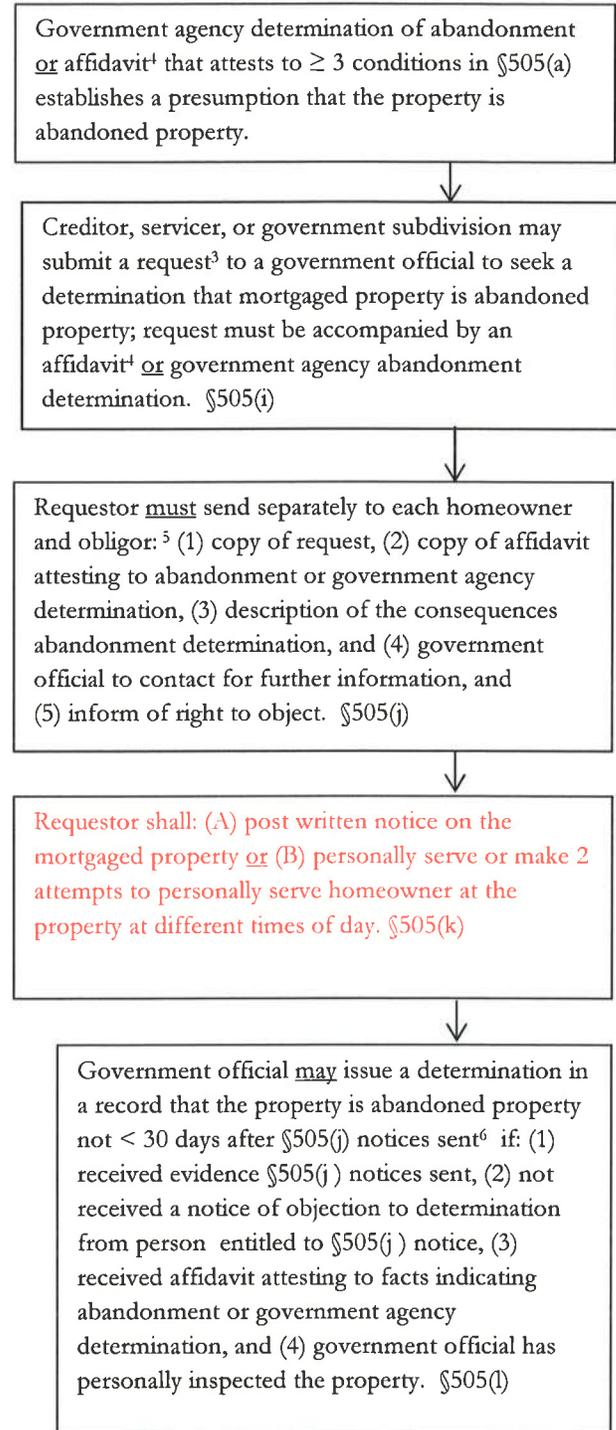
34 Subsection (c) poses the substantial question of what consequences should  
35 flow from the failure of the creditor to comply with its requirements. On the one  
36 hand, it would clearly be inappropriate to impose an obligation on a creditor to  
37 repair the property subject to the mortgage before the creditor has taken possession  
38 or an official determination is made that the property is abandoned. Certainly, the

This chart diagrams the steps leading to a determination that mortgaged property is abandoned property through judicial and non-judicial processes as proposed by the May 6, 2014 draft of the Home Foreclosure Procedures Act. The text in black tracks the language of the Act. Alternatives provided by the Reporters for consideration by the drafting committee appear in red.

## Judicial Foreclosure



## Non Judicial Foreclosure



<sup>1</sup> In a common interest community, the association that governs that community may intervene in the proceeding. <sup>2</sup> Motion may be withdrawn only with leave of court. § 505(o). <sup>3</sup> Request may be withdrawn only by consent of the person submitting the request and each homeowner and obligor. § 505(o).

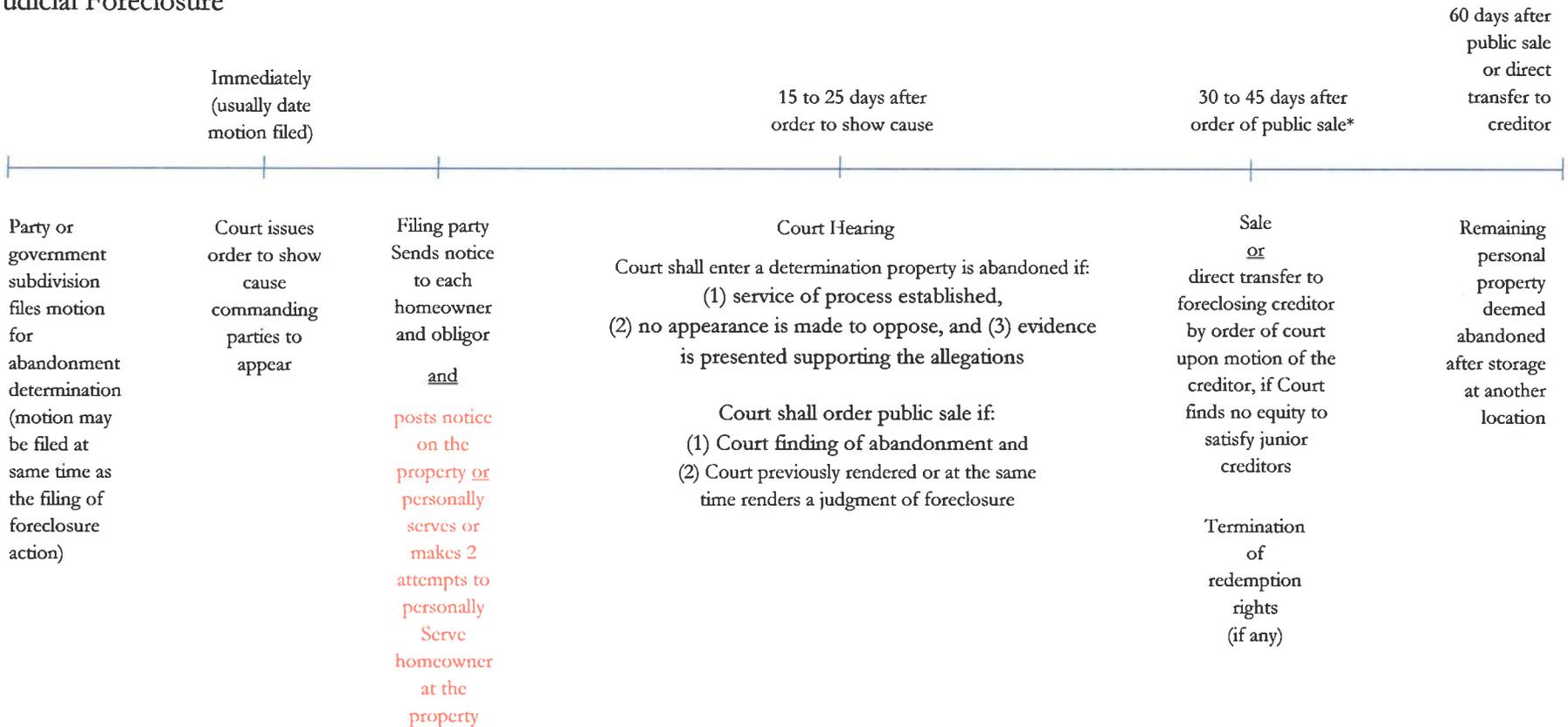
<sup>4</sup> Photographic or other documentary evidence that supports the conditions must be attached to the affidavit. §505(n) <sup>5</sup> Notice may be combined with notice required by section 201. <sup>6</sup> The government official must send determination to the creditor, homeowner, and any other person entitled to notice under §201. The determination or refusal to issue a determination is subject to de novo judicial review. § 505(m)

# Home Foreclosure Procedures Act

## Abandoned Property Processing Timeline

Text **red** indicates alternatives presented by draft dated May 6, 2014

### Judicial Foreclosure



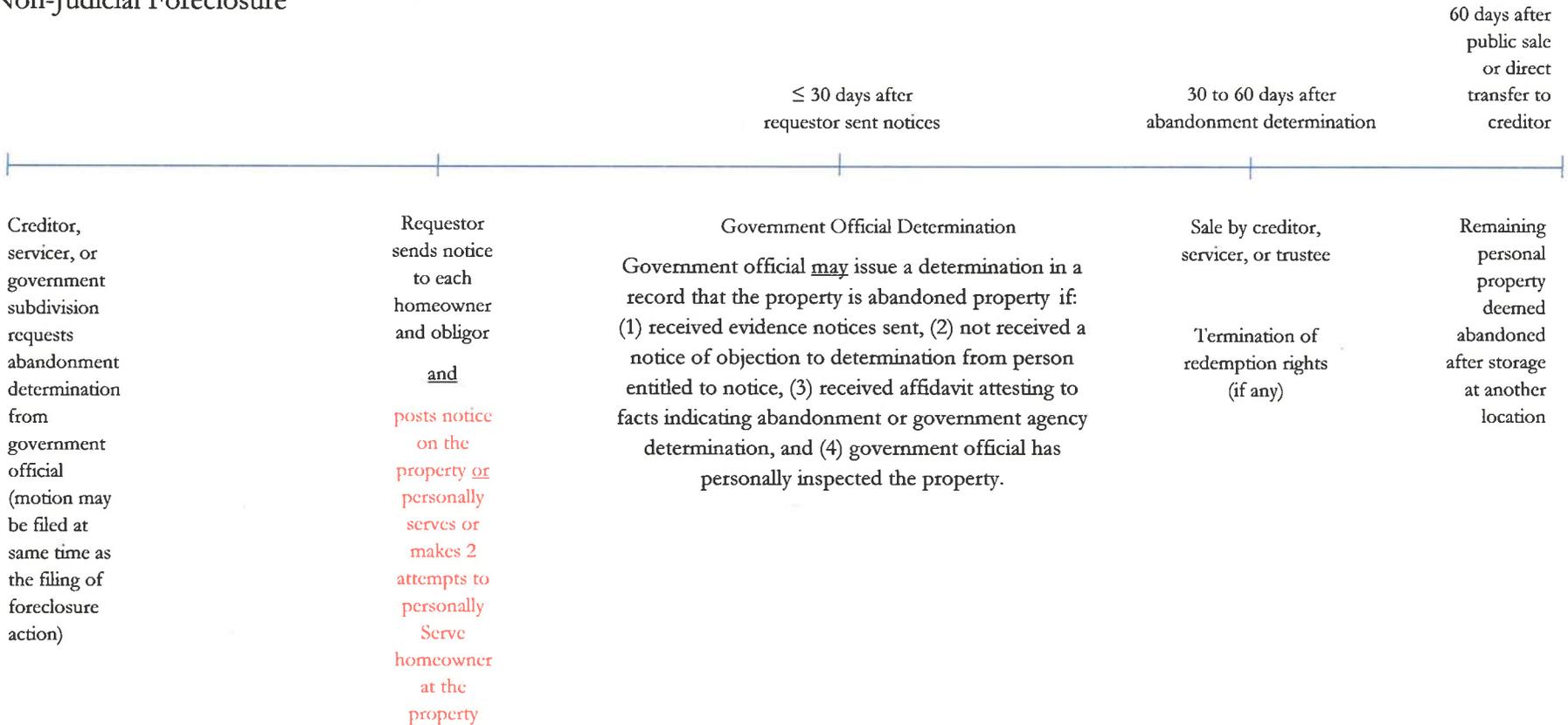
\* Creditor or servicer shall take action to cause sale or direct transfer to occur within reasonable time or 120 days after court determination of abandonment.

# Home Foreclosure Procedures Act

## Abandoned Property Processing Timeline

Text **red** indicates alternatives presented by draft dated May 6, 2014

### Non-Judicial Foreclosure



\* Creditor or servicer shall take action to cause sale or direct transfer to occur within reasonable time or 120 days after court determination of abandonment.