

# FEDERAL RESERVE BANK *of* CLEVELAND

Mark B. Greenlee  
Counsel  
*Legal Department*

Thomas J. Fitzpatrick IV  
Economist  
*Community Development Department*

PO Box 6387  
Cleveland, OH 44101-1387  
216.579.2163  
216.579.2990 *fax*  
mark.b.greenlee@clev.frb.org

216.579.3087  
216.579.3050 *fax*  
thomas.j.fitzpatrick@clev.frb.org

[www.clevelandfed.org](http://www.clevelandfed.org)

October 28, 2013

## VIA E-MAIL

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

Re: Comments on the June 4, 2013 draft of the Home Foreclosure Procedures Act ("Act")  
related to abandoned residential property

Dear Mr. Breetz:

This letter comments on the provisions of the Act related to expediting the foreclosure process for abandoned residential property. We support inclusion of provisions to expedite the foreclosure process for abandoned residential property if they improve the efficiency of the residential housing market. The letter to you from Gus Frangos, dated October 25, 2013, summarizes an approach to fast-tracking the foreclosure process for abandoned property that we support. We ask that you forward Mr. Frangos' letter, along with this letter to the Reporters and add the letters to the committee's website so that they are available for consideration at the November 15<sup>th</sup> and 16<sup>th</sup> meeting of the drafting committee. As with our previous comments, this letter presents our personal views, and not those of the Federal Reserve Bank of Cleveland or the Board of Governors of the Federal Reserve System.

When residential property is truly abandoned an ordinary foreclosure process imposes costs to communities, lenders, and homeowners, without corresponding benefits. Extended periods of vacancy harm property values, attract crime, and can lead to rapid depreciation of the value of the collateral. Homeowners that walk away from property do not benefit from a long and protracted foreclosure process. In states that allow deficiency judgments, protracted foreclosure on vacant property may actually hurt the homeowner's interest further by lowering the eventual sale price of the home. At the same time, the ability of creditors to take possession and sell the property is unnecessarily impeded. Speeding up the transfer of abandoned residential property to a new owner can improve the efficiency of the market and benefit the creditor and community without incremental cost to the homeowner.

The following comments on the provisions of the Act related to abandoned residential property are offered for consideration by the committee.

First, based on feedback we have received from several practitioners, we have some concern that the draft does not do enough to pragmatically fast-track private mortgage foreclosure. Section 505(c) as written requires a court finding of abandonment after notice and hearing, which we are told will reduce use of the fast-track and slow the process down when it is used. It is our understanding that the Indiana law,<sup>1</sup> which the Act tracks, is rarely used by bank council for this very reason. Ohio has fast-tracked property-tax foreclosures for vacant and abandoned property by using a rebuttable presumption framework that substantially expedites the tax-foreclosure process.<sup>2</sup> When a tax-foreclosure complaint is filed, the foreclosing party states that the property is vacant and abandoned and elects to use the fast-track in the complaint itself. This creates a rebuttable presumption that the property is vacant, and if the owner does not respond to the foreclosure notice within the prescribed period to rebut it, the fast-track takes place. Currently, a similar law is being drafted in Ohio for private mortgage foreclosure, which is summarized in the above-mentioned letter from Gus Frangoes.

The June 4<sup>th</sup> draft of the Act seems to move in the direction proposed by Mr. Frangoes because the phrase "constitutes prima facie evidence" as has replaced by the phrase "establishes a presumption" in the introduction to Section 505(a). However, Section 505(c) requires an evidentiary hearing before the court may issue an order finding that property is abandoned. Mr. Frangoes' proposal does not require a hearing. The court may find that property is abandoned based upon an affidavit, unless the homeowner appears to contest such a finding. In such event, a hearing would be held.

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<sup>1</sup> Indiana Code Annotated § 32-30-10.6-4.

<sup>2</sup> Ohio Revised Code § 323.65(G)(2).

We believe a similar approach could make the Act's expedited processing provisions more effective and efficient, and is worth consideration. We propose that the expedited process apply when a foreclosure complaint or other pleading is filed electing to use the fast track process accompanied by an affidavit swearing that the property is vacant and abandoned, attesting to specific facts to establish the affiant's knowledge and belief that [three] or more of the conditions listed in Section 505(a) exist, and the borrower does not respond to contest the claim of vacancy and abandonment.

Second, we are concerned that the phrase "which must include entry into any dwelling unit on the property" in section 505(d)(2) may cause a "government official" to violate the Fourth Amendment to the U.S. Constitution unless they obtain a search warrant. Drafters' Note 4 to this section repeats the entry requirement. Such entry by a government official is government action under the Fourth Amendment. Housing officials in many jurisdictions believe that a search warrant is necessary to avoid violation of the Fourth Amendment. While it might be argued that entry would not constitute a search because a homeowner no longer has a reasonable expectation of privacy in abandoned property, it would create a litigation risk local governments are unwilling to bear. In any event, the factors listed in 505(a) can be determined without entry into a dwelling unit or involve the creditor action (i.e., action by a private person not subject to the Fourth Amendment).

Third, it seems that Drafting Note 3 to Section 505 misstates the consequence of the death of a homeowner. The second sentence of the note states: "Under Subsection (a) proof of death of the homeowner constitutes prima facie evidence that the mortgaged property is abandoned. . . ." However, Section 505(a) states: "A government agency's determination, finding, or order that mortgaged property is abandoned or the presence of not less than [three] of the following conditions constitutes a presumption that the mortgaged property is abandoned property." Under this section, the death of the homeowner is only one condition that combined with [two] other conditions may establish a presumption of abandonment. As written, Drafting Note 3 states that the death of the homeowner alone constitutes prima facie evidence. Therefore, we suggest the following revision: "Under Subsection (a) proof of death of the homeowner ~~constitutes~~ is one of [three] conditions that can establish a rebuttable presumption that the mortgaged property is abandoned. . . ." For consistency, "rebuttable presumption" should be substituted for "prima facie evidence" in Drafters' Notes 2 and 3 to Section 505.

Fourth, there is an inconsistency between Section 506(c) and Reporter's Drafting Note 3 thereto. The section states that "the creditor shall take necessary and appropriate action to cause the foreclosure sale to be completed within a reasonable time...." This allows for flexibility but also introduces uncertainty. The note states: "In that event,

subsection (c) provides an outside limit of [four months] to complete the sale.” What measure of time is intended?

Fifth, we wonder whether the words “determination, finding, or order” should be substituted for “citation” in Section 507(d) to make it consistent with the first sentence of Section 505(a). Alternatively, the words “determination, finding, order or citation” could be used in both places.

Finally, many community development corporations focus on the maintenance and construction of housing in a delineated geographic area. The presence of these corporations varies dramatically from state to state and municipality to municipality. Where they are present, they would have an interest in the impact of abandoned property on the surrounding neighborhoods and communities. Therefore, it would be appropriate to add “[a community development corporation serving the area in which the mortgaged property is located]” to the list of persons entitled to enforce the obligations created by section 507(h), as an option for jurisdictions with community development corporations.

We appreciate the opportunity to comment on the Act and look forward to further discussion at the upcoming meeting.

Sincerely,



Thomas J. Fitzpatrick IV  
Economist



Mark B. Greenlee  
Counsel

cc: Ms. Lucy Grelle  
Mr. John Sebert