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FISCAL IMPACT REPORT

ORIGINAL DATE 1/26/15
 SPONSOR Neville LAST UPDATED 1/30/15 HB _____
 SHORT TITLE Foreclosure of Vacant & Abandoned Property SB 122
 ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI				

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with SB 30
 May conflict with SB 141

SOURCES OF INFORMATION

LFC Files

Responses Received From

NM Mortgage Finance Authority (MFA)
 Administrative Office of the Courts (AOC)
 Regulation & Licensing Department (RLD)
 Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

Senate Bill 122 provides a mechanism for summary foreclosure of vacant and abandoned residential property when the borrower/owner is in default on a mortgage loan. It sets out criteria to be used in determining whether property is vacant and abandoned, including: no utility connections; accumulation of junk, trash and debris on the property; a written statement from one borrower expressing a clear intent of all borrowers to abandon the property; and the existence of a risk to the public health and safety. It allows a mortgage holder that has filed a motion for summary foreclosure to enter the property to secure and protect it from damage without liability to the mortgagor or other owner. It also authorizes service by mailing and establishes a 14-day notice requirement for posting the property prior to a hearing on a motion for summary foreclosure, and reduces publication of the judicial notice of sale from four weeks to two weeks.

FISCAL IMPLICATIONS

AOC reports that it does not expect the shortened time limits for hearing on a motion for summary judgment provided for in SB 122 to impose a significant burden.

SIGNIFICANT ISSUES

MFA reports that New Mexico is a judicial foreclosure state. From date of filing, foreclosures take an average of 800 days to close in the State. This lengthy period can be detrimental to community and neighborhood stability in areas with high concentrations of abandoned and foreclosed homes. As both AOC and the Financial Institutions Division of RLD point out, homes that have been abandoned may be subject to damage, vandalism and deterioration, causing a loss of value on both that property and other properties nearby.

Additionally, as FID reports, mortgage holders incur substantial costs to foreclose on properties that are in default when it is clear that the debtors have no intention of curing the defaults or maintaining the properties.

On the other hand, AGO raises a number of concerns with the particular provisions of this bill, some of which are based on complaints it has received from homeowners:

- Definition of Abandonment: AGO advises that in New Mexico, a homeowner has a lawful right to remain in the home until the conclusion of a foreclosure lawsuit, and the legal definition of “abandoned” appears to set a rather high standard: a total relinquishment of all interest in and control over a property. It expresses concern that the bill appears to change that common law concept substantially. It notes the bill defines an abandoned or vacant home in a manner that includes a circumstance where “junk or debris” is on the property, where no “person is visibly present” inside the home, or “any other reasonable indicia” that the home is vacant and abandoned. Thus, the AGO points out, a property could be deemed abandoned if during a work day a person is not home at the time of the inspection and weeds are growing in the yard. It provides as an example a 2014 case, in which the homeowner/borrower was in negotiations with the lender and affirmed weekly that she was occupying the home, yet the absence of a car in the driveway and the presence of weeds led the lender’s agent to find abandonment, taking the position that the communications with the lender were irrelevant. Additionally, in two cases known to the AGO, a property preservation firm entered homes that were clearly marked as “for sale” by a realtor without making any attempt to reach either the homeowner or the realtor by phone.

Another basis for abandonment is a written statement by one borrower expressing clear intent that all the owners intend to abandon the property. According to AGO, it is unclear how one owner could take a legally binding position for all owners: in many cases, a divorced couple legally both own a property. This bill does not indicate how in such a circumstance one of the owners could abandon the home for the other homeowner. In addition, the AGO reports it has observed that deceptive practices are sometimes used in communications to homeowners that state or imply that the home will be foreclosed upon “in 30 days” regardless of the actions of the borrower. In such situations, a homeowner might be deceived or induced into signing a statement “abandoning” the home because the owner thinks, incorrectly, that the foreclosure would happen quickly and any efforts

to save the home would be futile. Noting that the bill does not set out any model or form language for such a statement and there is no indication that the homeowner would have an opportunity to meet with a housing counselor or attorney prior to signing such a statement, AGO expresses concern that without more, there is a substantial risk that borrowers might end up giving up their homes to lenders in these circumstances.

- Right of Mortgage Holder to Secure Property: In addition to authorizing expedited foreclosure, a finding of abandonment which leads to a motion for summary foreclosure authorizes the lender to enter the residence to secure it. AGO reports it has received at least three complaints since 2012 that property preservation firms have taken personal property from a home (or caused damage) without a court order, even when no foreclosure action is pending. The AGO is currently investigating one such firm. The Illinois Attorney General is in litigation with the highest volume property preservation firm in the country on the grounds that it constructively evicted homeowners and made improper findings of “abandonment.” In that case, the Illinois court has found sufficient allegations of unfair and deceptive conduct. Several of the complaints to the AGO involve that same company.
- Service by Mailing and Posting: Unlike a typical foreclosure suit which requires personal service of a summons and complaint, SB 122’s summary process authorizes service by mailing the complaint and posting a notice on the property. AGO reports that under existing New Mexico law, only cases involving disputes for less than \$10,000.00 in metropolitan or magistrate courts permit service by mailing and posting. Thus, this provision of the bill appears to change the Rules of Civil Procedure, which is the province of the Supreme Court. Further, the bill does not appear to contemplate where a homeowner is unavailable for an extended time (such as being hospitalized or in a nursing home) and cannot reasonably either attend the hearing or even receive the notices.
- Power of Court: AGO suggests SB 122 may change the common law of New Mexico that a foreclosure is a purely equitable action by directing that a court “shall immediately” issue a summary foreclosure judgment in favor of the lender if the court finds default and abandonment, which language may limit the discretion of the court. It notes the bill does not include any other grounds for the homeowner to challenge or refute the default or assert defenses in equity once a finding of abandonment is made, and concludes that the bill may not only “speed up” the foreclosure, but alter the common law grounds for foreclosure and invade the discretion of the court.
- Lender Immunity: SB 122 grants immunity to lenders and their agents for actions related to entry of the property once summary foreclosure proceedings are initiated. AGO suggests this provision may conflict with other existing law, including the Unfair Practices Act and AGO’s ability to enforce that Act.
- Deficiency Judgments: AGO expresses concern that proceedings under this bill might still result in a personal judgment against a borrower if proceeds upon sale do not satisfy the outstanding mortgage while at the same time reducing the service and notice requirements and available defenses.

MFA also suggests the provisions of this bill may conflict with homeowner protections in the mortgage instrument or in the Consumer Financial Protection Bureau federal regulations, which could subject mortgage loan servicers to lawsuits and penalties.

Additionally, the provision in Section 3(E) providing that the reinstatement and redemption periods “shall end in accordance with Section 39-5-19 NMSA 1978” is not clear. That section of existing law allows the parties in a foreclosure action to agree to a shorter redemption period (not less than one month) or a court to extend a period of redemption (not more than nine months) prior to the entry of a judgment upon a showing that redemption will be effected, but the circumstances in which SB 122 applies appear to be predicated on an unengaged homeowner/debtor. Further, it only applies following the entry of a final judgment. Thus, the provisions of Section 39-5-19 do not appear to apply to the circumstances being addressed in SB 122; rather the procedures set out in existing Section 39-5-18--including a nine month period of redemption—likely would apply, which may not be the intent of this particular subsection of SB 122.

CONFLICT

Section 4B of SB 30 requires a 120-day delinquency requirement before filing for foreclosure on a residential home loan, which conflicts with the summary proceeding set forth in this bill allowing a motion for summary foreclosure upon default and evidence of vacancy and abandonment.

This bill may also conflict with SB 141, which proposes a state-wide settlement facilitation program for residential foreclosures.

MD/bb