

LFC Requester:	Marty Daly
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply: Date Jan. 28, 2015
Original **Amendment** **Bill No:** SB 122
Correction **Substitute**

Sponsor: Sen. Steven P. Neville **Agency Code:** Attorney General's Office
Person Writing AAG David C. Kramer

FORECLOSURE OF VACANT &
ABANDONED PROPERTY

Short Title: _____ **Phone:** 505-222-9134 : **Email** dkramer@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

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(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

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

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
 Duplicates/Relates to Appropriation in the General Appropriation Act:

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

BILL SUMMARY

Synopsis:

This bill creates a new Act which allows for a summary or “fast track” foreclosure of a property that is determined to be “vacant or abandoned.” Further, this bill grants immunity to the lender’s “property preservation” firm for entry into the home, as well as the bank/lender.

FISCAL IMPLICATIONS

As the proposed act creates a new and “expedited” type of case for the Courts, the Administrative Office of the Courts (AOC) should be consulted as to whether such a new type of civil case would increase staffing needs or other expenses for district courts.

SIGNIFICANT ISSUES

- 1) FINDING OF ABANDONMENT: The bill defines an abandoned or vacant home in a broad and vague manner to include 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, as written, a property could be deemed abandoned if during a work day a person was not home at the time of the “inspection” and “any other” indicia was found, which could include the presence of weeds. Under this standard, many homes that are lawfully occupied could be deemed abandoned if the owner was at work during the day and had some weeds growing in the yard.

The property preservation industry has in the past used, at times, “indicia” of vacancy facts such as a car not being present during working hours on a work day. Further, the

AGO has received several complaints from homeowners that the lender or its agent have deemed a property to be abandoned even when the homeowner is in weekly contact with the lender or the home is clearly being marketed for sale by a realtor. In two cases known to the AGO, the firm entered homes that were clearly marked as “for sale” by a realtor and yet the firm made no attempts to reach either the homeowner or the realtor by phone. In New Mexico, a homeowner has a lawful right to remain in their home until the conclusion of a foreclosure lawsuit. The legal definition of “abandoned” in New Mexico appears to be a rather high standard according to case law (a total relinquishment of all interest in and control over a property), and it is generally a factual question. The bill arguably seeks to change the common law substantially.

For example, in one case in 2014, the borrower was in negotiations with the lender and affirmed weekly that she was occupying the home. In that case, the lender’s agent still made a finding that the home was “abandoned” when the only indication was the presence of weeds and the absence of a vehicle in the driveway. In such cases the property preservation firm has taken the position that the borrower’s communication with the lender is irrelevant.

These cases reasonably support the inference that lenders and their agents make avoidable errors in making “abandonment” determinations. This fact combined with the broad definition of “abandonment” in the act subjects homeowners to substantial risk of erroneous determinations and in those cases would immunize the bank or its agents from any liability for, among other things, trespass, conversion, negligence or possibly even burglary. The AGO 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, and even without a foreclosure action pending. The AGO has an investigation, pending now, into one such firm. The Illinois Attorney General also sued Safeguard, the highest volume property preservation firm in the country, on the grounds that it constructively evicted homeowners and made improper findings of “abandonment.” That case is in litigation at this time after an Illinois court found sufficient allegations of unfair and deceptive conduct by Safeguard. Safeguard operates in New Mexico and several of the complaints noted above were in relation to Safeguard. Such actions by the agents of banks could be viewed as trespass, burglary, negligence, constructive eviction, or conversion.

- 2) STATEMENT BY BORROWER: The bill proposes to permit a finding of abandonment when the homeowner signs a statement “expressing clear intent” of all owners to abandon the home. First, it is unclear how one owner could take a legally binding position for all owners. In many cases, for example, a divorced couple are legally both owners of a property. This section does not indicate how in such a circumstance one of the owners could abandon the home for all homeowners. Secondly, the AGO has observed that lenders and their attorneys in New Mexico have at times used deceptive communications to homeowners to 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 could easily be deceived or induced into signing a statement “abandoning” the home because he or she would think, incorrectly, that the foreclosure would happen quickly and any efforts to save the home would be futile. 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. This creates substantial risk that borrowers could potentially be badgered into giving up their homes to the lender under the specific and new provisions of this bill.

- 3) REMOVES THE EQUITABLE POWER OF THE COURT: The bill arguably proposes to change the common law of New Mexico that a foreclosure is a purely equitable action. The bill claims to mandate that the court “shall immediately” issue a summary foreclosure judgment in favor of the lender if the court finds default and abandonment. This appears to take substantial discretion away from the court because the court “shall” issue a judgment in favor of the bank even if the borrower appears as long as the court finds the home to be “abandoned.” The bill does not include any other grounds for the homeowner to challenge or refute the default or assert defenses in equity. This, in effect, appears to not only “speed up” the foreclosure but alter the common law grounds for foreclosure and invade the discretion of the court.
- 4) CHANGE IN SERVICE OF PROCESS AND NOTICE OF SALE: The bill asserts that unlike a typical foreclosure suit which requires personal service of a summons and complaint, that the summary process achieves service through only mailing the complaint and posting a notice. Under New Mexico law currently, only cases with disputes for less than \$10,000.00 in metropolitan or magistrate courts permit service by mailing and posting. This portion 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.

The act also changes the notice of sale provision of NMSA 1978, § 39-5-1 to allow for a sale notice to run in a newspaper for just two weeks instead of four weeks. Again, such speed could possibly permit a sale to occur without an owner who is unavailable to not receive such notice.

- 5) SPEED: It is unclear whether the district courts will functionally be able to meet the deadline imposed that it must hear the motion for summary foreclosure within fifteen (15) days. Such timelines in courts are typically reserved for abuse and neglect proceedings or domestic violence proceedings. 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. In such cases, the speed imposed could be fundamentally unfair.
- 6) IMMUNITY: The bill purports to grant immunity to the bank and its agents for entry into a home once the bank files a summary foreclosure. It is unclear how such immunity would interact with other laws or acts, including the Unfair Practices Act, or the AGO’s ability to enforce the law. For example, it is unclear whether such immunity could bar an action like that filed by the Illinois Attorney General against a preservation firm even though by its terms it only applies to claims by the “mortgagor.”

- 7) NOTICE: The bill proposes a form Notice to be used to be posted at the home. That notice is arguably confusing or deceptive because it states or implies to the homeowner that he or she has the burden of demonstrating to the court that he or she “lawfully occupies” the property. As noted above, under New Mexico law, a homeowner may lawfully occupy a home until the judgment is entered and the sale confirmed by the Court. It is unlikely that most homeowners know this without consulting an attorney. Some homeowners believe that being in default bars them from occupying the home. So it is possible that the notice again takes advantage of a lack of knowledge or experience of the homeowner to an unfair degree. This notice also potentially shifts the burden of proof from the lender/plaintiff in this summary action to be the homeowner’s burden to show how he or she has not abandoned the home.
- 8) DEFICIENCY: It is unclear whether this bill makes any distinction between a judgment entered in favor of the lender in a “regular” foreclosure versus this summary and expedited proceeding. This new type of foreclosure appears to result in a personal judgment against the borrower while reducing the notice/service and defense periods.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

- 1) The bill creates a new type of action in court which will be brought by the lender in order to hold a fast hearing on occupancy. Because this is a new and “expedited” type of procedure, the Administrative Office of the Courts should be consulted about possible impacts to the district courts’ staff or operations. As noted above, it is unclear whether every district court could hold such hearings within the timelines imposed.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

- 1) Conflict - The definition of abandonment conflicts with a City of Albuquerque Ordinance which addresses vacant or abandoned properties. That ordinance, § 14-3-5-14, imposes a duty on an owner to register a vacant property. A prior section of the city code defines a vacant property as one that is unoccupied for a period of 90 days and is not listed for sale by a realtor. The act has no number of days without occupancy and does not exclude homes listed for sale.
- 2) Conflict – S.B. 141 (Sen. Padilla) proposes a state-wide settlement facilitation program for residential foreclosures. Section 1(E) of that bill touches upon the various options that are available at settlement, including a ‘fast track’ procedure for foreclosure if the homeowner signs a “statement that the borrower does not intend to return to and maintain ownership of the home.” This bill appears to provide the details of that fast track process. Again, such a statement presents a substantial risk in terms of taking advantage of the homeowner’s lack of knowledge in the area of foreclosures. It is unclear whether this “fast track” process is exempted from the general provisions of the settlement program, and if not, the timelines of the fast-track process could conflict with the letter and spirit of SB 141 because the homeowner may not receive any settlement facilitation prior to the home being summarily foreclosed upon.

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

By not passing the bill, lenders could continue to use the judicial foreclosure process and continue to use preservation firms as they do today.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Lenders would continue to use the existing judicial foreclosure process to gain ownership and control over abandoned homes.

AMENDMENTS