

ASSEMBLY FINANCIAL INSTITUTIONS COMMITTEE

STATEMENT TO

ASSEMBLY, No. 486

with committee amendments

STATE OF NEW JERSEY

DATED: DECEMBER 9, 1996

The Assembly Financial Institutions Committee reports favorably and with committee amendments Assembly Bill No. 486.

This bill, as amended, provides a lender who makes commercial mortgage loans the authority to include a power of sale provision in a commercial mortgage and the holder of a commercial mortgage containing such a provision the authority to exercise this power of sale upon monetary default by the mortgagor. The use of power of sale mortgages is consistent with the common law relating to mortgage foreclosures. If a commitment is issued for a commercial mortgage in which the lender intends to include a power of sale provision, the lender is required to indicate this in the commitment. The bill provides that if a notice of monetary default has been provided a mortgagor, the mortgagee may not realize on, or proceed to enforce a claim against, any collateral, other than the real property subject to the commercial mortgage, of the mortgagor or of any guarantor which serves as additional security for the debt secured by the commercial mortgage. This limitation is in effect until the mortgagee discontinues the power of sale process or until the mortgage commences a judicial foreclosure. From and after the effective date of sale, any collateral, other than the real property secured by the commercial mortgage, given by the mortgagor or by a guarantor to secure the commercial mortgage shall no longer be subject to any rights, lien or claim of the mortgagee to cover a deficiency or shortfall in the amount due on the mortgage loan. This does not mean, however, that if the collateral used by a mortgagor or a guarantor to secure the commercial mortgage subject to the power of sale, is also used to secure other obligations of the mortgagor or guarantor with the mortgagee, that the mortgagee gives up rights to enforce those other obligations, including rights with respect to that collateral. The bill also provides the mortgagor with the right to redeem the mortgaged property up to and including the day which is not later than 30 days after the date the mortgaged property is sold.

Upon the monetary default by the mortgagor and before exercising a power of sale, the mortgagee is required to send a notice of

monetary default to a mortgagor by certified mail, return receipt requested, or by service on the mortgagor, by which notice the mortgagor is informed of the monetary default and is provided with the following information: the particular commercial mortgage under which the mortgagee intends to exercise a power of sale; the nature of the monetary default claimed; that the mortgagee has accelerated the maturity of the debt, if that is the case; the right of the mortgagor to cure the monetary default, including the amount to be paid or other action necessary to cure and the time by which such cure must take place in order to prevent the mortgagee's exercise of its right of sale; that the mortgagor's ownership of the mortgaged property may be terminated by a sale of the property pursuant to this act; any right to transfer the mortgaged property and the transferee's rights, that the mortgagor's right to possession will be terminated upon delivery by the mortgagee of the deed and that upon such termination, the mortgagor may be evicted from the mortgaged property; the right of the mortgagor to any surplus from the sale, and the information that if a mortgagor claims not to be in monetary default or claims any other valid defense to the non-judicial foreclosure by power of sale, the mortgagor has the right to commence a summary proceeding in Superior court to contest the sale. In addition, the mortgagee may record the notice of non-judicial foreclosure in the office of the county recorder which recordation will serve in a manner similar to the filing of a notice of *lis pendens*.

The bill provides that a mortgagor may cure a monetary default up to the date and time of the sale, or to the date and time for which an extension or delay is granted under the provisions of the bill. The right to cure is unlimited, except that the mortgagee has the right to take action in a court of competent jurisdiction to seek to establish whether the mortgagor is abusing that right. If the mortgagee establishes that the mortgagor is abusing the right to cure and there is no other basis for delay, the court may require the sale of the mortgaged premises no sooner than 30 days after publication of a notice of sale.

If the mortgagee executes a notice of sale, the mortgagee is required to: serve the mortgagor and other parties in interest with the notice; include in the notice of sale served on parties having an interest in the mortgaged property information which reasonably apprises that party of the nature of that party's interest in the mortgaged property, whose interest the mortgagee seeks to foreclose in the non-judicial foreclosure process; publish the notice in a paper with circulation in the county in which the property is located at least 30 days before the date of the sale; and record the notice of sale together with true copies of proofs of service, proof of publication and posting, if required, in the county recorder's office within 10 days of the date of the sale. Service of the notice of sale may be accomplished by use of the Sheriff, upon request by the mortgagee, and if the Sheriff serves the notice, the Sheriff is entitled to charge the same fees for service as for

the service of a summons and complaint in a Superior Court action. The date of the sale specified in the notice of sale must be not sooner than 90 days after a notice of monetary default is mailed to or served by a mortgagee to a mortgagor.

Under the bill, if the monetary default by the mortgagor is due to the loss of a tenant or tenants in the property subject to the mortgage and less than 50% of the total rentable square footage in the mortgaged premises is rented at the time of monetary default or if the monetary default is due to the inability of a tenant or tenants to pay rent and the tenant or tenants occupy 50% or more of the total rentable square footage in the mortgage premises at the time of the monetary default, the mortgagor may request, and is entitled to, an extension of the date of sale for a period of up to 90 days. This request has to be made in writing and sent certified mail, return receipt requested, at least 15 days before the first scheduled date of sale. A mortgagor is entitled to only one such extension per monetary default. If a subsequent monetary default is due to the loss or inability to pay rent of the same tenant or tenants responsible for an earlier monetary default, the mortgagor is not eligible for an extension.

The sale shall take place in any county in which part of the property to be sold is situated, on the date and at the time and specific place designated in the notice of sale. The sale may be conducted by an agent of the mortgagee. Any person, including the mortgagee and mortgagor, may bid at the sale. The mortgagee may require a purchaser, other than the mortgagee, to post cash or certified funds equal to 15% of the amount bid for the property. If the purchaser fails to post the required amount, the mortgagee may continue the sale and may accept the next highest bid. If the purchaser is not the mortgagee, closing shall occur no sooner than 30 days after the date the mortgaged property is sold. The purchaser has 30 days, or a longer period of time as agreed to by the mortgagee, to complete the sale by submitting an amount necessary to pay the full amount bid.

Upon completion of the sale, the mortgagee is to execute and deliver a deed, without warranty, to the purchaser. Recording of this deed constitutes a presumption of compliance with the requirements of this bill. After a period of one year from its recording, the mortgagee's deed constitutes conclusive evidence of the validity and regularity of the proceedings in favor of bona fide purchasers for value and without actual notice.

The bill provides for the recording of certain notices and proofs of service in the office of the county recorder and for fees to be charged for such recording.

The committee amended the bill to: replace the word "default" with the phrase "monetary default" throughout; clarify the meaning of monetary default; clarify the meaning of deficiency by providing that (1) if a notice of monetary default has been given to a mortgagor, the mortgagee may not realize on, or proceed to enforce a claim against, any collateral, other than the real property subject to the commercial

mortgage, of the mortgagor or of any guarantor which serves as additional security for the debt secured by the commercial mortgage, and (2) that this limitation is in effect until the mortgagee discontinues the power of sale process or until the mortgage commences a judicial foreclosure, and (3) that from and after the effective date of sale, any collateral, other than the real property secured by the commercial mortgage, given by the mortgagor or by a guarantor to secure the commercial mortgage shall no longer be subject to any rights, lien or claim of the mortgagee to cover a deficiency or shortfall in the amount due on the mortgage loan, and finally (5) this does not mean, however, that if the collateral used by a mortgagor or a guarantor to secure the commercial mortgage subject to the power of sale, is also used to secure other obligations of the mortgagor or guarantor with the mortgagee, that the mortgage gives up rights to enforce those other obligations, including rights with respect to that collateral; provide the mortgagor the right to redeem the mortgaged property up to and including the day which is 30 days after the date of the sale of the mortgaged property; add to the notice requirements, the information that if a mortgagor claims not to be in monetary default or claims any other valid defense to the non-judicial foreclosure by power of sale, the mortgagor has the right to commence a summary proceeding in Superior Court to contest the sale; clarify that the right to cure up to the day and time of the sale of the mortgaged property includes the day and time to which the sale may be extended under certain circumstances permitted in the bill; provide for the filing of a notice of non-judicial foreclosure within 10 days of mailing or serving the notice of monetary default, which filing is to have the same effect as a notice of lis pendens; clarify that the notice of sale served on parties having an interest in the mortgaged property shall provide information which reasonably apprises that party of the nature of that party's interest in the mortgaged property, whose interest the mortgagee seeks to foreclose in the non-judicial foreclosure process; in the notice of sale, provide the mortgagor notice of the right to redeem up to 30 days after the date of the sale of the mortgaged property; provide that the failure of a person to receive timely notice of sale will not affect the title of the purchaser at the sale unless the person which did not receive timely notice of sale proves by the preponderance of the evidence that there was a lack of substantial compliance with the requirements regarding the notice of sale and that the lack of substantial compliance was the proximate cause of that person's alleged injury and the lack of substantial compliance materially prejudiced that person's interest in the mortgaged property; change from 120 days to 90 days the number of days after serving the notice of monetary default that a sale of the mortgaged property can take place; increase the number of days to which a mortgagor can get the date of the sale extended from 60 days to 90 days if monetary default is due to loss of a tenant or tenants which loss result in less than 50% of the total rentable square footage in the mortgaged property being

rented, or is caused by an inability of a tenant or tenants occupying 50% or more of the total rentable square footage in the mortgaged property to pay rent, at the time of the monetary default; clarify that the 90 day extension permitted in loss of tenant or tenants or inability of a tenant or tenants to pay rent situations applies again if the mortgagor has successfully cured the monetary default and at a later time is again subject to a monetary default due to loss of a tenant or tenants, except if the monetary default is due to loss of the same tenant or tenants or the inability of the same tenant or tenants to pay rent; authorize the Sheriff of each county and the Sheriff's respective deputies, upon request of the mortgagee, to make service of the notice of sale and provide that the Sheriff will be entitled to the same fees for service as for the service of a summons and complaint in a Superior Court action; require the mortgagee, within 10 days of the date of the sale of the mortgaged property, to cause to be recorded with the county recording officer a true copy of the notice of sale, proofs of service of the notice of monetary default, notice of sale, proof of publication and, if required, proof of posting, upon each party upon whom or which the particular notice was served; provide that, if the purchaser is not the mortgagee, the closing shall occur not sooner than 30 days after the date the mortgaged property is sold; clarify that it is the recording of the mortgagee's deed that constitutes a presumption of compliance with the requirements of the bill, not the execution and delivery of the deed; provide that any person claiming injury by reason of any alleged failure to comply with any of the requirements of this act shall have the burden of demonstrating lack of substantial compliance with the provisions of the bill and that, in fact, the lack of compliance was the proximate cause of that person's alleged injury; change from two years to one year from its recording, that the mortgagee's deed shall constitute conclusive evidence of the validity and regularity of the proceedings in favor of bona fide purchasers for value; provide that 30 days after the date of the sale, instead of after execution and delivery of the deed, conveyance shall be absolute, without right of redemption; and add a new section which provides for the filing in county recording offices of notices of non-judicial foreclosure and notices of sale and the respective fees to be charged for such filings.

This bill was pre-filed for introduction in the 1996 session pending technical review. As reported, the bill includes the changes required by technical review which has been performed.