

[Second Reprint]
SENATE, No. 1574

STATE OF NEW JERSEY

INTRODUCED OCTOBER 3, 1996

By Senators INVERSO and CASEY

1 AN ACT concerning non-judicial foreclosures of commercial
2 mortgages and supplementing Title 2A of the New Jersey Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. This act shall be known and may be cited as the "Commercial
8 Mortgage Non-Judicial Foreclosure Act."

9

10 2. a. The purpose of this act is to provide holders of commercial
11 mortgages with a process for non-judicial foreclosure as an alternative
12 to the judicial foreclosure process.

13 b. Nothing herein shall be deemed to limit or prevent judicial
14 foreclosure in accordance with the procedures provided by applicable
15 rules and statutes, at any time prior to the completion of any sale
16 pursuant to this act. The commencement of any action by a lender
17 under this act may, at the sole discretion of the lender, be discontinued
18 by the lender at any time prior to the completion of any sale pursuant
19 to this act, whereupon the lender shall thereafter be entitled to pursue
20 any rights the lender may have under this act or under any other
21 statute or other law, including the right to pursue foreclosure through
22 the judicial foreclosure process.

23 c. ²[The] Prior to the effective date of sale of the property subject
24 to the commercial mortgage sold pursuant to section 12 of this act,
25 the² exercise by the lender of its rights under this act shall not in any
26 way limit any rights pursuant to any other statute or other law,
27 including the right to pursue foreclosure through the judicial
28 foreclosure process. ²After the effective date of sale of the property,
29 the lender's rights shall be limited as set forth in subsection b. of
30 section 6 of this act.² No provision of this act shall be construed to
31 require a lender to exercise its rights under this act prior to instituting

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹ Senate SSM committee amendments adopted November 7, 1996.

² Senate floor amendments adopted December 16, 1996.

1 an action against a mortgagor or any other party, including any
2 guarantor, in order to exercise any right the lender may have against
3 a mortgagor or any other party or guarantor, including an action on a
4 promissory note, loan agreement guaranty, indemnification agreement
5 or obligation of a mortgagor or guarantor.

6
7 3. As used in this act:

8 "Commercial mortgage" means a mortgage, security interest or
9 other instrument which secures a loan made other than primarily for
10 personal, family or household purposes, in which the security is real
11 property located in this State, and which property, as of the execution
12 of the mortgage, is other than a one, two, three or four-family unit
13 dwelling in which at least one unit shall be, or is planned to be,
14 occupied as a residence by the debtor who is a natural person or by the
15 spouse, parent, brother, sister or child of the debtor or debtor's
16 spouse.

17 "Debtor" means the person or entity shown on the record of the
18 commercial mortgage lender as being obligated to pay the note, or
19 other evidence of an obligation, secured by the commercial mortgage.

20 ¹["Default"] ²["Monetary default"]¹ means the failure to comply
21 with any obligation in the commercial mortgage, note, bond, or other
22 loan agreement, with respect to payment of money to the lender,
23 payment of real estate taxes, payment of premiums for required
24 insurance, payment of governmental assessments or tax or other liens
25 against the mortgaged property ¹which would have priority over the
26 commercial mortgage¹, payment of other specified amounts, or
27 payment of funds into escrow for any of the items set forth ¹if such
28 funds are not available for making agreed upon disbursements from the
29 escrow account on a timely basis¹.] "Effective date of sale" means the
30 earlier of (1) 30 days following the sale of the property subject to the
31 commercial mortgage pursuant to section 12 of this act, or (2) if the
32 mortgagee is the successful purchaser, the date of recording of the
33 deed of sale pursuant to section 13 of this act.²

34 "Lender" or "mortgagee" means any person or entity which makes
35 or holds a commercial mortgage and any person or entity to which a
36 commercial mortgage is assigned or otherwise transferred and shall
37 include duly authorized agents.

38 ²"Monetary default" means the failure to comply with any obligation
39 in the commercial mortgage, note, bond or other loan agreement, with
40 respect to payment of money to the lender, payment of real estate
41 taxes, payment of premiums for required insurance, payment of
42 governmental assessments or tax or other liens against the mortgaged
43 property which would have priority over the commercial mortgage,
44 payment of other specified amounts, or payment of funds into escrow
45 for any of the items set forth if such funds are not available for making
46 agreed upon disbursements from the escrow account on a timely

1 basis.²

2 "Mortgagor" means the debtor and shall also include the owner of
3 the property being sold subject to the power of sale permitted pursuant
4 to this act.

5

6 4. A commercial mortgage may contain a provision for a power of
7 sale which authorizes the lender upon ¹monetary ¹default in the
8 mortgage to foreclose the mortgage and sell the mortgaged property
9 without instituting a foreclosure action through the judicial process.
10 The power of sale shall be exercised in accordance with the provisions
11 of this act.

12

13 5. If a lender issues a commitment in a transaction to make a
14 commercial mortgage loan, which loan is intended to contain a power
15 of sale provision pursuant to this act, the lender shall indicate in the
16 commitment that the mortgage will contain the power of sale
17 provision.

18

19 6. With respect to any commercial mortgage in which a power of
20 sale is granted:

21 a. The commercial mortgage shall state in bold and underlined
22 language, substantially the following: "A power of sale has been
23 granted in this commercial mortgage. A power of sale allows the
24 mortgagee to take the mortgaged property and sell it, without
25 instituting a judicial foreclosure action, upon ¹monetary¹ default by the
26 mortgagor under this commercial mortgage."

27 b. ²[A mortgagor ¹or anyone who has guaranteed the mortgagor's
28 debt¹ shall not be liable for any deficiency in the amount due and
29 owing a mortgagee after a sale pursuant to this act ¹[unless the
30 mortgagor specifically agrees to be liable for the deficiency by
31 signature separate from the signature on the commercial mortgage,
32 which agreement and separate signature may either be on a separate
33 document recorded with the commercial mortgage or in the
34 commercial mortgage document. Failure to obtain the separate
35 agreement and signature shall not limit a mortgagee's rights against
36 any party or person in any way except to prevent the mortgagee from
37 pursuing a deficiency judgment against the mortgagor after sale
38 pursuant to this act. The amount of any deficiency shall be the
39 difference between the amount obtained by the mortgagee from the
40 sale of the mortgaged property and the total amount due under the
41 mortgage loan documentation including principal, interest, late
42 charges, default interest, and the reasonable costs and expenses of the
43 sale, including the amount of attorney's fees fixed in the commercial
44 mortgage by agreement, unless a portion of all of the fees are waived
45 by the parties or the amount fixed is found by a court to be
46 unconscionable. If such fees are found to be unconscionable or no

1 fees are fixed in the commercial mortgage by agreement, a court may
2 allow reasonable attorney's fees. If, in an action for a deficiency, the
3 mortgagor shall establish that the fair market value of the property as
4 of the date of the sale exceeded the sale price, then the deficiency
5 otherwise obtainable under this subsection shall be reduced by the
6 amount of the excess. Any action for a deficiency pursuant to the
7 provisions of this subsection shall be commenced within 90 days after
8 the date of the sale]¹.] If a notice of monetary default has been
9 provided to the mortgagor pursuant to section 8 of this act, the
10 mortgagee may not realize on, or proceed to enforce a claim against,
11 any collateral, other than the real property subject to the commercial
12 mortgage, of the mortgagor or of any guarantor which serves as
13 additional security for the debt secured by the commercial mortgage.
14 This limitation shall apply until the mortgagee discontinues the power
15 of sale process pursuant to this act by giving written notice to the
16 mortgagor or until the mortgagee commences a judicial foreclosure.
17 From and after the effective date of sale, any collateral other than the
18 real property secured by the commercial mortgage given by the
19 mortgagor or by a guarantor to secure the commercial mortgage shall
20 no longer be subject to any rights, lien or claim of the mortgagee to
21 cover any deficiency or shortfall in the amount due on the mortgage
22 loan. Nothing in this subsection shall limit a mortgagee's rights to
23 enforce obligations other than the commercial mortgage or any
24 guarantees related thereto, including rights with respect to any
25 collateral securing those obligations which collateral may also secure
26 the commercial mortgage.²

27

28 7. Nothing in this act shall be construed to impair the right of any
29 person who has a right to redeem the ¹mortgaged¹ property from
30 redeeming ¹[prior to the execution and delivery of a deed pursuant to
31 section 13 of this act] that property up to and including the day
32 which is not later than 30 days after the date the mortgaged property
33 is sold pursuant to section 12 of this act¹, upon payment of the
34 amount owed, including all expenses ¹, as these amounts are described
35 in subsection c. of section 9 of this act¹.

36

37 8. a. If the commercial mortgage authorizes a mortgagee to
38 exercise a power of sale, the mortgagee, after ¹monetary¹ default by
39 a mortgagor and before exercising a power of sale, shall send the
40 mortgagor a notice of ¹monetary¹ default.

41 b. A notice of ¹monetary¹ default shall be sent by certified mail,
42 return receipt requested, to the mortgagor at the mortgagor's address
43 specified in the commercial mortgage as the place to which notices are
44 to be sent, or if no address is specified for receipt of notices, to the
45 address of the mortgagor as set forth in the mortgage and if changed,
46 to the address specified in a written notice of a new address received

1 by the mortgagee prior to the date of the notice of ¹monetary¹ default.
2 Notice pursuant to this subsection b. shall be considered to have been
3 given to a mortgagor if it is sent by certified mail, return receipt
4 requested, to the address as set forth herein or if served in the manner
5 of service of the notice of sale as set forth in section 10 of this act.

6 c. The notice shall state, in a manner reasonably calculated to make
7 the mortgagor aware of the situation:

8 (1) the particular commercial mortgage under which the mortgagee
9 intends to exercise a power of sale;

10 (2) the nature of the ¹monetary¹ default claimed;

11 (3) that the mortgagee has accelerated the maturity of the debt, if
12 that is the case;

13 (4) any right the mortgagor has to cure the ¹monetary¹ default,
14 including the amount to be paid or other action necessary to cure, and
15 the time within which the cure shall take place in order to prevent the
16 mortgagee's exercise of its right of sale;

17 (5) that the mortgagor's ownership may be terminated by a sale of
18 the property pursuant to this act;

19 (6) if the commercial mortgage specifically permits transfer of the
20 mortgaged property subject to the commercial mortgage, the
21 transferee's right, if any, to succeed to the rights of the mortgagor in
22 curing the ¹monetary¹ default;

23 (7) that the mortgagor's right to possession will be terminated
24 ²[effective upon delivery by the mortgagee] on the earlier of (a) 30
25 days following sale of the property subject to the commercial
26 mortgage pursuant to section 12 of this act, or (b) if the mortgagee is
27 the successful purchaser, the date of recording² of the deed pursuant
28 to section 13 of this act, and that upon such termination, the
29 mortgagor may be evicted from the mortgaged property; ¹[and]¹

30 (8) the right of the mortgagor to any surplus from the sale¹; and

31 (9) the right of the mortgagor who claims not to be in monetary
32 default or claims any other valid defense to the non-judicial
33 foreclosure by power of sale to commence a summary proceeding ²[.]²
34 pursuant to section 15 of this act¹ .

35 d. A mortgagor, or any one authorized to act on behalf of the
36 mortgagor, shall have the right ¹to cure the monetary default, de-
37 accelerate and reinstate the commercial mortgage by tendering the
38 amount or performance specified in subsection e. of this section¹ at
39 any time, up to the date and time of sale as set forth in the notice of
40 sale pursuant to subsection b. of section 9 of this act, ¹[to cure the
41 default, de-accelerate and reinstate the commercial mortgage by
42 tendering the amount or performance specified in subsection e. of this
43 section] or, if extended pursuant to paragraph (2) of subsection d. of
44 section 9 of this act, up to the date and time to which the sale is
45 extended which date shall also be subject to the notice of sale
46 requirements of sections 9 and 10 of this act, or, if delayed pursuant

1 to subsection b. of section 12 of this act, to the date and time to which
2 the sale is postponed or continued, provided that the notices required
3 under subsection b. of section 12 have been properly given¹. The
4 payment or tender shall be made to the lender, holder or servicing
5 agent. Provided, however, that if a mortgagee can establish in a court
6 of competent jurisdiction that the mortgagor has a pattern of waiting
7 until more than 30 days after receipt of notice of ¹monetary¹ default to
8 cure the ¹monetary¹ default pursuant to subsection e. of this section,
9 or can establish that the mortgagor is not using the right to cure in
10 good faith, the court ¹[shall] may¹, if there is no other basis for delay
11 of the sale, order the sale of the mortgaged premises no sooner than
12 30 days after a notice is published pursuant to subsection c. of section
13 10 of this act.

14 e. To cure a ¹monetary¹ default under this section, a mortgagor
15 shall:

16 (1) pay or tender to the person whose name, address and phone
17 number is given in the notice of ¹monetary¹ default, in the form of
18 cash, cashier's check, or certified check, all sums due as set forth in the
19 notice of ¹monetary¹ default and all other sums due which have
20 accrued after the date of the notice of ¹monetary¹ default and up to
21 the time of payment or tender, including the total amount due under
22 the commercial mortgage loan documentation including past-due
23 principal payments, interest, late charges, default interest, any other
24 sum of money that is due under the commercial mortgage loan
25 documentation, and the reasonable costs and expenses of collection of
26 the foregoing, including the amount of attorney's fees fixed in the
27 commercial mortgage by agreement, unless a portion of all of the
28 attorney's fees are waived by the parties or the amount fixed for
29 attorney's fees is found by a court to be ¹[unconscionable]
30 unreasonable¹. If the attorney's fees are found to be ¹[unconscionable]
31 unreasonable¹ or no attorney's fees are fixed in the commercial
32 mortgage by agreement, a court may allow reasonable attorney's fees;
33 and

34 (2) perform any other obligation which the mortgagor was bound
35 to perform under the commercial mortgage.

36 f. To cure a ¹monetary¹ default under this section, a mortgagor
37 shall not be required to pay any charge, fee or penalty attributable
38 solely to the exercise of the right to cure a ¹monetary¹ default as
39 provided for in this act.

40 g. Cure of ¹monetary¹ default reinstates the mortgagor, for the
41 purposes of this act, to the same position as if the cured ¹monetary¹
42 default had not occurred. It nullifies, as of the date of cure, any
43 acceleration of any obligation under the mortgage, note or bond
44 arising from the ¹monetary¹ default which was cured.

45 h. The right to cure a ¹monetary¹ default under this section is
46 independent of any right of redemption or any other right or remedy

1 under the common law, principles of equity, State or federal statute,
2 or rule of court.

3 ¹i. Within 10 days of mailing or serving of the notice of monetary
4 default, the mortgagee may file with the recording officer in the county
5 in which the mortgaged property is located, or if located in more than
6 one county, in each county in which the mortgaged property is
7 located, a notice of non-judicial foreclosure, which shall be in
8 substantially the same form and have the same effect as a notice of lis
9 pendens filed pursuant to N.J.S.2A:15-6 et seq.¹
10

11 9. a. If, upon ¹monetary¹ default by a mortgagor, a mortgagee
12 elects to use a power of sale granted in the commercial mortgage, it
13 shall execute a notice of sale in written form directed to the
14 mortgagor, any holder of a commercial mortgage or other lien of
15 record, which is subordinate to the mortgagee's interest, and any other
16 person having an interest, claim or lien of record in the mortgaged
17 property whose interest, claim or lien the mortgagee seeks to foreclose
18 by the exercise of its power of sale.

19 b. ¹(1)¹ The notice of sale shall state the name of the mortgagor,
20 the occurrence of a ¹monetary¹ default, the general description of the
21 ¹monetary¹ default such as "failure to make a payment due," "failure
22 to pay taxes," or other similar terms, the election to use the power of
23 sale, the date, time and place when the mortgaged property will be
24 sold, the legal description of the mortgaged property as it appears in
25 the commercial mortgage and any street address of that property,
26 which appears in the commercial mortgage, and as reasonably
27 determined by the lender by title search or otherwise, any holder of a
28 prior commercial mortgage or other lien of record, and any person
29 having an interest, claim or lien of record in the mortgaged property
30 whose interest, claim or lien the mortgagee seeks to foreclose by the
31 exercise of its power of sale, and shall designate the person or persons
32 whose unknown successors are being served. The notice shall state
33 any terms and conditions applicable to the sale, including whether the
34 mortgaged property may be sold in separate lots or parcels.

35 ¹(2) With respect to any party having an interest, claim or lien
36 which the mortgagee seeks to foreclose, the notice shall provide
37 information which reasonably apprises the party of the nature of the
38 party's interest. If the party is the State of New Jersey or the United
39 States of America, the provisions of N.J.S.2A:45-1 et seq. and 26
40 U.S.C. §7425, respectively, shall govern the contents of the notice.¹

41 c. The notice shall advise the mortgagor of the mortgagor's right,
42 pursuant to this act, to redeem the mortgaged property from
43 foreclosure by paying to the mortgagee ¹not later than 30 days after
44 the date the mortgaged property is sold pursuant to section 12 of this
45 act,¹ the total amount due under the commercial mortgage loan
46 documentation including: principal; interest; late charges; default

1 interest; prepayment fee, charge, penalty or similar payment; any other
2 sum of money due under the commercial mortgage loan
3 documents and the reasonable costs and expenses of a sale including
4 the amount of attorney's fees fixed in the commercial mortgage by
5 agreement, unless a portion of all of the attorney's fees are waived by
6 the parties or the amount of the attorney's fees is found by a court to
7 be ¹[unconscionable, prior to the execution and delivery of a deed
8 pursuant to section 13 of this act] unreasonable¹, and shall advise all
9 other persons claiming an interest in that property that the property
10 will be sold subject to their claims unless they elect to join the exercise
11 of the power of sale or that the mortgagee claims an interest superior
12 to the claims of such persons and that their interests shall be
13 terminated by the sale unless they take appropriate legal action.

14 d. (1) The date of sale specified in the notice of sale shall be at
15 least 30 days from the date the notice is served, mailed or posted
16 pursuant to section 10 of this act, as applicable, and also shall be at
17 least ¹[120] 90¹ days after the date a notice of ¹monetary¹ default is
18 mailed or served by the mortgagee to the mortgagor pursuant to
19 subsection b. of section 8 of this act. ¹Failure of a person to receive
20 timely notice of sale shall not adversely affect the title of the purchaser
21 at the sale unless the person which did not receive timely notice of sale
22 proves by a preponderance of the evidence that there was lack of
23 substantial compliance with the requirements of this section and
24 section 10 of this act and that the lack of substantial compliance was
25 the proximate cause of that person's alleged injury and the lack of
26 substantial compliance materially prejudiced that person's interest in
27 the mortgaged property.¹

28 (2) If the ¹monetary¹ default by the mortgagor is due to the loss of
29 a tenant or tenants in the property subject to the commercial mortgage
30 and less than 50% of the total rentable square footage in the
31 mortgaged property is rented at the time of a ¹monetary¹ default, ²or
32 if the monetary default by the mortgagor is due to the inability of a
33 tenant or tenants who occupy 50% or more of the total rentable square
34 footage in the mortgaged property to pay rent at the time of monetary
35 default,² the mortgagor may request and shall be entitled to an
36 extension of the date of sale for a period of up to ¹[60] 90¹ days. Any
37 such request shall be made in writing and shall be sent certified mail,
38 return receipt requested, to the mortgagee or its agent, at least 15 days
39 prior to the first scheduled date of sale. A mortgagor shall be entitled
40 to only one such extension ¹for a monetary default.

41 (3) If a mortgagor cures a monetary default and at a later time is
42 subject to another monetary default, the provisions of paragraph (2)
43 of this subsection d. shall not apply if the monetary default is the
44 result of the loss of the same tenant or tenants ²or the result of the
45 inability of the same tenant or tenants to pay rent,² whose ²[lose] loss
46 or failure to pay rent² was responsible for an earlier monetary default¹.

1 10. a. The notice of sale shall be personally served by the
2 mortgagee's attorney or the attorney's agent or any other competent
3 adult not having a direct interest in the mortgaged property being
4 foreclosed. ¹In addition, the Sheriff of each county and the Sheriff's
5 respective deputies are authorized, upon request of the mortgagee, to
6 make service of the notice of sale, as provided herein. The Sheriff
7 shall be entitled to the same fees for service as for the service of a
8 summons and complaint in a Superior Court action.¹ Service shall be
9 made as follows:

10 (1) (a) Upon an individual other than a minor under 14 years of
11 age or an incompetent person, by delivering a copy of the notice to the
12 individual personally; or by leaving a copy thereof at the dwelling
13 house or usual place of abode with a competent member of the
14 household of the age of 14 years or over then residing therein; or by
15 delivering a copy thereof to a person authorized by appointment or by
16 law to receive service of process on the individual's behalf;

17 (b) Upon a minor under 14 years of age, by delivering a copy of
18 the notice personally to the minor's father, mother or guardian of the
19 person or a competent adult member of the household with whom the
20 minor resides;

21 (c) Upon an incompetent person, by delivering a copy of the notice
22 personally to the guardian of the person or a competent adult member
23 of the household with whom the incompetent resides; or, if the
24 incompetent is living in an institution, then to the director or chief
25 executive officer of the institution;

26 (2) Upon a domestic or foreign corporation, by serving, in the
27 manner prescribed in subsection a. of this section, either an officer,
28 director, trustee, or managing or general agent; or any person
29 authorized by appointment or by law to receive service of process on
30 behalf of the corporation; or the person at the registered office of the
31 corporation in charge thereof. If service cannot be made upon any of
32 the foregoing, then it may be made upon the person at the principal
33 place of business of the corporation in this State in charge thereof, or
34 if there is no place of business in this State, then upon any servant of
35 the corporation within this State acting in the discharge of his duties.
36 If it appears by affidavit of mortgagee's attorney or of any person
37 having knowledge of the facts that after diligent inquiry and effort,
38 personal service cannot be made upon any of the foregoing and if the
39 corporation is a foreign corporation, then, consistent with due process
40 of law, service may be made by mailing, by registered or certified mail,
41 return receipt requested, a copy of the notice to a registered agent of
42 service, or to its principal place of business, or to its registered office.

43 (3) Upon an unincorporated association which is subject to suit
44 under a recognized name and upon a partnership, a limited liability
45 partnership or a limited liability company by serving, in the manner
46 prescribed in subsection a. of this section, an officer, a managing or

1 general agent, or, in the case of a partnership, a partner, or, if it
2 appears that after diligent inquiry and effort, service cannot be made
3 upon any of the foregoing, then, consistent with due process of law,
4 by mailing, by registered or certified mail, return receipt requested, a
5 copy of the notice of sale to a registered agent for service, or to its
6 principal place of business, or to its registered office.

7 (4) Upon the State of New Jersey, by registered, certified or
8 ordinary mail or by delivering a copy of the notice personally to the
9 Attorney General or to any person in his office designated by him in
10 writing filed with the Clerk of the Superior Court.

11 (5) Upon any county, municipality, or other public body, by
12 delivering a copy of the notice personally to the presiding officer or to
13 the clerk or secretary thereof.

14 b. Notice of sale shall be mailed by the mortgagee, if by due
15 diligence, personal service cannot be made on an individual pursuant
16 to paragraph (1) of subsection a. of this section, within seven days of
17 the publication required by subsection c. of this section, to the
18 residence or place where the party to be served usually receives mail,
19 unless it shall appear after due diligence that such residence or place
20 cannot be ascertained after inquiry; and then the publication pursuant
21 to subsection c. of this section shall be deemed sufficient.

22 c. A notice of sale shall be published once in a newspaper which is
23 published in the county in which the property is located, or, if there is
24 none, in a newspaper published in this State circulating in that county.
25 In any instance when personal service has not been able to be made on
26 all parties pursuant to subsections a. and b. of this section, a copy of
27 the notice of sale shall be posted upon the property to be sold within
28 seven days after publication. The notice shall be published at least 30
29 days before the date appointed for selling the property.

30 d. ¹[A notice of sale shall be recorded in the office of the county
31 clerk or register of deeds of each county wherein the mortgaged
32 property is situated within 30 days after compliance with the
33 provisions of subsection c. of this section. The recording of the
34 notice of sale pursuant to this subsection shall serve as notice of the
35 pendency of the procedure to any person acquiring a subsequent
36 interest in the property. To verify compliance with the notice
37 provisions of section 9 of this act and subsections a., b. and c. of this
38 section, proof of receipt, return of service or affidavit in lieu of
39 personal service, or copies thereof and proof of publication of the
40 notice of sale shall be recorded in the office of the county clerk or
41 register of deeds of each county wherein the mortgaged property is
42 situated any time before the recording of the mortgagee's deed
43 executed pursuant to the sale under this act.] Within 10 days following
44 the date of sale as provided pursuant to section 12 of this act, the
45 mortgagee shall cause to be recorded with the recording officer in the
46 county in which the mortgaged property is located, or if located in

1 more than one county, in each county where the mortgaged property
2 is located, a true copy of the notice of sale, together with true copies
3 of proofs of service, however made, of the notice of monetary default
4 and notice of sale, including but not limited to, proof of publication
5 and proof of posting, if required, upon each party upon whom or
6 which the notice of monetary default, notice of sale, or both, were
7 served. Failure to comply with the provisions of this subsection shall
8 not adversely affect the title of the purchaser at the sale or the validity
9 of the non-judicial foreclosure proceedings.¹

10 ²e. Service of the notice of sale on the mortgagor pursuant to this
11 section shall be made within one year from the date of effective service
12 of the notice of monetary default as provided pursuant to section 8 of
13 this act. The foregoing time limitation shall be tolled from and after
14 the date of filing of any legal action by the mortgagor objecting to the
15 sale of the property pursuant to this act until this action is finally
16 concluded.²

17
18 11. The sale shall be held in any county where part of the
19 mortgaged property to be sold is situated at the time designated in the
20 notice of sale, or a date to which the sale has been continued as
21 provided by this act, on a day other than a Saturday, Sunday or legal
22 holiday, between the hours of nine o'clock a.m. and five o'clock p.m.
23 at a specified place on that property, at the courthouse or at another
24 specified place in the county.

25
26 12. a. On the date and at the time and place designated in the
27 notice of sale, the mortgagee exercising the power of sale shall cause
28 the mortgaged property to be sold at public auction to the highest
29 bidder. If the mortgaged property is legally divisible into separate lots
30 or parcels, conditional bids shall be received for each and every
31 separate lot or parcel and for the entire property as a whole. The
32 mortgagee shall determine which conditional sale or sales result in the
33 highest total price bid for all of that property. An attorney or other
34 agent for the mortgagee may conduct the sale, and act at the sale as
35 the auctioneer for the mortgagee. Any person, including the
36 mortgagee or mortgagor may bid at the sale. Every bid shall be
37 deemed an irrevocable offer, until the sale is completed and the sale
38 shall not be deemed completed until the purchaser pays the price bid
39 in a form satisfactory to the mortgagee. If a purchaser other than the
40 mortgagee, when required by the mortgagee, fails to post cash or
41 certified funds equal to 15% of the amount bid for the mortgaged
42 property, the mortgagee may proceed with the sale and may accept the
43 next highest bid. The party that fails to make the payment shall be
44 liable to any person who suffers loss or expenses, including attorney's
45 fees, occasioned thereby and the mortgagee may thereafter in any sale
46 of the mortgaged property reject any bid of that person. The 15%

1 deposit shall be placed and held in escrow by the mortgagee pending
2 completion of the sale. In the event a purchaser fails to complete the
3 transaction of sale within 30 days of the sale or a longer reasonable
4 time permitted by the mortgagee in writing, any deposit shall be
5 applied first to the expenses of the sale and the balance to the debt,
6 and the purchaser shall be liable to any person who suffers loss or
7 expenses, including attorney's fees, occasioned by the resale of the
8 mortgaged property.

9 b. The person conducting the sale, for any cause deemed in the
10 interest of the mortgagee, the mortgagor, or both, may postpone or
11 continue the sale or change the place of the sale to another location
12 permitted by law, by giving notice, including the new time and place,
13 by public declaration at the time and place last appointed for the sale
14 and in any other manner reasonable under the circumstances which
15 shall include publication one time at least 10 days prior thereto of a
16 notice of the new date, time and place of sale, such notice to be
17 directed to the same persons as the original notice of sale, and proof
18 of publication then to be filed in the office of the county clerk of each
19 county wherein the mortgaged property to be sold is situated any time
20 before the recording of the mortgagee's deed executed pursuant to the
21 sale under this act. No other notice of the postponed, continued,
22 changed or relocated sale is required.

23 ²c. The purchaser at the sale shall have the right to possession and
24 control of the property subject to the sale as of the effective date of
25 sale. If a person other than the mortgagee is the successful bidder at
26 the sale, the right to possession and control shall vest in the mortgagee
27 after the effective date of sale until the date of delivery of the deed, at
28 which time the purchaser shall have the right of possession and
29 control.²

30

31 13. a. The sale shall be closed at a time and under reasonable
32 conditions determined and specified by the mortgagee at the time of
33 the sale ¹, provided however, that if the purchaser is not the
34 mortgagee, closing shall occur no sooner than 30 days after the date
35 the mortgaged property is sold pursuant to section 12 of this act¹ .
36 Upon receipt of payment in form satisfactory to the mortgagee, the
37 mortgagee shall execute and deliver a deed, without warranty or
38 covenants to the purchaser, except as specifically set forth in this act,
39 and which identifies the mortgagee's and other interests foreclosed and
40 the parties involved and indicates where the documents evidencing
41 those interests are recorded, recites the amount of the successful bid,
42 and recites that the deed is executed by the mortgagee exercising a
43 power of sale after a ¹[breach or] monetary¹ default and sale under this
44 act. Signature and title or authority of the person signing the deed as
45 grantor is sufficient proof of the signer's authority to sign. Further
46 proof is not required even though the signer is also named as grantee

1 in the deed. ¹[The] Recording of the¹ mortgagee's deed shall ¹[raise]
2 constitute¹ a presumption of compliance with the requirements of this
3 act ¹[regarding the exercise of the power of sale and the sale of the
4 mortgaged property, including the giving of the notice of default and
5 of sale and the conduct of sale. Such deed shall constitute conclusive
6 evidence of the meeting of such requirements in favor of purchasers
7 for value and without actual notice so long as the failure to meet those
8 requirements would otherwise render the sale only voidable and, even
9 if the sale is void, the deed shall constitute conclusive evidence of the
10 meeting of the requirements in favor of purchasers for value and
11 without actual notice after the passage of two years from the date of
12 the recording of the deed, unless a contrary determination is made
13 within such two-year period by a court of competent jurisdiction].
14 Any person whose right, title, lien, claim or interest was divested by
15 a proceeding under this act, or person claiming by, under or through
16 any such person, who claims injury by reason of any alleged failure to
17 comply with any of the requirements of this act, shall not have any
18 claim against the mortgaged property unless that person proves, by a
19 preponderance of the evidence, that there was a lack of substantial
20 compliance with this act, that the lack of substantial compliance was
21 the proximate cause of that person's alleged injury, and the lack of
22 substantial compliance materially prejudiced that person's interest in
23 the mortgaged property. After a period of one year from its recording,
24 the mortgagee's deed shall constitute conclusive evidence of the
25 validity and regularity of the proceedings in favor of bona fide
26 purchasers for value and without actual notice¹.

27 b. ¹[The] Recording of the¹ mortgagee's deed, pursuant to
28 compliance with the provisions of this act, shall have the same effect
29 as delivery of a valid sheriff's deed in a judicial foreclosure process and
30 shall operate to convey to the purchaser the title, interest and claim of
31 the mortgagee and of the mortgagor and their respective successors in
32 interest, and of all persons claiming an interest in the property sold
33 which was acquired subsequent to the recording of the commercial
34 mortgage pursuant to which the power of sale is exercised and prior
35 to delivery of the mortgagee's deed. ¹[Such] Thirty days after the date
36 the mortgage property is sold pursuant to section 12 of this act, such¹
37 conveyance shall be absolute, without right of redemption and clear of
38 all liens, claims, or interests to the extent provided in this section, if
39 the record shows that all necessary parties were duly notified or served
40 with process as required pursuant to this act and except for any
41 statutory right of redemption which may be held by the United States
42 of America under authority of ¹[28 U.S.C. § 2410] 26 U.S.C. §7425¹.

43

44 14. a. The mortgagee shall apply the proceeds of the sale of the
45 mortgaged property as follows:

46 (1) To the reasonable costs and expenses of exercising the power

1 of sale and of the sale, including the payment of reasonable attorney's
2 fees actually incurred; and

3 (2) Unless otherwise required by law, to the payment of the
4 contract or indebtedness secured by the commercial mortgage, the
5 payment of all other obligations provided in or secured by the
6 commercial mortgage, and the obligations of any junior lienholders or
7 encumbrancers, in order of their priority as otherwise provided for by
8 law. After payment in full to all junior lienholders and encumbrancers,
9 payment shall be made to the party who is the owner of the property
10 immediately preceding the sale.

11 b. In lieu of making payments to subordinate lienholders or
12 encumbrancers or the mortgagor, the mortgagee may elect to deposit
13 all or any part of the sale proceeds which exceed the amount due to
14 the mortgagee with the clerk of the Superior Court subject to order of
15 the Superior Court upon the application of any interested party. Upon
16 deposit of such monies together with a legal description of the
17 property whose sale produced the proceeds, the mortgagee shall be
18 discharged from all responsibility for acts performed in good faith
19 according to the provisions of this ¹[act] section¹.

20

21 15. a. A mortgagor who claims not to be in ¹monetary¹ default or
22 claims any other valid defense to the non-judicial foreclosure by power
23 of sale may commence a summary proceeding in Superior Court to
24 contest the proposed sale.

25 b. Nothing herein shall be deemed to affect any right of possession
26 a mortgagee may have to the property prior to the completion of the
27 sale or to limit the equitable jurisdiction of the courts ¹[with respect
28 to mortgages or with respect to the provisions of this act]¹.

29

30 ¹16. a. The county recording officer shall cause notices of non-
31 judicial foreclosure, amended notices of non-judicial foreclosure,
32 warrants to discharge these notices and releases thereof to be filed
33 and indexed in the same manner as are notices of lis pendens, amended
34 notices of lis pendens, warrants to discharge these notices and releases
35 thereof. The fees charged for recording and indexing these notices
36 shall be the same as the fees charged by the county recording officer
37 for similar actions taken with respect to notices of lis pendens. A
38 marginal notation shall be made upon the record of each mortgage in
39 the same manner as is provided by N.J.S.2A:15-9, and the county
40 recording officer may charge the appropriate fees for these services.

41 b. The county recording officer shall cause notices of sale,
42 amended notices of sale, warrants to discharge these notices and
43 releases thereof to be recorded and indexed in the same manner as are
44 instruments recorded and indexed pursuant to section 1 of P.L.1939,
45 c.170 (C.46:16-1.1). The fees charged for recording and indexing
46 these notices shall be the same as the fees charged by the county

1 recording officer for recording and indexing an instrument pursuant to
2 section 1 of P.L.1939, c.170 (C.46:16-1.1). A marginal notation shall
3 be made upon the record of each mortgage for which any such
4 ²[instrument has] notices, amended notices, warrants or releases have²
5 been submitted, and the county recording officer may charge the
6 appropriate ²[fee] fees² for these services.¹

7

8 ¹[16.] 17.¹ This act shall take effect immediately.

9

10

11

12

13 Provides for non-judicial foreclosure of commercial mortgages.