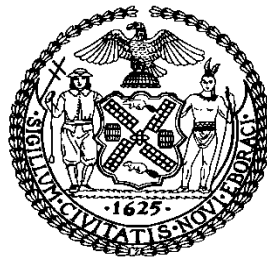


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THE COUNCIL



BRIEFING PAPER OF THE INFRASTRUCTURE DIVISION

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COMMITTEE ON COMMUNITY DEVELOPMENT

Hon. Albert Vann, Chair

January 30, 2012

OVERSIGHT: ***Oversight: Systemic Problems in the Ongoing Mortgage Foreclosure Crisis,
and its Effect On New York City Neighborhoods***

I. INTRODUCTION

On January 30, 2012, the Committee on Community Development, chaired by Council Member Albert Vann, will hold an oversight hearing concerning several distinct systemic problems within the current mortgage foreclosure crisis and their effect on New York City Neighborhoods. Those invited to offer testimony include representatives of the New York City Department of Housing Preservation, the Office of the Chief Judge of the State of New York, the Center for New York City Neighborhoods, Pratt Area Community Council, Neighborhood Economic Development Advocacy Project, the Association for Neighborhood and Housing Development, Neighborhood Housing Services of New York, and other community based, not-for-profit organizations, legal services organizations and advocacy groups.

II. BACKGROUND

Almost every person in America who purchases a home does so with a loan, or promissory note, that is evidenced by a mortgage containing a security interest in the home itself, as collateral for the loan.¹ If a homeowner fails to repay the mortgaged loan as agreed, the lender, usually a bank or another entity the lender has transferred the right of collection to, enforces the security interest provisions of the mortgage by having the home sold to satisfy the loan's outstanding balance. This enforcement process is known as foreclosure.²

During the past four years, millions of American homeowners in every region of the nation suffered the loss of homes to mortgage foreclosure.³ From 2005 through 2009, the foreclosure and default rates for the country reached their highest level in three decades.⁴ Currently, there are approximately two million residential mortgage foreclosure cases pending

¹ See Black's Law Dictionary, mortgage.

² Id., foreclosure.

³ New York Times, "Foreclosures", January 24, 2012 (updated).

⁴ United States Government Accountability Office, "Troubled Asset Relief Program, Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs", June 2010, page 4.

across the country and approximately two million additional cases, in pre-foreclosure circumstances, waiting to be foreclosed.⁵ Based on the number of residential mortgage foreclosures, the geographic expanse of foreclosure activity and the impact of foreclosures across economic and demographic groups, many describe the current activity of foreclosure cases a crisis and further describe it as ‘depression-like’ in its severity.⁶

It is generally noted that the impact of the foreclosure crisis on New York City is less severe than other metropolitan areas of the nation. Notwithstanding, the foreclosure crisis has affected New York City generally, and has had a significant impact in particular communities in the City.⁷ Since 2007, more than 53,000 foreclosure notices have been filed in the City.⁸ City neighborhoods most affected by foreclosures are non-white neighborhoods where foreclosures are “due to factors such as subprime lending, unemployment, and declining home values. Neighborhoods in Southeast Queens, Central Brooklyn and the Bronx, with large numbers of African American and Latino residents, are hardest hit.”⁹ These neighborhoods, are “at risk neighborhoods”, as defined by the United States Department of Housing and Urban Development.¹⁰

⁵ New York Times, “Foreclosures”, January 24, 2012 (updated).

⁶ US REO Properties online blog, “Present Foreclosure Crisis Causes Seniors To Recall Memories of the Great Depression”, <http://www.usreoproperties.com/blog/present> foreclosure crisis causes seniors to recall memories of the great depression, accessed January 26, 2012.

⁷ New York State Comptroller, report 13–2011, “Foreclosures in New York City”, March 2011

⁸ Brazill, Caitlyn, Prepared testimony before the New York State Assembly, Committees on Housing, Judiciary and Banks, “Mortgage Foreclosures in New York: An Evolving Crisis”, November 7, 2011.

⁹ See generally, NY Communities for Change, “Foreclosure Crisis: Disproportionate Impact on African–American and Latino Households and Neighborhoods”, January 2011; Brazill, Caitlyn, Prepared testimony before the New York State Assembly; New York State Comptroller, report 13–2011, “Foreclosures in New York City”, March 2011

Committees on Housing, Judiciary and Banks, “Mortgage Foreclosures in New York: An Evolving Crisis”, November 7, 2011.

¹⁰ Michael Jacobs, New York City Independent Budget Office before the New York City Council Committee on Community Development, October 28, 2010.

Although homeowners typically earn higher incomes and are more educated than non-homeowners,¹¹ it has become urgently clear to court officials and social and economic justice advocates that homeowners of all income levels, and particularly low-income homeowners, require significant assistance in defending and exercising legal rights when the complex processes of foreclosure procedures begin.¹² New York State is one of twenty-two states that require banks and lenders to exercise their contractual right to foreclosure under the laws and procedures of the civil court system.¹³

Often, homeowners defending against foreclosure suits are not only without attorney representation but, due to the complexity of laws and court rules, they are generally incapable of adequately representing their legal interest in the case. In contrast, the foreclosing party is almost always represented by an attorney. Legal and consumer advocates have demonstrated numerous instances where homeowners were frustrated or outright denied either the opportunity or ability to enforce their rights when defending against mortgage foreclosure law suits.

III. ANALYSIS OF RESOLUTIONS

Proposed Res. No. 871-A

During the recent residential mortgage foreclosure crisis affecting the nation, some lawyers representing financial institutions and investors filed documents with the courts that contained legally significant statements of purported fact that were often inaccurate and potentially fraudulent. These documents frequently went unnoticed by homeowners without legal

¹¹ The Park Place Economist, “The Determinants of Home Ownership”, by Hood, Jaelyn K, vol. VII, 1998.

¹² See State of New York Unified Court System, 2011 Report of the Chief Administrator of the Courts, Pfau, Ann, Chief Administrative Judge; New York State Comptroller, Report 13–2011, “Foreclosures in New York City”; Brazill, Caitlyn, prepared testimony before the New York State Assembly, Committees on Housing, Judiciary and Banks.

¹³ Mortgage Bankers Association, www.mbaa.org/files/ResourceCenter/ForeclosureProcess/JudicialVersusNon-JudicialForeclosure.pdf

representation and by overburdened judges and court staff until it was too late for legal remedies to address the problem.

Recently, Chief Judge Jonathan Lippman, Chief Judge of the State of New York, has required that every attorney practicing law in New York State file an affidavit or affirmation affirming the “scope of inquiry” and the “accuracy of papers” when filing court documents in residential mortgage foreclosure cases.

As the Chief Judge of the State of New York, Chief Judge Lippman has the authority to require this rule with the advice and consent of the Administrative Board of the Courts. However, the rule may be reversed by a future Chief Judge.

Proposed Resolution 871-A calls upon the State Legislature to make this rule permanent by enacting legislation to codify it.

Proposed Res. No. 872-A

New York homeowners that are subject to foreclosure are often unable to afford legal representation, have little idea how to defend themselves in court, and frequently face experienced, well-paid attorneys who represent the interests of financial institutions.

Proposed Resolution 872-A calls on the New York State Legislature and the Governor to support the continuation of Subprime Foreclosure Prevention Services Program in the 2012-2013 Executive Budget. The Subprime Foreclosure Prevention Services Program supports foreclosure prevention by providing direct service grants and foreclosure prevention training to local non-profit organizations across the State. The Subprime Foreclosure Prevention Services Program also provides funding to legal service providers for the representation of needy homeowners facing foreclosure.

In the December 2011 tax reform agreement, \$1 million in State funds were allocated to allow the Subprime Foreclosure Prevention Services Program to continue to operate until the end of the State's fiscal year.

The Governor's 2012-2013 Executive Budget released this week did not include funds for the program, and while the Governor has proposed the creation of a new Foreclosure Relief Unit, there are no funds allocated in the budget for legal services for homeowners.

Res. No. 988

In order to proceed with a foreclosure suit, a foreclosing party must own or represent the owner of the mortgage on the property against which they are filing. If a homeowner can demonstrate that there is insufficient evidence that the foreclosing party owns or represents the owner of the mortgage, they can file an Answer with the court asserting a defense to the suit based on the lack of standing of the foreclosing party.

Unfortunately, because individual mortgages are often pooled with hundreds of other mortgages and packaged as investments, it has become extraordinarily difficult for homeowners and attorneys to discover whether the foreclosing party owns or represents the owner of the mortgage on the property or not. These bundled mortgages can be transferred from one investor to another dozens of times, without reliable record keeping to document the owners of particular mortgages. Once a mortgage foreclosure case has been filed in court, a homeowner typically has between 20 and 40 days to determine if the plaintiff has standing. If they cannot do so within that time, they may lose their right to assert this defense.

Pooling and Servicing Agreements (PSAs) are contracts between a mortgage loan originator, a loan servicer, who collects payments and sends them to investors, and a legal trusts,

the entity having legal ownership of the pool of mortgages. These PSA contracts have specific rules that allow the owner of an individual mortgage on a property to be properly tracked.

Resolution 988 calls on the Legislature and Governor to enact legislation that would require a foreclosing party to produce the pooling and service agreement when the law suit is initially filed.

Res. No. 989

The Mortgage Electronic Registration System (MERS) is an electronic registry system that was created by financial institutions to record mortgages. It was intended to streamline the mortgage process and track mortgage loans for the benefit of the financial institutions holding the loans. The MERS works by becoming the owner of record for the mortgages of its member financial institutions. When a member financial institution sells its ownership interest in a particular mortgage to another member, the transaction is recorded with MERS. No mortgage recording fees are required by the State because the owner of record does not change.

The MERS system makes it difficult to discover who actually owns the mortgage on a property being foreclosed. This information is important because a homeowner should have the ability to require proof of a claim before their property is foreclosed upon. Under the MERS system, the actual owner of the mortgage is often too difficult to locate within the time limits of a law suit.

A United States Bankruptcy Judge in the United States District Court for the Eastern District of New York issued an opinion in February 2011 questioning the rules and procedures MERS uses to transfer mortgages and handle foreclosures for the largest United States banks.

This resolution calls for the Legislature and Governor to enact legislation that would increase transparency of the MERS system, thereby protecting homeowners from foreclosure by parties without the legal right to enforce a mortgage.

Res. No. 990

The Federal Truth-in-Lending Act (TILA) provides a safety net to homeowners subject to a mortgage. TILA says that a homeowner may rescind a home loan if the lender, at the time the loan was made, failed to fairly and accurately inform the homeowner of certain information, such as the interest rate of the loan, or the loan's repayment terms. The homeowner may exercise their right to rescind up to three years from the time the loan was made.

Until this year, the Federal Reserve Bank enforced this safety net for homeowners. However, in 2010, the Fed proposed a change to the rule that would effectively eliminate this protection for most homeowners. The proposed rule change would allow a homeowner to rescind a home loan only if the homeowner repaid the entire principal balance. Because this is unlikely, homeowners that were not fairly and accurately informed of the terms of their loans will still be legally responsible for the repayment of the principal and interest on those loans.

As of 2011, responsibility for enforcement of this law has been transferred to the newly created Consumer Financial Protection Bureau (CFPB). Although the proposed rule was initiated by the Fed, the CFPB has inherited the proposed rule, which remains pending.

Resolution 990 calls on the Federal Reserve Bank/CFPB to preserve the right of rescission for homeowners, as established in the Truth-in-Lending Act. The right of rescission has been an important home-saving legal tool protecting borrowers against predatory loans and should be continued.

IV. CONCLUSION

Today's hearing will seek testimony as to the efficacy of the resolutions to remedy the systemic obstacles to due process experienced by today's homeowners defending against mortgage foreclosure cases.

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Proposed Res. No. 871-A

Resolution calling upon the New York State Legislature to codify subdivision (f) of section 202.12-a of the Uniform Rules for the New York State Trial Courts, addressing the accuracy of filings in residential mortgage foreclosure actions.

By Council Members Vann, Arroyo, Brewer, James, Rose, Seabrook and Williams

Whereas, During the past three years, millions of American homeowners have suffered the loss of their homes to mortgage foreclosure; and

Whereas, According to the United States Government Accountability Office, from 2005 through 2009, the foreclosure and default rates for the country reached their highest level in three decades; and

Whereas, It has been broadly reported that New York City has not suffered the depth and severity of the mortgage foreclosure crisis to the extent that other areas of the county have; and

Whereas, Whether or not this assertion is correct, since 2005, foreclosure filings in the City have more than doubled; and

Whereas, While some foreclosure filings may be based on correct information there are instances where that has not been the case; and

Whereas, A New York Times article from January 10, 2011, reported that judges assigned to the New York State Supreme Court have taken the initiative in attempting to combat false filings by attorneys for the financial institutions seeking to foreclose on mortgages; and

Whereas, The article mentioned how an upstate New York law firm was ordered to pay nearly \$20,000 in fines and penalties due to the fact that an attorney for the firm filed numerous papers which contained many “falsities;” and

Whereas, Other examples cited in the article include that of a law firm in Florida against whom the Florida State Attorney General is pursuing a civil investigation; and

Whereas, With regards to the upstate New York firm, judges have called the due diligence of the firm “slipshod work,” which has resulted in some cases in the dismissal of the foreclosure action; and

Whereas, In light of the problem of attorneys for financial institutions filing false paperwork, the Chief Administrative Judge of the Courts of New York has promulgated a new section of the Uniform Rules for the New York State Trial Courts which would require counsel to attest to the accuracy of such paperwork by filing an affidavit or affirmation; and

Whereas, Since the Chief Administrative Judge can amend the rule subject only to the advice and consent of the Administrative Board of the Courts and a future Chief Administrative judge may seek to amend or repeal the rule it would be beneficial for the New York State Legislature to codify the rule, now, therefore, be it

Resolved, That the Council of the City of New York calls upon the New York State Legislature to codify subdivision (f) of section 202.12-a of the Uniform Rules for the New York State Trial Courts, addressing the accuracy of filings in residential mortgage foreclosure actions.

BJG/
LS # 1822
2/14/2011

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1/13/12 Res 871

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Proposed Resolution No. 872-A

Resolution calling upon the New York State Legislature and the Governor to support the continuation of New York's Foreclosure Prevention Services Program in the 2012–2013 Executive Budget.

By Council Members Vann, Comrie, Arroyo, Eugene, Gentile, Koppell, Lander, Mendez, Rose, Williams and Nelson

Whereas, Over the past several years the United States (U.S.) housing market has experienced a crisis due to historic foreclosure rates; and

Whereas, According to the Empire Justice Center, ten percent of mortgage loans in New York City are either delinquent by 90 days or more or in foreclosure; and

Whereas, According to the Federal Reserve Bank of New York (the Fed), in September 2011, approximately seven percent of mortgage loans in Queens, approximately eight percent of mortgage loans in Brooklyn, approximately seven percent of mortgage loans in the Bronx, approximately five percent of loans in Staten Island and approximately one percent of the loans in Manhattan were in foreclosure; and

Whereas, According to the Fed, in September, approximately six percent of the mortgage loans in Queens, approximately five percent of the mortgage loans in Brooklyn, approximately six percent of the mortgage loans in the Bronx, approximately five percent of the mortgage loans in Staten Island and approximately one percent of the mortgage loans in Manhattan were sixty or more days delinquent on their mortgage payments and were in danger of being foreclosed; and

Whereas, A report, entitled “Do Foreclosures Cause Crime?” by the Furman Center for Real Estate and Urban Policy at New York University found that violent crime increases about two percent on blocks where a home becomes foreclosed and by approximately six percent if a second home is foreclosed on the same block; and

Whereas, According to the report, entitled “Neighborhood Effects of Concentrated Mortgage Foreclosures” a single foreclosure can reduce the price of nearby homes by one to two percent and three foreclosures can reduce the price of nearby homes by about three percent; and

Whereas, According to a report by the Task Force to Expand Access to Civil Legal Services,

forty-four percent of New York homeowners are unrepresented in foreclosure cases throughout New York State; and

Whereas, There have been instances where certain financial institutions used improper methods in hastening foreclosures, negatively impacting the homeowners' chances of keeping their property; and

Whereas, Many families who encounter foreclosure cannot afford legal representation, resulting in homeowners having little idea how to defend themselves; and

Whereas, New York State should provide legal services in order to aid those individuals who cannot afford legal representation in foreclosure proceedings; and

Whereas, A recent change to the Uniform Rules for the New York State Trial Courts which requires counsel to attest to the accuracy of paperwork by filing an affidavit or affirmation attesting to the accuracy of foreclosure documents they submit, coupled with the growing number of foreclosure filings, may have slowed the foreclosure resolution process and created a backlog in the court system, thereby creating a need for foreclosure mitigation services, which may be needed for several years to come, now; therefore, be it

Resolved, That the Council of the City of New York calls upon the New York State Legislature and the Governor to support the continuation and increased funding of New York's Foreclosure Prevention Services Program in the 2012–2013 Executive Budget.

WJH/BJG

LS # 2149 & 3046

1/12/2012

Res. No. 988

Resolution calling on the New York State Legislature and the Governor to enact legislation that would require the foreclosing party in a mortgage foreclosure action to produce the pooling and service agreement at the commencement of a mortgage foreclosure action.

By Council Members Vann, Brewer, Fidler, James, Lander, Mendez, Williams and Mark-Viverito

Whereas, After a dramatic rise in foreclosures from 2008, foreclosure activity will increase again as lenders and servicers gradually process the backlog of thousands of foreclosures that have been delayed due to improperly processed paperwork; and

Whereas, Securitization of home loans enabled mortgage lenders to disperse exposure to credit risk; and

Whereas, An unfortunate drawback to the proliferation of these complex mortgage-backed securities is that they have made it difficult for judges and lawyers to determine who actually owns the underlying properties in a typical securitized mortgage pool; and

Whereas, The Pooling and Servicing Agreement (PSA) is the primary contractual document between all parties involving the transfer of specific home loans from the originator to the servicer and ultimately to a trust, which then becomes the legal owner of a pool of mortgages; and

Whereas, This document prescribes how the trust must oversee the disbursement of the cash flows, monitors compliance with appropriate covenants by other parties to the agreement, and details the specific loan documents contained in each loan file that will be delivered to the Trustee or Document Custodian on behalf of the trust, establishing who holds the original note and where it may be found; and

Whereas, In New York State, in order for a homeowner in a mortgage foreclosure action to assert that the party initiating the foreclosure does not have a legal right to do so, he or she

must include that claim in a written answer in the foreclosure proceeding and many homeowners do not file a written answer or do not have enough information to make that assertion; and

Whereas, The homeowner's time to serve and file an answer is not very long; usually 20 to 40 days after they receive the initial foreclosure papers, depending on the method of service; and

Whereas, After the time to answer has expired, a defendant may not later assert the standing defense unless he or she receives permission from the court to allow the filing of a late or amended answer, which generally requires that the defendant show 1) a reasonable excuse for the delay and 2) a meritorious defense to the foreclosure; and

Whereas, These motions are not easily made by pro se defendants, so the absence of legal representation for homeowners means that very few such motions are being made despite the widespread abuses of the foreclosure process by plaintiffs who would not be able to prove their right to foreclose; and

Whereas, The process of reversing a wrongful foreclosure is difficult once an auction has taken place and is almost impossible once the property is purchased by a third party; now, therefore, be it

Resolved, That the Council of the City of New York calls on the New York State Legislature and the Governor to enact legislation that would require the foreclosing party in a mortgage foreclosure action to produce the pooling and service agreement at the commencement of a mortgage foreclosure action.

LS 1823
AS 7-15-11

Res. No. 989

Resolution calling on the New York State Legislature and the Governor to enact legislation that would prohibit lenders from concealing mortgage assignments through the use of the Mortgage Electronic Registration System, Inc., known as MERS.

By Council Members Vann, Brewer, James, Lander, Mendez and Williams

Whereas, In the mid-1990s, Fannie Mae, Freddie Mac and several large banks in the United States created the Mortgage Electronic Registration System, Inc. (MERS), an electronic-
lien registry system built by the housing finance industry, to streamline the mortgage process;
and

Whereas, Each mortgage that is entered into the MERS system has a unique mortgage identification number (MIN) used to track a mortgage loan throughout its life, from its origination through securitization; and

Whereas, Critics claim the decision to create MERS was made mostly to avoid paying recording fees charged by government agencies which required that all mortgage transfers and assignments be properly recorded and indexed in publicly available registries of deeds; and

Whereas, Its processing standards are designed for MERS to rapidly and accurately be recorded in the public records as mortgagee after loan origination or when a mortgage has been assigned to MERS; and

Whereas, The ability of MERS members to transfer mortgage loans to each other without recording these transactions is contingent on MERS being properly recorded as the mortgagee in the relevant public records; and

Whereas, MERS has served as a privately run, national registry of deeds under which MERS could act as the owner and depository of all mortgages entered into the system while the mortgage notes and loans themselves can be freely bought and sold on a secondary market, in

which cash proceeds go to an investor; and

Whereas, The company's practices have begun to receive heavy scrutiny from both state prosecutors and federal regulators, in light of foreclosure documentation problems that surfaced last fall; and

Whereas, Ownership of mortgages have been obscured by lenders through the frequent use of the MERS to avoid the need to re-record mortgages each time a loan is assigned; and

Whereas, The complex nature of the system makes it difficult for both homeowners and advocates to determine who owns a loan; and

Whereas, United States Bankruptcy Judge Robert E. Grossman, serving in the Eastern District of New York, issued an opinion in February 2011 calling into question the rules and procedures that MERS uses to transfer mortgages and handle foreclosures on behalf of the largest United States banks; and

Whereas, Judge Grossman concluded that "MERS and its partners made the decision to create and operate under a business model that was designed in large part to avoid the requirements of the traditional mortgage recording process" thus rejecting any argument that because "MERS may be involved with fifty (50) percent of all residential mortgages in the county ... it should receive favorable treatment from the judiciary and turn a blind eye to the fact that this process does not comply with the law"; and

Whereas, New York State can give homeowners tools to better ensure that they do not lose their homes to lenders without the legal right to enforce a mortgage especially since it is often impossible at the commencement of a foreclosure action on a homeowner to determine whether the plaintiff owns the note and the mortgage; now, therefore, be it

Resolved, That the Council of the City of New York calls on the New York State

Legislature and the Governor to enact legislation that would prohibit lenders from concealing mortgage assignments through the use of the Mortgage Electronic Registration System, Inc., known as MERS.

LS 1824
AS 6-29-11

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Res. No. 990

Resolution calling upon the Federal Reserve Bank to rescind its proposed rule requiring borrowers to pay off the remaining principal on a mortgage before the lender is forced to cancel its security interest in the home.

By Council Members Vann, Brewer, James, Mealy, Mendez and Williams

Whereas, During the past three years, millions of American homeowners have suffered the loss of their homes to mortgage foreclosure; and

Whereas, According to the United States Government Accountability Office, from 2005 through 2009, the foreclosure and default rates for the country reached their highest level in three decades; and

Whereas, It has been broadly reported that New York City has not suffered the depth and severity of the mortgage foreclosure crisis to the extent that other areas of the country have; and

Whereas, Whether or not this assertion is correct, since 2005, foreclosure filings in the City have more than doubled; and

Whereas, It should be a goal of the United States Government to promote home ownership and minimize foreclosures, especially those foreclosures which may be improper or fraudulent; and

Whereas, The Federal Reserve Bank (Fed) has proposed a rule pursuant to the authority delegated to the Fed by the Truth-in-Lending Act (15 U.S.C. 1604) that would not allow homeowners to use the right of rescission; and

Whereas, The right of recession is the ability of a borrower to convince a court to rescind a mortgage or home equity loan within three years of its being made on the grounds that the lender has violated the disclosure requirements set forth in the Truth-in-Lending Act (TILA) under certain circumstances, relating to the loan amount, interest rate and repayment terms; and

Whereas, The proposed rule would reverse TILA's right of rescission by requiring a homeowner to pay off the entire mortgage amount before a creditor is required to cancel its security interest in the home; and

Whereas, The Fed has promulgated the rule due to concern over costs that banks incurred when seeking to comply with TILA, but the Fed's proposed rule may have the unintended consequence of making the right of rescission available to only the wealthiest homeowners since people who are wealthy are far more likely to have or be able to acquire the means to pay off the remaining balance on the mortgage; and

Whereas, The extended right of rescission has been an important home-saving legal tool protecting borrowers against predatory loans; and

Whereas, While many foreclosure proceedings are based on correct information there are also many instances where that has not been the case; and

Whereas, At this time of record foreclosures and reports of false filings on behalf of the financial institutions seeking to foreclose on mortgages, the Fed should not seek to aid unscrupulous or careless lending institutions who may have violated provisions of TILA by eliminating the important consumer protection of the right of rescission; now, therefore, be it

Resolved, That the Council of the City of New York calls upon the Federal Reserve Bank to rescind its proposed rule requiring borrowers to pay off the remaining principal on a mortgage before the lender is forced to cancel its security interest in the home.

BJG
LS # 1825
6/10/2011