

Amendment No. 901

Senate Amendment to Assembly Bill No. 149 Second Reprint (BDR 9-824)

Proposed by: Senate Committee on Commerce and Labor**Amends:** Summary: No Title: No Preamble: No Joint Sponsorship: No Digest: Yes

Adoption of this amendment will MAINTAIN the 2/3s majority vote requirement for final passage of A.B. 149 (§ 1).

ASSEMBLY ACTION		Initial and Date		SENATE ACTION		Initial and Date	
Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>
Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>
Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>

EXPLANATION: Matter in (1) *blue bold italics* is new language in the original bill; (2) *green bold italic underlining* is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill that is proposed to be retained in this amendment; and (6) green bold dashed underlining is newly added transitory language.

TMC



Date: 5/21/2009

A.B. No. 149—Revises provisions governing foreclosures on property.
(BDR 9-824)



ASSEMBLY BILL NO. 149—ASSEMBLYMEN BUCKLEY, OCEGUERA, CONKLIN, LESLIE, SMITH; AIZLEY, ANDERSON, ATKINSON, BOBZIEN, CLABORN, DENIS, DONDERO LOOP, GOICOECHEA, GRADY, HAMBRICK, HARDY, HOGAN, HORNE, KIHUEN, KIRKPATRICK, KOIVISTO, MANENDO, MASTROLUCA, MCCLAIN, MUNFORD, OHRENSCHALL, PARNELL, PIERCE, SEGERBLOM, SETTELMAYER, SPIEGEL AND STEWART

FEBRUARY 9, 2009

JOINT SPONSORS: SENATORS HORSFORD; AND COFFIN

Referred to Committee on Commerce and Labor

SUMMARY—Revises provisions governing foreclosures on property. (BDR 9-824)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: Yes.

~

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to real property; revising provisions governing foreclosures on property; providing for mediation under certain circumstances; providing for the imposition of a fee for mediation; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law sets forth procedures governing foreclosures on real property upon default. A trustee under a deed of trust has the power to sell the property to which the deed of trust applies, subject to certain restrictions. (NRS 107.080, 107.085) **Section 1** of this bill establishes additional restrictions on the trustee's power of sale with respect to owner-occupied housing by providing a grantor of a deed of trust or the person who holds the title of record with the right to request mediation under which he may receive a loan modification. Once mediation is requested, no further action may be taken to exercise the power of sale until the completion of the mediation. Each mediation must be conducted by a senior justice, judge, hearing master or other designee pursuant to rules adopted by the Nevada Supreme ~~Court or an entity designated by the Nevada Supreme~~ Court, and a fee of not more than \$85 per hour may be charged and collected for the mediation. **Section 2** of this bill also restricts the trustee's power of sale with respect to owner-occupied housing by revising the period in which a deficiency in performance or payment under the trust agreement may be made good before the trustee may exercise that power. Similarly, **section 3** of this bill restricts the trustee's power of sale with respect to owner-occupied housing by revising the manner in which service of notice that a person is in danger of losing his home must be made. In addition, **section 4** of this bill authorizes the Nevada Supreme Court to adopt rules providing for voluntary mediation with respect to a homeowner who is not in default but is at risk of default.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 107 of NRS is hereby amended by adding thereto a new section to read as follows:

1. In addition to the requirements of NRS 107.085, the exercise of the power of sale pursuant to NRS 107.080 with respect to any trust agreement which concerns owner-occupied housing is subject to the provisions of this section.

2. The trustee shall not exercise a power of sale pursuant to NRS 107.080 unless the trustee:

(a) Includes ~~the~~ with the notice of default and election to sell which is mailed to the grantor or the person who holds the title of record as required by subsection ~~2~~ 3 of NRS ~~107.085~~ 107.080:

(1) Contact information which the grantor or the person who holds the title of record may use to reach a person with authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust;

(2) Contact information for at least one local housing counseling agency approved by the United States Department of Housing and Urban Development; and

(3) A form upon which the grantor or the person who holds the title of record may indicate his election to enter into mediation or to waive mediation and one envelope addressed to the trustee and one envelope addressed to the Mediation Administrator, which the grantor or the person who holds the title of record may use to comply with the provisions of subsection 3;

(b) Serves a copy of the notice upon the Mediation Administrator; and

(c) Causes to be recorded in the office of the recorder of the county in which the trust property, or some part thereof, is situated:

(1) The certificate provided to the trustee by the Mediation Administrator pursuant to subsection 3 or 6 which provides that no mediation is required in the matter; or

(2) The certificate provided to the trustee by the Mediation Administrator pursuant to subsection 7 which provides that mediation has been completed in the matter.

3. The grantor ~~and~~ or the person who holds the title of record shall, not later than 30 days after service of the notice upon him in the manner required by NRS ~~107.085~~ 107.080, complete the form required by subparagraph (3) of paragraph (a) of subsection 2 and return the form to the trustee by certified mail, return receipt requested. If the grantor or the person who holds the title of record indicates on ~~his respective~~ the form his election to enter into mediation, the trustee shall notify the beneficiary of the deed of trust and every other person with an interest as defined in NRS 107.090, by certified mail, return receipt requested, of the election of the grantor or the person who holds the title of record ~~or both~~ to enter into mediation and file the form with the Mediation Administrator, who shall assign the matter to a senior justice, judge, hearing master or other designee and schedule the matter for mediation. No further action may be taken to exercise the power of sale until the completion of the mediation. If ~~both~~ the grantor ~~and~~ or the person who holds the title of record ~~indicate~~ indicates on ~~their respective forms their~~ the form his election to waive mediation or ~~if both fail~~ fails to return ~~their respective forms~~ the form to the trustee as required by this subsection, the trustee shall execute an affidavit

1 attesting to that fact under penalty of perjury and serve a copy of the affidavit,
2 together with the waiver of mediation by the grantor ~~and~~ or the person who
3 holds the title of record, or proof of service on the grantor ~~and~~ or the person
4 who holds the title of record of the notice required by subsection 2 of this section
5 and subsection ~~2~~ 3 of NRS 107.080, upon the Mediation Administrator. Upon
6 receipt of the affidavit and the waiver or proof of service, the Mediation
7 Administrator shall provide to the trustee a certificate which provides that no
8 mediation is required in the matter.

9
10 4. Each mediation required by this section must be conducted by a senior
11 justice, judge, hearing master or other designee pursuant to the rules adopted
12 pursuant to subsection 8. The beneficiary of the deed of trust or his representative
13 shall attend the mediation. The grantor or his representative shall attend the
14 mediation if the grantor elected to enter into mediation, ~~and~~ or the person who
15 holds the title of record or his representative shall attend the mediation if the
16 person who holds the title of record elected to enter into mediation. The
17 beneficiary of the deed of trust shall bring to the mediation the original or a
18 certified copy of the deed of trust, the mortgage note and each assignment of the
19 deed of trust or mortgage note. If the beneficiary of the deed of trust is
20 represented at the mediation by another person, that person must have authority
21 to negotiate a loan modification on behalf of the beneficiary of the deed of trust
22 or have access at all times during the mediation to a person with such authority.

23 5. If the beneficiary of the deed of trust or his representative fails to attend
24 the mediation, fails to participate in the mediation in good faith or does not bring
25 to the mediation each document required by subsection 4 or does not have the
26 authority or access to a person with the authority required by subsection 4, the
27 mediator shall prepare and submit to the Mediation Administrator a petition and
28 recommendation concerning the imposition of sanctions against the beneficiary
29 of the deed of trust or his representative. The court may issue an order imposing
30 such sanctions against the beneficiary of the deed of trust or his representative as
31 the court determines appropriate, including, without limitation, requiring a loan
32 modification in the manner determined proper by the court.

33 6. If ~~both~~ the grantor ~~and~~ or the person who holds the title of record
34 elected to enter into mediation and ~~both fail~~ fails to attend the mediation, ~~for if~~
35 ~~only one of those persons elected to enter into mediation and that person fails to~~
36 ~~attend the mediation,~~ the Mediation Administrator shall provide to the trustee a
37 certificate which states that no mediation is required in the matter.

38 7. If the mediator determines that the parties, while acting in good faith, are
39 not able to agree to a loan modification, the mediator shall prepare and submit to
40 the Mediation Administrator a recommendation that the matter be terminated.
41 The Mediation Administrator shall provide to the trustee a certificate which
42 provides that the mediation required by this section has been completed in the
43 matter.

44 8. The Supreme Court ~~for an entity designated by the Supreme Court~~ shall
45 adopt rules necessary to carry out the provisions of this section. The rules must,
46 without limitation, include provisions:

47 (a) Designating an entity to serve as the Mediation Administrator pursuant to
48 this section. The entities that may be so designated include, without limitation,
49 the Administrative Office of the Courts, the District Court of the county in which
50 the property is situated or any other judicial entity.

51 (b) Ensuring that mediations occur in an orderly and timely manner.

52 (c) Requiring each party to a mediation to provide such information as the
mediator determines necessary.

(d) *Establishing procedures to protect the mediation process from abuse and to ensure that each party to the mediation acts in good faith.*

(e) *Establishing a total fee of not more than \$400 that may be charged and collected by the Mediation Administrator for ~~for~~ mediation services pursuant to this section and providing that the responsibility for payment of the fee must be shared equally by the parties to the mediation.*

9. *Except as otherwise provided in subsection 11, the provisions of this section do not apply if:*

(a) *The grantor or the person who holds the title of record has surrendered the property, as evidenced by a letter confirming the surrender or delivery of the keys to the property to the trustee, the beneficiary of the deed of trust or the mortgagee, or an authorized agent thereof; or*

(b) *A petition in bankruptcy has been filed with respect to the grantor or the person who holds the title of record under chapter 7, 11, 12 or 13 of Title 11 of the United States Code and the bankruptcy court has not entered an order closing or dismissing the case or granting relief from a stay of foreclosure.*

10. *A noncommercial lender is not excluded from the application of this section.*

11. *The Mediation Administrator and each mediator who acts pursuant to this section in good faith and without gross negligence is immune from civil liability for those acts.*

12. *As used in this section:*

(a) *“Mediation Administrator” means the entity so designated pursuant to subsection 8.*

(b) *“Noncommercial lender” means a lender which makes a loan secured by a deed of trust on owner-occupied housing and which is not a bank, financial institution or other entity regulated pursuant to title 55 or 56 of NRS.*

(c) *“Owner-occupied housing” means housing that is occupied by an owner as his primary residence. The term does not include any time share or other property regulated under chapter 119A of NRS.*

Sec. 2. NRS 107.080 is hereby amended to read as follows:

107.080 1. Except as otherwise provided in NRS 107.085, *and section 1 of this act*, if any transfer in trust of any estate in real property is made after March 29, 1927, to secure the performance of an obligation or the payment of any debt, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which the transfer is security.

2. The power of sale must not be exercised, however, until:

(a) ~~He~~ *Except as otherwise provided in paragraph (b), in the case of any trust agreement coming into force:*

(1) On or after July 1, 1949, and before July 1, 1957, the grantor, ~~for his successor in interest,~~ *the person who holds the title of record*, a beneficiary under a subordinate deed of trust or any other person who has a subordinate lien or encumbrance of record on the property ~~has~~ *has*, for a period of 15 days, computed as prescribed in subsection 3, failed to make good the deficiency in performance or payment; or

(2) On or after July 1, 1957, the grantor, ~~for his successor in interest,~~ *the person who holds the title of record*, a beneficiary under a subordinate deed of trust or any other person who has a subordinate lien or encumbrance of record on the property ~~has~~ *has*, for a period of 35 days, computed as prescribed in subsection 3, failed to make good the deficiency in performance or payment;

(b) *In the case of any trust agreement which concerns owner-occupied housing as defined in section 1 of this act, the grantor, the person who holds the title of record, a beneficiary under a subordinate deed of trust or any other*

1 *person who has a subordinate lien or encumbrance of record on the property has,*
2 *for a period that commences in the manner and subject to the requirements*
3 *described in subsection 3 and expires 5 ~~business~~ days before the date of sale,*
4 *failed to make good the deficiency in performance or payment;*

5 (c) The beneficiary, the successor in interest of the beneficiary or the trustee
6 first executes and causes to be recorded in the office of the recorder of the county
7 wherein the trust property, or some part thereof, is situated a notice of the breach
8 and of his election to sell or cause to be sold the property to satisfy the obligation;
9 and

10 ~~(c)~~ (d) Not less than 3 months have elapsed after the recording of the notice.

11 3. The 15- or 35-day period provided in paragraph (a) of subsection 2, *or the*
12 *period provided in paragraph (b) of subsection 2,* commences on the first day
13 following the day upon which the notice of default and election to sell is recorded
14 in the office of the county recorder of the county in which the property is located
15 and a copy of the notice of default and election to sell is mailed by registered or
16 certified mail, return receipt requested and with postage prepaid to the grantor ~~or~~
17 ~~and~~ *or* to the person who holds the title of record on the date the notice of default
18 and election to sell is recorded, at ~~{their respective addresses,}~~ *his address,* if
19 known, otherwise to the address of the trust property. The notice of default and
20 election to sell must describe the deficiency in performance or payment and may
21 contain a notice of intent to declare the entire unpaid balance due if acceleration is
22 permitted by the obligation secured by the deed of trust, but acceleration must not
23 occur if the deficiency in performance or payment is made good and any costs, fees
24 and expenses incident to the preparation or recordation of the notice and incident to
25 the making good of the deficiency in performance or payment are paid within the
26 time specified in subsection 2.

27 4. The trustee, or other person authorized to make the sale under the terms of
28 the trust deed or transfer in trust, shall, after expiration of the 3-month period
29 following the recording of the notice of breach and election to sell, and before the
30 making of the sale, give notice of the time and place thereof by recording the notice
31 of sale and by:

32 (a) Providing the notice to each trustor and any other person entitled to notice
33 pursuant to this section by personal service or by mailing the notice by registered or
34 certified mail to the last known address of the trustor and any other person entitled
35 to such notice pursuant to this section;

36 (b) Posting a similar notice particularly describing the property, for 20 days
37 successively, in three public places of the township or city where the property is
38 situated and where the property is to be sold; and

39 (c) Publishing a copy of the notice three times, once each week for 3
40 consecutive weeks, in a newspaper of general circulation in the county where the
41 property is situated.

42 5. Every sale made under the provisions of this section and other sections of
43 this chapter vests in the purchaser the title of the grantor and his successors in
44 interest without equity or right of redemption. A sale made pursuant to this section
45 may be declared void by any court of competent jurisdiction in the county where
46 the sale took place if:

47 (a) The trustee or other person authorized to make the sale does not
48 substantially comply with the provisions of this section ~~or~~ *or any applicable*
49 *provision of section 1 of this act;*

50 (b) Except as otherwise provided in subsection 6, an action is commenced in
51 the county where the sale took place within 90 days after the date of the sale; and

(c) A notice of lis pendens providing notice of the pendency of the action is recorded in the office of the county recorder of the county where the sale took place within 30 days after commencement of the action.

6. If proper notice is not provided pursuant to subsection 3 or paragraph (a) of subsection 4 to the grantor, to the person who holds the title of record on the date the notice of default and election to sell is recorded, to each trustor or to any other person entitled to such notice, the person who did not receive such proper notice may commence an action pursuant to subsection 5 within 120 days after the date on which the person received actual notice of the sale.

7. The sale of a lease of a dwelling unit of a cooperative housing corporation vests in the purchaser title to the shares in the corporation which accompany the lease.

Sec. 3. NRS 107.085 is hereby amended to read as follows:

107.085 1. With regard to a transfer in trust of an estate in real property to secure the performance of an obligation or the payment of a debt, the provisions of this section apply to the exercise of a power of sale pursuant to NRS 107.080 only if:

(a) The trust agreement becomes effective on or after October 1, 2003 ~~and~~ ~~(b) On~~, and, on the date the trust agreement is made, the trust agreement is subject to the provisions of § 152 of the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. § 1602(aa), and the regulations adopted by the Board of Governors of the Federal Reserve System pursuant thereto, including, without limitation, 12 C.F.R. § 226.32 ~~and~~; or

(b) The trust agreement concerns owner-occupied housing as defined in section 1 of this act.

2. The trustee shall not exercise a power of sale pursuant to NRS 107.080 unless:

(a) In the manner required by subsection 3, not later than 60 days before the date of the sale, the trustee causes to be served upon the grantor ~~and~~ *or the person who holds the title of record* a notice in the form described in subsection 3; and

(b) If an action is filed in a court of competent jurisdiction claiming an unfair lending practice in connection with the trust agreement, the date of the sale is not less than 30 days after the date the most recent such action is filed.

3. The notice described in subsection 2 must be:

(a) Served upon the grantor ~~and~~ *or the person who holds the title of record:*

*(1) Except as otherwise provided in subparagraph (2), by personal service or, if personal service cannot be timely effected, in such other manner as a court determines is reasonably calculated to afford notice to the grantor ~~and~~ ~~and~~ *or the person who holds the title of record; or**

(2) If the trust agreement concerns owner-occupied housing as defined in section 1 of this act:

(I) By personal service;

(II) If the grantor or the person who holds the title of record is absent from his place of residence or from his usual place of business, by leaving a copy with a person of suitable age and discretion at either place and mailing a copy to the grantor or the person who holds the title of record at his place of residence or place of business; or

(III) If the place of residence or business cannot be ascertained, or a person of suitable age or discretion cannot be found there, by posting a copy in a conspicuous place on the trust property, delivering a copy to a person there residing if the person can be found and mailing a copy to the grantor or the person who holds the title of record at the place where the trust property is situated; and

(b) In substantially the following form, with the applicable telephone numbers and mailing addresses provided on the notice and a copy of the promissory note attached to the notice:

NOTICE
YOU ARE IN DANGER OF LOSING YOUR HOME!

Your home loan is being foreclosed. In not less than 60 days your home will be sold and you will be forced to move. For help, call:

Consumer Credit Counseling _____
The Attorney General _____
The Division of Financial Institutions _____
Legal Services _____
Your Lender _____
Nevada Fair Housing Center _____

4. This section does not prohibit a judicial foreclosure.

5. As used in this section, "unfair lending practice" means an unfair lending practice described in NRS 598D.010 to 598D.150, inclusive.

Sec. 3.5. NRS 107.095 is hereby amended to read as follows:

107.095 1. The notice of default required by NRS 107.080 must also be sent by registered or certified mail, return receipt requested and with postage prepaid, to each guarantor or surety of the debt. If the address of the guarantor or surety is unknown, the notice must be sent to the address of the trust property. Failure to give the notice, except as otherwise provided in subsection 3, releases the guarantor or surety from his obligation to the beneficiary, but does not affect the validity of a sale conducted pursuant to NRS 107.080 ~~that~~ or the obligation of any guarantor or surety to whom the notice was properly given.

2. Failure to give the notice of default required by NRS 107.090, except as otherwise provided in subsection 3, releases the obligation to the beneficiary of any person who has complied with NRS 107.090 and who is or may otherwise be held liable for the debt or other obligation secured by the deed of trust, but such a failure does not affect the validity of a sale conducted pursuant to NRS 107.080 ~~that~~ or the obligation of any person to whom the notice was properly given pursuant to this section or to NRS 107.080 or 107.090.

3. A guarantor, surety or other obligor is not released pursuant to this section if:

(a) The required notice is given at least 15 days before the later of:

(1) The expiration of the 15- or 35-day period described in *paragraph (a) of subsection 2 of NRS 107.080*; ~~or~~

(2) *In the case of any trust agreement which concerns owner-occupied housing as defined in section 1 of this act, the expiration of the period described in paragraph (b) of subsection 2 of NRS 107.080; or*

(3) Any extension of ~~that~~ *the applicable* period by the beneficiary; or

(b) The notice is rescinded before the sale is advertised.

Sec. 4. Chapter 2 of NRS is hereby amended by adding thereto a new section to read as follows:

The Supreme Court may adopt rules providing for voluntary mediation with respect to a homeowner who is not in default but is at risk of default.

Sec. 5. NRS 459.646 is hereby amended to read as follows:

459.646 1. A person who, without participating in the management of a parcel of real property, holds or is the beneficiary of evidence of title to the

property primarily to protect a security interest in the property is not a responsible party with respect to a release of a hazardous substance on the property if:

(a) The owner of the property is relieved from liability under NRS 459.610 to 459.658, inclusive, with respect to the release;

(b) The owner or holder of evidence of title did not cause the release; and

(c) The owner or holder of evidence of title does not participate actively in decisions concerning hazardous substances on the property.

2. A lender to a prospective purchaser who has filed an application to participate in the program pursuant to NRS 459.634 or a lender who forecloses his security interest in property pursuant to NRS 40.430 to 40.450, inclusive, or 107.080 to 107.100, inclusive, *and section 1 of this act*, and within a reasonable period after the foreclosure, not to exceed 2 years, sells, transfers or conveys the property to a prospective purchaser who has filed an application to participate in the program pursuant to NRS 459.634 is not a responsible party solely as a result of:

(a) Foreclosing a security interest in the property; or

(b) Making a loan to the prospective purchaser if the loan:

(1) Is to be used for acquiring property or removing or remediating hazardous substances on property; and

(2) Is secured by the property that is to be acquired or on which is located the hazardous substances that are to be removed or remediated.

Sec. 5.5. The amendatory provisions of this act governing trust agreements which concern owner-occupied housing, as defined in section 1 of this act, apply only with respect to such agreements for which a notice of default is recorded on or after July 1, 2009.

Sec. 5.7. Notwithstanding any provision of NRS 2.120 to the contrary and in recognition of the emergency situation confronting this State concerning mortgage foreclosures and the need to implement the provisions of this act quickly, any rules adopted by the Supreme Court pursuant to subsection 8 of section 1 of this act take effect on the date specified by the Supreme Court in the order adopting the rules, which in no event may be less than 30 days after entry of the order.

Sec. 6. This act becomes effective on July 1, 2009.