

SENATE BILL NO. 307—SENATOR COPENING

MARCH 21, 2011

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to the exercise of the power of sale under a deed of trust concerning owner-occupied property. (BDR 9-958)

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

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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 the exercise of the power of sale under a deed of trust concerning owner-occupied property; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, the trustee under a deed of trust concerning owner-occupied housing has the power to sell the property to which the deed of trust applies, subject to certain restrictions. (NRS 107.080, 107.085, 107.086) Existing law prohibits the exercise of the trustee's power of sale concerning owner-occupied property unless the trustee records in the office of the county recorder a certificate issued by the entity designated as the Mediation Administrator for the foreclosure mediation program which indicates that foreclosure mediation is not required or has been completed. (NRS 107.086)

This bill establishes additional restrictions on the trustee's power of sale with respect to owner-occupied housing which are based on Maryland law and which require an analysis of the eligibility of the grantor or person who holds the title of record for a loan modification or other loss mitigation alternative. **Section 1** of this bill provides that, not later than 30 days before the notice of default and election to sell is recorded in the office of the county recorder of the county in which the property is located, the beneficiary of the deed of trust must mail to the grantor or the person who holds title of record an application for a loan modification program or other loss mitigation alternative. If the application is returned to the beneficiary within 30 days after the date on which it is received by the grantor or person who holds title of record: (1) the beneficiary must forward it to the person responsible for analyzing the eligibility of the grantor or the person who holds title of record for a loan modification or other loss mitigation alternative; (2) that person must complete an analysis of the application; and (3) the trustee may not exercise the power of sale unless the beneficiary has mailed to the grantor or the person who holds title of record an affidavit certifying that an analysis of the application was



completed. If the grantor or person who holds title of record returns a loss mitigation application within the required time period and requests foreclosure mediation in accordance with existing law: (1) under **section 1**, the analysis of application must be completed before the mediation is conducted; and (2) under **section 1.7** of this bill, the beneficiary of the deed of trust must bring to the mediation certain information related to the loss mitigation application. **Section 1** further provides that if the grantor or the person who holds title of record does not return the loss mitigation application within 30 days after receipt of the application: (1) the beneficiary shall mail an affidavit to the grantor or person who holds title of record attesting to that fact; and (2) the trustee may exercise the power of sale in accordance with existing law.

Existing law provides that if certain provisions of existing law governing the exercise of the trustee's power of sale are not followed, a court of competent jurisdiction may void the sale. (NRS 107.080) **Section 1.3** of this bill authorizes a court of competent jurisdiction to void a sale made pursuant to the exercise of the trustee's power of sale if the beneficiary of the deed of trust does not comply with the provisions of this bill.

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 and 107.086, 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:

(a) Not later than 30 days before the notice of default and election to sell is recorded in the office of the county recorder of the county in which the property is located pursuant to subsection 3 of NRS 107.080, the beneficiary of the deed of trust mails by registered or certified mail, return receipt requested and with postage prepaid, to the grantor or to the person who holds the title of record:

(1) A loss mitigation application for loss mitigation programs that are applicable to the obligation secured by the deed of trust;

(2) Instructions for completing the loss mitigation application;

(3) A description of the eligibility requirements for the loss mitigation programs offered by the beneficiary that may be applicable to the obligation secured by the deed of trust;

(4) A telephone number which the grantor or the person who holds title of record may call to confirm receipt of the completed loss mitigation application; and



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1 (5) *An envelope preprinted with the address of the*
2 *beneficiary.*

3 (b) *The beneficiary mails by registered or certified mail, return*
4 *receipt requested and with postage prepaid, to the grantor or the*
5 *person who holds title of record, the affidavit described in*
6 *subsection 3 or a final loss mitigation affidavit.*

7 3. *If the grantor or the person who holds the title of record*
8 *fails to return the loss mitigation application to the beneficiary of*
9 *the deed of trust within 30 days after receipt of the application, the*
10 *beneficiary shall execute an affidavit attesting to that fact under*
11 *penalty of perjury and mail a copy of the affidavit to the grantor or*
12 *the person who holds the title of record by registered or certified*
13 *mail, return receipt requested and with postage prepaid.*

14 4. *If the grantor or the person who holds the title of record*
15 *returns the loss mitigation application to the beneficiary of the*
16 *deed of trust within 30 days after receipt of the application,*
17 *the beneficiary shall forward the loss mitigation application to the*
18 *person responsible for conducting loss mitigation analysis on*
19 *behalf of the beneficiary. Upon receipt of a loss mitigation*
20 *application pursuant to this subsection, the person responsible for*
21 *conducting loss mitigation analysis shall perform and complete a*
22 *loss mitigation analysis. If the grantor or the person who holds the*
23 *title of record has returned the loss mitigation application to the*
24 *beneficiary within the time specified in this subsection and has*
25 *elected to enter into mediation pursuant to NRS 107.086, the loss*
26 *mitigation analysis must be completed before the mediation is*
27 *conducted.*

28 5. *Upon completion of the loss mitigation analysis pursuant*
29 *to subsection 4, the beneficiary shall:*

30 (a) *Execute a final loss mitigation affidavit; and*

31 (b) *Mail the final loss mitigation affidavit by registered or*
32 *certified mail, return receipt requested and with postage prepaid,*
33 *to the grantor or the person who holds the title of record.*

34 6. *A beneficiary of a deed of trust, or a person conducting*
35 *loss mitigation analysis on behalf of the beneficiary, which has*
36 *received a loan mitigation application within the time specified in*
37 *subsection 4 shall not deny a loan modification or any other loss*
38 *mitigation program because of an inability to establish*
39 *communication with the grantor or the person who holds the title*
40 *of record or obtain all documentation and information necessary*
41 *to conduct the loss mitigation analysis unless, for at least 30 days*
42 *after receipt of the loss mitigation application, the beneficiary or*
43 *the person acting on its behalf has made good faith attempts to:*

44 (a) *Establish communication with the grantor or the person*
45 *who holds the title of record; and*



(b) Obtain all documentation and information necessary to conduct the loss mitigation analysis.

7. As used in this section:

(a) "Final loss mitigation affidavit" means an affidavit that:

(1) Is made by the beneficiary of a deed of trust or a person authorized to act on behalf of the beneficiary;

(2) Certifies the completion of the final determination of loss mitigation analysis in connection with a deed of trust; and

(3) Certifies the denial of a loan modification or other loss mitigation.

(b) "Loss mitigation analysis" means an evaluation of the facts and circumstances of an obligation secured by a deed of trust concerning owner-occupied housing to determine:

(1) Whether the grantor or the person who holds the title of record qualifies for a loan modification; and

(2) If there will not be a loan modification, whether any other loss mitigation program may be made available to the grantor or the person who holds the title of record.

(c) "Loss mitigation program" means an option in connection with an obligation secured by a deed of trust concerning owner-occupied housing that:

(1) Avoids the exercise of the trustee's power of sale through loan modification or other changes to the existing terms of the obligation that are intended to allow the grantor or the person who holds the title of record to stay in the property;

(2) Avoids the exercise of the trustee's power of sale through a short sale, deed in lieu of trustee's sale or other alternative that is intended to simplify the relinquishment of ownership of the property by the grantor or the person who holds the title of record; or

(3) Lessens the harmful impact of the exercise of the trustee's power of sale on the grantor or the person who holds the title of record.

(d) "Owner-occupied housing" has the meaning ascribed to it in NRS 107.086.

Sec. 1.3. NRS 107.080 is hereby amended to read as follows:

107.080 1. Except as otherwise provided in NRS 107.085 and 107.086, *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) 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, 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, 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, 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, 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 NRS 107.086, the grantor, 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, for a period that commences in the manner and subject to the requirements described in subsection 3 and expires 5 days before the date of sale, failed to make good the deficiency in performance or payment;

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

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

3. The 15- or 35-day period provided in paragraph (a) of subsection 2, or the period provided in paragraph (b) of subsection 2, commences on the first day following the day upon which the notice of default and election to sell is recorded in the office of the county recorder of the county in which the property is located and a copy of the notice of default and election to sell is mailed by registered or certified mail, return receipt requested and with postage prepaid to the grantor or, to the person who holds the title of record on the date the notice of default and election to sell is recorded, and, if the property is operated as a facility licensed under chapter 449 of NRS, to the State Board of Health, at their respective addresses, if known, otherwise to the address of the trust property. The notice of default and election to sell must:

(a) Describe the deficiency in performance or payment and may contain a notice of intent to declare the entire unpaid balance due if acceleration is permitted by the obligation secured by the deed of trust, but acceleration must not occur if the deficiency in performance or payment is made good and any costs, fees and



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1 expenses incident to the preparation or recordation of the notice and
2 incident to the making good of the deficiency in performance or
3 payment are paid within the time specified in subsection 2; and

4 (b) If the property is a residential foreclosure, comply with the
5 provisions of NRS 107.087.

6 4. The trustee, or other person authorized to make the sale
7 under the terms of the trust deed or transfer in trust, shall, after
8 expiration of the 3-month period following the recording of the
9 notice of breach and election to sell, and before the making of the
10 sale, give notice of the time and place thereof by recording
11 the notice of sale and by:

12 (a) Providing the notice to each trustor, any other person entitled
13 to notice pursuant to this section and, if the property is operated as a
14 facility licensed under chapter 449 of NRS, the State Board of
15 Health, by personal service or by mailing the notice by registered or
16 certified mail to the last known address of the trustor and any other
17 person entitled to such notice pursuant to this section;

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

22 (c) Publishing a copy of the notice three times, once each week
23 for 3 consecutive weeks, in a newspaper of general circulation in the
24 county where the property is situated; and

25 (d) If the property is a residential foreclosure, complying with
26 the provisions of NRS 107.087.

27 5. Every sale made under the provisions of this section and
28 other sections of this chapter vests in the purchaser the title of the
29 grantor and any successors in interest without equity or right of
30 redemption. A sale made pursuant to this section may be declared
31 void by any court of competent jurisdiction in the county where the
32 sale took place if:

33 (a) The trustee or other person authorized to make the sale does
34 not substantially comply with the provisions of this section or any
35 applicable provision of NRS 107.086 and 107.087 ~~(b)~~ *or the*
36 *beneficiary of the deed of trust does not comply with any*
37 *applicable provision of section 1 of this act;*

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

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



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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.

8. After a sale of property is conducted pursuant to this section, the trustee shall:

(a) Within 30 days after the date of the sale, record the trustee's deed upon sale in the office of the county recorder of the county in which the property is located; or

(b) Within 20 days after the date of the sale, deliver the trustee's deed upon sale to the successful bidder. Within 10 days after the date of delivery of the deed by the trustee, the successful bidder shall record the trustee's deed upon sale in the office of the county recorder of the county in which the property is located.

9. If the successful bidder fails to record the trustee's deed upon sale pursuant to paragraph (b) of subsection 8, the successful bidder:

(a) Is liable in a civil action to any party that is a senior lienholder against the property that is the subject of the sale in a sum of up to \$500 and for reasonable attorney's fees and the costs of bringing the action; and

(b) Is liable in a civil action for any actual damages caused by the failure to comply with the provisions of subsection 8 and for reasonable attorney's fees and the costs of bringing the action.

10. The county recorder shall, in addition to any other fee, at the time of recording a notice of default and election to sell collect:

(a) A fee of \$150 for deposit in the State General Fund.

(b) A fee of \$50 for deposit in the Account for Foreclosure Mediation, which is hereby created in the State General Fund. The Account must be administered by the Court Administrator, and the money in the Account may be expended only for the purpose of supporting a program of foreclosure mediation established by Supreme Court Rule.

➤ The fees collected pursuant to this subsection must be paid over to the county treasurer by the county recorder on or before the fifth day of each month for the preceding calendar month, and, except as otherwise provided in this subsection, must be placed to the credit of the State General Fund or the Account as prescribed pursuant to this subsection. The county recorder may direct that 1.5 percent of the



1 fees collected by the county recorder be transferred into a special
2 account for use by the office of the county recorder. The county
3 treasurer shall, on or before the 15th day of each month, remit the
4 fees deposited by the county recorder pursuant to this subsection to
5 the State Controller for credit to the State General Fund or the
6 Account as prescribed in this subsection.

7 11. The beneficiary, the successor in interest of the beneficiary
8 or the trustee who causes to be recorded the notice of default and
9 election to sell shall not charge the grantor or the successor in
10 interest of the grantor any portion of any fee required to be paid
11 pursuant to subsection 10.

12 12. As used in this section, "residential foreclosure" means the
13 sale of a single family residence under a power of sale granted by
14 this section. As used in this subsection, "single family residence":
15

16 (a) Means a structure that is comprised of not more than four
17 units.

18 (b) Does not include any time share or other property regulated
19 under chapter 119A of NRS.

20 **Sec. 1.7.** NRS 107.086 is hereby amended to read as follows:

21 107.086 1. In addition to the requirements of NRS 107.085,
22 *and section 1 of this act*, the exercise of the power of sale pursuant
23 to NRS 107.080 with respect to any trust agreement which concerns
24 owner-occupied housing is subject to the provisions of this section.

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

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

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

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

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

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

45 (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 or the person who holds the title of record shall, not later than 30 days after service of the notice in the manner required by NRS 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 the form an 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 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 the grantor or the person who holds the title of record indicates on the form an election to waive mediation or fails to return the form to the trustee as required by this subsection, the trustee shall execute an affidavit attesting to that fact under penalty of perjury and serve a copy of the affidavit, together with the waiver of mediation by the grantor or the person who holds the title of record, or proof of service on the grantor or the person who holds the title of record of the notice required by subsection 2 of this section and subsection 3 of NRS 107.080, upon the Mediation Administrator. Upon receipt of the affidavit and the waiver or proof of service, the Mediation Administrator shall provide to the trustee a certificate which provides that no mediation is required in the matter.

4. Each mediation required by this section must be conducted by a senior justice, judge, hearing master or other designee pursuant to the rules adopted pursuant to subsection 8. The beneficiary of the deed of trust or a representative shall attend the mediation. The grantor or a representative shall attend the mediation if the grantor elected to enter into mediation, or the person who holds the title of record or a representative shall attend the mediation if the person who holds the title of record elected to enter into mediation. The beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of the deed of trust, the mortgage note, ~~and~~ each assignment of the deed of trust or mortgage note ~~and~~, *if the grantor or the person who holds the title of record has*



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1 *returned to the beneficiary a loss mitigation application pursuant*
2 *to section 1 of this act, a copy of the loss mitigation application, a*
3 *final loss mitigation affidavit and the information obtained in*
4 *connection with the loss mitigation analysis.* If the beneficiary of

5 the deed of trust is represented at the mediation by another person,
6 that person must have authority to negotiate a loan modification on
7 behalf of the beneficiary of the deed of trust or have access at all
8 times during the mediation to a person with such authority.

9 5. If the beneficiary of the deed of trust or the representative
10 fails to attend the mediation, fails to participate in the mediation in
11 good faith or does not bring to the mediation each document
12 required by subsection 4 or does not have the authority or access to
13 a person with the authority required by subsection 4, the mediator
14 shall prepare and submit to the Mediation Administrator a petition
15 and recommendation concerning the imposition of sanctions against
16 the beneficiary of the deed of trust or the representative. The court
17 may issue an order imposing such sanctions against the beneficiary
18 of the deed of trust or the representative as the court determines
19 appropriate, including, without limitation, requiring a loan
20 modification in the manner determined proper by the court.

21 6. If the grantor or the person who holds the title of record
22 elected to enter into mediation and fails to attend the mediation, the
23 Mediation Administrator shall provide to the trustee a certificate
24 which states that no mediation is required in the matter.

25 7. If the mediator determines that the parties, while acting in
26 good faith, are not able to agree to a loan modification, the mediator
27 shall prepare and submit to the Mediation Administrator a
28 recommendation that the matter be terminated. The Mediation
29 Administrator shall provide to the trustee a certificate which
30 provides that the mediation required by this section has been
31 completed in the matter.

32 8. The Supreme Court shall adopt rules necessary to carry out
33 the provisions of this section. The rules must, without limitation,
34 include provisions:

35 (a) Designating an entity to serve as the Mediation
36 Administrator pursuant to this section. The entities that may be so
37 designated include, without limitation, the Administrative Office of
38 the Courts, the district court of the county in which the property is
39 situated or any other judicial entity.

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

42 (c) Requiring each party to a mediation to provide such
43 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 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 are immune from civil liability for those acts.

12. As used in this section:

(a) ***"Final loss mitigation affidavit" has the meaning ascribed to it in section 1 of this act.***

(b) "Mediation Administrator" means the entity so designated pursuant to subsection 8.

~~(b)~~ (c) "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)~~ (d) "Owner-occupied housing" means housing that is occupied by an owner as the owner's primary residence. The term does not include any time share or other property regulated under chapter 119A of NRS.

Sec. 2. The amendatory provisions of this act apply only with respect to trust agreements which concern owner-occupied housing, as defined in NRS 107.086, as amended by section 1.7 of this act, for which a notice of default is recorded on or after July 1, 2011.

Sec. 3. This act becomes effective on July 1, 2011.

