

SENATE BILL NO. 295—SENATOR ROBERSON

MARCH 18, 2013

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to title to real property.
(BDR 9-1003)

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

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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 an action to declare void a trustee's sale; providing that a failure to comply with the provisions of law governing a trustee's sale does not affect the validity of a sale in favor of a bona fide purchaser or bona fide encumbrancer; defining the terms "bona fide purchaser" and "bona fide encumbrancer"; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

1 Under existing law, a sale by the trustee under a deed of trust must be declared
2 void by a court of competent jurisdiction if: (1) the trustee or a person authorized to
3 make the sale does not substantially comply with certain provisions of existing law
4 governing the exercise of the trustee's power of sale; and (2) an action is
5 commenced in the county where the sale took place within 90 days after the date of
6 the sale or, if the notice of default and election to sell or the notice of sale is not
7 provided to certain persons in accordance with existing law, within 120 days after
8 the person received actual notice of the sale. Existing law requires a trustee or a
9 successful bidder at trustee's sale of property to record a trustee's deed upon sale
10 not later than 30 days after the trustee's sale of the property. (NRS 107.080) Under
11 **section 1** of this bill: (1) not later than 5 days after a trustee's deed upon sale is
12 recorded, the trustee or successful bidder at the trustee's sale must post
13 conspicuously on the property a notice of the trustee's sale; (2) an action to declare
14 void a trustee's sale must be commenced within 15 days after the recording
15 of the trustee's deed upon sale or, in certain circumstances, within 15 days after the
16 posting on the property of the notice of the trustee's sale; and (3) after the
17 expiration of the period for commencing an action to declare void a trustee's sale,
18 any failure to comply with a provision of existing law governing the exercise of the
19 trustee's power of sale does not affect the rights of a bona fide purchaser or bona



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20 fide encumbrancer. **Section 2** of this bill specifies the circumstances under which a
21 purchaser or encumbrancer is a bona fide purchaser or bona fide encumbrancer.

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

1 **Section 1.** NRS 107.080 is hereby amended to read as follows:
2 107.080 1. Except as otherwise provided in NRS 106.210,
3 107.085 and 107.086, if any transfer in trust of any estate in real
4 property is made after March 29, 1927, to secure the performance of
5 an obligation or the payment of any debt, a power of sale is hereby
6 conferred upon the trustee to be exercised after a breach of the
7 obligation for which the transfer is security.
8 2. The power of sale must not be exercised, however, until:
9 (a) Except as otherwise provided in paragraph (b), in the case of
10 any trust agreement coming into force:
11 (1) On or after July 1, 1949, and before July 1, 1957, the
12 grantor, the person who holds the title of record, a beneficiary under
13 a subordinate deed of trust or any other person who has a
14 subordinate lien or encumbrance of record on the property has, for a
15 period of 15 days, computed as prescribed in subsection 3, failed to
16 make good the deficiency in performance or payment; or
17 (2) On or after July 1, 1957, the grantor, the person who
18 holds the title of record, a beneficiary under a subordinate deed of
19 trust or any other person who has a subordinate lien or encumbrance
20 of record on the property has, for a period of 35 days, computed as
21 prescribed in subsection 3, failed to make good the deficiency in
22 performance or payment.
23 (b) In the case of any trust agreement which concerns owner-
24 occupied housing as defined in NRS 107.086, the grantor, the
25 person who holds the title of record, a beneficiary under a
26 subordinate deed of trust or any other person who has a subordinate
27 lien or encumbrance of record on the property has, for a period that
28 commences in the manner and subject to the requirements described
29 in subsection 3 and expires 5 days before the date of sale, failed to
30 make good the deficiency in performance or payment.
31 (c) The beneficiary, the successor in interest of the beneficiary
32 or the trustee first executes and causes to be recorded in the office of
33 the recorder of the county wherein the trust property, or some part
34 thereof, is situated a notice of the breach and of the election to sell
35 or cause to be sold the property to satisfy the obligation which,
36 except as otherwise provided in this paragraph, includes a notarized
37 affidavit of authority to exercise the power of sale stating, based on
38 personal knowledge and under the penalty of perjury:



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(1) The full name and business address of the trustee or the trustee's personal representative or assignee, the current holder of the note secured by the deed of trust, the current beneficiary of record and the servicers of the obligation or debt secured by the deed of trust;

(2) The full name and last known business address of every prior known beneficiary of the deed of trust;

(3) That the beneficiary under the deed of trust, the successor in interest of the beneficiary or the trustee is in actual or constructive possession of the note secured by the deed of trust;

(4) That the trustee has the authority to exercise the power of sale with respect to the property pursuant to the instruction of the beneficiary of record and the current holder of the note secured by the deed of trust;

(5) The amount in default, the principal amount of the obligation or debt secured by the deed of trust, a good faith estimate of all fees imposed and to be imposed because of the default and the costs and fees charged to the debtor in connection with the exercise of the power of sale; and

(6) The date, recordation number or other unique designation of the instrument that conveyed the interest of each beneficiary and a description of the instrument that conveyed the interest of each beneficiary.

➤ The affidavit described in this paragraph is not required for the exercise of the trustee's power of sale with respect to any trust agreement which concerns a time share within a time share plan created pursuant to chapter 119A of NRS if the power of sale is being exercised for the initial beneficiary under the deed of trust or an affiliate of the initial beneficiary.

(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:



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

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

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

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

(b) Posting a similar notice particularly describing the property, for 20 days successively, in a public place in the county where the property is situated;

(c) Publishing a copy of the notice three times, once each week for 3 consecutive weeks, in a newspaper of general circulation in the county where the property is situated or, if the property is a time share, by posting a copy of the notice on an Internet website and publishing a statement in a newspaper in the manner required by subsection 3 of NRS 119A.560; and

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

5. Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the title of the grantor and any successors in interest without equity or right of redemption. ~~1A~~ *Except as otherwise provided in subsection 7, a sale made pursuant to this section must be declared void by any court of competent jurisdiction in the county where the sale took place if:*

(a) The trustee or other person authorized to make the sale does not substantially comply with the provisions of this section or any applicable provision of NRS 107.086 and 107.087;

(b) Except as otherwise provided in subsection 6, an action is commenced in the county where the sale took place within ~~100~~ *15*



1 days after the date ~~of the sale;~~ *on which the trustee's deed upon*
2 *sale is recorded pursuant to subsection 10 in the office of the*
3 *county recorder of the county in which the property is located;* and

4 (c) A notice of lis pendens providing notice of the pendency of
5 the action is recorded in the office of the county recorder of the
6 county where the sale took place within ~~30~~ 5 days after
7 commencement of the action.

8 6. If proper notice is not provided pursuant to subsection 3 or
9 paragraph (a) of subsection 4 to the grantor, to the person who holds
10 the title of record on the date the notice of default and election to
11 sell is recorded, to each trustor or to any other person entitled to
12 such notice, the person who did not receive such proper notice may
13 commence an action pursuant to subsection 5 within ~~120~~ 15 days
14 after the ~~date on which the person received actual notice of the~~
15 ~~sale.~~ *notice required by subsection 11 is posted on the property.*

16 7. *Upon expiration of the time for commencing an action*
17 *which is set forth in subsections 5 and 6, any failure to comply*
18 *with the provisions of this section or any other sections of this*
19 *chapter does not affect the rights of a bona fide purchaser or bona*
20 *fide encumbrancer, as described in NRS 111.180.*

21 8. If, in an action brought by the grantor or the person who
22 holds title of record in the district court in and for the county in
23 which the real property is located, the court finds that the
24 beneficiary, the successor in interest of the beneficiary or the trustee
25 did not comply with any requirement of subsection 2, 3 or 4, the
26 court must award to the grantor or the person who holds title of
27 record:

28 (a) Damages of \$5,000 or treble the amount of actual damages,
29 whichever is greater;

30 (b) An injunction enjoining the exercise of the power of sale
31 until the beneficiary, the successor in interest of the beneficiary or
32 the trustee complies with the requirements of subsections 2, 3 and 4;
33 and

34 (c) Reasonable attorney's fees and costs,
35 ➔ unless the court finds good cause for a different award. The
36 remedy provided in this subsection is in addition to the remedy
37 provided in subsection 5.

38 ~~8~~ 9. The sale of a lease of a dwelling unit of a cooperative
39 housing corporation vests in the purchaser title to the shares in the
40 corporation which accompany the lease.

41 ~~9~~ 10. After a sale of property is conducted pursuant to this
42 section, the trustee shall:

43 (a) Within 30 days after the date of the sale, record the trustee's
44 deed upon sale in the office of the county recorder of the county in
45 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.

~~H0~~ **11.** *Within 5 days after recording the trustee's deed upon sale, the trustee or successful bidder, whomever recorded the trustee's deed upon sale pursuant to subsection 10, shall cause a copy of the trustee's deed upon sale to be conspicuously posted on the property.*

12. If the successful bidder fails to record the trustee's deed upon sale pursuant to paragraph (b) of subsection ~~H9~~ **10**, 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 ~~H9~~ **10** and for reasonable attorney's fees and the costs of bringing the action.

~~H11~~ **13.** 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 \$45 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.

(c) A fee of \$5 to be paid over to the county treasurer on or before the fifth day of each month for the preceding calendar month. The county recorder may direct that 1.5 percent of the fees collected by the county recorder pursuant to this paragraph be transferred into a special account for use by the office of the county recorder. The county treasurer shall remit quarterly to the organization operating the program for legal services that receives the fees charged pursuant to NRS 19.031 for the operation of programs for the indigent all the money received from the county recorder pursuant to this paragraph.

~~H2~~ **14.** The fees collected pursuant to paragraphs (a) and (b) of subsection ~~H11~~ **13** 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



1 the Account for Foreclosure Mediation as prescribed pursuant to
2 subsection ~~111.1~~ 13. The county recorder may direct that 1.5 percent
3 of the fees collected by the county recorder be transferred into a
4 special account for use by the office of the county recorder. The
5 county treasurer shall, on or before the 15th day of each month,
6 remit the fees deposited by the county recorder pursuant to this
7 subsection to the State Controller for credit to the State General
8 Fund or the Account as prescribed in subsection ~~111.1~~ 13.

9 ~~113.1~~ 15. The beneficiary, the successor in interest of the
10 beneficiary or the trustee who causes to be recorded the notice of
11 default and election to sell shall not charge the grantor or the
12 successor in interest of the grantor any portion of any fee required to
13 be paid pursuant to subsection ~~111.1~~ 13.

14 ~~114.1~~ 16. As used in this section:

15 (a) "Residential foreclosure" means the sale of a single family
16 residence under a power of sale granted by this section. As used in
17 this paragraph, "single family residence":

18 (1) Means a structure that is comprised of not more than four
19 units.

20 (2) Does not include vacant land or any time share or other
21 property regulated under chapter 119A of NRS.

22 (b) "Trustee" means the trustee of record.

23 Sec. 2. NRS 111.180 is hereby amended to read as follows:

24 111.180 1. *Any purchaser who purchases an interest in real*
25 *property for valuable consideration and who does not know, or*
26 *have reasonable cause to believe, that there exists a defect in, or*
27 *adverse rights, title or interest to, the real property is a bona fide*
28 *purchaser. An encumbrancer who makes a loan of valuable*
29 *consideration which is secured by real property and who does not*
30 *know, or have reasonable cause to believe, that there exists a*
31 *defect in, or adverse rights, title or interest to, the real property is a*
32 *bona fide encumbrancer.*

33 2. No ~~such~~ conveyance ~~it~~ or charge ~~it~~ shall be deemed
34 fraudulent in favor of a ~~subsequent~~ bona fide purchaser *or bona*
35 *fide encumbrancer, as applicable*, who ~~shall have~~ has legal notice
36 thereof at the time of the purchase by the subsequent purchaser,
37 unless it ~~shall appear~~ appears that the ~~grantee~~ bona fide
38 purchaser in such conveyance, or ~~person to be benefited by~~ bona
39 fide encumbrancer in such charge, was privy to the fraud intended.

40 Sec. 3. This act becomes effective upon passage and approval.

