

ASSEMBLY BILL NO. 388—ASSEMBLYMAN OHRENSCHALL

MARCH 21, 2011

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to real property.
(BDR 9-568)

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

Legislative Counsel’s Digest:

1 Under existing law, the trustee under a deed of trust concerning owner-
2 occupied housing has the power to sell the property to which the deed of trust
3 applies, subject to certain restrictions. (NRS 107.080, 107.085, 107.086) One such
4 restriction: (1) requires the trustee under the deed of trust to include a form to
5 request mediation with the notice of default and election to sell which is mailed to
6 the grantor of the deed of trust or the person who holds the title of record; and (2)
7 authorizes the grantor of the deed of trust or the person who holds the title of record
8 to request mediation under rules adopted by the Supreme Court. (NRS 107.086)
9 **Section 20.7** of this bill requires the notice of default and election to sell which is
10 mailed to the grantor or the person who holds the title of record to include a notice
11 provided by the entity designated to administer the Foreclosure Mediation Program
12 which states that the grantor or the person who holds the title of record has a right
13 to seek foreclosure mediation in the Foreclosure Mediation Program.

14 Under existing law, another restriction on the exercise of the trustee’s power of
15 sale prohibits the trustee from exercising the power of sale unless, not later than 60
16 days before the date of the sale, the trustee causes a notice to be served on the
17 grantor or the person who holds the title of record which contains the telephone
18 numbers of certain agencies which may provide assistance to the grantor or the
19 person who holds the title of record. (NRS 107.085) **Section 20.3** of this bill
20 amends this notice to include: (1) a statement that the person receiving the notice
21 may have a right to participate in the State of Nevada Foreclosure Mediation
22 Program if the time to request mediation has not expired; (2) the telephone number
23 of the State of Nevada Foreclosure Mediation Program; and (3) the telephone
24 number of the Division of Mortgage Lending of the Department of Business and
25 Industry.



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

- 1 **Section 1.** (Deleted by amendment.)
2 **Sec. 2.** (Deleted by amendment.)
3 **Sec. 3.** (Deleted by amendment.)
4 **Sec. 4.** (Deleted by amendment.)
5 **Sec. 5.** (Deleted by amendment.)
6 **Sec. 6.** (Deleted by amendment.)
7 **Sec. 7.** (Deleted by amendment.)
8 **Sec. 8.** (Deleted by amendment.)
9 **Sec. 9.** (Deleted by amendment.)
10 **Sec. 10.** (Deleted by amendment.)
11 **Sec. 11.** (Deleted by amendment.)
12 **Sec. 12.** (Deleted by amendment.)
13 **Sec. 13.** (Deleted by amendment.)
14 **Sec. 14.** (Deleted by amendment.)
15 **Sec. 15.** (Deleted by amendment.)
16 **Sec. 16.** (Deleted by amendment.)
17 **Sec. 17.** (Deleted by amendment.)
18 **Sec. 18.** (Deleted by amendment.)
19 **Sec. 19.** (Deleted by amendment.)
20 **Sec. 20.** (Deleted by amendment.)
21 **Sec. 20.3.** NRS 107.085 is hereby amended to read as follows:
22 107.085 1. With regard to a transfer in trust of an estate in
23 real property to secure the performance of an obligation or the
24 payment of a debt, the provisions of this section apply to the
25 exercise of a power of sale pursuant to NRS 107.080 only if:
26 (a) The trust agreement becomes effective on or after October 1,
27 2003, and, on the date the trust agreement is made, the trust
28 agreement is subject to the provisions of § 152 of the Home
29 Ownership and Equity Protection Act of 1994, ~~15 U.S.C. §~~
30 ~~1602(aa),~~ **15 U.S.C. § 1602(bb)** and the regulations adopted by the
31 Board of Governors of the Federal Reserve System pursuant thereto,
32 including, without limitation, 12 C.F.R. § 226.32; or
33 (b) The trust agreement concerns owner-occupied housing as
34 defined in NRS 107.086.
35 2. The trustee shall not exercise a power of sale pursuant to
36 NRS 107.080 unless:
37 (a) In the manner required by subsection 3, not later than 60
38 days before the date of the sale, the trustee causes to be served upon
39 the grantor or the person who holds the title of record a notice in the
40 form described in subsection 3; and



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

5 3. The notice described in subsection 2 must be:

6 (a) Served upon the grantor or the person who holds the title of
7 record:

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

13 (2) If the trust agreement concerns owner-occupied housing
14 as defined in NRS 107.086:

15 (I) By personal service;

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

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

28 (b) In substantially the following form, with the applicable
29 telephone numbers and mailing addresses provided on the notice
30 and, except as otherwise provided in subsection 4, a copy of the
31 promissory note attached to the notice:

32
33 NOTICE
34 YOU ARE IN DANGER OF LOSING YOUR HOME!
35

36 ***YOU MAY HAVE A RIGHT TO PARTICIPATE IN THE STATE***
37 ***OF NEVADA FORECLOSURE MEDIATION PROGRAM IF***
38 ***THE TIME TO REQUEST MEDIATION HAS NOT EXPIRED!***
39

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

43
44 ***State of Nevada Foreclosure Mediation Program*** _____
45 Consumer Credit Counseling _____



- 1 The Attorney General _____
- 2 *The Division of Mortgage Lending* _____
- 3 The Division of Financial Institutions _____
- 4 Legal Services _____
- 5 Your Lender _____
- 6 Nevada Fair Housing Center _____

7

8 4. The trustee shall cause all social security numbers to be
 9 redacted from the copy of the promissory note before it is attached
 10 to the notice pursuant to paragraph (b) of subsection 3.

11 5. This section does not prohibit a judicial foreclosure.

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

15 **Sec. 20.7.** NRS 107.086 is hereby amended to read as follows:
 16 107.086 1. In addition to the requirements of NRS 107.085,
 17 the exercise of the power of sale pursuant to NRS 107.080 with
 18 respect to any trust agreement which concerns owner-occupied
 19 housing is subject to the provisions of this section.

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

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

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

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

32 (3) *A notice provided by the Mediation Administrator*
 33 *indicating that the grantor or the person who holds the title of*
 34 *record has the right to seek mediation pursuant to this section;*
 35 *and*

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

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



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

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

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

9 3. The grantor or the person who holds the title of record shall,
10 not later than 30 days after service of the notice in the manner
11 required by NRS 107.080, complete the form required by
12 subparagraph ~~(3)~~ (4) of paragraph (a) of subsection 2 and return
13 the form to the trustee by certified mail, return receipt requested. If
14 the grantor or the person who holds the title of record indicates
15 on the form an election to enter into mediation, the trustee shall
16 notify the beneficiary of the deed of trust and every other person
17 with an interest as defined in NRS 107.090, by certified mail, return
18 receipt requested, of the election of the grantor or the person who
19 holds the title of record to enter into mediation and file the form
20 with the Mediation Administrator, who shall assign the matter to a
21 senior justice, judge, hearing master or other designee and schedule
22 the matter for mediation. No further action may be taken to exercise
23 the power of sale until the completion of the mediation. If the
24 grantor or the person who holds the title of record indicates on the
25 form an election to waive mediation or fails to return the form to
26 the trustee as required by this subsection, the trustee shall execute an
27 affidavit attesting to that fact under penalty of perjury and serve a
28 copy of the affidavit, together with the waiver of mediation by the
29 grantor or the person who holds the title of record, or proof of
30 service on the grantor or the person who holds the title of record of
31 the notice required by subsection 2 of this section and subsection 3
32 of NRS 107.080, upon the Mediation Administrator. Upon receipt of
33 the affidavit and the waiver or proof of service, the Mediation
34 Administrator shall provide to the trustee a certificate which
35 provides that no mediation is required in the matter.

36 4. Each mediation required by this section must be conducted
37 by a senior justice, judge, hearing master or other designee pursuant
38 to the rules adopted pursuant to subsection 8. The beneficiary of the
39 deed of trust or a representative shall attend the mediation. The
40 grantor or a representative shall attend the mediation if the grantor
41 elected to enter into mediation, or the person who holds the title of
42 record or a representative shall attend the mediation if the person
43 who holds the title of record elected to enter into mediation. The
44 beneficiary of the deed of trust shall bring to the mediation the
45 original or a certified copy of the deed of trust, the mortgage note



1 and each assignment of the deed of trust or mortgage note. If the
2 beneficiary of the deed of trust is represented at the mediation by
3 another person, that person must have authority to negotiate a loan
4 modification on behalf of the beneficiary of the deed of trust or have
5 access at all times during the mediation to a person with such
6 authority.

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

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

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

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

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

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

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

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



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

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

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

13 (b) A petition in bankruptcy has been filed with respect to the
14 grantor or the person who holds the title of record under chapter 7,
15 11, 12 or 13 of Title 11 of the United States Code and the
16 bankruptcy court has not entered an order closing or dismissing the
17 case or granting relief from a stay of foreclosure.

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

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

23 12. As used in this section:

24 (a) "Mediation Administrator" means the entity so designated
25 pursuant to subsection 8.

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

30 (c) "Owner-occupied housing" means housing that is occupied
31 by an owner as the owner's primary residence. The term does not
32 include any time share or other property regulated under chapter
33 119A of NRS.

34 **Sec. 21.** (Deleted by amendment.)

35 **Sec. 22.** (Deleted by amendment.)

36 **Sec. 23.** The amendatory provisions of this act apply only with
37 respect to trust agreements for which a notice of default is recorded
38 on or after July 1, 2011.

39 **Sec. 24.** This act becomes effective on July 1, 2011.

