

SENATE BILL NO. 491—COMMITTEE ON
COMMERCE, LABOR AND ENERGY

MARCH 25, 2013

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to foreclosures.
(BDR 9-636)

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 affidavit of authority to exercise the power of sale under a deed of trust; revising provisions governing real property sold pursuant to the exercise of the power of sale under a deed of trust; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

1 Existing law requires a notice of default and election to sell real property
2 subject to a deed of trust to include an affidavit based on personal knowledge of the
3 affiant setting forth certain information concerning the deed of trust, the amount
4 due, the possession of the note secured by the deed of trust and the authority to
5 foreclose. (NRS 107.080) This bill provides that certain information provided in the
6 affidavit may be based on: (1) the information obtained by the affiant’s review of
7 certain business records; and (2) the information contained in the records of the
8 recorder of the county in which the property is located or the title guaranty or title
9 insurance issued by a title insurer or title agent authorized to do business in this
10 State. This bill also revises the information required to be stated in the affidavit.

11 Under existing law, a sale by the trustee under a deed of trust must be declared
12 void by a court of competent jurisdiction if: (1) the trustee or a person authorized to
13 make the sale does not substantially comply with certain provisions of existing law
14 governing the exercise of the trustee’s power of sale; and (2) an action is
15 commenced in the county where the sale took place within a certain period after the
16 sale. (NRS 107.080) This bill provides that a recital in the trustee’s deed recorded
17 after the trustee’s sale which evidences compliance with the requirements of
18 existing law governing the exercise of the trustee’s power of sale is prima facie
19 evidence of compliance with those provisions and conclusive evidence of
20 compliance with those provisions in favor of a bona fide purchaser or
21 encumbrancer for value. Thus, under this bill, any failure to comply with the



22 provisions of existing law governing the exercise of the power of sale would not
23 affect the rights of a bona fide purchaser or encumbrancer for value.

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~~
38 ~~on personal knowledge and~~ *Except as otherwise provided in*
39 *subparagraph (6), the affidavit required by this paragraph must*



1 *state* under the penalty of perjury ~~†~~ *the following information,*
2 *which must be based on the direct, personal knowledge of the*
3 *affiant or the personal knowledge of the affiant which the affiant*
4 *acquired by a review of the business records of the beneficiary, the*
5 *successor in interest of the beneficiary or the servicer of the*
6 *obligation secured by the deed of trust, which business records*
7 *must meet the standards set forth in NRS 51.135:*

8 (1) The full name and business address of the *current* trustee
9 or the *current* trustee's personal representative or assignee, the
10 current holder of the note secured by the deed of trust, the current
11 beneficiary of record and the ~~†servicers†~~ *current servicer* of the
12 *holder of the* obligation or debt secured by the deed of trust. ~~†~~

13 ~~†The full name and last known business address of every~~
14 ~~prior known beneficiary of the deed of trust;~~

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

18 ~~—(4) That†~~ or that the *beneficiary or its successor in interest*
19 *or the trustee is entitled to enforce the obligation or debt secured*
20 *by the deed of trust. For the purposes of this subparagraph, a*
21 *beneficiary or its successor in interest or the trustee is entitled to*
22 *enforce the obligation or debt secured by the deed of trust if the*
23 *beneficiary or its successor in interest or the trustee is:*

24 (I) *The holder of the instrument constituting the*
25 *obligation or debt;*

26 (II) *A nonholder in possession of the instrument who*
27 *has the rights of a holder; or*

28 (III) *A person not in possession of the instrument who is*
29 *entitled to enforce the instrument pursuant to a court order issued*
30 *under NRS 104.3309.*

31 (3) *That the beneficiary or its successor in interest or the*
32 *servicer of the obligation or debt secured by the deed of trust has*
33 *instructed the* trustee ~~†has the authority†~~ to exercise the power of
34 sale with respect to the property. ~~†pursuant to the instruction of the~~
35 ~~beneficiary of record and the current holder of the note secured by~~
36 ~~the deed of trust;~~

37 ~~—(5)†~~ (4) *That the beneficiary or its successor in interest, the*
38 *servicer of the obligation or debt secured by the deed of trust or*
39 *the trustee has sent to the obligor or borrower of the obligation or*
40 *debt secured by the deed of trust a written statement of:*

41 (I) *The amount of payment required to make good the*
42 *deficiency in performance or payment, void the exercise of the*
43 *power of sale and reinstate the underlying obligation or debt, as of*
44 *the date of the statement;*

45 (II) The amount in default ~~†the†~~ ;



1 **(III) The** principal amount of the obligation or debt
2 secured by the deed of trust ~~f-a~~;

3 **(IV) The amount of accrued interest and late charges;**

4 **(V) A** good faith estimate of all fees imposed ~~and to be~~
5 ~~imposed because of the default and the costs and fees charged to the~~
6 ~~debtor~~ in connection with the exercise of the power of sale; and

7 ~~f(6)~~ **(VI) Contact information for obtaining the most**
8 **current amounts due and the toll-free telephone number described**
9 **in subparagraph (5).**

10 **(5) A toll-free telephone number that the obligor or**
11 **borrower of the obligation or debt may call to receive answers to**
12 **any questions concerning the information contained in the**
13 **affidavit.**

14 **(6) The date ~~f~~ and the** recordation number or other unique
15 designation of ~~the instrument that conveyed the interest of each~~
16 ~~beneficiary and a description of the instrument that conveyed the~~
17 ~~interest of each beneficiary~~ , and the name of each assignee
18 under, each recorded assignment of the deed of trust. The
19 information required to be stated in the affidavit pursuant to this
20 subparagraph may be based on:

21 **(I) The direct, personal knowledge of the affiant;**

22 **(II) The personal knowledge which the affiant acquired**
23 **by a review of the business records of the beneficiary, the**
24 **successor in interest of the beneficiary or the servicer of the**
25 **obligation or debt secured by the deed of trust, which business**
26 **records must meet the standards set forth in NRS 51.135;**

27 **(III) Information contained in the records of the**
28 **recorder of the county in which the property is located; or**

29 **(IV) The title guaranty or title insurance issued by a title**
30 **insurer or title agent authorized to do business in this State**
31 **pursuant to chapter 692A of NRS.**

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

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

40 3. The 15- or 35-day period provided in paragraph (a) of
41 subsection 2, or the period provided in paragraph (b) of subsection
42 2, commences on the first day following the day upon which the
43 notice of default and election to sell is recorded in the office of the
44 county recorder of the county in which the property is located and a
45 copy of the notice of default and election to sell is mailed by



1 registered or certified mail, return receipt requested and with
2 postage prepaid to the grantor or, to the person who holds the title of
3 record on the date the notice of default and election to sell is
4 recorded, and, if the property is operated as a facility licensed under
5 chapter 449 of NRS, to the State Board of Health, at their respective
6 addresses, if known, otherwise to the address of the trust property.
7 The notice of default and election to sell must:

8 (a) Describe the deficiency in performance or payment and may
9 contain a notice of intent to declare the entire unpaid balance due if
10 acceleration is permitted by the obligation secured by the deed of
11 trust, but acceleration must not occur if the deficiency in
12 performance or payment is made good and any costs, fees and
13 expenses incident to the preparation or recordation of the notice and
14 incident to the making good of the deficiency in performance or
15 payment are paid within the time specified in subsection 2; and

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

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

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

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

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

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

41 5. Every sale made under the provisions of this section and
42 other sections of this chapter vests in the purchaser the title of the
43 grantor and any successors in interest without equity or right of
44 redemption. A sale made pursuant to this section must be declared



1 void by any court of competent jurisdiction in the county where the
2 sale took place if:

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

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

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

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

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

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

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

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

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

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

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



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

6 *↳ A recital in the trustee's deed upon sale of default, evidencing
7 the trustee's compliance with the requirements of this section for
8 the exercise of the trustee's power of sale, is prima facie evidence
9 of compliance with the requirements of this section and conclusive
10 proof of such compliance in favor of a bona fide purchaser and
11 encumbrancer for value.*

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

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

19 (b) Is liable in a civil action for any actual damages caused by
20 the failure to comply with the provisions of subsection 9 and for
21 reasonable attorney's fees and the costs of bringing the action.

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

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

25 (b) A fee of \$45 for deposit in the Account for Foreclosure
26 Mediation, which is hereby created in the State General Fund. The
27 Account must be administered by the Court Administrator, and the
28 money in the Account may be expended only for the purpose of
29 supporting a program of foreclosure mediation established by
30 Supreme Court Rule.

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

41 12. The fees collected pursuant to paragraphs (a) and (b) of
42 subsection 11 must be paid over to the county treasurer by the
43 county recorder on or before the fifth day of each month for the
44 preceding calendar month, and, except as otherwise provided in this
45 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 11. The county recorder may direct that 1.5 percent of
3 the fees collected by the county recorder be transferred into a special
4 account for use by the office of the county recorder. The county
5 treasurer shall, on or before the 15th day of each month, remit the
6 fees deposited by the county recorder pursuant to this subsection to
7 the State Controller for credit to the State General Fund or the
8 Account as prescribed in subsection 11.

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

14 14. 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.** The amendatory provisions of this act apply only to a
24 notice of default and election to sell which is recorded pursuant to
25 NRS 107.080, as amended by this act, on or after October 1, 2013.

