

# HOUSE BILL REPORT

## ESHB 1108

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### As Passed Legislature

**Title:** An act relating to maintaining funding and assistance for homeowners navigating the foreclosure process.

**Brief Description:** Maintaining funding and assistance for homeowners navigating the foreclosure process.

**Sponsors:** House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Orwall, Ortiz-Self, Kloba, Hackney, Chopp, Santos, Macri, Pollet and Harris-Talley).

#### **Brief History:**

##### **Committee Activity:**

Civil Rights & Judiciary: 1/19/21, 1/22/21 [DPS].

##### **Floor Activity:**

Passed House: 1/29/21, 96-0.

Senate Amended.

Passed Senate: 4/3/21, 46-0.

House Concurred.

Passed House: 4/12/21, 98-0.

Passed Legislature.

#### **Brief Summary of Engrossed Substitute Bill**

- Extends the mediation and certain other pre-foreclosure requirements under the Deeds of Trust Act and the Foreclosure Fairness Act (FFA) to residential real property of up to four units and removes the requirement that a property be owner-occupied.
- Modifies the mediation exemption under the FFA for the 2021 and 2022 calendar years to provide that whether or not a beneficiary must participate in mediation is determined by the number of the beneficiary's trustee sales that occurred in 2019.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.*

- Modifies the remittance exemption under the FFA for the 2021 and 2022 calendar years to provide that whether or not a beneficiary must remit a fee is determined by the number of notices of trustee's sale that were recorded on its behalf in 2019.
- Shifts the remittance requirement and exemption to be based on the number of issued notices of default rather than notices of trustee's sale.

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## HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 16 members: Representatives Hansen, Chair; Simmons, Vice Chair; Walsh, Ranking Minority Member; Gilday, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member; Abbarno, Davis, Goodman, Kirby, Klippert, Orwall, Peterson, Thai, Valdez, Walen and Ybarra.

**Staff:** Yelena Baker (786-7301).

### **Background:**

#### Nonjudicial Foreclosure of Deeds of Trust.

Most loan obligations for residential real property in Washington are secured by deeds of trust, which may be foreclosed either through the judicial process or a nonjudicial trustee's sale.

The Deeds of Trust Act (DOTA) imposes detailed notice and process requirements for nonjudicial foreclosure of deeds of trust on residential real property, which is defined as property consisting solely of a single-family residence, a residential condominium unit, or a residential cooperative unit. In 2011, the Foreclosure Fairness Act (FFA) was enacted, making changes to the process related to the nonjudicial foreclosure of deeds of trust under the DOTA, and establishing the Foreclosure Fairness Program (Program).

#### *Meet and Confer Requirement.*

Before a beneficiary may issue a notice of default (NOD) to a borrower of a loan secured by a deed of trust on owner-occupied residential real property, the beneficiary must make initial contact with the borrower by letter and provide the borrower with a notice of pre-foreclosure options in accordance with specified requirements. A notice of pre-foreclosure options must inform the borrower of the opportunity to meet with the beneficiary in an attempt to work out an alternative to the foreclosure. This "meet and confer" requirement applies only to deeds of trust that are recorded against owner-occupied residential real property.

If a borrower does not respond to the initial contact letter, a NOD may be issued 30 days

after a trustee or beneficiary satisfies the due diligence requirements, including making several attempts to contact the borrower by mail and telephone and providing means for the borrower to contact the beneficiary in a timely manner. If a borrower responds within 30 days of the initial contact letter, a NOD may not be issued until 90 days after the initial contact with the borrower.

*Notice of Default and Other Requisites to Trustee's Sale.*

At least 30 days before notice of trustee's sale (NOTS) may be recorded, a borrower must be provided with a NOD that contains specified information, including a description of the property, a concise statement of the alleged default, an itemized account of the amount in arrears, and statement that failure to cure default within a certain timeframe may lead to the property being sold at public auction. If the property is owner-occupied residential real property, a NOD must also include a prominent statement providing specific information about the foreclosure process and the options a homeowner may have available, including housing counseling, mediation, and legal help.

In addition to issuing a NOD, several other requirements must be met in order for a deed of trust to be nonjudicially foreclosed through a trustee's sale, including that the trustee has proof that the beneficiary is the owner of the obligation secured by the deed of trust on residential real property. A declaration by the beneficiary that the beneficiary is the actual holder is sufficient proof. Additionally, a beneficiary must have complied with the "meet and confer" requirement and, if applicable, the mediation requirement.

*Mediation Requirement Under the Foreclosure Fairness Act.*

Among other things, the FFA created a mediation process applicable to beneficiaries and borrowers of deeds of trust on owner-occupied residential real property. Beneficiaries are exempt from foreclosure mediation if they certify under penalty of perjury that they were not a beneficiary of deeds of trust in more than 250 trustee sales of owner-occupied residential real properties during the preceding calendar year.

For purposes of the foreclosure mediation program, "owner-occupied residential real property" includes residential real property up to four units.

*Remittance Requirements Under the Foreclosure Fairness Act.*

Nonexempt beneficiaries must remit \$325 to the Department of Commerce for every original NOTS recorded on residential real property. The remittance requirement does not apply to any beneficiary or loan servicer that is a federally insured depository institution and that certifies under penalty of perjury that fewer than 50 NOTS were recorded on its behalf in the preceding year. Remittances are deposited into the Foreclosure Fairness Account (Account); moneys in the Account pay for the Program, including mediation, counseling, consumer protection, and legal representation of homeowners in matters relating to foreclosure.

For purposes of the remittance requirement, "residential real property" includes residential

real property with up to four dwelling units, whether or not the property or any part thereof is owner-occupied.

### Federal and State Actions Relating to Foreclosure During the Coronavirus Disease 2019 Pandemic.

In response to the Coronavirus Disease 2019 pandemic, the federal government has taken a series of actions relating to mortgage borrowers and foreclosure. Starting March 18, 2020, the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act imposed a 60-day foreclosure moratorium, a temporary halt in the initiation or continuation of foreclosure proceedings, for certain federally backed mortgage loans.

Before the CARES Act moratorium was scheduled to expire, the relevant federal agencies that regulate, insure, or guarantee mortgage loans extended the moratorium for their respective loans. These extensions were renewed further several times during 2020, resulting in the continued foreclosure moratorium for federally backed mortgage loans through the end of the year 2020.

The federal foreclosure moratorium is currently set to expire on June 30, 2021.

At the state level, on March 20, 2020, the Washington State Department of Financial Institutions (DFI) issued guidance for state-regulated and exempt residential mortgage loan servicers and requested, but did not require, that residential mortgage loan servicers postpone foreclosures for 90 days. The DFI subsequently extended its guidance and the requested foreclosure moratorium through the end of 2020, with the current guidance effective until the state is no longer operating under a state of emergency declaration.

### **Summary of Engrossed Substitute Bill:**

#### Extension of Certain Pre-Foreclosure Requirements to Residential Real Property of Up to Four Units and Removal of the Owner-Occupied Requirement.

The "meet and confer" requirement is extended to residential real property of up to four units, and the restriction that the property be owner-occupied is removed.

The following requisites to a trustee's sale are made applicable to residential real property of up to four units, and, where applicable, the requirement that the property be owner-occupied is removed:

- NOD;
- prominent statement with specific information about the foreclosure process and homeowner's options;
- a beneficiary's declaration to prove that the beneficiary is the owner of the obligation secured by the deed of trust; and
- compliance with the "meet and confer" requirement and, if applicable, the mediation requirement.

The requirement that residential real property of up to four units be owner-occupied for purposes of the foreclosure mediation program is removed. Beneficiaries are exempt from foreclosure mediation if they certify that during the preceding calendar year, they were not a beneficiary of deeds of trust in more than 250 trustee sales of residential real properties of up to four units, whether or not a property is owner-occupied.

Modification of the Mediation Exemption.

The mediation requirement does not apply to deeds of trusts where the grantor is a partnership, corporation, or limited liability company, or where the property is vested in a partnership, corporation, or limited liability company at the time the NOD is issued.

For the 2021 and 2022 calendar years, whether a beneficiary must participate in mediation is determined by the number of its trustee sales that occurred in 2019 rather than 2020 and 2021 respectively.

Beginning on January 1, 2023, a beneficiary is exempt from foreclosure mediation if it certifies that during the preceding calendar year, it was not a beneficiary of deeds of trust in more than 250 trustee sales of residential real properties of up to four units, whether or not a property is owner-occupied.

Modification of the Remittance Requirement and Exemption.

For the 2021 and 2022 calendar years, whether or not a beneficiary must remit a fee into the Foreclosure Fairness Account is determined by the number of NOTS that were recorded on its behalf in 2019 rather than 2020 and 2021 respectively.

Beginning on January 1, 2022, the remittance requirement is modified to be based on the number of NOD, rather than NOTS, that a beneficiary issues or causes to be issued during the previous quarter. Specifically, a beneficiary must:

- report to the Department of Commerce the total number of residential real properties for which the beneficiary has issued a NOD during the previous quarter, together with the street address, city, and zip code; and
- remit \$250 for each residential property for which a NOD has been issued to the Department of Commerce to be deposited into the Account.

Information obtained by the Department of Commerce under these provisions is exempt from disclosure under the Public Records Act.

After January 1, 2022, the NOTS-based remittance of \$325 per every recorded NOTS is required only with respect to NOTS for which remittance and reporting for that same residential real property was not made pursuant to the new \$250 NOD-based remittance requirement.

Beginning on January 1, 2023, the remittance exemption is also modified to be based on the number of NOD, rather than NOTS, issued during the preceding year. Specifically, a beneficiary is exempt from the remittance requirement if it certifies that it has issued or caused to be issued fewer than 250 NOD during the preceding year.

References to the new NOD-based remittance requirement are added to the provisions related to the Account and the application of the Consumer Protect Act, without making substantive changes to those provisions.

Provisions related to the NOTS-based remittance requirement are repealed effective June 30, 2023. The repeal does not affect any existing right acquired or liability or obligation incurred under the repealed provisions.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill contains an emergency clause and takes effect immediately, except for sections 5, 9, 11, and 12, relating to the shift to the NOD-based remittance, which take effect January 1, 2022, and sections 13 and 14 relating to the repeal of the NOTS-based remittance requirement, which take effect June 30, 2023.

**Staff Summary of Public Testimony:**

(In support) The Foreclosure Fairness Act (FFA) is an extremely effective law that mitigates the lenders' relative power advantage over homeowners and creates a forum for fair resolution of mortgage default issues. A large majority of families that access the mediation process through the FFA resolve their mortgage default and retain their homes. The FFA provides a funding mechanism for the mediation program, as well as legal aid and housing counseling support, which are necessary to preserve housing for Washingtonians at risk of foreclosure. It is critical for the positive outcome that financial institutions participate in the mediation and their contributions are key to ensure that these important services remain available and viable.

No one expected the protracted foreclosure moratorium necessary to buoy homeowners during the pandemic, and there are growing concerns about a tidal wave of foreclosures as the end of the federal foreclosure moratorium approaches. Foreclosures tend to affect black, Indigenous, and people of color in a way that they do not other communities. Because of the federal foreclosure moratorium, many if not all financial institutions will qualify for the exemption from the mediation and remittance requirements in 2021. This bill will keep the mediation and the funding for the free counseling available to homeowners.

The cities' priority is to ensure the housing stability for Washingtonians as they work through the effects of the Coronavirus Disease 2019 (COVID-19) pandemic. The state's housing and homelessness support system did not match the need prior to the COVID-19 pandemic, so it is really important to support the stability of people who already have housing. A recent survey showed almost 10 percent of households in the state are behind on their mortgage payments and at risk of foreclosure in two months, so it is critical to pass this bill quickly. Without action, housing safety net services will collapse just as they are most needed.

The FFA mediation process does not apply to Homeowners Associations (HOAs) or Condominium Associations. During the previous housing crises, more homeowners lost their home to their HOA than they did to the banks. An HOA can foreclose nonjudicially in 90 days, and these homeowners are going to be in desperate need of help, so additional protections, including mediation requirements, should be part of the law.

(Opposed) None.

(Other) The mediation program was created so that homeowners in nonjudicial foreclosure, who were not given the benefit of judicial oversight, had an opportunity for a face-to-face conversation with beneficiaries. The FFA also increases transparency and allows homeowners to understand what is happening to their mortgages. The bill will keep this critical proceeding in place and available to homeowners in the time of crisis. Mortgage delinquencies are the highest since the Great Recession and there are many unknowns facing thousands of Washington homeowners. In addition to helping owners, this bill is really is the only option for homeowners in nonjudicial foreclosure to pause the process and seek assistance, and we need to maintain it as we enter a post-pandemic world.

**Persons Testifying:** (In support) Representative Orwall, prime sponsor; Paula Sardinias, Washington Build-Back Black Alliance; Raelene Schifano; Marc Cote, Parkview Services; Nathan Peppin, Department of Commerce; Carl Schroeder, Association of Washington Cities; and Denise Rodriguez, Washington Homeownership Resource Center.

(Other) Joseph Jordan, Northwest Justice Project.

**Persons Signed In To Testify But Not Testifying:** None.