

# HOUSE BILL REPORT

## HB 1349

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**As Passed House:**

February 28, 2023

**Title:** An act relating to foreclosure protections.

**Brief Description:** Concerning foreclosure protections.

**Sponsors:** Representatives Orwall, Leavitt, Ramel, Kloba, Reed, Lekanoff, Pollet and Fosse.

**Brief History:**

**Committee Activity:**

Housing: 1/26/23, 2/2/23 [DP].

**Floor Activity:**

Passed House: 2/28/23, 97-0.

**Brief Summary of Bill**

- Revises various provisions related to nonjudicial foreclosures of deeds of trust, including changing the timeline for referral to preforeclosure mediation; clarifying provisions related to delivery of the trustee's deed to the purchaser following trustee sale of the property; removing the home occupancy requirement for successors in interest; and modifying the exemptions from the mediation and remittance requirements.
- Requires that a trustee delay a foreclosure sale upon receipt of written notice from the Homeowner Assistance Fund program that an application for federal relief funds has been submitted to the program on behalf of the borrower, a successor in interest to a deceased borrower, or a person who has been awarded title to the property.

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**HOUSE COMMITTEE ON HOUSING**

**Majority Report:** Do pass. Signed by 13 members: Representatives Peterson, Chair;

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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.*

Alvarado, Vice Chair; Leavitt, Vice Chair; Klicker, Ranking Minority Member; Connors, Assistant Ranking Minority Member; Barkis, Bateman, Chopp, Entenman, Hutchins, Low, Reed and Taylor.

**Staff:** Audrey Vasek (786-7383).

**Background:**

Deeds of Trust.

Most loan obligations for residential real property in Washington are secured by deeds of trust. A deed of trust is a financing tool created by statute which is essentially a triparty mortgage. The real property purchaser, the grantor of the deed of trust, conveys the real property to an independent trustee, who is usually a title insurance company, for the benefit of the lender to secure the borrower's repayment of the loan. In the event of default, deeds of trust may be foreclosed either through the judicial process or through a nonjudicial trustee's sale process.

Nonjudicial Foreclosure of Deeds of Trust on Residential Real Property.

Nonjudicial foreclosure of deeds of trust on residential real property is subject to detailed notice and process requirements. Residential real property is defined as property consisting solely of a single-family residence, a residential condominium unit, or a residential cooperative unit.

*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 residential real property, the beneficiary must make initial contact with the borrower by letter and provide the borrower with a notice of preforeclosure options in accordance with specified requirements. A notice of preforeclosure 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 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 a 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 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.

#### *Preforeclosure Mediation Requirement.*

The foreclosure mediation program applies to beneficiaries and borrowers of deeds of trust on residential real property of up to four units. A borrower may request that a housing counselor or attorney refer them to mediation at any time after a NOD has been issued, but not later than 20 days after the NOTS has been recorded. A borrower does not need to occupy the property as their primary residence to be referred to mediation.

Beginning January 1, 2023, a beneficiary is exempt from foreclosure mediation requirements if the beneficiary certifies under penalty of perjury that the beneficiary was not a beneficiary of deeds of trust in more than 250 trustee sales of residential real properties during the preceding calendar year. Nonexempt beneficiaries must provide borrowers with a NOD and NOTS that contains information about the mediation referral timelines.

#### *Remittance Requirements.*

Nonexempt beneficiaries are required to remit certain payments to the Department of Commerce based on the number of NOTS recorded or NODs issued or caused to be issued on residential real property. Remittances are deposited into the Foreclosure Fairness Account to pay for the Foreclosure Fairness Program, which provides mediation, counseling, consumer protection, and legal representation of homeowners in matters relating to foreclosure. For purposes of the remittance requirements, "residential real property" includes residential real property with up to four dwelling units, regardless of whether the property is owner-occupied.

Prior to the 2021 calendar year, nonexempt beneficiaries were required to remit \$325 to the Department of Commerce for every original NOTS recorded on residential real property,

and a beneficiary was exempt from remittance requirements if the beneficiary certified under penalty of perjury that fewer than 50 NOTS were recorded on its behalf in the preceding year.

For the 2021 and 2022 calendar years, whether or not a beneficiary was required to remit a fee into the Foreclosure Fairness Account was determined by the number of the NOTS that were recorded on its behalf in the 2019 calendar year, and a beneficiary was exempt from remittance requirements if the beneficiary certified under penalty of perjury that fewer than 50 NOTS were recorded on its behalf in 2019.

Beginning January 1, 2022, the remittance requirement is based on the number of NODs, rather than NOTS, that a beneficiary issued or caused to be issued during the previous quarter. Each quarter a beneficiary is required to:

- report to the Department of Commerce the total number of residential real properties for which the beneficiary 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 had been issued to the Department of Commerce to be deposited into the Foreclosure Fairness Account.

The \$325 NOTS-based remittance requirement is effective until June 30, 2023, and overlaps for a period with the new \$250 NOD-based remittance requirements that went into effect January 1, 2022. After January 1, 2022, the NOTS-based remittance of \$325 per every recorded NOTS is required only with respect to the NOTS for which remittance and reporting for that same residential real property was not made pursuant to the new \$250 NOD-based remittance requirement. A beneficiary is exempt from the remittance requirement if it certifies that it has issued or caused to be issued fewer than 250 NODs during the preceding year.

#### Homeowner Assistance Fund.

On March 11, 2021, President Biden signed the American Rescue Plan Act passed by Congress, which included the Homeowner Assistance Fund (HAF). Under the HAF program, federal funds are available to qualified homeowners who are behind on their mortgage due to hardship caused by the COVID-19 pandemic. The United States Department of the Treasury requires each state to submit a HAF plan in order to receive federal funds.

The Washington State Housing Finance Commission (WSHFC) administers the Washington HAF program. The WSHFC approved Washington's HAF plan on March 24, 2022. The Washington HAF program connects Washington homeowners with housing counselors who provide free individual support and assist homeowners with navigating their options to prevent foreclosure. Under the Washington HAF program, qualified Washington homeowners behind on their mortgage due to pandemic hardship are eligible for federal relief funds of up to \$60,000 per household.

## **Summary of Bill:**

### Preforeclosure Mediation Referral Timeline.

The timeline for referral to preforeclosure mediation is modified to provide that a borrower may be referred to mediation no later than 90 days before the date of sale listed in the NOTS, or no later than 25 days before the date of sale listed in an amended NOTS, instead of no later than 20 days from the date a NOTS is recorded. The mediation referral timeline language required to be included in a NOD and NOTS is amended to reflect the switch from the 20-day timeline to the 90-day countback timeline.

### Mediation Referrals for Successors in Interest.

The home occupancy requirement for mediation referrals is removed for successors in interest. A deceased borrower's successor in interest does not need to occupy a property threatened by foreclosure as their primary residence in order to be referred to mediation.

### Beneficiary Exemptions from Mediation Requirements.

During the 2023 calendar year, a beneficiary is exempt from the preforeclosure mediation requirements if the beneficiary certifies to the Department of Commerce under penalty of perjury that it was not a beneficiary of deeds of trust in more than 250 trustee sales of residential real properties during 2019.

Beginning January 1, 2024, a beneficiary is exempt from the preforeclosure mediation requirements if the beneficiary certifies to the Department of Commerce under penalty of perjury that it was not a beneficiary of deeds of trust in more than 250 trustee sales of residential real properties during the preceding calendar year.

The beneficiary exemptions from the mediation requirements apply retroactively to January 1, 2023, and prospectively beginning with the effective date of this section of the bill, which is subject to an emergency clause and takes effect immediately.

### Beneficiary Exemptions from Remittance Requirements.

During the 2023 calendar year, a beneficiary is exempt from the remittance requirements if the beneficiary certifies to the Department of Commerce under penalty of perjury that fewer than 50 NOTS were recorded on its behalf in 2019.

The beneficiary exemptions from the remittance requirements apply retroactively to January 1, 2023, and prospectively beginning with the effective date of this section of the bill, which is subject to an emergency clause and takes effect immediately.

### Delivery of Trustee's Deed following Sale of Property.

A statutory cross-reference regarding the physical delivery of the trustee's deed to the purchaser and the reasons for which the trustee's sale may be declared void is added to the provisions in the foreclosure and notice of sale statute related to the delivery of the trustee's deed to the purchaser following the trustee sale of the property.

Temporary Delay of Sale Requirements related to the Homeowner Assistance Fund Program.

A trustee must continue a foreclosure sale for at least 30 days upon receipt of written notice from the Washington Homeowner Assistance Fund (HAF) program that an application has been submitted to the program on behalf of the borrower, a successor in interest to a deceased borrower, or a person who has been awarded title to the property. The trustee must continue the foreclosure sale for an additional 30-day period upon receipt of a written notice from the HAF program that the applicant is deemed eligible for the program. A continuance of sale related to the HAF program may not be included in calculating the 120-day maximum sale continuance period.

If an application to the HAF program is approved in an amount that would cure the default and make the beneficiary whole, a sale may not proceed while the approved application is pending for payment. The sale may proceed if the HAF program issues a written confirmation that the application has been denied or that no funds from the program will be paid, and that any appeal process available to the applicant has been exhausted and is no longer pending.

The trustee does not need to delay a sale if the applicant has already received a continuance based on a prior application to the HAF program, unless the applicant demonstrates that a new application is pending based on a substantial change in circumstances and has not been submitted solely for the purpose of delaying the sale.

The section of the bill containing the continuance of sale requirements related to the HAF program is subject to an emergency clause and takes effect immediately. The continuance of sale requirements related to the HAF program expire upon the expiration and permanent closure of the HAF program. The Washington State Housing Finance Commission must provide written notice of this contingent expiration date to the Chief Clerk of the House of Representatives, the Secretary of the Senate, and the Office of the Code Reviser.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Sections 7 through 10 of the bill contain an emergency clause and take effect immediately. The remainder of the bill takes effect 90 days after adjournment of the session in which the bill is passed.

## **Staff Summary of Public Testimony:**

(In support) There has been a lot of collaboration and agreement among stakeholders that these changes will do a lot to help and add clarity for homeowners and trustees. The group of homeowners, homeowner attorneys, and banking industry members that got together to create the Foreclosure Fairness Act continues to meet.

There were concerns about what was going to happen around foreclosure after the moratorium. This bill is important to keep certain Foreclosure Fairness Program pieces in place, including free housing counseling and mediation to everyone in the state.

Due to the eviction moratorium, funding for the Foreclosure Fairness Program was impacted. Part of what the bill addresses is how to look back to 2019 to keep our funding going forward to support the program.

Another piece that is important is the federal HAF program, which is a really critical tool right now to help people stay in their homes. Part of what the bill does is allow people more time before foreclosure if they have an application for HAF funds because many people are able to keep their house if they get those funds. Programs only save homes when the homeowners can access them. This bill would allow more time for a homeowner to access the HAF program and potentially save their home from foreclosure.

This bill also helps more homeowners by allowing successors in interest to be referred to mediation even if they do not live in the home, and by extending the provisions allowing an 11-day period for the trustees to have a breather after the foreclosure sale where a trustee could fix and undo any issues with the foreclosure sale. Some people have lost hundreds of thousands of dollars of equity in their homes because they have inherited property as a successor in interest to a property that was foreclosed.

(Opposed) None.

(Other) We do support this bill. In addition to the provisions around notifications for homeowners and recognition for the HAF program, there's also funding language providing stability for the program. It is a good bill and there's a lot of moving pieces and negotiation that went on among stakeholders.

**Persons Testifying:** (In support) Representative Tina Orwall, prime sponsor; Lance Olsen; Denise Rodriguez, Washington Homeownership Resource Center; Robert McDonald, Quality Loan Service Corporation; Christina Henry; and Meredith Bruch, Northwest Justice Project.

(Other) Holly Chisa, United Trustees Association.

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