

# HOUSE BILL REPORT

## HB 1349

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### As Passed Legislature

**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.

Senate Amended.

Passed Senate: 4/6/23, 46-0.

House Concurred.

Passed House: 4/14/23, 96-0.

Passed Legislature.

#### 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 and rescission of the trustee's sale; removing the home occupancy requirement for successors in interest; providing examples of documentation that may be used for establishing 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

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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.*

a person who has been awarded title to the property.

- Provides that it is unlawful to seek or receive any fee or compensation for locating, or purporting to purchase or otherwise acquire the right to recover, surplus funds held by a court or county resulting from a foreclosure where the fee is in excess of 5 percent of the value of the property reasonably expected to be recovered and reasonable attorneys' fees and costs.

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## HOUSE COMMITTEE ON HOUSING

**Majority Report:** Do pass. Signed by 13 members: Representatives Peterson, Chair; 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. The lender is commonly referred to as the beneficiary. 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.

#### Successors in Interest.

A successor in interest is someone who follows another in ownership or control of property. A successor in interest generally retains the same rights as the original owner, with no change in substance.

Upon written notice identifying the property address and the name of the borrower to the mortgage servicer or trustee by someone claiming to be a successor in interest to the borrower's or grantor's property rights, a trustee must not record a notice of sale until the trustee completes the following:

- The trustee must acknowledge the notice in writing and request reasonable documentation of the death of the borrower. The claimant must be allowed 30 days from the date of the request to present this documentation.
- If the trustee obtains or receives written documentation of the death of the borrower from the claimant, or independently confirms the death of the borrower, then the trustee must request in writing documentation demonstrating the claimant's ownership interest in the real property. A claimant has 60 days from the date of the request to present this documentation.
- If the trustee receives written documentation demonstrating the claimant's ownership interest in the property prior to the expiration of the 60-day period, then within 20 days of receipt of the proof of ownership interest, the trustee must provide the claimant with information about the loan balance, interest rate, the basis for the default, the monthly payment amount, and certain other information.
- Upon receipt by the trustee of the documentation establishing the claimant's ownership interest in the property, the claimant is deemed a "successor in interest."

Additional provisions may apply if there is more than one successor in interest to the borrower's property rights. The existence of a successor in interest does not impose a duty on a mortgage servicer or alter any obligation that a mortgage servicer has to provide a loan modification to the successor in interest. Some of these requirements do not apply to common interest community association beneficiaries.

#### Delivery of Trustee's Deed and Rescission of Trustee's Sale.

When delivered to the purchaser after a trustee's sale, the trustee's deed conveys the right, title, and interest in the real property sold that the grantor had or had the power to convey at the time of the execution of the deed of trust. If a trustee accepts a bid, the trustee's sale is final as of the date and time of the acceptance of the bid if it is recorded within 15 days.

Up to the eleventh day following a trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary may declare the sale and trustee's deed void if:

- the trustee, beneficiary, or authorized agent asserts that there was an error with the foreclosure sale process including, but not limited to, an erroneous opening bid;
- the beneficiary and borrower, prior to the sale, agreed to a loan modification or loss mitigation plan to postpone or discontinue the sale; or
- the beneficiary or authorized agent accepted finds that fully reinstated or satisfied the loan.

The trustee must send a notice of rescission to parties no later than 15 days following the date of the voided trustee's sale. The trustee must refund the bid amount to the purchaser no later than the third day following the mailing of the rescission notice. If the rescission is based on an error in the sale process or based on the borrower and beneficiary previously agreeing to a loan modification or postponement of the sale, the trustee may set a new sale date not less than 45 days following the mailing of the rescission notice and must comply with certain notice requirements.

#### 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.

#### Consumer Protection Act.

The Consumer Protection Act (CPA) prohibits unfair or deceptive acts or practices in trade or commerce; the formation of contracts, combinations, and conspiracies in restraint of trade or commerce; and monopolies. A person injured by a violation of the CPA may bring a civil action to enjoin further violations and recover actual damages, costs, and attorneys' fees.

The Attorney General (AG) may bring an action in the name of the state, or on behalf of persons residing in the state, against any person to enjoin violations of the CPA and obtain restitution. The AG may seek civil penalties up to the statutorily authorized maximums against any person who violates the CPA. Civil penalties are paid to the state.

#### **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.

#### Documentation for Establishing Successors in Interest.

The provisions related to establishing a successor in interest to a deceased borrower's property rights are amended to include examples of permissible documentation. In addition to a death certificate, other written evidence of the death of the borrower may include an obituary, a published death notice, or documentation of an open probate action for the estate of the borrower.

Documentation demonstrating a claimant's ownership interest in a deceased borrower's real property rights includes, but is not limited to, excerpts of a trust document noting the claimant as a beneficiary of a trust with title to the real property, a will of the borrower listing the claimant as an heir with respect to the real property, a probate order or finding of heirship issued by any court documenting the claimant as an heir or awarding the real property to the claimant, a recorded lack of probate affidavit listing the claimant as an heir of the borrower under the intestacy laws, a deed giving any ownership interest to the claimant resulting from the death of the borrower or executed by the borrower for estate planning purposes, and other proof documenting the claimant as an heir of the borrower under the state rules of intestacy.

#### 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 Section 7 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 and Rescission of Trustee's Sale.

Certain provisions related to delivery of the trustee's deed following the trustee's sale of the

property are amended to include a cross-reference to the statute containing the reasons for which the trustee's sale may be declared void and rescinded. Instead of requiring the trustee to execute the deed to the purchaser on payment of the price bid, a cross-reference is added requiring the trustee to execute the deed to the purchaser on payment of the price bid and subject to the statute that allows the trustee, beneficiary, or authorized agent for the beneficiary to declare the sale and trustee's deed void for certain reasons up to the eleventh day following the sale.

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.

*Contingent Expiration Date.*

The section of the bill containing the continuance of sale requirements related to the HAF program takes effect immediately and expires 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.

Penalties for Excessive Fees for Locating Foreclosure Surplus Funds.

It is unlawful for any person to seek, receive, or contract with any person for any fee or compensation for locating or purporting to purchase the right to recover surplus funds held by a court or county that are proceeds from a judicial foreclosure of a mortgage or a nonjudicial foreclosure of a deed of trust where the fee is in excess of 5 percent of the value returned to the owner and reasonable attorneys' fees and costs. Every such contract must



contain a notice that meets specified requirements, including a statement that a homeowner is entitled to cancel the contract within 10 days of signing it.

A violation of the prohibition on excessive fees is a violation of the Consumer Protection Act. Any person who violates the prohibition on excessive fees is guilty of a misdemeanor and must be fined or imprisoned for not more than 30 days, or both. The fine must be not less than the amount of the fee or charge that was sought, received, or contracted for, and not more than 10 times such amount.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Sections 7 through 9 and 12 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.