

SENATE CS FOR CS FOR HOUSE BILL NO. 163(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FIFTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 4/6/08

Referred: Finance

Sponsor(s): REPRESENTATIVE RAMRAS

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to real property foreclosures, to the sale of property on execution, and**
2 **to deeds of trust."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 *** Section 1.** AS 09.35.140 is amended to read:

5 **Sec. 09.35.140. Notice of sale on execution.** Before the sale of property on
6 execution, notice of the sale shall be given as follows:

7 (1) notice of the sale of personal property is given by posting a written
8 or printed notice of the time and place of sale in three public places within five miles
9 of the place where the sale is to be held, not less than 10 days before the day of sale;
10 [ONE OF THE NOTICES SHALL BE POSTED AT THE POST OFFICE NEAREST
11 TO THE PLACE WHERE THE SALE IS TO TAKE PLACE;]

12 (2) notice of the sale of real property is given by posting a similar
13 notice particularly describing the property, including the property's street address if
14 there is a street address for the property, not less than 30 days before the day of sale in

1 three public places, as provided in (1) of this section, and publishing a copy of the
 2 notice four times, once a week for four successive weeks in a newspaper of general
 3 circulation published nearest to the place of sale; an inaccuracy in the street address
 4 may not be used to set aside a sale if the legal description is correct; in this paragraph,
 5 "newspaper of general circulation" means a publication that

6 (A) is published in newspaper format;

7 (B) is distributed at least once a week for at least 50 weeks
 8 each year within the judicial district, excluding a period when publication is
 9 interrupted by a labor dispute or by a natural disaster or other casualty that the
 10 publisher cannot control; and has a total paid circulation or paid distribution of
 11 at least 500 copies, or 10 percent of the total population of the judicial district,
 12 whichever is less; in this subparagraph, "judicial district" means the judicial
 13 district where the place of sale is located;

14 (C) holds a second class mailing permit from the United States
 15 Postal Service;

16 (D) is not published primarily to distribute advertising; and

17 (E) is not intended primarily for a particular professional or
 18 occupational group.

19 * **Sec. 2.** AS 22.10.020(g) is amended to read:

20 (g) In case of an actual controversy in the state, or as required under
 21 AS 34.20.080(a), the superior court, upon the filing of an appropriate pleading, may
 22 declare the rights and legal relations of an interested party seeking the declaration,
 23 whether or not further relief is or could be sought. The declaration has the force and
 24 effect of a final judgment or decree and is reviewable as such. Further necessary or
 25 proper relief based on a declaratory judgment or decree may be granted, after
 26 reasonable notice and hearing, against an adverse party whose rights have been
 27 determined by the judgment.

28 * **Sec. 3.** AS 34.20.070(b) is amended to read:

29 (b) Not less than 30 days after the default and not less than 90 days [THREE
 30 MONTHS] before the sale, the trustee shall record in the office of the recorder of the
 31 recording district in which the trust property is located a notice of default setting out

1 (1) the name of the trustor, (2) the book and page where the trust deed is recorded or
 2 the serial number assigned to the trust deed by the recorder, (3) a description of the
 3 trust property, including the property's street address if there is a street address for the
 4 property, (4) a statement that a breach of the obligation for which the deed of trust is
 5 security has occurred, (5) the nature of the breach, (6) the sum owing on the
 6 obligation, (7) the election by the trustee to sell the property to satisfy the obligation,
 7 and (8) the date, time, and place of the sale. An inaccuracy in the street address may
 8 not be used to set aside a sale if the legal description is correct. At any time before the
 9 sale, if the default has arisen by failure to make payments required by the trust deed,
 10 the default may be cured by payment of the sum in default other than the principal that
 11 would not then be due if no default had occurred, plus attorney fees or court costs
 12 actually incurred by the trustee due to the default. If, under the same trust deed, notice
 13 of default under this subsection has been recorded two or more times previously and
 14 the default has been cured under this subsection, the trustee may elect to refuse
 15 payment and continue the sale.

16 * **Sec. 4.** AS 34.20.070(c) is amended to read:

17 (c) Within 10 days after recording the notice of default, the trustee shall mail a
 18 copy of the notice by certified mail to the last known address of each of the following
 19 persons or their legal representatives: (1) the **trustor** [GRANTOR] in the trust deed;
 20 (2) the successor in interest to the **trustor** [GRANTOR] whose interest appears of
 21 record or of whose interest the trustee or the beneficiary has actual notice, or who is in
 22 **actual physical** possession of the property; (3) any other person **actually** in **physical**
 23 possession of [OR OCCUPYING] the property; (4) any person having a lien or
 24 interest subsequent to the interest of the trustee in the trust deed, where the lien or
 25 interest appears of record or where the trustee or the beneficiary has actual notice of
 26 the lien or interest, **except as provided in (e) of this section**. The notice may be
 27 delivered personally instead of by mail.

28 * **Sec. 5.** AS 34.20.070 is amended by adding new subsections to read:

29 (e) In (c)(4) of this section, if the existence of a lien or nonpossessory interest
 30 can only be inferred from an inspection of the real property, the person holding the
 31 lien or nonpossessory interest is not entitled to notice under this subsection unless the

1 lien or nonpossessory interest appears of record or a written notice of the lien or
2 nonpossessory interest has been given to the beneficiary or trustee before the
3 recording of the notice of default.

4 (f) If the trustee delivers notice personally under (c) of this section to the
5 property or to an occupant of the property, the trustee may, notwithstanding (c) of this
6 section, deliver the notice up to 20 days after the notice of default is recorded. If there
7 is not a structure on the property and a person is not present on the property at the time
8 of delivery, the trustee may place the notice on the property, or as close as practicable
9 to the property if

10 (1) there is not a practical road access to the property; or

11 (2) access to the property is restricted by gates or other barriers.

12 (g) If the trustee or other person who delivered notice under (f) of this section
13 signs an affidavit for the delivery, the affidavit is prima facie evidence that the trustee
14 complied with (f) of this section. After one year from the delivery, as evidenced by the
15 affidavit, the trustee is conclusively presumed to have complied with (f) of this section
16 unless, within one year from the delivery, an action has been filed in court to contest
17 the foreclosure based on failing to comply with (f) of this section.

18 (h) If a person who is entitled to receive notice by mail under (c) of this
19 section is known by the beneficiary or trustee to be deceased, the trustee may satisfy
20 the notice requirements of (c) of this section by mailing the notice to the last known
21 address of the deceased person and to the personal representative of the deceased
22 person if the beneficiary or trustee knows that a personal representative has been
23 appointed for the deceased person.

24 (i) If a person who is entitled to receive notice by mail under (c) of this section
25 is known by the beneficiary or trustee to be deceased but the trustee and the
26 beneficiary do not know that a personal representative has been appointed for the
27 deceased person, the trustee may satisfy the notice requirements of (c) of this section
28 by

29 (1) mailing the notice to the heirs and devisees of the deceased person

30 (A) whose names and addresses are known to the beneficiary or

31 trustee; or

1 (B) who have recorded a notice of their interest in the property;
2 and

3 (2) publishing and posting the notice of the foreclosure as provided by
4 law for the sale of real property on execution, except that the notice must be titled "To
5 the Heirs or Devisees of (insert the name of the deceased person)" and include in the
6 body of the notice a list of the names of the persons who are known by the beneficiary
7 or trustee to be the heirs and devisees of the deceased person.

8 (j) If notice is given as required by (h) and (i) of this section, an heir or
9 devisee of the deceased person may not challenge the foreclosure on the ground that
10 the heir or devisee did not receive notice of the sale, unless the heir or devisee
11 challenges the foreclosure on this ground within 90 days after the sale.

12 (k) A person may bring an action in court to enjoin a foreclosure on real
13 property only if the person is the trustor of the deed of trust under which the real
14 property was foreclosed, a guarantor of the obligation that the real property is
15 securing, a person who has an interest in the real property that has been recorded, a
16 person who has a recorded lien against the real property, an heir to the real property, a
17 devisee of the real property, or the attorney general acting under other legal authority.

18 (l) If a person brings an action under (k) of this section to stop a sale of real
19 property, and if the sale is being brought because of a default in the performance of a
20 nonmonetary obligation required by the deed of trust that the real property is securing,
21 the court may impose on the person the conditions that the court determines are
22 appropriate to protect the beneficiary.

23 (m) In this section, "devisee," "heir," and "personal representative" have the
24 meanings given in AS 13.06.050.

25 * **Sec. 6.** AS 34.20.080(a) is amended to read:

26 (a) The sale authorized in AS 34.20.070 shall be made under the terms and
27 conditions and in the manner set out in the deed of trust. However, the sale shall be
28 made

29 (1) at public auction held at the front door of a courthouse of the
30 superior court in the judicial district where the property is located, unless the deed of
31 trust specifically provides that the sale shall be held in a different place; a trustee

1 may, in the trustee's sole discretion, also accept bids by telephone, on the
 2 Internet, and by electronic mail, except that, before accepting bids on the
 3 Internet, the trustee shall bring an action under AS 22.10.020(g) to establish that
 4 the procedures established by the trustee for accepting bids on the Internet are
 5 fair, accessible, and designed to result in money that is immediately available for
 6 disbursement; and

7 (2) after public notice of the time and place of the sale has been given
 8 in the manner provided by law for the sale of real property on execution.

9 * **Sec. 7.** AS 34.20.080(b) is amended to read:

10 (b) The attorney for the trustee or another agent of the trustee may conduct
 11 the sale and act in the sale as the auctioneer for the trustee. The trustee may set
 12 reasonable rules and conditions for the conduct of the sale. Sale shall be made to
 13 the highest and best bidder. The beneficiary under the trust deed may bid at the
 14 trustee's sale. Except as provided by (g) of this section, the [THE] trustee shall
 15 execute and deliver to the purchaser a deed to the property sold.

16 * **Sec. 8.** AS 34.20.080(e) is amended to read:

17 (e) The trustee may postpone sale of all or any portion of the property by
 18 delivering to the person conducting the sale a written and signed request for the
 19 postponement to a stated date and hour. The person conducting the sale shall publicly
 20 announce the postponement to the stated date and hour at the time and place originally
 21 fixed for the sale. This procedure shall be followed in any succeeding postponement,
 22 but the foreclosure may not be postponed for more than 12 months unless a new
 23 notice of the sale is given under (a)(2) of this section. A sale may be postponed for
 24 up to 12 months from the sale date stated in the notice of default under
 25 AS 34.20.070(b) without providing a basis for challenging the validity of the
 26 foreclosure process because of the length of time the foreclosure has been
 27 pending.

28 * **Sec. 9.** AS 34.20.080 is amended by adding new subsections to read:

29 (f) The proceeds from a sale shall be placed in escrow until they are disbursed.
 30 After delivery of a deed under (b) of this section, the trustee shall distribute any cash
 31 proceeds of the sale in the following order to

1 (1) the beneficiary of the deed of trust being foreclosed until the
2 beneficiary is paid the full amount that is owed under the deed of trust to the
3 beneficiary;

4 (2) the persons who held, at the time of the sale, recorded interests,
5 except easements, in the property, that were subordinate to the foreclosed deed of
6 trust; the distribution under this paragraph shall be made according to the priority of
7 the recorded interest, and a recorded interest with a higher priority shall be satisfied
8 before distribution is made to the recorded interest that is next lower in priority;
9 however, if a person holds a recorded interest that is an assessment, the person is
10 entitled only to the amount of the assessment that was due at the time of the sale; in
11 this paragraph, "recorded interest" means an interest, including a lease, recorded under
12 AS 40.17;

13 (3) the trustor in the trust deed if the trustor is still the owner of the
14 property at the time of the foreclosure sale, but, if the trustor is not still the owner of
15 the property at the time of the foreclosure sale, then to the trustor's successor in
16 interest whose interest appears of record at the time of the foreclosure sale.

17 (g) The trustee may withhold delivery of the deed under (b) of this section for
18 up to five days after the sale. If, during the five days, the trustee determines that the
19 sale should not have proceeded, the trustee may not issue the deed but shall

20 (1) inform the beneficiary, the otherwise successful bidder, and the
21 trustor of the trust deed or the trustor's successor in interest that the sale is rescinded;
22 and

23 (2) return to the otherwise successful bidder money received from the
24 otherwise successful bidder as a bid on the property; return of this money is the
25 otherwise successful bidder's only remedy if the trustee withholds delivery of the deed
26 under (b) of this section.

27 (h) If a trustee rescinds a sale under (g) of this section and the obligation
28 secured by the deed of trust remains in default, the trustee may, at the request of the
29 beneficiary, reschedule the sale for a date that is not less than 45 days after the date of
30 the rescinded sale. Not less than 30 days before the rescheduled sale date, the trustee
31 shall

1 (1) mail notice of the rescheduled sale date by certified mail to the last
2 known address of each of the persons identified by AS 34.20.070(c); and

3 (2) publish and post the notice of the rescheduled sale date as provided
4 by law for the sale of real property on execution.

5 (i) Unless a sale is rescinded under (g) of this section, the sale completely
6 terminates the rights of the trustor of the trust deed in the property.

7 * **Sec. 10.** AS 34.20.120(a) is amended to read:

8 (a) The trustee under a trust deed upon real property given to secure an
9 obligation to pay money and conferring no duties upon the trustee other than the duties
10 that are incidental to the exercise of the power of sale conferred in the deed may be
11 substituted by recording in the mortgage records of the recording district in which the
12 property is located a substitution executed and acknowledged by

13 (1) all the beneficiaries under the trust deed, or their successors in
14 interest; or

15 (2) the attorneys for all of the beneficiaries or the attorneys for all
16 of the beneficiaries' successors in interest.

17 * **Sec. 11.** AS 34.20.120(b) is amended to read:

18 (b) The substitution must contain

19 (1) the date of execution of the trust deed;

20 (2) the names of the trustee, trustor, and beneficiary, and, if the
21 substitution is executed by the attorney for the beneficiary or successor in
22 interest to the beneficiary, the name, address, and Alaska Bar Association
23 identification number of the attorney;

24 (3) the book and page where the trust deed is recorded or the serial
25 number assigned to the trust deed by the recorder;

26 (4) the name of the new trustee; and

27 (5) an acknowledgment signed and acknowledged by the trustee
28 named in the trust deed of a receipt of a copy of the substitution, or an affidavit of
29 service of a copy of it.

30 * **Sec. 12.** AS 34.20 is amended by adding a new section to read:

31 **Sec. 34.20.125. Trustee bond required.** (a) Before performing the duties of a

1 trustee under AS 34.20.070 and 34.20.080, a person shall obtain a surety bond in the
2 amount of \$250,000 to protect the trustors and beneficiaries of trust deeds against
3 fraud or defalcation by the trustee in the performance of the duties.

4 (b) The bond required by (a) of this section must be a bond that is terminable
5 at any time by the surety by sending written notice by first class United States mail to
6 the obligee and the principal at the address for each that is last known by the surety.
7 The bond terminates when 45 days have expired after the date the notice is mailed.
8 The surety is not liable for an act or omission of the principal that occurs after the
9 termination. The surety is not liable after the termination for more than the face
10 amount of the bond, regardless of the number of claims made against the bond or the
11 number of years the bond remains in force. A revision of the amount of the bond is not
12 cumulative.

13 (c) If a bond terminates under (b) of this section, the person who obtained the
14 bond under (a) of this section may not act as a trustee until the person obtains another
15 bond under (a) of this section.

16 (d) The bonding requirements of this section do not apply to

17 (1) a title insurance company authorized under AS 21.66 to transact a
18 title insurance business in this state; or

19 (2) a title insurance limited producer who is licensed as required by
20 AS 21.66.270.