

HOUSE BILL NO. 488

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE LABOR AND COMMERCE COMMITTEE

Introduced: 2/18/92

Referred: Labor & Commerce, Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the nonjudicial foreclosure of interests in real property, to the
2 maturity dates of instruments creating real property liens, and to recording address changes
3 for persons having recorded interests in real property; and providing for an effective
4 date."

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

6 * **Section 1. PURPOSE.** The purpose of this Act is to clarify and eliminate possible ambiguities in
7 the existing nonjudicial deed of trust foreclosure statutes by enacting comprehensive legislation to
8 establish the procedure by which a power of sale affecting real property in the state is exercised.
9 Nonjudicial foreclosure statutes, functioning as an alternative to judicial foreclosure, must carefully
10 balance the conflicting interests of the beneficiaries, trustors, and trustees. Beneficiaries desire well-
11 defined nonjudicial remedies in the case of default. Trustors desire protection against inequitable
12 forfeiture of property rights. Trustees desire a clear statement of their responsibilities and obligations.

13 * **Sec. 2. AS 34.20.070 is repealed and reenacted to read:**

14 **Sec. 34.20.070. POWER OF SALE.** (a) If a deed of trust authorizes the real property

1 that is the subject of the deed of trust to be sold when the trustor defaults on the terms of the
2 deed of trust, the trustee may sell the property without securing a judgment of foreclosure from
3 a court. Except as otherwise specifically provided under (b) of this section or under
4 AS 34.20.100, the beneficiary may also pursue other judicial and nonjudicial remedies.

5 (b) If a beneficiary obtains a judgment on an obligation secured by a deed of trust
6 without first obtaining a judicial decree of foreclosure, the trustee's power of sale terminates, but
7 the judgment holder may execute under AS 09.35.

8 * Sec. 3. AS 34.20 is amended by adding new sections to read:

9 Sec. 34.20.071. DUTIES OF TRUSTEE. (a) When exercising the power of sale under
10 a deed of trust, a trustee owes a fiduciary duty to the beneficiary and the trustor of the deed of
11 trust. The trustee does not owe a fiduciary duty to other persons.

12 (b) If a dispute over the power of sale arises between the beneficiary and the trustor, the
13 trustee is not required to seek judicial resolution of the dispute.

14 Sec. 34.20.072. TRUSTEE FEE. The trustee may charge a fee for exercising the power
15 of sale.

16 Sec. 34.20.073. BENEFICIARY'S REQUEST FOR SALE. (a) If a monetary or
17 nonmonetary default has occurred in the terms of a deed of trust, the beneficiary may request the
18 trustee to exercise the power of sale. When making the request, the beneficiary shall provide the
19 trustee with an affidavit and declaration of default that contains

20 (1) a statement that a default has occurred and a description of the nature and date
21 of the default;

22 (2) the book number, page numbers, and date of recordation for the deed of trust
23 in each recording district in which the deed of trust is recorded;

24 (3) the legal description of the property to be foreclosed, including the street or
25 route address of the property if given in the deed of trust;

26 (4) the total amount owing to the beneficiary, specifying the amount of principal,
27 interest, and late fees due on a specific date, the interest rate, and the rate and manner in which
28 late fees accrue;

29 (5) the name, address, and telephone number of the beneficiary;

30 (6) the name and last known address of the trustor; in this paragraph, "last known
31 address" means the address on the deed of trust, the last changed address communicated as an

1 address change to the beneficiary in writing, or the address in a notice of change of address
2 recorded under AS 40.17.110(b), whichever is the most recent;

3 (7) an instruction to the trustee to sell the property and to apply the proceeds to
4 the debt secured by the deed of trust; and

5 (8) a statement whether a right to cure the default exists under AS 34.20.095.

6 (b) If there is more than one current beneficiary, all current beneficiaries must execute
7 the affidavit and declaration of default.

8 Sec. 34.20.075. NOTICE OF DEFAULT AND SALE. Upon request by the beneficiary
9 under AS 34.20.073, the trustee shall record a notice of default and sale in all recording districts
10 in which the real property that is encumbered by the deed of trust is located. The notice of
11 default and sale may not be recorded before the 30th day that follows the default.

12 Sec. 34.20.077. CONTENTS OF NOTICE OF DEFAULT AND SALE. A notice of
13 default and sale must state

14 (1) the names of the parties to the deed of trust;

15 (2) the book number, page numbers, and date of recordation for the deed of trust
16 in each recording district where the deed of trust is recorded;

17 (3) the legal description of the property to be foreclosed, as given in the deed of
18 trust and, if the legal description has changed, the current legal description;

19 (4) the street or route address of the property if given in the deed of trust;

20 (5) the total amount owing to the beneficiary, specifying the amount of principal,
21 interest, and late fees due on a specific date, the interest rate, and the rate and manner in which
22 late fees accrue;

23 (6) the date, time, and place set by the trustee for the sale;

24 (7) the name, address, and telephone number of the trustee or the trustee's
25 attorney;

26 (8) a statement that a default has occurred and a description of the nature and date
27 of the default; and

28 (9) a statement of whether a right to cure the default exists under AS 34.20.095.

29 Sec. 34.20.079. DELIVERY OF NOTICE OF DEFAULT AND SALE. (a) Within 15
30 days following the recording of the notice of default and sale, the trustee shall deliver a copy of
31 the notice to the last known address of each of the following persons whose interests are of

1 record before the notice of default and sale is recorded:

2 (1) the trustor and the current successor in interest to the trustor;

3 (2) a person in possession of the property;

4 (3) a person, or the current assignee of the person, who has a lien or interest that
5 was recorded after the deed of trust was recorded; and

6 (4) a judgment creditor, or the attorney of record for the judgment creditor as
7 stated in the judgment.

8 (b) If the state records a lien against the property after the deed of trust is recorded and
9 before the notice of default and sale is recorded, the trustee shall deliver a copy of the state lien
10 and the notice of default and sale to the office of the attorney general and to the commissioner
11 of the state department identified in the lien, if a department is identified in the lien.

12 (c) The trustee shall search for the address of a person entitled to receive notice under
13 (a)(1) and (3) - (4) of this section in the records of the recording district in which the property
14 is located by reviewing the document creating the interest in the property, a modification of the
15 document, documents that affect the property, and a notice of change of address that is recorded
16 under AS 40.17.110(b) before the notice of default and sale is recorded. The trustee is not
17 required to search records and documents other than those identified in this section.

18 (d) The trustee is not required to deliver the notice of default and sale to a person unless
19 the person is identified under (a) or (b) of this section.

20 (e) Delivery of the notices required by this section shall be by personal service or by
21 certified mail, return receipt requested.

22 * Sec. 4. AS 34.20.080 is repealed and reenacted to read:

23 Sec. 34.20.080. TIME AND MANNER OF SALE. (a) A sale may not occur before the
24 91st day that follows the recording of the notice of default and sale.

25 (b) The sale shall be

26 (1) made by public auction;

27 (2) held at the main front door of the building in which the superior court is
28 located in the judicial district where the majority of the property is located; if there is more than
29 one location in the judicial district for the superior court, the sale shall be held at the location
30 that is nearest to the property being sold; and

31 (3) held between 9:00 o'clock in the morning and 4:00 o'clock in the evening on

1 a working day.

2 (c) Notice of the sale shall be given to the public by posting the notice of default and
3 sale at the superior court building where the sale is to be held, the post office nearest to the
4 superior court building where the sale is to be held, and at another public place. In this
5 subsection, "public place" means a governmental or commercial building or other structure, if the
6 general public

7 (A) can enter the building or structure without having to give a specific
8 purpose for being in the building or structure;

9 (B) passes through the building or structure on a regular basis.

10 (d) Notice of the sale shall also be given to the public by publishing the notice of default
11 and sale in a newspaper of general circulation in the judicial district in which the sale is to take
12 place. The notice shall be published once a week for four weeks, and the last notice may not
13 appear later than the seventh day before the originally scheduled sale date.

14 (e) The trustee shall sell the property to the highest bidder who otherwise qualifies under
15 this chapter to bid on and purchase the property. If the real property to be sold under a deed of
16 trust consists of separate parcels of property, the trustee shall sell the parcels both in bulk and
17 as separate parcels in a manner established by the trustee that is reasonably designed to obtain
18 the highest bids and subject to the trustee's selection of the bids that would result in the highest
19 total bid for the sale. Unless the deed of trust requires the beneficiary to bid, the beneficiary is
20 not required to bid at either sale. If the beneficiary chooses to bid on the separate parcels, the
21 beneficiary may apportion its bid in the manner it chooses.

22 (f) An attorney for the trustee may conduct the sale. The trustee or the trustee's attorney
23 may not bid, except to make an offset bid for the beneficiary.

24 (g) A bidder other than the beneficiary may not bid by offset bid. If the beneficiary
25 desires to bid an amount higher than the offset bid, the additional amount shall be paid to the
26 trustee under (h) of this section.

27 (h) The successful bidder shall pay the amount of the bid to the trustee or the trustee's
28 attorney in cash, by a cashier's check, or by a postal money order when the trustee or the
29 trustee's attorney declares the successful bid.

30 * Sec. 5. AS 34.20 is amended by adding new sections to read:

31 Sec. 34.20.085. DUTIES OF TRUSTEE AFTER SALE. (a) Within 20 working days

1 following the sale, the trustee shall execute and deliver to the successful bidder a trustee's deed
2 that provides

3 (1) the name and address of the grantee;

4 (2) an affirmation that the trustee has complied with AS 34.20.070 - 34.20.135
5 and with the terms of the deed of trust in the conduct and notice of the sale;

6 (3) the book number, page numbers, and date of recordation for the notice of
7 default and sale in each recording district where the notice of default and sale is recorded;

8 (4) the actual consideration for the conveyance, including the amount of an offset
9 bid;

10 (5) the time and place of the sale;

11 (6) the book number, page numbers, and date of recordation for the deed of trust
12 in each recording district where the deed of trust is recorded; and

13 (7) the legal description of the property being conveyed.

14 (b) Within 20 working days following the sale, the trustee shall also record a trustee's
15 statement of sale in each recording district in which the notice of default and sale is recorded.
16 The trustee's statement of sale must state

17 (1) the legal description of the property;

18 (2) the book number, page numbers, and date of recordation for the deed of trust
19 in each recording district where the deed of trust is recorded.

20 (c) The trustee shall attach to the trustee's statement of sale

21 (1) an affidavit of posting that states the date and place where each notice of
22 default and sale was posted under AS 34.20.080(c);

23 (2) an affidavit of publication that names the newspaper in which the notice of
24 default and sale was published under AS 34.20.080(d) and the dates of publication; and

25 (3) an affidavit of service that states the date of delivery, the method of delivery,
26 and the names and addresses of all persons to whom a copy of the notice of default and sale was
27 delivered under AS 34.20.079 and 34.20.087(c).

28 **Sec. 34.20.087. POSTPONEMENT.** (a) The trustee may postpone the sale by
29 announcing the postponement on the date and at the time and place where the sale was originally
30 scheduled.

31 (b) The trustee may postpone the sale more than one time, but each postponement may

1 not be for more than 30 days.

2 (c) Before a sale may occur on a date that is more than 180 days after the date of the
3 originally scheduled sale, the trustee shall post and publish an amended notice of default and sale
4 that satisfies the requirements of AS 34.20.080(c) - (d). The amended notice of default and sale
5 must provide the same information that was contained in the original notice of default and sale,
6 except that the sale date and time shall be changed to reflect the date and time to which the sale
7 has been postponed.

8 (d) If the sale does not take place before the first anniversary of the originally scheduled
9 sale date, the trustee shall terminate the sale and record a termination of sale under
10 AS 34.20.097(a).

11 * Sec. 6. AS 34.20.090 is repealed and reenacted to read:

12 Sec. 34.20.090. RIGHTS OF PURCHASER; RESIDENTIAL TENANTS. The purchaser
13 at a sale is entitled to the immediate possession of the property as against a party whose interest
14 in the property was foreclosed by the sale. The purchaser at the sale may enforce the right to
15 possession by bringing an action under AS 09.45.070 - 09.45.160. The landlord-tenant provisions
16 of AS 34.03 do not limit the purchaser's right to take possession unless the purchaser expressly
17 enters into a residential landlord-tenant relationship that is subject to AS 34.03 with an occupant
18 of the property.

19 * Sec. 7. AS 34.20 is amended by adding new sections to read:

20 Sec. 34.20.091. EFFECT OF TRUSTEE'S DEED. (a) The trustee's deed conveys to
21 the purchaser all right, title, and interest in the property conveyed that the trustor had in the
22 property at the time of the execution of the deed of trust and all right, title, and interest in the
23 property conveyed that the trustor acquired before the sale.

24 (b) The trustee's deed is prima facie evidence of compliance with AS 34.20.070 -
25 34.20.135 and with the terms of the deed of trust if

26 (1) the beneficiary is the successful bidder at the sale; and

27 (2) the deed substantially complies with the requirements of AS 34.20.085 and
28 contains the affirmation required by AS 34.20.085(a)(2).

29 (c) The affirmation contained in the trustee's deed creates in favor of a person who is
30 a bona fide purchaser or encumbrancer for value an irrebuttable presumption of compliance with
31 AS 34.20.070 - 34.20.135 and the terms of the deed of trust if the person

1 (1) purchases or encumbers the property at or after the sale; and
2 (2) does not have actual knowledge before the sale that the sale did not comply
3 with AS 34.20.070 - 34.20.135.

4 (d) The trustee's deed constitutes a quitclaim deed and does not provide implied
5 warranties.

6 Sec. 34.20.093. FINALITY OF SALE. (a) A sale that complies with AS 34.20.070 -
7 34.20.135 is final when the trustee accepts a final bid at the sale and receives payment.

8 (b) A person may not redeem the property after the sale.

9 Sec. 34.20.095. CURING A DEFAULT. (a) Unless a right to cure is prohibited under
10 (b) of this section, a default may be cured by any person at any time before a sale is final under
11 AS 34.20.093. To cure, a person shall

12 (1) pay the sum in default, excluding any principal whose payment was
13 accelerated due to the default, together with the attorney fees and costs actually incurred by the
14 trustee due to the default; and

15 (2) satisfy nonmonetary defaults.

16 (b) If a notice of default and sale has been recorded two or more times previously for
17 the same deed of trust and the default has been cured each time, the trustee shall, at the request
18 of the beneficiary, refuse a tender of the cure and continue the sale.

19 Sec. 34.20.097. TERMINATION OF SALE. (a) If a trustee terminates a sale for any
20 reason, the trustee shall record a termination of sale that states the reason for the termination.

21 (b) A beneficiary may request the termination of a sale in order to bring an action for
22 a judicial foreclosure or for other reasons. To request the termination, the beneficiary shall give
23 to the trustee before the sale a written statement of the beneficiary's election to terminate the
24 foreclosure before the sale.

25 Sec. 34.20.099. DISTRIBUTION OF PROCEEDS. (a) Proceeds of a sale shall first be
26 applied in the following order to

27 (1) reasonable costs and fees actually incurred by the trustee in connection with
28 the foreclosure;

29 (2) the satisfaction of the amounts due to the beneficiary under the foreclosed
30 deed of trust; and

31 (3) the satisfaction of liens filed under AS 23.20.250.

1 (b) If proceeds remain after applying the sale proceeds under (a) of this section, the
2 trustee shall notify the persons who hold subordinate recorded interests in the property that were
3 foreclosed by the sale of the trustee's intent to make a distribution under this subsection. The
4 interests shall be satisfied in the order of priority that appears of record based on the sequence
5 of recordation, except for a subordination that appears of record. The trustee shall send the notice
6 by first class mail to the addresses determined for the subordinate interest holders under
7 AS 34.20.079. The trustee shall make the proposed distribution if a subordinate interest holder
8 does not object in writing within a fixed, reasonable period of time established in the notice. If
9 the trustee receives an objection during the time period, and if the objector and the other
10 subordinate interest holders agree on another plan of distribution that complies with
11 AS 34.20.070 - 34.20.135 and is satisfactory to the trustee, the trustee shall make the proposed
12 distribution. If the trustee receives an objection to the proposed distribution during the time
13 period, and if the objector and the other subordinate interest holders do not agree on a plan of
14 distribution that complies with AS 34.20.070 - 34.20.135 and is satisfactory to the trustee, the
15 trustee shall interplead the remaining proceeds in an action in the superior court in the judicial
16 district in which the majority of the foreclosed property is located.

17 (c) The trustee shall distribute to the trustor any proceeds that remain after the sale
18 proceeds have been distributed under (a) - (b) of this section.

19 (d) The trustee shall require and may rely upon sworn evidence from a party described
20 in (a) or (b) of this section to determine an amount due.

21 (e) A party who is entitled to payment under (b) of this section may not recover damages
22 against the trustee if the trustee has complied with this section.

23 * Sec. 8. AS 34.20 is amended by adding new sections to read:

24 Sec. 34.20.105. POST-SALE ACTION FOR DAMAGES TO PROPERTY. Regardless
25 of the amount of the offset bid, if the purchaser at a deed of trust sale is the beneficiary of the
26 deed of trust foreclosed, the purchaser may bring an action for damages against a person,
27 including the trustor, who wilfully or intentionally harms the property beyond ordinary wear and
28 tear, unless the purchaser had actual knowledge of the harm before the sale became final under
29 AS 34.20.093.

30 Sec. 34.20.107. FORECLOSURE AGAINST COLLATERAL OTHER THAN REAL
31 PROPERTY. A beneficiary under a deed of trust who holds a security interest in personal

1 property to secure the same obligation that is secured by the deed of trust, may foreclose the
2 security interest on the personal property as well as foreclosing the deed of trust, if

3 (1) the foreclosure on the personal property satisfies AS 45.09;

4 (2) the deed of trust and the personal property security agreements do not prohibit
5 more than one sale; and

6 (3) the proceeds of the sale that occurs first do not satisfy the debt for which the
7 sale is conducted.

8 * Sec. 9. AS 34.20.120 is amended by adding a new subsection to read:

9 (e) A trustee may withdraw as trustee under a deed of trust. If the trustee withdraws,
10 the beneficiary shall select a substitute trustee.

11 * Sec. 10. AS 34.20 is amended by adding new sections to read:

12 Sec. 34.20.125. JUDICIAL REVIEW OF SALES. (a) If an action to review a proposed
13 sale is filed in court and served on the trustee before the sale takes place, the court shall strictly
14 construe AS 34.20.070 - 34.20.135 and grant the relief that is necessary to ensure compliance
15 with AS 34.20.070 - 34.20.135.

16 (b) If an action to review a sale is filed and served on the trustee after the sale is final
17 under AS 34.20.093, the court shall grant appropriate relief if the court determines that substantial
18 irregularities occurred in the sale and the irregularities caused probable loss or injury to the
19 person filing the action.

20 (c) Notwithstanding (b) of this section, the court may not set aside a sale if the property
21 was sold or has been subsequently conveyed to or encumbered by a bona fide purchaser or
22 encumbrancer for value who did not have actual knowledge of the irregularities when the bona
23 fide purchaser or encumbrancer acquired the interest in the property.

24 Sec. 34.20.127. COMPUTATION OF TIME. If the last day of a time period in
25 AS 34.20.070 - 34.10.135 falls on a Saturday, Sunday, or state legal holiday, the last day of the
26 time period is the next working day.

27 * Sec. 11. AS 34.20.135 is repealed and reenacted to read:

28 Sec. 34.20.135. DEFINITIONS. In AS 34.20.070 - 34.20.135, unless the context requires
29 otherwise,

30 (1) "beneficiary" means the person for whose benefit a security interest is created
31 by a deed of trust;

- 1 (2) "day" means a calendar day;
- 2 (3) "deed of trust" means an agreement that conveys real property to a trustee as
3 security for the payment of a debt;
- 4 (4) "last known address" means the most recent of the following:
- 5 (A) for the trustee, the address listed for the trustee on the notice of
6 default and sale;
- 7 (B) for persons other than and the trustee, the address of record for the
8 person on the document creating the interest of the person in the real property;
- 9 (C) the address indicated by a notice of change of address recorded under
10 AS 40.17.110(b);
- 11 (5) "offset bid" means a bid that is by the beneficiary for an amount up to or
12 equal to the sums owed to the beneficiary under the deed of trust, excluding a sum for damages
13 to the property, and that is credited to the beneficiary as a bid without the payment of cash;
- 14 (6) "of record" means recorded in a recording district where the real property
15 encumbered by the deed of trust is located;
- 16 (7) "power of sale" means the authorization under a deed of trust to sell the real
17 property that is the subject of the deed of trust if the trustor defaults on the terms of the deed of
18 trust;
- 19 (8) "property" or "real property" means the real property that is the subject of a
20 deed of trust, and includes an interest in real property;
- 21 (9) "sale" means a sale of real property by foreclosure of a deed of trust under
22 AS 34.20.070 - 34.20.135;
- 23 (10) "trustee" means the person in whose name the title to real property is held
24 in a deed of trust;
- 25 (11) "trustor" means the person who transfers real property to a trustee for a
26 beneficiary under a deed of trust;
- 27 (12) "working day" means a day other than a Saturday, Sunday, or state legal
28 holiday.
- 29 * Sec. 12. AS 34.20.150(a) is amended to read:
- 30 (a) The date of maturity of an instrument creating a lien upon real property is considered
31 to be 35 [10] years from the date of the instrument, unless

1 (1) the period of the instrument is disclosed by the terms of the instrument; or
2 (2) another instrument extending the period of the first instrument or a
3 memorandum of payment of the first instrument is recorded.
4 * **Sec. 13.** AS 40.17.110(b) is amended by adding a new paragraph to read:
5 (60) a notice of change of address for a person who has a real property interest
6 recorded under this chapter.
7 * **Sec. 14. TRANSITIONAL PROVISIONS.** (a) This Act applies to a nonjudicial foreclosure sale
8 under a deed of trust unless a notice of default under former AS 34.20.070 is recorded for the deed of
9 trust before the effective date of this Act and the default identified in the notice is not cured before the
10 effective date of this Act.
11 (b) When counting under AS 34.20.095(b), enacted by sec. 7 of this Act, the number of previous
12 cures made under a deed of trust, the cures made under former AS 34.20.070(b) may be used to reach
13 the number required by AS 34.20.095(b) to refuse the tender of a cure.
14 * **Sec. 15.** This Act takes effect immediately under AS 01.10.070(c).