SB

198

HOUSE & SENATE JOINT
JOURNAL SUPPLEMENT

February 27, 1985 No.7

THE FOLLOWING COMMENTARY

FROM THE

ALASKA CODE REVISION COMMISSION

COVERS

HOUSE BILL NO. 245)
)
) "An Act relating to
) security interests
) in real property;
) and providing for
) an effective date."
)
SENATE BILL NO. 198)

ALASKA CODE REVISION COMMISSION

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February 15, 1985

The Honorable Jack Fuller
Chairman, Alaska Legislative Council
Pouch V, State Capitol
Juneau, Alaska 99811

Re: Bill on security interests in real property

Dear Chairman Fuller:

The attached bill is submitted to the Alaska Legislative Council pursuant to AS 24.20.075 with the request that it be introduced in the Fourteenth Legislature.

The bill was in the Thirteenth Legislature as HB 341/SB 244. That bill did not move out of committee. At least part of the reason was that it was erroneously associated in many minds with a controversial "due-on-sale" section of an earlier bill, HB 403 of the Twelfth Legislature. That section is not in the bill now offered. Changes in other state and federal lending laws have made it unnecessary.

The bill covers the relationship, rights, and remedies of debtor and creditor in secured real property transactions. It resulted from the commission's general review of real property law in Title 34.

The main sources drawn upon in preparing the bill are the existing Alaska law on deeds of trust, the Uniform Commercial Code, the Washington law on nonjudicial foreclosure, and the Uniform Land Transfers Act.

A commentary on the bill is attached.

Respectfully submitted,

John W. Abbott

John W. Abbott, Chairman
Alaska Code Revision Commission

JWA:chw
Attachments
cc: Hon. Bill Sheffield
Hon. Edmond W. Burke, Chief Justice
Executive Director, Legislative Affairs Agency

FEBRUARY 1985

ALASKA CODE REVISION COMMISSION

COMMENTARY TO ACCOMPANY

DRAFT BILL ON SECURITY INTERESTS IN REAL PROPERTY

BILL NO.

General Features of the Bill

The attached bill prepared by the Alaska Code Revision Commission is an effort to bring into secured real property transactions some of the same principles that govern secured personal property transactions under the Uniform Commercial Code. The bill covers the broad area of relationships, rights, and remedies of debtor and secured creditor. The state law on summary foreclosure of deeds of trust would be superseded, but not drastically changed. In cases where foreclosure [illegible] der [illegible] power of sale is required, the bill makes possible [illegible] ally reasonable resale by listing and sale through a real [illegible] agent, in order to avoid the disasterous forced-sale pr[illegible] ten received at public auction.

The bill was introduced in the Twelfth Legislature as HB 403. Action was not taken on it. All attention focused on a relatively minor part of the bill, a section limiting the use of "due-on-sale" clauses in security agreements for the purchase of a home. That controversial section, readily separable from the body of the bill, is not included in the present form of the bill and has largely been preempted by recent federal and state statutes and regulations (sec. 341, Garn-St. Germain Depository Act of 1982, P.L. 97-320, 12 U.S.C., sec. 1701 j-3; 12 U.S. sec. 371(g); 12 C.F.R. sec. 548.8-4([illegible]); AS 06.01.020; AS 18.56.098(e); 15 AAC 118.267).

In the Thirteenth Legislature the bill was again introduced, but it was not scheduled for committee hearings. In that legislature the code revision commission was asking that priority be given to several other bills it had drafted. However, the commission believes the time now is right for legislative

attention to this bill.

Persons familiar ith the present Alaska law on both real and personal property should find the bill a natural development. The vast majority of real property sales are now financed by deeds of trust. Most departures in the bill from present practices under deeds of trust are not great. The main changes occur where needed to permit additional kinds of sales of collateral in cases of default. The bill makes deed of trust foreclosure procedures applicable to mortgages and contracts of sale. Under present law mortgages are more difficult to foreclose than deeds of trust, for no logical reason, and there are no statutory guidelines for foreclosing contracts of sale, which has resulted in substantial litigation at both the superior court and supreme court level (e.g., Lonas v. Metropolitan Mortgage and Securities Co., 432 P.2d 603 (1967); Moran v. Holman, 501 P.2d 769 (1972); Curry v. Tucker, 616 P.2d 8 (1980); Wickwire v. McFadden, 633 P.2d (1981); Strack v. Miller, 645 P.2d 184 (1982); additional cases are summarized in Department of Revenue v. Baxter, 486 P.2d 360 365 n.10).

A bill of this kind must specify procedures to be followed and forms to be used in carrying out the procedures. The procedures to be followed before sale in a summary foreclosure are set out in the bill in AS 34.21.110--34.21.150. These sections are followed by AS 34.21.160--34.21.170 which specify the content of forms that are to be used. Since the forms are designed to advise the defaulting debtor of his rights and to inform him of the procedures that will be followed, they cover some of the same material that is set out in the preceding substantive sections. AS 34.21.100 in the bill explains this relationship between the sections.

A contents page and a comparison of time elements and steps from default to sale under existing law and under the bill are attached here for ready reference. (See next 3 pages)

CHAPTER 21. SECURITY INTERESTS IN REAL PROPERTY

Sec. 34.21.010. POLICY AND SCOPE
Sec. 34.21.020. TRANSACTIONS EXCLUDED
Sec. 34.21.030. WHERE COLLATERAL NOT OWNED BY DEBTOR
Sec. 34.21.040. REQUEST FOR STATEMENT OF ACCOUNT
Sec. 34.21.050. ALIENABILITY OF DEBTOR'S RIGHTS
Sec. 34.21.060. NOTIFICATION OF ASSIGNMENT
Sec. 34.21.070. RELEASE OF SECURITY INTEREST
Sec. 34.21.080. REMEDIES OF SECURED PARTY
Sec. 34.21.090. REQUIREMENTS FOR SUMMARY FORECLOSURE
Sec. 34.21.100. PROCEDURE BEFORE SALE
Sec. 34.21.110. TRANSMITTING AND POSTING NOTICE OF DEFAULT
Sec. 34.21.120. RECORDING NOTICE OF INTENT TO SELL
Sec. 34.21.130. TRANSMITTING, POSTING, AND PUBLISHING NOTICE OF INTENT TO SELL
Sec. 34.21.140. TRANSMITTING FURTHER INFORMATION ABOUT SALE
Sec. 34.21.150. MANNER OF TRANSMITTING NOTICE
Sec. 34.21.160. CONTENT OF NOTICE OF DEFAULT
Sec. 34.21.170. CONTENT OF NOTICE OF INTENT TO SELL
Sec. 34.21.180. CURING DEFAULT BEFORE SALE; EXTINCTION OF DEBTOR'S RIGHT TO CURE
Sec. 34.21.190. MANNER OF SALE
Sec. 34.21.200. PURCHASE OF COLLATERAL BY LIENHOLDER
Sec. 34.21.210. PROCEDURE AFTER SALE
Sec. 34.21.220. EFFECT OF SALE
Sec. 34.21.230. DISPOSITION OF PROCEEDS OF SALE
Sec. 34.21.240. SECURED PARTY'S LIABILITY FOR FAILURE TO COMPLY; ENJOINING SALE
Sec. 34.21.250. GENERAL VALIDITY OF SECURITY AGREEMENT
Sec. 34.21.260. WAIVER OF RIGHTS
Sec. 34.21.270. DEFINITIONS

Other Amendments:

Sec. 06.05.175. DEPOSITOR AND CUSTOMER RECORDS CONFIDENTIAL
Sec. 09.45.170. JUDGMENT ON FORECLOSURE OF LIEN

Repeal of AS 09.45.200 and AS 34.20.010--34.20.135

Transitional provisions

Effective date

STEPS IN SUMMARY FORECLOSURE

UNDER EXISTING SECTIONS 34.20.070 - 34.20.135

(Deeds of Trust)

DEFAULT
(including the running of any grace period)

[wait 30 days or more]

Record notice of default and sale

[within 10 days]

Transmit copy to (1) debtor, his known successor, recorded successor, or successor in possession; (2) any other person in possession; (3) recorded subsequent lienholders, and (4) state (special notice re its liens)

[no wait necessary]

Post copy in three public places and publish once a week for four weeks

(Right to cure default and resume payment schedule until auctioneer's hammer falls)

SALE AT PUBLIC AUCTION
(No creditor's right to recover deficiency and no debtor's right of redemption)

Minimum time between the end of a grace period for receipt of payments and the date of sale: 120 days.

* A and B time lapse is used depending upon which brings one to a later sale date.

STEPS IN SUMMARY FORECLOSURE
UNDER PROPOSED SECTIONS 34.21.090 - 34.21.280

(Any security agreement containing a power of sale)

DEFAULT

[wait 30 days or more]

↓

Transmit notice of default
[to (1) debtor or his successor
and (2) occupants]

[wait 30 days or more]

↓

Record notice of intent to sell

[no wait necessary]

↓

Transmit notice of intent to sell [to (1) debtor and any other person with known or recorded interest in the collateral; (2) an attorney shown in a lis pendens, and (3) the Attorney General with special notice re state liens], post it on the collateral and start publication of it once a week for 3 weeks

[no wait necessary]

↓

Notice of time and place of public sale or time after which private sale will be made (this separate notice is not necessary if it was included in notice of intent to sell)

[wait 10 days or more]

↓

SALE
(No creditor's right to recover deficiency and no debtor's right of redemption)

*A-wait 60 days or more

*B-wait 45 days or more following transmittal posting and start of publication

Minimum time between the end of a grace period for receipt of payments and the date of sale: 120 days.

* A and B time lapse is used depending upon which brings one to a later "sale" date.

The date for "sale" shown here is also the last date for curing a default and resuming the regular payment schedule (a "simple" cure). The sale may be held later as a public sale or a "commercially reasonable" private sale, but after the final date for a simple cure, the sale can be stopped only by paying the full principal, interest and costs.

Section Analysis

Following are source notes and brief comments on the sections, where appropriate. In the source notes and comments the Uniform Commercial Code, AS 45.01--45.09, is referred to as the UCC. The Uniform Land Transactions Act is referred to as the ULTA and the Uniform Simplification of Land Transfers Act is referred to as the USLTA. The Revised Code of Washington Annotated is referred to as RCWA.

Section 1

COMMENT: This section states the general purposes of the Act.

Section 2

AS 34.21.010

SOURCE: (a) is from AS 45.09.102; (b) is from AS 45.09.202; (c) is part of the ULTA sec. 3-103(7) and USLTA sec. 1-201.

COMMENT: (a) is intended to allow a court to find a transaction subject to this chapter even though there is no documentary evidence of the parties' intent. The Supreme Court of Alaska has made it clear this is our present law. *Brand v. First Fed. Sav. and Loan*, 478 P.2d 820 (1970); *Dept. of Revenue v. Baxter*, 486 P.2d 360, 365 (1971).

The material in (c) was included as part of the definition of "security interest" in the referenced uniform acts. The general subject matter of .010 is covered in ULTA sec. 3-102.

AS 34.21.020

SOURCE: AS 45.09.104(8).

COMMENT: The exclusion in this section is consistent

with the definition of "security interest" as a "consensual" interest.

AS 34.21.030

SOURCE: AS 45.09 112.

COMMENT: This section is designed to protect the real party in interest. Its effect is similar to that of existing law, which requires the trustee to send a notice of sale "where the trustee or beneficiary has actual notice of the lien or interest." AS 34.20.070(c)(3).

AS 34.21.040

SOURCE: This section was taken from ULTA sec. 3-209 which is based upon sec. 9-208 of the UCC (AS 45.09.208). Language is added to allow a debtor to request statements from the bank to which he actually makes his payments.

COMMENT: Existing law makes no provision for such a statement, although the common practice is for statements to be sent even though not requested.

Liability is imposed on the person failing to comply with the request only if he lacks a "reasonable excuse."

The bill gives the holder of a subordinate security interest like a second deed of trust the right to get from the trustee or beneficiary on a first deed of trust a statement of account on the obligation secured by the first deed of trust. The duty placed on the secured party or his agent bank to provide information would create an exception to the strict confidentiality or bank records under AS 06.05.175. Section 3 near the end of the bill specifically amends that section.

AS 34.21.050

SOURCE: AS 45.09.311.

COMMENT: This section is verbatim from the UCC. It is to make clear that in all secured real property transactions the debtor has an interest which the debtor can dispose of and which the creditors of the debtor can reach.

The section does not preclude a security agreement provision which makes a transfer a default but merely prevents such a provision from having the effect of prohibiting transfer. The transfer would be subject to the security interest.

AS 34.21.060

SOURCE: AS 45.09.405(c).

COMMENT: Existing law deals with the subject of this section only by providing that recording an assignment of a mortgage is not in itself notice to the debtor of the assignment. AS 34.20.010. In contrast, AS 34.20.130 provides that recording an assignment of the beneficial interest in a deed of trust is "constructive notice to all persons." (When the assignor acts as the assignee's agent to receive payments following the assignment, this section could be ignored.)

AS 34.21.070

SOURCE: The section is based upon AS 45.09.404(a), sec. 9-404(1) of the UCC.

COMMENT: The section requires the secured party to pay the debtor both a fixed sum of $500 and his actual damages if he fails to provide the statement within 15 days after demand. This is the UCC provision, substantially, except the UCC requires the statement within 10 days and the dollar penalty is $100.

AS 34.21.080

SOURCE: AS 45.09.501(a), with major changes.

COMMENT: The commission saw no reason to restrict the secured party from proceeding with judicial and nonjudicial remedies simultaneously. The section follows generally UCC sec. 9-501(1) which provides that remedies shall be cumulative.

The section is subject to the court's authority to consolidate actions and to require marshaling of assets. As with existing law on nonjudicial foreclosure, AS 34.21.220(d) in the bill provides that there is no right to recover a deficiency after sale in a nonjudicial foreclosure.

AS 34.21.090

SOURCE: RCWA 61.24.030.

COMMENT: The last phrase, "or another person," in subparagraph (1) is intended to insure that deeds of trust continue to be summarily foreclosed.

All of the requirements of this section are also in existing law. AS 34.20.070(a) and (b).

AS 34.21.100

SOURCE: Original drafting.

COMMENT: This section is a guide to the balance of the chapter. It is to make clear that secs. 110 through 150 cover the pre-sale procedures and time elements for power-of-sale foreclosure, and that secs. 160 and 170 only establish the content of the principal notices, i.e., the notice of default and the notice of intent to sell.

AS 34.21.110

SOURCE: RCWA 61.24.030.

COMMENT: This section repeats the present rule that proceedings cannot begin until 30 days after the default.

As under existing law, notice is sent to the debtor. The requirement of service on an occupant is new to Alaska Statutes, but almost certainly required by common law.

AS 34.21.120

SOURCE: RCWA 61.24.040(1)(a).

COMMENT: Existing law requires a notice of default which includes a notice of time and place of sale. The proposed section requires a simple notice of default followed, if necessary, by a formal notice of intent to sell which is recorded. If a sale becomes necessary, sec. 150 requires that an informal notice giving further information as to the sale be provided to interested parties.

AS 34.21.130

SOURCE: (1)(A) is from RCWA 61.24.040(b); (1)(B) is from RCWA 61.24.040(c); (2) is from AS 34.20.070(d); (3) is from RCWA 61.24.030; and (4) is from AS 09.35.140(2). There are changes from the original forms.

COMMENT: The initial notice of default should be relatively inexpensive for the secured party to send out, unlike the currently used notice of default which requires a record search. The more expensive notice of intent to sell goes out only if the debtor fails to cure within 30 days of the first notice. Since the debtor pays costs and attorneys fees when he cures under both present law and the proposed section, this provision should save the debtor considerable money.

Subparagraph (2) continues the present rule requiring that the state be given particular information as to the liens it has on the collateral.

Posting on the collateral of notice of intent to sell is required.

Subparagraph (d)(3) changes the present publishing requirement which is hidden in AS 09.45.180 and 09.35.140(2) from four to three weeks. But the time between the first publication and the sale must be at least 45 days.

AS 34.21.140

SOURCE: Original drafting.

COMMENT: This section includes provision for giving notice of time and place or manner of sale to all those who received the notice of intent to sell and to all those who have asked to be notified.

AS 34.21.150

SOURCE: Original drafting.

COMMENT: The section clarifies intent.

AS 34.21.160

SOURCE: Paraphrased from RCWA 61.24.030(6).

COMMENT: This section requires that when a secured party declares a debtor in default, he fully informs him the basis of the default, what he must do to cure the default and the consequences if he fails to cure it. It requires a clear warning to the debtor that his rights in the collateral will be cut off under sec. 180(g) if he fails to cure within the required time.

AS 34.21.170

SOURCE: RCWA 61.24.040(f), with many changes.

COMMENT: The notice set out in this section corresponds to the existing notice of sale, except that this notice need not contain the time, place, and manner of the sale. When it does not contain this information, the debtor and interested parties will be advised of specifics as to the sale by a later notice. The later notice will also go

out to all other persons who have written to the person designated in the notice expressing an interest and providing a mailing address.

AS 34.21.180

SOURCE: (a) is from RCWA 61.24.090(b)(1); (b) and (c) are paraphrased from AS 34.20.070(b); (d) is original drafting; (e) is from RCWA 61.24.090(b)(2) and (4); (f) is from RCWA 61.24.090(b)(5); (g) and (h) are original drafting.

COMMENT: Subsection (a) essentially restates existing law, except that it explicitly allows cure by persons other than the debtor.

Subsection (b) sets a time limit within which cure must be made. After the expiration of that time period, cure can only be made by tendering the full amount of indebtedness under (d).

Subsection (c) limits to two the number of times the debtor will be permitted to cure after the second step toward foreclosure has been reached. By subsection (c) the debtor is limited in the number of times he can reinstate the security agreement after defaulting and permitting foreclosure to reach the last stage before sale.

Subsection (d) is intended to ameliorate the harshness of (g), which cuts off the debtor's right to cure in order to maximize the purchase price at the foreclosure sale. The debtor may rescue his home at any time before the sale by paying the entire default, including the accelerated amount.

Subsection (e) applies to cures the rule currently applicable to post-sale redemption, which is that a creditor who rescues the debtor acquires a lien for the amount spent on the rescue.

Subsection (f) is designed to provide a clear record for the title searcher. If the secured party's failure to record the required notice after cure causes a debtor to lose a sale, the debtor may sue for damages under sec. 240.

Subsection (g) is a radical departure from existing law, which allows cure until the auctioneer's hammer falls. The proposed section cuts off the debtor's right to a simple cure so that the collateral can be listed and sold. While the proposed section appears on its face to treat the debtor harshly, it is intended to protect his equity from the usual sacrifice sale. No other state has been found which has eliminated the requirement of a public auction.

Subsection (h) assures that any payment made which stops default proceedings will not be a bogus payment.

AS 34.21.190

SOURCE: (a) is from AS 45.09.904; (b) is original drafting; (c) is on the subject of AS 45.09.904(c); (d) is from AS 45.09.904(c); (e) is from AS 45.09.507(b); and (f) is from AS 45.09.507(b).

COMMENT: Subsection (a) provides for sale following expiration of the cure period.

Subsections (d) and (e) incorporate the UCC standard of the commercially reasonable sale. To insure a high purchase price, a commercially unreasonable sale transfers good title to the buyer (see sec. 220). However, an aggrieved debtor may sue the secured party for damages under sec. 240.

The concept of this section is basic to the UCC and basic to this bill.

AS 34.21.200

SOURCE: Original drafting.

COMMENT: Offset bidding at a sale of collateral at public auction is the norm at present, and continues to be provided for in this section.

This bill permits negotiated sales of the collateral as well as sales at public auction. Subsection (a) prohibits the foreclosing secured party from being a purchaser at a sale that he negotiates as seller.

Subsection (b) authorizes a junior lienholder to set off the amount of his lien if he is a purchaser of the collateral and first pays off or secures the release of superior liens.

AS 34.21.210

SOURCE: AS 34.20.080(c) and (d).

COMMENT: This section requires that there be included in, or attached to, the deed issued by the secured party (1) an affidavit of the manner of giving the required notices and (2) an affidavit of publication of the notice of intent to sell. Existing AS 34.10.080(d) calls for recording of these affidavits by the secured party after the sale.

AS 34.21.220

SOURCE: (a) is from AS 34.20.090(a); (b) is from AS 34.20.090(b); (c) is from AS 34.20.090(c); and (d) is from AS 34.20.100.

COMMENT: This section is little changed from existing law.

Subsection (d) restates the present rule which allows nonjudicial foreclosure only where no deficiency judgment is permitted.

AS 34.21.230

SOURCE: (a) is from AS 45.09.504(a); (b) is original drafting; and (c) is from AS 45.09.504(b).

COMMENT: Subsection (a) is taken from the UCC. The priorities among various types of liens and security interests are left by (a)(3) to case law. Although it is not spelled out in the bill, it is intended that the secured party retains a right to file an interpleader action when priorities are in doubt.

AS 34.21.240

SOURCE: AS 45.09.507.

COMMENT: This section allows for an injunction before sale or damages after sale for failure to comply with this chapter.

AS 34.21.250

SOURCE: AS 45.09.201.

COMMENT: This section is taken from the UCC, and is included principally to contrast with AS 34.21.260.

AS 34.21.260

SOURCE: This section is from AS 45.09.501(c), but is more inclusive.

COMMENT: This section protects debtors from being asked to waive various rights guaranteed by this chapter.

AS 34.21.290

SOURCE: (1) is from AS 45.09.105(3); (2) is from AS 45.09.105(4); (.) is from USLTA sec. 1-201(19); (4) is from AS 45.09.105(8); (5) is from USLTA sec. 1-201(25) and ULTA sec. 3-103(7); and (6) is from AS 45.09.105(9).

COMMENT: All definitions are paraphrased from the UCC or the USLTA, as noted. The terms "governmental agency,"

"receiver," and "trustee in bankruptcy" are added in (6) to clarify intent.

Section 3

AS 06.05.175

COMMENT. This subsection is added to meet the possible reluctance of a financial institution to provide information to the holder of a subordinate security interest.

Section 4

AS 09.45.170

COMMENT: This section substitutes the broader term "security interest" for the term "mortgage" in the long-standing section on judicial foreclosure in the Code of Civil Procedure. No change is made in the judicial foreclosure procedure, but it is made clear by statute that the procedure is available broadly for foreclosure of all security interests.

Section 5

Repeal of AS 09.45.200 and AS 34.20.010--34.20.135

COMMENT: AS 09.45.200, here repealed, provides that an action for foreclosure cannot be maintained while an action is pending for the debt. Reference AS 34.21.080 in the bill.

The other sections repealed are the existing law on deeds of trust.

Section 6

COMMENT: This transitional section takes the conservative approach that the law in effect when a security agreement is entered into shall be the law used in enforcing the security agreement. However, since this Act follows more closely the existing law on deeds of trust than it does the existing law on other security agreements, an exception is made as to deeds of trust. The person foreclosing a deed of trust

is given an option to proceed with foreclosure under this Act if he should wish to.

This transitional section will make it necessary that the statutes repealed or amended by this Act be retained in Alaska Statutes volumes for several years after this Act goes into effect.

Section 7

The effective date of the Act should be several months following enactment to allow time for becoming familiar with its terms.

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF COMMERCE &
ECONOMIC DEVELOPMENT

REAL ESTATE COMMISSION

3601 C Street
Suite 798
Anchorage, Alaska 99503
Phone: (907) 563-2169

November 18, 1985

House Judiciary Committee
Pouch V
State Capitol
Juneau, Alaska 99811

Attn: Hayden Kaden, Committee Counsel

Dear Mr. Kaden:

I have reviewed HB 244 and HB 245 and the sectional analyses that you provided. Clarification and simplification in these areas would materially benefit the public. In our day to day dealings with public inquiries and complaints it is not uncommon for a problem to be traceable to problems with either recording or security instruments or both. In many cases the problems stem from confusion regarding what is proper and legal and what is not. The "unification" of foreclosure procedures, regardless of what they are called would eliminate many problems. In this respect, one of the problem areas and one that is frequently involved when fraud is committed involves unrecorded contracts for deed. The unrecorded contract for deed is frequently used by subdividers to eliminate the time and costs of foreclosure proceedings under deeds of trust. I would suggest that a penalty provision be attached to the non waiverability section of HB 245 making it a fraud to circumvent or deny a person's rights under the law through the use of any instrument or scheme that deceives a person about or conceals from the person their rights under the law. This might be similar to the other provisions that provide for a minimum of unproven damages or actual damages if they are greater.

Often in real estate transactions the problem boils down to the fact that the consumers do not know the law that would protect them. The commission, in common with similar bodies in other states is looking at increased disclosure requirements rather than extensive additional regulation. A requirement that the foreclosure procedures and the owner's rights under them be disclosed in the instrument when an instrument other than a deed of trust is executed might be quite beneficial.

In sec. 7 of HB 245 I would suggest that the word "recorded" be inserted so it reads (a) A recorded security instrument....This would eliminate many of the problems that are waiting to manifest themselves with current unrecorded instruments and would get most legitimate instruments recorded. A "grace" period could be granted from the effective date of the act to enable unrecorded instruments to be recorded. This would mean that instruments that do not get recorded and unrecordable instruments would be covered by the new law rather than any law that was in effect at the time they were allegedly drafted.

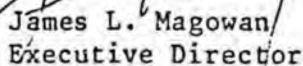
Hayden Kaden, Committee Counsel
House Judiciary Committee
Page Two
November 18, 1985

Such an amendment to the bill would affect primarily those people who are attempting to victimize the public by the use of what might be called creative foreclosures which avoid the normal delays and protections afforded the consumer. In order to eliminate harmful effects that might occur to people who used other or unrecorded instruments for legitimate reasons and which instruments may not be in recordable form (not notarized etc) there might be , during the grace period, a waiver of most requirements for recordation with the caveat that in the event of a challenge to an instrument so recorded recordation is not effective as full constructive notice unless a court rules it is.

A current practice is to require a borrower to sign an undated quit claim deed or reconveyance to the seller or creditor so that in the event of a default the creditor does not have to go through foreclosure proceedings but simply date and record the instrument. If I read it correctly the non waiverability clause in HB 245, (34.21.260), would render such a practice ineffective if it were fought by the debtor. This is precisely the class of event that disclosure would give adequate protection to both parties in. Sometimes the undated reconveyance is a benefit. Buyers sometimes default and disappear, for example. In such a circumstance the recording of a previously undated instrument is a benefit and a saving all around. Disclosure rather than prohibition would permit proper use of such instruments but would go a long way toward eliminating abuses.

I hope these comments are of some assistance to the committee. If I can be of any additional help I will gladly do what I can.

Very truly yours,



James L. Magowan
Executive Director

JLM/0144M

National Bank of Alaska
Corporate Headquarters P.O. Box 600 • Anchorage Alaska 99510-0600 • (907) 276-1132

November 15, 1985

Wes Coyner
3111 Douglas Highway
Juneau, AK 99801

Re: House Bill #245

Dear Mr. Coyner:

In regard to the above-indicated bill, it seems that National Bank of Alaska will be impacted as a lender, as a servicer of loans for other institutional lenders, and as a servicer of escrows in our Contract Collections Department. Concerning Sections 34.21.040, which pertains to providing an additional Statement of Account, it seems that the bank will be charged a $250 penalty without any proof of damages when we do not respond in a 15-day period of time. Under the new rules, it will be more difficult for us to determine who actually has the legal right to obtain additional statements. We are also guided by Federal and State Right-to-Privacy regulations about giving out information, so this is of some concern to us. The Contract Collections Department generally provides a monthly statement which provides for account balances, interest, and other information. We believe that we are providing a public service in providing this additional information and therefore should be limited to a $250 penalty when damages are actually incurred and no penalty in cases where no damages are incurred.

In regard to Section 34.21.070, a penalty of $500 without proof of any damages for not releasing the security interest within a 15-day period of time is "totally unreasonable". In many cases the lenders are outside the state of Alaska and the 15-day period is difficult to meet unless prearranged by a borrower. Fannie Mae and other lenders have rather extensive bureaucracies, so I would find it difficult to respond in that period of time on a routine basis and would discourage lenders from making loans in the state. You are probably aware that the recording office has been as much as a year behind in recording reconveyances. How would it be decided as to who was at fault in late filing of the reconveyances? If the State of Alaska finds it impossible to record reconveyances in a timely manner, how can you hold lending and servicing institutions at a much higher level of conduct? Would the State of Alaska be subject to a $500 fine for not recording the reconveyance within the 15-day period? This could possibly amount to several million dollars in penalties to the State if it held itself accountable. We have not received many consumer complaints, so this must not cause many problems, but the fine is unreasonable. Perhaps $500 maximum with proof of damages would be reasonable in cases where a prior written request is received by the servicing agency.

In regard to Section 34.21.180, we are somewhat concerned as to the language which allows lenders with inferior priorities to be able to cure the fault. If, in fact, this section means that they may cure the default only by paying off the entire balance, then it would not cause any concern, but the section confuses us. Does this mean that the inferior institution can continue to make monthly payments indefinitely? If so, this language leads to a dilution of the "Due-on-Sale" clause, which violates federal policy under the Garn-St. Germain Act. This issue also relates back to Section 34.21.050, which states that a borrower can convey property regardless of the provisions of the security interest. Even though this language does not preclude us from foreclosing under the Due-on-Sale clause of a mortgage, the language is confusing and could lead to unnecessary legal action. Also, we have in our possession the commentary Booklet #7 which does not clarify the matter in our minds.

Basically, the issue of "posting of property" as stated in my letter of a year ago is still worrisome. We do not see that any of our previous concerns have been addressed.

I hope this is going to be of assistance to you.

Sincerely yours,

J. K. Sieberts
Senior Vice President

acm

cc: Hayden Kaden

February 28, 1984

Wes Coyner
3111 Douglas Highway
Juneau, AK 99801

Dear Wes:

In regard to last year's House Bill #341 pertaining to security interests in real property, we continue to have problems with the draft legislation.

From an historical point of view, Alaska lenders are generally not holders of long-term notes of Deeds of Trust on real property. We tend to be servicers of these real estate obligations or, as defined in the bill, "a secured party's agent". In this regard, we have provided a service not always found in other states. Early on in our banking history, we realized that we were not capable of internally generating the capital needs of the state of Alaska and consequently became extremely aggressive in seeking funds for mortgages from capital sources outside the state. Therefore, we service loans for pension funds, insurance companies, other financial institutions, and governmental agencies.

In addition to this servicing arrangement of external capital, most banks in the state provide a service for the public, generally described as an escrow function or a contract collection function depending on which bank you deal with. In these institutions, banks serve as a paying and receiving agent for the consumers who entrust the recordkeeping to the financial institution. This service is provided in the state for fees ranging from $30 to $75 per year which is extremely beneficial to the consumer. This service is not generally provided by banks in the Lower 48 due to liabilities to the institution created by various governmental regulations. Therefore, the consumer is on his own to maintain this recordkeeping service, which I believe probably creates more disputes and law suits than the system that has developed within Alaska.

Under either of these scenarios, acting as a collecting agent for a consumer or for another financial institution, certain penalties established in this bill are prohibitive and would cause lenders throughout the state to re-think the services that they are providing the consumer at a reasonable cost today. And, in cases of contract collections, the cost to the consumer would substantially increase in those institutions that decided to continue to provide the service.

We do not have any problem with the concept that a lender should provide a statement of account to a legally authorized party. We provide statements in most cases at no cost at all to the consumer. These statements, however, do not generally provide for the status of escrow funds being held by a secured party. However, I believe under Section 34.21.040(a) that the escrow information should be specifically requested for by the consumer in addition to a request for a statement of principal and interest due.

The language states that the bank or collection agent is liable for all damages caused to that person because of failure to comply, and $250 without proof of actual damages is excessive. If, in fact, no damages are incurred by the party, why should any damages be paid? We suspect that if a consumer has been damaged they will seek restitution from the bank in any case. Under Section 34.21.260, Waiver of Rights, a bank is not able to limit their liability and the consequential damages they might be faced with. As a matter of practice, the consumer who sets up a collection in a bank would do so under almost any circumstances because of the bank's ability to provide satisfactory recordkeeping. Under paragraph (c) this legislation prohibits us from charging a fee for an additional statement every six months, and we feel that if the government wishes to legislate on this matter we should be allowed to set up our own schedule of charges. The $20 fee for each additional statement furnished may not be an adequate fee 10 years from today; however, the current demand for our Contract Collection Department by our consuming public leads us to believe that our service charges are at least economically competitive within the community.

Paragraph (e) states that if a mistake is made on the statement the collection agent can be held liable and may not request additional funds. It would seem obvious that if a clerk mistakenly sends out a statement showing a zero balance on a million dollar loan the bank would not be able upon payoff to collect the million dollars. However, on the proposed legislation we would have to accept a payoff of zero dollars and release the security interest. Mistakes are often made despite our attempts to be extremely careful in recordkeeping, and I would suspect that we should be allowed to correct reasonable errors. As a matter of practice in the community, selling agents seek payoff balances preliminarily and at later dates seek final payoff figures on closing.

Under Section 34.21.070(c)(1) we would be fined $500 for not providing a reconveyance on property within 15 days and no proof of damages is required. It could be that it would take the Contract Collection personnel 15 days to research and determine if a reconveyance is actually warranted. Certain out-of-state lenders sign their own reconveyances which takes more time. Such a penalty seems excessive when no harm has been done.

We continue to be concerned about the posting requirement as defined in Section 34.21.130(3). Our attorney has reviewed this and feels this is a very difficult requirement because:

1. Many foreclosures in this state occur in rural locations, and the proposed posting requirement could ultimately discourage lenders to provide financing in rural outposts.

2. The property may be raw land where there is no conspicuous place to post and would be difficult to post at best.

3. The lender may not have legal access to the real property and could be shot as a trespasser in attempting to post the property.

We can see the logic of posting the property as an additional method of notification; however, to make it a mandatory requirement for providing foreclosure services to real property, we believe that this is an excessive requirement that will cause a great deal of problems in the industry. The notice could be rapidly torn down if the foreclosed party has not left the premises and would, therefore, not serve its purpose as notification to other interested parties. We think the language in this regard should be re-thought or possibly eliminated. Our legal counsel additionally informs us that there are probably some technical problems with the bill when it comes to leasehold estates, etc.

In summary, though we are not opposed to the whole piece of legislation, we believe that the consequential damages called for and posting notices are excessive and will discourage the good services provided by banks to the consumers at large. We do not feel that the intent of providing a notice to the consumer in itself is a bad concept; however, the State Recording Office has not returned recorded documents to us in the past year. If the State cannot perform in a reasonable time frame, how can you put the burden on institutions attempting to provide good service. The change in the method

of handling foreclosures is not objectionable in itself, except that the posting requirement probably should be eliminated. We have not found the existing methods of foreclosing on real property to be burdensome to lenders or the public and do not quite understand why legislation is being undertaken to change a law which seems to work reasonably well. We are asking our legal counsel to continue to research the matter, so if you have any additional questions in this regard, please give me a call at 265-2991.

Sincerely,

J. K. Sieberts
Senior Vice President

sb

cc: Lucille Stietz
Dick Hall
Stan Reitman