

# HOUSE BILL ANALYSIS

## HB 2823

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**Title:** An act relating to deeds of trust.

**Brief Description:** Changing statutes affecting deeds of trust.

**Sponsors:** Representatives Lambert and Constantine.

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### HOUSE COMMITTEE ON LAW & JUSTICE

**Staff:** Edie Adams (786-7180).

**Background:** A deed of trust is a type of security interest in real property. Basically, a deed of trust is a three-party mortgage. The borrower (grantor) grants a deed creating a lien on the real property to a third party (the trustee) who holds the deed in trust as security for an obligation due to the lender (the beneficiary).

The major benefit of a deed of trust as opposed to a mortgage is that the deed of trust may be nonjudicially foreclosed whereas a mortgage may only be foreclosed judicially. If the grantor defaults on the loan obligation, the trustee may foreclose on the real property as long as certain procedural and notice requirements are met.

The trustee of a deed of trust may be a domestic corporation, a title insurance company, an attorney, a professional corporation whose shareholders are licensed attorneys, an agency of the United States government, or a bank or savings and loan association. A trustee must resign at the request of a beneficiary, and the beneficiary may designate a successor trustee. A trustee must reconvey the property to the grantor if the grantor has satisfied the obligation secured by the deed of trust, or if the beneficiary requests the trustee to reconvey the property.

In order for a deed of trust to be nonjudicially foreclosed, the following requirements must be met: (1) the deed contains a power of sale and provides that the real property is not used principally for agricultural purposes; (2) a default has occurred which makes the power of sale operative; (3) the deed has been recorded; (4) a notice of default is sent at least 30 days before a notice of sale is recorded; and (5) no other action is pending to seek satisfaction of an obligation secured by the deed of trust.

To initiate foreclosure procedures the trustee must: (1) file a notice of trustee's sale 90 days before the sale; (2) send notice of the sale to the grantor, beneficiary, and any other person with a recorded interest in the land; (3) post the notice on the

property or personally serve any occupants; and (4) publish the notice of sale in a newspaper at specified dates.

The sale may not take place less than 190 days from the date of default. Any person other than the trustee may bid at the sale. After sale of the property there is no right of redemption and no right to a deficiency judgment. However, on commercial obligations, foreclosure on the deed of trust does not preclude a judicial or nonjudicial foreclosure of any other deed of trust, mortgage, or other security interest or lien granted on the obligation.

The proceeds of the foreclosure sale are distributed first to the expenses of sale and the obligation secured by the deed of trust, and the surplus is deposited with the clerk of the court. Any interests or liens on the real property that are eliminated by the sale attach to the surplus proceeds.

**Summary of Bill:** A number of provisions of the Deed of Trust Act are amended.

A definition section is added for terms used throughout the chapter, including "grantor," "beneficiary," "trustee," "borrower," and "guarantor."

The types of entities that may serve as a trustee are amended to exclude domestic corporations that are not wholly owned by a professional entity that is wholly owned by licensed attorneys, and to include escrow agents and professional limited liability entities if they are wholly owned by licensed attorneys.

The beneficiary of a deed of trust may replace the trustee without a requirement that the trustee first resign. Recording of the appointment of a successor trustee by the beneficiary vests all powers of the original trustee in the successor.

Several changes are made to the requirements of a notice of trustee's sale: notice must be given to occupants of property consisting of a single-family residence, condominium, cooperative, and dwelling with less than five units; the notice must identify personal property that may be sold and any other action that is pending to foreclose on another security; the notice must specify the potential effects of foreclosure on the occupants of the property; and the two time periods during which the trustee must publish in a legal newspaper the notice of sale are lengthened from five to eight days.

The beneficiary may credit bid all or any part of the obligation secured by the deed of trust at the sale. If the beneficiary is the purchaser, the amount bid by the beneficiary in excess of the credit bid must be paid in the form of cash, certified check, cashier's check, money order, or electronic transfer. If the purchaser is not the beneficiary, the entire bid must be paid in one of these forms. The trustee's sale is deemed final

on the date and time that the trustee has accepted a bid if the trustee's deed is recorded within 15 days after the date of the accepted bid.

Procedures for dealing with surplus sales proceeds are established. A written notice of any surplus from the proceeds of sale must be mailed, along with the notice of sale and an affidavit of mailing, to each party to whom the original notice of sale was sent. The written notice of surplus and the affidavit of mailing must also be deposited, along with the surplus proceeds, with the clerk of the superior court. A party who seeks disbursement of surplus funds must file a motion seeking disbursement with the superior court and must mail notice of the motion to all parties to whom the trustee mailed the notice of surplus.

A deficiency judgment is not available after a trustee's sale except for a deed of trust securing a commercial loan. The beneficiary may seek a deficiency judgment against the borrower in the following two situations, but only if the fair value of the property sold at the trustee's sale is less than the obligation, and if the property is not occupied by the borrower as a principal residence: (1) for a decrease in the fair market value in the property caused by abusive or destructive use of the property by the borrower; or (2) for damages caused by the wrongful retention of rents, insurance proceeds, or condemnation awards.

The beneficiary may seek a deficiency judgment against a guarantor of the commercial loan if certain conditions are met, including the following: (1) the action must be commenced within one year; (2) the guarantor must have been given notice of the trustee's sale that contains the guarantor's rights and defenses, and an opportunity to cure the default; and (3) the guarantor may ask the court to determine the fair value of the property, and the amount of the deficiency is the amount owed by the guarantor to the beneficiary less the greater of either the fair value of the property or the price paid at the sale.

An authorized financial institution may record a release of its beneficial interest in the property secured by the deed of trust, and thereby terminate the deed of trust without obtaining the trustee's signature on the release.

Procedures following the dissolving of a restraining order or bankruptcy stay on the foreclosure sale are amended. The specification that the court may set a new sale date if the restraining order or automatic bankruptcy stay is dissolved after the date for continuance is removed. A new provision is added that states that the procedures applicable to a new sale ordered by a court upon dissolution of a restraining order or stay are permissive only and do not prohibit the trustee from continuing with a sale on a properly continued sale date.

It is a violation of the Consumer Protection Act for any person to offer, offer to accept, or accept from another person consideration of any type not to bid or to

reduce a bid at a trustee's sale. It is not a violation of the Consumer Protection Act for a person to state that the property is being sold in an "as-is" condition or for the beneficiary to arrange to provide financing for a particular bidder.

A beneficiary may not force tenants of a single-family residence, condominium, cooperative, or other dwelling with less than five units to pay rent to the beneficiary without providing the tenant with a court order or a written consent by the landlord. It is a defense to eviction on the basis of nonpayment of rent that the tenant paid the rent to the beneficiary under a court order or a landlord's written consent.

Various technical and clarifying amendments are made.

**Fiscal Note:** Not requested.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

Office of Program Research