
Judiciary Committee

HB 1362

Title: An act relating to protecting and assisting homeowners from unnecessary foreclosures.

Brief Description: Addressing homeowner foreclosures.

Sponsors: Representatives Orwall, Hope, Rolfes, Moeller, Liias, Probst, Green, Darneille, Frockt, Kirby, Miloscia, Roberts, Hunt, Dickerson, Upthegrove, Fitzgibbon, Kagi, Eddy, Hasegawa, Pettigrew, Ormsby, Sells, Kenney, Cody, Hudgins, Lytton, Moscoso, Ryu, Appleton, Reykdal, Van De Wege, Carlyle, Dunshee, Santos, McCoy, Tharinger, Haigh, Goodman, Jinkins, Jacks, Takko, Sullivan, Blake, Seaquist, Billig, Stanford, Ladenburg, Finn and Pedersen.

Brief Summary of Bill

- Amends the "meet and confer" requirement to, among other things, repeal the expiration date and make it applicable to all deeds of trust for owner-occupied residential real property.
- Establishes procedures for foreclosure mediation, if the borrower elects mediation.
- Makes it a Consumer Protection Act violation if a beneficiary fails to comply with the "meet and confer" and mediation provisions.
- Requires the county auditor to impose a \$30 surcharge when a notice of trustee sale on owner-occupied residential real property is recorded.
- Makes other changes to the deeds of trust statutes.

Hearing Date: 1/26/11

Staff: Trudes Tango (786-7384).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

Foreclosure Process for Deeds of Trust.

Unlike a mortgage, which requires judicial foreclosure, a deed of trust may be nonjudicially foreclosed if the borrower defaults on the loan obligation. The deeds of trust act establishes procedures for foreclosure and imposes certain requirements on beneficiaries and trustees.

To foreclose on a deed of trust, the beneficiary or trustee must send a notice of default to the borrower. After 30 days from when the notice of default is sent, the trustee may record a notice of foreclosure sale. The notice of sale is recorded in the county auditor's office. The foreclosure sale may not occur until after 90 days from the time the notice of foreclosure sale is recorded, and may not occur until at least 190 days from the date of default. Within that time frame, the borrower may cure the default and discontinue the sale. The trustee's sale is automatically stayed if the borrower files for bankruptcy. The trustee also has authority to continue a sale for up to 120 days for any cause the trustee deems advantageous.

In 2008, the Legislature enacted Engrossed Senate Bill 5810 which, among other things, requires a beneficiary to contact a borrower before issuing a notice of default in order to assess the borrower's financial situation. The contact must be by telephone and letter. The beneficiary must give the borrower information for housing counseling agencies and must inform the borrower that he or she can request a subsequent meeting with the beneficiary to explore options for the borrower to avoid foreclosure. This requirement is referred to as the "meet and confer" requirement. The "meet and confer" requirement applies to deeds of trust made from January 1, 2003 to December 31, 2007 on owner-occupied residential property and expires on December 31, 2012.

Summary of Bill:

Numerous changes are made to the deeds of trust foreclosure process.

Meet and Confer.

The "meet and confer" provision is amended to: (1) require that the subsequent meeting, if requested by the borrower, be in person unless the borrower waives the requirement to meet in person; (2) make the "meet and confer" requirement applicable to all deeds of trust (not just deeds made from 2003 to 2007); and (3) repeal the expiration date of the "meet and confer" requirement.

Mediation.

A procedure is added for foreclosure mediation if the borrower elects mediation. The mediation provision applies to deeds of trust on owner-occupied residential property. It does not apply to community banks and credit unions.

Anytime after the notice of default is sent but before a notice of sale is recorded, the beneficiary must conduct a good faith review of the borrower's financial situation and offer a loan modification or other option if the borrower is eligible. A good faith review means that the beneficiary: (1) evaluates the borrower's eligibility for all loan modification programs; and (2) participates in foreclosure mediation, if the borrower elects mediation. If the beneficiary fails to conduct a good faith review, it is a defense to foreclosure.

Before recording a notice of sale, the trustee or beneficiary must provide a notice to the borrower and to the Department of Commerce (DOC) with certain information, including: (1) contact information for a person with authority to negotiate a loan modification; (2) contact information for housing counseling agencies; and (3) a form notice explaining the availability of the mediation program. This is in addition to the information the beneficiary must provide for the “meet and confer” process.

The form notice, created by the DOC, must contain an option for the borrower to elect or waive mediation and must encourage the borrower to meet with a counselor or attorney before mediation. The borrower must return the form to the DOC within 30 days or the borrower waives mediation.

If the borrower elects mediation, the DOC must select a mediator and notify the parties. The foreclosure mediator must convene an in-person mediation session within 45 days after receiving a referral from the DOC, unless the parties agree in writing to extend the time.

Provisions are established to address when the mediator must send the parties notice of the mediation session, what documents and calculations the parties must provide to the mediator, and what factors the parties must consider during mediation.

Parties in mediation have the duty to act in good faith. Sharing information, negotiating willingly, cooperating with the mediator and keeping agreements are indications of good faith. A violation of the duty to act in good faith can include, but are not limited to, the failure to timely participate in mediation without good cause, the failure of either party to provide certain information to the other party, and the failure of the beneficiary to agree to a modification when the net present value of a modified loan exceeds the anticipated net recovery at foreclosure. The mediator must certify to the DOC the outcome of mediation and whether the parties acted in good faith.

Provisions are established regarding the mediator's fees. The DOC must maintain a list of approved foreclosure mediators and the DOC may establish a training program for mediators. The DOC must make annual reports to the legislature on the results of the mediation program.

A foreclosure sale cannot occur less than 60 days from the date the mediator submits a written certification to the DOC, if the borrower elected foreclosure mediation.

Consumer Protection Act.

It is a Consumer Protection Act violation for any person to violate the duty of good faith in the mediation requirement or for failing to comply with the “meet and confer” requirement.

County Auditor Surcharge.

The county auditor must impose a \$30 surcharge when a notice of trustee’s sale on owner-occupied residential real property is recorded. The county may keep up to 2 percent of the fee collected, with the remaining funds going to the DOC to be used to fund housing counselors. The DOC may enter an interagency agreement with the Washington State Housing Finance Commission to administer the funds.

Servicer's Duty.

A servicer's duty to maximize net present value under a pooling and servicing agreement is a duty that is owed to all parties in a deed of trust pool, not to a particular party, and the servicer acts in the best interests of all parties if it agrees to a modification where the anticipated recovery under a modification is more than the anticipated recovery through foreclosure. The beneficiary must offer a borrower a modification unless the beneficiary produces evidence showing that the modification is prohibited by express terms of a pooling and service agreement and those terms cannot be waived.

Real Estate Excise Tax.

If a deed in lieu for foreclosure transaction includes providing the transferor with a nominal sum of funds to assist the transferor with relocating, the transfer is not considered a sale for the purposes of the real estate excise tax.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.