

Enrolled Senate Bill 519

Sponsored by Senator DINGFELDER; Senator BONAMICI, Representative FREDERICK (Pre-session filed.)

CHAPTER

AN ACT

Relating to sales of property subject to foreclosure; creating new provisions; and amending ORS 86.705, 86.755, 130.005 and 456.280.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 86.705 is amended to read:

86.705. As used in ORS 86.705 to 86.795[, *unless the context requires otherwise*]:

(1) “Affordable housing covenant” has the meaning given that term in ORS 456.270.

[(1)] **(2) “Beneficiary” means [the] a person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person’s successor in interest, and who [shall not be] is not the trustee unless the beneficiary is qualified to be a trustee under ORS 86.790 (1)(d).**

(3) “Eligible covenant holder” has the meaning given that term in ORS 456.270.

[(2)] **(4) “Grantor” means the person [conveying] that conveys an interest in real property by a trust deed as security for the performance of an obligation.**

[(3)] **(5) “Residential trust deed” means a trust deed on property upon which are situated four or fewer residential units, [and] one of which [the residential units is occupied as the principal residence of] the grantor, the grantor’s spouse or the grantor’s minor or dependent child occupies as a principal residence at the time a trust deed foreclosure is commenced.**

[(4)] **(6) “Residential unit” means an improvement designed for residential use.**

[(5)] **(7) “Trust deed” means a deed executed in conformity with ORS 86.705 to 86.795[, and conveying] that conveys an interest in real property to a trustee in trust to secure the performance of an obligation [owed by] the grantor or other person named in the deed owes to a beneficiary.**

[(6)] **(8) “Trustee” means a person, other than the beneficiary, to whom [an interest in real property is conveyed by] a trust deed conveys an interest in real property, or [such] the person’s successor in interest[. The term includes a person who is], or an employee of the beneficiary, if the [person] employee is qualified to be a trustee under ORS 86.790.**

SECTION 2. ORS 86.755 is amended to read:

86.755. (1)(a) [The] **A** trustee shall hold [the] **a** trustee’s sale on the date and at the time and place designated in the notice of sale **given under ORS 86.740**, which must be at a designated time after 9 a.m. and before 4 p.m., based on the standard of time set forth in ORS 187.110 and at a designated place in the county or one of the counties where the property is situated. **Except as provided in paragraph (b) of this subsection**, the trustee may sell the property in one parcel or in separate parcels and shall sell the parcel or parcels at auction to the highest bidder for cash. Any person, including the beneficiary under the trust deed, but excluding the trustee, may bid at the

trustee's sale. [The] **An** attorney for the trustee, or an agent that the trustee or the attorney designates, may conduct the sale and act in the sale as the trustee's auctioneer.

(b) If the trustee sells property upon which a single residential unit that is subject to an affordable housing covenant is situated, the eligible covenant holder may purchase the property from the trustee at the trustee's sale for cash or cash equivalent in an amount that is the lesser of:

(A) The sum of the amounts payable under ORS 86.765 (1) and (2); or

(B) The highest bid received for the property other than a bid from the eligible covenant holder.

(c)(A) Except as provided in subparagraph (B) of this paragraph, if an eligible covenant holder purchases the property in accordance with paragraph (b) of this subsection, the sale forecloses and terminates all other interests in the property as provided in ORS 86.770 (1).

(B) If an interest in the property exists that is prior to the eligible covenant holder's interest, other than the interest set forth in the trust deed that was the subject of the foreclosure proceeding under ORS 86.735, notwithstanding the provisions of ORS 86.770 (1) the sale does not foreclose and terminate the prior interest and the eligible covenant holder's title to the property is subject to the prior interest.

(2) The trustee or the attorney for the trustee, or an agent that the trustee or the attorney conducting the sale designates, may postpone the sale for one or more periods [totaling] **that total** not more than 180 days from the original sale date, giving notice of each adjournment by public proclamation made at the time and place set for sale. The trustee, the attorney or an agent that the trustee or the attorney designates may make the proclamation.

(3) The purchaser shall pay at the time of sale the price bid **or the price determined in accordance with subsection (1)(b) of this section**, and, within 10 days following payment, the trustee shall execute and deliver the trustee's deed to the purchaser.

(4) The trustee's deed shall convey to the purchaser the interest in the property that the grantor had, or had the power to convey, at the time the grantor executed the trust deed, together with any interest the grantor or the grantor's successors in interest acquire after the execution of the trust deed.

(5)(a) The purchaser at the trustee's sale is entitled to possession of the property on the 10th day after the sale. A person that remains in possession after the 10th day under any interest, except an interest prior to the trust deed, or an interest the grantor or a successor of the grantor created voluntarily, is a tenant at sufferance. The purchaser may obtain possession of the property from a tenant at sufferance by following the procedures set forth in ORS 105.105 to 105.168 or other applicable judicial procedure.

(b) Except as provided in paragraph (c) of this subsection, at any time after the trustee's sale the purchaser may follow the procedures set forth in ORS 105.105 to 105.168 or other applicable judicial procedure to obtain possession of the property from a person that holds possession under an interest that the grantor or a successor of the grantor created voluntarily if, not earlier than 30 days before the date first set for the sale, the person was served with not less than 30 days' written notice of the requirement to surrender or deliver possession of the property.

(c) If the property purchased at the trustee's sale is a dwelling unit, as defined in ORS 90.100 (9), that the person holds under a tenancy that the grantor or a successor of the grantor created voluntarily and in good faith, the purchaser may follow the procedures set forth in ORS 105.105 to 105.168 or other applicable judicial procedure to obtain possession if after the sale the purchaser terminates the tenancy in a written notice given to the person:

(A) At least 60 days before the termination date specified in the notice, if the tenancy is a fixed term tenancy, as defined in ORS 90.100, and at least 30 days before the date first set for the trustee's sale the person provided the trustee with a copy of the rental agreement that established the fixed term tenancy. The provisions of this subparagraph do not apply to a purchaser that does not intend to terminate a fixed term tenancy before the date on which the fixed term tenancy ends.

(B) At least 30 days before the termination date specified in the notice, if:

(i) The tenancy is a month-to-month tenancy or week-to-week tenancy, as those terms are defined in ORS 90.100, and at least 30 days before the date first set for the trustee's sale the person provided the trustee with a copy of the rental agreement that established the tenancy or with other written evidence of the existence of a rental agreement, if the person cannot provide the rental agreement; or

(ii) The tenancy is a fixed term tenancy for which the person has provided notice to the trustee as provided in subparagraph (A) of this paragraph and the purchaser intends to occupy the property that is subject to the fixed term tenancy as the purchaser's primary residence.

(d) A purchaser may not commence a proceeding under ORS 105.105 to 105.168 that is authorized under this subsection before the later of:

(A) The 10th day after the trustee's sale;

(B) The date specified in a written notice of the requirement to surrender or deliver possession of the property if the notice is required by and is given to the person in accordance with paragraph (b) of this subsection;

(C) The date specified in a written notice of the purchaser's intent to terminate a tenancy if the notice is required by and is given to the person in accordance with paragraph (c) of this subsection; or

(D) The date on which the term of a fixed term tenancy ends, if the property is a dwelling unit and the purchaser has not terminated the tenancy in accordance with paragraph (c) of this subsection.

(e) For the purposes of this subsection:

(A) A month-to-month tenancy or a week-to-week tenancy that a grantor or a successor of the grantor first created after a notice of sale was served under ORS 86.750 is presumed not to be a tenancy created in good faith.

(B) A fixed term tenancy that a grantor or a successor of the grantor created after a notice of sale was served under ORS 86.750 is not a tenancy created in good faith.

(6) A purchaser shall serve a notice under subsection (5) of this section by first class mail and not by certified or registered mail or a form of mail that may delay or hinder actual delivery of mail to the addressee. The notice is effective three days after the notice is mailed.

(7)(a) Notwithstanding the provisions of subsection (5)(c) of this section and except as provided in paragraph (b) of this subsection, the purchaser is not a landlord subject to the provisions of ORS chapter 90 unless the purchaser:

(A) Accepts rent from the person who possesses the property under a tenancy described in subsection (5)(c) of this section;

(B) Enters into a new rental agreement with the person who possesses the property under a tenancy described in subsection (5)(c) of this section; or

(C) Fails to terminate the tenancy as provided in subsection (5)(c) of this section within 30 days after the date of the sale.

(b) The purchaser may act as a landlord for purposes of terminating a tenancy in accordance with the provisions of ORS 90.396.

(8)(a) Except as provided in paragraph (b) of this subsection, the purchaser is not liable to the person who possesses the property under a tenancy described in subsection (5)(c) of this section for:

(A) Damage to the property or diminution in rental value; or

(B) Returning a security deposit.

(b) A purchaser that is a landlord under the provisions of subsection (7)(a) of this section is liable to the person who possesses the property under a tenancy described in subsection (5)(c) of this section for:

(A) Damage to the property or diminution in rental value that occurs after the date of the trustee's sale; or

(B) Returning a security deposit the person pays after the date of the trustee's sale.

(9)(a) Notwithstanding subsection (2) of this section, except when a beneficiary has participated in obtaining a stay, foreclosure proceedings that are stayed by order of the court, by proceedings

in bankruptcy or for any other lawful reason shall, after release from the stay, continue as if uninterrupted, if within 30 days after release the trustee sends amended notice of sale by registered or certified mail to the last-known address of the persons listed in ORS 86.740 and 86.750 (1).

(b) In addition to the notice required under paragraph (a) of this subsection, the trustee shall send amended notice of sale:

(A) By registered or certified mail to:

(i) The address provided by each person who was present at the time and place set for the sale that was stayed; and

(ii) The address provided by each member of the Oregon State Bar who by registered or certified mail requests the amended notice of sale and includes with the request the notice of default or an identification number for the trustee's sale that would assist the trustee in identifying the property subject to the trustee's sale and a self-addressed, stamped envelope measuring at least 8.5 by 11 inches in size; or

(B) By posting a true copy or a link to a true copy of the amended notice of sale on the trustee's Internet website.

(10) The amended notice of sale must:

(a) Be given at least 20 days [*prior to*] **before** the amended date of sale;

(b) Set an amended date of sale that may be the same as the original sale date, or date to which the sale was postponed, provided the requirements of this subsection and ORS 86.740 and 86.750 are satisfied;

(c) Specify the time and place for sale;

(d) Conform to the requirements of ORS 86.745; and

(e) State that the original sale proceedings were stayed and the date the stay terminated.

(11) If the publication of the notice of sale was not completed before the date the foreclosure proceedings were stayed by order of the court, by proceedings in bankruptcy or for any other lawful reason, after release from the stay, in addition to complying with the provisions of subsections (9) and (10) of this section, the trustee shall complete the publication by publishing an amended notice of sale that states that the notice has been amended following release from the stay and that contains the amended date of sale. The amended notice must be published in a newspaper of general circulation in each of the counties in which the property is situated once a week for four successive weeks, except that the required number of publications must be reduced by the number of publications that were completed before the effective date of the stay. The last publication must be made more than 20 days before the date the trustee conducts the sale.

SECTION 3. ORS 130.005 is amended to read:

130.005. (1) Except as provided in subsection (2) of this section, this chapter applies to express trusts, whether charitable or noncharitable, and to trusts created pursuant to a statute or a judgment that requires that the trust be administered in the manner of an express trust.

(2) This chapter does not apply to:

(a) A trust that is part of an employee benefit arrangement or an individual retirement account.

(b) A trust account established under a qualified tuition savings program pursuant to ORS 348.841 to 348.873.

(c) Trust accounts maintained on behalf of clients or customers by licensed service professionals, including trust accounts maintained by attorneys pursuant to rules of professional conduct adopted under ORS 9.490 and by real estate brokers pursuant to ORS 696.241.

(d) An endowment care fund established by a cemetery authority pursuant to ORS 97.810.

(e) Funds maintained by a public [*bodies*] **body**, as defined [*by*] **in** ORS 174.109, or other governmental entities.

(f) Trust funds held for a single business transaction or an escrow arrangement.

(g) Trusts created by a depository agreement with a financial institution.

(h) Trusts created by an account agreement with a regulated financial services entity.

(i) An account maintained under the Oregon Uniform Transfers to Minors Act as set forth in ORS 126.805 to 126.886.

(j) A fund maintained pursuant to court order in conjunction with a bankruptcy proceeding or business liquidation.

(k) A business trust as described in ORS 128.560.

(L) A voting trust as described in ORS 60.254.

(m) Funds maintained to manage proceeds from class actions.

(n) A trust deed as defined in ORS 86.705 [(5)] or any other trust created solely to secure the performance of an obligation.

(o) A trust established on behalf of a resident of a residential facility under ORS 443.880.

(p) A trust managed by a nonprofit association for persons with disabilities under 42 U.S.C. 1396p(d)(4)(C), as in effect on January 1, 2006, and under the rules of the Department of Human Services.

(q) A resulting or constructive trust.

(r) A trust fund established for a purchaser who enters into a prearrangement sales contract, as defined in ORS 97.923, or a preconstruction sales contract, as defined in ORS 97.923.

SECTION 4. ORS 456.280 is amended to read:

456.280. (1) A person may create an affordable housing covenant as a condition of giving or receiving a subsidy during ownership or upon [conveyance of] **conveying** real property, in the form of a covenant, servitude, easement, condition or restriction in a deed, declaration, land sale contract, trust deed, mortgage, security agreement, assignment, will, trust, rental agreement, lease or other written instrument that is:

(a) Executed by the owner of the real property and the covenant holder; and

(b) Recorded in the deed and mortgage records of the county in which the real property is located.

(2) The affordable housing covenant creates a real property right in an eligible covenant holder to:

(a) Limit the use of real property to occupancy by low or moderate income households in rental or owner-occupied housing;

(b) Restrict the rental rate or sale price of real property to ensure affordability by future low and moderate income households; [or]

(c) Limit, restrict or condition the use and enjoyment of real property to create or retain rental or owner-occupied affordable housing for occupancy by low or moderate income households[.]; **or**

(d) Purchase real property at a trustee's sale under terms set forth in ORS 86.755.

(3) The affordable housing covenant may be conveyed, assigned, modified or terminated by a written instrument recorded in the deed and mortgage records of the county in which the real property is located. The affordable housing covenant may be:

(a) Conveyed or assigned by a written instrument executed by the conveying or assigning covenant holder and the accepting covenant holder;

(b) Modified by a written instrument executed by the covenant holder and the owner of the real property; or

(c) Terminated by a written instrument executed by the covenant holder and a third party with the right to enforce the covenant.

(4) An affordable housing covenant is not invalid because a holder of the covenant is not an eligible covenant holder. A covenant holder who is not an eligible covenant holder may not modify, terminate or commence an action to enforce the covenant. However, the covenant holder may convey or assign the covenant to an eligible covenant holder who may modify or terminate the covenant or commence an action to enforce the covenant.

(5) An affordable housing covenant is unlimited in duration unless:

(a) The instrument creating the covenant provides otherwise;

(b) The duration of the covenant is modified [*prior to the expiration of its*] **before the stated term of the covenant expires**; or

(c) The covenant is terminated.

(6) Upon termination of an affordable housing covenant for any reason [prior to the expiration of its] **before the stated term of the covenant expires**, the covenant holder is entitled to receive the difference between the fair market value of the real property immediately before termination and the fair market value of the real property immediately after termination.

(7) **An affordable housing covenant does not impair** an interest in real property [in existence when an] **that exists at the time the** affordable housing covenant is created [is not impaired by the affordable housing covenant] unless the owner of the interest is a party to the affordable housing covenant, subordinates the interest to the affordable housing covenant or otherwise agrees to be bound by the affordable housing covenant.

(8) [The] **An instrument [creating] that creates** an affordable housing covenant may grant the eligible covenant holder, or a designee of the eligible covenant holder, a right to enter the real property to ensure compliance with the covenant and, if the right is granted, the instrument shall designate the time and manner in which the eligible covenant holder or designee may enter the real property.

(9) An affordable housing covenant holder may assign a third-party right of enforcement, by a written instrument executed by the covenant holder and recorded in the deed and mortgage records of the county in which the real property is located, to a person that qualifies [to be] **as** an eligible covenant holder but that is not the holder of that covenant.

(10) An affordable housing covenant is automatically terminated if:

(a) The only holder of the covenant is a corporation, as defined in ORS 65.001, that is dissolved without conveying or assigning the covenant; and

(b) No person is entitled to exercise a third-party right of enforcement pursuant to subsection (9) of this section.

SECTION 5. (1) The amendments to ORS 86.705 and 86.755 by sections 1 and 2 of this 2011 Act apply to trustee's sales for which notice was sent on or after the effective date of this 2011 Act.

(2) The amendments to ORS 456.280 by section 4 of this 2011 Act apply to affordable housing covenants that are created on or after the effective date of this 2011 Act.

Passed by Senate April 21, 2011

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Repassed by Senate June 21, 2011

.....M.,....., 2011

Approved:

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Robert Taylor, Secretary of Senate

.....M.,....., 2011

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Peter Courtney, President of Senate

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John Kitzhaber, Governor

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Filed in Office of Secretary of State:

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Bruce Hanna, Speaker of House

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Arnie Roblan, Speaker of House

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Kate Brown, Secretary of State