

1                   A bill to be entitled  
2           An act relating to nonjudicial foreclosure of commercial  
3           real property; creating chapter 52, F.S., relating to  
4           nonjudicial foreclosure of commercial real property;  
5           providing a short title; providing for applicability of  
6           provisions; providing definitions; providing for  
7           appointment of a trustee; providing for trustee initiation  
8           of foreclosure of mortgage liens; providing for objections  
9           by obligors; providing for redemption of property;  
10          providing requirements to be met before encumbered  
11          property may be sold by trustee; providing for notice of  
12          default and intent to foreclose; providing for notice and  
13          manner of sale; specifying the effect of a sale; providing  
14          for a trustee's certificate of compliance and deed;  
15          providing for disposition of sale proceeds; providing that  
16          provisions concerning the trustee foreclosure procedure do  
17          not impair or otherwise affect a foreclosing creditor's  
18          right to bring a judicial foreclosure action; providing  
19          for civil actions against foreclosing creditors for  
20          material failure to follow trustee foreclosure procedures;  
21          providing criminal penalties for a trustee who  
22          intentionally violates provisions concerning the trustee  
23          foreclosure procedure; providing for construction;  
24          providing for application of provisions to mortgage liens  
25          existing prior to the effective date of this act for which  
26          a foreclosure proceeding has not commenced; providing a  
27          directive to the Division of Statutory Revision; providing  
28          an effective date.

29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56

Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapter 52, Florida Statutes, consisting of sections 52.101, 502.102, 52.103, and 52.104, is created to read:

CHAPTER 52

NONJUDICIAL FORECLOSURE OF COMMERCIAL REAL PROPERTY

52.101 Short title; applicability.—

(1) This chapter may be cited as the "Nonjudicial Foreclosure of Commercial Real Property Act."

(2) In lieu of any other foreclosure remedy that may be available under the laws of this state within the judicial system, this chapter may, at the option of the foreclosing creditor, be used to effect a foreclosure of a security instrument in commercial real property. However, if the foreclosing creditor does not elect to use this chapter to effect a foreclosure, this chapter does not modify any other foreclosure remedy available to the foreclosing creditor under the laws of this state.

52.102 Definitions.—As used in this chapter, the term:

(1) "Commercial real property" means real property that, when a security instrument is entered into, is used or is intended by its owner to be used other than for the personal, family, or household purposes of its owner. Residential real property on which the borrower resides is deemed commercial if it is improved, or is intended by its owner to be improved, to have more than four additional dwelling units.

HB 799

2011

57       (2) "Debtor" means a person who is obligated, primarily or  
58 secondarily, on an obligation secured in whole or in part by  
59 commercial real property.

60       (3) "Foreclosing creditor" means a secured creditor who is  
61 engaged in a foreclosure under this chapter.

62       (4) "Interest holder" means a person who holds a  
63 possessory interest, other than a leasehold interest with a  
64 duration of 1 year or less, in nonresidential real property in  
65 which a security interest exists.

66       (5) "Junior interest holder" means a person who owns a  
67 legally recognized interest in real or personal property that is  
68 subordinate in priority to a security interest foreclosed under  
69 this chapter.

70       (6) "Nonresidential real property" means commercial real  
71 property.

72       (7) "Obligor" means a person who owes payment or other  
73 performance of an obligation, whether absolute or conditional,  
74 primary or secondary, secured under a security instrument,  
75 whether or not the security instrument imposes personal  
76 liability on the obligor. The term does not include a person  
77 whose sole interest in the property is a security interest.

78       (8) "Personalty and fixtures" means any personal property  
79 or fixtures located on or within or affixed to a commercial real  
80 property and pledged as collateral for the credit facility in  
81 default. To the extent the lender has a perfected security  
82 interest in such collateralized personalty and fixtures, such  
83 property shall be encompassed by the term "commercial real

84 property" and the security interest in such property shall be  
85 foreclosed in the manner set forth in this chapter.

86 (9) "Real property" means any estate or interest in, over,  
87 or under land, including minerals, structures, fixtures, and  
88 other things that by custom, usage, or law pass with a  
89 conveyance of land though not described or mentioned in the  
90 contract of sale or instrument of conveyance. The term includes  
91 the interest of a landlord or tenant and, unless under the law  
92 of the state in which the property is located that interest is  
93 personal property, an interest in a common interest community.

94 (10) "Secured creditor" means a creditor that has the  
95 right to foreclose a security interest in real property under  
96 this chapter.

97 (11) "Security instrument" means a mortgage, deed of  
98 trust, security deed, contract for deed, agreement for deed,  
99 land sale contract, lease creating a security interest, or other  
100 contract or conveyance that creates or provides for an interest  
101 in real property to secure payment or performance of an  
102 obligation, whether by acquisition or retention of a lien, a  
103 lessor's interest under a lease, or title to the real property.  
104 A security instrument may also create a security interest in  
105 personal property. If a security instrument makes a default  
106 under any other agreement a default under the security  
107 instrument, the security instrument includes the other  
108 agreement. The term includes any modification or amendment of a  
109 security instrument, and includes a lien on real property  
110 created by a record to secure an obligation owed by an owner of

HB 799

2011

111 the real property to an association in a common interest  
112 community or under covenants running with the real property.

113 (12) "Security interest" means an interest in real or  
114 personal property that secures payment or performance of an  
115 obligation.

116 (13) "Trustee" means an attorney who is a member in good  
117 standing of The Florida Bar and who has been practicing law for  
118 at least 5 years or that attorney's law firm, or a title insurer  
119 who is authorized to transact business in this state under s.  
120 624.401 and who has been authorized to transact business for at  
121 least 5 years.

122 52.103 Procedure for trustee foreclosure of mortgage  
123 lien.—This section establishes a trustee foreclosure procedure  
124 for mortgage liens and security interests in personalty and  
125 fixtures collateralizing the same obligation for which the  
126 mortgage was given.

127 (1) APPOINTMENT OF TRUSTEE.—

128 (a) A trustee or a substitute trustee may be appointed by  
129 a foreclosing creditor at any time by recording a notice of  
130 appointment of trustee or notice of substitution of trustee in  
131 the official records of the county or counties in which the  
132 commercial real property is located. A foreclosing creditor may  
133 appoint multiple trustees in a single appointment and any  
134 appointed trustee may be used by the foreclosing creditor  
135 regarding the trustee foreclosure of any mortgage lien.

136 (b) A trustee shall use good faith, skill, care, and  
137 diligence in discharging all of the trustee duties under this  
138 section and shall deal honestly and fairly with all parties.

139 (c) The recorded notice of appointment of trustee or  
 140 notice of substitution of trustee shall contain the name and  
 141 address of the trustee or substitute trustee and the name and  
 142 address of the foreclosing creditor.

143 (2) INITIATING TRUSTEE FORECLOSURE OF MORTGAGE LIENS.—

144 (a) Before initiating the trustee foreclosure against  
 145 commercial real property, the mortgage or an amendment to a  
 146 mortgage executed by the obligor before the effective date of  
 147 this section must contain a statement in substantially the  
 148 following form:

149  
 150 If the mortgagor (which term shall include the original  
 151 mortgagor's successors or assigns) fails to make timely  
 152 payments under the obligation secured by this mortgage, or  
 153 is otherwise deemed in uncured default of this mortgage,  
 154 the lien against the mortgagor's commercial real property  
 155 created by this mortgage may be foreclosed in accordance  
 156 with either a judicial foreclosure procedure or a trustee  
 157 foreclosure procedure and may result in the loss of your  
 158 commercial real property. If the mortgagee initiates a  
 159 trustee foreclosure procedure, the mortgagor has the option  
 160 to object and the mortgagee may proceed only by filing a  
 161 judicial foreclosure action.

162  
 163 (b) In order to initiate a trustee foreclosure procedure  
 164 against commercial real property, the foreclosing creditor shall  
 165 deliver to the trustee an affidavit sworn to, under penalties of  
 166 perjury, by the creditor that identifies the obligor, the notice

HB 799

2011

167 address of the obligor, the commercial real property, the  
168 official records book and page number in which the mortgage is  
169 recorded, the personalty and fixtures and the information  
170 regarding perfection of the security interest in such property,  
171 and the name and notice address of any holder of a junior  
172 interest in any collateral subject to foreclosure. The affidavit  
173 shall be accompanied by a title search of the commercial real  
174 property identifying any junior interest holders of record and a  
175 lien search, and the effective date of the title search and the  
176 lien search must be a date that is within 60 calendar days  
177 before the date of the affidavit. The affidavit shall also:

178 1. State the facts that establish that the obligor has  
179 defaulted in the obligation to make a payment under a specified  
180 provision of the mortgage or is otherwise deemed in uncured  
181 default under a specified provision of the mortgage.

182 2. Specify the amounts secured by the lien as of the date  
183 of the affidavit and a per diem amount to account for further  
184 accrual of the amounts secured by the lien.

185 3. State that the appropriate amount of documentary stamp  
186 tax and intangible taxes has been paid upon recording of the  
187 mortgage or otherwise paid to the state.

188 4. State that the foreclosing creditor is the holder of  
189 the note and has complied with all preconditions in the note and  
190 mortgage to determine the amounts secured by the lien and to  
191 initiate the use of the trustee foreclosure procedure.

192 (3) OBLIGOR'S RIGHTS.—

193 (a) The obligor may object to the foreclosing creditor's  
194 use of the trustee foreclosure procedure for a specific default

HB 799

2011

195 within 15 business days after receipt of notice by sending a  
196 written objection to the trustee using the objection form  
197 provided for in subsection (5), and the foreclosing creditor may  
198 proceed thereafter only with a judicial foreclosure action as to  
199 that specified default.

200 (b) At any time before the trustee issues the certificate  
201 of sale under paragraph (7)(f), the obligor may redeem the  
202 commercial real property by paying the amounts secured by the  
203 lien in cash or certified funds to the trustee. After the  
204 trustee issues the certificate of sale, there is no right of  
205 redemption.

206 (4) CONDITIONS TO TRUSTEE'S EXERCISE OF POWER OF SALE.—A  
207 trustee may sell an encumbered commercial real property  
208 foreclosed under this section if:

209 (a) The trustee has received the affidavit from the  
210 foreclosing creditor under paragraph (2)(b).

211 (b) The trustee has not received a written objection to  
212 the use of the trustee foreclosure procedure under paragraph  
213 (3)(a).

214 (c) The commercial real property was not redeemed under  
215 paragraph (3)(b).

216 (d) There is no lis pendens recorded and pending against  
217 the same commercial real property.

218 (e) The trustee is in possession of the original  
219 promissory note and all renewals, modifications, or other  
220 renegotiations thereof then in effect executed by the mortgagor  
221 and secured by the mortgage lien.

222 (f) The trustee has provided written notice of default and  
 223 intent to foreclose as required under subsection (5) and a  
 224 period of at least 30 calendar days has elapsed after the notice  
 225 is deemed perfected under subsection (5).

226 (g) The notice of sale required under subsection (6) has  
 227 been recorded in the official records of the county in which the  
 228 mortgage was recorded.

229 (5) NOTICE OF DEFAULT AND INTENT TO FORECLOSE.—

230 (a) In any foreclosure proceeding under this section, the  
 231 trustee is required to notify the obligor of the proceeding by  
 232 sending the obligor a written notice of default and intent to  
 233 foreclose to the notice address of the obligor by certified  
 234 mail, commercial delivery service, or delivery service permitted  
 235 by the agreement between the mortgagor and the mortgagee, return  
 236 receipt requested, and by first-class mail or permitted delivery  
 237 service, postage prepaid, as follows:

238 1. The notice of default and intent to foreclose shall  
 239 identify the obligor, the notice address of the obligor, the  
 240 legal description of the commercial real property, the nature of  
 241 the default, the amounts secured by the lien, and a per diem  
 242 amount to account for further accrual of the amounts secured by  
 243 the lien and shall state the method by which the obligor may  
 244 cure the default, including the period of time after the date of  
 245 the notice of default and intent to foreclose within which the  
 246 obligor may cure the default.

247 2. The notice of default and intent to foreclose shall  
 248 include an objection form with which the obligor can notify the  
 249 trustee that the obligor objects to the use of the trustee

250 foreclosure procedure by signing and returning the objection  
 251 form to the trustee. The objection form shall identify the  
 252 obligor, the notice address of the obligor, the commercial real  
 253 property, and the return address of the trustee and shall state:

254  
 255 The undersigned obligor exercises the obligor's right to  
 256 object to the use of the trustee foreclosure procedure  
 257 contained in section 52.103, Florida Statutes.

258  
 259 The objection is not effective unless notarized and sworn to  
 260 under penalty of perjury.

261 3. The notice of default and intent to foreclose shall  
 262 also contain a statement in substantially the following form:

263  
 264 If you fail to cure the default as set forth in this notice  
 265 or take other appropriate action with regard to this  
 266 foreclosure matter, you risk losing ownership of your  
 267 commercial real property through the trustee foreclosure  
 268 procedure established in section 52.103, Florida Statutes.  
 269 You may choose to sign and send to the trustee the enclosed  
 270 objection form notifying him or her of your objection to  
 271 proceeding nonjudicially. You have the right to cure your  
 272 default in the manner set forth in this notice at any time  
 273 before the trustee's sale of your commercial real property.  
 274 You may be responsible for the difference between the  
 275 amount for which the trustee can sell the property and the  
 276 amount you still owe under the mortgage. A deficiency may  
 277 only be established in a court of law in a proceeding

HB 799

2011

278 separate from the trustee's foreclosure. In any such  
279 proceeding, you will be allowed to raise the sufficiency of  
280 the trustee's sale price as a defense to the deficiency.

281  
282 4. The trustee shall also mail a copy of the notice of  
283 default and intent to foreclose, without the objection form, to  
284 the notice address of any junior interest holder by certified  
285 mail, registered mail, or permitted delivery service, return  
286 receipt requested, and by first-class mail or permitted delivery  
287 service, postage prepaid.

288 5. Notice under this paragraph is considered perfected  
289 upon the trustee receiving the return receipt bearing the  
290 signature of the obligor or junior interest holder, as  
291 applicable, within 30 calendar days after the trustee sent the  
292 notice under this paragraph. Notice under this paragraph is not  
293 perfected if the notice is returned as undeliverable within 30  
294 calendar days after the trustee sent the notice, if the trustee  
295 cannot ascertain from the receipt that the obligor or junior  
296 interest holder, as applicable, is the person who signed the  
297 receipt, or if the receipt from the obligor or junior interest  
298 holder, as applicable, is returned or refused within 30 calendar  
299 days after the trustee sent the notice.

300 (b) If the notice required by paragraph (a) is returned as  
301 undeliverable within 30 calendar days after the trustee sent the  
302 notice, the trustee shall perform a diligent search and inquiry  
303 to obtain a different address for the obligor or junior interest  
304 holder. For purposes of this paragraph, any address known and  
305 used by the foreclosing creditor for sending regular mailings or

306 other communications from the foreclosing creditor to the  
 307 obligor or junior interest holder, as applicable, shall be  
 308 included with other addresses produced from the diligent search  
 309 and inquiry, if any.

310 1. If the trustee's diligent search and inquiry produces  
 311 an address different from the notice address, the trustee shall  
 312 mail a copy of the notice by certified mail, registered mail, or  
 313 permitted delivery service, return receipt requested, and by  
 314 first-class mail or permitted delivery service, postage prepaid,  
 315 to the new address. Notice under this subparagraph is considered  
 316 perfected upon the trustee receiving the return receipt bearing  
 317 the signature of the obligor or junior interest holder, as  
 318 applicable, within 30 calendar days after the trustee sent the  
 319 notice under this subparagraph. Notice under this subparagraph  
 320 is not perfected if the trustee cannot ascertain from the  
 321 receipt that the obligor or junior interest holder, as  
 322 applicable, is the person who signed the receipt or the receipt  
 323 from the obligor or junior interest holder, as applicable, is  
 324 returned refused. If the trustee does not perfect notice under  
 325 this subparagraph, the trustee shall perfect service as provided  
 326 in paragraph (c).

327 2. If the trustee's diligent search and inquiry does not  
 328 locate a different address for the obligor or junior interest  
 329 holder, as applicable, the trustee may perfect notice against  
 330 that person as provided in paragraph (c).

331 (c) If the notice is not perfected under subparagraph  
 332 (a)5. and such notice was not returned as undeliverable, or if  
 333 the notice was not perfected under subparagraph (b)1., the

334 trustee may perfect notice by publication in a newspaper of  
335 general circulation in the county or counties in which the  
336 commercial real property is located. The notice shall appear at  
337 least once a week for 2 consecutive weeks. Notice under this  
338 paragraph is considered perfected upon completion of publication  
339 as required in this paragraph.

340 (d) If notice is perfected under paragraph (a), the  
341 trustee shall execute an affidavit in recordable form setting  
342 forth the manner in which notice was perfected and attach the  
343 affidavit to the certificate of compliance set forth in  
344 subsection (9). The affidavit shall state the nature of the  
345 notice, the date on which the notice was mailed, the name and  
346 address on the envelope containing the notice, the manner in  
347 which the notice was mailed, and the basis for that knowledge.

348 (e) If notice is perfected under paragraph (b), the  
349 trustee shall execute an affidavit in recordable form setting  
350 forth the manner in which notice was perfected and attach the  
351 affidavit to the certificate of compliance set forth in  
352 subsection (9). The affidavit shall state the nature of the  
353 notice, the dates on which the notice was mailed, the name and  
354 addresses on the envelopes containing the notice, the manner in  
355 which the notice was mailed, the fact that a signed receipt from  
356 the certified mail, registered mail, or permitted delivery  
357 service was timely received, and the name and address on the  
358 envelopes containing the notice.

359 (f) If notice is perfected under paragraph (c), the  
360 trustee shall execute an affidavit in recordable form setting  
361 forth the manner in which notice was perfected and attach the

362 affidavit to the certificate of compliance set forth in  
 363 subsection (9). The affidavit shall include all the information  
 364 contained in either paragraph (d) or paragraph (e), as  
 365 applicable, shall state that the notice was perfected by  
 366 publication after diligent search and inquiry was made for the  
 367 current address for the person, shall include a statement that  
 368 notice was perfected by publication, and shall set forth the  
 369 information required by s. 49.041 in the case of a natural  
 370 person or s. 49.051 in the case of a corporation, whichever is  
 371 applicable. No other action of the trustee is necessary to  
 372 perfect notice.

373 (6) NOTICE OF SALE.—

374 (a) The notice of sale shall set forth:

- 375 1. The name and notice addresses of the obligor and any  
 376 junior interest holder.
- 377 2. The legal description of the commercial real property  
 378 and a list of all personalty and fixtures.
- 379 3. The name and address of the trustee.
- 380 4. A description of the default that is the basis for the  
 381 foreclosure.
- 382 5. The official records book and page numbers in which the  
 383 mortgage is recorded.
- 384 6. The amounts secured by the lien and a per diem amount  
 385 to account for further accrual of the amounts secured by the  
 386 lien.
- 387 7. The date, location, and starting time of the trustee's  
 388 sale.

389 8. The right of and the method by which the obligor may  
 390 redeem the collateral or the right of any junior interest holder  
 391 to redeem its interest up to the date the trustee issues the  
 392 certificate of sale in accordance with paragraph (7) (f).

393 (b) The trustee shall send a copy of the notice of sale  
 394 within 3 business days after the date it is submitted for  
 395 recording by first-class mail or permitted delivery service,  
 396 postage prepaid, to the notice addresses of the obligor and any  
 397 junior interest holder.

398 (c) After the date of recording of the notice of sale,  
 399 notice is not required to be given to any person claiming an  
 400 interest in the commercial real property except as provided in  
 401 this section. The recording of the notice of sale has the same  
 402 force and effect as the filing of a lis pendens in a judicial  
 403 proceeding under s. 48.23.

404 (d) The trustee shall publish the notice of sale in a  
 405 newspaper of general circulation in the county or counties in  
 406 which the commercial real property is located at least once a  
 407 week for 2 consecutive weeks before the date of the sale. The  
 408 last publication shall occur at least 5 calendar days before the  
 409 sale.

410 (7) MANNER OF SALE.—

411 (a) The sale of foreclosed commercial real property by the  
 412 trustee in a public auction shall be held in the county in which  
 413 the commercial real property is located on the date, location,  
 414 and starting time designated in the notice of sale, which shall  
 415 be after 9 a.m. but before 4 p.m. on a business day not less  
 416 than 30 calendar days after the recording of the notice of sale.

HB 799

2011

417 The trustee's sale may occur online at a specific website on the  
418 Internet or in any other manner used by the clerk of the court  
419 for a judicial foreclosure sales procedure in the county or  
420 counties in which the commercial real property is located.

421 (b) The trustee shall conduct the sale and may act as the  
422 auctioneer.

423 (c) The foreclosing creditor and any person other than the  
424 trustee may bid at the sale. In lieu of participating in the  
425 sale, the foreclosing creditor may send the trustee written  
426 bidding instructions that the trustee shall announce as  
427 appropriate during the sale.

428 (d) The trustee may postpone the sale from time to time.  
429 In such case, notice of postponement must be given by the  
430 trustee at the date, time, and location contained in the notice  
431 of sale. The notice of sale for the postponed sale shall be  
432 mailed as provided in paragraph (6) (b), recorded as provided in  
433 paragraph (4) (g), and published as provided in paragraph (6) (d).  
434 The effective date of the initial notice of sale as provided in  
435 paragraph (6) (b) is not affected by a postponed sale.

436 (e) The highest bidder of the commercial real property  
437 shall pay the price bid to the trustee in cash or certified  
438 funds on the day of the sale. If the foreclosing creditor is the  
439 highest bidder, the foreclosing creditor shall receive a credit  
440 in the amount of the high bid up to the amount set forth in the  
441 notice of sale as provided in subparagraph (6) (a) 6.

442 (f) On the date of the sale and upon receipt of the cash  
443 or certified funds due from the highest bidder, the trustee  
444 shall issue to the highest bidder a certificate of sale stating

HB 799

2011

445 that a foreclosure conforming to the requirements of this  
446 section has occurred, including the time, location, and date of  
447 the sale, that the foreclosed commercial real property was sold,  
448 the amounts secured by the lien, and the amount of the highest  
449 bid. A copy of the certificate of sale shall be mailed by  
450 certified mail, registered mail, or permitted delivery service,  
451 return receipt requested, to all persons entitled to receive a  
452 notice of sale under subsection (6).

453 (g) Before a sale is conducted pursuant to this  
454 subsection, a junior interest holder may pursue adjudication by  
455 court, by interpleader, or in any other authorized manner  
456 reflecting any matter that is disputed by the junior interest  
457 holder.

458 (8) EFFECT OF TRUSTEE'S SALE.—

459 (a) A sale conducted under subsection (7) forecloses and  
460 terminates all interests of any person with notice to whom  
461 notice is given under subsection (5) and paragraph (6)(b), and  
462 of any other person claiming interests by, through, or under any  
463 such person, in the affected commercial real property. A failure  
464 to give notice to any person entitled to notice does not affect  
465 the validity of the sale as to the interests of any person  
466 properly notified. A person entitled to notice but not given  
467 notice has the rights of a person not made a defendant in a  
468 judicial foreclosure.

469 (b) Upon issuance of a certificate of sale under paragraph  
470 (7)(f), all rights of redemption that have been foreclosed under  
471 this section shall terminate.

HB 799

2011

472 (c) The foreclosing creditor may seek a deficiency  
473 judgment against the debtor in a judicial proceeding subsequent  
474 to the foreclosure sale. The debtor may raise the adequacy of  
475 the price obtained at the foreclosure sale as a defense to all  
476 or part of the deficiency, but has the burden of proof as to the  
477 alleged inadequacy.

478 (d) The issuance and recording of the trustee's deed is  
479 presumed valid and may be relied upon by third parties without  
480 actual knowledge of any irregularities in the foreclosure  
481 proceedings. If for any reason there is an irregularity in the  
482 foreclosure proceedings, a purchaser becomes subrogated to  
483 rights of the foreclosing creditor to the indebtedness that it  
484 secured to the extent necessary to reforeclose the mortgage lien  
485 in order to correct the irregularity and becomes entitled to an  
486 action de novo for the foreclosure of such mortgage lien. Any  
487 subsequent reforeclosure required to correct an irregularity may  
488 be conducted as provided in this section.

489 (9) TRUSTEE'S CERTIFICATE OF COMPLIANCE.—

490 (a) Within 10 calendar days after the trustee conducts a  
491 sale, the trustee shall execute and acknowledge a certificate of  
492 compliance that:

493 1. Confirms delivery of the notice of default and intent  
494 to foreclose and attaches the affidavit required under  
495 subsection (5).

496 2. States that the default was not cured, that the trustee  
497 did not receive any written objection under paragraph (3) (a),  
498 and that the commercial real property was not redeemed under  
499 paragraph (3) (b).

HB 799

2011

500       3. States that the trustee is in possession of the  
501 original promissory note executed by the mortgagor and secured  
502 by the mortgage lien.

503       4. Confirms that the notice of sale was published as  
504 required in paragraph (6) (d) and attaches an affidavit of  
505 publication for the notice of sale.

506       5. Confirms that the notice of sale was mailed as required  
507 in paragraph (6) (b) together with a list of the parties to whom  
508 the notice of sale was mailed.

509       (b) In furtherance of the execution of the certificate of  
510 compliance required under this subsection, the trustee may rely  
511 upon an affidavit or certification from the foreclosing creditor  
512 as to the facts and circumstances of default and failure to cure  
513 the default.

514       (10) TRUSTEE'S DEED.—

515       (a) The trustee's deed shall include the name and address  
516 of the trustee, the name and address of the highest bidder, the  
517 name of the former owner, a legal description of the commercial  
518 real property, and the name and address of the preparer of the  
519 trustee's deed. The trustee's deed may not contain any  
520 warranties of title from the trustee. The certificate of  
521 compliance shall be attached as an exhibit to the trustee's  
522 deed.

523       (b) Ten calendar days after a sale, absent the prior  
524 filing and service on the trustee of a judicial action to enjoin  
525 issuance of the trustee's deed to the commercial real property,  
526 the trustee shall:

HB 799

2011

527 1. Cancel the original promissory note executed by the  
528 mortgagor and secured by the mortgage lien.

529 2. Issue a trustee's deed to the highest bidder or the  
530 highest bidder's assignee.

531 3. Record the trustee's deed in the official records of  
532 the county or counties in which the commercial real property is  
533 located.

534 (c)1. The certificate of compliance and trustee's deed  
535 together are presumptive evidence of the truth of the matters  
536 set forth in them, and an action to set aside the sale and void  
537 the trustee's deed may not be filed or otherwise pursued against  
538 any person acquiring the commercial real property for value.

539 2. The trustee's deed conveys to the highest bidder or its  
540 assignee all rights, title, and interest in the commercial real  
541 property and personalty and fixtures that the former owner had,  
542 or had the power to convey, together with all rights, title, and  
543 interest that the former owner or his or her successors in  
544 interest acquired after the execution of the mortgage.

545 3. The issuance and recording of a trustee's deed has the  
546 same force and effect as the issuance and recording of a  
547 certificate of title by the clerk of the court in a judicial  
548 foreclosure action.

549 (11) DISPOSITION OF PROCEEDS OF SALE.—

550 (a) The trustee shall apply the proceeds of the sale as  
551 follows:

552 1. To the expenses of the sale, including compensation of  
553 the trustee.

HB 799

2011

554 2. To the amount owed and set forth in the notice as  
555 required under subparagraph (6) (a) 6.

556 3. If there are junior interest holders, the trustee may  
557 file an action in interpleader, pay the surplus to a court of  
558 competent jurisdiction, name the competing junior interest  
559 holders, and ask the court to determine the proper distribution  
560 of the surplus. In an interpleader action, the trustee shall  
561 recover reasonable attorney's fees and costs.

562 4. If there are no junior interest holders, or if all  
563 junior interest holders have been paid, any surplus shall be  
564 paid to the former owner. If the trustee is unable to locate the  
565 former owner within 1 year after the sale, the surplus, if any,  
566 shall be deposited with the Chief Financial Officer as provided  
567 in chapter 717.

568 (b) In disposing of the proceeds of the sale, the trustee  
569 may rely on the information provided in the affidavit of the  
570 foreclosing creditor under paragraph (2) (b) and, in the event of  
571 a dispute or uncertainty over such claims, the trustee has the  
572 discretion to submit the matter to adjudication by court, by  
573 interpleader, or in any other authorized manner and shall  
574 recover reasonable attorney's fees and costs.

575 (12) JUDICIAL FORECLOSURE ACTIONS.—The trustee foreclosure  
576 procedure established in this section does not impair or  
577 otherwise affect the foreclosing creditor's continuing right to  
578 bring a judicial foreclosure action, in lieu of using the  
579 trustee foreclosure procedure, with respect to any mortgage  
580 lien.

HB 799

2011

581           (13) ACTIONS FOR FAILURE TO FOLLOW TRUSTEE FORECLOSURE  
582 PROCEDURE.—

583           (a) An action for actual damages for a material violation  
584 of this section may be brought by an obligor against the  
585 foreclosing creditor for the failure to follow the trustee  
586 foreclosure procedure contained in this section.

587           (b) Any trustee who intentionally violates the provisions  
588 of this section concerning the trustee foreclosure procedure  
589 commits a felony of the third degree, punishable as provided in  
590 s. 775.082, s. 775.083, or s. 775.084.

591           52.104 Miscellaneous provisions.—

592           (1) In the event of a conflict between the provisions of  
593 this chapter and chapter 702 or other applicable law, the  
594 provisions of this chapter prevail. The procedures in this  
595 chapter must be given effect in the context of any foreclosure  
596 proceedings against commercial real properties governed by this  
597 chapter, chapter 702, chapter 718, or chapter 719.

598           (2) In addition to assessment liens and mortgage liens  
599 arising after the effective date of this act, this chapter  
600 applies to all mortgage liens existing prior to the effective  
601 date of this act for which a foreclosure proceeding has not yet  
602 commenced.

603           Section 2. The Division of Statutory Revision is directed  
604 to replace the phrase "the effective date of this act" wherever  
605 it occurs in this act with the date this act becomes a law.

606           Section 3. This act shall take effect July 1, 2011.