

MAINE STATE LEGISLATURE

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127th MAINE LEGISLATURE

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Legislative Document

No. 276

H.P. 194

House of Representatives, February 5, 2015

An Act Regarding Maine's Power of Sale Foreclosure Law

Reference to the Committee on Judiciary suggested and ordered printed.

Robert B. Hunt
ROBERT B. HUNT
Clerk

Presented by Representative FREDETTE of Newport.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 14 MRSA §6203-A**, as repealed and replaced by PL 2009, c. 476, Pt. B, §3
3 and affected by §9, is amended to read:

4 **§6203-A. Power of sale; procedure; notice; form**

5 **1. Power of sale.** Any holder of a mortgage on real estate that is granted by a
6 corporation, partnership, including a limited partnership or a limited liability partnership,
7 limited liability company or trustee of a trust and that contains a power of sale, as
8 described in Title 33, section 501-A, or a person authorized by the power of sale, or an
9 attorney duly authorized by a writing under seal, or a person acting in the name of the
10 holder of such mortgage or any such authorized person, may, upon breach of condition
11 and without action, do all the acts authorized or required by the power; except that a sale
12 under the power is not effectual to foreclose a mortgage unless, previous to the sale,
13 notice has been published once in each of 3 successive weeks, the first publication to be
14 not less than 21 days before the day of the sale in a newspaper of general circulation in
15 the town where the land lies and which notice must ~~prominently state the street address of~~
16 ~~the real estate encumbered by the mortgage deed, if any, and the book and page number~~
17 ~~of the mortgage, if any~~ comply with the requirements of subsection 3. This provision is
18 implied in every power of sale mortgage in which it is not expressly set forth. For
19 mortgage deeds executed on or after October 1, 1993, the power of sale may be used only
20 if the mortgage deed states that it is given primarily for a business, commercial or
21 agricultural purpose. ~~A copy of the notice must, at least 21 days before the date of the~~
22 ~~sale under the power in the mortgage, be recorded in each registry of deeds in which the~~
23 ~~mortgage deed is or by law ought to be recorded and must be served on the mortgagor or~~
24 ~~its representative in interest, or may be sent by registered mail addressed to the mortgagor or~~
25 ~~or the mortgagor's representative at the mortgagor's last known address, or to the person~~
26 ~~and to the address as may be agreed upon in the mortgage, at least 21 days before the date~~
27 ~~of the sale under the power in the mortgage.~~ Any power of sale incorporated into a
28 mortgage is not affected by the subsequent transfer of the mortgaged premises from the
29 corporation, partnership, including a limited partnership or a limited liability partnership,
30 limited liability company or trustee of the trust to any other type of organization or to an
31 individual or individuals. The power of sale may not be used to foreclose a mortgage
32 deed granted by a trustee of a trust if at the time the mortgage deed is given the real estate
33 is used exclusively for residential purposes, the real estate has 4 or fewer residential units
34 and one of the units is the principal residence of the owner of at least 1/2 of the beneficial
35 interest in the trust. If the mortgage deed contains a statement that at the time the
36 mortgage deed is given the real estate encumbered by the mortgage deed is not used
37 exclusively for residential purposes, that the real estate has more than 4 residential units
38 or that none of the residential units is the principal residence of the owner of at least 1/2
39 of the beneficial interest in the trust, the statement conclusively establishes these facts and
40 the mortgage deed may be foreclosed by the power of sale. The method of foreclosure of
41 real estate mortgages provided by this section is specifically subject to the ~~order of~~
42 ~~priority~~ rights of junior mortgagees set out in section 6205.

43 **1-A. Notice to mortgagor and parties in interest; definition.** At least 21 days
44 before the date of the sale under the power in a mortgage, a copy of the foreclosure notice

1 must be served on the mortgagor or its representative in interest, or may be sent by
2 registered or certified mail addressed to the mortgagor or the mortgagor's representative
3 at the mortgagor's last known address, or to the person and to the address as may be
4 agreed upon in the mortgage or to the address as may be provided in writing by the
5 mortgagee. In addition, a copy of the foreclosure notice must be sent by
6 first-class mail, postmarked at least 21 days prior to the public sale, to all other parties in
7 interest, except for parties in interest having a superior priority to the foreclosing
8 mortgagee, at the address, if any, listed in the instrument evidencing the interest, and, if
9 none is listed, to the registered agent for the party in interest, or to any other address that
10 may be readily available to the mortgagee. For the purposes of this section, "parties in
11 interest" means those parties having a claim to the real estate whose claim is recorded in
12 the registry of deeds as of the time of recording the notice of foreclosure. Failure to
13 notify any party in interest, other than the mortgagor, does not invalidate the foreclosure
14 as to other parties in interest who were given notice.

15 **2. Notice to tenants; effect on title.** In addition to the notices provided pursuant to
16 subsection ~~4~~ 1-A, the mortgagee shall provide a copy of the foreclosure notice to a
17 residential tenant if the mortgagee knows or should know by exercise of due diligence
18 that the property is occupied as a rental unit. Upon request from a mortgagee, the
19 mortgagor or its representative in interest shall provide the name, address and other
20 contact information for any residential tenant. Notice to a residential tenant may be
21 served on the residential tenant by sheriff ~~or~~, may be sent by first class mail ~~and~~
22 ~~registered mail~~ at the residential tenant's last known address or may be posted
23 conspicuously at each entrance to the mortgaged premises. A residential tenant may not
24 be evicted unless a mortgagee institutes an action for forcible entry and detainer pursuant
25 to section 6001 at least 21 days after a mortgagee has served the notice required by this
26 subsection. This subsection may not be construed to prohibit an action for forcible entry
27 and detainer in accordance with section 6001 for a reason that is not related to a
28 foreclosure sale. The failure to provide the notice required by this subsection does not
29 affect the validity of the foreclosure sale.

30 **2-A. Recording foreclosure notice.** At least 21 days before the date of a sale under
31 the power in a mortgage, a copy of the foreclosure notice must be recorded in each
32 registry of deeds in which the mortgage deed is or by law ought to be recorded in order to
33 provide constructive notice.

34 **3. Form of foreclosure notice.** A foreclosure notice must identify the mortgagee,
35 the mortgagor, the terms of the public sale, the location, date and time of the public sale,
36 the street address, if any, of the real estate encumbered by the mortgage, a description of
37 the real estate encumbered by the mortgage, which may be incorporated by reference to
38 the book and page number of an instrument of record containing an adequate legal
39 description of the real estate, and the book and page number, if any, of the mortgage. The
40 following form of foreclosure notice may be used and may be altered as circumstances
41 require; but nothing herein may be construed to prevent the use of other forms.

42 FORM

43 Mortgagee's sale of real estate

1 By virtue of and in execution of the Power of Sale contained in a certain Mortgage
2 Deed given by (Mortgagor) to (Mortgagee) dated
3 and recorded in the County Registry of Deeds, Book, Page, of
4 which Mortgage the undersigned is the present holder, (if by assignment, or
5 in any fiduciary capacity give reference), for
6 breach of the conditions of said Mortgage and for the purpose of foreclosing the same
7 there will be sold at Public Sale at o'clock, M. on the day of
8 20....., at (Location of Public Sale), all and singular the premises described in said
9 Mortgages,, (in case of partial releases state exceptions).

10 To wit: "(Description exactly as in of the real estate encumbered by the Mortgage,
11 including all which may be incorporated by reference to title, restrictions, encumbrances,
12 etc., as made in the Mortgage the book and page number of an instrument of record
13 containing an adequate legal description of the real estate)".

14 Street Address: (Street address, if any, of the real estate encumbered by the
15 Mortgage).

16 Terms of Sale: (State here the amount, if any, to be paid in cash by the purchaser at
17 the time and place of the sale, and the time or times for payment of the balance or the
18 whole as the case may be and any other terms or conditions relating to the sale).

19 Other terms to be announced at the sale.

20 Signed:
21 (Present holder of Mortgage)

22 20.....

23 **4. Notice of sale.** A foreclosure notice of sale in subsection 3, published in
24 accordance with this chapter or in accordance with the power in the mortgage together
25 with such other or further notice, if any, as is required by the mortgage, along with notice
26 to the mortgagor and parties in interest whose interest appears of record at the time that
27 the foreclosure notice is recorded in the appropriate registry of deeds, is sufficient notice
28 of the sale, and the premises are considered to have been sold, and the free and clear of
29 the interest of the mortgagor and of all other parties in interest who have been given
30 notice in compliance with subsection 1-A, except for parties in interest having a superior
31 priority to the foreclosing mortgagee. The deed thereunder must convey the premises
32 subject to and with the benefit of all restrictions, easements, improvements, outstanding
33 tax titles, municipal or other public taxes, assessments, liens or claims in the nature of
34 liens and existing encumbrances of record created prior to the mortgage, whether or not
35 reference to such restrictions, easements, improvements, liens or encumbrances is made
36 in the deed; but no purchaser at the sale is bound to complete the purchase if there are
37 encumbrances, other than those named in the mortgage and included in the notice of the
38 sale, that are not stated at the sale and included in the seller's contract with the purchase
39 or foreclosure notice. Any other party in interest having a claim to the real estate whose
40 claim is not recorded in the registry of deeds as of the time of recording the foreclosure
41 notice need not be given notice, and any such party has no claim against the real estate
42 after completion of the public sale, in accordance with Title 33, section 501-A. The
43 interests of parties in interest having a superior priority are not affected by the
44 foreclosure.

1 **5. Public sale.** At the completion of a public sale pursuant to this section, the
2 foreclosing mortgagee shall execute a purchase and sale agreement with the highest
3 bidder. The purchase and sale agreement may be assigned by the purchaser. If the
4 highest bidder fails to perform on the agreement, the foreclosing mortgagee may execute
5 a purchase and sale agreement with the next highest bidder. If the foreclosing mortgagee
6 is the highest bidder or becomes the highest bidder by failure of a bidder to perform a
7 purchase and sale agreement, a purchase and sale agreement need not be executed. A
8 mortgagee may bid and may purchase any real estate sold at such sale, as long as the
9 mortgagee is the highest bidder. If the real estate is sold for an amount in excess of the
10 outstanding balance of the mortgage together with all interest and costs, said excess must
11 be used to satisfy any other encumbrances on said property the claims of parties in
12 interest whose interests were extinguished by the foreclosure in the order of priority that
13 existed prior to the foreclosure and, after all said encumbrances of those parties in interest
14 are satisfied together with all interest and costs, any excess then remaining must be paid
15 to the mortgagor. If the mortgagor or any person holding an encumbrance such party in
16 interest cannot be found after a diligent search, the money must be paid into the Superior
17 Court in the county where the land lies for the benefit of the mortgagor or the holder of
18 any such encumbrance.

19 **6. Continuation of sale.** A public sale pursuant to this section may be adjourned,
20 for any time not exceeding 30 days and from time to time until a sale is made, by
21 announcement to those present at each adjournment.

22 **Sec. 2. 14 MRSA §6203-B,** as amended by PL 2009, c. 476, Pt. B, §4 and affected
23 by §9, is further amended to read:

24 **§6203-B. Copy of notice; affidavit; recording; evidence**

25 The person selling mortgagee or its agent shall, within 30 days after the sale date of
26 the delivery of the deed to the purchaser or the purchaser's agent, cause a copy of the
27 notice as published and the person's an affidavit, fully and particularly stating the person's
28 mortgagee's acts, or the acts of the person's principal or ward mortgagee's agent, along
29 with a copy of the foreclosure notice as published, to be recorded in the registry of deeds
30 for the county where the land lies. The affidavit must identify the mortgagee and
31 mortgagor and include the street address, if any, of the real estate encumbered by the
32 mortgage; a description of the real estate encumbered by the mortgage, which may be
33 incorporated by reference to the book and page number of an instrument of record
34 containing an adequate legal description of the real estate; the book and page number, if
35 any, of the mortgage; the dates of publication and the name of the publishing entity of the
36 public notice required by section 6203-A, subsection 1; the recipients and mailing or
37 service dates of notices provided pursuant to section 6203-A, subsections 1 and 1-A and
38 section 6203-E; the final purchaser under the agreement described in section 6203-A,
39 subsection 5; and the date of delivery of the deed to the purchaser or the purchaser's
40 agent. If the affidavit shows that the requirements of the power of sale and section
41 6203-A, subsection 1 have in all respects been complied with, the affidavit or a certified
42 copy of the record thereof must be admitted as evidence that the power of sale was duly
43 executed. In case of an error or omission in the affidavit recorded as aforesaid, the
44 Superior Court, on petition and after such notice as it may order may, if it determines

1 proper, authorize the recording of an affidavit amending, correcting or in substitution for
2 an affidavit so recorded, and the affidavit so authorized to be recorded or a certified copy
3 of the record thereof must have mortgagee or its agent shall record an amended affidavit
4 correcting the error or omission and the amended affidavit so recorded has the same
5 effect and must be admitted in evidence, as if it had been recorded within said 30 days,
6 but such subsequent affidavit does not prejudicially affect any title or interest in land that
7 may have arisen or have been created between the recording of the original and of the
8 subsequent affidavit.

9 **Sec. 3. 14 MRSA §6203-D**, as enacted by PL 1967, c. 424, §2, is amended to
10 read:

11 **§6203-D. Limitation of actions**

12 Actions on mortgage notes, whether witnessed or not, or on other obligations to pay a
13 debt secured by a mortgage of real estate, to recover judgments for deficiencies after
14 foreclosure by sale under a power contained in the mortgage, and actions on such notes or
15 other obligations ~~which that~~ are subject to a prior mortgage, to recover the amount due
16 thereon after the foreclosure sale of such prior mortgage under the power contained
17 therein, ~~shall must~~, except as otherwise provided, be commenced within 2 years after the
18 date of ~~the foreclosure sale~~ delivery of the deed to the purchaser or the purchaser's agent
19 or, if the principal of the note or other obligation does not become payable until after the
20 ~~foreclosure sale~~ date of delivery of the deed to the purchaser or the purchaser's agent, then
21 within 2 years after the time when the cause of action for the principal accrues.

22 **Sec. 4. 14 MRSA §6203-E**, as amended by PL 1987, c. 736, §17, is further
23 amended to read:

24 **§6203-E. Liability for deficiency on sale; necessity of notice; form; affidavit**

25 No action for a deficiency ~~shall may~~ be brought by the holder of the mortgage note or
26 other obligation secured by mortgage of real estate after foreclosure by exercise of the
27 power of sale, unless a notice in writing of the mortgagee's intention to foreclose the
28 mortgage ~~shall have~~ has been served on the mortgagor or its representative in interest or
29 the same has been sent by registered or certified mail with return receipt requested at its
30 last address then known to the mortgagee, to such address as may be agreed upon in ~~said~~
31 the mortgage, together with a naming of liability for the deficiency, in substantially the
32 form below, at least 21 days before the date of the sale under the power in the mortgage,
33 and an affidavit has been signed and sworn to, within 30 days after the ~~foreclosure sale~~
34 date of delivery of the deed to the purchaser or purchaser's agent, of the mailing of ~~such~~
35 the notice. A notice mailed as aforesaid ~~shall be~~ is a sufficient notice, and such an
36 affidavit made within the time specified ~~shall be~~ is prima facie evidence in such action of
37 the mailing of such notice.

38 The following form of notice and affidavit may be used and may be altered as
39 circumstances require; but nothing herein ~~shall may~~ be construed to prevent the use of
40 other forms:

41 FORM

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Notice of Intention to Foreclose and of Liability for Deficiency After Foreclosure of Mortgage

To: A. B. of Street, Town of County of and State of

You are hereby notified in accordance with the statute, of my intention, on (date of sale), to foreclose by sale under the Power of Sale for breach of condition, the Mortgage held by me on property located on Street, Town of, County of and State of dated and recorded in the County Registry of Deeds, Book, Page, to secure a note (or other obligation) signed by you, for the whole, or any part, of which you may be liable to me and in case of a deficiency in the proceeds of the Foreclosure Sale to hold you liable for the whole or any part thereof still remaining unpaid.

Very truly yours,

.....

(Name of holder of said Mortgage)

Affidavit

I hereby certify on oath that on the day of 19
20....., I mailed by registered or certified mail with return receipt requested, the notice a copy of which is hereinabove set forth, direct to such person or persons at the address therein named ~~which~~ that was the last address of such person known to me at the time of mailing or to such person or persons at the address therein named ~~which~~ that was the person and the address agreed upon in said Mortgage.

Subscribed and sworn to before me this day of 19
20..... .

.....

Notary Public

In the event that the mortgagee is the purchaser at the public sale, any deficiency is limited to the difference between the fair market value of the premises at the time of the sale, as established by an independent appraisal, and the sum due the mortgagee with interest plus the expenses incurred in making the sale.

1 **Sec. 5. 14 MRSA §6203-G** is enacted to read:

2 **§6203-G. Assignment of mortgage**

3 The assignment of a mortgage by a foreclosing mortgagee at any time during the
4 foreclosure process does not affect the validity of the foreclosure. Upon the recording of
5 the assignment of mortgage in the registry of deeds where the land lies, the assignee of
6 the mortgage may complete the foreclosure.

7 **Sec. 6. 32 MRSA §286, sub-§5**, as enacted by PL 1999, c. 146, §5, is amended to
8 read:

9 **5. Mortgage foreclosure sales.** This chapter does not apply to any individual
10 conducting a mortgage foreclosure sale ~~pursuant to a court order~~.

11 **Sec. 7. 33 MRSA §501-A**, as amended by PL 1995, c. 106, §2, is further amended
12 to read:

13 **§501-A. "Power of sale"**

14 The following "power" is known as "The Statutory Power of Sale" and may be
15 included in any mortgage or incorporated by reference in any mortgage granted by a
16 corporation, partnership, including a limited partnership or a limited liability partnership,
17 limited liability company or trustee of a trust and, if included in the mortgage, the
18 mortgage may be foreclosed pursuant to Title 14, section 6203-A. The power of sale may
19 not be used to foreclose a mortgage deed granted by a trustee of a trust if at the time the
20 mortgage deed is given the real estate is used exclusively for residential purposes, the real
21 estate has 4 or fewer residential units and one of the units is the principal residence of the
22 owner of at least 1/2 of the beneficial interest in the trust. If the mortgage deed contains a
23 statement that at the time the mortgage deed is given the real estate encumbered by the
24 mortgage deed is not used exclusively for residential purposes, that the real estate has
25 more than 4 residential units or that none of the residential units is the principal residence
26 of the owner of at least 1/2 of the beneficial interest in the trust, the statement
27 conclusively establishes these facts and the mortgage deed may be foreclosed by the
28 power of sale.

29 POWER

30 ~~But upon~~ Upon any default in the performance or the observance of the foregoing or
31 other condition, the mortgagee or ~~his~~ the mortgagee's executors, administrators,
32 successors or assigns, ~~his or their~~ the agent or attorney of the mortgagee or the
33 mortgagee's executors, administrators, successors or assigns, may sell the mortgaged
34 premises or such portion thereof as may remain subject to the mortgage in case of any
35 partial release thereof, either as a whole or in parcels, together with all improvements that
36 may be thereon, by a public sale ~~on or near the premises~~ in the county where the real
37 estate then subject to the mortgage is situated, or, if more than one parcel is then subject
38 thereto, then ~~on or near~~ in the county where one of said parcels is situated, or at such
39 place as may be designated for the purpose in the mortgage, first complying with the
40 terms of the mortgage and the statutes relating to the foreclosure of mortgage by the

1 exercise of a power of sale, and ~~he or they~~ the mortgagee or the mortgagee's executors,
2 administrators, successors or assigns or the agent or attorney of the mortgagee or the
3 mortgagee's executors, administrators, successors or assigns may convey the same by
4 proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and
5 such sale shall forever ~~bar~~ bars the mortgagor and all persons claiming under it from all
6 right and interest in the mortgaged premises, whether at law or in equity.

7 SUMMARY

8 This bill makes several changes to the power of sale mortgage foreclosure law in
9 order to clarify certain provisions, improve notice to interested parties and ensure the
10 marketability of titles. The bill makes the following changes to the power of sale
11 mortgage foreclosure law.

12 1. It clarifies that the statutory power of sale applies to a mortgage granted by a
13 limited liability partnership.

14 2. It provides cross-references between the power of sale laws in the Maine Revised
15 Statutes, Title 14 and those in Title 33.

16 3. It requires that written notice of sale be sent to all parties in interest, not just the
17 mortgagor.

18 4. It provides that a written foreclosure notice may be given to the mortgagor at an
19 address provided in writing by the mortgagor to the mortgagee.

20 5. It defines "parties in interest."

21 6. It clarifies that written foreclosure notices may be delivered to the mortgagor by
22 certified mail in addition to registered mail.

23 7. It provides that a copy of a notice of foreclosure may be provided to a residential
24 tenant by posting the notice conspicuously at each entrance to the mortgaged premises.

25 8. It clarifies the information that must be included in a foreclosure notice of sale.

26 9. It provides that property may be sold free and clear of the interests of the
27 mortgagor and other junior parties in interest who have been sent a foreclosure notice of
28 sale, but specifies that parties in interest having a superior priority are not affected by the
29 foreclosure.

30 10. It requires a foreclosing mortgagee to execute a purchase and sale agreement
31 with the highest bidder at a public sale and provides that, if the highest bidder fails to
32 perform on the agreement, the foreclosing mortgagee may execute an agreement with the
33 next highest bidder.

34 11. It provides that a foreclosure sale may be adjourned for up to 30 days and from
35 time to time until a sale is made.

1 12. It clarifies the information relating to a foreclosure that must be included in the
2 recorded foreclosure affidavit.

3 13. It provides that a foreclosure affidavit must be recorded within 30 days after the
4 date of delivery of the deed to the purchaser at the foreclosure sale rather than 30 days
5 after the date of the sale.

6 14. It requires a mortgagee to correct an error in a recorded foreclosure affidavit.
7 Current law provides for such an error to be corrected by the Superior Court. The bill
8 retains the provision of current law that provides that the amended affidavit does not
9 prejudicially affect any title or interest in land that may have arisen or have been created
10 between the recording of the original and the amended affidavits.

11 15. It provides that, if a mortgagee is the purchaser at a public sale, any deficiency is
12 limited to the difference between the fair market value of the premises at the time of the
13 sale, as established by an independent appraisal, and the sum due the mortgagee with
14 interest plus the expenses incurred in making the sale.

15 16. It provides that the assignment of a mortgage during the foreclosure process does
16 not affect the validity of the foreclosure and, upon the recording of the assignment of
17 mortgage, the assignee of the mortgage may complete the foreclosure.

18 17. It exempts individuals conducting mortgage foreclosure sales from auctioneer
19 licensing requirements of Title 32. Current law exempts only individuals conducting
20 foreclosure sales pursuant to a court order.

21 18. It provides that a public foreclosure sale must be held in the county where the
22 real estate is situated rather than on or near the premises.