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HOUSE BILL NO. 1391

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on the Judiciary
on February 24, 2020)

(Patron Prior to Substitute—Delegate Leftwich)

*A BILL to amend and reenact §§ 55.1-320 and 55.1-322 of the Code of Virginia, relating to deeds of trust; fiduciary duties; advertisement requirements.***Be it enacted by the General Assembly of Virginia:****1. That §§ 55.1-320 and 55.1-322 of the Code of Virginia are amended and reenacted as follows:****§ 55.1-320. How deed of trust construed; duties, rights, etc., of parties.**

Every deed of trust to secure debts or indemnify sureties is in the nature of a contract and shall be construed according to its terms to the extent not in conflict with the requirements of law. Unless the deed of trust provides otherwise, it shall be construed to impose and confer upon the parties and beneficiaries the following duties, rights, and obligations in like manner as if the same were expressly provided for by such deed of trust:

1. The deed shall be construed as given to secure the performance of each of the covenants entered into by the grantor as well as the payment of the primary obligation.

2. The grantor shall be deemed to covenant that he will pay all taxes, levies, assessments, and charges upon the property, including the fees and charges of such agents or attorneys as the trustee may deem advisable to employ at any time for the purpose of the trust, so long as any obligation upon the grantor under the deed of trust remains undischarged.

3. The grantor shall be deemed to covenant that he will keep the improvements on the property in tenantable condition, whether such improvements were on the property when the deed of trust was given or were placed there at a later time.

4. The grantor shall be deemed to covenant that no waste shall be committed or suffered upon the property.

5. The grantor shall be deemed to covenant that in the event of his failure to meet any obligations imposed upon him, then the trustee or any beneficiary may, at his option, satisfy such obligations. The money so advanced, with interest as provided in the deed of trust, shall be a part of the debt secured by the deed of trust, in the event of sale to be paid next after the expenses of executing the trust, and shall be otherwise recoverable from the grantor as a debt. In addition, to the extent not otherwise covered, the grantor shall be deemed to covenant that amount advanced or incurred by the trustee or any beneficiary under a deed of trust (i) with respect to an obligation secured by a lien or encumbrance prior to the lien of the deed of trust or (ii) for the protection of the lien secured by the deed of trust, together with interest as provided in the deed of trust, shall be a part of the debt secured by the deed of trust, to be paid next after expenses of executing the trust.

6. A covenant to pay interest shall be deemed a covenant to pay interest on the principal balance as such rate may vary or be modified from time to time by the parties under the original instruments or agreements or a written agreement of modification, whether or not recorded, and all the interest on the principal secured by the deed of trust shall be on an equal priority with the principal debt secured by the deed of trust, in the event of sale to be paid next after the expenses of executing the trust.

Any covenant, otherwise authorized by law, that the lender shall be entitled to share in the gross income or the net income, or the gross rent or revenues, or net rents or revenues of the property, or in any portion of the proceeds or appreciation upon sale or appraisal or similar event, shall be on an equal priority with the principal debt secured by the deed of trust, in the event of sale to be paid next after the expenses of executing the trust, and shall be specified in the recorded deed of trust or other recorded document in order to be notice of record as against subsequent parties.

7. In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable and may take possession of the property and proceed to sell the same at auction at the premises or in the front of the circuit court building or at such other place in the county or city in which the property or the greater part thereof lies, or in the corporate limits of any city surrounded by or contiguous to such county, or in the case of annexed land, in the county of which the land was formerly a part, as the trustee may select upon such terms and conditions as the trustee may deem best. *A trustee has no duties, rights, or obligations other than those imposed and conferred by the deed of trust or this article. A trustee shall comply with all restrictive covenants regarding affordability that affect the property secured by such deed of trust.*

8. If the sale is upon credit terms, the deferred purchase money shall bear interest from the day of

60 sale and shall be secured by a deed of trust upon the property contemporaneous with the trustee's deed
61 to the purchaser.

62 9. The party secured by the deed of trust, or the holders of greater than 50 percent of the monetary
63 obligations secured thereby, shall have the right and power to appoint one or more substitute trustees for
64 any reason and, regardless of whether such right and power is expressly granted in such deed of trust,
65 by executing and acknowledging an instrument designating and appointing a substitute. When the
66 instrument of appointment has been executed, the substitute trustee named therein shall be vested with
67 all the powers, rights, authority, and duties vested in the trustee in the original deed of trust. The
68 instrument of appointment shall be recorded in the office of the clerk in which the original deed of trust
69 is recorded prior to or at the time of recordation of any instrument in which a power, right, authority, or
70 duty conferred by the original deed of trust is exercised.

71 10. *A trustee under a deed of trust is a fiduciary for both the debtor and creditor; however, the*
72 *trustee does not breach such fiduciary duty if the trustee's actions are consistent with the duties imposed*
73 *upon the trustee under the terms of the deed of trust or by this article.*

74 **§ 55.1-322. Advertisement required before sale by trustee.**

75 A. Advertisement of sale by a trustee or trustees in execution of a deed of trust shall be ~~in~~ as
76 follows:

77 1. In a newspaper having a general circulation in the county or city in which the property to be sold,
78 or any portion of such property, lies pursuant to the following provisions:

79 ~~1-~~ a. If the deed of trust itself provides for the number of publications of such newspaper
80 advertisement, which may be done by using the words "advertisement required" or similar words
81 followed by the number agreed upon, then no other or different advertisement shall be necessary,
82 provided that, if such advertisement be inserted on a weekly basis, it shall be published not less than
83 once a week for two weeks, and if such advertisement be inserted on a daily basis, it shall be published
84 not less than once a day for three days, which may be consecutive days, and in either case shall be
85 subject to the provisions of § 55.1-330 in the same manner as if the method were set forth in the deed
86 of trust. Should the deed of trust provide for advertising on other than a weekly or daily basis, either of
87 the foregoing provisions shall be complied with in addition to those provided in such deed of trust.
88 Notwithstanding the provisions of the deed of trust, the sale shall be held on any day following the day
89 of the last advertisement that is no earlier than eight days following the first advertisement or more than
90 30 days following the last advertisement.

91 ~~2-~~ b. If the deed of trust does not provide for the number of publications of such newspaper
92 advertisement, the trustee shall advertise once a week for four successive weeks, provided, however, that
93 if the property or some portion of such property is located in a city or in a county immediately
94 contiguous to a city, publication of the advertisement five different days, which may be consecutive
95 days, shall be deemed adequate. The sale shall be held on any day following the day of the last
96 advertisement that is no earlier than eight days following the first advertisement or more than 30 days
97 following the last advertisement.

98 ~~B-~~ c. Such advertisement shall be placed in that section of the newspaper where legal notices appear
99 or where the type of property being sold is generally advertised for sale.

100 d. *The newspaper shall (i) post the complete advertisement on the newspaper's website, if a website*
101 *is published by such newspaper, where it shall be posted contemporaneously with the advertisement's*
102 *first print publication and shall remain on the website for at least as long as the advertisement appears*
103 *in such newspaper; (ii) include on its website homepage a link to its public notice section; and (iii) post*
104 *the complete advertisement on a searchable, statewide repository website for at least as long as it*
105 *appears in the newspaper. Any advertisement published on a website pursuant to this section shall be*
106 *accessible to the public at no charge; and*

107 2. *The trustee or trustees shall post the complete advertisement on one or more websites operated by*
108 *the Commonwealth, including the Supreme Court of Virginia, the county or city in which the property is*
109 *located, a political subdivision of the Commonwealth or such county or city, or the circuit court having*
110 *jurisdiction over the property. Any advertisement published on a website pursuant to this section shall*
111 *be accessible to the public at no charge. Such advertisement shall remain on the website for at least as*
112 *long as it appears in the newspaper or 10 days, whichever is longer.*

113 B. *The cost of publishing and posting such advertisement shall be included as an expense of*
114 *executing the trust.*

115 C. In addition to the advertisement required by subsection A, the trustee shall give such other further
116 and different advertisement as the deed of trust may require and in addition may give such additional
117 advertisement as he may deem appropriate.

118 D. In the event of postponement of sale, which postponement shall be at the discretion of the trustee,
119 advertisement of such postponed sale shall be in the same manner as the original advertisement of sale.

120 E. Failure to comply with the requirements for advertisement contained in this section shall, upon
121 petition, render a sale of the property voidable by the court.