

1 SB127  
2 197508-1  
3 By Senator Shelnutt  
4 RFD: Fiscal Responsibility and Economic Development  
5 First Read: 19-MAR-19

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8 SYNOPSIS: Under current law, a future advance  
9 mortgage, which is created upon its execution, may  
10 secure funds advanced at the time the mortgage is  
11 executed as well as funds advanced in the future. A  
12 recent Alabama Supreme Court opinion held that a  
13 future advance mortgage, although recorded, is not  
14 created until the lender advances funds under the  
15 loan secured by the mortgage, thus potentially  
16 eliminating the priority a future advance mortgage  
17 has over subsequently recorded mortgages or liens.

18 This bill would create the Future Advance  
19 Mortgage Protection Act.

20 This bill would clarify that a mortgage may  
21 secure not only existing indebtedness but also  
22 future advances to the same extent as if the future  
23 advances were made at the same time the mortgage  
24 was created.

25 This bill would also provide that this bill  
26 would apply prospectively to mortgages created in

1           the future, as well as retrospectively to existing  
2           mortgages.

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4                           A BILL  
5                           TO BE ENTITLED  
6                           AN ACT

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8           Relating to future advance mortgages; to add a new  
9           Article 6, commencing with Section 35-10-120, to Chapter 10 of  
10          Title 35 of the Code of Alabama 1975; to establish the Future  
11          Advance Mortgage Protection Act; to provide that future  
12          advance mortgages are valid and enforceable; and to provide  
13          that this article shall apply prospectively to mortgages  
14          created in the future and retrospectively to existing  
15          mortgages.

16          BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

17                 Section 1. A new Article 6, commencing with Section  
18                 35-10-120, is added to Chapter 10 of Title 35 of the Code of  
19                 Alabama 1975, to read as follows:

20                 Article 6. The Future Advance Mortgage Protection  
21                 Act.

22                 §35-10-120.

23                 This article shall be known and may be cited as The  
24                 Future Advance Mortgage Protection Act.

25                 §35-10-121.

26                 The Legislature finds and declares the following:

1           (1) There is prevalent use in this state of future  
2 advance mortgages, which are mortgage loan arrangements in  
3 which the borrower takes either none, or only a portion, of  
4 the loan proceeds at the outset, but receives loan proceeds in  
5 the future, thereby saving interest charges on the unadvanced  
6 portion until it is needed.

7           (2) Future advance mortgage financing arrangements  
8 are beneficial to homeowners, developers, builders, suppliers,  
9 borrowers, and lenders. Mortgage instruments to secure future  
10 advances have been, and should be, validly created by  
11 execution under Article 2, commencing with Section 35-4-20, of  
12 Chapter 4.

13           (3) A recent Alabama Supreme Court opinion contains  
14 language to the effect that a future advance mortgage, even  
15 though executed and recorded, is not created or valid until  
16 the lender makes an advance under the mortgage, and thus the  
17 mortgage does not have priority over other mortgages or liens  
18 created, arising, or recorded before the advance is made.

19           (4) In order to protect those mortgages and  
20 facilitate their continued use, both the validity and  
21 enforceability of these mortgages are due to be and are herein  
22 clarified and established, and this article applies both  
23 prospectively and retrospectively.

24           §35-10-122.

25           As used in this article, the following terms shall  
26 have the following meanings:

1           (1) FUTURE ADVANCE. An advance, extension of credit,  
2 indebtedness, or loan of any type or description whatsoever,  
3 whether obligatory or optional, or both, and whether made  
4 under loan agreements, notes, mortgages, or other agreements,  
5 or otherwise, that are made or come into existence after the  
6 creation of the future advance mortgage.

7           (2) FUTURE ADVANCE MORTGAGE. A mortgage in which  
8 future advances are among the secured indebtedness.

9           §35-10-123.

10          (a) Without limitation, a future advance mortgage  
11 may secure existing indebtedness and advances made  
12 contemporaneously with the creation of the mortgage. A future  
13 advance mortgage is valid and enforceable for future advances  
14 to the same extent as if the future advances were made  
15 contemporaneously with the creation of the mortgage, without  
16 regard to whether any advance is made at the time of the  
17 creation of the mortgage, and without regard to whether any  
18 indebtedness is outstanding at the time any future advance is  
19 made. Nothing in this subsection is intended to limit or  
20 restrict the obligations, indebtedness, liabilities,  
21 covenants, disbursements, or advances that may be secured by  
22 any mortgage.

23          (b) A future advance mortgage is created, and the  
24 estate of the mortgage is conveyed and the security afforded  
25 thereby attaches, at the time of its execution, without the  
26 requirement of any other consideration and without regard to  
27 whether any advance of loan proceeds has been made.

1 §35-10-124.

2 (a) The provisions of Section 7-9A-334, which relate  
3 to the priority of security interests in fixtures and crops,  
4 and Section 7-9A-604, which relate to security agreements  
5 covering real property or fixtures, are not affected by this  
6 article.

7 (b) This article shall apply prospectively to  
8 mortgages created after the effective date of the act adding  
9 this article and retrospectively to mortgages in existence on  
10 the effective date of the act adding this article.

11 Section 2. This act shall become effective  
12 immediately following its passage and approval by the  
13 Governor, or its otherwise becoming law.