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HOUSE BILL 221

**50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011**

INTRODUCED BY

Zachary J. Cook

AN ACT

RELATING TO PROPERTY; AMENDING THE DEED OF TRUST ACT; MAKING  
TECHNICAL REVISIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 48-10-3 NMSA 1978 (being Laws 1987,  
Chapter 61, Section 3, as amended) is amended to read:

"48-10-3. DEFINITIONS.--As used in the Deed of Trust Act,  
unless the context otherwise requires:

A. "affiliate of a trustee of a deed of trust"  
means a person that, directly or indirectly, through one or  
more intermediaries, controls, is controlled by or is under  
common control with the trustee of the deed of trust;

[A.] B. "beneficiary" means the person named or  
otherwise designated in a deed of trust as the person for whose  
benefit a deed of trust is given or the person's successor in

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1 interest;

2           ~~[B-]~~ C. "contract" means an agreement between or  
3 among two or more persons, including, without limitation, a  
4 note, promissory note, guarantee or the terms of any deed of  
5 trust;

6           ~~[G-]~~ D. "credit bid" means a bid made by the  
7 beneficiary in full or partial satisfaction of the contract  
8 that is secured by the deed of trust. A credit bid may only  
9 include an amount owing on a contract with interest secured by  
10 liens, mortgages, deeds of trust or encumbrances that are  
11 superior in priority to the deed of trust and which liens,  
12 mortgages or encumbrances, whether recourse or nonrecourse, are  
13 outstanding as provided in the contract or as provided in the  
14 deed of trust, together with the amount of other obligations  
15 provided in or secured by the deed of trust and the costs of  
16 exercising the power of sale and the trustee's sale, including  
17 the fees of the trustee and reasonable attorney fees actually  
18 incurred by the trustee and the beneficiary;

19           ~~[D-]~~ E. "parent corporation" means a corporation  
20 that owns eighty percent or more of each class of the issued  
21 and outstanding stock of another corporation or, in the case of  
22 a savings and loan association, eighty percent or more of the  
23 issued and outstanding guaranty capital of the savings and loan  
24 association;

25           ~~[E-]~~ F. "person" means an individual or

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1 organization;

2 [F-] G. "deed of trust" means a document by way of  
3 mortgage in substance executed in conformity with the Deed of  
4 Trust Act and in conformity with Section 47-1-39 NMSA 1978  
5 granting or mortgaging trust real estate to a trustee qualified  
6 under the Deed of Trust Act to secure the performance of a  
7 contract;

8 [G-] H. "junior encumbrancer" means a person  
9 holding a lien, mortgage or other encumbrance of record  
10 evidencing an interest in the trust real estate that is  
11 subordinate in priority to the deed of trust and includes a  
12 lienholder, a mortgagee, a seller and a purchaser as provided  
13 in a real estate contract and, where the context is applicable,  
14 escrow agents as provided in a real estate contract;

15 [H-] I. "trust real estate" means any legal,  
16 equitable, leasehold or other interest in real estate,  
17 including the term "real estate" as defined in Section 47-1-1  
18 NMSA 1978 and any improvements and fixtures, ~~[which]~~ that is  
19 capable of being transferred whether or not the interest is  
20 subject to any prior mortgages, deeds of trust, contracts for  
21 conveyance of real estate, real estate contracts or other liens  
22 or encumbrances; provided, however, "trust real estate" shall  
23 not include:

24 (1) any real estate used by the trustor for  
25 farming operations, including farming, tillage of the soil,

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1 dairy farming, ranching, production or raising of crops,  
2 poultry or livestock, and production of poultry or livestock  
3 products in an unmanufactured state; or

4 (2) oil and other liquid hydrocarbons, or gas,  
5 including casinghead gas, condensates and other gaseous  
6 petroleum substances, or coal or other minerals in, on or under  
7 real estate, including patented and unpatented mining claims,  
8 unless such minerals have not been severed from and are  
9 included with the surface estate.

10 The character of trust real estate shall be determined as  
11 of the date of the deed of trust covering the trust real  
12 estate;

13 [~~F.~~] J. "trustee" means a person qualified as  
14 provided in the Deed of Trust Act. The obligations of a  
15 trustee to the trustor, beneficiary and other persons are as  
16 provided in the Deed of Trust Act, together with any other  
17 obligations specified in the deed of trust. Both the  
18 beneficiary and the trustee have all the powers of a mortgagee  
19 as provided by law; and

20 [~~J.~~] K. "trustor" means the person or the person's  
21 successor in interest granting or mortgaging trust real estate  
22 by a deed of trust as security for the performance of a  
23 contract and is the same as a mortgagor granting or mortgaging  
24 real estate by way of mortgage as provided by law."

25 SECTION 2. Section 48-10-5 NMSA 1978 (being Laws 1987,

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1 Chapter 61, Section 5) is amended to read:

2 "48-10-5. DESCRIPTION OF TRUST REAL ESTATE--MAILING  
3 ADDRESS OF TRUSTOR, BENEFICIARY AND TRUSTEE.--

4 A. In deeds of trust, the legal description of  
5 trust real estate shall be given by one or more of the  
6 following methods:

7 (1) [~~by~~] the use of lot, block, tract or  
8 parcel as provided in a recorded subdivision plat;

9 (2) [~~by~~] the use of a metes and bounds or  
10 course and distance survey;

11 (3) [~~by~~] the use of the governmental  
12 rectangular survey system with specific identification of the  
13 location within any section or [~~sections~~] tract [~~or tracts~~] of  
14 a township and range; or

15 (4) [~~by~~] the use of any other method of  
16 description provided by law.

17 B. If the trust real estate is the subject of a  
18 recorded subdivision plat, the legal description of the trust  
19 real estate shall be given by [~~the use of lot, block, tract or~~  
20 ~~parcel as shown on the recorded subdivision plat~~] one or more  
21 of the methods provided for in Subsection A of this section.

22 C. The mailing address of each trustor, beneficiary  
23 and trustee shall be specified in each deed of trust."

24 SECTION 3. Section 48-10-6 NMSA 1978 (being Laws 1987,  
25 Chapter 61, Section 6) is amended to read:

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1 "48-10-6. TRUSTEE OF DEED OF TRUST--QUALIFICATION.--

2 A. Except as provided in Subsection B of this  
3 section, the trustee of a deed of trust shall be:

4 (1) an organization doing business under the  
5 laws of New Mexico as a bank, trust company, savings and loan  
6 association, escrow company or title insurance company,  
7 including an agent or underwriter;

8 (2) an individual who is a member of the state  
9 bar of New Mexico;

10 (3) an organization [~~which~~] that is licensed,  
11 chartered or regulated by the federal deposit insurance  
12 corporation, the comptroller of the currency, the federal  
13 savings and loan insurance corporation, the federal home loan  
14 bank, the bureau of federal credit unions or any successors; or

15 (4) the parent corporation of any association  
16 or corporation referred to in this subsection or any subsidiary  
17 corporation all the stock of which is owned by or held solely  
18 for the benefit of any such association or corporation referred  
19 to in this subsection.

20 B. No trustee of a deed of trust or [~~parent~~  
21 ~~corporation or subsidiary corporation of a corporate trustee~~  
22 ~~which is~~] affiliate of a trustee of a deed of trust shall be  
23 the beneficiary of the deed of trust."

24 SECTION 4. Section 48-10-10 NMSA 1978 (being Laws 1987,  
25 Chapter 61, Section 10, as amended) is amended to read:

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1 "48-10-10. SALE OF TRUST REAL ESTATE--POWER OF  
2 TRUSTEE--FORECLOSURE OF DEED OF TRUST.--

3 A. By virtue of the trustee's position, a power of  
4 sale is conferred upon the trustee of a deed of trust under  
5 which the trust real estate may be sold as provided in the Deed  
6 of Trust Act after a breach or default in performance of the  
7 contract for which the trust real estate is granted or  
8 mortgaged as security or a breach or default in performance of  
9 the deed of trust. Except as specifically provided in the Deed  
10 of Trust Act, the trustee shall not delegate the duties of the  
11 trustee as provided in the Deed of Trust Act. At the option of  
12 the beneficiary, a deed of trust may be foreclosed in the  
13 manner provided by law for the foreclosure of mortgages on real  
14 estate. Either the beneficiary or the trustee shall constitute  
15 the proper and complete party plaintiff in any action to  
16 foreclose a deed of trust.

17 B. The trustee or beneficiary may commence an  
18 action to foreclose a deed of trust at any time before the  
19 trust real estate has been sold as provided in the power of  
20 sale. A sale of trust real estate as provided in a power of  
21 sale in a deed of trust shall not be held after an action to  
22 foreclose the deed of trust has been commenced unless the  
23 foreclosure action has been dismissed.

24 C. The power of sale of trust real estate conferred  
25 upon the trustee shall not be exercised before the expiration

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1 of [~~ninety~~] thirty days from the latter of the recording of the  
2 notice of the sale or the last publication of the notice of  
3 sale.

4 D. The trustee need only be joined as a party in  
5 separate civil actions pertaining to a breach of an obligation  
6 of a trustee as provided in the Deed of Trust Act or as  
7 provided in the deed of trust. Any order of the court entered  
8 against the beneficiary is binding upon the trustee with  
9 respect to any actions that the trustee is authorized to take  
10 by the deed of trust or by the Deed of Trust Act. If the  
11 trustee is joined as a party in any other separate civil  
12 action, other than an action in which the trustee is an  
13 indispensable or necessary party, the trustee is entitled to be  
14 immediately dismissed and to recover the costs and reasonable  
15 attorney fees actually incurred by the trustee from the person  
16 joining the trustee and from the beneficiary, jointly and  
17 severally."

18 SECTION 5. Section 48-10-11 NMSA 1978 (being Laws 1987,  
19 Chapter 61, Section 11, as amended) is amended to read:

20 "48-10-11. NOTICE OF TRUSTEE'S SALE.--

21 A. The trustee shall give written notice of the  
22 time and place of sale, legally describing the trust real  
23 estate to be sold, by each of the following methods:

24 (1) publication of the notice as provided by  
25 law for foreclosure of mortgages on real estate;

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1 (2) recording of the notice in the office of  
2 the clerk of each county in which the trust real estate is  
3 situated; and

4 (3) giving notice as provided in Section  
5 48-10-12 NMSA 1978 to the extent applicable.

6 B. The sale shall be held at the time and place  
7 designated in the notice of sale on a day other than a  
8 Saturday, Sunday or legal holiday and at the time provided by  
9 law for the foreclosure sale of real estate under real estate  
10 mortgages on the front steps of the courthouse of the county in  
11 which the trust real estate is located. If the trust real  
12 estate is located in more than one county, the sale may be held  
13 in any county in which part of the trust real estate is  
14 located.

15 C. The notice of sale shall contain the street  
16 address, if any, or identifiable location as well as the legal  
17 description of the trust real estate or any one or more of the  
18 then-existing and legally described and established lots,  
19 blocks, tracts or parcels comprising the trust real estate.  
20 Failure to accurately describe within the notice either the  
21 street address or the identifiable location of the trust real  
22 estate to be sold shall not be grounds for invalidating the  
23 sale if the correct legal description of the trust real estate  
24 to be sold was contained in the notice of sale. The notice of  
25 sale shall be sufficient if made in substantially the following

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1 form:

2 "NOTICE OF TRUSTEE'S SALE

3 The following legally described trust real estate  
4 will be sold, pursuant to the power of sale as  
5 provided in the deed of trust recorded in book

6 \_\_\_\_\_ at page \_\_\_\_\_, \_\_\_\_\_

7 County, New Mexico, records, at public auction to

8 the highest bidder on the front steps of the county

9 courthouse in \_\_\_\_\_ County, New

10 Mexico, in or near \_\_\_\_\_,

11 New Mexico, on \_\_\_\_\_, 20\_\_\_\_, at

12 \_\_\_\_\_ o'clock \_\_\_\_m. of that day:

13 (street address, if any, or identifiable location

14 of trust real estate and legal description of

15 trust real estate)

16 Dated this \_\_\_\_\_ day of \_\_\_\_\_,

17 20\_\_\_\_.

18 \_\_\_\_\_

19 (Name of Trustor)

(Name of Trustee)

20 \_\_\_\_\_

21 Signature

22 (Here add Acknowledgment)."."

23 SECTION 6. Section 48-10-12 NMSA 1978 (being Laws 1987,

24 Chapter 61, Section 12) is amended to read:

25 "48-10-12. REQUEST FOR COPIES OF NOTICE OF SALE--MAILING

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1 BY TRUSTEE OR BENEFICIARY.--

2 A. A person desiring a copy of a notice of sale as  
3 provided in a deed of trust shall, at any time after the  
4 recording of the deed of trust and thirty days or more before  
5 the recording of a notice of sale as provided in a deed of  
6 trust, record in the office of the county clerk in any county  
7 in which part of the trust real estate is situated an  
8 acknowledged request for a copy of the notice of sale. The  
9 request shall provide the name and address of the person  
10 requesting a copy of the notice and shall identify the deed of  
11 trust by providing the county book and page numbers of the  
12 recording data of the deed of trust and by stating the names of  
13 the original parties to the deed of trust, the date the deed of  
14 trust was recorded and the legal description of the trust real  
15 estate and shall be in substantially the following form:

16 "REQUEST FOR NOTICE

17 Request is made that a copy of any notice of sale as provided  
18 in the deed of trust recorded in book \_\_\_\_\_ at page  
19 \_\_\_\_\_, \_\_\_\_\_ County, New  
20 Mexico records, on \_\_\_\_\_, [~~19~~] 20 \_\_\_\_\_  
21 (legal description of trust real estate)  
22 executed by \_\_\_\_\_ as trustor, in  
23 which \_\_\_\_\_ is named as  
24 beneficiary and \_\_\_\_\_ as trustee, be  
25 mailed to \_\_\_\_\_

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\_\_\_\_\_

at \_\_\_\_\_.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, [19] 20 \_\_\_\_.

\_\_\_\_\_

Signature

(Here add Acknowledgment)".

B. Not later than [~~thirty~~] five business days after recording the notice of sale, the trustee or beneficiary shall mail by certified or registered mail, with postage prepaid, a copy of the notice of sale with the recording date shown on the notice of sale, together with any notice required to be given by Subsection C of this section, addressed as follows:

(1) to each person whose name and address are provided in a request for notice [~~which~~] that has been recorded thirty days or more before the recording of the notice of sale, directed to the address designated in the request; and

(2) to each person who, [~~at the time of~~] thirty days or more before the recording of the notice of sale, appears by a document recorded in the real estate records of the county clerk in the county in which any part of the trust real estate is situated to have an interest in any of the trust real estate described in the notice of sale, including junior encumbrancers. The copy of the notice shall be addressed to the person whose interest so appears at the address provided in the document. If no address for the person is provided in the

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1 document, no notice need be mailed to the person. If the  
2 ~~[interest which appears on the records of the county clerk]~~  
3 document is a deed of trust, a copy of the notice need only be  
4 mailed to the beneficiary as provided in the deed of trust. If  
5 any person having such an interest or the trustor or any person  
6 who has recorded a request for notice wants to change the  
7 address to which notice shall be mailed, the change shall be  
8 accomplished by a timely request for notice as provided in this  
9 section.

10 C. The trustee or beneficiary shall, within five  
11 business days after the recordation of the notice of sale, mail  
12 by certified or registered mail, with postage prepaid, a copy  
13 of any notice of sale, showing the recording date the notice  
14 was recorded to each of the persons who were parties to the  
15 deed of trust. The notice shall be addressed to the mailing  
16 address specified in the deed of trust. In addition, notice to  
17 each such party shall contain a statement that a breach or  
18 default in performance of the deed of trust or the contract  
19 secured by the deed of trust, or both, has occurred and shall  
20 provide the nature of the breach or default in performance and  
21 of the election of the beneficiary to sell or cause to be sold  
22 the trust real estate as provided in the deed of trust and the  
23 additional notice shall be signed by the beneficiary or the  
24 agent of the beneficiary. A copy of the additional notice  
25 shall also be sent with the notice as provided in Paragraph (2)

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1 of Subsection B of this section to all junior encumbrancers,  
2 together with a written statement that the interest of the  
3 junior encumbrancer may be subject to being terminated by the  
4 trustee's sale. The written statement may be provided in the  
5 statement of breach or default in performance.

6 D. No request for a copy of a notice recorded as  
7 provided in this section nor any statement or allegation in the  
8 request nor any record of the request shall affect the title to  
9 the trust real estate or be deemed notice to any person that a  
10 person requesting a copy of notice of sale has or claims any  
11 interest in or claim upon the trust real estate."

12 SECTION 7. Section 48-10-13 NMSA 1978 (being Laws 1987,  
13 Chapter 61, Section 13, as amended) is amended to read:

14 "48-10-13. SALE BY PUBLIC AUCTION--POSTPONEMENT OF SALE.--

15 A. On the date and at the time and place designated  
16 in the notice of sale, the trustee shall sell the trust real  
17 estate described in the notice of sale at public auction for  
18 cash to the highest bidder. To determine the highest bidder,  
19 the trustor or beneficiary present at the sale may suggest the  
20 then-existing and legally described and established lots,  
21 blocks, tracts or parcels of the trust real estate in which the  
22 trust real estate described in the notice of sale may be sold.  
23 The trustee shall ascertain all such suggestions, shall  
24 conditionally sell the trust real estate described in the  
25 notice of sale under each suggestion and, in addition, shall

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1 sell the trust real estate described in the notice of sale as a  
2 whole. The trustee shall determine which conditional sale  
3 results in the highest total price bid for all of the trust  
4 real estate described in the notice of sale. The lawyer for  
5 the trustee may conduct the sale and may act at the sale as the  
6 auctioneer for the trustee. Any person, including the trustee  
7 or beneficiary, may bid at the sale. Only the beneficiary may  
8 make a credit bid, instead of cash, at the sale. A junior  
9 encumbrancer may bid the amount or value of the obligation  
10 secured by the lien, mortgage, encumbrance or real estate  
11 contract, as the case may be, owed to the junior encumbrancer,  
12 less the amount or value of any prior deeds of trust,  
13 mortgages, liens, encumbrances or real estate contracts, if  
14 any, instead of cash, at the sale. In appropriate  
15 circumstances, the trustee may sell the trust real estate  
16 described in the notice of sale subject to prior deeds of  
17 trust, mortgages, liens, encumbrances or real estate contracts  
18 that are not being foreclosed. Every bid shall be deemed an  
19 irrevocable offer until the sale is completed and the sale  
20 shall not be deemed completed until the purchaser pays the  
21 price bid in immediately collectible or available federal  
22 funds. If the purchaser fails to pay the amount bid by the  
23 purchaser for the trust real estate described in the notice of  
24 sale struck off to the purchaser at the sale as provided in the  
25 Deed of Trust Act, the trustee may accept the next highest bid

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1 or proceed with the sale of the trust real estate described in  
2 the notice of sale to the highest bidder. The person who fails  
3 to make the payment shall be liable to any person who suffers  
4 loss or expenses, including reasonable attorney fees actually  
5 incurred by the trustee and beneficiary occasioned by the  
6 failure, and the trustee may subsequently in any postponed or  
7 continued sale of the trust real estate described in the notice  
8 of sale reject any bid of the person failing to pay the amount  
9 bid.

10 B. The person conducting the sale may, for the  
11 purpose of verifying the proper amount to be paid or the  
12 availability of immediately collectible federal funds, postpone  
13 or continue the sale for a reasonable period by giving notice  
14 of the new time by public declaration at the time and place  
15 last appointed for the sale. No other notice of the postponed  
16 or continued sale is required."

17 **SECTION 8. APPLICABILITY.**--The provisions of this act  
18 shall apply to a sale of trust real estate or foreclosure of a  
19 deed of trust, the proceedings for which are initiated after  
20 June 30, 2011.

21 **SECTION 9. EFFECTIVE DATE.**--The effective date of the  
22 provisions of this act is July 1, 2011.