

SENATE BILL NO. 402—COMMITTEE ON JUDICIARY

MARCH 28, 2011

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to real property.
(BDR 9-1090)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to real property; revising provisions relating to covenants that may be adopted by reference in a deed of trust; providing methods by which assumption fees for a change of parties in a deed of trust may be set; requiring a foreclosure sale of commercial property to be held in a location specified in certain recorded documents; limiting the amount of certain secured interests in foreclosure sales and deficiency judgments; revising provisions relating to accounting for impound accounts for the payment of certain obligations relating to certain real property; providing a civil penalty; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

- 1 **Sections 1 and 2** of this bill amend a statutory covenant that may be adopted by
2 reference in a deed of trust to allow the parties thereto the alternatives of paying, in
3 connection with a trustee’s sale, either reasonable counsel fees and actual costs
4 incurred or counsel fees in an amount equal to a specified percentage of the
5 property secured by the deed of trust.
6 **Section 3** of this bill sets forth certain methods of specifying assumption fees
7 for a change in parties in a deed of trust.
8 **Section 4** of this bill requires a foreclosure sale of commercial property to be
9 conducted at the location specified in the notice of sale recorded by the trustee of a
10 trust deed or transfer in trust.
11 **Section 4.5** of this bill revises provisions limiting the amount of certain secured
12 interests included in the term “indebtedness” for the purpose of foreclosure sales
13 and deficiency judgments.



14 **Sections 5 and 6** of this bill revise provisions relating to accountings for
15 impound accounts for the payment of certain obligations relating to certain real
16 property.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** NRS 107.030 is hereby amended to read as follows:
2 107.030 Every deed of trust made after March 29, 1927, may
3 adopt by reference all or any of the following covenants,
4 agreements, obligations, rights and remedies:

5 1. COVENANT NO. 1. That grantor agrees to pay and discharge
6 at maturity all taxes and assessments and all other charges and
7 encumbrances which now are or shall hereafter be, or appear to be, a
8 lien upon the trust premises, or any part thereof; and that grantor
9 will pay all interest or installments due on any prior encumbrance,
10 and that in default thereof, beneficiary may, without demand or
11 notice, pay the same, and beneficiary shall be sole judge of the
12 legality or validity of such taxes, assessments, charges or
13 encumbrances, and the amount necessary to be paid in satisfaction
14 or discharge thereof.

15 2. COVENANT NO. 2. That the grantor will at all times keep the
16 buildings and improvements which are now or shall hereafter be
17 erected upon the premises insured against loss or damage by fire, to
18 the amount of at least \$....., by some insurance company or
19 companies approved by beneficiary, the policies for which insurance
20 shall be made payable, in case of loss, to beneficiary, and shall be
21 delivered to and held by the beneficiary as further security; and that
22 in default thereof, beneficiary may procure such insurance, not
23 exceeding the amount aforesaid, to be effected either upon the
24 interest of trustee or upon the interest of grantor, or his or her
25 assigns, and in their names, loss, if any, being made payable to
26 beneficiary, and may pay and expend for premiums for such
27 insurance such sums of money as the beneficiary may deem
28 necessary.

29 3. COVENANT NO. 3. That if, during the existence of the trust,
30 there be commenced or pending any suit or action affecting the
31 conveyed premises, or any part thereof, or the title thereto, or if any
32 adverse claim for or against the premises, or any part thereof, be
33 made or asserted, the trustee or beneficiary may appear or intervene
34 in the suit or action and retain counsel therein and defend same, or
35 otherwise take such action therein as they may be advised, and may
36 settle or compromise same or the adverse claim; and in that behalf
37 and for any of the purposes may pay and expend such sums of
38 money as the trustee or beneficiary may deem to be necessary.



1 4. COVENANT NO. 4. That the grantor will pay to trustee and to
2 beneficiary respectively, on demand, the amounts of all sums of
3 money which they shall respectively pay or expend pursuant to the
4 provisions of the implied covenants of this section, or any of them,
5 together with interest upon each of the amounts, until paid, from the
6 time of payment thereof, at the rate of percent per annum.

7 5. COVENANT NO. 5. That in case grantor shall well and truly
8 perform the obligation or pay or cause to be paid at maturity the
9 debt or promissory note, and all moneys agreed to be paid, and
10 interest thereon for the security of which the transfer is made, and
11 also the reasonable expenses of the trust in this section specified,
12 then the trustee, its successors or assigns, shall reconvey to the
13 grantor all the estate in the premises conveyed to the trustee by
14 the grantor. Any part of the trust property may be reconveyed at the
15 request of the beneficiary.

16 6. COVENANT NO. 6. That if default be made in the
17 performance of the obligation, or in the payment of the debt, or
18 interest thereon, or any part thereof, or in the payment of any of the
19 other moneys agreed to be paid, or of any interest thereon, or if any
20 of the conditions or covenants in this section adopted by reference
21 be violated, and if the notice of breach and election to sell, required
22 by this chapter, be first recorded, then trustee, its successors or
23 assigns, on demand by beneficiary, or assigns, shall sell the above-
24 granted premises, or such part thereof as in its discretion it shall find
25 necessary to sell, in order to accomplish the objects of these trusts,
26 in the manner following, namely:

27 The trustees shall first give notice of the time and place of such
28 sale, in the manner provided in NRS 107.080 and may postpone
29 such sale not more than three times by proclamation made to the
30 persons assembled at the time and place previously appointed and
31 advertised for such sale, and on the day of sale so advertised, or to
32 which such sale may have been postponed, the trustee may sell the
33 property so advertised, or any portion thereof, at public auction, at
34 the time and place specified in the notice, at a public location in the
35 county in which the property, or any part thereof, to be sold, is
36 situated, to the highest cash bidder. The beneficiary, obligee,
37 creditor, or the holder or holders of the promissory note or notes
38 secured thereby may bid and purchase at such sale. The beneficiary
39 may, after recording the notice of breach and election, waive or
40 withdraw the same or any proceedings thereunder, and shall
41 thereupon be restored to the beneficiary's former position and have
42 and enjoy the same rights as though such notice had not been
43 recorded.

44 7. COVENANT NO. 7. That the trustee, upon such sale, shall
45 make (without warranty), execute and, after due payment made,



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1 deliver to purchaser or purchasers, his, her or their heirs or assigns, a
2 deed or deeds of the premises so sold which shall convey to the
3 purchaser all the title of the grantor in the trust premises, and shall
4 apply the proceeds of the sale thereof in payment, firstly, of the
5 expenses of such sale, together with the reasonable expenses of the
6 trust, including counsel fees, in an amount equal to
7 percent of the amount secured thereby and remaining unpaid **H** *or*
8 *reasonable counsel fees and costs actually incurred*, which shall
9 become due upon any default made by grantor in any of the
10 payments aforesaid; and also such sums, if any, as trustee or
11 beneficiary shall have paid, for procuring a search of the title to the
12 premises, or any part thereof, subsequent to the execution of the
13 deed of trust; and in payment, secondly, of the obligation or debts
14 secured, and interest thereon then remaining unpaid, and the amount
15 of all other moneys with interest thereon herein agreed or provided
16 to be paid by grantor; and the balance or surplus of such proceeds of
17 sale it shall pay to grantor, his or her heirs, executors, administrators
18 or assigns.

19 8. COVENANT NO. 8. That in the event of a sale of the premises
20 conveyed or transferred in trust, or any part thereof, and the
21 execution of a deed or deeds therefor under such trust, the recital
22 therein of default, and of recording notice of breach and election of
23 sale, and of the elapsing of the 3-month period, and of the giving of
24 notice of sale, and of a demand by beneficiary, his or her heirs or
25 assigns, that such sale should be made, shall be conclusive proof of
26 such default, recording, election, elapsing of time, and of the due
27 giving of such notice, and that the sale was regularly and validly
28 made on due and proper demand by beneficiary, his or her heirs and
29 assigns; and any such deed or deeds with such recitals therein shall
30 be effectual and conclusive against grantor, his or her heirs and
31 assigns, and all other persons; and the receipt for the purchase
32 money recited or contained in any deed executed to the purchaser as
33 aforesaid shall be sufficient discharge to such purchaser from all
34 obligation to see to the proper application of the purchase money,
35 according to the trusts aforesaid.

36 9. COVENANT NO. 9. That the beneficiary or his or her assigns
37 may, from time to time, appoint another trustee, or trustees, to
38 execute the trust created by the deed of trust or other conveyance in
39 trust. A copy of a resolution of the board of directors of beneficiary
40 (if beneficiary be a corporation), certified by the secretary thereof,
41 under its corporate seal, or an instrument executed and
42 acknowledged by the beneficiary (if the beneficiary be a natural
43 person), shall be conclusive proof of the proper appointment of such
44 substituted trustee. Upon the recording of such certified copy or
45 executed and acknowledged instrument, the new trustee or trustees



1 shall be vested with all the title, interest, powers, duties and trusts in
2 the premises vested in or conferred upon the original trustee. If there
3 be more than one trustee, either may act alone and execute the trusts
4 upon the request of the beneficiary, and all of the trustee's acts
5 thereunder shall be deemed to be the acts of all trustees, and the
6 recital in any conveyance executed by such sole trustee of such
7 request shall be conclusive evidence thereof, and of the authority of
8 such sole trustee to act.

9 **Sec. 2.** NRS 107.040 is hereby amended to read as follows:

10 107.040 1. In order to adopt by reference any of the
11 covenants, agreements, obligations, rights and remedies in NRS
12 107.030, it shall only be necessary to state in the deed of trust the
13 following: "The following covenants, Nos.,
14 and (inserting the respective numbers) of NRS 107.030
15 are hereby adopted and made a part of this deed of trust."

16 2. A deed of trust or other conveyance in trust, in order to fix
17 the amount of insurance to be carried, need not reincorporate the
18 provisions of Covenant No. 2 of NRS 107.030, but may merely state
19 the following: "Covenant No. 2," and set out thereafter the amount
20 of insurance to be carried.

21 3. In order to fix the rate of interest under Covenant No. 4 of
22 NRS 107.030, it shall only be necessary to state in such trust deed or
23 other conveyance in trust, "Covenant No. 4," and set out thereafter
24 the rate of interest to be charged thereunder.

25 4. In order to fix the amount or percent of counsel fees under
26 Covenant No. 7 of NRS 107.030, it shall only be necessary to state
27 in such deed of trust, or other conveyance in trust, the following:
28 "Covenant No. 7," and set out thereafter *either* the percentage to be
29 allowed *or, in lieu of the percentage to be allowed, reasonable*
30 *counsel fees and costs actually incurred.*

31 **Sec. 3.** NRS 107.055 is hereby amended to read as follows:

32 107.055 If a party to a deed of trust, executed after
33 July 1, 1971, desires to charge an assumption fee for a change in
34 parties, the amount of such charge must be clearly set forth in the
35 deed of trust at the time of execution. *Without limiting or*
36 *prohibiting any other method by which the amount of the charge*
37 *may be clearly set forth in the deed of trust, the charge may be set*
38 *forth as:*

- 39 1. *A fixed sum;*
40 2. *A percentage of the amount secured by the deed of trust*
41 *and remaining unpaid at the time of assumption; or*
42 3. *The lesser of, the greater of or some combination of the*
43 *amounts determined by subsections 1 and 2.*



1 **Sec. 4.** NRS 107.081 is hereby amended to read as follows:

2 107.081 1. All sales of property pursuant to NRS 107.080
3 must be made at auction to the highest bidder and must be made
4 between the hours of 9 a.m. and 5 p.m. The agent holding the sale
5 must not become a purchaser at the sale or be interested in any
6 purchase at such a sale.

7 2. All sales of real property must be made:

8 (a) *For a residential foreclosure or foreclosure of a residential*
9 *unit:*

10 (1) In a county with a population of less than 100,000, at the
11 courthouse in the county in which the property or some part thereof
12 is situated.

13 ~~(b)~~ (2) In a county with a population of 100,000 or more, at
14 the public location in the county designated by the governing body
15 of the county for that purpose.

16 (b) *For a foreclosure of commercial property, at a location in*
17 *the county in which the property or some part thereof is situated as*
18 *specified in the notice of sale recorded by the trustee of the trust*
19 *deed or transfer in trust.*

20 3. *For the purposes of this section:*

21 (a) *“Commercial property” has the meaning ascribed to it in*
22 *NRS 645E.040.*

23 (b) *“Residential foreclosure” has the meaning ascribed to it in*
24 *NRS 107.080.*

25 (c) *“Residential unit” means a unit in a common-interest*
26 *community that is used exclusively for residential use, as those*
27 *terms are defined in chapter 116 of NRS.*

28 **Sec. 4.5.** NRS 40.451 is hereby amended to read as follows:

29 40.451 As used in NRS 40.451 to 40.463, inclusive,
30 “indebtedness” means the principal balance of the obligation
31 secured by a mortgage or other lien on real property, together with
32 ~~that~~ :

33 1. All interest accrued and unpaid prior to the time of
34 foreclosure sale ~~that~~ ;

35 2. All costs and fees of such a sale ~~that~~ ;

36 3. All advances made with respect to the property by the
37 beneficiary ; ~~it~~ and ~~that~~

38 4. All other amounts secured by the mortgage or other lien on
39 the real property in favor of the person seeking the deficiency
40 judgment. Such ~~amount constituting a lien is~~ *other amounts are*
41 limited to the amount ~~of the consideration~~ paid by the lienholder
42 ~~it~~ *or the predecessor of the lienholder.*

43 **Sec. 5.** NRS 100.091 is hereby amended to read as follows:

44 100.091 1. For each loan requiring the deposit of money to
45 an escrow account, loan trust account or other impound account for



1 the payment of taxes, assessments, rental or leasehold payments, ~~for~~
2 ~~fire, hazard or other~~ insurance premiums ~~[.]~~ *or other obligations*
3 *related to the encumbered property*, the lender shall ~~[,at]~~ :

4 (a) *Require contributions in an amount reasonably necessary*
5 *to pay the obligations as they become due.*

6 (b) *Unless money in the account is insufficient, pay in a timely*
7 *manner the obligations as they become due.*

8 (c) *At least annually, analyze the account. The analysis of each*
9 *account must be performed to determine whether sufficient money*
10 *is contributed to the account on a monthly basis to pay for the*
11 *projected disbursements from the account. At least 30 days before*
12 *the effective date of any increased contribution to the account based*
13 *on the analysis, a statement must be sent to the borrower showing*
14 *the method of determining the amount of money held in the account,*
15 *the amount of projected disbursements from the account and the*
16 *amount of the reserves which may be held in accordance with*
17 *federal guidelines.*

18 2. If, upon completion of the analysis, it is determined that an
19 account is not sufficiently funded to pay from the normal payment
20 the items when due on the account, the lender shall offer the
21 borrower the opportunity to correct the deficiency by making one
22 lump-sum payment or by making increased monthly contributions,
23 in an amount required by the lender. The lender shall not declare a
24 default on the account solely because the borrower is unable to pay
25 the amount of the deficiency in one lump sum.

26 3. *Except for payments made by a borrower for a lender to*
27 *recover previous deficiencies in contributions to the account*
28 *pursuant to subsection 2, the borrower is entitled pursuant to*
29 *subsection 4 to the amount by which the borrower's contributions*
30 *to the account exceed the amount reasonably necessary to pay the*
31 *annual obligations due from the account, together with interest*
32 *thereon at the rate established pursuant to NRS 99.040.*

33 4. If, upon completion of the analysis, it is determined that the
34 amount of money held by the lender in the account, together with
35 anticipated future monthly contributions to the account to be
36 credited to the account before the dates items are due on the
37 account, exceed the amount of money required to pay the items
38 when due, the lender shall, ~~[at the option of]~~ *not later than 30 days*
39 *after completion of its annual review of the account, notify the*
40 *borrower:*

41 (a) *Of the amount by which the contributions and interest*
42 *earned pursuant to subsection 3 exceed the amount reasonably*
43 *necessary to pay the annual obligations due from the account; and*

44 (b) *That the borrower ~~[either repay]~~ may, not later than 20*
45 *days after receipt of the notice, specify that the lender:*



- 1 (1) *Repay* the excess *money and interest* promptly to the
2 borrower ~~[-apply]~~ ;
3 (2) *Apply* the excess *money and interest* to the outstanding
4 principal balance ; or ~~[retain]~~
5 (3) *Retain* the excess *money and interest* in the account.
6 5. *If the borrower fails to specify the disposition of the excess*
7 *money and interest as provided in paragraph (b) of subsection 4,*
8 *the lender shall maintain the excess money and interest in the*
9 *account.*
10 6. If any payment on the loan is delinquent at the time of the
11 analysis, the lender shall retain any excess money *and interest* in the
12 account and apply the *excess* money *and interest* in the account
13 toward payment of the delinquency.
14 ~~[4.]~~ 7. *A lender who violates any provision of subsections 4, 5*
15 *and 6 is liable to the borrower for a civil penalty of not more than*
16 *\$1,000.*
17 8. *The provisions of this section apply exclusively to:*
18 (a) *A loan secured by a single family residence, as that term is*
19 *defined in NRS 107.080; and*
20 (b) *A unit in a common-interest community that is used*
21 *exclusively for residential use, as those terms are defined in*
22 *chapter 116 of NRS.*
23 9. As used in this section:
24 (a) "Borrower" means any person who receives a loan secured
25 by real property and who is required to make advance contributions
26 for the payment of taxes, insurance premiums or other expenses
27 related to the property.
28 (b) "Lender" means any person who makes loans secured by
29 real property and who requires advance contributions for the
30 payment of taxes, insurance premiums or other expenses related to
31 the property.
32 **Sec. 6.** NRS 106.105 is hereby repealed.

TEXT OF REPEALED SECTION

106.105 Contributions; payment of obligations; notice regarding and disposition of excess money; civil penalty.

1. Except as otherwise provided in subsection 2, a lender who requires a borrower to make advance contributions to an impound trust account, or an account of similar name, for the payment of taxes, insurance premiums or other obligations related to the encumbered property shall:



(a) Require contributions in an amount reasonably necessary to pay the obligations as they become due.

(b) Unless money in the account is insufficient, pay in a timely manner the obligations as they become due.

(c) Within 30 days after the completion of its annual review of the account, notify the borrower:

(1) Of the amount by which the contributions exceed the amount reasonably necessary to pay the annual obligations due from the account; and

(2) That the borrower may specify the disposition of the excess money within 20 days after receipt of the notice. If the borrower fails to specify such a disposition within that time, the lender shall maintain the excess money in the account.

↳ A lender who violates any provision of this subsection is liable to the borrower for a civil penalty of not more than \$1,000.

2. A lender, to recover previous deficiencies in contributions to an impound trust account, may require contributions to the account in an amount greater than that reasonably necessary to pay the obligations as they become due. The borrower is otherwise entitled to the amount by which the borrower's contributions to the account exceed the amount reasonably necessary to pay the annual obligations due from the account, together with interest thereon at the rate established pursuant to NRS 99.040.

3. As used in this section:

(a) "Borrower" means a mortgagor, grantor of a deed of trust or other obligor on a loan secured by a lien upon real property.

(b) "Lender" means a mortgagee, beneficiary of a deed of trust or other obligee on a loan secured by a lien upon real property, and his or her successor in interest.



