

SENATE BILL NO. 356—SENATOR ROBERSON
(BY REQUEST)

MARCH 18, 2013

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to real property.
(BDR 9-824)

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 to a deed of trust may be set; revising provisions relating to certain agreements to sell real property to a third party; revising provisions concerning 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 Existing law provides that certain covenants may be adopted by reference in a
2 deed of trust. (NRS 107.030) **Section 1** of this bill amends one such statutory
3 covenant to provide the parties to a deed of trust the alternatives of paying, in
4 connection with a trustee’s sale, either: (1) counsel fees in an amount equal to a
5 specified percentage of the amount secured by the deed of trust and remaining
6 unpaid; or (2) reasonable counsel fees and costs actually incurred. **Section 2** of this
7 bill revises accordingly the information that must be stated in a deed of trust which
8 contains such a covenant. **Section 1** also amends another statutory covenant which
9 authorizes a beneficiary or his or her assigns to appoint another trustee to execute a
10 trust by removing the use of a certified copy of a resolution of the board of
11 directors of a corporate beneficiary as conclusive proof of the proper appointment
12 of a trustee.

13 Existing law also provides that if a party to a deed of trust desires to charge an
14 assumption fee for a change in parties to the deed of trust, the amount of the
15 assumption fee must be clearly set forth in the deed of trust at the time of execution.
16 (NRS 107.055) **Section 3** of this bill sets forth certain methods of specifying
17 assumption fees for a change in parties to a deed of trust.



18 Existing law prohibits a court from awarding a deficiency judgment to a
19 creditor or beneficiary of a deed of trust who is a banking or other financial
20 institution if certain circumstances exist, including when a debtor or grantor and the
21 banking or other financial institution have entered into an agreement to sell real
22 property secured by a mortgage or deed of trust to a third party for an amount less
23 than the indebtedness secured by the mortgage or deed of trust, and the agreement:
24 (1) does not state the amount owed to the banking or other financial institution or
25 does not authorize the banking or other financial institution to recover the amount
26 owed; and (2) contains a statement signed by the debtor or grantor which provides
27 that the banking or other financial institution has waived its right to recover the
28 amount owed and sets forth the amount being waived. (NRS 40.458) **Section 4** of
29 this bill requires that such a statement also be signed by the banking or other
30 financial institution.

31 Existing law additionally provides that if a loan requires the deposit of money
32 to an impound account for the payment of certain obligations, the lender must
33 analyze the account at least annually. (NRS 100.091) Existing law also imposes
34 certain duties upon a lender who requires a borrower to make advance contributions
35 to an impound account for the payment of certain obligations. (NRS 106.105)
36 **Section 5** of this bill revises provisions concerning the accounting for impound
37 accounts and the related duties of a lender by incorporating provisions repealed by
38 **section 6** of this bill.

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



1 interest of trustee or upon the interest of grantor, or his or her
2 assigns, and in their names, loss, if any, being made payable to
3 beneficiary, and may pay and expend for premiums for such
4 insurance such sums of money as the beneficiary may deem
5 necessary.

6 3. COVENANT NO. 3. That if, during the existence of the trust,
7 there be commenced or pending any suit or action affecting the
8 conveyed premises, or any part thereof, or the title thereto, or if any
9 adverse claim for or against the premises, or any part thereof, be
10 made or asserted, the trustee or beneficiary may appear or intervene
11 in the suit or action and retain counsel therein and defend same, or
12 otherwise take such action therein as they may be advised, and may
13 settle or compromise same or the adverse claim; and in that behalf
14 and for any of the purposes may pay and expend such sums of
15 money as the trustee or beneficiary may deem to be necessary.

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

22 5. COVENANT NO. 5. That in case grantor shall well and truly
23 perform the obligation or pay or cause to be paid at maturity the
24 debt or promissory note, and all moneys agreed to be paid, and
25 interest thereon for the security of which the transfer is made, and
26 also the reasonable expenses of the trust in this section specified,
27 then the trustee, its successors or assigns, shall reconvey to the
28 grantor all the estate in the premises conveyed to the trustee by the
29 grantor. Any part of the trust property may be reconveyed at
30 the request of the beneficiary.

31 6. COVENANT NO. 6. That if default be made in the
32 performance of the obligation, or in the payment of the debt, or
33 interest thereon, or any part thereof, or in the payment of any of the
34 other moneys agreed to be paid, or of any interest thereon, or if any
35 of the conditions or covenants in this section adopted by reference
36 be violated, and if the notice of breach and election to sell, required
37 by this chapter, be first recorded, then trustee, its successors or
38 assigns, on demand by beneficiary, or assigns, shall sell the above-
39 granted premises, or such part thereof as in its discretion it shall find
40 necessary to sell, in order to accomplish the objects of these trusts,
41 in the manner following, namely:

42 The trustees shall first give notice of the time and place of such
43 sale, in the manner provided in NRS 107.080 and may postpone
44 such sale not more than three times by proclamation made to the
45 persons assembled at the time and place previously appointed and



1 advertised for such sale, and on the day of sale so advertised, or to
2 which such sale may have been postponed, the trustee may sell the
3 property so advertised, or any portion thereof, at public auction, at
4 the time and place specified in the notice, at a public location in the
5 county in which the property, or any part thereof, to be sold, is
6 situated, to the highest cash bidder. The beneficiary, obligee,
7 creditor, or the holder or holders of the promissory note or notes
8 secured thereby may bid and purchase at such sale. The beneficiary
9 may, after recording the notice of breach and election, waive or
10 withdraw the same or any proceedings thereunder, and shall
11 thereupon be restored to the beneficiary's former position and have
12 and enjoy the same rights as though such notice had not been
13 recorded.

14 7. COVENANT NO. 7. That the trustee, upon such sale, shall
15 make (without warranty), execute and, after due payment made,
16 deliver to purchaser or purchasers, his, her or their heirs or assigns, a
17 deed or deeds of the premises so sold which shall convey to the
18 purchaser all the title of the grantor in the trust premises, and shall
19 apply the proceeds of the sale thereof in payment, firstly, of the
20 expenses of such sale, together with the reasonable expenses of the
21 trust, including counsel fees, in an amount equal to
22 percent of the amount secured thereby and remaining unpaid **H or**
23 **reasonable counsel fees and costs actually incurred**, which shall
24 become due upon any default made by grantor in any of the
25 payments aforesaid; and also such sums, if any, as trustee or
26 beneficiary shall have paid, for procuring a search of the title to the
27 premises, or any part thereof, subsequent to the execution of the
28 deed of trust; and in payment, secondly, of the obligation or debts
29 secured, and interest thereon then remaining unpaid, and the amount
30 of all other moneys with interest thereon herein agreed or provided
31 to be paid by grantor; and the balance or surplus of such proceeds of
32 sale it shall pay to grantor, his or her heirs, executors, administrators
33 or assigns.

34 8. COVENANT NO. 8. That in the event of a sale of the premises
35 conveyed or transferred in trust, or any part thereof, and the
36 execution of a deed or deeds therefor under such trust, the recital
37 therein of default, and of recording notice of breach and election of
38 sale, and of the elapsing of the 3-month period, and of the giving of
39 notice of sale, and of a demand by beneficiary, his or her heirs or
40 assigns, that such sale should be made, shall be conclusive proof of
41 such default, recording, election, elapsing of time, and of the due
42 giving of such notice, and that the sale was regularly and validly
43 made on due and proper demand by beneficiary, his or her heirs and
44 assigns; and any such deed or deeds with such recitals therein shall
45 be effectual and conclusive against grantor, his or her heirs and



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1 assigns, and all other persons; and the receipt for the purchase
2 money recited or contained in any deed executed to the purchaser as
3 aforesaid shall be sufficient discharge to such purchaser from all
4 obligation to see to the proper application of the purchase money,
5 according to the trusts aforesaid.

6 9. COVENANT NO. 9. That the beneficiary or his or her assigns
7 may, from time to time, appoint another trustee, or trustees, to
8 execute the trust created by the deed of trust or other conveyance in
9 trust. ~~[A copy of a resolution of the board of directors of beneficiary~~
10 ~~(if beneficiary be a corporation), certified by the secretary thereof,~~
11 ~~under its corporate seal, or an]~~ An instrument executed and
12 acknowledged by the beneficiary ~~[(if the beneficiary be a natural~~
13 ~~person), shall be]~~ is conclusive proof of the proper appointment of
14 such substituted trustee. Upon the recording of such ~~[certified copy~~
15 ~~or]~~ executed and acknowledged instrument, the new trustee or
16 trustees shall be vested with all the title, interest, powers, duties and
17 trusts in the premises vested in or conferred upon the original
18 trustee. If there be more than one trustee, either may act alone and
19 execute the trusts upon the request of the beneficiary, and all of the
20 trustee's acts thereunder shall be deemed to be the acts of all
21 trustees, and the recital in any conveyance executed by such sole
22 trustee of such request shall be conclusive evidence thereof, and of
23 the authority of such sole trustee to act.

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

25 107.040 1. In order to adopt by reference any of the
26 covenants, agreements, obligations, rights and remedies in NRS
27 107.030, it shall only be necessary to state in the deed of trust the
28 following: "The following covenants, Nos.,
29 and (inserting the respective numbers) of NRS 107.030
30 are hereby adopted and made a part of this deed of trust."

31 2. A deed of trust or other conveyance in trust, in order to fix
32 the amount of insurance to be carried, need not reincorporate the
33 provisions of Covenant No. 2 of NRS 107.030, but may merely state
34 the following: "Covenant No. 2," and set out thereafter the amount
35 of insurance to be carried.

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

40 4. In order to fix the amount or percent of counsel fees under
41 Covenant No. 7 of NRS 107.030, it shall only be necessary to state
42 in such deed of trust, or other conveyance in trust, the following:
43 "Covenant No. 7," and set out thereafter *either* the percentage to be
44 allowed ~~[]~~ *or, in lieu of the percentage to be allowed, reasonable*
45 *counsel fees and costs actually incurred.*



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

2 107.055 If a party to a deed of trust, executed after July 1,
3 1971, desires to charge an assumption fee for a change in parties,
4 the amount of such charge must be clearly set forth in the deed of
5 trust at the time of execution. *Without limiting or prohibiting any*
6 *other method by which the amount of the charge may be clearly*
7 *set forth in the deed of trust, the charge may be set forth as:*

8 1. *A fixed sum;*

9 2. *A percentage of the amount secured by the deed of trust*
10 *and remaining unpaid at the time of assumption; or*

11 3. *The lesser of, the greater of or some combination of the*
12 *amounts determined by subsections 1 and 2.*

13 **Sec. 4.** NRS 40.458 is hereby amended to read as follows:

14 40.458 1. If the judgment creditor or the beneficiary of the
15 deed of trust who applies for a deficiency judgment is a banking or
16 other financial institution, the court may not award a deficiency
17 judgment to the judgment creditor or the beneficiary of the deed of
18 trust if:

19 (a) The real property is a single-family dwelling and the debtor
20 or the grantor of the deed of trust was the owner of the real property
21 at the time of the sale in lieu of a foreclosure sale;

22 (b) The debtor or grantor used the amount for which the real
23 property was secured by the mortgage or deed of trust to purchase
24 the real property;

25 (c) The debtor or grantor continuously occupied the real
26 property as the debtor's or grantor's principal residence after
27 securing the mortgage or deed of trust;

28 (d) The debtor or grantor and the banking or other financial
29 institution entered into an agreement to sell the real property secured
30 by the mortgage or deed of trust to a third party for an amount less
31 than the indebtedness secured thereby; and

32 (e) The agreement entered into pursuant to paragraph (d):

33 (1) Does not state the amount of money still owed to the
34 banking or other financial institution by the debtor or grantor or
35 does not authorize the banking or other financial institution to
36 recover that amount from the debtor or grantor; and

37 (2) Contains a conspicuous statement that has been
38 acknowledged by the signature of the *banking or other financial*
39 *institution and the* debtor or grantor which provides that the
40 banking or other financial institution has waived its right to recover
41 the amount owed by the debtor or grantor and which sets forth the
42 amount of recovery that is being waived.

43 2. As used in this section:

44 (a) "Banking or other financial institution" means any bank,
45 savings and loan association, savings bank, thrift company, credit



1 union or other financial institution that is licensed, registered or
2 otherwise authorized to do business in this State.

3 (b) "Sale in lieu of a foreclosure sale" means a sale of real
4 property pursuant to an agreement between a person to whom an
5 obligation secured by a mortgage or other lien on real property is
6 owed and the debtor of that obligation in which the sales price of the
7 real property is insufficient to pay the full outstanding balance of the
8 obligation and the costs of the sale. The term includes, without
9 limitation, a deed in lieu of foreclosure.

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

11 100.091 1. For each loan requiring the deposit of money to
12 an escrow account, loan trust account or other impound account for
13 the payment of taxes, assessments, rental or leasehold payments, ~~for~~
14 ~~fire, hazard or other~~ insurance premiums ~~+~~ *or other obligations*
15 *related to the encumbered property*, the lender shall ~~+~~ *:*

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

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

20 (c) *At least annually, analyze the account. The analysis of each*
21 *account must be performed to determine whether sufficient money*
22 *is contributed to the account on a monthly basis to pay for the*
23 *projected disbursements from the account. At least 30 days before*
24 *the effective date of any increased contribution to the account based*
25 *on the analysis, a statement must be sent to the borrower showing*
26 *the method of determining the amount of money held in the account,*
27 *the amount of projected disbursements from the account and the*
28 *amount of the reserves which may be held in accordance with*
29 *federal guidelines.*

30 2. If, upon completion of the analysis, it is determined that an
31 account is not sufficiently funded to pay from the normal payment
32 the items when due on the account, the lender shall offer the
33 borrower the opportunity to correct the deficiency by making one
34 lump-sum payment or by making increased monthly contributions,
35 in an amount required by the lender. The lender shall not declare a
36 default on the account solely because the borrower is unable to pay
37 the amount of the deficiency in one lump sum.

38 3. *Except for payments made by a borrower for a lender to*
39 *recover previous deficiencies in contributions to the account*
40 *pursuant to subsection 2, the borrower is entitled pursuant to*
41 *subsection 4 to the amount by which the borrower's contributions*
42 *to the account exceed the amount reasonably necessary to pay the*
43 *annual obligations due from the account, together with interest*
44 *thereon at the rate established pursuant to NRS 99.040.*



1 4. If, upon completion of the analysis, it is determined that the
2 amount of money held by the lender in the account, together with
3 anticipated future monthly contributions to the account to be
4 credited to the account before the dates items are due on the
5 account, exceed the amount of money required to pay the items
6 when due, the lender shall, ~~at the option of~~ **not later than 30 days**
7 **after completion of its annual review of the account, notify the**
8 **borrower:**

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

12 (b) **That the borrower ~~is either repay~~ may, not later than 20**
13 **days after receipt of the notice, specify that the lender:**

14 (1) **Repay** the excess **money and interest** promptly to the
15 borrower ~~is apply~~;

16 (2) **Apply** the excess **money and interest** to the outstanding
17 principal balance ; or ~~retain~~

18 (3) **Retain** the excess **money and interest** in the account.

19 5. **If the borrower fails to specify the disposition of the excess**
20 **money and interest as provided in paragraph (b) of subsection 4,**
21 **the lender shall maintain the excess money and interest in the**
22 **account.**

23 6. If any payment on the loan is delinquent at the time of the
24 analysis, the lender shall retain any excess money **and interest** in the
25 account and apply the **excess** money **and interest** in the account
26 toward payment of the delinquency.

27 ~~14.~~ 7. **A lender who violates any provision of subsections 4,**
28 **5 and 6 is liable to the borrower for a civil penalty of not more**
29 **than \$1,000.**

30 8. **The provisions of this section apply exclusively to:**

31 (a) **A loan secured by a single family residence, as that term is**
32 **defined in NRS 107.080; and**

33 (b) **A unit in a common-interest community that is used**
34 **exclusively for residential use, as those terms are defined in**
35 **chapter 116 of NRS.**

36 9. As used in this section:

37 (a) "Borrower" means any person who receives a loan secured
38 by real property and who is required to make advance contributions
39 for the payment of taxes, insurance premiums or other expenses
40 related to the property.

41 (b) "Lender" means any person who makes loans secured by
42 real property and who requires advance contributions for the
43 payment of taxes, insurance premiums or other expenses related to
44 the property.

45 **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.

