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HOUSE BILL 254

47TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2006

INTRODUCED BY

Al Park

AN ACT

RELATING TO PROPERTY; AMENDING THE DEED OF TRUST ACT; AMENDING,
REPEALING AND ENACTING SECTIONS OF THE NMSA 1978.

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. "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 ~~[his]~~ the person's
successor in interest;

~~[B. "qualified construction project" means a
low-income housing project of a regional, county or municipal
housing authority or a qualified nonprofit organization;~~

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1 ~~C.~~ "qualified nonprofit organization" means an
2 organization that is certified by the state housing authority
3 as having been granted exemption from federal income tax
4 pursuant to Section 501(c)(3) or (4) of the Internal Revenue
5 Code of 1986, as amended, and that includes as one of its
6 exempt purposes the fostering of low-income housing;

7 ~~D.~~ B. "contract" means an agreement between or
8 among two or more persons, including, without limitation, a
9 note, promissory note, guarantee or the terms of any deed of
10 trust;

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

24 ~~F.~~ D. "parent corporation" means a corporation
25 that owns eighty percent or more of each class of the issued

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1 and outstanding stock of another corporation or, in the case of
2 a savings and loan association, eighty percent or more of the
3 issued and outstanding guaranty capital of the savings and loan
4 association;

5 [G.] E. "person" means an individual or
6 organization;

7 [H.] F. "deed of trust" means a document by way of
8 mortgage in substance executed in conformity with the Deed of
9 Trust Act and in conformity with Section 47-1-39 NMSA 1978
10 granting or mortgaging trust real estate to a trustee qualified
11 under the Deed of Trust Act to secure the performance of a
12 contract; ~~[but does not include a deed of trust that encumbers~~
13 ~~in whole or in part trust real estate located in New Mexico and~~
14 ~~in one or more other states;~~

15 [I.] G. "junior encumbrancer" means a person holding
16 a lien, mortgage or other encumbrance of record evidencing an
17 interest in the trust real estate that is subordinate in
18 priority to the deed of trust and includes a lienholder, a
19 mortgagee, a seller and a purchaser as provided in a real
20 estate contract and, where the context is applicable, escrow
21 agents as provided in a real estate contract;

22 ~~[J. "low-income household" means a household that~~
23 ~~the state housing authority certifies is a household with~~
24 ~~income at or below eighty percent of the state's median~~
25 ~~household income;~~

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1 K. ~~"low-income housing project" means a housing~~
2 ~~project that the state housing authority certifies is housing~~
3 ~~for low-income households;~~

4 L. ~~"state housing authority" means the New Mexico~~
5 ~~mortgage finance authority;~~

6 M.] H. "trust real estate" means any legal,
7 equitable, leasehold or other interest in real estate,
8 including the term "real estate" as defined in Section 47-1-1
9 NMSA 1978 and any improvements and fixtures, which is capable
10 of being transferred whether or not the interest is subject to
11 any prior mortgages, deeds of trust, contracts for conveyance
12 of real estate, real estate contracts or other liens or
13 encumbrances; provided, however, trust real estate shall not
14 include:

15 ~~[(1) any dwelling and the underlying real~~
16 ~~estate designed for occupancy by one to four families,~~
17 ~~including mobile homes and condominiums, except when occupancy~~
18 ~~is designed for low-income households;~~

19 ~~(2)]~~ (1) any real estate used by the trustor
20 for farming operations, including farming, tillage of the soil,
21 dairy farming, ranching, production or raising of crops,
22 poultry or livestock, and production of poultry or livestock
23 products in an unmanufactured state; or

24 ~~[(3)]~~ (2) oil and other liquid hydrocarbons,
25 or gas, including casinghead gas, condensates and other gaseous

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1 petroleum substances, or coal or other minerals in, on or under
2 real estate, including patented and unpatented mining claims,
3 unless such minerals have not been severed from and are
4 included with the surface estate.

5 The character of trust real estate shall be determined as
6 of the date of the deed of trust covering the trust real
7 estate;

8 [N.] I. "trustee" means a person qualified as
9 provided in the Deed of Trust Act. The obligations of a
10 trustee to the trustor, beneficiary and other persons are as
11 provided in the Deed of Trust Act, together with any other
12 obligations specified in the deed of trust. Both the
13 beneficiary and the trustee have all the powers of a mortgagee
14 as provided by law; and

15 [Ø.] J. "trustor" means the person or [~~his~~] the
16 person's successor in interest granting or mortgaging trust
17 real estate by a deed of trust as security for the performance
18 of a contract and is the same as a mortgagor granting or
19 mortgaging real estate by way of mortgage as provided by law."

20 Section 2. Section 48-10-7 NMSA 1978 (being Laws 1987,
21 Chapter 61, Section 7) is amended to read:

22 "48-10-7. APPOINTMENT OF SUCCESSOR TRUSTEE BY
23 BENEFICIARY.--

24 A. If a person appointed as trustee fails to
25 qualify, is unwilling, unqualified or unable to serve or

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1 resigns as trustee, the beneficiary may appoint a successor
2 trustee and the appointment shall constitute a substitution of
3 trustee.

4 B. The beneficiary may remove a trustee at any time
5 for any reason or cause and appoint a successor trustee, and
6 [~~such~~] the appointment shall constitute a substitution of
7 trustee.

8 C. Substitutions shall be made by recording notice
9 of the substitution in the office of the county clerk of each
10 county in which all or any part of the trust real estate is
11 situated at the time of the substitution. The beneficiary
12 shall give written notice through registered or certified mail,
13 postage prepaid, to the trustor, the trustee and the successor
14 trustee. A notice of substitution of trustee shall be
15 sufficient if acknowledged by all beneficiaries as provided in
16 the deed of trust and prepared in substantially the following
17 form:

18 "NOTICE OF SUBSTITUTION OF TRUSTEE"

19 The undersigned beneficiary hereby appoints _____
20 _____ successor trustee under the
21 deed of trust executed by _____ as trustor,
22 in which _____ is named beneficiary and
23 _____ as trustee, and recorded
24 _____, [19] 20_____, in
25 _____ County, New Mexico, in book

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1 _____, page _____, and

2 legally describing the trust real estate as:

3 (legal description of trust real estate)

4 Dated this _____ day of

5 _____, [~~19~~] 20_____.

6 _____

7 Signature of Beneficiary

8 (Here add Acknowledgment)."

9 D. A notice of substitution of trustee is effective
10 immediately on execution as provided in Subsection C of this
11 section.

12 [~~D-~~] E. A person appointed as a trustee under a
13 deed of trust may resign as trustee at any time. The
14 resignation shall be without liability, provided the person has
15 not agreed in writing to be appointed trustee or [~~he~~] has not
16 acted in the capacity of trustee. The trustee may only resign
17 as provided in the deed of trust and the Deed of Trust Act. If
18 a trustee fails to qualify or is unwilling or unable to serve
19 or resigns, the validity of the deed of trust shall not be
20 affected, except that no action required to be performed by the
21 trustee as provided in the Deed of Trust Act or as provided in
22 the deed of trust may be taken until a successor trustee is
23 appointed by the beneficiary as provided in this section. If
24 the beneficiary fails or refuses to appoint a successor
25 trustee, the terms of Section 47-1-42 NMSA 1978 shall be

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1 applicable. Resignation by a trustee is made by recordation of
2 a notice of resignation in the office of the county clerk of
3 each county in which all or any part of the trust real estate
4 is situated at the time of the resignation. Written notice
5 shall be given through registered or certified mail, postage
6 prepaid, to the trustor and the beneficiary. A notice of
7 resignation of trustee is sufficient if acknowledged by the
8 trustee and prepared in substantially the following form:

9 "NOTICE OF RESIGNATION OF TRUSTEE

10 The undersigned trustee hereby resigns as trustee
11 under the deed of trust executed by
12 _____, as trustor, in which
13 _____ is named
14 beneficiary, and recorded _____,
15 [19] 20_____, in _____
16 County, New Mexico, in book _____,
17 page _____, and legally describing the trust
18 real estate as:

19 (legal description of trust real estate)

20 Dated this _____ day of
21 _____, [19] 20_____.

22 _____
23 Signature of Trustee

24 (Here add Acknowledgment)."."

25 Section 3. Section 48-10-10 NMSA 1978 (being Laws 1987,

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1 Chapter 61, Section 10, as amended) is amended to read:

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

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

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

25 C. The power of sale of trust real estate conferred

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1 upon the trustee [~~as to trust real estate for commercial or~~
2 ~~business loans~~] shall not be exercised before the expiration of
3 [~~one hundred eighty~~] ninety days from the recording of the
4 notice of the sale. [~~The power of sale of trust real estate~~
5 ~~conferred upon the trustee as to low-income household loans~~
6 ~~shall not be exercised before the expiration of forty-five days~~
7 ~~from the recording of the notice of the sale.~~]

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

22 Section 4. Section 48-10-11 NMSA 1978 (being Laws 1987,
23 Chapter 61, Section 11) is amended to read:

24 "48-10-11. NOTICE OF TRUSTEE'S SALE.--

25 A. The trustee shall give written notice of the

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1 time and place of sale, legally describing the trust real
2 estate to be sold, by each of the following methods:

3 (1) publication of the notice [~~shall be~~] as
4 provided by law for foreclosure of mortgages on real estate;

5 [~~(2) posting of the notice at least twenty~~
6 ~~days before the date of sale in some conspicuous place on the~~
7 ~~trust real estate to be sold, if such can be accomplished~~
8 ~~without a breach of the peace, and at one of the places~~
9 ~~provided for posting public notices at the courthouse of the~~
10 ~~county in which the trust real estate is to be sold;~~

11 ~~(3)]~~ (2) recording of the notice in the office
12 of the clerk of each county in which the trust real estate is
13 situated; and

14 [~~(4)]~~ (3) giving notice as provided in Section
15 [~~12 of the Deed of Trust Act]~~ 48-10-12 NMSA 1978 to the extent
16 applicable.

17 B. The sale shall be held at the time and place
18 designated in the notice of sale on a day other than a
19 Saturday, Sunday, legal holiday or nonbanking day and at the
20 time provided by law for the foreclosure sale of real estate
21 under real estate mortgages on the front steps of the
22 courthouse of the county in which the trust real estate is
23 located [~~or~~]. If the trust real estate is located in more than
24 one county, the sale may be held in any county in which part of
25 the trust real estate is located.

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1 C. The notice of sale shall contain the street
2 address, if any, or identifiable location as well as the legal
3 description of the trust real estate. Failure to accurately
4 describe within the notice either the street address or the
5 identifiable location of the trust real estate to be sold shall
6 not be grounds for invalidating the sale if the correct legal
7 description of the trust real estate to be sold was contained
8 in the notice of sale. The notice of sale shall be sufficient
9 if made in substantially the following form:

10 "NOTICE OF TRUSTEE'S SALE"

11 The following legally described trust real estate
12 will be sold, pursuant to the power of sale as
13 provided in the deed of trust recorded in book
14 _____ at page _____,
15 County, New Mexico, records, at public auction to
16 the highest bidder on the front steps of the county
17 courthouse in _____ County, New
18 Mexico, in or near _____,
19 New Mexico, on _____, [+9] 20____, at
20 _____ o'clock ___m. of that day:

21 (street address, if any, or identifiable location
22 of trust real estate and legal description of
23 trust real estate)

24 Dated this _____ day of _____,
25 [+9] 20_____.

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(Name of Trustor) (Name of Trustee)

Signature

(Here add Acknowledgment).".."

Section 5. Section 48-10-13 NMSA 1978 (being Laws 1987, Chapter 61, Section 13) is amended to read:

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

A. On the date and at the time and place designated in the notice of sale, the trustee shall sell the trust real estate at public auction for cash to the highest bidder. To determine the highest bidder, the trustor or beneficiary present at the sale may suggest the then existing and legally described and established lots, blocks, tracts or parcels of the trust real estate in which the trust real estate may be sold. The trustee shall ascertain all such suggestions, shall conditionally sell the trust real estate under each suggestion and, in addition, shall sell the trust real estate as a whole. The trustee shall determine which conditional sale results in the highest total price bid for all of the trust real estate. The lawyer for the trustee may conduct the sale and may act at the sale as the auctioneer for the trustee. Any person, including the trustee or beneficiary, may bid at the sale. Only the beneficiary may make a credit bid, instead of cash, at

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1 the sale. A junior encumbrancer may bid the amount or value of
2 the obligation secured by the lien, mortgage, encumbrance or
3 real estate contract, as the case may be, owed to the junior
4 encumbrancer, less the amount or value of any prior deeds of
5 trust, mortgages, liens, encumbrances or real estate contracts,
6 if any, instead of cash, at the sale. In appropriate
7 circumstances, the trustee may sell the trust real estate
8 subject to prior deeds of trust, mortgages, liens, encumbrances
9 or real estate contracts ~~[which]~~ that are not being foreclosed.
10 Every bid shall be deemed an irrevocable offer until the sale
11 is completed and the sale shall not be deemed completed until
12 the purchaser pays the price bid in immediately collectible or
13 available federal funds. If the purchaser fails to pay the
14 amount bid by the purchaser for the trust real estate struck
15 off to the purchaser at the sale as provided in the Deed of
16 Trust Act, the trustee may accept the next highest bid or
17 proceed with the sale of the trust real estate to the highest
18 bidder. The person who fails to make the payment shall be
19 liable to any person who suffers loss or expenses, including
20 reasonable ~~[attorneys']~~ attorney fees actually incurred by the
21 trustee and beneficiary occasioned by the failure, and the
22 trustee may subsequently in any postponed or continued sale of
23 the trust real estate reject any bid of the person failing to
24 pay the amount bid.

25 B. The person conducting the sale may, for the

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1 purpose of verifying the proper amount to be paid or the
2 availability of immediately collectible federal funds, postpone
3 or continue the sale for a reasonable period by giving notice
4 of the new time by public declaration at the time and place
5 last appointed for the sale. No other notice of the postponed
6 or continued sale is required.

7 C. A sale is not complete if the sale as held is
8 contrary to or in violation of any federal statute in effect
9 because of an unknown or undisclosed bankruptcy. A sale so
10 held is deemed to be continued to a date, time and place
11 announced by the trustee at the sale and shall comply with
12 Subsection B of this section or, if not announced, is deemed
13 continued to the same place and at the same time twenty-eight
14 days later, unless the twenty-eighth day falls on a Saturday,
15 Sunday or legal holiday, in which event is deemed continued to
16 the first business day thereafter. In the event a sale is
17 continued because of an unknown or undisclosed bankruptcy, the
18 trustee shall notify by registered or certified mail, with
19 postage prepaid, all bidders who provide their names, addresses
20 and telephone numbers in writing to the party conducting the
21 sale of the continuation of the sale."

22 Section 6. Section 48-10-16 NMSA 1978 (being Laws 1987,
23 Chapter 61, Section 16) is repealed and a new Section 48-10-16
24 NMSA 1978 is enacted to read:

25 "48-10-16. [NEW MATERIAL] REDEMPTION.--

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1 A. After the sale of trust real estate pursuant to
2 Section 48-10-13 NMSA 1978, the trust real estate may be
3 redeemed by the beneficiary, or by any junior encumbrancer, by
4 paying the purchaser at any time within nine months from the
5 date of the sale the amount paid with interest from the date of
6 purchase at the rate of ten percent a year, together with all
7 taxes, interest and penalties thereon, and all payments made to
8 satisfy in whole or in part any prior lien or mortgage not
9 foreclosed paid by the purchaser, with interest on such taxes,
10 interest, penalties and payments made on liens or mortgages at
11 the rate of ten percent a year from the date of payment.

12 B. The parties may in the deed of trust shorten the
13 redemption period to not less than one month."

14 Section 7. Section 48-10-17 NMSA 1978 (being Laws 1987,
15 Chapter 61, Section 17, as amended) is amended to read:

16 "48-10-17. ACTION TO RECOVER BALANCE AFTER SALE OR
17 FORECLOSURE ON TRUST REAL ESTATE AS PROVIDED IN DEED OF
18 TRUST--ACTION TO RECOVER BALANCE PROHIBITED ON LOANS SECURED BY
19 LOW-INCOME HOUSEHOLDS.--

20 A. Except as provided in Subsections D and E of
21 this section, [~~within twelve months after the date of sale of~~
22 ~~trust real estate under a deed of trust as provided in the Deed~~
23 ~~of Trust Act]~~ a separate civil action may be commenced to
24 recover a deficiency judgment for the balance due on the
25 contract for which the deed of trust was given as security.

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1 The deficiency judgment shall be for an amount equal to the sum
2 of the total amount owing the beneficiary as of the date of the
3 sale, as determined by the court, and, if applicable, the
4 amount owing on all prior mortgages, deeds of trust, liens and
5 encumbrances and real estate contracts with interest less the
6 sale price at the sale by the trustee of the trust real estate.
7 Any deficiency judgment recovered shall include interest on the
8 amount of the deficiency from the date of the sale at the rate
9 provided in the deed of trust or contract, together with any
10 costs of the action.

11 B. If no action is commenced for a deficiency
12 judgment as provided in Subsection A of this section, the
13 proceeds of the sale, regardless of amount, shall be deemed to
14 be in full satisfaction of the debt and no right to recover a
15 deficiency in any separate civil action shall exist.

16 C. Except as provided in Subsections D and E of
17 this section, the Deed of Trust Act does not preclude a
18 beneficiary or a trustee from foreclosing a deed of trust in
19 the same manner provided by law for the foreclosure of
20 mortgages on real estate.

21 D. A deed of trust not encumbering real estate
22 occupied by a low-income household may, by express language,
23 validly prohibit the recovery of any balance due after the
24 trust real estate is sold or after the deed of trust is
25 foreclosed in the manner provided by law for the foreclosure of

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1 mortgages on real estate.

2 E. No deficiency judgment shall be sought or
3 obtained under any deed of trust encumbering real estate
4 occupied by a low-income household. A deed of trust
5 encumbering real estate occupied by a low-income household
6 shall expressly prohibit the recovery of any balance due after
7 the trust real estate is sold or after the deed of trust is
8 foreclosed in the manner provided by law for the foreclosure of
9 mortgages on real estate.

10 F. No deficiency in recovery of any balance due
11 after the sale of trust real estate encumbering real estate
12 occupied by a low-income household shall be reported to any
13 credit reporting agencies or disclosed to any person, other
14 than the trustor, unless the disclosure is required by law or
15 regulation.

16 G. For the purposes of Subsections D, E and F of
17 this section, "low-income household" means a household that the
18 New Mexico mortgage finance authority certifies as low income
19 at the time of the closing of the contract."

20 Section 8. REPEAL.--Sections 48-10-2 and 48-10-4 NMSA
21 1978 (being Laws 1987, Chapter 61, Sections 2 and 4, as
22 amended) are repealed.