

# **PRACTICAL REAL PROPERTY ISSUES AFFECTING FORECLOSURES**

Annual Meeting – State Bar of Nevada  
Incline Village, Nevada  
June 13, 2009

## **Presenters:**

Zach Ball (Anderson, McPharlin & Conners)  
Michael Buckley (Jones Vargas)  
Jan Chubb (Jones Vargas)  
Elizabeth Fielder (Jones Vargas)  
Doug Flowers (Holland and Hart)

## **WORKSHOP I**

**(60 minutes)**

### **I. The Basic Foreclosure Process (Michael Buckley) (10 minutes)**

- A. Notice of Default
- B. Reinstatement Period
- C. Receivers
- D. Notice of Sale
- E. Trustee's Sale
- F. Trustee's Deed
- G. Bankruptcy
- H. Deficiency Proceedings

### **II. Practical Issues (Michael Buckley) (15 minutes)**

- A. Foreclosures are Expensive
- B. Don't Depend on Trustee to Do Your Work
- C. What is Being Foreclosure On?

- D. Original Documents
- E. Bidding at Sale
- F. Is the One Action Rule Still Scary?
- G. Law Governing Guaranties
- H. What Can Receivers Do?
- I. Chilling the Bid?
- J. Multiple Beneficiaries
- K. Title Insurance Binders
- L. Declarant Rights

**III. Basic Differences Between Commercial and Residential Foreclosures** (Doug Flowers) (25 minutes)

- A. Existing Laws
- B. Legislative Update:
  - A. AB 140 (July 1, 2009)
  - B. AB 149 (July 1, 2009)
- C. Proposed Supreme Court Mediation Rules (Jan Chubb)
- D. Protecting Tenants at Foreclosure Act (S. 896, effective May 20, 2009)
- E. AB 152 (July 1, 2009)

**IV. Other New Legislation Affecting Nevada Foreclosures** (Michael Buckley) (10 minutes)

- A. AB 361 (October 1, 2009)
- B. SB 128 (July 1, 2009)
- C. AB 513 (May 29, 2009)

## **WORKSHOP II**

**(60 minutes)**

### **I. Securitization Basics**

**(Zach Ball)**

**(25 minutes)**

- A. Brief History
- B. Bond Classes
- C. REMICs
- D. Pooling and Service Agreements
- E. Servicers
- F. MERS

### **II. Loan Workouts**

**(Elizabeth Fielder)**

**(25 minutes)**


- A. Introduction
- B. Kinds of Workouts
  - 1. What is the Problem?
  - 2. What is the Business Plan?
  - 3. Some Common Examples
- C. Lender Strategies/Considerations
- D. Borrower Strategies/Considerations
- E. Selected Issues Re Loan Modifications
  - 1. Retaining Priority

2. Language in Deed of Trust or Subordination
3. Purchase Money Mortgages
4. Subordination Agreements
5. Retaining Guarantor Liability
6. Title Endorsement
7. Waiver of Automatic Stay – Enforceable?
8. Recording of Modification – Always Necessary?

**III. Deeds in Lieu of Foreclosure (Michael Buckley) (10 minutes)**

- A. What is a Deed in Lieu?
- B. Benefits
- C. Prerequisites
  1. Voluntary
  2. Borrower's Good Title
  3. Junior Liens
  4. Environmental Issues
  5. Appraisal
  6. Consideration
- D. Issues
  1. Merger/Grantee
  2. Real Property Transfer Tax
  3. Due Diligence

4.     Recharacterization as Equitable Mortgage
5.     Insurance
6.     Timing of Conveyance
7.     Title Insurance
8.     Borrower Insolvency
9.     Tax Consequences



2009 Annual Meeting of the  
Nevada State Bar  
June 12, 2009

Foreclosures: Lessons Learned  
and Forgotten  
Michael E. Buckley  
Jones Vargas

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**Trustee's Sale**

- ☐ Notice of Default and Election to Sell  
NRS 107.080(3)
- ☐ Reinstatement Period  
NRS 107.080(2)
- ☐ Receiver  
NRS 107.100 or NRS 107A

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**Trustee's Sale**

- ☐ Notice of Sale  
NRS 107.080(4)
- ☐ Decision: Personal Property  
UCC 9-604 or NRS 107.090
- ☐ The Auction  
NRS 107.081 and NRS 107.082

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## Trustee's Sale

- ☐ Sale Declared Void
  - 11 NRS 107.080(5)(b)
- ☐ Trustee's Deed
  - 11 NRS 107.080(5)(b) (SB 128, Chapter 247, 2009 Statutes)
  - 11 MAC 375.150 and MAC 375.160
- ☐ Bankruptcy
  - 11 11 U.S.C. 362

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## Trustee's Sale

- ☐ Deficiency
  - 11 NRS 40.457 and NRS 40.459

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## Some Practical Things to Know about Trustee's Sales

- ☐ Foreclosures Are Expensive
  - 11 Trustee's Sale Guaranty
  - 11 Trustee's Fee
  - 11 Out of Pocket Expenses
  - 11 Including Interest in a Credit Bid - Taxed as Income
  - 11 Less Costly Alternatives?

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**Some Practical Things to Know about Trustee's Sales**

- ☐ Don't Depend on the Trustee to Do Your Work
- ☐ Combined Sales of Real and Personal Property
- ☐ Original Documents

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**Some Practical Things to Know about Trustee's Sales**

- ☐ Bidding at the Sale
- ☐ Is the One Action Rule Still Scary?  
(1) NRS 40.430(4)(g)
- ☐ Laws Governing Guaranties  
(1) NRS 40.495

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**Some Practical Things to Know about Trustee's Sales**

- ☐ What Can Receivers Do?  
(3) NRS 107A.280, NRS 107.100, NRS 32.010 et seq
- ☐ Chilling the Bid
- ☐ Multiple Beneficiaries  
(1) AB 513, Chapter 347 of 2009 Statutes

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## Some Practical Things to Know about Trustee's Sales

- ☐ Title Insurance Binders
- ☐ Declarant Rights
  - ☐ NRS 115 3104(3)
- ☐ Information Disclosed at Auction

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APN:  
WHEN RECORDED MAIL TO:

RE: FILE NUMBER:

### NOTICE OF TRUSTEE'S SALE

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On January \_\_, 2009, at \_\_\_\_\_ o'clock, P.M., \_\_\_\_\_ TITLE .. a Nevada corporation ("Trustee"), as Trustee under Deed of Trust dated \_\_\_\_\_, 20\_\_, and recorded March \_\_, 20\_\_ in Book \_\_\_\_\_, Instrument No. \_\_\_\_\_ of Official Records, in the office of the County Recorder of Clark County, Nevada ("Deed of Trust"), executed by Trustor, \_\_\_\_\_, L.L.C., a Nevada limited liability company ("Trustor"), and securing, among other obligations, a note in the amount of \$\_\_\_\_\_, dated \_\_\_\_\_, 20\_\_, in favor of \_\_\_\_\_ ("Beneficiary") (as successor to \_\_\_\_\_), by reason of now continuing default in the payment or performance of the obligations secured by the Deed of Trust, including the breach or default, notice of which was recorded in the office of the County Recorder of Clark County, Nevada, by Beneficiary and the undersigned more than three months prior to the date hereon, will sell at public auction to the highest bidder for lawful money of the United States of America, at the front entrance to Nevada Legal News, located at: 930 S. Fourth St., Las Vegas, NV 89101, all right, title and interest now held by it under the Deed of Trust in the property situated in the County of Clark, Nevada, described in Exhibit A attached hereto and made a part hereof.

Together with all appurtenances, water rights and rights of way, including all shares of which Trustor has any interest of the capital stock of any Water Company, the water represented by which stock is used on or is in anywise appurtenant to aforesaid premises.

*Beneficiary hereby elects to have Trustee conduct a unified foreclosure sale of personal and real property as permitted under Nevada Revised Statutes 104.9604(1)(b) and to include in the trustee's sale at the time and place set forth hereinabove all of the personal property and fixtures granted to Beneficiary pursuant to the Deed of Trust, which personal property and fixtures are more particularly described in Exhibit B attached hereto and made a part hereof.*

*Beneficiary reserves the right to revoke its election as to some or all of said personal property and/or fixtures, or to add additional personal property and/or fixtures to this trustee's sale, at Beneficiary's sole election, from time to time and at any time until the consummation of the trustee's sale to be conducted pursuant to the Deed of Trust and this Notice of Trustee's Sale.*

*A sale of less than all of the real and personal property described in Exhibits A and B attached hereto shall in no way render defective or noncomplying either this Notice of Sale or a sale conducted pursuant to this Notice of Sale.*

Said sale will be made (without covenants, or warranty, express or implied, regarding the title, possession or encumbrances) to pay the unpaid principal of said note, to-wit \$\_\_\_\_\_ with interest from \_\_\_\_\_, 20\_\_, as in said note provided, advances, if any, under the terms of the Deed of Trust, charges and expenses of Trustee and of the trusts created by the Deed of Trust.

**FILE NUMBER:** \_\_\_\_\_

Date:

\_\_\_\_\_ Title

\_\_\_\_\_  
By: \_\_\_\_\_  
Its: Trustee Administrator

STATE OF NEVADA     )  
                                      ) ss  
COUNTY OF CLARK    )

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, personally appeared before me, a Notary Public, \_\_\_\_\_, known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged that she executed the instrument.

\_\_\_\_\_  
Notary Public

**Exhibit A**

## **Exhibit B**

All goods, building and other materials, supplies, work in process, equipment, machinery, fixtures, furniture, furnishings, signs and other personal property and embedded software included therein, wherever situated, which are or are to be incorporated into, used in connection with, or appropriated for use on (i) the real property described in Exhibit A of this Notice of Trustee's Sale and incorporated by reference herein or (ii) the "Improvements" described in that certain Building Loan Agreement, dated \_\_\_\_\_, 20\_\_\_\_, between \_\_\_\_\_, L.L.C. ("Trustor") and \_\_\_\_\_ ("Beneficiary") (as successor to \_\_\_\_\_) (which real property and Improvements are collectively referred to herein as the "Subject Property"); together with all rents (to the extent, if any, they are not real property); all inventory, accounts, cash receipts, deposit accounts, accounts receivable, contract rights, licenses, agreements, general intangibles, chattel paper (whether electronic or tangible), instruments, documents, promissory notes, drafts, letters of credit, letter of credit rights, supporting obligations, insurance policies, insurance and condemnation awards and proceeds, any other rights to the payment of money, trade names, trademarks and service marks arising from or related to the ownership, management, leasing or operation of the Subject Property or any business conducted thereon by Trustor all permits, consents, approvals, licenses, authorizations and other rights granted by, given by or obtained from, any governmental entity with respect to the Subject Property; all deposits or other security made with or given to utility companies by Trustor with respect to the Subject Property; all advance payments of insurance premiums made by Trustor with respect to the Subject Property; all plans, drawings and specifications relating to the Subject Property; all loan funds held by Beneficiary, whether or not disbursed; all funds deposited with Beneficiary pursuant to any loan agreement; all reserves, deferred payments, deposits, accounts, refunds, cost savings and payments of any kind related to the Subject Property or any portion thereof; together with all books, records and files relating to any of the foregoing.

Consumer: 107 085  
Guarantors 40.495

## MAJOR 2009 STATUTORY CHANGES AFFECTING FORECLOSURES

### Major Statutory Changes

1. AB 65, Section 5 (July 1, 2009). Amends 107.080. New subsection 8 requires \$50 fee (98.5% goes to fund Supreme Court Mediation under AB 149).
2. AB 140 (October 1, 2009 except Section 10, July 1, 2009).
  - a. Section 5. Amends 40.255:
    - (1) 40.255(2): After foreclosure, need 30-60 days notice to tenant (pg. 7).
    - (2) 40.255(3): New owner and tenant after foreclosure have same rights, obligations and liabilities of original owner and tenant under NRS 118A.
    - (3) 40.255(4): Required provisions in notice under 40.255(2).
    - (4) 40.255(5): No evictions prior to 40.255(2) notice.
    - (5) 40.255(6): Tenant may vacate and lender and tenant may agree to amendments or terminations.
    - (6) 40.255(8): "Residential foreclosure" defined: single family residence "not more than four units" (houses?).
  - b. Section 5.5. Amends 40.280(3), requires proof of service of 40.255 notice.
  - c. Section 6.3. Adds new provision to NRS 107 (same as provision added to NRS 40 in Section 4) requiring maintenance of foreclosed-on property:
    - (1) In addition to complying with local ordinances, new owner must:
      - (a) Limit excessive foliage growth
      - (b) Prevent trespassers from remaining on property
      - (c) Prevent mosquito larvae from growing in standing water
      - (d) Prevent any other public nuisance.
    - (2) Upon a violation of above, the local government must give notice that civil penalty may be imposed unless person acts to correct violation within 14 days of notice and completes within 30 days.
    - (3) Person may contest and apply for a court hearing.

- (4) Penalty may be not more than \$1000 per day and may not be in addition to other penalties, but this section does not preempt local ordinances. Proceeds must go to local nuisance abatement.
- (5) Local government may extend cure period if good faith effort and can't be corrected within original time.
- (6) Penalties resulting in liens must be recorded.
- d. Section 6.7. Requires a notice of default and notice of sale to be posted on property and include required information:
  - (1) Address of property.
  - (2) Contact information for lender/trustee.

The notice must not be defaced until after transfer of title. [what about rescission?]

Separate notice must be posted and mailed at the time notice of sale is given, describing prospects of eviction and time periods.
- e. Section 7. Amends NRS 107.080 to include new notices of 6.7 and definition of "residential foreclosure."
- f. Section 10. Amends AB 149, Section 3 by requiring that SSN be removed from notices.

3. AB 149 (July 1, 2009).

- a. Section 1(2)(a): Requires notice of default to have (i) contact information for person who can negotiate a loan modification, (ii) contact information for local housing counseling agency and (iii) mediation forms.
- b. Section 1(2)(b): Requires notice of default to be mailed to Mediation Administrator.
- c. Section 1(2)(c): Requires trustee to record the mediation certificate.
- d. Section 1(3): Enables "grantor or person who holds title of record" to request mediation or forego mediation.
- e. Section 1(4): Conduct of mediator.
- f. Section 1(5): Permits sanctions for lender who fails to participate in mediation.
- g. Section 1(6)(7): When no mediation required.

- h. Section 1(8): Supreme Court to promulgate mediation rules.
  - i. Section 1(9): When mediation not required: property surrendered or grantor bankruptcy.
  - j. Section 1(11): Mediator immunity.
  - k. Section 2: Adds NRS 107.080(2)(b) which permits reinstatement up to five days before the sale for owner-occupied housing.
  - l. Section 3: Amends NRS 107.085 to require certain means of service of special notice for "owner-occupied housing."
  - m. Section 5: Authorizes Supreme Court to adopt voluntary mediation rules.
4. AB 361 (October 1, 2009). Amends NRS 116.
- a. Section 1(1): Lender must provide HOA with contact information within 30 days of commencement of foreclosure.
  - b. Section 1(2): The association may, after notice and hearing following commencement of foreclosure, enter the grounds of the unit to:
    - (1) Maintain exterior.
    - (2) Remove or abate a public nuisance which (i) is visible, (ii) threatens health or safety of residents, (iii) results in blight and (iv) adversely affects the use and enjoyment of nearby units.
  - c. Section 1(3): If unit is vacant, association may enter and cure nuisance as defined in subsection 2, after notice and hearing.
  - d. Section 1(4): Costs of abatement and collection costs are a lien and may be foreclosed.
  - e. Section 1(5): Amounts expended bear interest.
  - f. Section 1(6): Lien is prior except per FNMA regulations, then up to six months.
  - g. Section 1(7): Purchaser bound by governing documents.
  - h. Section 1(8): Immunity from trespass.
  - i. Section 1(9): Definition of "exterior of unit" and "vacant."
  - j. Section 4: Amends NRS 107.090 to require that trustee's deed be given to association which requested it.



5. SB 128 (July 1).

Section 1: Amends NRS 107.080 by adding new subsection 8 and 9 to require trustee's deed be recorded within 30 days after the sale. Liability to "senior lienholder."

6. AB 513 (passage and approval). Adds the following to NRS 645B (Mortgage brokers and mortgage agents).

Section 8: States that 51% of the owners of a loan secured by real property control action of lender, including issues relating to designation of agent, foreclosure, sale of property acquired in foreclosure, release, and modification. Applicability to all non-exempt lender loans?

## DEEDS IN LIEU – SELECTED ISSUES

Michael E. Buckley  
Annual Meeting State Bar of Nevada  
June 13, 2009  
Hyatt Regency, Incline Village NV

### A. What is a Deed in Lieu?

1. Conveyance by the debtor of the encumbered collateral as a result of which the debtor's obligation to repay the loan is satisfied.
2. Typically accomplished by a deed in lieu agreement (variation of purchase agreement) and Deed with "magic language." See Attachment.

### B. Benefits.

Lender: Immediate control of property, quick negotiation and consummation, reduce time and expense of foreclosure, avoid negative publicity, protection against latter insolvency if no equity

Borrower: Release of some or all liability, avoid time, expense and negative publicity of foreclosure, lender may pay some expenses, possible limited retained rights

### C. Prerequisites.

1. Voluntary (i.e., borrower must freely offer and lender need not accept proffered deed). Evidenced by settlement agreement and affidavit.
2. Borrower's good title to assets. Lender will require title insurance.
3. Junior liens: Lender becomes property owner, and therefore takes subject to all existing liens, including potential (unfiled) mechanics' liens.

*Unionamerica Mortgage and Equity Trust v. McDonald*, 97 Nev. 210, 626 P. 2d 1272 (1981): Sign company sued bank which had taken deed in lieu alleging that the bank had "impliedly assumed" the sign lease. The evidence supported that the bank told sign company it had no interest in sign and sign company could remove sign. No unjust enrichment or need for restitution.

4. Environmental issues. As owner lender will become liable for environmental problems in absence of usual investigation, representations (innocent landowner defense).

5. Appraisal: Lender will need to convince title insurer (and possibly recorder) that borrower has no equity.

6. Consideration: release or covenant not to sue (exclude indemnities).

**D. Issues.**

1. Merger / Grantee. The continued existence of the deed of trust provides the lender with protection should the conveyance be attacked by borrower or borrower's creditors in a bankruptcy. If preserved, it can be released when the lender ultimately sells the property or the applicable periods of limitations have expired. Nevada law generally supports no merger of that is the intent of the parties.

*Aladdin Heating v. Trustees, Cent. States*, 93 Nev. 257, 563 P.2d 82 (1977); *Roy v. Luschar*, 108 Nev. 567, 835 P. 2d 807:

"[In *Aladdin*], this court held that a merger had not occurred for two reasons: (1) the parties did not intend for a merger to take place, and (2) the interests said to merge were not coextensive and commensurate."

Aladdin Case:

[Central States] loaned Kings Castle Limited Partnership \$6,500,000 to finance the construction of the Kings Castle Hotel and Casino located at Incline Village, Nevada. To secure this loan, the partnership gave [Central States] a promissory note and a deed of trust which covered the Kings Castle real property, existing improvements, and improvements to be thereafter constructed on the land. [Central States] recorded this deed of trust on May 9, 1969.

As part of the loan transaction and apparently in lieu of paying loan 'points' in advance, Kings Castle Limited Partnership and [Central States] also entered into a sale-leaseback arrangement. This arrangement contemplated that [Central States] would purchase Kings Castle's real property, lease the land back to Kings Castle for a five-year period, and, at the end of this period, Kings Castle would repurchase the property at a higher price, thereby permitting [Central States] to receive their loan 'points' at this later date. Pursuant to this arrangement, Kings Castle executed in favor of [Central States] a grant, bargain, and sale deed covering the subject real property only, excluding any improvements. [Central States] recorded this deed on May 9, 1969, subsequent to the recording of their deed of trust.

Kings Castle defaulted on payments of the promissory note, and [Central States] foreclosed their deed of trust pursuant to the deed's power

of sale provision. At the foreclosure sale, [Central States] bid and acquired the property and improvements thereon for \$5,000,000.

After the foreclosure sale, appellants [mechanics' lien claimant] filed suit to foreclose mechanics' liens which they had perfected pursuant to NRS Ch. 108. The district court ruled that the deed of trust was senior to the mechanics' liens and, thus, foreclosure of the deed of trust had extinguished the mechanics' liens. Appellants here contend the district court erred in ruling (1) that the deed of trust took priority over mechanics' liens, (2) that there had been no merger of [Central States'] interests, (3) that [Central States] were not required to file a notice of non-responsibility to maintain their priority, and (4) that *Call v. Thunderbird Mortgage Co.*, 58 Cal.2d 542, 25 Cal.Rptr. 265, 375 P.2d 169 (1962) was inapplicable to the facts of this case. These contentions are without merit. . . .

Appellants next contend that delivery of the grant, bargain, and sale deed to [Central States] caused all legal and equitable title to merge in [Central States], and, due to this merger, the deed of trust was extinguished leaving nothing to defeat appellants liens. It is true that when a greater estate and lesser one coincide and meet in the same person, the lesser estate merges into the greater and is extinguished. [Citations omitted.] However, as the district court correctly found, no merger took place.

Whether a merger has occurred depends on the intent of the parties, especially the one in whom the interests unite. [Citations omitted.] If merger is against that party's best interest, it will not be deemed intended by the parties. [Citations omitted.] Here, it is apparent the parties did not intend that a merger take place. Merger would be against respondents' best interests because their deed of trust would lose its priority. Similarly, the parties' conduct clearly indicates their intent to have a security arrangement only, and not a merger. This fact is manifested by [Central States'] retention of the debt instrument and Kings Castle's treatment of that debt as still alive by making periodic payments. . . .

Not only is there no intent to have a merger, but the estates appellants contend merged are not coextensive and commensurate. . . . The deed conveyed legal title only of the real property, while the deed of trust covered the property plus existing improvements and improvements to be constructed in the future. Since respondents acquired only part of the subject matter covered by their deed of trust, there can be no merger. . . .

Deed of Trust preserved until later sale. Can lien be foreclosed?

2. Real Property Transfer Tax. Prior to 2009, based on Attorney General Opinion 71-45 (1971), the real property transfer tax (RPTT) imposed under NRS Chapter 375 had limited effect on deeds in lieu of foreclosure.

(a) Determination of Value for RPTT Purposes: Based on recent interpretations, in order to qualify for the favorable treatment under RPTT statutes, deed in lieu must:

- (1) State on its face that it is a deed in lieu of foreclosure
- (2) Be a conveyance from the property owner to the holder of the mortgage/deed of trust.

(b) Rationale:

(1) AGO 71-45:

4. Is a deed in lieu of foreclosure subject to tax, and, if so, how is the value, for purposes of tax, to be computed.

A deed in lieu of foreclosure is subject to tax in the same manner as is any other deed. . . . The value attributable to that deed is that which his grantee (the original seller) gives in exchange for the deed in lieu of foreclosure. In substance, what the grantee gives up by avoiding the foreclosure proceeding and accepting the deed in lieu of foreclosure in full satisfaction, is the right to a deficiency judgment against his defaulting buyer.

. . . NRS 40.450 limits the amount for which a deficiency judgment can be rendered by providing that the judgment shall not be for more than the amount by which the unpaid obligation exceeds the fair market value of the property, and never more than the difference between the amount of unpaid obligation and amount received in an actual sale. The latter does not apply to a deed in lieu of foreclosures, because there is no actual sale.

Accordingly, we conclude that *if the amount of the unpaid obligation is greater than the fair market value, conveyance by deed in lieu of foreclosure is taxable, and the amount of the tax is based on the amount by which the unpaid obligation exceeds the fair market value. On the other hand, if the amount of the unpaid obligation is less than the fair market value, conveyance by deed in lieu of foreclosure is not taxable.* The reason is that the unpaid seller gives up nothing of value in accepting the deed in lieu of foreclosure.

(2) Definition of Value:

NRS 375.010 (1) (as amended by SB 276, effective July 1, 2009):

(f) “Value” means:

(1) In the case of any deed which is not a gift, *or a land sale installment contract*, the amount of the full purchase price paid or to be paid for the real property.

(2) In the case of a gift, or any deed with nominal consideration or without stated consideration, the estimated fair market value of the property.

2. As used in paragraph (e) [sic] of subsection 1, "estimated fair market value" means the estimated price the real property would bring on the open market in a sale between a willing buyer and a willing seller. Such price may be derived from the assessor's taxable value or the prior purchase price, if the prior purchase was within the 5 years immediately preceding the date of valuation, whichever is higher.

(3) NAC Regulations:

**NAC 375.030 "Consideration" defined.** (NRS 360.090, 375.015) "Consideration" means that which is regarded as the equivalent or return given or suffered by one for the act or promise of another. It means the price paid for the real property transferred. The consideration can be in the form of money, or in the form of other things of value, or a combination of both.

[Tax Comm'n. Real Property Transfer Tax Ruling part No. 1, eff. 1-1-68]

**NAC 375.040 "Deed of trust" and "trust deed" defined.** (NRS 360.090, 375.015) "Deed of trust" or "trust deed" means an instrument taking the place and serving the uses of a common-law mortgage, by which legal title to real property is placed in one or more trustees, to secure the repayment of a sum of money or the performance of other conditions.

[Tax Comm'n. Real Property Transfer Tax Ruling part No. 1, eff. 1-1-68]

(4) Recent Attorney General's Opinion:

May 20, 2009 e-mail from Susan Lewis (sulewis@tax.State.nv.us) to Erin Barnett at Marquis & Aurbach :

Here you go [enclosing the following e-mail.]. This is being treating as an AG opinion. The last paragraph essentially means that keeping an underlying DOT on a property will preclude a DILF from being viewed as a DILF for tax purposes.

March 31, 2009 e-mail from Gina C. Session [GSession@ag.nv.gov] to Terry Rubald:

I have reviewed this issue and give the following response. NAC 375.040 defines a Deed of Trust as an instrument taking the place and serving the uses of a common-law mortgage. by which legal title to real property is placed in one or more trustees, to secure the repayment of a sum of money or the performance of other conditions. Because the third-party in this

transaction is not the holder of the deed of trust the transfer of the property to the third-party cannot be treated as a Deed in Lieu of Foreclosure.

In our discussion with Susan, I think that she mentioned that the possibility of foreclosure would still exist after the transfer of the deed. If foreclosure is still an option, then again the transaction would not meet the definition of a deed in lieu of foreclosure.

If I can be of further assistance, let me know.

3. Due Diligence: Junior liens and undisclosed liabilities (e.g., tenants, work giving rise to mechanics' liens, unpaid taxes).

Solvency of borrower. If borrower is insolvent, the danger of subsequent bankruptcy increases risk for lender.

4. Recharacterization as Equitable Mortgage (e.g., options, rights of first refusal and right to remain in possession). If the lender grants the borrower/grantor continued rights in the property, the deed may be recharacterized as an equitable mortgage.

*Robinson v. Durston*, 83 Nev. 337, 432 P.2d 75 (Nev.. 1967):

The question presented is whether the transaction was a loan and security or an absolute sale with option to repurchase. The applicable principles of law are not greatly in dispute. A deed absolute on its face may be shown to be a mortgage in equity and particularly so where the claim of usury is made or indicated. In such cases the form of the transaction will be disregarded and its substance and the intention of the parties at the time will control. The only question we need consider is: Did the parties intend that the transaction should be a mortgage? Either party has the right to testify at to what that intention was--weight is for trier of fact. [Citations omitted.] . . . Pomeroy's classic statement of the equitable principles here involved is quoted from his Section 1193:

"In general, all persons able to contract are permitted to determine and control their own legal relations by any agreements which are not illegal, or opposed to good morals or to public policy; but the mortgage forms a marked exception to this principle. The doctrine has been firmly established from an early day that when the character of a mortgage has attached at the commencement of the transaction, so that the instrument, whatever be its form, is regarded in equity as a mortgage, that character of mortgage must and will always continue. If the instrument is in its essence a mortgage, the parties cannot by any stipulations, however express and positive, render it

anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right.

"This doctrine is based upon the relative situation of the debtor and the creditor; it recognizes the fact that the creditor necessarily has a power over his debtor which may be exercised inequitably; that the debtor is liable to yield to the exertion of such power; and it protects the debtor absolutely from the consequences of his inferiority, and of his own acts done through infirmity of will. The doctrine is universal in its application, and underlies many special rules of equity. \*\*\*"

. . . Through the years, a number of circumstances have been so often associated with transactions which are intended to be loans of money secured by real estate mortgages, but which are effected under the guise of a sale and purchase of real estate, that they have come to be accepted as indicia of a secured loan transaction. Such circumstances which are pertinent here are:

(1) What do the documents say? (2) Who was to pay the taxes on the property? (3) Were documentary stamps affixed to the deed? (4) Was the price disproportionate? (5) Right to repurchase. (6) Absence of common formal procedures employed in real estate sales. (7) Relationship between the parties. (8) Computation of buy back rights. (9) Bonus to be paid in repurchase. (10) Financial embarrassment of the grantor. (11) Continued possession, management, and improvement of the property by the grantor. (12) Non-payment of rent.

5. Insurance: Make sure lender is covered!

*Mann v. Glens Falls Insurance Company*, 541 F.2d 819 (D. Nev., 1976): Owner (Mann) sold home and took back a mortgage. The insurance policy was not changed or assigned. When Mann became a mortgagee, the insurable interest of the former owner was solely that of a mortgagee. When casualty occurred, insurance



company offered to pay full amount in return for assignment of subrogation rights. Mann refused. When, later, she took a deed in lieu, she destroyed subrogation rights and lost any claims under the policy.

6. Timing of Conveyance. Placing the deed in escrow for conveyance later in time may be subject to attack. Clearly deed may not be given when loan is made, but some courts hold that placing a deed in escrow in connection with a default and workout is acceptable. However, if borrower is insolvent, borrower, borrower's trustee or other creditors may seek to set aside the deed or stop the release/recording of the deed.

7. Title Insurance:

(a) Continuation of Lender's Policy: 1992 ALTA Lender's Policy provides:

After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, *conveyance in lieu of foreclosure*, or other legal manner which discharges the lien of the insured mortgage: . . . .

(b) Owner's Policy

(c) Non-Merger endorsement to Loan Policy.

The Company hereby insures the owner of the indebtedness secured by the mortgage referred to in Schedule A against loss or damage the Insured may sustain by reason of a final court judgment from a court of competent jurisdiction which holds that the lien of the insured mortgage is invalid and unenforceable by reason of a merger of the mortgage estate created by the insured mortgage with the fee estate acquired by \_\_\_\_\_ through the deed from \_\_\_\_\_, as grantor to \_\_\_\_\_, as grantee dated \_\_\_\_\_ and recorded \_\_\_\_\_ in book \_\_\_\_\_ page \_\_\_\_\_ of Official Records \_\_\_\_\_ County, \_\_\_\_\_. This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

8. Borrower Insolvency

(a) Preferences (Bankruptcy):

90 day statute of limitations unless insider

Transfer on account of antecedent debt

Enables creditor to receive more than it would receive on liquidation

Fraudulent Transfer (Bankruptcy and State law):

**NRS 112.170 Value; reasonably equivalent value; present value.**

1. Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

2. For the purposes of paragraph (b) of subsection 1 of NRS 112.180 and NRS 112.190, a person gives a *reasonably equivalent value* if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust or security agreement.

3. A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

**NRS 112.180 Transfer made or obligation incurred with intent to defraud or without receiving reasonably equivalent value; determination of intent.**

1. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay or defraud any creditor of the debtor; or

(b) *Without receiving a reasonably equivalent value* in exchange for the transfer or obligation, and the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

**NRS 112.190 Transfer made or obligation incurred by insolvent.**

1. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation *without receiving a reasonably equivalent value* in exchange for the transfer or obligation *and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.*

2. A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

**NRS 112.230 Limitation of actions.** Except as otherwise provided in NRS 166.170, a claim for relief with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

1. Under paragraph (a) of subsection 1 of NRS 112.180, within *4 years* after the transfer was made or the obligation was incurred or, if later, within *1 year* after the transfer or obligation was or could reasonably have been discovered by the claimant;

2. Under paragraph (b) of subsection 1 of NRS 112.180 or subsection 1 of NRS 112.190, within *4 years* after the transfer was made or the obligation was incurred; or

3. Under subsection 2 of NRS 112.190, within *1 year* after the transfer was made or the obligation was incurred.

9. Tax Consequences

Borrower: write off of debt as income?

Lender: receipt of property as payment of loan and income?

References:

First American Title Company Website. Jack Murray reference library:  
<http://www.firstam.com/listshortcut.cfm?id=3248&menu=676>

**DEED IN LIEU AGREEMENT  
(Selected Provisions)  
Including Deed in Lieu**

**Submitted by Michael E Buckley, Jones Vargas  
2009 Annual Meeting State Bar of Nevada**

**Recitals:**

Borrower is currently in material default under the terms of the Loan Documents by, among other things, failing to pay the monthly payments due under the Note (collectively, the "Default"). Borrower acknowledges and agrees that all required notices with respect to the Default have been received by Borrower from Lender, any and all applicable notice and cure periods under each of the Loan Documents have lapsed, and Lender has the right to exercise any or all of Lender's rights or remedies under the Loan Documents. All indebtedness evidenced or secured by the Loan Documents is presently due and owing to Lender by Borrower without any counterclaims, setoffs or defenses whatsoever.

Borrower has notified Lender that Borrower is unable or unwilling to cure the existing Default under the Loan Documents and Lender is unwilling to extend the time to cure said Default.

Borrower desires to obtain Lender's covenant not to maintain any suit or action against Borrower for payment of the indebtedness or performance of the other obligations under the Loan Documents, and, in consideration thereof, Borrower is willing to transfer the Property to Buyer (as hereinafter defined), subject to the Loan and the Permissible Exceptions (as hereinafter defined).

It is the express intent of Lender, which intent Borrower acknowledges, that (i) the transfer of the Property subject to the Loan to Buyer as contemplated by this Agreement shall not cause a merger of Buyer's interest in the Property acquired hereunder with Lender's interest in the Property under the Security Instrument or any of the other Loan Documents, and (ii) Lender shall retain the ability and right to commence and to complete a judicial or non-judicial foreclosure sale subsequent to the Closing (as hereinafter defined) under this Agreement and the transfer of the Property to Buyer, but Lender for itself and for Buyer and their respective successors and assigns, agrees not to seek a judgment for a deficiency against Borrower (provided, however, Lender for itself and for Buyer and their respective successors and assigns, hereby expressly reserves the right to seek a judgment for a deficiency against Guarantor and to pursue any and all other claims, rights and remedies which Lender may have against Guarantor).

The fair market value of the Property is less than the indebtedness evidenced by the Note and secured by the Security Instrument.

Borrower and Guarantor each understands and acknowledges that: (i) Borrower and Guarantor are not obligated to enter into this Agreement, but each is doing so of their own free will without interference, influence or coercion by Lender; (ii) Borrower and Guarantor each have had the opportunity to consult with attorneys, appraisers, accountants and other advisors and consultants of Borrower's and Guarantor's choice for advice concerning the terms of this Agreement, the fair value of Borrower's interest in the Property and the tax implications of the transaction contemplated herein; (iii) Lender has pursued a course of fair dealing and that the transaction contemplated herein is fair and equitable; (iv) income from the Property is insufficient to pay for the operating expenses of the Property and debt service due under the Loan Documents; and (v) Borrower and Guarantor are entering into this Agreement to avoid the time, delay, expense and publicity attendant to foreclosure, and to enjoy the benefits of Lender's promises and covenants contained herein.

**Agreement:**

1.1 Claims. Neither Borrower nor Guarantor have received notice of any claims, actions, suits or proceedings pending or contemplated, with respect to the Property or Borrower's ownership, management, leasing or operations thereof (including, without limitation, claims of tort, breach of contract, violation of law or eminent domain).

1.2 Disclosure. Borrower and Guarantor have delivered the Disclosure Materials (copies of which Borrower has retained for Borrower's records) and Borrower and Guarantor have disclosed to Lender all facts and information known to Borrower that are material to the Property or the transactions contemplated by this Agreement, including, without limitation, any adverse facts or information.

1.3 Contracts. Other than the Assigned Contracts and the Excluded Contracts, there are no other Contracts that affect the Property. Except as otherwise expressly disclosed in Exhibits "B-1" and "B-2" attached hereto and the Lender's Policy (as to Permissible Exceptions): (a) no default has occurred and no event has occurred that with notice or lapse of time or both would constitute a default under any of the Contracts or the Permissible Exceptions; (b) none of the Contracts or Permissible Exceptions has been amended or modified; (c) each of the Contracts is in full force and effect; and (d) Borrower has not assigned or granted a security interest in any of the Property, Contracts or Permissible Exceptions to anyone other than Lender, and Borrower's interests therein are not subject to any lien, encumbrance, claim, set-off or deduction.

1.4 Leases and Rents. Exhibit "C" attached hereto is a true, complete and accurate copy of the Rent Roll. There are no leases, subleases, licenses or concession agreements or other agreements for occupancy of the Real Property other than the Leases specifically listed on the attached Rent Roll. All Security Deposits are set forth on the attached Rent Roll.

1.5 Environmental Condition. The Property does not contain any Hazardous Substances. Neither Borrower, Guarantor nor any of their Affiliates (a) has conducted or authorized the generation, transportation, storage, treatment or disposal at the Property, of any Hazardous Substances; (b) is aware of any pending or threatened litigation or proceedings before any administrative agency in which any person or entity alleges the presence, release, threat of release, or placement on or in any portion of the Property any Hazardous Substances; and (c) has received any written notice that any governmental authority or any employee or agent thereof is investigating whether there is, or has determined that there has been (i) a presence, release, threat of release, or placement on, under or in the Property of any Hazardous Substances, or (ii) any generation, transportation, storage, treatment or disposal at the Property of any Hazardous Substances. There have been no communications or agreements between Borrower, Guarantor or any of their Affiliates, on the one hand, and any governmental authority or agency (federal, state or local) or any private entity, on the other hand, including, without limitation, any prior owners of the Property, relating in any way to (i) the presence, release, threat of release, or placement on or in the Property of any Hazardous Substances, or (ii) any generation, transportation, storage, treatment, or disposal at the Property of any Hazardous Substances.

1.6 Financial Information. All financial statements submitted by Borrower and Guarantor to Lender or Buyer with respect to Borrower, Guarantor and the Property are true and correct in all material respects, fairly present the respective financial conditions and results of operations of the Borrower, Guarantor and the Property as of the dates thereof. Borrower and Guarantor have each made adequate provisions for the payment of all Borrower's creditors other than Lender prior to the Closing Date. Neither Borrower nor Guarantor intends to hinder, delay or defraud any of Borrower's creditors in anticipation of seeking relief under the Bankruptcy Code.

1.7 No Insolvency or Judgment; No Bankruptcy Filing. Borrower is not currently the subject of or a party to any completed or pending voluntary bankruptcy, reorganization or insolvency proceeding. Borrower is not contemplating either the filing of a petition by Borrower under any state or federal bankruptcy or insolvency law or the liquidation of all or a major portion of Borrower's property, and, to the best of Borrower's knowledge, no person is contemplating the filing of any such petition against Borrower.

1.8 No Takings. Borrower has not received any notice of any pending condemnation or sale in lieu thereof, or threatened rezoning which has the Property or any portion thereof as its subject matter, and neither Borrower nor Guarantor has knowledge of any such proceeding contemplated by any governmental or quasi-governmental authority. Borrower has received no notice of violation of any statute, law or ordinance from any governmental authority having jurisdiction over the Property.

1.9 Removal of Personal Property. All Personal Property located at, or owned in connection with, the Real Property as of the date of this Agreement or any other property to be conveyed to Buyer or Lender herein has remained in its status and location as of \_\_\_\_\_, \_\_\_\_ 200\_\_.

2. Closing of Transaction. Subject to the terms and conditions hereof, the closing of the transactions contemplated by the Agreement (the "Closing") shall occur on the Closing Date. All of the items to be delivered and all of the actions to be taken pursuant to this Section 4 shall be considered as having taken place simultaneously and no delivery or action below in this Section 4 shall be considered as having been made or taken place until all delivered and actions have taken place. The parties agree to execute such escrow instructions as Lender or the Title Company may reasonably require to carry out the Closing in accordance with this Agreement; provided, however, in the event of any conflict between the terms of this Agreement and the terms of such escrow instructions, the terms of this Agreement shall govern.

2.1 Termination of Excluded Contracts. On the Closing Date, Borrower shall terminate effective as of the Closing the Excluded Contracts; provided, however, any notice of termination of an Excluded Contract by Borrower shall be effective as of the Closing and conditional upon the Closing taking place in a timely manner in accordance with this Agreement. Upon the Closing and pursuant to the Bill of Sale (as hereinafter defined), Borrower shall assign to Lender or Buyer, as applicable, and such party shall accept and assume, from and after the Closing, all of the Assigned Contracts.

2.2 Title. On the Closing Date, the Title Company shall issue or commit to issue to (i) Lender an endorsement to the Lender's Policy which amends the effective date of the Lender's Policy to the date and time of recordation of the Deed (as hereinafter defined), confirms that Buyer is the insured thereunder, adds no new exceptions to title and insures the Security Instrument as a valid first lien on the Property, together with an anti-merger of estates endorsement to the Lender's Policy (collectively, the "Endorsements"), and (ii) Buyer a binder for the issuance of an ALTA Owner's Policy of Title Insurance (together with such endorsements as Buyer may request in Buyer's sole but reasonable discretion) (the ALTA Owner's Policy of Title Insurance, together with the endorsement shall hereinafter be referred to collectively as the "Binder") in the amount of \_\_\_\_ Million \_\_\_\_ Hundred Thousand Dollars (\$\_\_\_\_00,000) insuring fee title is vested in Buyer subject only to the Permissible Exceptions.

2.3 Transfer of Account. On the Closing Date, Borrower shall transfer to Lender or Buyer its interest in and to the Account and Borrower hereby consents to the acceptance by the Lender of the assets contained in any such Account.

2.4 Delivery of Cash and Accounts. On the Closing Date, Borrower shall (i) deliver to Lender (a) checks, if any, received from the tenants in payment of all Rents accruing on and after the Closing Date; and (b) a cashier's or certified check payable to Lender in the amount of (i) the Security Deposits, plus (ii) the amounts of all Rents accruing on and after the Closing Date for which Borrower has previously received and deposited or cashed checks from the tenants, plus (iii) all amounts remaining in any operating accounts and any other bank accounts related to the Property. Notwithstanding the provisions of this Section 4.4 or any other Section of this Agreement or the Closing Documents, neither Lender nor any Buyer hereby or thereby assumes the liability of Borrower to any tenant for the return of any Security Deposit, except to the extent, and only to the extent, that (a) such Security Deposit is identified in the Rent Roll attached hereto, (b) such Security Deposit is maintained by Borrower in a segregated account, and (c) Lender or Buyer actually receives such Security Deposit from Borrower.

2.5 Borrower's Insurance. If either (a) Borrower's casualty and liability insurance coverage related to the Property cannot be assigned to Buyer, or (b) Lender or Buyer elects to obtain separate insurance coverage and instructs Borrower to cancel Borrower's insurance related to the Property as of the Closing Date then, in such event, Borrower shall assign to Lender all rights of Borrower to a refund, if any, of any prepaid insurance premiums refundable upon cancellation of Borrower's insurance coverage related to the Property.

2.6 No Monies to Borrower or Guarantor. No monies, cash or amounts of any kind shall be received by Borrower, Guarantor or their Affiliates at the Closing (or credited toward any amounts due from Borrower or Guarantor).

2.7 Closing Documents. Borrower shall deliver, or cause to be delivered, to Buyer the following on or before the Closing Date (collectively, the "Closing Documents"):

(a) a \_\_\_\_\_ deed in the form of Exhibit "E" attached hereto (the "Deed") duly executed by Borrower in recordable form;

(b) a bill of sale and assignment in the form of Exhibit "F" attached hereto (the "Bill of Sale") duly executed by Borrower;

(c) an estoppel affidavit in the form of Exhibit "G" attached hereto (the "Estoppel Affidavit") duly executed by Borrower;

(d) a certification of non-foreign status in the form of Exhibit "H" attached hereto (the "FIRPTA") duly executed by Borrower;

(e) such transfer declarations, disclosure statements, evidence of due authorization, execution and delivery and other documentation that may be required by law or as may be reasonably required by Lender, Buyer or the Title Company; and

(f) [ADD ANY DOCUMENTS REQUIRED PURSUANT TO LOCAL LAW].

2.8 Original Documents. To the extent available, Borrower shall deliver, or cause to be delivered, to Buyer or cause to remain at the Real Property, the following on or before the Closing Date:

(a) the original Leases and Contracts:

- (b) the original Licenses and Permits;
- (c) the original Warranties
- (d) the original Plans and Specifications;
- (e) copies of all insurance policies in place as of the Closing Date; and
- (f) copies of all available Disclosure Materials.

2.9 Other Deliverables. Borrower shall deliver, or cause to be delivered, to Buyer, the following on or before the Closing Date:

- (a) all keys for the Property, including the keys for any machinery, equipment or other Personal Property and any individual space and any office, storage or other facilities used in connection with the Property, which keys shall be properly tagged for identification;

- (b) any entry cards or opening devices for any security gates or garages in the Property;

- (c) all property stored for security purposes, if any, at a location other than the Property;

- (d) a notice to each holder of a utility deposit, duly executed by Borrower, in form and content satisfactory to Lender instructing such holder to pay any refund thereof to Buyer;

- (e) a cashier's check payable to Buyer drawn on each bank with which the Account is maintained, or a confirmed wire transfer, in the amount payable to Buyer pursuant to Section 4.4 above, together with an accounting of such amounts;

- (f) a notice to each tenant under a Lease in the form of Exhibit "I" attached hereto, duly executed by Borrower informing the tenant of the change of ownership and instructing such tenant to pay all Rents under such tenant's Lease as directed by Buyer;

- (g) possession of all of the Property; and

- (h) evidence satisfactory to Lender that Borrower has terminated the Excluded Contracts, and has paid all sums due thereunder.

2.10 Reserve/Escrow Account. Borrower acknowledges and agrees that any balance in any reserve or escrow account maintained by Lender in connection with the Loan shall be retained by Lender to be applied on account of the Loan obligations as determined by Lender in Lender's sole and absolute discretion.

2.11 Recording and Delivery of Deed. Subject to the fulfillment of the terms and conditions set forth herein, the parties shall direct Title Company to immediately cause the Deed to be recorded in the Official Records and to deliver the Endorsements and the Binder to Lender and Buyer, respectively, concurrently therewith.



2.12 Closing Costs. Borrower shall pay (a) any documentary, stamp, intangible or other transfer tax with respect to the Deed and any sales taxes due in connection with the transfer of the Personal Property, (b) the cost of recording the Deed, (c) any escrow fees or charges incurred in connection with this transaction; and (d) the cost of the Endorsements and the Binder. At the request of Lender, Borrower and Lender shall each execute a settlement statement in the form required by the Title Company.

2.13 Obligations of Lender to Third Parties. Borrower acknowledges and agrees that acceptance by Lender or Buyer of title to the Property pursuant to the terms of this Agreement shall not create any obligations on the part of Lender or Buyer, or any of their respective successors and assigns, to third parties which may have claims, demands, or causes of action of any kind against Borrower or any portion of the Property, and that, except as expressly provided herein and except for the rights of any third parties under the Assigned Contracts, neither Lender nor Buyer shall have agreed to assume or agree to discharge any such claims, demands or causes of action which were made or arose prior to the Closing. Except as expressly set forth in this Agreement, no person or entity not a party to this Agreement shall have any "third party beneficiary" rights or any other rights hereunder. Moreover, Lender has not agreed, and neither Lender nor Buyer will agree, to assume or incur any liability or responsibility with respect to: (a) any expenses or income or sales taxes incurred or accrued by Borrower or any receiver prior to the date of recording of the Deed or the completion of any Foreclosure Action (as hereinafter defined), or (ii) except as expressly set forth in the Closing Documents, any other obligation or liability of Borrower.

### 3. Covenant Not to Sue: Releases.

3.1 Covenant Not to Sue. If and only if the Closing occurs, then, upon the Closing Date, Lender, for itself and for Buyer and their respective successors and assigns, shall be deemed to have covenanted and agreed, except as set forth in this Agreement, not to bring, file or commence any action, suit, claim or cause of action against Borrower and/or its heirs, executors, administrators, personal representatives, successors, assigns, and past, present, and future affiliates, officers, directors, employees, members, managers, shareholders, and agents on account of any and all liabilities, duties, responsibilities, obligations, claims, demands, actions, damages, costs, losses, and expenses now existing or hereafter arising out of or in any way relating to or connected with, directly or indirectly, the Property, the Loan, and the Loan Documents, including any deficiency (with the exception of mandatory counter or cross-claims); provided, however, that the foregoing covenant and agreement shall in no event extend to the continuing liabilities and obligations of Borrower and Guarantor relating to, arising out of, or in connection with (i) the material breach of any representation, warranty, indemnity, covenant or agreement set forth in this Agreement or any of the documents or instruments delivered at Closing or (ii) any indemnities in favor of Lender under any Loan Document; and, provided further, however, that the foregoing covenant and agreement in this Section 5.1 shall be void from its inception, if:

(a) Borrower, Guarantor or any of their Affiliates shall take any act or make any claim of rescission of this Agreement or make any other claim which is inconsistent with this Agreement; or

(b) a court of competent jurisdiction determines that (or any claim is made by Borrower, Guarantor, any of their Affiliates or any third party other than Lender or Buyer in bankruptcy that) the transfer of the Property to Buyer or the receipt of any funds by any party hereunder constitutes a preference or a fraudulent conveyance, or otherwise sets aside or holds ineffective such transfer of the Property or such funds.

The foregoing covenant and agreement shall not defeat, limit or otherwise affect any right of Lender to commence or complete foreclosure proceedings under the Security Instrument or any of the other Loan Documents.

Notwithstanding anything contained in this Section 5.1 or elsewhere in this Agreement to the contrary, it is expressly understood and agreed that this covenant of Lender shall not in any manner defeat, limit, preclude or otherwise affect any right of Lender to (i) commence or complete foreclosure proceedings under the Security Instrument or any of the other Loan Documents, (ii) pursue any and all claims, secured or unsecured, arising in any bankruptcy proceeding of Borrower or Guarantor or (iii) pursue any and all claims and remedies against any collateral securing the obligations evidenced by the Note in any state or federal forum or in any manner, including but not limited to rights of self help or setoff, or foreclosure in respect to the claims of others, if any, against the Property or otherwise.

Further notwithstanding anything contained in this Section 5.1 or elsewhere in this Agreement to the contrary, Lender for itself and for Buyer and their respective successors and assigns, hereby expressly reserves the right to bring, file or commence any action, suit, claim or cause of action against Guarantor with respect to any obligation under the Loan Documents including, without limitation, under the Guaranties. [ADD OTHER PARTIES, IF APPLICABLE]

3.2 Release of Lender and Buyer. Borrower and Guarantor, each for itself and their respective successors and assigns, as of the Closing Date, hereby absolutely and irrevocably waives, releases, and forever discharges Lender, Buyer, and their respective partners, officers, shareholders, directors, managers, members, agents, servants, contractors, employees, parent, affiliated and subsidiary corporations, partnerships and limited liability companies and predecessors-in-interest (collectively the "Lender Released Parties") from any and all claims, rights, demands, actions, suits, causes of actions, damages, counterclaims, defenses, losses, costs, obligations, liabilities and expenses of every kind or nature, known or unknown, suspected or unsuspected, fixed or contingent, foreseen or unforeseen (collectively "Claims"), arising out of or relating directly or indirectly to any circumstances or state of facts pertaining to the Loan, the Loan Documents or the Property, including, without limitation, claims related to the actions of Lender or Lender's predecessors in administering the Loan or negotiating the Loan Documents and claims of lender liability, fraud, duress, illegality, usury, waiver, bad faith, interference in Borrower's business, or any nonperformance or non-payment of any agreement or obligation related thereto, or any statements, representations, acts or omissions, intentional, willful, negligent or innocent, by any of the Lender Released Parties in any way connected with, relating to or affecting, directly or indirectly, the Loan, the Loan Documents, or the Property; provided, however, that the foregoing shall not constitute a release of any of Lender's or Buyer's obligations under this Agreement.

3.3 Waiver. As of the Closing Date, Borrower and Guarantor expressly, knowingly and intentionally waive all rights and protections under the provisions of applicable law, which provide:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

3.4 Release of Borrower. Lender, for itself, Buyer and their respective successors and assigns, effective upon the Closing, hereby absolutely and irrevocably waives, releases, and forever discharges Borrower and its respective partners, officers, shareholders, directors, managers, members, agents, servants, contractors, employees, parent, affiliated and subsidiary corporations, partnerships and limited liability companies, predecessors-in-interest and heirs (expressly excluding, however, the

Guarantor [ADD OTHER PARTIES, IF APPLICABLE]) (collectively, the "Borrower Released Parties") from any and all Claims arising out of or relating directly or indirectly to any circumstances or state of facts pertaining to the Loan, the Loan Documents or the Property, including, without limitation, claims arising due to fraud, duress, illegality, usury, waiver, bad faith, interference in Lender's business, or any nonperformance or non-payment of any agreement or obligation related thereto, or any statements, representations, acts or omissions, intentional, willful, negligent or innocent, by any of the Borrower Released Parties in any way connected with, relating to or affecting, directly or indirectly, the Loan, the Loan Documents, or the Property: provided, however, that in no event shall the foregoing release be deemed a release of the indebtedness evidenced and secured by the Loan Documents, it being the intent of the parties hereto, that such indebtedness shall remain outstanding with Borrower Released Parties having been released from all personal liability therefore but that Lender retains all rights to enforce the Loan Documents against the Property *in rem* and name the Borrower in such *in rem* enforcement subject to the terms of this Agreement: provided further, however, that the foregoing shall not extend to the continuing liabilities and obligations of Borrower and Guarantor relating to, arising out of, or in connection with (i) the breach of any representation, warranty, indemnity, covenant or agreement set forth in this Agreement or any of the Closing Documents or (ii) any indemnities in favor of Lender under any Loan Document; and, provided further, that the foregoing release in this Section 5.4 shall be void from its inception, if:

(a) Borrower, Guarantor or any of their Affiliates shall take any act or make any claim of rescission of this Agreement or make any other claim which is inconsistent with this Agreement; or

(b) a court of competent jurisdiction determines that (or any claim is made by Borrower, Guarantor, any of their Affiliates or any third party other than Lender or Buyer in bankruptcy that) the transfer of the Property to Buyer or the receipt of any funds by any party hereunder constitutes a preference or a fraudulent conveyance, or otherwise sets aside or holds ineffective such transfer of the Property or such funds.

The foregoing release shall not defeat, limit or otherwise affect any right of Lender to commence or complete foreclosure proceedings under the Security Instrument or any of the other Loan Documents.

Notwithstanding anything contained in this Section 5.4 or elsewhere in this Agreement to the contrary, it is expressly understood and agreed that this release shall not in any manner defeat, limit, preclude or otherwise affect any right of Lender to (i) commence or complete foreclosure proceedings under the Security Instrument or any of the other Loan Documents, (ii) pursue any and all claims, secured or unsecured, arising in any bankruptcy proceeding of Borrower or Guarantor or (iii) pursue any and all claims and remedies against any collateral securing the obligations evidenced by the Note in any state or federal forum or in any manner, including but not limited to rights of self help or setoff, or foreclosure in respect to the claims of others, if any, against the Property or otherwise.

Further notwithstanding anything contained in this Section 5.4 or elsewhere in this Agreement to the contrary, Lender for itself and for Buyer and their respective successors and assigns, hereby expressly reserves the right to bring, file or commence any action, suit, claim or cause of action against Guarantor with respect to any obligation under the Loan Documents including, without limitation, under the Guaranties. [ADD OTHER PARTIES, IF APPLICABLE]

#### 4. Bankruptcy.

4.1 No Objection or Defense. Borrower hereby acknowledges and agrees that, in consideration of the recitals and mutual covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, in the event Borrower, after

the Closing Date, shall (a) file a petition for relief with any bankruptcy court or otherwise be the subject of any petition filed under the Bankruptcy Code, (b) be the subject of any order for relief issued under the Bankruptcy Code, (c) file or be the subject of any petition seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief for debts, (d) have sought or consented to or acquiesced in the appointment of any trustee, receiver, conservator or liquidator, (e) be the subject of any order, judgment or decree entered by any court of competent jurisdiction approving a petition filed against such party for any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency or relief for debts, then Borrower shall not raise any objection or defense of any kind or nature or otherwise prevent, hinder or delay (i) any attempt by Lender to obtain relief from any automatic stay imposed by Section 362 of the Bankruptcy Code, or otherwise, or (ii) the exercise by Lender of any or all of the rights and remedies otherwise available to Lender, as provided in the applicable Loan Documents, as hereby amended, and as otherwise provided by law.

4.2 Acknowledgements and Agreements. Borrower and Guarantor each hereby acknowledges and agrees that: (i) this Agreement is of considerable benefit to Borrower and Guarantor; (ii) this Agreement allows Borrower to fully settle and resolve the obligations owed to the Lender, subject to the terms contained in this Agreement; (iii) Borrower have received substantial legal and financial accommodations from the Lender under this Agreement; (iv) the value of the Property is less than the debt that is secured by the Property; and (v) Lender is entering into this Agreement in reliance on representations of Borrower and Guarantor in this Agreement. Borrower and Guarantor each also hereby represents and warrants to Lender and acknowledges and agrees as follows: (a) neither Borrower nor Guarantor currently intend to file a bankruptcy petition and have no intention of seeking a non-consensual plan of reorganization in any bankruptcy forum; (b) any attempt to sell the Property or otherwise reorganize Borrower's and Guarantor's financial affairs and to pay and perform Borrower's and Guarantor's obligations to Lender would be fruitless and impracticable to achieve; (c) any filing by Borrower or Guarantor of a voluntary petition in bankruptcy or the exercise of like or similar rights by Borrower or Guarantor prior to satisfaction in full of the indebtedness to Lender under the Loan Documents would be inconsistent with and contrary to the intentions of the parties hereto and made only with the intention of hindering or delaying Lender in the enforcement of Lender's rights as a secured creditor; (d) neither Borrower nor Guarantor can formulate or implement a successful plan of reorganization in any such proceeding (whether in bankruptcy or under a like proceeding) which would adequately and sufficiently protect the rights of Lender or enable Borrower or Guarantor to satisfy Borrower's or Guarantor's obligations to Lender; (e) in light of the foregoing, any such filing would be made in bad faith, as such term is used by courts in construing the Bankruptcy Code, as to Lender and only with the intention to hinder or delay Lender from exercising its rights and remedies as to the obligations of Borrower and Guarantor to Lender (whether hereunder or otherwise) and the Property (and/or other collateral) securing such obligations; (f) in light of the foregoing, if any voluntary or involuntary proceeding in bankruptcy or under like laws granting relief to Borrower or Guarantor is filed by or against Borrower or Guarantor, Lender shall, in addition to any other rights or remedies set forth in this Section 6 or otherwise in this Agreement, have the right to seek and obtain immediate relief from any stay and to have the exclusivity period for the filing of any plan of reorganization terminated, and Borrower hereby waives any objection or opposition in any manner to the relief requested by Lender or the termination of any such exclusivity period in a bankruptcy proceeding; and (g) neither Borrower nor Guarantor shall solicit, assist or encourage any third party to file an involuntary bankruptcy petition against Borrower or Guarantor. Lender is relying on, among other things, the representations, warranties and covenants contained in this Section 6.2 in entering into this Agreement.

5. Consent to Foreclosure. Without in any way limiting the terms and provisions of Section 5.1 hereof, Borrower acknowledges and agrees that Lender has or at any time hereafter may commence a Foreclosure Action (as hereinafter defined) in connection with the Loan and the Property

and that, at any time, if Lender, in Lender's sole and absolute discretion, determines that it is in Lender's best interest to do so, Lender shall be entitled under this Agreement, without any prior notice whatsoever to Borrower, to (a) prosecute through completion, in Lender's sole discretion, a judicial or non-judicial foreclosure action under applicable law pursuant to the Security Instrument and Assignment of Leases (a "Foreclosure Action") and to have the Property sold in one or more foreclosure or public sales (as the case may be), and (b) obtain any judicial order confirming or approving any such sale(s). In connection with any Foreclosure Action, if requested by Lender, Borrower shall: (i) accept service of process from Lender of a summons and complaint; and (ii) execute and deliver to Lender any one or more of the following: (A) a notice and acknowledgement of receipt of summons and complaint, (B) a consent decree of foreclosure, (C) any acknowledgment that the sale(s) were commercially reasonable dispositions of the Property after sale(s) and waiving any rights in opposition thereto that might otherwise exist, (D) a consent order authorizing foreclosure, and (E) any other document, instrument, pleading, notice or writing Lender may deem necessary to prosecute to completion and/or effectuate any Foreclosure Action or the purpose and intent of this Agreement (collectively, the "Consensual Foreclosure Materials"). Neither Borrower nor Guarantor shall raise any objection or defense and shall take no action to hinder, delay or otherwise interfere with, object to or appeal any Foreclosure Action or any sale(s) of the Property or Lender's prosecution of any Foreclosure Action, the entry of any judgment or the confirmation of any sale(s) of any of the Property. With respect to any such Foreclosure Action, Borrower and Guarantor agree to cooperate in the submission, preparation or execution of any documents reasonably necessary or reasonably required for the expeditious prosecution of such Foreclosure Action as reasonably determined by the Lender. The covenant contained in this Section 7 shall survive the Closing or any termination of this Agreement, provided that the Covenant Not to Sue given by Lender in Section 5.1 of this Agreement remains in force.

6. Acknowledgments. Borrower and Guarantor each acknowledge and agree that the Loan Documents are in full force and effect and are the valid and legally binding obligations of the Borrower and Guarantor, as applicable, free from all legal and equitable defenses, offsets and counterclaims. Borrower and Guarantor each hereby ratify and confirm their respective liabilities, obligations and agreements under all of the Loan Documents, except as may be specifically and expressly modified by this Agreement, and the liens and security interests created thereby, and acknowledge that (a) Borrower is in default of Borrower's liabilities and obligations under the Loan Documents and that neither Borrower nor Guarantor have any defenses, claims, counterclaims or set-offs of any kind or nature whatsoever to the enforcement by Lender of the liabilities, obligations and agreements contained in the Loan Documents, and each hereby forever waive any right to assert any such defense, claim, counterclaims, or setoff, (b) Lender has fully performed all obligations to Borrower and/or Guarantor that Lender may have had or has on and as of the Closing Date, and (c) Lender does not waive, diminish or limit any term or condition contained in any of the Loan Documents, except as specifically and expressly set forth in this Agreement.

6.1 No Merger, etc. It is the intent of Lender, Buyer, Borrower and Guarantor that (a) the interests of Borrower conveyed to Buyer hereunder or under the Closing Documents and the interests of Lender existing under the Security Instrument and the Assignment of Leases shall not merge upon or after Closing, (b) the Security Instrument, the Assignment of Leases and the Note shall continue in full force and effect and the Security Instrument shall remain as a first priority lien against the Real Property notwithstanding the transfer of the Real Property to Buyer and Lender's covenant not to sue Borrower pursuant to Section 5.1 hereof, and (c) Lender shall retain the right to foreclose upon the Property after the Closing and shall retain its right to exercise Lender's rights under the Assignment of Lease after the Closing but agrees not to seek a judgment for deficiency against Borrower.

6.2 Absolute Conveyance. Borrower acknowledges and agrees that (a) the conveyance to Lender or Buyer of the Property, according to the terms of this Agreement, is given

voluntarily and is an absolute conveyance of all of Borrower's right, title and interest in and to the Property in fact as well as form and is not intended as a mortgage, trust conveyance, deed of trust or security instrument of any kind; and (b) the consideration for such conveyance is exactly as recited herein and Borrower has no further interest or claim of any kind (including but not limited to, homestead rights and rights of redemption) in or to any portion of the Property, or to the proceeds and profits which may be derived thereof, whether sold for more or less than the outstanding indebtedness due under the Loan Documents. In the event any Rents are received by Borrower with respect to the Real Property after the date on which title is conveyed to Lender, such Rents shall be immediately delivered to Buyer.

6.3 Indemnification. Borrower and Guarantor shall, jointly and severally, indemnify, defend, protect, and hold harmless the Lender Released Parties, and each of them, from and against any and all Claims arising directly or indirectly from (a) any inaccuracy in any representation or warranty made by Borrower or Guarantor in this Agreement or any of the Closing Documents, (b) the failure of Borrower or Guarantor to observe or perform any agreement, covenant or provision of this Agreement or the Closing Documents, (c) any breach of or default by Borrower under any Contract, Lease or Permissible Exception, (d) any acts or events by or caused by Borrower or Borrower's agents, or of which the Borrower or Borrower's agents have knowledge, with respect to the Property, which occur on or prior to the Closing Date, (e) any rights or claims of rights by any person or entity in and to any impound accounts, or (f) any claim by any direct or indirect owner of Borrower in connection with the Property, the Loan, the Loan Documents, this Agreement or the documents and instruments executed and delivered at Closing.

6.4 Effect on Loan Documents. Neither the provisions of, nor any performance under, this Agreement shall amend, modify, supplement, extend, delay, renew, terminate, waive, release or otherwise limit or prejudice Lender's rights and remedies or Borrower's obligations under the Loan Documents (including, without limitation, Lender's right to receive full payment as well as late charges, delinquent interest and all other charges provided for in the Loan Documents), subject, however, to Section 5.1 if, and only if, the Closing occurs.

6.5 Relationship. This Agreement is not intended, and shall not be construed to create a joint venture, partnership or agency relationship between Lender and Borrower.

6.6 Mortgagee in Possession. Borrower agrees that Lender is not a mortgagee-in-possession and that this Agreement does not create any obligation on the part of Lender to manage or operate the Property or give Lender any control over the Property until after the Closing Date.

6.7 No Novation or Release. Except as may be expressly provided in this Agreement, neither this Agreement nor any of the exhibits attached to this Agreement is intended to be, and none shall be deemed or construed to be, a reinstatement, novation, amendment, modification or release of the Loan or any of them. Neither this Agreement nor any of the exhibits to this Agreement nor any payments made or any actions taken pursuant to this Agreement shall be deemed to cure any existing Default under the Loan Documents, it being the intention of the parties that the Loan is and shall remain in default and immediately due and payable in full notwithstanding this Agreement, the Closing or other transactions contemplated by this Agreement.

**DEED IN LIEU OF FORECLOSURE**

APN NO.:

Affix RPTT:

WHEN RECORDED MAIL TO:

MAIL TAX STATEMENTS TO:

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**GRANT, BARGAIN, SALE DEED**

THIS INDENTURE WITNESSETH THAT:

\_\_\_\_\_, LLC, a Delaware limited liability company ("Grantor")

in consideration of the sum of Ten Dollars (\$10.00), the receipt of which is hereby acknowledged, does hereby Grant, Bargain, Sell and convey to

[ insert name of grantee ] ("Grantee")

all of the right, title and interest in that real property situated in the County of Clark, State of Nevada, bounded and described as follows:

SUBJECT TO: (1) all general and special taxes for the fiscal year; and (2) conditions, covenants, restrictions, reservations, rights, rights of way and easements now of record.

TOGETHER WITH all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining thereto.

This deed is given voluntarily and is an absolute conveyance of all of Grantor's right, title and interest in and to the real property described above in fact as well as form and is not intended as a mortgage, trust conveyance, deed of trust or security instrument of any kind and the consideration for such conveyance is fair and adequate, such consideration, in addition to that above recited, being a covenant not to sue for the personal liability of Grantor with respect to all debts, costs, obligations and charges secured by that certain Deed of Trust, Security Agreements and Financing Statement ("**Deed of Trust**") recorded on \_\_\_\_\_ in Book \_\_\_\_\_ as Instrument No. \_\_\_\_\_ in the Official

Records of Clark County, Nevada, executed by \_\_\_\_\_, LLC, a Delaware limited liability company, as Trustor/Grantor to \_\_\_\_\_ Title Company, as Trustee, for the benefit of \_\_\_\_\_, a Delaware Corporation, as Beneficiary.

In addition to the foregoing, it is the express intention of Grantor and Grantee that upon execution, delivery and recordation of this deed, this deed shall not merge with the Deed of Trust, but shall be and remain at all times separate and distinct, notwithstanding any union of said interests in Grantee at any time, and that Grantee, and its successors and assigns, shall continue to enjoy all rights and remedies set forth in the Deed of Trust, including the right to foreclose either by judicial action or under the power of sale contained there under.

Grantor hereby declares that this conveyance is freely and fairly made and that Grantor has no further interest or claim of any kind (including but not limited to, homestead rights and rights of redemption) in or to any portion of the real property described above.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_, LLC,  
a Delaware limited liability company

By: \_\_\_\_\_

STATE OF \_\_\_\_\_ )  
 ) ss.  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 2009, personally appeared before me \_\_\_\_\_, Manager of \_\_\_\_\_, LLC, a Delaware limited liability company, who duly acknowledged that he executed the above instrument.

\_\_\_\_\_  
Notary Public

My commission expires: