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Foreclosure by Power of Sale

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TABLE OF CONTENTS

Page 1

Foreclosure process steps
45-Day Letter

Page 2

30-Day Letter
Substitution of Trustee
Notice of Hearing File
Service of Notice of Hearing

Page 3

Hearing
Notice of Sale
Sale
Preliminary Report of Sale

Page 4

Upset Bid
Final Report & Surplus Funds
Trustee's Notice of
Foreclosure and Deed

Foreclosure by Power of Sale

There are two types of foreclosures in North Carolina, judicial foreclosures and foreclosures by power of sale. The most common is the foreclosure by power of sale.

When a loan is past due by 60 days or more, a lender may begin the foreclosure process. Where the deed of trust has a power of sale clause the trustee may initiate a power of sale foreclosure. There are various requirements provided under N.C.G.S. Chapter 45 that must be followed to foreclose under a power of sale. The process includes the following steps, each of which is briefly summarized in this article:

1. 45 Day Letter
2. 30 Day Letter
3. Substitution of Trustee
4. Notice of Hearing Filed
5. Service of Notice of Hearing
6. Hearing
7. Notice of Sale
8. Sale
9. Preliminary Report of Sale
10. Upset Bid
11. Final Report & Surplus Funds
12. Trustee's Notice of Foreclosure & Deed

From an investor's perspective, it is important the above steps are carried out as required by law under N.C.G.S. Chapter 45, otherwise the Trustee's Deed provided at the end of the process may not be marketable.

45-Day Letter – N.C.G.S. §§ 45-102, 45-103, & 45-104(c)

The process begins with the 45-day letter. At least 45 days prior to the filing of a notice of hearing in a foreclosure proceeding on a primary residence, mortgage servicers of home loans must send written notice by mail to the last known address of the borrower to inform the borrower of the availability of resources to avoid foreclosure, including:

- Past due amounts causing the loan to be in default.
- Other charges that must be paid in order to bring the loan current.



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- A statement that the borrower may have options available other than foreclosure and that the borrower may discuss available options with the mortgage lender, the mortgage servicer, or a counselor approved by the U.S. Department of Housing and Urban Development.
- The address, telephone number, and other contact information for the mortgage lender, the mortgage servicer, or the agent for either of them who is authorized to attempt to work with the borrower to avoid foreclosure.
- The name, address, telephone number, and other contact information for one or more HUD-approved counseling agencies operating to assist borrowers in North Carolina to avoid foreclosure.
- The address, telephone number, and other contact information for the State Home Foreclosure Prevention Project of the Housing Finance Agency.

Not all loans with respect to residential property are considered “home loans”. Only those loans defined as home loans under N.C.G.S. 45-101 must receive a 45-Day Letter.

30-Day Letter – N.C.G.S. §§ 45-21.16(c)(5a)

To satisfy the 30-Day Letter requirement, the debtor must send a detailed written statement of the amount of principal, interest, and any other fees, expenses, and disbursements that the holder of the loan note is claiming to be due as of the date of the written statement, together with a daily interest charge based on the contract rate as of the date of the written statement. This statement should be sent by first-class mail to the debtor's last known address within 30 days of the notice of hearing mentioned below.

Substitution of Trustee – N.C.G.S. §§ 45-10, 45-15, & 45-17

When a creditor hires an attorney to help with a foreclosure, it is common for the creditor to substitute the original trustee under the deed of trust with the law firm handling the foreclosure. This trustee substitution must be filed with the Register of Deeds where the property is located.

Notice of Hearing Filed – N.C.G.S. §§ 45-21.16(c), & 45-21.16(c2)

The trustee who seeks to exercise a power of sale shall file with the clerk of court a notice of hearing in accordance with the terms of N.C.G.S. 45-21.16. This notice of hearing must include a long list of information whose purpose it is to identify: the holder of the note, that the various requirements prior to a hearing have been satisfied, and the rights of the creditor at the hearing. After the notice of hearing is filed, it must be served on each party entitled to notice as mentioned below.

Service of Notice of Hearing – N.C.G.S. §§ 45-21.16(a), & 45-21.16(b)

After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice. This includes any person who the deed of trust directs notice to be sent in case of default; any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability, and every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county.

The notice must specify a time and place for the hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. In some instances, notice is permitted by posting a notice in a conspicuous place on the property not less than 20 days prior to the hearing.

Hearing - N.C.G.S. §§ 45-21.12A, 45-21.16(d), 45-21.16(d1), & 45-21.16(f)

The hearing is before a clerk of Superior Court and is held at the place and time specified in the notice of hearing. At the commencement of the hearing, the clerk inquires as to whether the debtor occupies the real property as his/her principal residence. If so, the clerk asks about the efforts the mortgagee, trustee, or loan servicer has made to communicate with the debtor and to attempt to resolve the matter voluntarily before the foreclosure proceeding. The clerk shall order the hearing continued if the clerk finds that there is good cause to believe that additional time or additional measures have a reasonable likelihood of resolving the delinquency without foreclosure.

If the hearing is not continued, the party seeking an order authorizing the foreclosure sale must prove the following six factors:

- (1) The existence of a valid debt of which the party seeking to foreclose is the holder,
- (2) Default,
- (3) Right to foreclose under the deed of trust,
- (4) Proper Notice,
- (5) Home loan compliance with the 45-Day Letter, and
- (6) That the sale is not barred due to a party's military service.

The above matters are rarely contested. If the above factors are established, the clerk orders the property to be sold at a public auction. Prior to such a sale, proper notice of the sale must be provided.

Notice of Sale - N.C.G.S. §§ 45-21.16A, 45-21.17, & 45-21.17A

After the clerk orders property to be sold, the trustee must comply with the notice of sale requirements. These requirements provide who the notice must be provided to, how such notice must be provided, and when such notice must be provided.

Sale - N.C.G.S. §§ 45-21.4, 45-21.7, 45-21.8-9, 45-21.10, 45-21.21, 45-21.22, 45-21.23, & 45-21.24

The sale must occur at the place and time specified in the notice of sale which is generally the courthouse in the county where the property is located. The highest bidder at the sale must provide a cash deposit. If the deed of trust contains no provision with respect to a cash deposit at the sale, the trustee may require the highest bidder immediately to make a cash deposit not to exceed the greater of five percent (5%) of the amount of the bid or seven hundred fifty dollars (\$750.00). The highest bidder does not obtain rights in the property until the upset bid period ends, as discussed below.

Preliminary Report of Sale - N.C.G.S. §§ 45-21.26, & 45-21.14

The person exercising a power of sale of real property, shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county in which the sale occurred. The report shall be signed by the person authorized to hold the sale, or by his agent or attorney and shall provide various items of information about the sale.

Upset Bid – N.C.G.S. §§ 45-21.27, 45-21.29A, & 45-21.30

After a sale, an upset bid may be placed within 10 days. An upset bid is an increased, or raised bid whereby someone offers to purchase real property sold, for an amount exceeding the reported sale price or last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars (\$750.00). An upset bid is made by delivering to the clerk of superior court, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars (\$750.00).

There may be successive upset bids each of which shall be followed by a period of 10 days for a further upset bid. But, if an upset bid is not filed following a sale, resale, or prior upset bid within the period specified, the rights of the parties to the sale or resale become fixed.

Final Report & Disposition of Proceeds – N.C.G.S. §§ 45-21.14, 45-21.15, 45-21.31, 45-21.32, & 45-21.33

A person who holds a sale pursuant to a power of sale must file with the clerk of the superior court a final report and account of his receipts and disbursements within 30 days after the receipt of the proceeds of such sale.

The proceeds of any sale shall be applied in the following order:

- (1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred, and reasonable attorney fees;
- (2) Taxes due and unpaid on the property sold, as provided by N.C.G.S. 105-385, unless the notice of sale provides that the property be sold subject to taxes thereon and the property was so sold;
- (3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by N.C.G.S. 105-385, unless the notice of sale provides that the property be sold subject to special assessments thereon and the property was so sold; &
- (4) The obligation secured by the deed of trust.

Any surplus remaining after the application of the sale proceeds as set out above shall be paid to the person or persons entitled, such as other lien holders or the creditor whose property was sold.

Trustee's Notice of Foreclosure & Deed – N.C.G.S. § 45-38

In a foreclosure of any deed of trust, the trustee should record a notice of foreclosure with the Recorder of Deeds that includes the date when, and the person to whom, a conveyance was made by reason of the foreclosure. Further, the trustee should record a deed (the "Trustees Deed") to the high bidder at the sale. In an upcoming article, we will discuss what liens / encumbrances the trustee's deed may be subject to.