

Foreclosure by Power of Sale

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Course Objectives



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Leave here with the three C's...

1. Competent
2. Confident
3. Control



Judicial Act

“The act of the clerk in so finding or refusing to so find is a **judicial act**...”

G.S. 45-21.16(d1)

VS.

“...foreclosure by power of sale under a deed of trust is a non-judicial proceeding.”

In re Foreclosure of Lucks, 369 N.C. 222 (2016)



Power of Sale Overview

Four Key Points



#1

**You don't have to
solve everyone's
problems.**



#2

Chapter 45 controls in procedure and substance.

See In re Foreclosure of Lucks, 369 N.C. 222 (2016)

#3

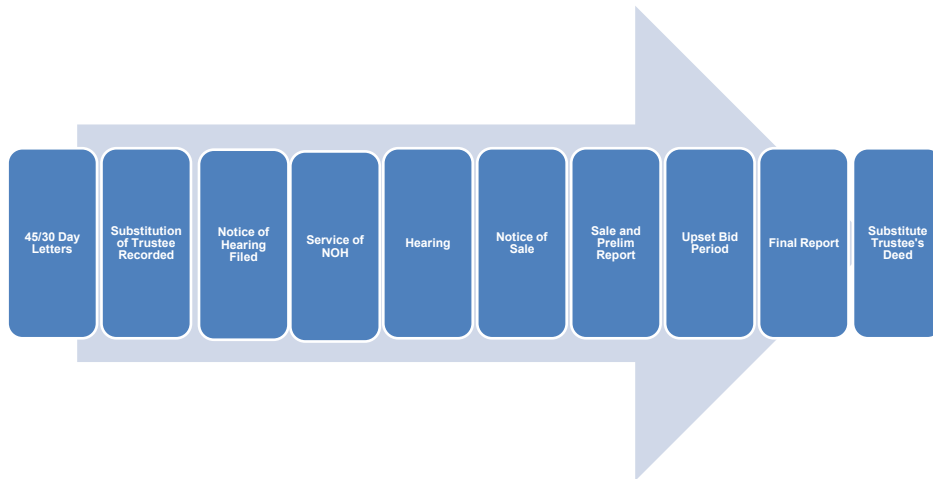
A power of sale foreclosure is an efficient and expeditious alternative elected by the lender.

Judicial Foreclosure	Power of Sale Foreclosure
Superior/District Court Judge	Clerk of Superior Court
Civil Action	Filed in the same manner as a special proceeding, G.S. 45-21.16(g)
G.S. Chapter 1	G.S. Chapter 45
\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$	\$\$
2 years or more	4-5 months
Any legal or equitable issue	Limited to 6 legal findings
Holder files a complaint and summons	Holder appoints trustee and directs the trustee to file a notice of hearing

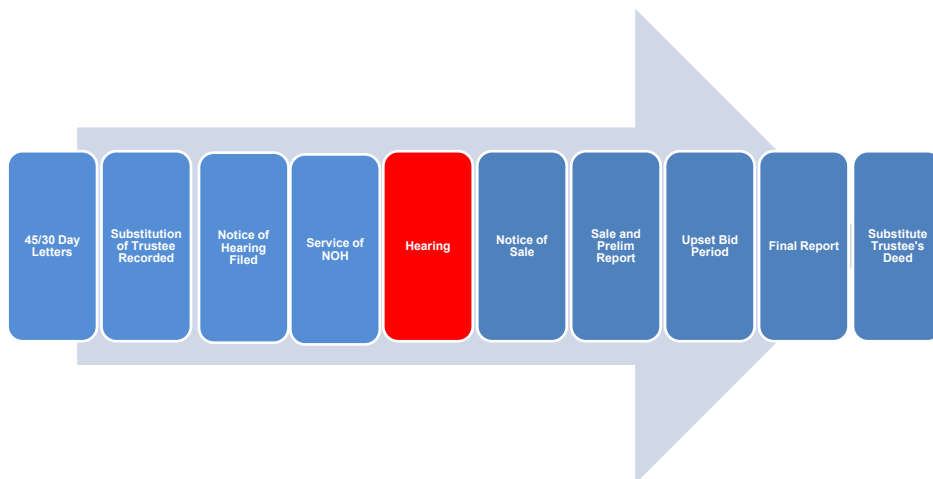
Put the pieces together.

Using the notecards on each table, work as a group to put the pieces in order from what happens first in a foreclosure proceeding to last.

Power of Sale Foreclosure



Power of Sale Foreclosure

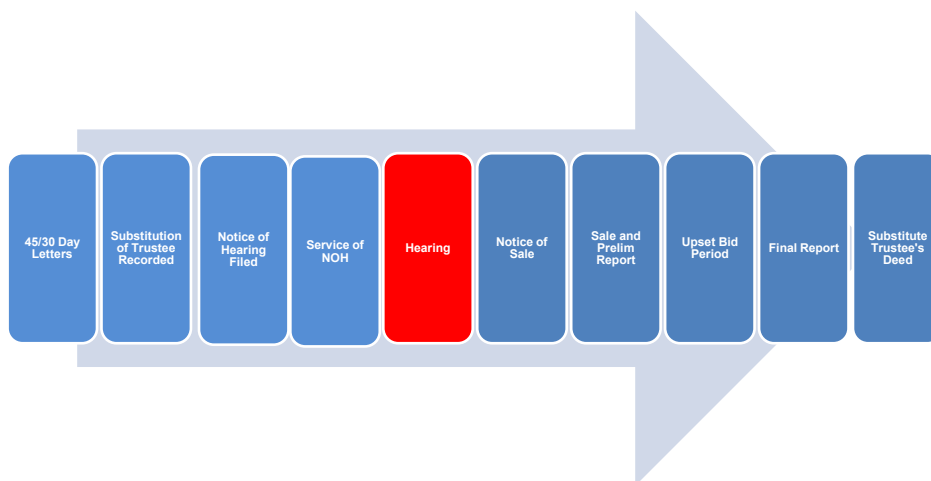


#4

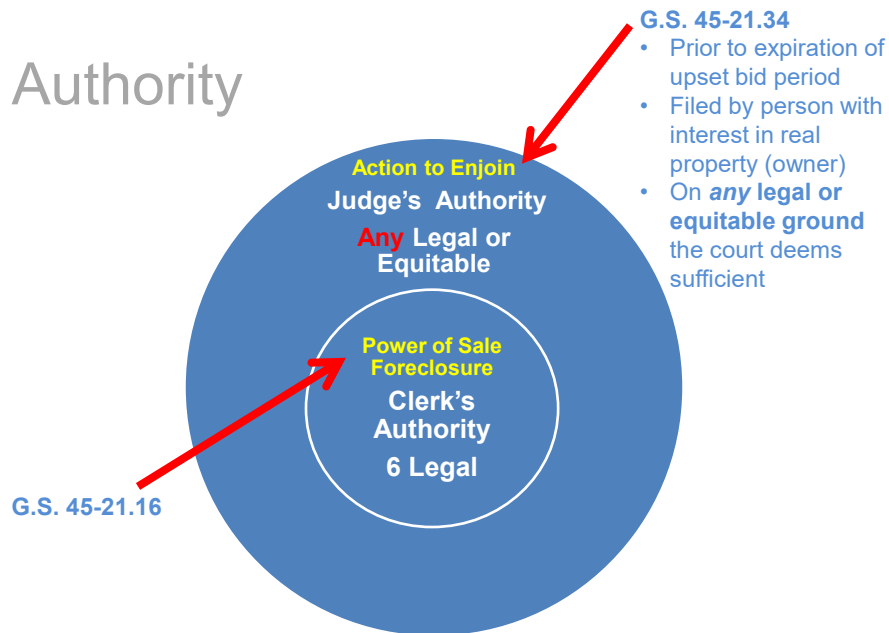
The clerk's authority is limited but it is not a rubber stamp.



Power of Sale Foreclosure



Authority



The Big Six

1. **Holder of a valid debt**
2. **Right to foreclose**
3. **Default**
4. **Notice**
5. **Home Loan**
6. **Military Service**



How Searching of an Inquiry?

Competent evidence of the **existence** of the six factors to authorize sale.....

Evidence that a reasonable mind might accept as adequate to support the finding of fact as to each of the six elements.

- In re Adams, 204 NC App 318, 321 (2010)

G.S. 45-21.16(d)

Evidence Rules Relaxed



“The statute provides for a relaxation in the form rules of evidence at the hearing.”

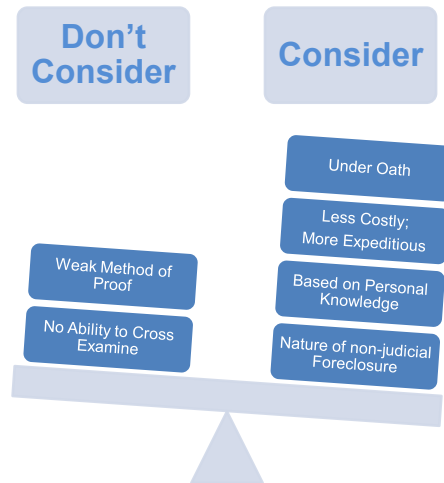
- In re Foreclosure of Lucks, ____ N.C. ____ (Dec. 21, 2016)

In addition to other forms of evidence permitted by law, the clerk “may consider affidavits and certified copies of documents.”

- G.S. 45-21.16(d).



Testimony by Affidavit



Trial by Affidavit

#1: Affidavit should include facts, not conclusions of law.

“XYZ Bank is the holder of the note.”

Court should not consider legal conclusions postured as allegations of fact.

- In re David A. Simpson, 211 NC App 483 (2011)



Trial by Affidavit

#2: Affiant must have personal knowledge of the facts they are attesting to in the affidavit.

- In re Yopp, 217 N.C. App. 489, 492 (2011)

Trial by Affidavit

- What capacity employed
 - The nature of job responsibilities
 - How s/he familiar with loan, record keeping policies of the company, etc.
- How do they know what they are attesting to in the affidavit?



Trial by Affidavit

Generally, a “witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.”

N.C. Gen. Stat. § 8C-1, Rule 602



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Repeat them!

#1: Affidavit should include facts, not conclusions of law.

#2: Affiant must have personal knowledge of the facts they are attesting to in the affidavit.



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Affirmative Showing

1. *Regardless* of whether it is contested or uncontested – not a default judgment.
2. Must have a hearing with presentation of evidence or the hearing must be affirmatively waived.

- G.S. 45-21.16(f)

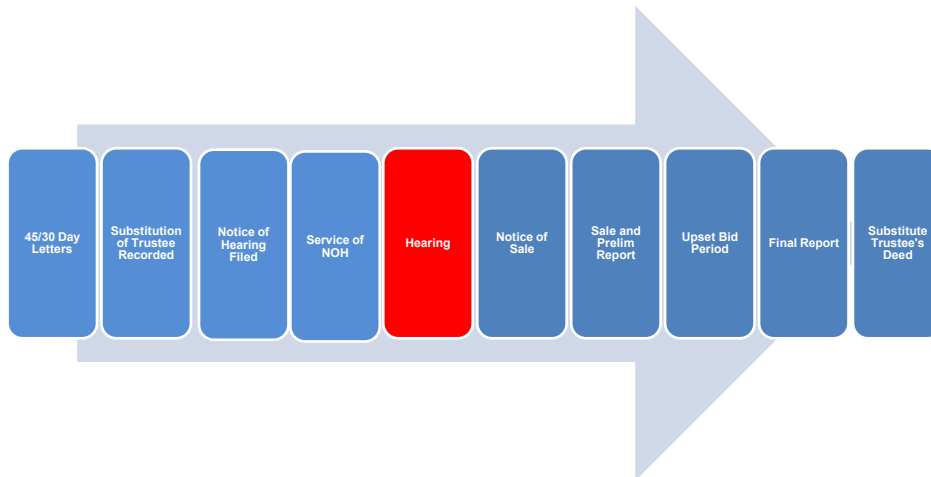
Reviewing the Documents....

What does your process look like?

- Presentation of evidence at the hearing?
Before the hearing?
- Decision under advisement?
- Trustee obligations?
- Checklist?



Power of Sale Foreclosure



So, remember....

1. You don't have to solve everyone's problems.
2. Chapter 45 controls in procedure* and substance.
3. A power of sale foreclosure is an efficient and expeditious alternative elected by the lender.
4. The clerk's authority is limited but it is not a rubber stamp.

