



NORTH CAROLINA  
ADMINISTRATIVE OFFICE  
*of the* COURTS

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**MEMORANDUM**

TO: Clerks of Superior Court  
Assistant Clerks of Court  
Deputy Clerks of Court

FROM: Jonathan Harris, Allison Smith, Amy Funderburk

DATE: April 4, 2017

RE: Clerk's Authority to Review Whether a Newspaper is Legally Qualified to Publish  
Notices of Sale in Power of Sale Foreclosures

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**Question:**

In power of sale foreclosure proceedings, does a Clerk of Superior Court have the authority or duty to review whether a newspaper is legally qualified to publish a notice of sale of real property, as required by G.S. § 45-21.17(1)(b.)?

**Short Answer:** No

**Explanation:**

It is critical to note at the outset that this guidance applies only to power of sale foreclosure proceedings. It is further limited to the publishing of notices of sale in these proceedings, and not to the initial notice of hearing which begins the foreclosure process.

Also, this guidance does not apply to a foreclosure by judicial action, to any proceedings in which the clerk has authority to confirm a judicial sale, or to any other proceedings where the clerk is given the discretion or authority to judge the adequacy of notice.

Our Supreme Court has emphasized that a clerk only has the authority given by statute and cannot perform functions involving the exercise of judicial discretion in the absence of statutory authority. See In re Foreclosure of the Deed of Trust of Vogler Realty, Inc., 365 N.C. 389, 394 (2012). In some proceedings, statutes do provide the clerk with the authority to

exercise judicial discretion, such as when a clerk is required to confirm a judicial sale in a partition proceeding or a special proceeding for the sale of a ward or decedent's real property. In contrast, in a power of sale foreclosure, the statutes do not confer authority on a clerk to determine whether a newspaper is legally qualified to publish notices of sale. Although a clerk "audits" the Final Report of Sale in a power of sale foreclosure under G.S. § 45-21.33(b), our courts have described this type of audit as a ministerial (not discretionary) act limited to determining whether the entries in the Final Report reflect the actual receipts and disbursements made by the trustee.

While G.S. § 45-21.33(c)(2), requires the person who holds the sale to file with the clerk a copy of the notice of sale published in a newspaper, the statute does not grant additional authority to review the adequacy of that notice.

We do not read G.S. § 45-21.33(c)(3) as a grant of authority to review published notices of sale either. This statute states that the person who holds the sale shall file with the clerk proof, as required by the clerk, which may be by affidavit, that notices of hearing, sale and resale were served upon all parties entitled thereto under G.S. § 45-21.16, 45-21.17, 45-21.17A, and 45-21.30. The "proof" required in this statute refers to proof that parties entitled to notice were, in fact, served with a notice. A notice of sale published in a newspaper is directed to the public at large. The public is not a party entitled to notice, nor can the public be "served" with notice. Therefore, G.S. § 45-21.33(c)(3) is inapplicable to notices of sale published in a newspaper.

As mentioned above, this guidance only applies to publication of the notice of sale, not to the initial notice of hearing which begins the foreclosure process and results in an order either authorizing or not authorizing the sale. The clerk does review whether a proper notice of hearing has been provided prior to authorizing the sale.

Finally, this memo also takes no position on whether a particular publication is qualified for legal advertising. If a situation arises where a clerk does have the discretion to determine if a publication is qualified, and the clerk is unsure of the answer, they should contact the Office of General Counsel for assistance.