



Foreclosures – 2013

Quick Overview

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Foreclosure Introduction

- Method of enforcing payment of a debt secured by a mortgage or deed of trust upon real property by selling the property and applying the proceeds of the sale to satisfy the debt.
- A foreclosure is not a special proceeding; it is filed as an “SP” for recordkeeping purposes only.
- Do not issue a special proceeding summons.

Trustee

Role of Trustee

- Cannot ethically represent either lender or debtor in an advocacy role at any stage of a foreclosure proceeding, and cannot present evidence in a contested case.
- Cannot bid on or purchase the property at the sale.
- The substitute trustee has authority ONLY from & after the recording of the document of substitution.

COB Suspension

G.S. 45-21.16B

- Commissioner of Banks may require suspension of foreclosure proceedings on residential property for 60 days, **and the clerk must enter an order suspending the foreclosure proceedings for 60 days from the date of the notice. (G.S. 45-21.16B & 53-244.17).**

Pre-Foreclosure Notice

G.S. 45-102

- 45 days before filing a foreclosure proceeding on a subject loan (**borrower's primary dwelling**), the lender or servicer must send a notice to the borrower (six required elements):

- Itemization of all past due amounts causing the loan to be in default.
- Itemization of any other charges that must be paid to bring the loan current.
- Statement that options other than foreclosure may be available and the borrower may discuss those options with the lender, the mortgage servicer, or a HUD approved counselor.

Contact information for:

- the lender, the mortgage servicer or the agent for either of them who is authorized to work with the borrower to avoid foreclosure.
- One or more HUD approved counseling agencies in NC.
- The State Home Foreclosure Prevention Project of the Housing Finance Agency.

Pre-Foreclosure cont...

G.S. 45-103 & 105

- Within 3 days of the notice, electronically file certain information about the borrower and the loan onto the AOC database.
- Upon review of this information, the HFA can order a one-time extension of time of up to 30 days (beyond the 45 days) before a foreclosure proceeding can be filed.

Notice of Hearing

G.S. 45-21.16(b)

Foreclosure initiated by filing of a notice of hearing by the trustee.

NOH is filed in every county where a portion of the land is situated.

▪ Notice must be filed with the clerk and then served on all **proper persons**:

- any person to whom deed of trust itself directs
- any person obligated to pay indebtedness against whom holder intends to assert liability.
- any record owner of the real estate whose interest is of record in the county where the real property is located at the time the hearing is filed in that county.

Notice of Hearing cont...

G.S. 45-21.16(a); 1A-1, Rule 4

Notice of hearing must be served at least 10 days before the hearing.

- If served ONLY by posting - 20 days before hearing.
 - Party who cannot be served by personal, registered, or certified mail after reasonable and diligent effort.
 - Trustee proves service by filing an affidavit showing posting, the circumstances warranting service by posting, and the actual efforts made to locate and serve the respondent(s).
 - Posting must be done by the sheriff.

Notice of Hearing cont...

G.S. 45-21.16(c)

Contents of Notice

- Requests for information within the last 2 years, if any, have been complied with – only applies to home loans (as defined in G.S. 45-101, See also 45-93);
- The trustee is a neutral party and may not advocate for the creditor or debtor;
- The debtor may apply to a judge of the superior court for an injunction to stop the foreclosure;

Notice of Hearing cont...

G.S. 45-21.16(c)

- The Clerk must find a valid debt of which the party seeking the foreclosure is the holder, default, the right to foreclose under the instrument, and notice to those entitled to it;
- The debtor has the right to appear before clerk at hearing and contest the evidence, but his failure to attend does not affect his right to pay the indebtedness and prevent the sale;
- The trustee will ask the Clerk for an order to sell the property;

Notice of Hearing cont...

G.S. 45-21.16(c)

- The debtor has the right to seek the advice of an attorney and that free legal advice may be available by contacting Legal Aid or other service providers;
- Description, which identifies real estate, including date of execution of security agreement, original amount of debt, original holder of note, and book & page of security instrument;
- Name & address of holder of security instrument at time notice of hearing is filed;
- Nature of claimed default;
- Fact that maturity of debt has been accelerated if appropriate;

Notice of Hearing cont...

- Any right of debtor to pay indebtedness or cure default;
- Within 30 days of date of notice, debtor was sent by first class mail to last known address a statement of amount of principal and interest that is owed as of date of statement, a daily rate of interest based on contract rate, and the amount of other expenses holder contends it is owed;

Notice of Hearing cont...

- If foreclosure sale is consummated, purchaser is entitled to possession of real estate when the deed is delivered and debtor can be evicted;
- Debtor should notify trustee in writing of any change in address to receive notice of all proceedings;
- Name, address, and telephone number of trustee; and
- Party will be notified of any change in hearing date.

Notice of Hearing cont...

In addition, the notice of hearing filed by trustee must contain the following certification:

- **On all foreclosure filed from and after 11/1/10, certification that it is not a "home loan" under GS 45-101, or the time limits have expired. (GS 45-107)**
 - Affidavits must be verified.
 - Access COB database to verify information and to check certifications.

NOH AND NEW MILITARY CERTIFICATION – 1/1/11 S-1400, SL 2010, 190

Beginning 1/1/11, The NOH must contain – "If the debtor is currently on military duty, the foreclosure may be prohibited by GS 45-21-12A" (S-1400, SL 2010 -190). See 6th Finding.

New legislation prohibits creditor exercising power of sale during or within 90 days after mortgagor's active duty, and prohibits clerk from holding a hearing without a certification that the hearing will take place at a time that is NOT during or within 90 days after active duty. Certification can be in NOH or affidavit. Applies to DTs, and to HOA liens.

Does not apply to judicial foreclosures.

Notice of Hearing cont...

G.S. 45-21.16(f)

Waiver of Service of Notice of Hearing/Hearing

- In case of secured indebtedness of \$100,000 or more, any person entitled to notice & hearing may waive service by the sheriff and accept service by signed & acknowledged written instrument, and if so specified, waive the right to answer and/or appear at the hearing.
 - Waiver must clearly state what is being waived. (Service of notice; or hearing; or BOTH service of notice and hearing). Waiver must be at the time of the filing, not as of the loan.
- Party's presence and willing participation at hearing constitutes waiver of notice.

Notice of Hearing cont...

Continuance of Hearing*

- Clerk must continue hearing if all parties have not been timely served
- Clerk may grant continuance of hearing "for good cause" like any other proceeding before the clerk. See factors in GS 45-21.16.C – Whether additional time or measures have reasonable likelihood of resolving.

Hearing by Clerk

- Hearing must be held before the clerk in the county where the land (or any part thereof) is situated [G.S. 45-21.16(d)].
- Only one hearing is held when the property is located in more than one county; however, notice of hearing must be filed in every county where a portion of the land is located.
- If the debtor wishes to raise issues of equity or fairness, the debtor can do so by filing a lawsuit in superior court to enjoin foreclosure pursuant to G.S. 45-21.34.

Hearing is limited to determination of six issues upon which clerk must base findings of fact – GS 45-21.16(d).

THE FINDINGS

- **1) Notice** - proper notice to those entitled to it.
- **2) Right to Foreclose** - express power of sale in the instrument.
- **3) Valid Debt** - held by party seeking foreclosure.
- **4) Default** - by debtor.
- **5) After 11/1/10 – Not a “Home Loan” or all notices timely given.**
- **6) After 1/1/11 – Not Active Duty Military with prior DT.**

Hearing by Clerk cont...

1) NOTICE

- Notice must be timely and comply with G.S. 45-21.16.
- Clerk should check deed of trust to make sure terms regarding notice have been complied with, especially with regard to any additional persons entitled to notice.

2) RIGHT TO FORECLOSE

- Evidenced by terms of instrument itself.
- Clerk should make sure that substitute trustee initiating foreclosure has authority to exercise the power of sale.

Hearing by Clerk cont...

3) VALID DEBT

- Evidence must show that party seeking to foreclose is **HOLDER** of **valid** debt.
- Invalid? – S/L, Wrong parties, other defects.
- Holder - Possession of original note (assignment or endorsement) is the key in determining holder of valid debt.
 - See memo dated January 24, 2007 - "Foreclosure Involving Mortgage Electronic Registration Systems" - for more information on holder of valid debt. Memo posted to the AOC intranet website:
<https://cis1.nccourts.org/intranet/aoc/legalservices/legalmemos/index.jsp>

Hearing by Clerk cont...

4) DEFAULT

- Failure to pay installments as they become due.
- Failure to provide insurance, pay taxes, or any other default in an obligation created by the instrument.

Home Loan cont...

5) - Home Loan - BEFORE proceeding to fifth finding ask the following questions:

- a) Is the loan **NOT** a "home loan" as defined in G.S. 45-101.
Ex. – home equity lines of credit, loans to entities, loans on commercial, rental or vacation property – other than the borrower's principal dwelling. The pre-foreclosure notice does not apply.
- b) Has the trustee submitted into evidence a signed and notarized "**Non-Home Loan Certificate**" printed from the AOC/Commissioner of Banks/NCHFA database?

If "Yes" to any of these questions – Proceed as normal. **Enter the fifth finding as the loan is NOT a home loan.**

Hearing by Clerk cont...

Even If It Is A Home Loan – 5th Finding

- Pre-foreclosure notice was provided in all material respects; and
- Periods of time established under the act have expired.

How to - Verify printout certifications by the COB (one of two may be provided).

- Non-Home Loan Certificate, or
- Conditional Certificate of Compliance

Hearing by Clerk cont...

Conditional Certificate of Compliance

- Clerks should require that a copy of the 45 day notice sent to the borrower be attached to the certification or otherwise introduced into evidence to show compliance with the statute.

Hearing by Clerk cont...

Next Step - Determine if the time limits have expired

- NOH filed at least 45 days after the pre-foreclosure notice was mailed to the borrower (75 days if the COB ordered a one-time extension)
- Enter the 5th Finding as **the pre-foreclosure notice required under G. S. 45-102 was provided in all material respects and the required time periods expired prior to the filing of the NOH.**
- To confirm the loan was submitted to the database, that the information submitted to you was correct, that no extension was ordered, or that a non-home loan certificate was validly issued, you may access the database.

Hearing by Clerk cont...

No COB certification?

Clerk should require affidavits or sworn testimony clearly establishing that the loan is NOT a home loan.

Dismissal and Sanctions

Grounds for dismissal without prejudice and payment by the filing party of the costs incurred by borrower in defending the action.

- Failure to submit a "home" loan to the database
- Falsely certifying in the NOH on a "home" loan that the loan is not a home loan or that the pre-foreclosure notice was given in all material respects
- See instructions for logging onto and navigating the HFA Data Base

6) – Military Finding – GS 45-21.12A, &10 USC101(d)(1)

In foreclosures filed on or after 1/1/11, the clerk must make a new 6th finding that "the sale is not barred by GS 45-21.12A," which provides a lender may not exercise a power of sale during or w/in 90 days after debtor's military service, and **CSC may not hold a hearing w/o certification** the hearing will not be taking place w/in those dates.

- Applies only to members of the Army, Navy, Air Force, Marine Corps, or Coast Guard **on active duty, or within 90 days thereafter.**

▪ Does NOT apply to full time National Guard duty, except upon a call to active duty by the President or Sec. of Defense for a period of more than 30 consecutive days for national emergency.

www.dmdc.osd.mil/appj/scra/scraHOME.doc

MILITARY FINDING, cont.

- Applies only to mortgages and DTs **originated before the O's period of military service.**

▪ May be waived by written instrument executed during or after military service.

▪ Does not affect judicial foreclosures, only Chap. 45 cases.

▪ NOTE: Gen. Ass. staff attorneys advise this **also prohibits HOA lien foreclosures** (b/c they use Chap 45)

SERVICE MEMBERS CIVIL RELIEF ACT

Even if the military finding does not apply, any foreclosure involving military personnel may be affected by the Service Members Civil Relief Act. Please see the memos detailing how to handle those matters on the AOC intranet site :

<https://cis1.nccourts.org/intranet/aoc/legalservices/legalmemos/index.jsp>

Hearing by Clerk cont...

Clerk's Findings and Order of Sale

- **GRANT** request to proceed with foreclosure sale if clerk finds the existence of requisite six issues from the evidence presented.
- **DENY** request to proceed with foreclosure sale if clerk fails to find the existence of **ANY ONE** of the requisite issues.

After the Hearing

- Following entry of the order of sale, the trustee can give notice of sale and conduct sale under the statute and deed of trust [G.S. 45-21.16(d)].
- Trustee must file a certified copy of clerk's order of sale in any other county where a portion of the property is located before trustee may proceed with sale of property located in that county.

Appeal - - Bond

- 10 days to appeal. Hearing before judge is de novo, limited to same 6 issues.
- Clerk must set appeal bond to protect opposing party from probable loss by reason of delay in the foreclosure [G.S. 45-21.16(d1)].
- The CSC must require a bond that is 1% of the principal balance due on the note or debt instrument. The CSC has discretion to require a lesser bond in cases of undue hardship or for other good cause shown, or to require a higher bond if there is a likelihood of damage or waste to the property or for other good cause shown. [GS 45-21.16(d1)].

Appeal - Alternative Bond

- In setting an alternative bond to the 1% presumptive bond, the clerk may wish to consider various factors depending on the facts of the particular case, such as:
 - Equity in property
 - Length of appeal
 - Daily interest accruing on note
 - Lack of adequate hazard insurance
 - Weather conditions affecting partial construction
 - Lack of occupancy
 - Physical security of property

Appeal cont...

- When the bond is posted the clerk must stay the foreclosure pending appeal [G.S. 45-21.16 (d1)].
- Parties have a right to have the appeal heard promptly, generally the next succeeding term of court.
- Trustee must file a certified copy of an order entered as a result of appeal in all counties where notice of hearing filed.

Sale by Trustee

G.S. 45-21.16A

Notice of Sale

■ Contents

- Description of the instrument;
- Date/hour/place of sale;
- Description of the real property & improvements to be sold;
- Terms of the sale;
- Any other provisions required by deed of trust;
- Statement that property will be sold subject to taxes or special assessments; and
- Statement whether the property will be sold subject to or together with identified subordinate interests.

Notice of Sale cont...

G.S. 45-21.17

■ Must be posted & published as required by the deed of trust & according to statute.

- Posted in area designated by the clerk for posting publications in the county in which the property is situated at least 20 days immediately preceding sale.
- Published in a newspaper that is published in & qualified for legal advertising in the county in which the property is located, or, if none, in one having general circulation in the county, once a week for two successive weeks, at least 7 days apart & completed no more than 10 days preceding date of sale.

Notice of Sale cont...

- Clerk may authorize additional advertising which in the opinion of the clerk will serve the interest of the parties, with costs paid as part of the cost of foreclosure.
- If the property is situated in more than one county, the trustee must comply with notice of sale provisions in each county in which any part of property is situated.
- Trustee must mail a notice of sale by first class mail at least 20 days before sale to all parties entitled to hearing, and to any party who has properly filed a request to receive notice of sale.

Sale by Trustee cont...

Time & Place of Sale

- Courthouse door of county in which land is situated, except as follows:
 - Single Tract located in two or more counties (Sale may be held in any one of the counties).
 - If Deed of Trust designates place of sale within county, the sale is held at the designated place.
 - If trustee is given power to designate place, the place shall be either on the premises to be sold or at the courthouse door in a county where property situated.

Sale by Trustee - Time

G.S. 45-21.23

- Sale may take place between 10:00 A.M. and 4:00 P.M. on any day except Sunday or a legal holiday when the courthouse is closed.
- The sale must begin at the designated time and place except that a one-hour delay or a delay caused by other sales at same place is permitted.

Sale by Trustee cont...

G.S. 45-21.21

Postponement of Sale

- May be postponed by the person exercising the power of sale not later than 90 days (exclusive of Sunday) after the original date of sale.
- Procedure for Postponement
 - Trustee must publicly announce the postponement at the time and place advertised for sale.
 - On the same day, trustee must attach a notice of postponement to the original notice of sale posted at courthouse bulletin board or note the postponement directly on the original notice.
 - Trustee must give notice of postponement (written or oral) to each person entitled to notice.

Sale by Trustee cont...

- If the sale is not held at the time fixed and is not postponed as required, trustee must comply again with the provisions of notice of sale in G.S. 45-21.16A, 45-21.17, and 45-21.17A but need not comply with the provisions for notice of hearing and hearing in G.S. 45-21.26.

Report of Sale

- Form: AOC-SP-400 (*Report of Foreclosure Sale/Resale*).
- Trustee must file with the clerk in county where sale took place.
- Must file within five (5) days following the sale to the highest bidder.

Fail to File? -Clerk may order the trustee to file a correct and complete report within 20 days after service of the order on him/her.

Report of Sale cont...

When do rights of parties become fixed?

- If no upset deposit is filed with the clerk by the close of the normal business hours on the 10th day after filing the report of sale. See GS 45-21.27
- Debtor retains an insurable interest and the right to possession until the purchase price is paid and the deed delivered. See Sprouse v. North River Ins. Co., 81 NC App. 311 (1986).

Upset Bid Period – Rolling 10 Day

G.S. 45-21.27

Requirements of upset bid

- Determine whether the upset bid was filed in proper time.
 - Must be deposited with clerk within 10 days after the filing of the report of sale or last notice of upset bid is filed.
 - Day one is the day AFTER the report is received by the clerk.
- Determine whether the amount of the upset bid is adequate.
 - An upset bid must exceed the reported sales price by at least 5%, but in any event the minimum increase is \$750.
 - Bidder can make an upset bid higher than the minimum required by statute
 - CSC sends SP-403, Notice of Upset Bid to Trustee

Upset Bid Period cont...

Determine whether the upset bidder made a proper deposit.

- Deposit must be made in cash, certified check, or cashier's check satisfactory with clerk.

Upset Bid Period cont...

G.S. 45-21.27(b)

Compliance Bond

- Upon motion of the trustee, the clerk may require an upset bidder to deposit a cash bond or surety bond, likely where there are patterns of upset bids for the sole purpose of delay.

Practical issues in requiring compliance bonds:

- Some clerks give notice to everyone who has bid before that a compliance bond will be required to be filed with an upset deposit.
- One factor to consider in requiring a compliance bond is that it not have the effect of chilling bidding.

Compliance bonds are payable to the State of North Carolina for use of the parties in interest and are conditioned on the principal obligor's compliance with the bid.

Defaulting Bidders

G.S. 45-21.30

- If bidder fails to make a cash deposit immediately after making a high bid, the trustee must again offer the property for sale at the same time and place.
- If bidder fails to comply with the bid after tender or a bona fide attempt to tender a deed for the property, the clerk, upon motion, may enter an order authorizing a resale.

Defaulting Bidder cont...

- Bidder is liable on the bid to the extent that the final sales price is less than defaulting bid, plus all costs of resale.
- Clerk must hold the deposit or compliance bond made by a defaulting bidder because the deposit & bond secure payment of the amount for which the defaulting bidder remains liable.

Defaulting Bidder cont...

Claiming deposit/determining defaulting bidder's liability:

- Upon motion, clerk may give deposit to trustee to apply to default damages.
 - Before giving back the deposit, clerk should give notice to defaulting bidder to appear and show cause why the money should not be turned over to the trustee to apply to the default.
 - Trustee then accounts for deposit in the final report of sale.
- Clerk should not release the current bidders deposit to the depositor until the sale has been completed.

Final Report of Sale – SP-402

G.S. 45-21.33(a)

- Trustee (or agent) must file a final report and account of receipts and disbursements with the clerk within 30 days after receipt of the proceeds of sale.
- Report must be filed Report must show whether property was sold as a whole or in parts, whether all the property was sold, and whether all or only part of the obligation was satisfied.
NOTE: If tracts sold separately, and were subject to separate upset bidding, separate final reports & fees are required.

Clerk audits the account and records it. Does not approve it.

Make sure proper vouchers or documentation for each receipt or disbursement are attached.

Final Report of Sale cont...

G.S. 7A-308(a)(1)

Fees which should appear on the final account include:

- \$300.00 for foreclosure under power of sale in deed of trust.
- \$.45 per \$100.00 of final sales price, with a minimum fee of \$10.00 and a maximum of \$500.00.
 - The fee is not collectable where the ultimate burden of paying the fee falls upon the federal government.
- Recordation fee for Trustee's Deed.
 - May want to provide Book and Page number on account.

Final Report of Sale cont...

Trustee (or agent) must also file with clerk the following:

- Copy of notices of sale & resale, if any, which were posted.
- Copy of notices of sale and resale, if any, which were published, with affidavit of publication; and
- Proof as required by the clerk that notices of hearing, sale and resale were served on all parties entitled to notice.
- In the absence of an affidavit to the contrary, an affidavit by the person holding the sale that notice of sale was posted in area designated by clerk for posting public notices in proper county 20 days before sale is proof of compliance with requirements of G.S. 45-21.17(1)(a).

Final Report of Sale cont...

G.S. 45-21.14

Failure to File?

- Clerk may issue order to compel the filing of a correct and complete report within 20 days, and upon a failure to comply may initiate civil contempt proceedings against person.
 - Notice to File (AOC-SP-404)
 - Order to File (AOC-SP-915M)

Order of Possession

Clerk may issue an order for possession of real property sold in favor of the purchaser and **against the former owner** when the all of the requirements in GS 45-21.29 have occurred:

- Basically, when the purchase price has been paid, the deed recorded, and 10 days notice has been given.

DO NOT ISSUE A GS 45-21.29 WRIT OF POSSESSION REGARDING A TENANT

NOTE: A writ of possession may not be issued against a bona fide tenant (someone other than a child, spouse or parent) with a lease by arm's length transaction for rent not substantially less than FMV. The new buyer must honor the lease, and the tenant may only be removed by summary ejectment. Federal law applies whether lease is recorded or not.

- If the lease has expired – new purchaser must give 90 days notice to bona fide tenants.
- If the buyer sells the property to someone as a primary residence, the lease can be terminated at closing, upon prior 90 day notice. [US Public Law 111-22, expires 12/31/14].
- OK to issue writ under GS 45-21.29 vs. former owner.