

# New(ish) Protections for Tenants Occupying Foreclosed Property

*UPDATE: The federal Protecting Tenants at Foreclosure Act was [restored without expiration](#), effective June 23, 2018. This federal law must be read in conjunction with G.S. 45-21.29 and G.S. 45-21.33A provisions. The full text of the PTFA is available [here](#).*

The protections afforded to tenants in foreclosure proceedings under the federal Protecting Tenants at Foreclosure Act (PTFA) of 2009 ended on December 31, 2014. The act expired and Congress did not extend it. **Effective October 1, 2015**, the North Carolina General Assembly enacted a law that partially fills the hole left by the expiration of the PTFA. This post covers some of the key changes and protections resulting from a **new section G.S. 45-21.33A** created by [S.L. 2015-178](#) (H 174).

## **#1: Protections only apply to single-family residences.**

Unlike the PTFA, which applied to any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property, the protections afforded to tenants under G.S. 45-21.33A only apply to tenants who occupy **single-family residential real property**. [G.S. 45-21.33A\(a\)](#). The protections do not extend to multi-family residential property, such as an apartment complex, occupied by a tenant.

## **#2: Protections do not limit purchaser's remedies under the lease.**

None of the protections set forth in G.S. 45-21.33A limit the remedies that are available to a purchaser for breaches of the lease by a tenant. [G.S. 45-21.33A\(f\)](#).

## **#3: Protections for Certain Tenants with Written Leases, Not Terminable At Will....**

Pursuant to the new G.S. 45-21.33A, the purchaser of foreclosed property, which includes any successor in interest of the purchaser, assumes title subject to the rights of a tenant to occupy the premises until the **shorter** of (i) the end of the remaining term of the lease, or (ii) one calendar year from the date the purchaser acquires title, if **all** of the following apply:

- The dwelling is a single-family residence;
- The purchaser will not occupy the premises as a primary residence;
- The tenant is not the debtor, or the child, spouse, or parent of the debtor, under the security

- instrument foreclosed;
- The lease is in writing;
  - The lease is not terminable at will; and
  - The lease requires payment of rent that is not substantially less than the fair market value (provided the rent is not reduced due to a federal or North Carolina subsidy).

A purchaser is never required to renew an existing lease. [G.S. 45-21.33A\(b\)](#).

#### **#4: Additional Notice Required in the Case of (i) Oral Leases, (ii) Leases Terminable at Will, and (iii) Purchaser at Foreclosure Who Will Occupy the Premises.**

If (i) a single-family residence is subject to an oral lease or a lease terminable at will, or (ii) the purchaser will occupy the premises as a primary residence, then the purchaser must give the tenant notice to vacate at least 90 days **BEFORE making an application for an order for possession** with the clerk of superior court under G.S. 45-21-29(k).

#### **#5: Protections Do Not Apply in Certain Instances**

1. **Option to Purchase.** The protections under G.S. 45-21.33A do not apply to the option to purchase terms of an option contract that is included in, combined with, or executed in conjunction with a residential lease. [G.S. 45-21.33A\(e\)\(1\)](#). The language used in G.S. 45-21.33A(e)(1) seems to indicate that while the purchaser at foreclosure does not assume title subject to a tenant's option to purchase the property, the purchaser would assume title subject to the related lease, provided the lease satisfies the requirements set forth in #3 above.
2. **Imminently Dangerous Condition.** The purchaser is not required to assume title subject to the rights of a tenant and does not have to send the 90-day notice if there is an imminently dangerous condition on the property on the date the property is acquired by the purchaser. "Imminently dangerous condition" means *any* of the following:
  1. Unsafe wiring
  2. Unsafe flooring or steps
  3. Unsafe ceilings or roofs
  4. Unsafe chimneys or flues
  5. Lack of potable water
  6. Lack of operable locks on all doors leading to the outside
  7. Broken windows or lack of operable locks on all windows on the ground level
  8. Lack of operable heating facilities capable of heating living areas to 65 degrees Fahrenheit when it is 20 degrees Fahrenheit outside from November 1 through March 31
  9. Lack of an operable toilet
  10. Lack of an operable bathtub or shower

11. Rat infestation as a result of defects in the structure that make the premises not impervious to rodents
12. Excessive standing water, sewage, or flooding problems caused by plumbing leaks or inadequate drainage that contribute to mosquito infestation or mold.

[G.S. 42-42\(a\)\(8\).](#)

#### **#6: Additional Evidence Required to Issue an Order for Possession**

Before the clerk may issue an order for possession, clerk must find that the applicant complied with the requirements set forth in G.S. 45-21.33A or that the requirements do not apply to the subject property (for example, the property is not a single-family residence). [G.S. 45-21.29\(k\)\(5a\)](#). An applicant for an order for possession after October 1, 2015 should include sufficient evidence in or with the application to enable the clerk to determine whether the requirements of G.S. 45-21.33A are satisfied or do not apply, including whether the property is commercial or residential and the details concerning any residential lease of the property.

If the lease is oral, terminable at will, or the purchaser will occupy the premises as a primary residence, then the applicant should provide evidence to the clerk that the tenant was provided a 90 day notice to vacate before the purchaser filed the application for an order of possession.

Even when a 90-day notice is required, the clerk cannot issue an order for possession until the clerk finds proof that a 10 day notice was given to the party or parties who remain in possession of the single-family residence at the time the application was made. [G.S. 45-21.29\(k\)\(5a\)](#) (stating that an occupant must “additionally” receive notice as required by G.S. 45-21.29(k)(5)).

#### **Other Changes under S.L. 2015-178 Applicable to Any Residential Property that Contains Less than Rental 15 Units**

In addition to protections afforded to tenants under the new G.S. 45-21.33A, S.L. 2015-178 also made changes to other sections of Chapter 45 that apply to **the foreclosure of any residential property that contains less than 15 rental units.**

##### **1. Contents of the Notice of Sale.**

After obtaining an order authorizing the sale of real property, the substitute trustee typically posts, publishes, and mails the notice of sale as is required by G.S. 45-21.17. Every notice of sale must contain the information set forth in G.S. 45-21.16A. In addition, if the property subject to the sale is residential and contains less than 15 rental units, then the notice of sale must also contain information related to (i) orders for possession, and (ii) an occupant’s right to terminate a rental agreement. [G.S. 45-21.16A\(b\)](#).

S.L. 2015-178 modifies the language in G.S. 45-21.16A(b) regarding what must be included in the notice of sale related to the occupant's right to terminate a rental agreement. The notice of sale must state that the tenant may provide written notice of termination that is effective on a day that is at least 10 days but no more than 90 days from the sale date contained in the notice of sale, provided that the mortgagor has not cured the default at the time the tenant provides notice of termination.

Copies of the notice of sale must be filed with the clerk in connection with the filing of the final report of sale. [G.S. 45-21.33\(c\)](#). Any notice of sale dated on or after October 1, 2015 should include the language set forth in G.S. 45-21.16A(b)(2) as amended.

## **2. Recipients of Notice of Sale**

The notice of the foreclosure sale must be mailed to the parties listed in G.S. 45-21.17. Included in the list is any person who occupies the property pursuant to a rental agreement if the property is (i) residential and (ii) contains less than 15 rental units. S.L. 2015-178 amends G.S. 45-21.17 to clarify that residential property that contains less than 15 rental units includes single-family residential real property.

The final report of sale filed with the clerk of superior court must provide proof that all notices of sale were served on parties entitled to notice, which now clearly includes persons occupying single-family residences pursuant to a rental agreement. [G.S. 45-21.33\(c\)\(3\)](#).