

Part 2. Procedure for Sale.

**§ 45-21.16. Notice and hearing.**

(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall file with the clerk of court a notice of hearing in accordance with the terms of this section. After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. The notice shall 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. The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. However, in those instances that publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of the hearing, and if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting the notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of hearing. Service by posting may run concurrently with any other effort to effect service. The notice shall be posted by the sheriff. In the event that the service is obtained by posting, an affidavit shall be filed with the clerk of court showing the circumstances warranting the use of service by posting.

If any party is not served or is not timely served prior to the date of the hearing, the clerk shall order the hearing continued to a date and time certain, not less than 10 days from the date scheduled for the original hearing. All notices already timely served remain effective. The mortgagee or trustee shall satisfy the notice requirement of this section with respect to those parties not served or not timely served with respect to the original hearing. Any party timely served, who has not received actual notice of the date to which the hearing has been continued, shall be sent the order of continuance by first-class mail at his last known address.

(b) Notice of hearing shall be served in a manner authorized in subsection (a) upon:

- (1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.
- (2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.
- (3) 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 term "record owner" means any person owning a present or future interest in the real property, which interest is of record at the time that the notice of hearing is filed and would be affected by the foreclosure proceeding, but does not mean or include the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanic's or materialman's lien, or other lien or security interest in the real property. Tenants in possession under unrecorded leases or rental agreements shall not be considered record owners.

(c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:

- (1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, original holder, and book and page of the security instrument.
- (2) The name and address of the holder of the security instrument at the time that the notice of hearing is filed.

- (3) The nature of the default claimed.
- (4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.
- (5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.
- (5a) The holder has confirmed in writing to the person giving the notice, or if the holder is giving the notice, the holder shall confirm in the notice, that, within 30 days of the date of the notice, the debtor was sent by first-class mail at the debtor's last known address a detailed written statement of the amount of principal, interest, and any other fees, expenses, and disbursements that the holder in good faith 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. Nothing herein is intended to authorize any fees, charges, or methods of charging interest which is not otherwise permitted under contract between the parties and other applicable law.
- (5b) To the knowledge of the holder, or the servicer acting on the holder's behalf, whether in the two years preceding the date of the statement any requests for information have been made by the borrower to the servicer pursuant to G.S. 45-93 and, if so, whether such requests have been complied with. If the time limits set forth in G.S. 45-93 for complying with any such requests for information have not yet expired as of the date of the notice, the notice shall so state. If the holder is not giving the notice, the holder shall confirm in writing to the person giving the notice the information required by this subsection to be stated in the notice.
- (6) Repealed by Session Laws 1977, c. 359, s. 7.
- (7) The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain all of the following:
  - a. A statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that the debtor's failure to attend the hearing will not affect the debtor's right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should the debtor elect to do so.
  - b. A statement that the trustee, or substitute trustee, is a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding.
  - c. A statement that the debtor has the right to apply to a judge of the superior court pursuant to G.S. 45-21.34 to enjoin the sale, upon any legal or equitable ground that the court may deem sufficient prior to the time that the rights of the parties to the sale or resale become fixed, provided that the debtor complies with the requirements of G.S. 45-21.34.
  - d. A statement that the debtor has the right to appear at the hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d), and that to authorize the foreclosure the clerk must find the existence of: (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to notice.

- e. A statement that if the debtor fails to appear at the hearing, the trustee will ask the clerk for an order to sell the real property being foreclosed.
  - f. A statement that the debtor has the right to seek the advice of an attorney and that free legal services may be available to the debtor by contacting Legal Aid of North Carolina or other legal services organizations.
- (8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.
  - (8a) The name, address, and telephone number of the trustee or mortgagee.
  - (9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.
  - (10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.
  - (11) That the hearing may be held on a date later than that stated in the notice and that the party will be notified of any change in the hearing date.
  - (12) That if the debtor is currently on military duty the foreclosure may be prohibited by G.S. 45-21.12A.

(c1) The person giving the notice of hearing, if other than the holder, may rely on the written confirmation received from the holder under subdivisions (c)(5a) and (c)(5b) of this section and is not liable for inaccuracies in the written confirmation.

(c2) In any foreclosure filed on or after November 1, 2010, where the underlying mortgage debt is a home loan as defined in G.S. 45-101(1b), the notice required by subsection (b) of this section shall contain a certification by the filing party that the pre-foreclosure notice and information required by G.S. 45-102 and G.S. 45-103 were provided in all material respects and that the periods of time established by Article 11 of this Chapter have elapsed.

(d) The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. In the event that the property to be sold consists of separate tracts situated in different counties or a single tract in more than one county, only one hearing shall be necessary. However, prior to that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. A certified copy of any authorization or order by the clerk shall be filed in any other county where any portion of the property to be sold is located before the mortgagee or trustee may proceed to advertise and sell any property located in that county. In the event that sales are to be held in more than one county, the provisions of G.S. 45-21.7 apply.

(d1) The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10

days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal. If the appealing party owns and occupies the property to be sold as his or her principal residence, the clerk shall require a bond in the amount of one percent (1%) of the principal balance due on the note or debt instrument, provided that the clerk, in the clerk's discretion, may require a lesser amount in cases of undue hardship or for other good cause shown; and further provided that the clerk, in the clerk's discretion, may require a higher bond if there is a likelihood of waste or damage to the property during the pendency of the appeal or for other good cause shown.

(e) In the event of an appeal, either party may demand that the matter be heard at the next succeeding term of the court to which the appeal is taken which convenes 10 or more days after the hearing before the clerk, and such hearing shall take precedence over the trial of other cases except cases of exceptions to homesteads and appeals in summary ejection actions, provided the presiding judge may in his discretion postpone such hearing if the rights of the parties or the public in any other pending case require that such case be heard first. In those counties where no session of court is scheduled within 30 days from the date of hearing before the clerk, either party may petition any regular or special superior court judge resident in a district or assigned to hold courts in a district where any part of the real estate is located, or the chief district judge of a district where any part of the real estate is located, who shall be authorized to hear the appeal. A certified copy of any order entered as a result of the appeal shall be filed in all counties where the notice of hearing has been filed.

(f) Waiver of the right to notice and hearing provided herein shall not be permitted except as set forth herein. In any case in which the original principal amount of indebtedness secured was one hundred thousand dollars (\$100,000), or more, any person entitled to notice and hearing may waive after default the right to notice and hearing by written instrument signed and duly acknowledged by such party. In all other cases, at any time subsequent to service of the notice of hearing provided above, the clerk, upon the request of the mortgagee or trustee, shall mail to all other parties entitled to notice of such hearing a form by which such parties may waive their rights to the hearing. Upon the return of the forms to the clerk bearing the signatures of each such party and that of a witness to each such party's signature (which witness shall not be an agent or employee of the mortgagee or trustee), the clerk in his discretion may dispense with the necessity of a hearing and proceed to issue the order authorizing sale as set forth above.

(g) Any notice, order, or other papers required by this Article to be filed in the office of the clerk of superior court shall be filed in the same manner as a special proceeding. (1975, c. 492, s. 2; 1977, c. 359, ss. 2-10; 1983, c. 335, s. 1; 1983 (Reg. Sess., 1984), c. 1108, ss. 1, 2; 1993, c. 305, s. 8; 1995, c. 509, s. 135.1(g); 1999-137, ss. 1, 2; 2007-351, s. 4; 2008-226, ss. 2, 3; 2009-573, s. 2; 2010-168, ss. 2, 3, 9; 2010-190, ss. 2, 3; 2012-79, s. 2.17(g).)