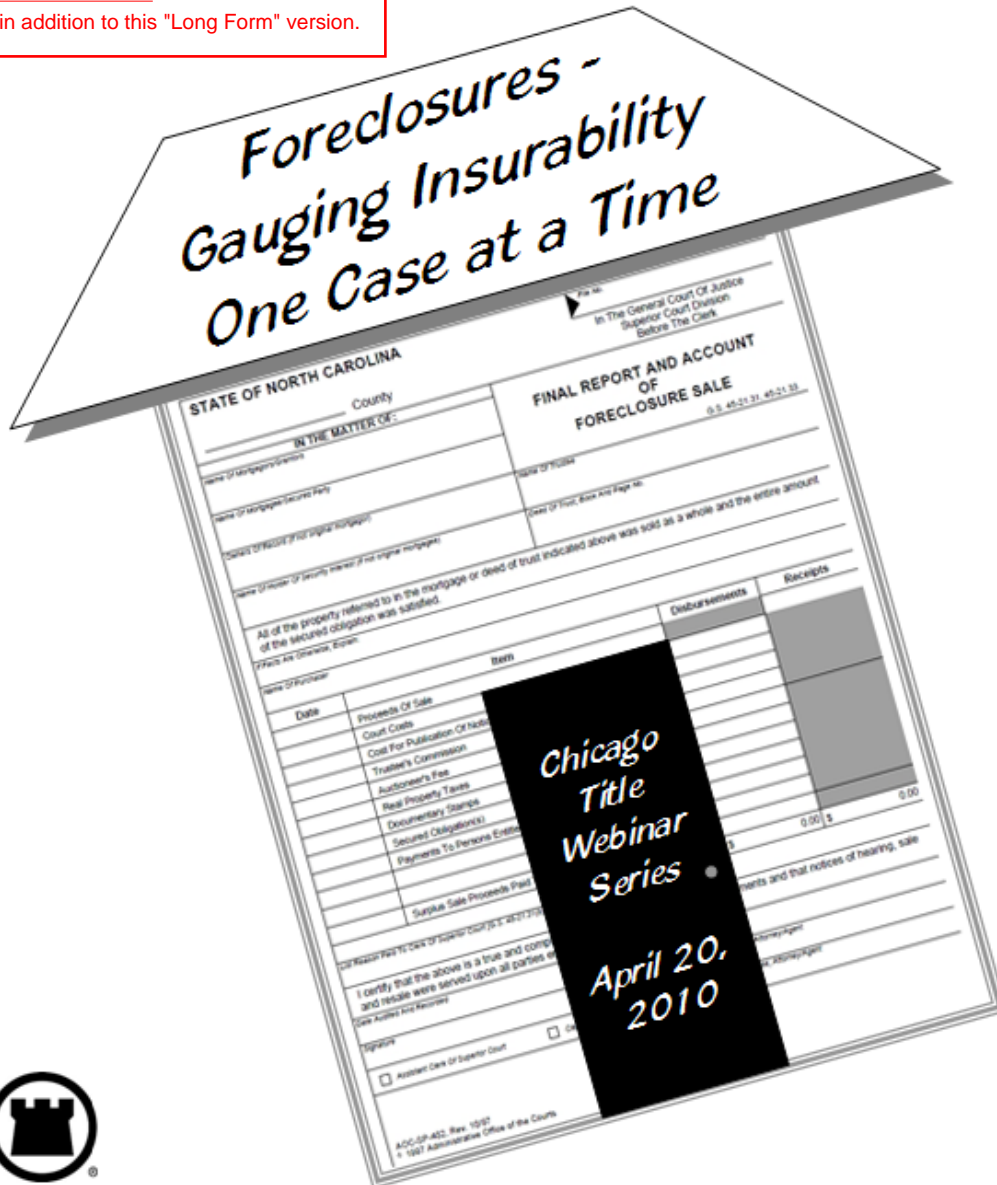


UPDATE NOTE AS OF 9/22/2010:

A finalized version of the Draft North Carolina Power of Sale Foreclosure Abstract Form referenced in this manuscript is available in the *CTIC-NC Miscellaneous Forms* section of our website at [www.northcarolina.ctt.com](http://www.northcarolina.ctt.com). A "Short Form" versions is available in addition to this "Long Form" version.



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Draft North Carolina Power of Sale Foreclosure Abstract Form

Foreclosure-Gauging Insurability One Case at a Time – PowerPoint Handout

AOC Memorandum Regarding  
Due Diligence Before Notice by Publication/Posting

# DRAFT-NORTH CAROLINA POWER OF SALE FORECLOSURE ABSTRACT FORM-DRAFT

Special Proceeding No. \_\_\_\_\_ SP \_\_\_\_\_ County, North Carolina  
 Deed of Trust Foreclosed (DTF): Book \_\_\_\_\_ Page \_\_\_\_\_  
 Abstracted by \_\_\_\_\_ on \_\_\_\_\_, 20\_\_\_\_

OWNER/PROPERTY/INTEREST FROM VESTING INSTRUMENT(S) OCCUPANCY, MILITARY STATUS AND BANKRUPTCY INFORMATION
<p>(a) <b>Owner</b>                      Owner of record at time of filing of notice of hearing: _____                      Spouse, if any, if not an owner of record: _____                      Owner of record at time of execution of DTF (if different): _____                      Spouse, if any, if not an owner of record: _____</p>
<p>(b) <b>Borrower</b>  <input type="checkbox"/> Same as Owner of record at time of notice of hearing, or  <input type="checkbox"/> _____</p>
<p>(c) <b>Property</b> (Attach copy of full legal description from vesting instrument)                      Street Address: _____                      Brief legal: _____                      Mobile/Manufactured home located on Property? <input type="checkbox"/> Yes <input type="checkbox"/> No                      DMV title status: _____                      Declaration of Intent of record in Register of Deeds? <input type="checkbox"/> Yes <input type="checkbox"/> No Book _____ Page _____                      MVR-46G Affixation Affidavit of record in Register of Deeds? <input type="checkbox"/> Yes <input type="checkbox"/> No Book _____ Page _____</p>
<p>(d) <b>Interest</b>  <input type="checkbox"/> Fee Simple <input type="checkbox"/> Leasehold <input type="checkbox"/> Life Estate <input type="checkbox"/> Remainder <input type="checkbox"/> Other _____</p>
<p>(e) <b>Occupancy (during foreclosure proceeding)</b>  <input type="checkbox"/> Owner ____ (Primary Residence) ____ (Second Home)  <input type="checkbox"/> Spouse of Owner ____ (Primary Residence) ____ (Second Home)  <input type="checkbox"/> Tenant ____ (Verbal/Unrecorded Lease) ____ (Lease recorded Book _____ Page _____)                      ____ (Less than 15 residential tenants) ____ (15 or more residential tenants) ____ (Commercial tenants)  <input type="checkbox"/> Vacant  <input type="checkbox"/> Other _____</p>
<p>(f) <b>Military Status (during foreclosure proceeding)</b> <a href="https://www.dmdc.osd.mil/appj/scra/scraHome.do">https://www.dmdc.osd.mil/appj/scra/scraHome.do</a>                      Owner: In military service? <input type="checkbox"/> Yes <input type="checkbox"/> No                      Spouse, if any, if not an owner of record: In military service? <input type="checkbox"/> Yes <input type="checkbox"/> No                      Borrower, if different than Owner: In military service? <input type="checkbox"/> Yes <input type="checkbox"/> No                      Tenant: In military service? <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>(g) <b>Bankruptcy (during foreclosure proceeding)</b> <a href="http://pacer.psc.uscourts.gov/">http://pacer.psc.uscourts.gov/</a>                      Owner: <input type="checkbox"/> Yes <input type="checkbox"/> No                      Borrower, if different than Owner: <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>(h) <b>Other</b></p>

Instrument or Process <small>CSC = Clerk of Superior Court   ROD = Register of Deeds</small>	Defects, Irregularities, Missing Information, Curative Notes, Comments
<b>(1) DEED OF TRUST FORECLOSED (DTF)</b>	<i>Required ROD</i>
(a) <b>Date of instrument:</b>	
(b) <b>Recording date/time:</b>	
(c) <b>Parties</b>	
Grantor:	
<input type="checkbox"/> All owners of record at time of execution of DTF named as grantors & instrument executed by all such owners & spouses	
Borrower (if different than Grantor):	
Trustee:	
Lender:	

<b>(d) Property</b>	
Brief legal description of property encumbered: (attach copy of full legal):	
<input type="checkbox"/> Legal description of encumbered parcel matches description of same parcel in Vesting Instrument described above	
All encumbered property located in one county? <input type="checkbox"/> Yes <input type="checkbox"/> No	
<b>(e) Interest encumbered:</b>	
<input type="checkbox"/> Fee Simple <input type="checkbox"/> Leasehold <input type="checkbox"/> Other: _____	
<b>(f) Debt/Type of loan</b>	
Amount: \$	
<input type="checkbox"/> Debt/note properly identified	
Future Advance Provisions? <input type="checkbox"/> Yes <input type="checkbox"/> No (GS 45-67 et seq.)	
Construction? <input type="checkbox"/> Yes <input type="checkbox"/> No (GS 45-67 et seq.)	
Reverse Mortgage? <input type="checkbox"/> Yes <input type="checkbox"/> No (GS 53-263 et seq.)	
Negative Amortization or Rate Spread Home Loan? <input type="checkbox"/> Yes <input type="checkbox"/> No [GS 45-101(3a)]	
Multiple Properties Encumbered - Cross-Collateralized? <input type="checkbox"/> Yes <input type="checkbox"/> No (GS 45-21.9A)	
Subprime Loan?: <input type="checkbox"/> Yes <input type="checkbox"/> No [GS 45-101(4)]	
<b>(g) Specific provisions</b>	
<input type="checkbox"/> Includes power of sale	
Trustee's Fee: \$	
Provision indicating subordinate to another lien? <input type="checkbox"/> Yes <input type="checkbox"/> No	
After-acquired property clause? <input type="checkbox"/> Yes <input type="checkbox"/> No (GS 47-20.5)	
Note any specific provisions regarding foreclosure or sale requirements:	
<b>(h) Other</b>	

<b>(2) INSTRUMENTS SPECIFICALLY RELATED TO DTF AFFECTING PROPERTY ENCUMBERED, PRIORITY, PARTIES ENTITLED TO NOTICE, PARTY ENTITLED TO FORECLOSE</b>	
(a) Subordination, Non-disturbance Attornment Agreement? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(b) Release deed? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(c) Modification of DTF? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(d) Subordination Agreement? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(e) Assignment? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(f) Substitution of Trustee? <input type="checkbox"/> Yes <input type="checkbox"/> No (GS 45-10)	
(g) Request for Notice? <input type="checkbox"/> Yes <input type="checkbox"/> No (GS 45-21.17A)	
(h) Other	

<b>(3) OTHER MATTERS AFFECTING/POSSIBLY AFFECTING FORECLOSURE PROCEEDING</b>	
(a) Other Deed of Trust? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(b) Lease & Modifications-Extensions? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(c) Right of First Refusal? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(d) Easement? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(e) Homeowner Association Dues? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(f) Transfer or reconveyance fees? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(g) Deed, Option or Contract to Purchase? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(h) Judgment? <input type="checkbox"/> Yes <input type="checkbox"/> No	

(i) Lis Pendens? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(j) Federal Tax Lien? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(k) Mechanics' or Materialmens Liens? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(l) Divorce? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(m) Marriage? Yes <input type="checkbox"/> No	
(n) Death/Estate? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(o) Special Proceeding (Partition, Incompetency, etc.)? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(p) Other	

**(4) AFFIDAVIT(S) OF NOTEHOLDER** [GS 45-21.16(c), GS 45-21.16(c1), GS 45-21.16C(a), GS 45-93, GS 45-102, GS 53-267 and GS 53-268] *Required CSC*

(a) <input type="checkbox"/> Affiant _____ identified as current holder of note <input type="checkbox"/> States nature of default <input type="checkbox"/> States following amount due of principal, interests, fees and charges and includes daily interest charge \$ _____ <input type="checkbox"/> States maturity of debt accelerated <input type="checkbox"/> Confirms compliance with 30-day itemized debt notice/letter required under GS 45-21.16(c)(5a) <input type="checkbox"/> States whether there have been any requests for information by borrower to servicer pursuant to GS 45-93, compliance with such requests, or the expiration date for compliance (Applicable to foreclosure proceeding filed or or after 4/1/2008)	
(b) If loan secured by principal residence of debtor, <input type="checkbox"/> describes efforts made as required by GS 45-21.16C(a) to communicate with debtor, resolve default, and results of such efforts (Applicable to foreclosure proceeding filed or or after 10/1/2009) <input type="checkbox"/> Not Applicable	
(c) If a reverse mortgage loan, <input type="checkbox"/> event of default is one authorized under GS 53-267 <input type="checkbox"/> confirms borrower given not less than 90 days' notice of intent to foreclose required by GS 53-268 (Applicable to foreclosure proceeding filed or or after 10/1/2009) <input type="checkbox"/> Not Applicable	
(d) Other	

**(5) CERTIFICATION(S) OF NOTEHOLDER/TRUSTEE/FILING PARTY** [GS 45-21.16(c2) & GS 45-107(a)] **as to PRE-FORECLOSURE NOTICE FOR SUBPRIME LOAN (AKA 45-DAY LETTER) (GS 45-102), and FILING WITH ADMINISTRATIVE OFFICE OF THE COURTS (GS 45-103)** *Required CSC*

(a) If a subprime loan on borrower's principal residence, <input type="checkbox"/> confirms compliance with GS 45-102 – the 45-day preforeclosure notice for subprime loans (Applicable to foreclosure proceeding filed or or after 11/15/2008 and expires 10/31/2010, unless extended) <input type="checkbox"/> confirms compliance with GS 45-103 - the preforeclosure notice to AOC for certain subprime loans (Applicable to foreclosure proceeding filed or or after 11/15/2008 and expires 10/31/2010, unless extended) <input type="checkbox"/> Not Applicable	
(b) Other	

<b>(6) NOTICE OF HEARING [GS 45-21.16(c)]</b>		<i>Required CSC</i>
<p>(a) <input type="checkbox"/> Includes description sufficient to identify real property to be sold which property is encumbered by the DTF. Property to be sold: _____</p>		
<p>(b) Specifies following time and place for hearing: _____</p>		
<p>(b) <input type="checkbox"/> Describes DTF including date, original amount, original holder, and book and page</p>		
<p>(c) <input type="checkbox"/> States nature of default</p>		
<p>(d) <input type="checkbox"/> States maturity of debt accelerated</p>		
<p>(e) <input type="checkbox"/> Includes right of debtor to pay/care default, if permitted</p>		
<p>(f) <input type="checkbox"/> Confirms that within 30 days of Notice of Hearing, debtor was sent itemized written statement of all amounts due required under GS 45-21.16(c)(5a).</p>		
<p>(g) <input type="checkbox"/> States whether there have been any requests for information by borrower to servicer pursuant to GS 45-93, compliance with such requests, or the expiration date for compliance (Applicable to foreclosure proceeding filed or or after 4/1/2008) <input type="checkbox"/> Not Applicable</p>		
<p>(h) <input type="checkbox"/> States right of debtor (or other party served) to appear before clerk at specified date, time, location to show cause why foreclosure should not be allowed</p>		
<p>(i) <input type="checkbox"/> States if uncontested, debtor does not have to appear and failure to appear will not affect right to pay indebtedness</p>		
<p>(j) <input type="checkbox"/> States Trustee/Substitute Trustee is neutral party and cannot advocate for either party</p>		
<p>(k) <input type="checkbox"/> States debtor's right pursuant to GS 45-21.34 to apply to superior court judge to enjoin sale</p>		
<p>(l) <input type="checkbox"/> States debtor's right to appear at hearing and contest evidence</p>		
<p>(m) States that to authorize foreclosure, clerk must find existence of  <input type="checkbox"/> (i) valid debt &amp; party seeking to foreclose is holder  <input type="checkbox"/> (ii) default  <input type="checkbox"/> (iii) right to foreclose under DTF  <input type="checkbox"/> (iv) notice to those entitled  <input type="checkbox"/> (v) whether or not debt underlying DTF is a subprime loan [per GS 45-101(4)], and if so, confirm 45-day pre-foreclosure notice provided and time period elapsed                      [Item (v) applicable for foreclosure proceeding filed or or after 11/15/2008 and expires 10/31/2010, unless extended]</p>		
<p>(n) <input type="checkbox"/> States Trustee will ask for order to sell if debtor does not appear?</p>		
<p>(o) <input type="checkbox"/> States debtor's right to seek advice of counsel and that free legal services may be available</p>		
<p>(p) <input type="checkbox"/> States if foreclosure consummated, purchaser entitled to possession as of date of delivery of deed and debtor can be evicted</p>		
<p>(q) <input type="checkbox"/> States name, address, phone number of trustee or mortgagee Trustee/Mortgagee named: _____</p>		
<p>(r) <input type="checkbox"/> States debtor should keep trustee or mortgagee informed in writing of his address</p>		

<p>(s) All information required by GS 45-21.16A for Notice of Sale (see Item ____ below)</p> <p><input type="checkbox"/> is included and this instrument can serve as Notice of Sale</p> <p><input type="checkbox"/> is not included</p>	
<p>(t) <input type="checkbox"/> States hearing may be later and party will be notified of change</p>	
<p>(u) If a subprime loan on borrower's principal residence,</p> <p><input type="checkbox"/> confirms compliance with GS 45-102—the 45 days preforeclosure notice for subprime loans (Applicable to foreclosure proceeding filed or or after 11/15/2008 and expires 10/31/2010, unless extended)</p> <p><input type="checkbox"/> confirms compliance with GS 45-103—the preforeclosure notice to AOC for certain subprime loans (Applicable to foreclosure proceeding filed or or after 11/15/2008 and expires 10/31/2010, unless extended)</p> <p><input type="checkbox"/> Not Applicable</p>	
<p>(v) If a reverse mortgage loan,</p> <p><input type="checkbox"/> confirms borrower given not less than 90 days' notice of intent to foreclose required by GS 53-268 (Applicable to foreclosure proceeding filed or or after 10/1/2009)</p> <p><input type="checkbox"/> event of default is one authorized under GS 53-267</p> <p><input type="checkbox"/> Not Applicable</p>	
<p>(w) Other</p>	

**(7) PROOF OF SERVICE OF NOTICE OF HEARING [GS 45-21.16(a) & GS 1A-1, Rule 4(j)], OR WAIVER OF RIGHT TO NOTICE AND HEARING [GS 45-21.16(f)]**  
 NOTE: Must be served at least 10 days before hearing unless service by posting in which case posted at least 20 days before hearing.  
*Required CSC*

<p><b>(a) Owner (time of filing Notice of Hearing) &amp; spouse, if any:</b></p> <p>Person(s) served: _____</p> <p>Date of service: _____</p> <p>Method/Proof:</p> <p><input type="checkbox"/> Affidavit of Trustee as to service by Certified/Registered Mail - Return Receipt Request (return receipt(s) attached)</p> <p><input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]</p> <p><input type="checkbox"/> Sheriff's Return of Service</p> <p><input type="checkbox"/> Other _____</p> <p>Proper waiver of notice and hearing by: _____</p>	
<p><b>(b) Borrower (identified in DTF), if different than Owner at time of filing of Notice of Hearing:</b></p> <p>Person(s) served: _____</p> <p>Date of service: _____</p> <p>Method/Proof:</p> <p><input type="checkbox"/> Affidavit of Trustee as to service by Certified/Registered Mail - Return Receipt Request (return receipt(s) attached)</p> <p><input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]</p> <p><input type="checkbox"/> Sheriff's Return of Service</p> <p><input type="checkbox"/> Other _____</p> <p>Proper waiver of notice and hearing by: _____</p>	

<p>(c) <b>Tenant under recorded lease:</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by Certified/Registered Mail - Return Receipt Request (return receipt(s) attached)  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Sheriff's Return of Service  <input type="checkbox"/> Other _____          Proper waiver of notice and hearing by: _____</p>	
<p>(d) <b>Other (including any person DTF directs notice be sent):</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by Certified/Registered Mail - Return Receipt Request (return receipt(s) attached)  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Sheriff's Return of Service  <input type="checkbox"/> Other _____          Proper waiver of notice and hearing by: _____</p>	

<p><b>(8) AFFIDAVIT REGARDING MILITARY STATUS [50 USCS Appx Sec 521(b)(1) and 533], and COMPLIANCE WITH SERVICEMEMBERS' CIVIL RELIEF ACT (50 USCS Appx Sec 501 et seq.)</b>  <a href="https://www.dmdc.osd.mil/appj/scra/scraHome.do">https://www.dmdc.osd.mil/appj/scra/scraHome.do</a>          NOTE: Temporary extension of the period from 90 days to 9 months after the termination of the servicemember's military service, effective for the period from July 30, 2008, until December 31, 2010 (if not further extended). <span style="float: right;"><i>Required CSC</i></span></p>	
<p>(a) <input type="checkbox"/> States whether or not _____ is in military service and shows necessary facts to support the affidavit, OR  <input type="checkbox"/> states that unable to determine whether or not _____ is in military service</p>	
<p>(b) Servicemember received actual notice of Notice of hearing and foreclosure proceeding?  <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	
<p>(c) Was stay requested or granted by court? <input type="checkbox"/> Yes <input type="checkbox"/> No          If stay granted,  <input type="checkbox"/> order dissolving stay entered on _____, or  <input type="checkbox"/> waiver of agreement by _____, a servicemember during or after military service (50 USCS Appx Sec 517)</p>	
<p>(d) Other _____</p>	

<p><b>(9) CONTINUANCES, CONTINUATIONS, SUSPENSIONS, INJUNCTIONS, POSTPONEMENTS, APPEALS</b>  <span style="float: right;"><i>Required CSC</i></span></p>	
<p>(a) <b>Continuance</b> of Hearing by clerk for lack of service (GS 45-21.16(a) or other good cause shown [GS 45-21.16C(b)]?  <input type="checkbox"/> Yes <input type="checkbox"/> No          If yes  <input type="checkbox"/> all parties property notified of date to which continued</p>	

<p>(b) <b>Continuation</b> of Hearing if "good cause to believe that additional time or additional measures have a reasonable likelihood of resolving the delinquency without foreclosure" on debtor's principal residence. [GS 45-21.16C(b)] (foreclosures initiated on or after 10/1/09) <input type="checkbox"/> Yes <input type="checkbox"/> No          If yes  <input type="checkbox"/> all parties property notified of date to which continued</p>	
<p>(c) <b>Appeal to District or Superior Court</b> of Clerk's findings at hearing [GS 45-21.16(d1)]? <input type="checkbox"/> Yes <input type="checkbox"/> No          If yes,  <input type="checkbox"/> certified copy of order entered for foreclosure proceeding to continue [GS 45-21.21(d)]</p>	
<p>(d) <b>Postponement of Sale</b> at the sale? [GS 45-21.21(a),(b),(c),(e)]  <input type="checkbox"/> Yes <input type="checkbox"/> No          If yes,  <input type="checkbox"/> postponed to _____ a date not more than 90 days, exclusive of Sundays, after original date of sale  <input type="checkbox"/> notice of postponement attached to or entered on original notice of sale posted at courthouse  <input type="checkbox"/> posted notice of postponement states sale is postponed, hour and date to which postponed, reason for postponement authorized under GS 45.21.21(a), and is signed by person authorized to hold sale or his agent or attorney</p>	
<p>(e) <b>Postponement of Sale</b> other than in Item (d) above? [GS 45-21.21(d)] <input type="checkbox"/> Yes <input type="checkbox"/> No          If yes,  <input type="checkbox"/> compliance with posting, publication and notice provisions of GS 45-21.16A, GS 45-21.17 &amp; GS 45-21.17A</p>	
<p>(f) <b>Suspension by Commissioner of Banks or clerk</b> for evidence of material violation of law in origination or servicing of loan? (GS 45-21.16B &amp; GS 53-244.17) <input type="checkbox"/> Yes <input type="checkbox"/> No          If yes,  <input type="checkbox"/> notification from Commissioner that foreclosure may be resumed  <input type="checkbox"/> if suspension prior to hearing -- written notice to all parties of new hearing date not less than 10 days prior to hearing [GS 45-21.16B(b)]  <input type="checkbox"/> if suspension after order to sell but before expiration of 10-day upset bid period -- no re-hearing  <input type="checkbox"/> compliance with notice, publication and posting provisions of GS 45-21.16A, GS 45-21.17 &amp; GS 45-21.17A</p>	
<p>(g) <b>Temporary restraining order</b> entered by Superior Court Judge? (GS 45-21.34) <input type="checkbox"/> Yes <input type="checkbox"/> No          If yes, result is  <input type="checkbox"/> Judge dissolves order restraining sale. Compliance with judge's order as to time and place ordered for sale and any additional notice requirements. [GS 45-21.22(a) &amp; (b)]  <input type="checkbox"/> Other: _____</p>	
<p>(h) <b>Bankruptcy Court order lifting stay?</b> [GS 45.21.22(c)]  <input type="checkbox"/> Yes <input type="checkbox"/> No          If yes,  <input type="checkbox"/> If stayed before hearing -- new hearing &amp; notices served?  <input type="checkbox"/> If stayed after entry of Clerk's order of sale (GS 45-21.16) and before expiration of 10-day upset bid period -- no-rehearing  <input type="checkbox"/> compliance with notice, publication and posting provisions of GS 45-21.16A, GS 45-21.17 &amp; GS 45-21.17A</p>	
<p>(i) <b>Other</b></p>	



<b>(10)CLERK'S ORDER OF SALE [GS 45-21.16]</b>		<i>Required CSC</i>
(a) <input type="checkbox"/> Filed in each county in which part of property located [GS 45-21.16(d)]		
(b) Finds existence of <input type="checkbox"/> (i) valid debt & party seeking to foreclose is holder <input type="checkbox"/> (ii) default <input type="checkbox"/> (iii) right to foreclose under DTF <input type="checkbox"/> (iv) notice to those entitled <input type="checkbox"/> (v) whether or not debt underlying DTF is a subprime loan [per GS 45-101(4)], and if so, confirm 45-day pre-foreclosure notice provided and time period elapsed <small>[Item (v) applicable for foreclosure proceeding filed or or after 11/15/2008 and expires 10/31/2010, unless extended]</small>		
(c) Authorizes _____ as mortgagee or trustee to proceed with sale		
(d) Other		

<b>(11)NOTICE OF SALE [GS 45-21.16A]</b>		<i>Required CSC</i>
(a) <input type="checkbox"/> Filed in each county in which part of property located		
(b) <input type="checkbox"/> Identifies original mortgagors and recording data for DTF?		
(c) Identifies record owner of property per Register of Deeds not more than 10 days prior to posting notice as being _____		
(d) <input type="checkbox"/> Designates _____ as date, hour & place of sale consistent with provisions of DTF, if any, and not a Sunday, legal holiday (GS 103-4, 5 USCS 6103(a)) or date when courthouse closed (GS 45-21.23) (See curative GS 45-21.43 regarding county & place of sale)		
(e) <input type="checkbox"/> Description of real property to be sold consistent with that in Notice of Hearing and is described in manner reasonably calculated to inform public what is being sold (and what is not being sold if a portion of property described in FDT is not being offered for sale) (GS 45-21.8 & GS 45-21.9)		
(f) <input type="checkbox"/> States terms of the sale and amount of cash deposit required		
(g) <input type="checkbox"/> Includes other provisions required by DTF, if any (GS 45-21.4, GS 45-21.7 & GS 45-21.8)		
(h) <input type="checkbox"/> States whether sold subject to taxes and special assessments		
(i) <input type="checkbox"/> States whether sold subject to or together with subordinate rights or interests (for development loans – includes together with developer/declarant rights, assigned interests, etc.)		
(j) <input type="checkbox"/> If less than 15 residential rental units, states that order for possession (GS 45-21.29) may issue (if allowed by federal acts), and rights of tenants to terminate leases (for leases or amendments on or after 10/1/2007) (GS 42-45.2)		
(k) Other		

<b>(12)AFFIDAVIT OF PUBLICATION [GS 45-21.17 &amp; GS 45-21.33(e)]</b>		<i>Required CSC</i>
<p>(a) Affidavit of publisher that notice(s) of sale and resale, if any, were published in _____ newspaper on _____ &amp; _____. (Must be published once a week for 2 successive weeks in newspaper qualified for legal advertising in each county in which part of property situated. Period from date first publication to date last publication, both dates inclusive, not less than 7 days, including Sundays; and date last publication not more than 10 days preceding date of sale.)</p>		
(b) Other _____		

<b>(13)SERVICE AND POSTING OF NOTICE OF SALE [GS 45-21.17] (Also see next 2 sections-service on IRS/United States)</b>		<i>Required CSC</i>
NOTE: Must be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of hearing (GS 45-21.16), any party desiring a copy who has complied with GS 45-21.17A, and tenant under residential rental agreement of property containing less than 15 rental units.		

<p>(a) <b>Posted</b> on _____ in area designed by CSC for posting public notices. (Must be posted in each county in which any part of property situated at least 20 days immediately preceding date of sale.)</p>		
<p>(b) <b>Owner (at time of filing Notice of Hearing) &amp; spouse, if any:</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Delivery with Notice of Hearing  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Other _____</p>		
<p>(c) <b>Borrower (identified in DTF), if different than Owner at time of filing Notice of Hearing:</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Delivery with Notice of Hearing  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Other _____</p>		
<p>(d) <b>Tenant under recorded lease:</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Delivery with Notice of Hearing  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Other _____</p>		
<p>(e) <b>Tenant(s) of residential property with less than 15 rental units: [GS 42-45.2]</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p>		
<p>(f) <b>Party filing Request for Notice of Sale:</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p>		

<p><b>(g) Party filing Request for Notice of Sale:</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p>	
<p><b>(h) Subordinate lienholder: (no Request for Notice)</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p>	
<p><b>(i) Subordinate lienholder: (no Request for Notice)</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p>	
<p><b>(j) Special posting or publishing provisions in DTF:</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p>	
<p><b>(k) Other (including any person DTF directs notice be sent):</b>          Person(s) served: _____          Date of service: _____          Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p>	

<p><b>(14) INTERNAL REVENUE SERVICE - SUBORDINATE FEDERAL TAX LIEN</b>  <b>[26 USCS 7425(b),(c) &amp; (d)], (IRS Publication 786) &amp; (Treasury Reg. 301.7425-2 et seq.)</b>          NOTES:          1. Federal tax liens with priority over the DTF are NOT extinguished by this procedure.          2. Subordinate federal tax liens filed more than 30 days prior to the actual final foreclosure sale date will NOT be extinguished by the foreclosure unless this notice procedure is followed <u>precisely</u> or the IRS files either discharge of property or consent to sale.          3. The IRS Right of Redemption continues for 120 days after date of sale, unless released, EVEN IF the notice procedure is followed. (For risk purposes, most title insurers look to the date 120 days after expiration of the last upset bid period.) <span style="float: right;"><i>Recommended CSC</i></span></p>	
<p><b>(a) Service of Notice of Sale</b>          IRS lien file # _____, filed _____          Date of delivery of Notice to IRS: _____          (must be delivered by registered or certified mail or by personal service, not less than 25 days prior to sale)          Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by              <input type="checkbox"/> Registered or certified mail (return receipt attached)              <input type="checkbox"/> Personal Delivery to IRS office          Contains:  <input type="checkbox"/> Name/address of person submitting notice of sale  <input type="checkbox"/> Copy of each notice of Federal Tax Lien [Form 668(Y)(c)] or              (A) IRS office named on notice of lien              (B) name and address of taxpayer              (C) date and place notice of lien filed  <input type="checkbox"/> Complete physical address, legal description, and, if available, title abstract of property  <input type="checkbox"/> Date, time, place, and terms of sale  <input type="checkbox"/> Approximate amount of principal obligation, interest, and expenses.</p>	

(b) <input type="checkbox"/> Redemption period has expired. (conservative calculation @ 120 days after expiration of last upset bid period)	
(c) Other	

<b>(15) UNITED STATES - SUBORDINATE FEDERAL LIEN, JUDGMENT OR MORTGAGE (OTHER THAN FEDERAL TAX LIEN):</b> (28 USCS 2410) <span style="float: right;"><i>Recommended CSC</i></span>	
(a) Notice given as required by applicable federal statute creating the lien? <input type="checkbox"/> Yes <input type="checkbox"/> No Method/Proof: _____	
(b) Waiver by United States of 1-year right of redemption [28 USCS 2410(c)]? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(c) Other	

<b>(16) PRELIMINARY REPORT OF FORECLOSURE SALE/RESALE</b> (Typically AOC-SP-400) [GS 45-21.26] <span style="float: right;"><i>Required CSC</i></span>	
(a) <input type="checkbox"/> Form AOC-SP-400 properly completed indicating a date, time and place of sale consistent with that in Notice of Sale; signed by person authorized to hold the sale or his agent or attorney; and filed with CSC in county where property sold on _____, said date being within 5 days after date of sale.  AOC-SP-400 shows: Highest Bidder: _____ Amount of Bid: \$ _____ Place of Sale: _____ Date & Time of Sale: _____ Description of property sold: _____	
(b) Is high bidder the borrower or a related party <input type="checkbox"/> Yes <input type="checkbox"/> No	
(c) Other:	

<b>(17) ORDER OF RESALE BY CLERK OF SUPERIOR COURT FOR DEFAULT OF SUCCESSFUL BIDDER</b> [GS 45-21.21(d), & GS 45-21.22(c) & GS 45-21.33(c)] <span style="float: right;"><i>Required CSC</i></span>	
(a) If yes, <input type="checkbox"/> compliance with clerk's order or resale and notice, publication and posting provisions of GS 45-21.16A, GS 45-21.17 & GS 45-21.17A	
(b) Other	

<b>(18) UPSET BID/NOTICE OF UPSET BID #1</b> (Typically AOC-SP-403) [GS 45-21.27] NOTE: If high bidder fails to comply with bid, see GS 45-21.30 <span style="float: right;"><i>Required CSC</i></span>	
(a) Form AOC-SP-403 properly completed; signed by upset bidder or his agent or attorney; and filed with CSC in county where property sold on _____, said date being within 10 days after filing of report of sale.  AOC-SP-403 shows: Upset Bidder: _____ Amount of Upset Bid: \$ _____	
(b) <input type="checkbox"/> Proof notice of upset bid mailed by first-class mail to last prior bidder and current record owner(s)	
(c) Is upset bidder the borrower or a related party <input type="checkbox"/> Yes <input type="checkbox"/> No	
(d) Other	

<b>(19)UPSET BID/NOTICE OF UPSET BID #2 (Typically AOC-SP-403) [GS 45-21.27]</b>		<i>Required CSC</i>
NOTE: If high bidder fails to comply with bid, see GS 45-21.30		
(a) <input type="checkbox"/> Form AOC-SP-403 properly completed; signed by upset bidder or his agent or attorney; and filed with CSC in county where property sold on _____, said date being within 10 days after filing of last upset bid.  AOC-SP-403 shows: Upset Bidder: _____ Amount of Upset Bid:\$ _____		
(b) <input type="checkbox"/> Proof notice of upset bid mailed by first-class mail to last prior bidder and current record owner(s)		
(c) Is upset bidder the borrower or a related party <input type="checkbox"/> Yes <input type="checkbox"/> No		
(d) Other		

<b>(20)ASSIGNMENT OF BID</b>		<i>Required CSC</i>
(a) Assignment of bid? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, <input type="checkbox"/> Assignment from _____ (being successful highest bidder) to _____		
(b) Is assignee related to lender, if indicated? <input type="checkbox"/> Yes <input type="checkbox"/> No		
(c) Indication of consideration for assignment? <input type="checkbox"/> Yes <input type="checkbox"/> No		
(d) Other		

<b>(21)TRUSTEE'S/SUBSTITUTE TRUSTEE'S DEED</b>		<i>Required ROD</i>
(a) <input type="checkbox"/> Deed consistent with foreclosure proceedings recorded in Book ____ page _____, _____ County Registry, from the authorized Trustee/Substitute Trustee to _____ (said grantee being the highest bidder or assignee of highest bidder.)		
(b) Other		

<b>(22)NOTICE OF FORECLOSURE (GS 45-38)</b>		<i>Required ROD</i>
(a) <input type="checkbox"/> Includes date when and person to whom conveyance made		
(b) <input type="checkbox"/> If only part of encumbered property sold, indicates which property sold		
(c) <input type="checkbox"/> Recites original parties and recording data for DTF		
(d) Other		

<b>(23)FINAL REPORT &amp; ACCOUNT OF FORECLOSURE SALE (Typically AOC-SP-402) [GS 45-21.31, 45-21.33]</b>		<i>Required CSC</i>
(a) <input type="checkbox"/> Form AOC-SP-402 properly completed; signed by person authorized to hold the sale or his agent or attorney; and audited and recorded by the CSC on _____.  AOC-SP-402 shows: Name of Purchaser: _____ As to the obligation secured: ( ) Entire amount of secured obligation satisfied, or ( ) Only a part of secured obligation satisfied As to the property encumbered by FDT: ( ) All property was sold, or ( ) Only a portion of property was sold		
(b) Other:		

**(24)POST FORECLOSURE PROCEEDINGS INCLUDING ACTION BY PARTY ENTITLED TO NOTICE NOT PROVIDED (GS 45-21.33), APPEAL (GS 1-301.2), ACTION FOR SURPLUS FUNDS (GS 45-21.31), ORDER FOR POSSESSION (GS 45-21.29), (50 USCS Appx Sec 531) & (Protecting Tenants at Foreclosure Act of 2009, P.L. 111-22**  
*Required CSC*

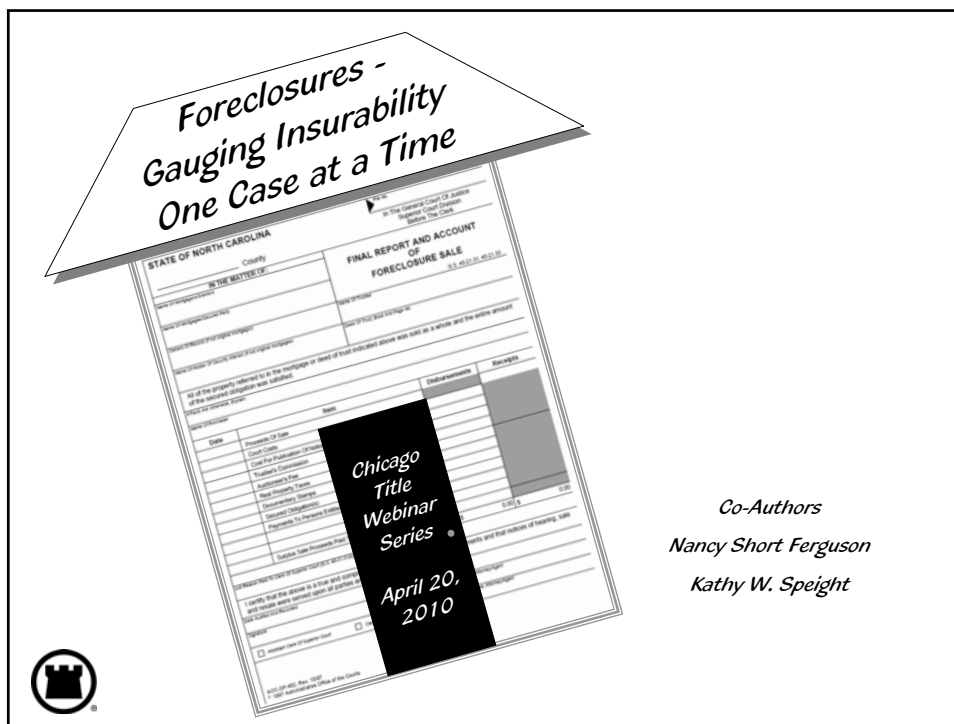
(a) Action filed within 6 months of final accounting by party entitled to notice not provided and lender was high bidder? <input type="checkbox"/> Yes <input type="checkbox"/> No (If yes, see G.S. 45-21.17A)	
(b) Appeal of foreclosure and sale? <input type="checkbox"/> Yes <input type="checkbox"/> No (If yes, see GS 1-301.2)	
(c) Action for surplus funds? <input type="checkbox"/> Yes <input type="checkbox"/> No (If yes, see GS 45-21.31)	
(c) Order for possession? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, <input type="checkbox"/> compliance with Protecting Tenants at Foreclosure Act of 2009 (Applicable to foreclosure proceeding filed or or after 5/20/2009 and expires 12/31/2012, unless extended) <input type="checkbox"/> compliance with 50 USCS Appx Sec 531 for occupant in military service <input type="checkbox"/> compliance with GS 45-21.29 in each county in which any part of property situated <input type="checkbox"/> eviction completed	
(d) Other	

**(25)OTHER**


**ATTORNEY COMMENTS/ITEMS TO DISCUSS WITH CLIENT AND/OR TITLE INSURER**

--

Comments by \_\_\_\_\_ Date: \_\_\_\_\_



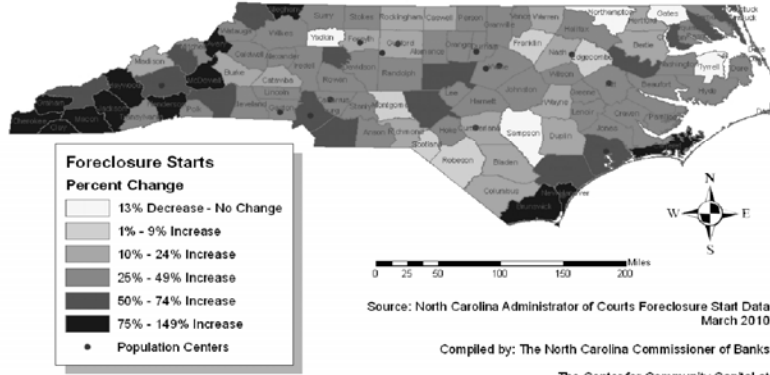
## Special Thanks

- Other Chicago Title counsel:
  - Kit Anderson
  - Robbie Cox
  - Jeff Hrdlicka
  - Scott Mansfield
  - Bob Rascoe
  - Jay Williams
- Outside firms who have contributed
  - Hutchens Senter & Britton
  - Caudle Law Firm
  - Pamela Weaver Best and the AOC

## Foreclosures Continue to Increase In All But Five NC Counties

http://www.ncforeclosurehelp.org/Research.aspx

Percent Change in Annual Foreclosure Starts from  
April 2009 - March 2010 Compared to Same  
Period Previous Year (April 2008 - March 2009)  
by North Carolina County



## “Advice” Is Just A Click Away

# Google™

north carolina help setting aside foreclosure

**Legal Corner**  
Defective Foreclosure Sales  
What Are Your Rights?

How to Reverse a Sheriff Sale, Foreclosure Auction, Trustee Sale



## Today's Agenda

- Post-foreclosure review / abstract – not a “how-to” of the foreclosure procedure
- Increase in number of foreclosure proceedings equates to increase in number of defective foreclosure proceedings
- Discussion of some “deficiencies” or “irregularities” in the foreclosed deed of trust or foreclosure process and whether insurable or curative action needed
- Title insurer’s risk perspective about some recurring issues
  - How long ago was the foreclosure?
  - Was good service had or notice received by all parties entitled?
  - Was there any equity to apply to subordinate liens?

## To Protect Your Client

- Duty of certifying attorney to determine issues in foreclosure proceeding and discuss with client and with title insurer to negotiate coverage
- Discuss suggested “cures”, contacts, related parties, costs



- Item Number in the accompanying *Draft-North Carolina Power of Sale Foreclosure Abstract Form*
- We welcome your comments to help us finalize and improve this form for use by our customers

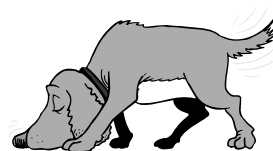
## Before You Begin Your Review of the Special Proceeding File

OWNER/PROPERTY/INTEREST FROM VESTING INSTRUMENT(S) OCCUPANCY, MILITARY STATUS AND BANKRUPTCY INFORMATION	
(a)	<b>Owner</b> Owner of record at time of filing of notice of hearing: _____ Spouse, if any, if not an owner of record: _____ Owner of record at time of execution of DTF (if different): _____ Spouse, if any, if not an owner of record: _____
(b)	<b>Borrower</b> <input type="checkbox"/> Same as Owner of record at time of notice of hearing, or <input type="checkbox"/> _____
(c)	<b>Property</b> (Attach copy of full legal description from vesting instrument) Street Address: _____ Brief legal: _____ Mobile/Manufactured home located on Property? <input type="checkbox"/> Yes <input type="checkbox"/> No DMV title status: _____ Declaration of Intent of record in Register of Deeds? <input type="checkbox"/> Yes <input type="checkbox"/> No Book _____ Page _____ MVR-46G Affixation Affidavit of record in Register of Deeds? <input type="checkbox"/> Yes <input type="checkbox"/> No Book _____ Page _____
(d)	<b>Interest</b> <input type="checkbox"/> Fee Simple <input type="checkbox"/> Leasehold <input type="checkbox"/> Life Estate <input type="checkbox"/> Remainder <input type="checkbox"/> Other _____
(e)	<b>Occupancy (during foreclosure proceeding)</b> <input type="checkbox"/> Owner _____ (Primary Residence) _____ (Second Home) <input type="checkbox"/> Spouse of Owner _____ (Primary Residence) _____ (Second Home) <input type="checkbox"/> Tenant _____ (Verbal/Unrecorded Lease) _____ (Lease recorded Book _____ Page _____) _____ (Less than 15 residential tenants) _____ (15 or more residential tenants) _____ (Commercial tenants) <input type="checkbox"/> Vacant <input type="checkbox"/> Other _____
(f)	<b>Military Status (during foreclosure proceeding)</b> <a href="https://www.dmdc.osd.mil/app/scra/scraHome.do">https://www.dmdc.osd.mil/app/scra/scraHome.do</a> Owner: In military service? <input type="checkbox"/> Yes <input type="checkbox"/> No Spouse, if any, if not an owner of record: In military service? <input type="checkbox"/> Yes <input type="checkbox"/> No Borrower, if different than Owner: In military service? <input type="checkbox"/> Yes <input type="checkbox"/> No Tenant: In military service? <input type="checkbox"/> Yes <input type="checkbox"/> No
(g)	<b>Bankruptcy (during foreclosure proceeding)</b> <a href="http://pacer.psc.uscourts.gov/">http://pacer.psc.uscourts.gov/</a> Owner: <input type="checkbox"/> Yes <input type="checkbox"/> No Borrower, if different than Owner: <input type="checkbox"/> Yes <input type="checkbox"/> No
(h)	<b>Other</b>

## Flush Out Title Concerns Early

Affirmative coverage included in a lender's loan policy of title insurance does not mean

- Everything's covered
- Coverage would extend to new purchaser
- Coverage would be sufficient for new purchaser
- Coverage would prevent *all* loss as opposed to just the covered loss:
  - "loss" – loan vs. owner's coverage
  - "continuation of coverage" – Liability *if* warranties



## Planning Ahead: A Few Title Insurance Issues

- Prior title defects
- Defects in Deed of Trust and/or closing
- Post-closing issues to address in foreclosure
- Appropriate Parties -- & Service
- Appropriate Property
- Survey issues
  - Encroachments
  - Erroneous property
  - Check GIS, aerials, Google Earth, tax appraisal card
- Personal Property
  - Mobile home (check for DMV title)
  - UCC Financing Statement

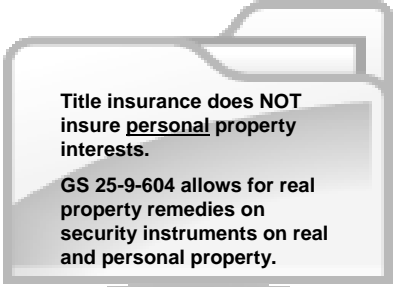
## Planning Ahead: Commercial / Development Foreclosure Issues

- Assignment of developer's and declarant's rights
- Rights to annex further property
- All property encumbered
- Outsale releases
- Copyrights & authority regarding maps
- Post-foreclosure recorded Assignment of Declarant or Developer's rights
- Landlord estoppel for leasehold parcels, and assignments of those leases from borrower to lender as collateral security (leasehold deed of trust)
- Utility easements
- Lack of joinder of lender on Declarations, plats, easements or other matters?
- UCC Financing Statements
- Assignments of Rents
- Loan agreement
- Other loan documents

1. *IN RE: C AND M INVESTMENTS OF HIGH POINT, INC.*, 346 N.C. 127 (1997)
2. *Tower Development Partners v. Zell*, 120 N.C. App. 136, (1995)

## Review Lender's File

- Deed of Trust?
- Assignments of Rents (Borrower = Landlord)?
- Assignment of Leases (Borrower = Tenant & Deed of Trust is leasehold)?
- Assignment of Developer's or Declarant's Rights?
- UCC Financing Statements?
- Mobile Home?
- Other?

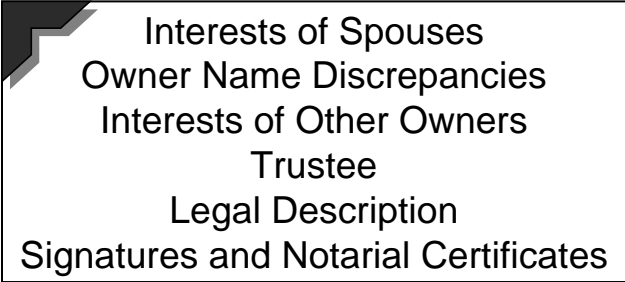


Title insurance does NOT insure personal property interests.

GS 25-9-604 allows for real property remedies on security instruments on real and personal property.

1 & 2

## The Instrument Foreclosed Deed of Trust Foreclosed (DTF)



Interests of Spouses  
Owner Name Discrepancies  
Interests of Other Owners  
Trustee  
Legal Description  
Signatures and Notarial Certificates

1

## Interests of Spouses

1

## Owner's Marital Status

- Show marital status
- Changed marital status & changed names
- Divorced?
- Remarried (or unknown)?
- Separation Agreement?

OWNER/PROPERTY/INTEREST FROM VESTING INSTRUMENT(S) OCCUPANCY, MILITARY STATUS AND BANKRUPTCY INFORMATION	
(a) <b>Owner</b>	
	Owner of record at time of filing of notice of hearing: _____
	Spouse, if any, if not an owner of record: _____
	Owner of record at time of execution of DTF (if different): _____
	Spouse, if any, if not an owner of record: _____
(b) <b>Borrower</b>	
	<input type="checkbox"/> Same as Owner of record at time of notice of hearing, or
	<input type="checkbox"/> _____

## No Joinder by Wife – Tenancy by Entirety

(1) DEED OF TRUST FORECLOSED (DTF)		Required ROD
(a) Date of instrument:		Property owned by husband and wife as tenants by entirety. Husband is the borrower and he is the only one that signed the Note and Deed of Trust.
(b) Recording date/time:		
(c) Parties		Though wife did not sign deed of trust, she was served with Notice of Hearing and Notice of Sale.
Grantor:		
<input type="checkbox"/> All owners of record at time of execution of DTF named as grantors & instrument executed by all such owners & spouses		
Borrower (if different than Grantor):		
Trustee:		
Lender:		

Borrower married at time of closing and property is owned tenancy by the entirety:

- Spouse must join in Deed of Trust *as an owner*, and
- Spouse must be served with Notice of Hearing and Notice of Sale *as an owner*

## Sole Owner – Non-Owning Spouse’s Interest Inchoate Rights (GS 29-30) & Right of Redemption (GS 45-45)

Borrower (sole owner) married @ time of Deed of Trust and married at time of foreclosure:

1. Spouse must join in Deed of Trust to subordinate marital interest (if not purchase money), and
2. Notice of Sale to spouse

Borrower (sole owner) not married @ time of Deed of Trust, but married at time of foreclosure:

1. Notice of Sale to spouse at time of foreclosure

Borrower (sole owner) married @ time of Deed of Trust, but not married at time of foreclosure:

1. No separate notice needed because no spouse

## Owner Name Discrepancies

1

## Grantor Name Discrepancies

Even if valid as between parties, is it sufficient constructive notice to third parties (GS 47-20)?

Some guidelines:

- findable in indexing by a “reasonable title examiner”
- enough is disclosed by the index to put a careful and prudent examiner upon inquiry, and if upon such inquiry the instrument would be found.
- Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc. 136 N.C. App. 493, 524 S.E.2d 591 (2000)  
Proper corporate name = “Tomika Investment Company”  
Property conveyed to = “Tomika Investments Incorporated”  
→ sufficient notice
- Hinnant v. Philips, 184 N.C. App. 241, 645 SE2d 867 (2007)  
Judgment docketed under “Phillips” instead of “Philips”  
→ sufficient notice

## More Grantor Name Discrepancies

- Change of marital status → change of name - can it be found by a reasonable title examiner?
- Corporate, LLC or filed entity change of name → GS 55D-26
- Must properly identify obligation(s) secured
- Wrong named “borrower” – *In re Foreclosure of Deed of Trust of Enderle*, 110 N.C. App. 773, 431 S.E.2d 549 (1993)
- Trustee-owner referenced in DTF as borrower, but note was from individuals, *Putnam v. Ferguson*, 130 N.C.App. 95, 502 S.E.2d 386 (1998) → DTF invalid
- Distinguish borrower if not *exactly* same as owner
- Entity vs individual owner(s)
- One spouse borrower -- Only one spouse is borrower, but need *both* on deed of trust – caution definition of “borrower” or “grantor” – Who is indebted to the bank under the Note?

## Interests of Other Owners

1, 2 & 3



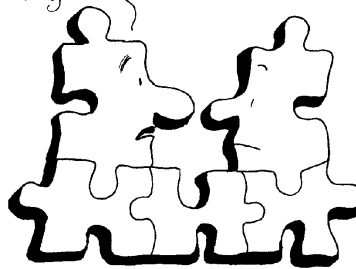
## Party Discrepancies = Major Problem!!

The parties named on the deed of trust and/or foreclosure aren't exactly and all of the same as the vested owners?

*Owners are Sam and Sue Jones*

*Borrower is Sam's Lingerie and Bait Shop, LLC*

Ever get the  
feeling something's  
missing?



## Not a Cure

Service of Notice of Hearing and Notice of Sale in a foreclosure proceeding does NOT cure failure to have all owners and spouses, if any, join in/execute the deed of trust itself.

## Borrower Deceased at Time of Foreclosure

(3) OTHER MATTERS AFFECTING/POSSIBLY AFFECTING FORECLOSURE PROCEEDING	
(l) Divorce? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(m) Marriage? Yes <input type="checkbox"/> No	
(n) Death/Estate? <input type="checkbox"/> Yes <input type="checkbox"/> No	Borrower deceased at time of institution of foreclosure proceeding.
(o) Special Proceeding (Partition, Incompetency, etc.)? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(p) Other	

### Sources of information:

- Death Certificate
- Obituaries (on internet)
- Google
- SSDI (Social Security Death Index)
- Accurint
- Where did decedent die? Estate file in that Clerk's office?

### Need:

- Guardian ad litem (Rule 17) for unknown heirs, especially if cannot verify no minors or incompetents, and post notice on property for unknown heirs
- Serve heirs and executor/administrator of the estate

## Partial Interest Encumbered?

Deed of trust from some but not all owners?

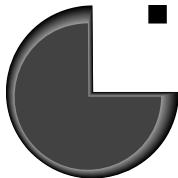
- Foreclose, then partition

Deed of trust from one of two tenancy-by-entirety owners?

- Not insurable unless curable (i.e. cured)

Joint tenancy with survivorship:

- G.S. 41-2 severance so creditors' liens attach



## Possible “Clarifying” Documentation

- Marital Status Affidavit
- Correction Affidavit (just to notify names changed)
- Name Affidavit

**CORRECTIVE OR SCRIVENER'S AFFIDAVIT FOR NOTICE OF TYPOGRAPHICAL OR OTHER MINOR ERROR**  
(N.C.G.S. § 42-17)

Prepared by \_\_\_\_\_  
Each undersigned Affiant, jointly and severally, being first duly sworn, hereby swears or affirms that the \_\_\_\_\_ (name or type of instrument) recorded on \_\_\_\_\_ (date) in Book \_\_\_\_\_ Page \_\_\_\_\_ County Registry, No. \_\_\_\_\_ and between \_\_\_\_\_ (original parties) contained typographical or minor errors, and this Affidavit is made to give notice of the herein corrected information.

Affiant is knowledgeable of the agreement and the intention of the parties in this regard. Affiant is the (check one)  
\_\_\_\_\_  
Oath or proctor of the previously recorded instrument  
\_\_\_\_\_  
County clerk for transaction involving the previously recorded instrument  
\_\_\_\_\_  
Attorney for grantor(s) named above in the previously recorded instrument  
\_\_\_\_\_  
Owner of the property described in the previously recorded instrument  
\_\_\_\_\_  
Other (check): \_\_\_\_\_

A copy of the previously recorded instrument (in part or in whole) \_\_\_\_\_ is/ is not attached.

Signature of Affiant \_\_\_\_\_ Signature of Affiant \_\_\_\_\_  
Print or Type Name \_\_\_\_\_ Print or Type Name \_\_\_\_\_

State of \_\_\_\_\_ County of \_\_\_\_\_  
Signed and sworn to (or affirmed) before me, this \_\_\_\_\_ day  
of \_\_\_\_\_ 20\_\_\_\_.

My Commission Expires \_\_\_\_\_  
Notary Public \_\_\_\_\_

Revised February 10, 2009

Trustee

## Missing Trustee

(1) DEED OF TRUST FORECLOSED (DTF)		<i>Required ROD</i>
(a) <b>Date of instrument:</b>		No Trustee named in the Deed of Trust. The line where the name should have been inserted is blank.
(b) <b>Recording date/time:</b>		
(c) <b>Parties</b>		
Grantor:		
<input type="checkbox"/> All owners of record at time of execution of DTF named as grantors & instrument executed by all such owners & spouses		
Borrower (if different than Grantor):		
Trustee:		
Lender:		

### Substitution of Trustee

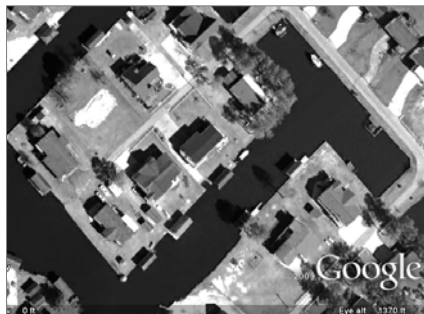
- GS 45-10(b) Substitution of Trustee if instrument appears on its face intended to be a deed of trust
  
- Date of Substitution before Notice of Hearing date and filing?
  
- See G.S. 45-10, 45-7, 45-15 & 45-21.16

## Legal Description

1, 6, 11 & 21

## Determine Exactly What Property Should be Included in the Foreclosure

- Compare:
  - aerials
  - Google Earth
  - GIS
  - tax appraisal card
  - drive-by
  - realtor, inspector, appraiser reports
- Improvements/encroachments
- Lender's file – appraisals, contract



## Legal Description

(1) DEED OF TRUST FORECLOSED (DTF)		<i>Required ROD</i>
<b>(d) Property</b>		Vesting deed conveys 27 acres. Prior to execution of DTF, owners sold 15 acres and retained 12 acres.  Legal description in DTF describes entire 27 acres, states it is same as Tax Parcel No. 87012A (which is a 12-acre parcel) and includes correct street address.
Brief legal description of property encumbered: (attach copy of full legal): <input type="checkbox"/> Legal description of encumbered parcel matches description of same parcel in Vesting Instrument described above		
All encumbered property located in one county? <input type="checkbox"/> Yes <input type="checkbox"/> No		
<b>(e) Interest encumbered:</b>		
<input type="checkbox"/> Fee Simple <input type="checkbox"/> Leasehold <input type="checkbox"/> Other: _____		
<b>(f) Debt/Type of loan</b>		

Legal description in deed of trust describes too much property but other descriptive information properly describes property to be encumbered?

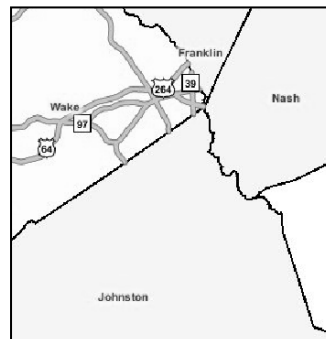
Legal description in foreclosure documents should describe larger tract with "save and except" for excess land or describe perimeter of smaller intended tract.

## Other Foreclosure Legal Description Issues

- **Fee**
  - All properties?
  - Include all improvements? Too much property? (Foreclose on the smaller intended portion)
  - Legal vs. address vs. PIN vs. back deed references
  - “Subdivided” or “carved out” of larger tract of borrower?
    - Violates subdivision ordinance for this conveyance
    - Access – easement by necessity?
  - Portion of property has title issue but remainder should bring sufficient (Discuss foreclosing on all with title insurer)
- **Appurtenant Easements (needed)**
  - Family road
  - Well & septic lots

## Multiple Properties Encumbered

- Properties in different counties
- Sale by individual parcels or by group
- Sale of all of property or part of property



## Commercial / Development Interest and Legal Description Issues

- LEASEHOLD (if that was interest borrower held & gave as security to lender)
- SAVE & EXCEPT:
  - Outsale parcels released
- INCLUDING:
  - Common elements not yet conveyed to HOA
  - Developer & Declarant rights & other rights from DOT
- SUBJECT TO Restrictions, obligations above, utility easements and other exceptions being ratified (post development)

## The Deed of Trust: Signatures and Notarial Certificates

- Signatures
  - Valid as between the parties
  - *All* owners (and spouses)
  - *Owner* (not necessarily borrower)
- Notarial Certificate
  - Not required for validity as between parties
  - Recording ineffective if not proper acknowledgment (GS 47-20)
    - Correction of notarial certificate
    - Lis pendens
  - GS 10B-3, 10B-20 & 10B-40:
    - Principal: individual whose identity and due execution of a record is being certified by the notary
    - no definition of particular “name” to use

## Interests of Other Parties

2, 3 & 6

## Other Interested Parties?

- Leases – subordinations, SNDA's
- Subordinated prior liens
- Subordinate (later filed) deeds of trust, judgments, liens
- Owners' Associations
- Rights of first refusal
- Transfer or reconveyance fees
- Intervening conveyances, options or contracts – especially related parties, trusts, foreclosure rescue schemes
- Declarations and plats of developed properties
- Recorded leases
- IRS liens
- Mechanics & Materialmen & equipment rentals for construction
- Small Business Administration (SBA)
- U.S. Attorney (civil judgment)
- Patriot Act check (SAR Report)

2 & 3



## Required and Recommended Documents

1-24

### “Required” Documents in Register of Deeds

- Substitution of Trustee
- Substitute Trustee’s Deed
- Notice of Foreclosure
- Request for Notice for Junior Lienholders
- Declaration of Intent or MVR-46G, if mobile or manufactured Home

(22)NOTICE OF FORECLOSURE (GS 45-38)

Required ROD

## “Required” Documents in Clerk of Superior Court File

- Notice of Hearing
- Sheriff’s Service forms
- Affidavit of Service / Certificate of Service for Notice of Hearing, including due diligence to locate owners not personally served
- Waiver of Right to Notice and Hearing
- Order to Sell
- Notice of Sale
- Notice of Postponement
- Notice of Continuance
- Affidavit of Service/Certificate of Service for Notice of Sale (if separate)
- Certified Mail Receipts
- Affidavit of Publication
- Affidavit of Posting
- Preliminary Report of Sale
- Notice(s) of Upset Bid(s)
- Assignment(s) of Bid
- Final Report of Sale
- Notice to Vacate

(23)FINAL REPORT & ACCOUNT OF FORECLOSURE SALE (Typically AOC-SP-402) [GS 45-21.31, 45-21.33] **Required CSC**

## “Recommended” Documents in Clerk of Superior Court File

- Notice to IRS, verification of service
- Notice to junior lien creditors, verification of service

### (14)INTERNAL REVENUE SERVICE - SUBORDINATE FEDERAL TAX LIEN [26 USCS 7425(b),(c) & (d)], (IRS Publication 788) & (Treasury Reg. 301.7425-2 et seq.)

#### NOTES:

1. Federal tax liens with priority over the DTF are NOT extinguished by this procedure.
2. Subordinate federal tax liens filed more than 30 days prior to the actual final foreclosure sale date will NOT be extinguished by the foreclosure unless this notice procedure is followed precisely or the IRS files either discharge of property or consent to sale.
3. The IRS Right of Redemption continues for 120 days after date of sale, unless released, **EVEN IF** the notice procedure is followed. (For risk purposes, most title insurers look to the date 120 days after expiration of the last upset bid period.)

**Recommended CSC**

# Notice of Hearing - Service

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**(7) PROOF OF SERVICE OF NOTICE OF HEARING [CS 45-21.16(a) & GS 1A.1, Rule 4]], or WAIVER OF RIGHT TO NOTICE AND HEARING [CS 45-21.16(f)]**  
NOTE: Must be served at least 10 days before hearing unless service by posting in which case posted at least 20 days before hearing. Required GOC

<p><b>(a) Owner (time of filing Notice of Hearing) &amp; spouse, if any</b>                  Person(s) served: _____                  Date of service: _____                  Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by Certified/Registered Mail - Return Receipt Request (return receipt(s) attached)  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Sheriff's Return of Service  <input type="checkbox"/> Other _____                  Proper waiver of notice and hearing by: _____</p>	
<p><b>(b) Borrower (identified in DTF), if different than Owner at time of filing of Notice of Hearing</b>                  Person(s) served: _____                  Date of service: _____                  Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by Certified/Registered Mail - Return Receipt Request (return receipt(s) attached)  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Sheriff's Return of Service  <input type="checkbox"/> Other _____                  Proper waiver of notice and hearing by: _____</p>	
<p><b>(c) Tenant under recorded lease</b>                  Person(s) served: _____                  Date of service: _____                  Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by Certified/Registered Mail - Return Receipt Request (return receipt(s) attached)  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Sheriff's Return of Service  <input type="checkbox"/> Other _____                  Proper waiver of notice and hearing by: _____</p>	
<p><b>(d) Other (including any person DTF directs notice be sent):</b>                  Person(s) served: _____                  Date of service: _____                  Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by Certified/Registered Mail - Return Receipt Request (return receipt(s) attached)  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Sheriff's Return of Service  <input type="checkbox"/> Other _____                  Proper waiver of notice and hearing by: _____</p>	

**Per GS 45-21.16, notice of hearing must be served on**

- any person to whom security instrument directs
- any person obligated to repay indebtedness
- every "record owner" of real estate whose interests is of record at time notice of hearing filed.

## No Service or No Proof of Service-Borrower

<p><b>(13) SERVICE AND POSTING OF NOTICE OF SALE</b> [GS 45-21.17] (Also see next 2 sections - service on IRS/United States)  <small>NOTE: Must be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of hearing (GS 45-21.16), any party desiring a copy who has complied with GS 45-21.17A, and tenant under residential rental agreement of property containing less than 15 rental units.</small></p>	
<p><b>(b) Owner (at time of filing Notice of Hearing) &amp; spouse, if any:</b>                  Person(s) served: _____                  Date of service: _____                  Method/Proof:  <input type="checkbox"/> Delivery with Notice of Hearing  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Other _____</p>	<p style="text-align: right;"><small>Required CSC</small></p>
<p><b>(c) Borrower (identified in DTF), if different than Owner at time of filing Notice of Hearing:</b>                  Person(s) served: _____                  Date of service: _____                  Method/Proof:  <input type="checkbox"/> Delivery with Notice of Hearing  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Other _____</p>	
<p>Borrower is not the same party as Owner. Owner has been properly served but there's no evidence of service of Notice of Hearing or Notice of Sale on Borrower.</p>	

Lack of service on non-owning borrower does not invalidate the foreclosure.

GS 45-21.16 provides:

Notice of hearing shall be served . . . upon . . . 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 deficiency remaining after the sale.*

## Service – Rule 4 and Rule 5 (See AOC letter dated 8/31/06 by Peter E. Powell & Pamela Weaver Best)

- **Three types:**
  - Sheriff
  - Certified mail – affidavit & green card (return receipt)
  - Overnight Carrier
- **If can't get personal service, you have to prove why served by posting –**
  - Statute requires affidavit on *why* ??? Must be proven !!
- **Due diligence to locate them such as**
  - Lender's file
  - Appraiser / inspector
  - Phone book
  - Tax records
  - DMV & Voter records
  - Register of Deeds – real estate records
  - LexisNexis → Accurint
  - Internet – such as Google
  - White pages of the phone book
- **GS 45-21.16 – owners of record title and rights of redemption**
  - Case of the non-owning spouse
  - Condo associations
  - Option holders, rights of first refusal
  - Co-owners
  - Intervening conveyances or foreclosures (even if subordinate liens)

## Parties in Possession

8, 11, 13 & 24

### Rights of Tenants:

#### Notice of Hearing, Orders of Possession & Federal Law

- If < 15 rental units → (G.S. 42-45.2; G.S. 45-21.17)
  - Notice of sale to tenants
  - Order of possession
  - Termination by tenant on 10 days' notice
- If 15 or more rental units →
  - 30 days' notice to parties in possession (State act; subject to fed. Act below)
- Protecting Tenants At Foreclosure Act of 2009, P.L. 111-22, (5/20/09 - 12/31/2012):
  - Bona fide tenants in possession →
    - Until end of lease term (if one)
      - Except: 90 days' notice if buyer using as personal residence
    - 90 days' notice if tenant at will
- Servicemembers → 50 USCS Appx Sec 531
  - 9 months notice (temp)
- Short term residential (resort) leases
- Commercial lease
  - Recorded?
  - SNDA?

## Possession Issues

- Who is *actually* in possession?
  - Ask Realtor, inspector, appraiser
- Tenant in possession of part, not all of property
- Tenant sharing property with owner
- Partial residential, partial business
- When to send 90-day letter
  - Expiration of upset bid period
  - vs.
  - Trustee's deed recorded



## Notice to Vacate – Request for Information

- OWNER (or spouse, child or parent):
  - 10-days' notice to vacate or sheriff ejectment (GS 45-21.29)
- TENANT (not spouse, child or parent of defaulted borrower):
  - (a) A copy of your written lease (if an oral lease, you must provide a summary of the terms of your oral lease, including: the term of the lease, monthly rental amount and all other relevant lease terms);
  - (b) Proof of your alleged monthly rental amount (proof may be in the form of a copy of lease showing the rental amount, or if an oral lease, copies of the cancelled checks or money orders);
  - (c) Proof that all monthly rentals payments due under the lease have been paid to date (proof may be in the form of cancelled checks, money orders, or a signed statement from your landlord stating that you have paid your rent in full as required by your lease);
  - (d) The names of all occupants of the property who are at least the age of 18 years; and
  - (e) Indicate whether you are a Section 8 tenant.  
(Federal Protecting Tenants At Foreclosure Act of 2009--Applicable to foreclosure proceeding filed or or after 5/20/2009 and expires 12/31/2012, unless extended )

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## IF SERVICEMEMBER (OR FAMILY)

HALT !!!!!



## Is Owner-Borrower-Tenant in Military Service

### OWNER/PROPERTY/INTEREST FROM VESTING INSTRUMENT(S) OCCUPANCY, MILITARY STATUS AND BANKRUPTCY INFORMATION

- (f) **Military Status (during foreclosure proceeding)** <https://www.dmdc.osd.mil/appj/scra/scraHome.do>  
Owner: In military service?  Yes  No  
Spouse, if any, if not an owner of record: In military service?  Yes  No  
Borrower, if different than Owner: In military service?  Yes  No  
Tenant: In military service?  Yes  No

**Service Members Civil Relief Act (SCRA)**  
[50 USC Appx. §§ 501 et seq, as amended]

**(SCRA) Service Members Civil Relief Act**

Enter all available information to improve the quality of the match.

SSN	<input type="text"/>	Repeat	<input type="text"/>
Last	<input type="text"/>	SSN	<input type="text"/>
First	<input type="text"/>	Last	<input type="text"/>
Middle	<input type="text"/>	First	<input type="text"/>
Middle	<input type="text"/>	Middle	<input type="text"/>
Birth Yr	<input type="text"/>	Month	<input type="text"/>
	<input type="text"/>	Day	<input type="text"/>
Birth Yr	<input type="text"/>	Month	<input type="text"/>
	<input type="text"/>	Day	<input type="text"/>

Upon clicking the "LookUp" button, based on the SSN and other personal information furnished, the Department will advise you that it does

1. **Not** possess information regarding whether the individual is on active duty, or
2. Possess information indicating that the individual is or was on active duty.

[Digital Certificate Help](#)

## Servicemembers' Civil Relief Act

### 50 USCS Appx Sec 531

- Affidavit
- Applies to:
  - Mortgage prior to active service
  - Borrower now in active service or unavailable
- Notice period
- Occupancy
  - Term
  - Family

## Tenant Member of Military Service

<b>(24)POST FORECLOSURE PROCEEDINGS INCLUDING ACTION BY PARTY ENTITLED TO NOTICE NOT PROVIDED (GS 46-21.33), APPEAL (GS 1-301.2), ACTION FOR SURPLUS FUNDS (GS 46-21.31), ORDER FOR POSSESSION (GS 46-21.29), (50 USCS Appx Sec 531) &amp; (Protecting Tenants at Foreclosure Act of 2009, P.L. 111-22</b>	
<p>(c) Order for possession? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If yes,</p> <p><input type="checkbox"/> compliance with Protecting Tenants at Foreclosure Act of 2009  <small>(Applicable to foreclosure proceeding filed on or after 5/20/2009 and expires 12/31/2012, unless extended)</small></p> <p><input type="checkbox"/> compliance with 50 USCS Appx Sec 531 for occupant in military service</p> <p><input type="checkbox"/> compliance with GS 46-21.29 in each county in which any part of property situated</p> <p><input type="checkbox"/> eviction completed</p> <p>(d) Other</p>	<p>Per proposed purchaser, occupant is wife of military servicemember. Her husband is on a tour of duty in Afghanistan. No recorded lease.</p> <p>There's an affidavit in the file that the owner at time of foreclosure was not a military servicemember, but nothing about the tenant.</p> <p>Proposed purchaser says lender, that purchased at foreclosure, is getting ready to evict current tenants and she intends to occupy as her primary residence after completion of this purchase. No eviction proceeding at time of abstract.</p>



# Bankruptcy

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## Bankruptcy During Foreclosure Proceeding

OWNER/PROPERTY/INTEREST FROM VESTING INSTRUMENT(S) OCCUPANCY, MILITARY STATUS AND BANKRUPTCY INFORMATION
(g) <b>Bankruptcy (during foreclosure proceeding)</b> <a href="http://pacer.psc.uscourts.gov/">http://pacer.psc.uscourts.gov/</a> Owner: <input type="checkbox"/> Yes <input type="checkbox"/> No Borrower, if different than Owner: <input type="checkbox"/> Yes <input type="checkbox"/> No

### Was owner or borrower in bankruptcy,

- Prior to foreclosure?
- During foreclosure?
  - Before Hearing
  - Before Sale
  - Before Expiration of Upset Bid period
  - Before Trustee's Deed delivered/recorded
- Post foreclosure?

Clerk looks for copy of Pacer verification of date / time of filing.

## Bankruptcy by One Owner During Foreclosure

(9) CONTINUANCES, CONTINUATIONS, SUSPENSIONS, INJUNCTIONS, POSTPONEMENTS, APPEALS	
	<i>Required CSC</i>
(h) <b>Bankruptcy Court order lifting stay?</b> [GS 45.21.22(c)] <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, <input type="checkbox"/> If stayed before hearing – new hearing & notices served? <input type="checkbox"/> If stayed after entry of Clerk's order of sale (GS 45-21.16) and before expiration of 10-day upset bid period -- no-rehearing <input type="checkbox"/> compliance with notice, publication and posting provisions of GS 45-21.16A, GS 45-21.17 & GS 45-21.17A	Found bankruptcy for one of owners during this foreclosure at <a href="http://pacer.psc.uscourts.gov/">http://pacer.psc.uscourts.gov/</a> , but don't see anything in foreclosure file about that.

## Notice of Sale - Service (Except on IRS/United States)

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(11) NOTICE OF SALE [GS 45-21.16A]		Required CSC
<p>(a) <input type="checkbox"/> Filed in each county in which part of property located</p> <p>(b) <input type="checkbox"/> Identifies original mortgagors and recording data for DTF?</p> <p>(c) Identifies record owner of property per Register of Deeds not more than 10 days prior to posting notice as being _____</p> <p>(d) <input type="checkbox"/> Designates _____ as date, hour &amp; place of sale consistent with provisions of DTF, if any, and not a Sunday, legal holiday (GS 103-4, 5 USCS 6103(a)) or date when courthouse closed (GS 45-21.23) (See curative GS 45-21.43 regarding county &amp; place of sale)</p> <p>(e) <input type="checkbox"/> Description of real property to be sold consistent with that in Notice of Hearing and is described in manner reasonably calculated to inform public what is being sold (and what is not being sold if a portion of property described in FDT is not being offered for sale) (GS 45-21.8 &amp; GS 45-21.9)</p> <p>(f) <input type="checkbox"/> States terms of the sale and amount of cash deposit required</p> <p>(g) <input type="checkbox"/> Includes other provisions required by DTF, if any (GS 45-21.4, GS 45-21.7 &amp; GS 45-21.8)</p> <p>(h) <input type="checkbox"/> States whether sold subject to taxes and special assessments</p> <p>(i) <input type="checkbox"/> States whether sold subject to or together with subordinate rights or interests (for development loans – includes taking with developer/declarant rights, assigned interests, etc.)</p> <p>(j) <input type="checkbox"/> If less than 15 residential rental units, states that order for possession (GS 45-21.29) may issue (if allowed by federal acts), and rights of tenants to terminate leases (for leases or amendments on or after 10/1/2007) (GS 42-45.2)</p> <p>(k) Other _____</p>	<h1 style="font-size: 2em;">Notice of Sale</h1>	

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(13) SERVICE AND POSTING OF NOTICE OF SALE [GS 45-21.17] (Also see next 2 sections service on R/R (retired States))		Required CSC
<small>NOTE: Must be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of hearing (GS 45-21.16), any party desiring a copy who has complied with GS 45-21.17A, and tenant under residential rental agreement of property containing less than 15 rental units.</small>		
<p>(b) <b>Owner (at time of filing Notice of Hearing) &amp; spouse, if any:</b>            Person(s) served: _____            Date of service: _____            Method/Proof:  <input type="checkbox"/> Delivery with Notice of Hearing  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Other _____</p> <p>(c) <b>Borrower (identified in DTF), if different than Owner at time of filing Notice of Hearing:</b>            Person(s) served: _____            Date of service: _____            Method/Proof:  <input type="checkbox"/> Delivery with Notice of Hearing  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Other _____</p> <p>(d) <b>Tenant under recorded lease:</b>            Person(s) served: _____            Date of service: _____            Method/Proof:  <input type="checkbox"/> Delivery with Notice of Hearing  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Affidavit of Trustee as to service by Posting and circumstances warranting service by Posting [GS 45-21.16(a)]  <input type="checkbox"/> Other _____</p> <p>(e) <b>Tenant(s) of residential property with less than 15 rental units: [GS 42-45.2]</b>            Person(s) served: _____            Date of service: _____            Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p> <p>(f) <b>Party filing Request for Notice of Sale:</b>            Person(s) served: _____            Date of service: _____            Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p> <p>(g) <b>Special posting or publishing provisions in DTF:</b>            Person(s) served: _____            Date of service: _____            Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p> <p>(k) <b>Other (including any person DTF directs notice be sent):</b>            Person(s) served: _____            Date of service: _____            Method/Proof:  <input type="checkbox"/> Affidavit of Trustee as to service by First-Class Mail  <input type="checkbox"/> Other _____</p>	<p><b>Per GS 45-21.17, notice of sale must be served on</b></p> <ul style="list-style-type: none"> <li>• each party entitled to notice of hearing</li> <li>• any party desiring a copy of sale who has complied with GS 45-21.17A</li> <li>• every occupant of a property containing less than 15 rental units</li> </ul>	

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## Notice of Sale Not Filed in All Counties

(11) NOTICE OF SALE [GS 45-21.16A]	Required CSC
(a) <input type="checkbox"/> Filed in each county in which part of property located	Property lies mostly in Wake and partially in Johnston County. Notice of Sale is filed in Wake County, but it is not filed in Johnston County.
(b) <input type="checkbox"/> Identifies original mortgagors and recording data for DTF?	
(c) Identifies record owner of property per Register of Deeds not more than 10 days prior to posting notice as being	

Failure to file/post/publish notice of sale in Johnston County clear violation of GS45-21.16A and sale of property in Johnston County not authorized.

## Notice to Subordinate Lienholders and Other Interested Parties?

- Request for Notice – GS 45-21.17A
- Subordinate IRS liens – 26 U.S.C.A. 7425
- Intervening conveyances, options or contracts – especially related parties, trusts, foreclosure rescue schemes
- Mennonite case & “best practices”
  - Owners’ association
  - Option & first refusal holders
  - Subordinated prior liens
  - Subordinate (later filed) deeds of trust, judgments, liens
  - Transfer or reconveyance fees
  - Mechanics & Materialmen & equipment rentals for construction
- Small Business Administration (SBA)
- U.S. Attorney (civil judgment) – often 26 U.S.C.A. 7425 because enforced as tax lien
- Patriot Act check (SAR Report)
- Leases – subordinations, SNDA’s, recorded memoranda (*see relevant statutes discussed later*)

## Subordinate Liens in Favor of the Internal Revenue Service



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### Priority over IRS Liens (26 USCS 6323)

- Deed of trust recorded prior to tax lien filing
- Personal property – purchase at retail without actual knowledge of lien
- Superpriority liens (taxes and assessments)
- Mechanics' liens (cap \$5,000 personal residence; \$6,890 for 2010 only)
- Commercial financing agreement
- Construction loan financing

\*\*\*\* ONLY ADVANCES / DRAWS made within 45 days *after* to IRS lien filing \*\*\*\*

**(14) INTERNAL REVENUE SERVICE - SUBORDINATE FEDERAL TAX LIEN**

[26 USCS 7425(b),(c) & (d)], (IRS Publication 786) & (Treasury Reg. 301.7425-2 et seq.)

NOTES:

1. Federal tax liens with priority over the DTF are NOT extinguished by this procedure.
2. Subordinate federal tax liens filed more than 30 days prior to the actual final foreclosure sale date will NOT be extinguished by the foreclosure unless this notice procedure is followed precisely or the IRS files either discharge of property or consent to sale.
3. The IRS Right of Redemption continues for 120 days after date of sale, unless released. **EVEN IF** the notice procedure is followed. (For risk purposes, most title insurers look to the date 120 days after expiration of the last upset bid period.)

**120-day right of redemption survives foreclosure:**

- 26 U.S.C.A. 7425(d)(1): 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer.
- Government's redemption was untimely under 26 USCS § 7425(d)(1) because "date of sale" was date public auction was held based on plain language of 26 C.F.R. § 301.7425-2(b), whether or not junior liens were divested as of date of auction or at some later point when sale became complete at end of upset bid period. *Ellis v United States (2005, MD NC) 2005-2 USTC 50518, 96 AFTR 2d 5535.*

**IRS Redemption Price**  
**28 U.S.C.A. 2410(d) and**  
**Treas.Reg. 26 CFR 301.7425-4 (b)**

- Only the high bid / purchase price at sale
- Interest @ 6% since sale
- expenses necessarily incurred in connection with such property, over (B) the income from such property plus (to the extent such property is used by the purchaser) a reasonable rental value of such property.
- payment made by the purchaser or his successor in interest after the foreclosure sale to a holder of a senior lien
- NOT any other intervening liens, subordinate to the foreclosed deed of trust but prior to the IRS lien

**NOTE: SUCCESSFUL BIDDER CANNOT SIMPLY DEFAULT ON THEIR BID OR TRY TO PAY THE IRS LIEN TO PRESERVE THE PROPERTY!!!**

"right of redemption is designed to protect taxpayer's equity in property"

## IRS 10-Year Tolling [26 U.S.C. 6323(g)(3)]

- **Required refiling period.** In the case of any notice of lien, the term "required refiling period" means--
  - (A) the one-year period ending 30 days after the expiration of 10 years after the date of the assessment of the tax, and
  - (B) the one-year period ending with the expiration of 10 years after the close of the preceding required refiling period for such notice of lien.



**CAUTION:** Treasury Regulation that if IRS joined as a party, that tolls the 10-year period pending the litigation

## No Service or No Proof of Service Subordinate IRS Lien

<b>(14)INTERNAL REVENUE SERVICE - SUBORDINATE FEDERAL TAX LIEN</b> <small>[26 USC 7425(b),(c) &amp; (d)], (IRS Publication 786) &amp; (Treasury Reg. 301.7425-2 et seq.)</small>	
<small>NOTES:</small> 1. Federal tax liens with priority over the DTF are NOT extinguished by this procedure. 2. Subordinate federal tax liens filed more than 30 days prior to the actual final foreclosure sale date will NOT be extinguished by the foreclosure unless this notice procedure is followed <u>precisely</u> or the IRS files either discharge of property or consent to sale. 3. The IRS Right of Redemption continues for 120 days after date of sale, unless released, EVEN IF the notice procedure is followed. (For risk purposes, most title insurers look to the date 120 days after expiration of the last upset bid period.)	
(a) Service of Notice of Sale IRS lien file # _____, filed _____ Date of delivery of Notice to IRS: _____ (must be delivered by registered or certified mail or by personal service, not less than 25 days prior to sale) Method/Proof: <input type="checkbox"/> Affidavit of Trustee as to service by <input type="checkbox"/> Registered or certified mail (return receipt attached) <input type="checkbox"/> Personal Delivery to IRS office Contains: <input type="checkbox"/> Name/address of person submitting notice of sale <input type="checkbox"/> Copy of each notice of Federal Tax Lien [Form 668(Y)(c)] or (A) IRS office named on notice of lien (B) name and address of taxpayer (C) date and place notice of lien filed <input type="checkbox"/> Complete physical address, legal description, and, if available, title abstract of property <input type="checkbox"/> Date, time, place, and terms of sale <input type="checkbox"/> Approximate amount of principal obligation, interest, and expenses.	Property owned tenancy by entirety. IRS lien against husband only for unpaid 2008 taxes was filed one day after filing of Notice of Hearing. This filing is more than 30 days prior to the actual sale.  There's no indication in the file that IRS served with Notice of Sale.
(b) <input type="checkbox"/> Redemption period has expired. (conservative calculation @ 120 days after expiration of last upset bid period)	
(c) Other _____	

## IF No Service on IRS with Subordinate Lien Used to be “Subordinate” IRS Lien

- IRS LIEN NOT EXTINGUISHED – sale is “subject to and without disturbing such lien” if the notice provisions are not complied with
- TENANCY-BY-ENTIRETY PROPERTY IS SUBJECT TO IRS LIEN ON *ONE OR BOTH* SPOUSES
  - United States v. Craft, 535 U.S. 274 (2002)
  - Internal Revenue Bulletin 2003-39 (September 29, 2003); Notice 2003-60 – Collection Issues Related to Entireties Property

## Subordinate Liens in Favor of the United States





**CAUTION:**  
Federal Criminal Judgments and Restitution Orders

- Some are enforced like IRS lien
- Must be notified under same time frames, terms, etc. as IRS lien
- Review the cited federal statute for procedures applicable

(15) UNITED STATES - SUBORDINATE FEDERAL LIEN, JUDGMENT OR MORTGAGE (OTHER THAN FEDERAL TAX LIEN): (28 USCS 2410)	
(a) Notice given as required by applicable federal statute creating the lien? <input type="checkbox"/> Yes <input type="checkbox"/> No Method/Proof: _____	
(b) Waiver by United States of 1-year right of redemption [28 USCS 2410(c)]? <input type="checkbox"/> Yes <input type="checkbox"/> No	
(c) Other	

**One year right of redemption survives foreclosure:**

Section 2410(c) provides that the United States shall have one year from the date of sale within which to redeem (other than IRS liens or federal liens referencing the IRS procedures).

## SBA Loans

- 28 USC 2410 gives the U.S., including SBA, a one year redemption period. SBA often secures its interest of record as mortgagee.
- The SBA 504 Loan Program provides healthy small and medium-sized businesses with long-term fixed rate financing for the acquisition or construction of fixed assets. Projects are financed through a unique public/private partnership that involves private lenders financing 50% of project costs, (SBA) covering up to 40% of project costs, and small businesses investing at least 10% of project costs. By taking a secondary collateral position on project assets, SBA provides a “collateral cushion” for the primary lender and reduces the amount of equity normally required of the borrower.

## Purchase by Borrower or Affiliate

16, 18, 19 & 21

## Purchase by Party Related to Borrower

<b>(16) PRELIMINARY REPORT OF FORECLOSURE SALE/RESALE</b> (Typically AOC-SP-400) [GS 45-21.26] Required CSC	
<p>(a) <input type="checkbox"/> Form AOC-SP-400 properly completed indicating a date, time and place of sale consistent with that in Notice of Sale; signed by person authorized to hold the sale or his agent or attorney; and filed with CSC in county where property sold on _____, said date being within 5 days after date of sale.</p> <p>AOC-SP-400 shows:            Highest Bidder: _____            Amount of Bid: \$ _____            Place of Sale: _____            Date &amp; Time of Sale: _____            Description of property sold: _____</p>	<p><b>Names of property owners: Charles and Sarah Amigone</b></p> <p><b>Name of high bidder: Amigone Funeral Homes</b></p> <p><b>Secretary of State's website shows Charles Amigone as registered agent for Amigone Funeral Homes.</b></p>
(b) Is high bidder the borrower or a related party <input type="checkbox"/> Yes <input type="checkbox"/> No	
(c) Other:	

- Junior liens not extinguished!!
- Dixieland Realty Co. v. Wysor, 272 N.C. 172, 158 S.E. 2d 7 (1967), citing and reaffirming Jones v. Kingsey, 55 N.C. 463 (1856), to the effect:  
*Where the owner of mortgaged premises, who has given a junior mortgage thereon, purchases the property upon a sale under a senior mortgage, the rule is that his purchase will not defeat the junior mortgage but will operate for the benefit of it in the same way as a discharge or transfer of the mortgage to himself would have done.*

## Borrower or Repeat Bidder – Clerk's and/or Trustee's Authority

<b>(19) UPSET BID/NOTICE OF UPSET BID #2</b> (Typically AOC-SP-403) [GS 45-21.27] Required CSC	
NOTE: If high bidder fails to comply with bid, see GS 45-21.30	
<p>(a) <input type="checkbox"/> Form AOC-SP-403 properly completed; signed by upset bidder or his agent or attorney; and filed with CSC in county where property sold on _____, said date being within 10 days after filing of last upset bid.</p> <p>AOC-SP-403 shows:            Upset Bidder: _____            Amount of Upset Bid: \$ _____</p>	
(b) <input type="checkbox"/> Proof notice of upset bid mailed by first-class mail to last prior bidder and current record owner(s)	
(c) Is upset bidder the borrower or a related party <input type="checkbox"/> Yes <input type="checkbox"/> No	
(d) Other	

- If not negotiating in good faith, or repeatedly making upset bids
- Lender can ask for deposit to be full amount of bid if they keep showing up
- Certificate of Identification (AOC form), private because SSN
- Rolling upset bids – No resales or confirmation required

# Assignment of Bid

20

# Assignment of Bid

(20) ASSIGNMENT OF BID		Required CSC
(a) Assignment of bid? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, <input type="checkbox"/> Assignment from _____ (being successful highest bidder) to _____	The highest bidder is not the grantee named in Trustee's deed. There must be an assignment of the bid, but there's no assignment in the Clerk's file.	
(b) Is assignee related to lender, if indicated? <input type="checkbox"/> Yes <input type="checkbox"/> No		
(c) Indication of consideration for assignment? <input type="checkbox"/> Yes <input type="checkbox"/> No		

- Assignment of bid must be in the foreclosure file if the high bidder is not the same entity as the ultimate grantee.
- Just because it's not in the file (yet) does not mean it was not done.
- Ask for needed/"required" documentation in foreclosure file for legal and marketability purposes.

# Final Report and Account and Trustee's/Substitute Trustee's Deed

21 & 23

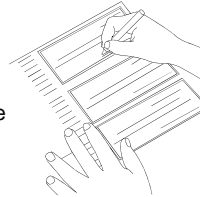
<b>STATE OF NORTH CAROLINA</b>		<small>File No.</small>
_____ County		In The General Court Of Justice Superior Court Division Before The Clerk.
<b>IN THE MATTER OF:</b>		
<b>FINAL REPORT AND ACCOUNT OF FORECLOSURE SALE</b>		G.S. 45-21.31, 45-21.33
<small>Name Of Mortgagee/Grantors</small>		<small>Name Of Trustee</small>
<small>Name Of Mortgagee/Secured Party</small>		<small>Deed Of Trust, Book And Page No.</small>
<small>Owners Of Record (if not original mortgage)</small>		
<small>Name Of Holder Of Security Interest (if not original mortgage)</small>		
All of the property referred to in the mortgage or deed of trust indicated above was sold as a whole and the entire amount of the secured obligation was satisfied.		
<small>Facts Are Otherwise, Explain:</small>		
<small>Name Of Purchaser</small>		
<b>Date</b>	<b>Item</b>	<b>Disbursements</b> <b>Receipts</b>
	Proceeds Of Sale	
	Court Costs	
	Cost For Publication Of Notice Of Sale	
	Trustee's Commission	
	Auctioneer's Fee	
	Real Property Taxes	
	Documentary Stamps	
	Secured Obligation(s)	
	Payments To Persons Entitled (Junior Liens, Etc.)	
	Surplus Sale Proceeds Paid To CSC (see below)	
	<b>TOTALS</b>	\$ 0.00      \$ 0.00
<small>Cost Reason Paid To Clerk Of Superior Court (G.S. 45-21.31(b))</small>		
I certify that the above is a true and complete account of my receipts and disbursements and that notices of hearing, sale and resale were served upon all parties entitled to such notice by statute.		
<small>Date Audited And Recorded</small>	<small>Date Of Report</small>	
<small>Signature</small>	<small>Name Of Mortgagee/Trustee, Attorney/Agent</small>	
<input type="checkbox"/> Assistant Clerk Of Superior Court <input type="checkbox"/> Clerk Of Superior Court	<small>Signature Of Mortgagee/Trustee, Attorney/Agent</small>	
<small>AOC-SP-402, Rev. 10/97 © 1997 Administrative Office of the Courts</small>		

is NOT sufficient to comply with requirement of affidavit showing why they had to post Notice of Hearing (if no personal delivery)

## Final Report of Sale and Trustee's Deed Catch-22



- ✓ G.S. 45-21.33 – file final report and account within 30 days of receipt of proceeds
- ✓ Buyer won't buy (deliver good funds) until Clerk signs off
- ✓ Trustee can't write checks until foreclosure file closed
- ✓ Clerk can't audit (and close foreclosure file) without checks verifying payments



Practical Response:

Clerk looks at checks (not yet delivered), then audits on that basis.

## AOC Certification as to Service

(23) FINAL REPORT & ACCOUNT OF FORECLOSURE SALE (Typically AOC-SP-402) [GS 45-21.31, 45-21.33]	
<i>Required CSC</i>	
<p>(a) <input type="checkbox"/> Form AOC-SP-402 properly completed; signed by person authorized to hold the sale or his agent or attorney; and audited and recorded by the CSC on _____.</p> <p>AOC-SP-402 shows:                      Name of Purchaser: _____                      As to the obligation secured:  <input type="checkbox"/> Entire amount of secured obligation satisfied, or  <input type="checkbox"/> Only a part of secured obligation satisfied                      As to the property encumbered by FDT:  <input type="checkbox"/> All property was sold, or  <input type="checkbox"/> Only a portion of property was sold</p> <p>(b) Other: _____</p>	<p>There are no affidavits in the file from the trustee stating service of notice of hearing and notice of sale on owner. AOC-SP-402 does include certification from trustee that "... notices of hearing, sale and resale were served upon all parties entitled to such notice by statute."</p>

Need to verify actual service, or due diligence exercised and basis for posting if owners not personally served.

# The Trustee's Deed

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## Trustee's/Substitute Trustee's Deed

(21) TRUSTEE'S/SUBSTITUTE TRUSTEE'S DEED		Required ROD
(a) <input type="checkbox"/> Deed consistent with foreclosure proceedings recorded in Book ____ page ____ County Registry, from the authorized Trustee/Substitute Trustee to _____ (said grantee being the highest bidder or assignee of highest bidder.)		

- Substitute Trustee
- Grantee same as high bidder?
  - OR Assignment of Bid in file?
- Compliance with G.S. 105-317.2:
  - Name & address of grantor
  - Name & address of grantee
  - Statement that not grantor's primary residence
- Applicable transfer / excise tax stamps, unless governmental agency (G.S. Ch 105, Art. 8E)

## Rescinding a Foreclosure Deed



- Clerk cannot do this.
- Requires either:
  - Superior Court Judge's order
  - Quitclaim back from lender to appropriate party IF can clear intervening matters
    - Be sure subject to DOT clearly noted
    - Could be back to borrower and substitute trustee

## Title Insurance Post Foreclosure

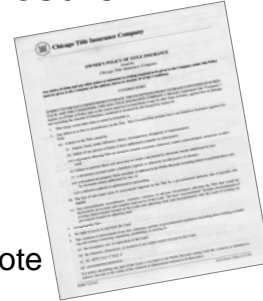
Why should I consider an owner's policy for my lender that purchased at foreclosure?

The lender already has a loan policy that covered the deed of trust foreclosed.



## Title Insurance Post Foreclosure

- Owner's vs. Loan coverage
  - Calculation of "loss"
  - Timing of "loss"
- Insured -- "Successors and assigns"
  - Assignment of bid vs assignment of note
- Intervening matters
  - Address specific coverage concerns
  - Matters not known/undisclosed or suffered assumed or agreed to by lender-purchaser
- Foreclosure process itself



## Foreclosure

### (Sample Commitment Requirement by Title Insurer)

Completion of pending foreclosure proceeding regarding deed of trust recorded in Book \_\_\_\_, page \_\_\_\_ in compliance with applicable law, including but not limited to:

- (1) verification that defaulted borrower in foreclosure proceeding is/was not active military under Servicemembers Civil Relief Act,
- (2) verification that the Internal Revenue Service was provided with satisfactory notice of sale if subordinate federal tax liens are to be extinguished,
- (3) waiver by Internal Revenue Service of any right of redemption, and
- (4) verification that the following subordinate liens will be extinguished upon proper completion of the foreclosure:

\_\_\_\_\_

## Definition of “Insured” in Loan Policy

- Insured named in Schedule A of policy
- Owner of the indebtedness
- Its successors as owner of debt
- Governmental agency/instrumentality insuring the debt (FHA, VA, etc.)

## Continuation of Coverage After Acquisition of Title/After Conveyance of Title

- Insured acquires land by foreclosure, deed in lieu of foreclosure
- Successor by operation of law (dissolution, merger, consolidation, distribution, or reorganization, conversion)
- Insured is liable for a covered matter under warranties of title (such as REO sale by *general* warranty deed)
- [2006 policy] wholly-owned or – owning affiliate

### **But No Continuation of Coverage:**

- Conveyance by insured (other than liability on warranties)
- Purchaser from insured
- Purchase money deed of trust back to insured on sale

## REVISITING: A Few Title Insurance Issues

- Prior title defects
- Defects in Deed of Trust and/or closing
- Post-closing issues to address in foreclosure
- Survey issues
  - Encroachments
  - Erroneous property
  - Check GIS, aerials, Google Earth, tax appraisal card
- Personal Property
  - Mobile home (check for DMV title)
  - UCC Financing Statement

## Loan v. Owner's Coverage

	Loan Policy	Owner's Policy
<b>Coverage Amount:</b>	Decreases as loan paid	Same or increases
<b>Loss Determined:</b>	After foreclosure AND title claim (not default) causes loss	Immediately at claim
<b>Terminates:</b>	Loan paid OR sale to third party at foreclosure	So long as insured owns property OR has liability for warranties

## Claims Comparison

Owner's Policy	Loan Policy
<p>Title defect may result in an immediate monetary claim by owner/insured.</p> <p><i>e.g. – fence encroachment and subsequent removal</i></p>	<p>Title defect results in a claim <b>ONLY</b> when:</p> <ol style="list-style-type: none"> <li>1. Debt accelerated by lender</li> <li>2. Lender foreclosed or exhausted remedies</li> <li>3. Lender has not received full payment of amount owed</li> <li>4. Lender shows that covered title defect caused the shortfall in recovery</li> </ol>

## Title Policies – Covered Risks (subject to Exceptions & Exclusions)

Owner's Policy	Loan Policy
<ol style="list-style-type: none"> <li>1. Title not vested in Owner</li> <li>2. Any defect, lien or encumbrance on title (<i>New list of examples</i>)</li> <li>3. Unmarketable title</li> <li>4. No right of access to and from the land</li> <li>5. <i>If notice recorded, some zoning &amp; subdivision coverage</i></li> <li>6. <i>If notice recorded, some police power / regulatory coverage</i></li> <li>7. <i>If notice recorded, condemnation loss</i></li> <li>8. <i>Governmental taking already occurred</i></li> <li>9. <i>Creditors' rights violation in prior transfer</i></li> <li>10. <i>Mini-gap between Date of Policy &amp; recording</i></li> </ol>	<ol style="list-style-type: none"> <li>1. Title not vested in Owner</li> <li>2. Any defect, lien or encumbrance on title (<i>New list of examples</i>)</li> <li>3. Unmarketable title</li> <li>4. No right of access to and from the land</li> <li>5. <i>If notice recorded, some zoning &amp; subdivision coverage</i></li> <li>6. <i>If notice recorded, some police power / regulatory coverage</i></li> <li>7. <i>If notice recorded, condemnation loss</i></li> <li>8. <i>Governmental taking already occurred</i></li> <li>9. Invalidity or Unenforceability of lien</li> <li>10. Priority of insured mortgage</li> <li>11. Lack of priority against Mechanics/ Materialmen's liens <i>and street assessments</i></li> <li>12. Invalidity or Unenforceability of any assignment of the insured mortgage if assignment shown in Schedule A.</li> <li>13. <i>Creditors' rights violation in prior transfer</i></li> <li>14. <i>Mini-gap between Date of Policy &amp; recording</i></li> </ol>

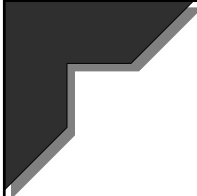
## Exclusions from Coverage

### Owner's Policy

1. Governmental regulation (zoning, subdivision, environmental)
2. Eminent domain
3. Matters:
  - Created, suffered, assumed by insured
  - Known to insured not disclosed
  - No loss or damage
  - Post-policy
  - Failure of insured to pay value
4. Creditors' rights
5. Taxes or assessments in mini-gap

### Loan Policy

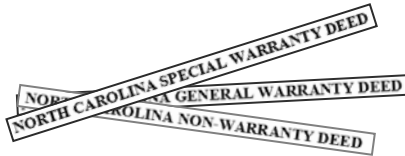
1. Governmental regulation (zoning, subdivision, environmental)
2. Eminent domain
3. Matters:
  - Created, suffered, assumed by insured
  - Known to insured not disclosed
  - No loss or damage
  - Post-policy
  - Failure of insured to pay value
4. Lender not comply with doing business laws of state
5. Usury, consumer credit protection or TIL
6. Creditors' rights
7. Taxes or assessments in mini-gap



## Lender's Real Estate Owned (REO) and Miscellaneous Post-Foreclosure Title Issues

## Lender's REO Deed

- General Warranty Deed from lender → may trigger policy coverage under loan policy insuring deed of trust foreclosed *if* loan loss at end of the REO conveyance transaction *due to a covered title defect*
- Special Warranty Deed from lender → may trigger policy coverage under loan policy insuring deed of trust foreclosed *if* loan loss at end of transaction due to a covered *title defect which is the "lawful claim" of a person "claiming by, under or through" the Lender*
- Non-Warranty (or Quitclaim) Deed from lender → no warranties → no lender liability → no loan policy coverage



## Risks of Post-Foreclosure Bankruptcy: Bid < Value ??

*BFP vs RTC*, 511 U.S. 531, 114 S. Ct. 1757 (1994) (not fraudulent conveyance, public sale presumed "reasonably equivalent value" to amount trustee could obtain in a Chapter 7 liquidation, § 548)

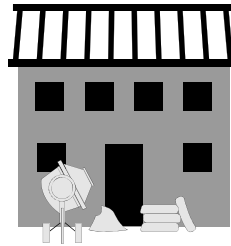
vs.

*In re Villareal*, 413 B.R. 633 (Bkrtcy. S.D. Texas, 2009) (might be preference; no presumption, § 547)

In an REO situation, this becomes a relevant concern for the title insurer since the policy does provide creditors' rights coverage for *prior* transactions.

## Construction Loans – Lien Waivers

- Mechanics' & Materialmen's liens
  - As long as all relate back subsequent to DOT AND DOT has sufficient future advance provision (if future advances to be secured) → not need *new* lien waiver at time of REO for period prior to lender taking title through foreclosure
  - Lender = REO seller → only need their affidavit for time of their ownership
- Status of Construction



## UCC Fixture Filings - Priority GS 25-9-334

**EXAMPLES:** water filtration system, HVAC, underground propane tanks

**PRIORITY – G.S. 25-9-334:**

- **UCC has priority IF:**
  - Filed before the deed of trust of same borrower, same property
  - Purchase money fixture filing filed within 20 days of installation (other than construction loan)
  - Replacements of domestic appliances that are consumer goods
  - Readily removable factory or office machines, or equipment that is not primarily used or leased for use in the operation of the real property
- **Deed of trust priority IF**
  - **Filed prior to non-PM fixture filing**
  - **Construction deed of trust (or refinance thereof) over fixture affixed during construction -- if a record of the mortgage is recorded before the goods become fixtures and the goods become fixtures before the completion of the construction. A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage.**

**UCC filed AFTER deed of trust** → Not extinguished if:



- it was purchase money on a fixture filed with 20-days of installation, other than construction loan situation. G.S. 25-9-334 (attached)

## UCC Fixture Filings - Enforcement GS 25-9-604

**ENFORCEMENT** – GS 25-9-604 provides in part:

- (a) if a security agreement covers both personal and real property, a secured party may proceed as to both the personal property and the real property in accordance with the rights with respect to the real property
- (b) if a security agreement covers goods that are or become fixtures, a secured party may proceed in accordance with the rights with respect to real property
- (c) if a secured party holding a security interest in fixtures has priority over all owners and encumbrancers of the real property, the secured party, after default, may remove the collateral from the real property.

Item (d) of GS 25-9-604 addresses injury resulting from removal and provides for prompt reimbursement to non-debtor owner for cost of repair of any physical injury caused by the removal, but *not* diminution in value of the real property caused by the absence of the goods removed or by any necessity of replacing them.

### **BOTTOM LINE**

Lender REO seller probably won't pay, fixture lien beneficiary may not be willing to pay,

- *Is your buyer wanting/expecting to keep the fixture → they may have to pay.*
- *Sale is subject to right of creditor to enter on property to remove.*

## Should a Mobile or Manufactured Home be Included?

- Ask *not just for VIN or serial number*
- Ask for address
- Ask for all owners of real estate since model year of home
- Ask for VIN numbers nearby in series
- Can call or email DMV for this information





## Maintenance Liens

(GS 160A-193, -228, -233, and -443)  
(GS 153-185 and 195)

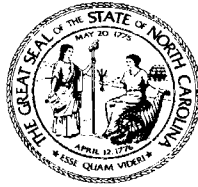
- Mowing, trash pickup
- Property vacant for a while
- Often not yet filed
- Have superpriority

## FHA Anti-Flipping “Seasoning” Waiver

- (a) Arms length contract -- no identity of interest between parties
- (b) Seller holds title - individual or "established" legitimately formed & operated LLC, corporation or trust
- (c) No previous flips of property within past 12 months
- (d) Marketed openly through MLS, auction, FSBO
- (e) If the proposed price exceeds the seller’s acquisition price by 20% or more:
  1. second appraisal evaluating legitimate renovations and repairs by seller or other sufficient explanation
  2. independent detailed inspection (not just of the repairs and renovations, but the entire structure)

## Fannie Mae Anti-Flipping "Seasoning" REO Investor Deed Restrictions

*"Grantee herein shall be prohibited from conveying captioned property to a bona fide purchaser for value for a sale prices of greater than (\$\_\_\_\_\_ = 120% of sales price) for a period of one hundred [sic] and eighty (180) days from the date of this deed. Grantee shall also be prohibited from encumbering subject property with a security interest in the amount greater than (\$\_\_\_\_\_ = 120% of sales price) for a period of one hundred and eighty (180) days from the date of this deed. These restrictions shall run with the land and are not personal to grantee."*



**ADMINISTRATIVE OFFICE OF THE COURTS  
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August 31 2006

**MEMORANDUM**

**TO:** Clerks of Superior Court

**FROM:** Peter E. Powell and Pamela Weaver Best

**SUBJECT: Due Diligence Required Before Notice by Publication/Posting**

Over time, questions have arisen regarding the validity of publication or posting as a means of service of process in many forms of actions, including foreclosures. The short answer is that service by publication/posting is not allowed unless the plaintiff establishes by sworn affidavit the circumstances justifying substituted service, and details the efforts made to actually locate and serve the defendant—this is referred to as “due diligence.” The long answer is set forth below.

Why is due diligence important?

A basic principle of law is that at a minimum a person has a right to know what action is pending and has a right to be heard to challenge the action. In *Mullane v. Central Hanover Bank and Trust Company*, 339 U. S. 306(1950), the United States Supreme Court held “[t]he fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending...” This is often referred to as notice and opportunity to be heard. In civil and special proceeding cases notice is given when the person is served with summons either by the sheriff, certified mail, designated delivery service or acceptance of service.

When service by any of the above means is, for whatever reason, unsuccessful the plaintiff has the right to use ‘substituted service’, usually publication, to provide notice to the defendant. However, substituted service should only be attempted once other efforts

to locate the defendant have been exhausted. This is in large part due to the fact that many people do not read the notices in the paper to look for cases pending against them.

What acts of due diligence must be shown to permit service by publication?

“A party subject to service of process under N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 4(j)(9) may be served by publication whenever the party's address, whereabouts, dwelling house, or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party... Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of N.C. Gen. Stat. § 1-75.10(2) and the **circumstances warranting the use of service by publication.**” *Sink v. Easter*, 284 NC 555 (1974),

In *Barclays American/Mortgage Corp. v. Beca Enterprises*, 116 NC App. 100(1994), the court held that notice by posting in a foreclosure action was invalid where the lender's only attempt at service was mailed to the partnership's business address when the partners residential addresses were readily available from a Certificate of General Partnership on record with the register of deeds, where tax records revealed both residential and other business addresses, as did the local telephone directory. “The ‘due diligence’ test of Rule 4(j1) requires a party to use all reasonably available resources to accomplish service.” See also *Federal Land Bank v. Lackey*, 94 NC App. 553 (1989).

In those instances, such as foreclosure, in which the Clerk is called upon to decide whether a party received notice of a proceeding, it is appropriate for the Clerk to require the serving party to establish what attempts were made to locate the party to be served. A simple statement that defendant could not be located is not sufficient. This information, in the form of an affidavit, is what the Clerk uses to ensure that the party serving by publication /posting used “due diligence” to attempt to locate the other party, and that the circumstances “warrant use of service by publication...” G. S. 1A-1, Rule 4(j2)(3).

Due diligence could include, but is not limited to:

1. Checking phone books
2. Checking tax records
3. Checking DMV and Voter records
4. Checking real estate (Register of Deeds)
5. Searching the plaintiff's own records (For example, a lender should check its own records for change of address information that may be on file)
6. If appropriate, doing an Internet Search

We hope you find this information helpful.