

GENERAL ASSEMBLY OF NORTH CAROLINA
1993 SESSION

CHAPTER 305
SENATE BILL 834

AN ACT TO CLARIFY THE PROCEDURE FOR FORECLOSURE UNDER POWER
OF SALE AND TO ESTABLISH A NEW UPSET BID PROCEDURE.

The General Assembly of North Carolina enacts:

Section 1. G.S. 45-21.1 reads as rewritten:

"§ 45-21.1. Definition. Definitions; construction.

- (a) As used in this Article, The following definitions apply in this Article:
- (1) 'Resale' means a resale of real property or a resale of any leasehold interest created by a lease of real property held pursuant to G.S. 45-21.30.
 - (2) 'sale'-'Sale' means a sale of real property or a sale of any leasehold interest created by a lease of real property pursuant to (i) an express power of sale contained in a mortgage, deed of trust, leasehold mortgage, or leasehold deed of trust-trust or (ii) a 'power of sale', under this Article, authorized by other statutory provisions.
- (b) The following constructions apply in this Article:
- (1) The terms 'mortgage' or 'deed of trust' include leasehold mortgages or leasehold deeds of trust.
 - (2) The terms 'mortgagee' or 'trustee' include any person or entity exercising a power of sale pursuant to this Article.
 - (3) The terms 'real property' or 'property' include any leasehold interest created by a lease of real property."

Sec. 2. G.S. 45-21.3 is repealed.

Sec. 3. G.S. 45-21.7(a) reads as rewritten:

"(a) When the property to be sold consists of separate tracts of real property situated in different counties, there shall be a separate advertisement, sale and report of sale of the property in each county. The report of sale for the property in any one county shall be filed with the clerk of the superior court of the county in which such property is situated. ~~The sale, and each subsequent resale, sale~~ of each such tract shall be subject to ~~a separate upset bid. bids.~~ The clerk of the superior court of the county where the property is situated has jurisdiction with respect to ~~resale-upset bids~~ of property situated within his county. To the extent the clerk deems necessary, the sale of each separate tract within his county, with respect to which an upset bid is received, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto."

Sec. 4. G.S. 45-21.8 is amended by adding a new subsection to read:

"(b1) When real property is sold in parts, the sale of any such part is subject to a separate upset bid; and, to the extent the clerk of superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto."

Sec. 5. G.S. 45-21.9A reads as rewritten:

"§ 45-21.9A. Simultaneous foreclosure of two or more instruments.

~~When the same property secures two or more mortgages or deeds of trust held by the same person, person are secured in whole or in part by the same property,~~ and there are no intervening liens, except for ad valorem taxes, between such mortgages or deeds of trust, the obligations secured by such mortgages or deeds of trust may be combined and the property sold once to satisfy the combined obligations if (i) powers of sale are provided in all such instruments; (ii) there is no provision in any such instrument which would not permit such a procedure; (iii) all the terms of all such instruments requiring compliance by the lender in connection with foreclosure sales are complied with; and (iv) all requirements of this Chapter governing power of sale foreclosures are met with respect to all such instruments. The proceeds of any sale shall be applied as provided in this Chapter. As between the combined obligations being foreclosed, proceeds shall be applied in the order of priority of the instruments securing them, and any deficiencies shall be determined accordingly."

Sec. 6. G.S. 45-21.10(b) reads as rewritten:

"(b) If the instrument contains no provision with respect to a cash deposit at the sale, the mortgagee or trustee ~~holding the sale of real property~~ may require the highest bidder immediately to make a cash deposit not to exceed ~~ten percent (10%) of the amount of the bid up to and including one thousand dollars (\$1,000), plus five percent (5%) of any excess over one thousand dollars (\$1,000).~~ the greater of five percent (5%) of the amount of the bid or seven hundred fifty dollars (\$750.00)."

Sec. 7. G.S. 45-21.15(b) reads as rewritten:

"(b) When no sale has actually been held, compensation for a trustee's services is determined as follows:

- (1) If no compensation for the trustee's services in holding a sale is provided for in the instrument, the trustee is not entitled to any compensation;
- (2) If compensation is specifically provided for the trustee's services when no sale is actually held, the trustee is entitled to such compensation;
- (3) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, the trustee is entitled to ~~such compensation as the parties agree upon;~~ follows: (i) one-fourth of the completed sale compensation before the trustee files the notice of hearing; (ii) one-half after the filing of the notice of hearing; and (iii) three-fourths after the hearing.
- (4) ~~If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, and the parties are not~~

able to agree as to the trustee's compensation, then five percent (5%) of the amount of the obligation secured by the instrument, not exceeding the amount stipulated in the instrument as compensation for the trustee's services in actually holding a sale, shall be deposited with the clerk of the superior court. Such sum shall be held by the clerk until the trustee's compensation is fixed by the clerk, upon petition by the trustee, after notice to the person who deposited such sum."

Sec. 8. G.S. 45-21.16 reads as rewritten:

"§ 45-21.16. Notice and hearing.

(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall ~~serve upon each party entitled to notice under this section a notice of hearing.~~ file with the clerk of court a notice of hearing in accordance with the terms of this section. The notice shall specify a time and place for a hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. ~~After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. The notice shall be served in any manner provided by the Rules of Civil Procedure for the service of summons, or may be served by actual delivery by registered or certified mail, return receipt requested; provided, that in those instances in which service by publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property for a period of not less than 20 days before the date of the hearing; provided further, if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting a notice in a conspicuous place and manner upon the property for a period of not less than 20 days before the date of hearing, which 20-day period may run concurrently with any other effort to effect service.~~ The notice shall specify a time and place for the hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. However, in those instances that publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of the hearing, and if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting the notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of hearing. Service by posting may run concurrently with any other effort to effect service. The notice shall be posted by the sheriff. In the event that the service is obtained by posting, an affidavit shall be filed with the clerk of court showing the circumstances warranting the use of service by posting.

If all parties are not served in time to hold the hearing on the date stated in the notice of hearing, the clerk shall order it continued. If any party is not served or is not timely served prior to the date of the hearing, the clerk shall order the hearing continued to a date and time certain, not less than 10 days from the date scheduled for the original hearing. All notices already timely served remain effective; when the mortgagee or

~~trustee has satisfied the notice requirements of this section, the clerk shall notify all parties of the date to which the hearing has been continued. effective. The mortgagee or trustee shall satisfy the notice requirement of this section with respect to those parties not served or not timely served with respect to the original hearing. The clerk shall notify any party who has not received actual notice of the date to which the hearing has been continued by sending the notice by first class mail to his last known address. Any party timely served, who has not received actual notice of the date to which the hearing has been continued, shall be sent the order of continuance by first-class mail at his last known address.~~

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

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

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

- (1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, original holder, and book and page of the security instrument.
- (2) The name and address of the holder of the security ~~instrument, and if different from the original holder, his name and address.~~ instrument at the time that the notice of hearing is filed.
- (3) The nature of the default claimed.
- (4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.
- (5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.
- (6) Repealed by Session Laws 1977, c. 359, s. 7.

- (7) The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain a statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that his failure to attend the hearing will not affect his right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should he elect to do so.
- (8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.
- (8a) The name, address, and telephone number of the trustee or mortgagee.
- (9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.
- (10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.
- (11) That the hearing may be held on a date later than that stated in the notice and that the party will be notified of any change in the hearing date.

(d) The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. In the event that the property to be sold consists of separate tracts situated in different counties or a single tract in more than one county, only one hearing shall be necessary. However, prior to that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. A certified copy of any authorization or order by the clerk shall be filed in any other county where any portion of the property to be sold is located before the mortgagee or trustee may proceed to advertise and sell any property located in that county. In the event that sales are to be held in more than one county, the provisions of G.S. 45-21.7 apply.

(d1) The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party

from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal.

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

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

(g) Any notice, order, or other papers required by this Article to be filed in the office of the clerk of superior court shall be filed in the same manner as a special proceeding."

Sec. 9. G.S. 45-21.16A reads as rewritten:

"§ 45-21.16A. Contents of notice of sale.

The notice of sale shall –

- (1) Describe the instrument pursuant to which the sale is held, by identifying the original mortgagors and recording ~~data, and if data.~~ If the record owner is different from the original mortgagors ~~mortgagors,~~ the notice shall also list the record owner of the property, as reflected on the records of the register of deeds not more than 10 days prior to posting the notice, who may be identified as present owners, and may notice. The notice may also reflect the owner not reflected on the records if known;
- (2) Designate the date, hour and place of sale consistent with the provisions of the instrument and this Article;

- (3) Describe the real property to be sold in such a manner as is reasonably calculated to inform the public as to what is being sold, which description may be in general terms and may incorporate the description as used in the instrument containing the power of sale by reference thereto. Any property described in the instrument containing the power of sale which is not being offered for sale should also be described in such a manner as to enable prospective purchasers to determine what is and what is not being offered for sale;
- (4) Repealed by Session Laws 1967, c. 562, s. 2.
- (5) State the terms of the sale provided for by the instrument pursuant to which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale;
- (6) Include any other provisions required by the instrument to be included therein; ~~and~~
- (7) State that the property will be sold subject to taxes and special assessments if it is to be so ~~sold~~; and
- (8) State whether the property is being sold subject to or together with any subordinate rights or interests provided those rights and interests are sufficiently identified."

Sec. 10. G.S. 45-21.17 reads as rewritten:

"§ 45-21.17. Posting and publishing notice of sale of real property.

In addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument,

- (1) Notice of sale of real property shall
 - a. Be posted, ~~at the courthouse door in the area designated by the clerk of superior court for posting public notices in the county in which the property is situated, for at least 15-20 days immediately preceding the sale.~~
 - b. And in addition thereto,
 1. ~~If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but~~ The notice shall be published once a week for at least two successive weeks in a newspaper published and qualified for legal advertising in the county in which the property is situated.
 2. If no such newspaper is published in the county, then notice shall be published once a week for at least two successive weeks in a newspaper having a general circulation in the county.
 3. In addition to the required newspaper advertisement ~~under 1 or 2 above, advertisement,~~ the clerk may in his discretion, on application of any interested party, authorize such additional advertisement as in the opinion

of the clerk will serve the interest of the parties, and permit the charges for such further advertisement to be taxed as a part of the costs of the foreclosure.

- (2) When the notice of sale is published in a newspaper,
 - a. The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days, including Sundays, and
 - b. The date of the last publication shall be not more than 10 days preceding the date of the sale.
- (3) When the real property to be sold is situated in more than one county, the provisions of subdivisions (1) and (2) shall be complied with in each county in which any part of the property is situated.
- (4) The notice of sale shall be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of the hearing provided by G.S. 45-21.16 whose address is known to the trustee or mortgagee and in addition shall also be mailed by first-class mail to any party desiring a copy of the notice of sale who has complied with ~~subdivision (5) below.~~ G.S. 45-21.17A. Notice of the hearing required by G.S. 45-21.16 shall be sufficient to satisfy the requirement of notice under this section provided such notice contains the information required by G.S. 45-21.16A.
- (5) a. ~~Requests for Copies of Notice. Any person desiring a copy of any notice of default and sale under any security instrument with power of sale upon real property may, at any time subsequent to the recordation of the security instrument and prior to the giving of notice of hearing provided for in G.S. 45-21.16, cause to be filed for record in the office of the register of deeds of the county where all or any part of the real property is situated, a duly acknowledged request for a copy of such notice of sale. This request shall be signed and acknowledged by the party making the request, shall specify the name and address of the party to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation, and the book and page where the same is recorded, and shall be in substantially the following form:~~

~~"In accordance with the provisions of G.S. 45-21.17(5) request is hereby made that a copy of any notice of sale under the deed of trust (mortgage) recorded on, 19...., in Book, page, records of County, North Carolina, executed by as trustor (mortgagor), in which is named as beneficiary (mortgagee), and as trustee, be mailed to at the following address:....."~~

Signature:

- ~~b. Register of Deeds' Duties.— Upon the filing for record of such request, the register of deeds shall index in the general index of grantors the names of the trustors (mortgagors) recited therein, and the names of the persons requesting copies, with a marginal entry in the index of the book and page of the recorded security instrument to which the request refers; or upon the filing for record of such request, the register of deeds may instead of indexing such request on the general index of grantors stamp upon the face of the security instrument referred to in the request the book and page of each request for notice thereunder.~~
- ~~e. Mailing Notice.— The mortgagee, trustee, or other person authorized to conduct the sale shall at least 20 days prior to the date of the sale cause to be deposited in the United States mail an envelope with postage prepaid containing a copy of the notice of sale, addressed to each person whose name and address are set forth in a duly recorded request therefor as specified in [paragraph] a above, directed to the address designated in such request.~~
- ~~d. Effect of Request on Title.— No request for a copy of any notice filed pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property, or be deemed notice to any person that the person requesting copies of notice has any claim or any right, title or interest in, or lien or charge upon, the property described in the deed of trust or mortgage referred to therein.~~
- ~~e. Evidence of Compliance.— The affidavit of the mortgagee, trustee, or other person authorized to conduct the sale that copies of the notice of sale have been mailed to all parties filing requests for the same hereunder shall be deemed prima facie true. If on hearing it is proven that a party seeking to have the foreclosure sale set aside or seeking damages resulting from the foreclosure sale was mailed notice in accordance with this section or had actual notice of the sale before it was held (or if a resale was involved, prior to the date of the last resale), then he shall not prevail. Costs, expenses, and reasonable attorneys' fees incurred by the prevailing party in any action to set aside the foreclosure sale or for damages resulting from the foreclosure sale shall be allowed as of course to the prevailing party.~~
- ~~f. Action to Set Foreclosure Sale Aside for Failure to Comply.— A person entitled to notice of sale by virtue of G.S. 45-21.17(5)a shall not bring any action to set the sale aside on grounds that he was not mailed the notice of sale unless such action is brought prior to the filing of the final report and~~

~~account as provided in G.S. 45-21.33, if the property is purchased by someone other than the secured party; or if brought by the secured party, unless the action is brought within six months of the date of such filing and prior to the time the secured party sells the property to a bona fide purchaser for value; nor unless the party bringing such action also tenders an amount exceeding the reported sale price or the amount of the secured party's interest in the property, including all expenses and accrued interest, whichever is greater. Such tender shall be irrevocable pending final adjudication of the action.~~

~~g. Action for Damages from Foreclosure Sale for Failure to Comply.—A person entitled to notice of sale by virtue of G.S. 45-21.17(5)a shall not bring any action for damages resulting from the sale on grounds that he was not mailed the notice unless such action is brought within six months of the date of the filing of the final report and account as provided in G.S. 45-21.33, nor unless the party bringing such action also deposits with the clerk a cash or surety bond approved by the clerk and in such amount as the clerk deems adequate to secure the party defending the action for such costs, expenses, and reasonable attorneys' fees to be incurred in the action.~~

(6) Any time periods relating to notice of hearing or notice of sale that are provided in the security instrument may commence with and run concurrently with the time periods provided in ~~G.S. 45-21.16 or 45-21.17.~~ G.S. 45-21.16, 45-21.17, or 45-21.17A."

Sec. 11. Article 2A, Chapter 45 of the General Statutes is amended by adding a new section to read:

"§ 45-21.17A. Requests for copies of notice.

(a) Any person desiring a copy of any notice of sale may, at any time subsequent to the recordation of the security instrument and prior to the filing of notice of hearing provided for in G.S. 45-21.16, cause to be filed for record in the office of the register of deeds of each county where all or any part of the real property is situated, a duly acknowledged request for a copy of such notice of sale. This request shall be a separate instrument entitled 'Request for Notice' and shall be signed and acknowledged by the party making the request, shall specify the name and address of the party to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation, and the book and page where the same is recorded, and shall be in substantially the following form:

'REQUEST FOR NOTICE'

'In accordance with the provisions of G.S. 45-21.17A, request is hereby made that a copy of any notice of sale under the deed of trust (mortgage) recorded on 19...., in Book, page, records of County, North Carolina, executed by as trustor (mortgagor), in which is named as beneficiary

(mortgagee), and as trustee, be mailed to at the following address:
.....

Signature:

[Acknowledgement]

(b) Register of Deeds' Duties. – Upon the filing for record of such request, the register of deeds shall index in the general index of grantors the names of the trustors (mortgagors) recited therein, and the names of the persons requesting copies, with a marginal entry in the index of the book and page of the recorded security instrument to which the request refers; or upon the filing for record of such request, the register of deeds may, instead of indexing such request on the general index of grantors, stamp upon the face of the security instrument referred to in the request the book and page of each request for notice thereunder.

(c) Mailing Notice. – The mortgagee, trustee, or other person authorized to conduct the sale shall at least 20 days prior to the date of the sale cause to be deposited in the United States mail an envelope with postage prepaid containing a copy of the notice of sale, addressed to each person whose name and address are set forth in the Request for Notice, and directed to the address designated in such request.

(d) Effect of Request on Title. – No request for a copy of any notice filed pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property, or be deemed notice to any person that the person requesting copies of notice has any claim or any right, title or interest in, or lien or charge upon, the property described in the deed of trust or mortgage referred to therein.

(e) Evidence of Compliance. – The affidavit of the mortgagee, trustee, or other person authorized to conduct the sale that copies of the notice of sale have been mailed to all parties filing requests for the same hereunder shall be deemed **prima facie** true. If on hearing it is proven that a party seeking to have the foreclosure sale set aside or seeking damages resulting from the foreclosure sale was mailed notice in accordance with this section or had actual notice of the sale before it was held (or if a resale was involved, prior to the date of the last resale), then the party shall not prevail. Costs, expenses, and reasonable attorneys' fees incurred by the prevailing party in any action to set aside the foreclosure sale or for damages resulting from the foreclosure sale shall be allowed as of course to the prevailing party.

(f) Action to Set Foreclosure Sale Aside for Failure to Comply. – A person entitled to notice of sale by virtue of this section shall not bring any action to set the sale aside on grounds that he was not mailed the notice of sale unless such action is brought prior to the filing of the final report and account as provided in G.S. 45-21.33, if the property was purchased by someone other than the secured party; or if brought by the secured party, unless such action is brought within six months of the date of such filing and prior to the time the secured party sells the property to a bona fide purchaser for value, if the property was purchased by the secured party. In either event, the party bringing such an action shall also tender an amount exceeding the reported sale price or the amount of the secured party's interest in the property, including all expenses and

accrued interest, whichever is greater. Such tender shall be irrevocable pending final adjudication of the action.

(g) Action for Damages from Foreclosure Sale for Failure to Comply. – A person entitled to notice of sale by virtue of this section shall not bring any action for damages resulting from the sale on grounds that he was not mailed the notice unless such action is brought within six months of the date of the filing of the final report and account as provided in G.S. 45-21.33. The party bringing such an action shall also deposit with the clerk a cash or surety bond approved by the clerk and in such amount as the clerk deems adequate to secure the party defending the action for such costs, expenses, and reasonable attorneys' fees to be incurred in the action."

Sec. 12. G.S. 45-21.21 reads as rewritten:

"§ 45-21.21. Postponement of sale.

(a) Any person exercising a power of sale may postpone the sale to a day certain not later than 90 days, exclusive of Sunday, after the original date for the sale –

- (1) When there are no bidders, or
- (2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
- (3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or
- (4) When he is unable to hold the sale because of illness or for other good reason, or
- (5) When other good cause exists.

The person exercising a power of sale may postpone the sale more than once whenever any of the above conditions are met, so long as the sale is held not later than 90 days after the original date for the sale.

(b) Upon postponement of a sale, the person exercising the power of sale shall personally, or through his agent or attorney –

- (1) At the time and place advertised for the sale, publicly announce the postponement thereof; ~~and~~
- (2) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted at the courthouse door, as provided by G.S. 45-21.17, a notice of the postponement; and
- (3) Give written or oral notice of postponement to each party entitled to notice of sale under G.S. 45-21.17.

(c) The posted notice of postponement shall –

- (1) State that the sale is postponed,
- (2) State the hour and date to which the sale is postponed,
- (3) State the reason for the postponement, and
- (4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor or within 90 days of the date originally fixed for the sale, then prior to such ~~sale's~~ sale taking place

the provisions of G.S. ~~45-21.16~~, 45-21.16 need not be complied with but the provisions of 45-21.16A, and ~~45-21.17~~ 45-21.17, and 45-21.17A shall be again complied with ~~with, except or if on appeal, that if on appeal from findings of the clerk pursuant to G.S. 45-21.16(d) and (e) the appellate court authorizes orders~~ the sale to be held, as to such sale so authorized the provisions of G.S. 45-21.16 need not be complied with again but those of G.S. ~~45-21.16A~~ 45-21.16A, and ~~45-21.17~~ 45-21.17, and 45-21.17A shall be.

(e) A sale may be postponed more than once provided the final postponed sale date is not later than 90 days, exclusive of Sunday and legal holidays, after the original date for the sale."

Sec. 13. G.S. 45-21.22 reads as rewritten:

"§ 45-21.22. Procedure upon dissolution of order restraining or enjoining sale, sale, or upon lifting of automatic bankruptcy stay.

(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable.

(c) When, after the entry of any authorization or order by the clerk of superior court pursuant to G.S. 45-21.16 and before the expiration of the 10-day upset bid period, the foreclosure is stayed by the debtor filing a bankruptcy petition and thereafter the stay is lifted, the trustee or mortgagee shall not be required to comply with the provisions of G.S. 45-21.16, but shall advertise and hold the sale in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A."

Sec. 14. G.S. 45-21.23 reads as rewritten:

"§ 45-21.23. Time of sale.

(a) A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place. The sale shall be held between the hours of 10:00 A.M. and 4:00 P.M. on any day other than Sunday or a legal holiday.

~~(b) No sale shall commence before 10:00 o'clock A.M. or after 4:00 o'clock P.M.~~

~~(c) No sale shall continue after 4:00 o'clock P.M., except that in cities or towns of more than 5,000 inhabitants, as shown by the most recent federal census, sale of personal property may continue until 10:00 o'clock P.M."~~

Sec. 15. G.S. 45-21.24 reads as rewritten:

"§ 45-21.24. Continuance of uncompleted sale.

A sale commenced but not completed within the time allowed by G.S. 45-21.23 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than ~~Sunday~~ Sunday or a legal holiday. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued."

Sec. 16. G.S. 45-21.27 reads as rewritten:

"§ 45-21.27. Upset bid on real property; compliance bonds.

(a) ~~An upset bid is an advanced, increased, or raised bid whereby any person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent (10%) of the first one thousand dollars (\$1000) thereof plus five percent (5%) of any excess above one thousand dollars (\$1000), or last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of twenty five dollars (\$25.00), seven hundred fifty dollars (\$750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of sale or last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars (\$750.00). such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, The deposit required by this section shall be filed with the clerk of the superior court, with whom the report of the sale or the last notice of upset bid was filed, within ten days after the filing of such report; such deposit to be made with the clerk of the superior court before the expiration of the tenth day, filed by the close of normal business hours on the tenth day after the filing of the report of the sale or the last notice of upset bid, and if the tenth day shall fall upon a Sunday or legal holiday, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid filed on the day following when said office is open for the regular dispatch of its business. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b). Subject to the provisions of G.S. 45-21.30, there shall be no resales; rather, there may be successive upset bids each of which shall be followed by a period of 10 days for a further upset bid. When an upset bid is not filed following a sale, resale, or prior upset bid within the time specified, the rights of the parties to the sale or resale become fixed.~~

(b) ~~The clerk of the superior court may require the person submitting an upset bid an upset bidder or the highest bidder at a resale held pursuant to G.S. 45-21.30 also to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The amount of such compliance bond shall not exceed the amount of the upset bid be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond, less the amount of the any required deposit. The compliance bond shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with the bid.~~

(c) ~~The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond.~~

~~(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid.~~

(e) At the same time that an upset bid on real property is submitted to the court as provided for in subsection (a) above, together with a compliance bond if one is required, the upset bidder shall simultaneously file with the clerk a notice of upset bid. The notice of upset bid shall:

- (1) State the name, address, and telephone number of the upset bidder;
- (2) Specify the amount of the upset bid;
- (3) Provide that the sale shall remain open for a period of 10 days after the date on which the notice of upset bid is filed for the filing of additional upset bids as permitted by law; and
- (4) Be signed by the upset bidder or the attorney or the agent of the upset bidder.

(e1) When an upset bid is made as provided in this section, the clerk shall notify the trustee or mortgagee who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owner(s) of the property.

(f) When an upset bid is made as provided in this section, the last prior bidder, regardless of how the bid was made, shall be released from any further obligation on account of the bid and any deposit or bond provided by him shall be released.

(g) Any person offering to purchase real property by upset bid as permitted in this Article shall be subject to and bound by the terms of the original notice of sale except as modified by court order or the provisions of this Article.

(h) The clerk of superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have the authority to fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure."

Sec. 17. G.S. 45-21.28 is repealed.

Sec. 18. G.S. 45-21.29 reads as rewritten:

"§ 45-21.29. ~~Resale of real property; jurisdiction; procedure; orders~~ Orders for possession.

~~(a) When an upset bid on real property is submitted to the clerk of the superior court, together with a compliance bond if one is required, the clerk shall order a resale.~~

~~(b) Notice of any resale to be held because of an upset bid shall—~~

~~(1) Be posted, at the courthouse door in the county in which the property is situated, for 15 days immediately preceding the sale.~~

~~(2) And in addition thereto,~~

~~a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but~~

~~b. If no such newspaper is published in the county, then notice shall be published once a week for at least two successive~~

~~weeks in a newspaper having a general circulation in the county.~~

~~(3) Notice of resale shall be mailed to each party entitled to notice of sale pursuant to G.S. 45-21.17.~~

~~(e) When the notice of resale is published in a newspaper,~~

~~(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than eight days, including Sunday, and~~

~~(2) The date of the last publication shall not be more*than seven days preceding the date of sale.~~

~~(d) When the real property to be resold is situated in more than one county, the provisions of subsections (b) and (c) shall be complied with in each county in which any part of the property is situated.~~

~~(e) The person holding the resale shall report the resale in the same manner as required by G.S. 45-21.26.~~

~~(f) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such resale remains subject to other upset bids and resales pursuant to this Article.~~

~~(g) Resales may be had as often as upset bids are submitted in compliance with this Article.~~

~~(h) When a resale of real property is had pursuant to an upset bid, such sale may not be consummated until it is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting any further upset bid, pursuant to G.S. 45-21.27, has expired.~~

~~(i) Except as otherwise provided in this section, all the provisions of this Article applicable to an original sale are applicable to resales.~~

~~(j) The clerk of the superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have authority to fix and determine all necessary procedural details with respect to resales in all instances in which this Article fails to make definite provision as to such procedure.~~

~~(k) Orders for possession of real property sold pursuant to this Article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:~~

~~(1) Such property has been sold in the exercise of the power of sale contained in any mortgage or deed of trust or granted by this Article, mortgage, deed of trust, leasehold mortgage, leasehold deed of trust, or a power of sale authorized by any other statutory provisions, and~~

~~(2) The purchaser is entitled to possession, and~~

~~(2a) The provisions of this Article have been complied with, and~~

~~(3) The sale has been consummated, and the purchase price has been paid, and~~

- (4) ~~The sale has been consummated, or if a resale is held, such resale has been confirmed,~~ The purchaser has acquired title to and is entitled to possession of the real property sold, and
- (5) ~~Ten days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and~~
- (6) ~~Application is made by petition to such clerk by the mortgagee, the trustee named in such deed of trust, any substitute trustee, or the purchaser of the property.~~ Application is made by petition to such clerk by the mortgagee, the trustee named in such deed of trust, any substitute trustee, the purchaser of the property, or any such person's authorized representative.

(l) ~~An order for possession issued pursuant to G.S. 45-21.29(k) shall be directed to the sheriff, sheriff and shall authorize him to remove all occupants the party or parties in possession, and their personal property, property from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. The purchaser shall have the same rights and remedies in connection with the execution of an order for possession and the disposition of personal property following execution as are provided to a landlord under North Carolina law, including Chapters 42 and 44A of the General Statutes.~~

(m) When the real property sold is situated in more than one county, the provisions of subsection (l) of this section shall be complied with in each county in which any part of the property is situated."

Sec. 19. G.S. 45-21.29A reads as rewritten:

"§ 45-21.29A. ~~No necessity~~ Necessity for confirmation of sale.

~~No confirmation of sales or resales of real property made pursuant to this Article shall be required except as provided in G.S. 45-21.29(h) for resales. required. If in case of an original sale under this Article no upset bid has been filed at the expiration of the 10-day period, as provided in G.S. 45-21.27, an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed."~~

Sec. 20. G.S. 45-21.30 reads as rewritten:

"§ 45-21.30. ~~Failure of bidder to make cash deposit or to comply with bid; resale.~~

(a) ~~If the terms of a sale of real property require the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.~~

(b) ~~Repealed by Session Laws 1967, c. 562, s. 2.~~

(c) ~~When the highest bidder at a sale or resale of real property or any upset bidder fails to comply with his bid upon tender to him of a deed for the real property or after a bona fide attempt to tender such a deed, the person authorized to sell the property may hold a resale. the clerk of superior court may, upon motion, enter an order authorizing a resale of the real property. The procedure for such resale shall be is the same in every respect as is provided by this Article in the case of an original sale of real property except that the provisions of G.S. 45-21.16 are not applicable to a resale, and~~

~~the provisions of G.S. 45-21.29(b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale. the resale.~~

(d) A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all the costs of such resale or resales. the resale. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for which the defaulting bidder remains liable under this section.

(e) Nothing in this section deprives any person of any other remedy against the defaulting bidder."

Sec. 21. G.S. 45-21.33(c) reads as rewritten:

"(c) The person who holds the sale shall also file with the clerk –

- (1) A copy of the notices of sale and resale, if any, which were posted, and
- (2) A copy of the notices of sale and resale, if any, which were published in a newspaper, together with an affidavit of publication thereof, if the notices were so published;
- (3) Proof as required by the clerk, which may be by affidavit, that notices of hearing, sale and resale were served upon all parties entitled thereto under G.S. 45-21.16, ~~45-21.17 and 45-21.29.~~ G.S. 45-21.17, 45-21.17A, and 45-21.30. In the absence of an affidavit to the contrary filed with the clerk, clerk prior to the order confirming the sale, an affidavit by the person holding the sale that the notice of sale was posted at the courthouse door in the area designated by the clerk of superior court for posting public notices in the county or counties in which the property is situated 20 days prior to the sale shall be proof of compliance with the requirements of G.S. 45-21.17(1)a."

Sec. 22. G.S. 45-21.34 reads as rewritten:

"§ 45-21.34. Enjoining mortgage sales ~~or confirmations thereof~~ on equitable grounds.

Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the ~~confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A~~ to enjoin such sale, sale or the confirmation thereof, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient: Provided, that the court or judge enjoining such ~~sale or the confirmation thereof,~~ sale, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be

as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction."

Sec. 23. G.S. 45-21.35 reads as rewritten:

"§ 45-21.35. Ordering ~~resales before confirmation~~; resales; receivers for property; tax payments.

The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, ~~any sale is confirmed~~ the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the appellate division in all cases."

Sec. 24. G.S. 45-38 reads as rewritten:

"§ 45-38. Recording of foreclosure.

In case of foreclosure of any deed of trust, or mortgage, the ~~trustee or mortgagee trustee, mortgagee, or the trustee's or mortgagee's attorney~~ shall record a notice of foreclosure and, whenever it is practical to do so, may also enter upon the margin of the record of the deed of trust or mortgage of the fact that such foreclosure and the date when, and the person to whom, a conveyance was made by reason of the foreclosure. In the event the entire obligation secured by a mortgage or deed of trust is satisfied by a sale of only a part of the property embraced within the terms of the mortgage or deed of trust, the ~~trustee or mortgagee~~ trustee, mortgagee, or the trustee's or mortgagee's attorney shall indicate in the notice of foreclosure which property was sold and which was not sold, and may make an additional notation indicating the same, whenever practical.

A notice of foreclosure shall consist of a separate instrument, or that part of the original deed of trust or mortgage rerecorded, reciting the information required hereinabove, the names of all parties to the original instrument, the amount of the obligation secured, a reference by book and page number to the record of the instrument foreclosed, and the date of recording the notice of foreclosure."

Sec. 25. This act becomes effective October 1, 1993, and applies to instruments recorded prior to, on, or after that date.

In the General Assembly read three times and ratified this the 8th day of July, 1993.

Dennis A. Wicker
President of the Senate

Daniel Blue, Jr.
Speaker of the House of Representatives