

NORTH CAROLINA GENERAL ASSEMBLY
1977 SESSION

CHAPTER 359
SENATE BILL 63

AN ACT TO AMEND THE STATUTORY PROVISIONS FOR NOTICE AND HEARING
PRIOR TO MORTGAGE FORECLOSURE SALES TO CLARIFY AMBIGUITIES AND
PROVIDE FOR A MORE EFFICIENT PROCEDURE.

The General Assembly of North Carolina enacts:

Section 1. G.S. 45-21.12(b) is amended by rewriting the second sentence to read as follows:

"For the purpose of this section, a sale is commenced when the notice of hearing or the notice of sale is first filed, given, served, posted, or published, whichever occurs first, as provided by this Article or by the terms of the instrument pursuant to which the power of sale is being exercised."

Sec. 2. G.S. 45-21.16(a) is amended by changing the period at the end of the section to a semicolon and adding the following proviso:

"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."

Sec. 3. G.S. 45-21.16(b) is amended by rewriting the first line as follows:

"(b) Notice of hearing shall be given in a manner authorized in subsection (a) to:".

Sec. 4. G.S. 45-21.16(b)(2) is amended by deleting the first word "To" and capitalizing the "A" in the first word "Any".

Sec. 5. G.S. 45-21.16(b)(3) is rewritten to read as follows:

"(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 term 'record owner' means any person owning a present or future interest of record in the real property which interest 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, mechanic's or materialman's lien, or other lien or security interest in the real property."

Sec. 6. G.S. 45-21.16(c)(5) is amended by substituting a period for the comma after the word "permitted" in the second line and by deleting the remainder of the subdivision.

Sec. 7. G.S. 45-21.16(c) is amended by deleting subdivision (6), renumbering accordingly subdivisions (7) through (9), and adding a new subdivision (9) to read as follows:

"(9) 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."

Sec. 8. G.S. 45-21.16(d) is amended by deleting the words "further find that" from the eighth line and substituting the word "authorize" therefor; by deleting the first word "can" from the ninth line and substituting the word "to" therefor; and by striking the last sentence and substituting therefor the following: "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."

Sec. 9. G.S. 45-21.16(e) is amended by rewriting the last sentence to read as follows:

"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."

Sec. 10. G.S. 45-21.16(f) is amended in the second line by lowering the case of the letter "A" in the word "At" and inserting between the end of the first sentence and the new word "at" the following:

"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 by such party. In all other cases,".

Sec. 11. G.S. 45-21.17(4) is amended by inserting the words "by first-class mail" after the word "mailed" in the first and fourth lines.

Sec. 12. G.S. 45-21.17(5)e is rewritten to read as follows:

"(5) 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."

Sec. 13. G.S. 45-21.17(5) is amended by adding two new subdivisions to read as follows:

"(5) 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.

"(5) 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."

Sec. 14. G.S. 45-21.17 is amended by adding a new subsection (6) to read as follows:

"(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 G.S. 45-21.17."

Sec. 15. G.S. 45-21.30(c) is amended in the sixth line by inserting between the word "provisions" and the word "of" the following:

"of G.S. 45-21.16 are not applicable to a resale, and the provisions".

Sec. 16. All General Statutes amended by this act appear in the 1976 Replacement of Volume 2A.

Sec. 17. This act shall not apply to pending litigation.

Sec. 18. This act shall become effective on October 1, 1977, and shall apply only to those foreclosure actions commenced on or after that date.

In the General Assembly read three times and ratified, this the 10th day of May, 1977.