

Nonjudicial Trust Deed Foreclosures Under the New Laws

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The last few Legislative Sessions have made changes that affect the procedure for conducting nonjudicial trust deed foreclosures. The 2008 Short Session added the “Danger Notice” to foreclosure of residential trust deeds. The 2009 Session modified the Danger Notice and enacted laws that require the trustee to send out a modification request with the Danger Notice to the trust deed grantor. The 2009 Session also added provisions for the protection of tenants of dwelling units. These new 2009 laws had emergency clauses and have been effective now for months. This article summarizes our procedure for conducting nonjudicial foreclosures in light of these new laws.

I. Before Recording Notice of Default and Election to Sell

Before initiating the foreclosure, we recommend ordering a trustee’s sale guarantee (TSG) from your friendly title company to find out the status of title and what liens are against the property. Make certain that the trust deed and all assignments are recorded so that the chain is complete to your client. ORS 86.735(1). Be sure your client has possession of the original note and there are no actions pending to collect it. ORS 86.735(4). If you are not already the trustee of the trust deed, your client must execute an appointment of successor trustee appointing you as trustee. Next, obtain a list of all events of default from your client: missing payments; failing to pay taxes, insurance or a senior trust deed; allowing un-permitted encumbrances, etc. Obtain current figures on the principal balance, interest accruals, late charges, and any credits, and prepare a notice of default and election to sell. ORS 86.735(3). Note that the notice of default and election to sell must contain the information required in the notice of sale. *Id.* Therefore, the notice of default must also contain the new notice to tenants that is now required under ORS 86.745. This notice to tenants is required regardless of whether the property being foreclosed is residential or nonresidential real property. Before recording, determine whether the trust deed is a residential trust deed as defined by ORS 86.705(3) or whether the property contains a dwelling unit occupied by a tenant. As noted below, this is important for sending the Danger Notice and modification request. Many trustees send the Danger Notice to everyone, including junior lien creditors, whether the trust deed is a residential trust deed or not. The Danger Notice found under ORS 86.737 applies to property that is subject to a residential trust deed. A residential trust deed is defined as a trust deed on property with four or fewer residential units, one of which is occupied by the grantor, the grantor’s spouse or grantor’s minor or dependant child at the time foreclosure is commenced. ORS 86.705(3). But be careful. Even though ORS 86.737(1) states that the trustee must give the Danger Notice to the grantor on property subject to a residential trust deed, subsection 5 also requires the trustee to give the Danger Notice to the occupant of residential real property if the trustee has actual knowledge that the grantor is not the occupant. “Residential real property” is not defined in the Oregon Trust Deed Act. Prepare a calendar, or time-line of events and deadlines for the entire nonjudicial proceeding. Refer to the PLF and OSB CLE publications with checklists for nonjudicial foreclosures. The notice of sale must be served at least 120 days before the

sale. ORS 86.740(1). The notice of default and election to sell must be recorded before the notice of sale is served and, as stated above, must include the information in the notice of sale. Therefore, we recommend setting the sale out 130 to 150 days from the time of recording the notice of default to allow time for both personal service on occupants, including posting if necessary, under ORS 86.750, and service on any other parties for whom you have not been able to obtain proof of service. All service must be completed at least 120 days before the sale or the sale must be postponed to a date 120 days after the last service is effected. Once your time-line is set, you are ready to send any assignments of the trust deed, the appointment of successor trustee, and your notice of default and election to sell to the title company for recording. We recommend that instructions to the title company request a date-down endorsement on the TSG through the date of recording the notice of default and election to sell. The notice of default and election to sell must be recorded before the notice of sale is served and, as stated above, must include the information in the notice of sale.

II. After Recording the Notice of Default and Election to Sell

Upon receiving recording information from the title company of the appointment of successor trustee and the notice of default, review the date-down endorsement to the TSG to see if any additional parties have acquired an interest in the property since the effective date of the TSG and may be entitled to notice of foreclosure under ORS 86.740. Prepare the notice of sale, the Danger Notice with the modification request (if you are foreclosing a residential trust deed or against property with a dwelling unit), and all affidavits of mailing required under ORS 86.750. The notice of sale is mailed first class and certified, return receipt requested, to the last known address of all grantors, occupants, junior lien holders and their successors in interest. If the property consists of a condominium unit or lot in a planned unit development, I recommend serving a copy of the notice of sale to the owners association regardless of whether an assessment lien has been recorded or shows on the TSG. (ORS 94.709(2) and 100.450(2) state that recording the declaration constitutes record notice and perfection of the lien for assessments.) No further recording is required to perfect the association's lien. Send the Danger Notice with the modification request in the same manner to all grantors and occupants. As noted above, send the Danger Notice and modification request at the same time as the notice of sale, if you are foreclosing a residential trust deed or there is a dwelling unit that you know the grantor does not occupy. ORS 86.737(5). The 2009 Legislature did a curious thing. It changed ORS 86.770(1) to make the sale effective to foreclose all persons who receive notice, rather than all persons to whom notice was given. (Some title companies now require proof that all parties to be foreclosed actually received notice. LC 136 (not yet assigned a bill number) will be introduced in the 2010 Short Session and is intended to correct the problems in ORS 86.770 created by HB 3004.) Therefore, five to seven days before the 120-day service deadline, we recommend confirming all certified mail cards acknowledging receipt have been returned and signed for by the addressee. If not, assess whether personal service by a process server needs to be made so we have proof of service if the title company requires it. On the 120th day before the sale, confirm that service is complete and that a title date-down endorsement to the TSG has been received showing the recording of the notice of default and no further interests of any person who

has not been served. In the days that follow, monitor receipt of proof of service on occupants regardless of who the occupants are. Also monitor receipt of any modification request which is due to be returned within 30 days after mailing the Danger Notice. If no completed modification request is received within that time, prepare an affidavit for the beneficiary or beneficiary's agent reciting the same. If a completed modification request is received, forward it to the client for compliance with Section 3, Chapter 864, 2009 Oregon Laws. (The new ORS Volume 2 does not include Section 3, Chapter 864, Oregon Laws 2009 in ORS 86.737 where one would expect to find it, but shows it instead in the second note after ORS 86.737. CAVEAT: Section 3, Chapter 864, Oregon Laws 2009 is effective now and is repealed January 2, 2012. *See* Sec 10, Ch 864, Oregon Laws 2009.) Between 50 and 60 days before the sale date, send the notice of sale for publication to a newspaper of general circulation in the county where the property is located for publication. ORS 86.750(2). Proofread the notice for errors after the first publication. The notice must be published once a week for four successive weeks, the last of which must be more than 20 days before the sale. Thirty days before the sale, request a federal tax lien search from the title company with a date-down endorsement to the TSG through the 30th day before the sale. If any IRS liens show up, serve the IRS as required by 26 USC §7425(c) at least 25 days before the sale. If the property contains a dwelling unit that is occupied by tenants, 27 to 25 days before the sale check to see if any rental agreements or leases have been received. This way you know what kind of notice must be given to tenants under 86.755(5) after the sale. If the property is occupied by the grantor or grantor's successor, and the property does not contain a dwelling unit, give these occupants 30 days' notice to vacate. ORS 86.755(5)(b). When you receive the affidavit of publication from the newspaper, or about two weeks before the sale, send the following to the title company with instructions to record: (1) affidavits of mailing, (2) affidavit of publication, (3) proofs of service, (4) notice of sale, (5) Danger Notice with modification request with affidavit from beneficiary or beneficiary's agent stating how the beneficiary has complied with Section 3(1) and (2), Chapter 864, Oregon Laws 2009, and (6) any notice to the IRS. These items must be recorded before the trustee conducts the sale. ORS 86.750(3), (4) and (5). Approximately 10 days before the sale, confirm that all affidavits and any other presale documents have been recorded, begin to prepare the credit bid and obtain bidding instructions from the client. The trustee may credit bid on behalf of the beneficiary. ORS 86.790(6). Then, having received no notices that a bankruptcy has been filed, and provided you have complied with any requests for information under ORS 86.757, conduct the sale on the designated date.

III. After the Sale

After the sale has been conducted, promptly prepare the trustee's deed, having reviewed the procedure and confirmed there have been no defects in the process. The trustee's deed must be delivered no later than ten days after the sale. ORS 86.755(3). If the grantors or their successors are individuals, complete an affidavit of nonmilitary service and hold it in the file. If the property includes a dwelling unit occupied by tenants, send out a notice to vacate, if appropriate, under ORS 86.755(5)(c) – provided the tenant is not a “bona fide tenant” under the federal Protecting Tenants at Foreclosure Act of 2009.

V. Conclusion

The procedure recommended above is only a suggested guide and a reminder. Practitioners who take on the role of trustee should read the statutes and new laws for themselves and draw their own conclusions about how to proceed. Needless to say, not every scenario that might conceivably arise in a nonjudicial foreclosure will allow the above procedure to be followed as written. Be on the lookout for more changes in the 2010 Short Session that may affect nonjudicial foreclosures.

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