



Foreclosure, Part 1

November 2005

With slowing appreciation in home values and the economy in a slower recovery than the rest of the nation, the number of foreclosures has continued to rise in Colorado in 2005 over 2004. The foreclosure rate is up 33 percent this year over last year.

The number of owner redemptions has decreased approximately 30 percent over the last two years, while the number of bank-owned properties has steadily increased.

In this technical bulletin, we'll discuss the three types of foreclosure in general and the Public Trustee System of foreclosure in detail. In next month's technical bulletin, we'll focus on the process for Judicial Foreclosures and Tax Sales.

Definition

Foreclosure is the act of selling by legal proceedings real property to satisfy the obligations of the land owner to a third party. It is the procedure whereby property pledged as security is sold to pay the debt in the event of default in payment or terms.

Three types of foreclosure

There are three main types of foreclosure.

1. The Public Trustee System. Foreclosure is conducted by the Public Trustee's office on deeds of trust containing a power of sale (the right to sell property at public auction in the event of default). The procedure for conducting the foreclosure is set by statute and must be followed precisely.

The deed of trust is an agreement between three parties: the Grantor (owner), the Public Trustee (who has the power of sale), and the Beneficiary (lender).

2. Judicial Foreclosure. Foreclosure is conducted through the court system on a mortgage, deed of trust, judgment, assessment lien or mechanic's lien. The procedure for conducting the foreclosure is under Rule 105 of the Colorado Rules of Civil Procedure.

3. Tax Sale. Real property is sold by the Treasurer for failure to pay real estate taxes. The procedure for conducting the sale is set by statute.

Public Trustee's foreclosure sale

In order to start the foreclosure, the following are submitted to the Public Trustee's Office:

1. Original or certified copy of the deed of trust.
2. Original promissory note or bond if original note has been lost, or a copy of the note certified by the owner of the note that the copy is a true and correct copy of the original. Only certain financial entities qualify to produce a copy under C.R.S. Section 38-38-101.
3. Notices of Election and Demand (two copies).
4. Mailing list, which includes names and addresses of all parties to receive notice of sale, rights to cure, and rights to redeem.
5. Additional documents required under foreclosure statute and payment of required fees.

The above documents are usually submitted to the Public Trustee by the attorney representing the lender of the loan in default.

The Public Trustee records the **Notice of Election and Demand (NED)** and starts the foreclosure proceeding. This must be done within ten working days.

Notices of Rights to Cure and Redeem are sent within 20 days to parties set out on the mailing list. The mailing list must include all parties whose interests appear in an instrument recorded subsequent to the foreclosed deed of trust and prior to the NED. The notices are sent to the addresses shown on the recorded instrument. If there is no address, then by statute it is not necessary to send any notice.

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The Public Trustee sets the sale date to be not less than 45 days nor more than 60 days from the recording of the NED. A **Notice of Sale** is mailed to all parties on the mailing list and is published for five consecutive weeks in general circulation newspapers within the county. The Notice of Sale sets out the time and place of the sale.

Filing of a bankruptcy by the owner of the property stops the foreclosure until the automatic stay is lifted or the bankruptcy court abandons the property or the bankruptcy case is dismissed or closed. The foreclosure sale extends week to week until the Bankruptcy Court takes action.

A court order authorizing the Public Trustee to conduct the sale must be issued. The Court takes a separate action from the Public Trustee's proceedings and is conducted under Rule 120 of the Colorado Rules of Civil Procedure. The only issue addressed in this action is whether there is reasonable probability of default under the note and deed of trust and justification for the exercise of the Power of Sale allowed the Beneficiary in the deed of trust.

If the default is not cured by 12:00 noon the day before the sale, the sale is held and the **Certificate of Purchase** is issued to the highest bidder. This sale is an auction type sale. A duplicate of the Certificate of Purchase is recorded with the Clerk and Recorder within ten days of the sale. The interest held under the Certificate of Purchase is fully assignable.

Redemption Periods. The redemption period for the owner is 75 days if the property is lot and block or located within the limits of a city and is not agricultural and six months if the property is agricultural. For junior lien holders, the redemption period is ten days after the owner's redemption period has expired for the first junior lien holder and five additional days for each junior lien holder thereafter. If there is an IRS lien against the property, the IRS has a 120-day redemption period. If a U.S. lien, such as an SBA loan, is of record on the

property, the U.S. government has a one-year redemption period.

Intents to redeem by the owner and any junior lien holder must be filed 15 days prior to the end of the owner redemption period. Only three consensual liens recorded after the NED will be considered by the Public Trustee to hold valid redemptive positions. The redemption must take place within the specified time period.

A **Certificate of Redemption** is issued to the party redeeming the property from the foreclosure. In an owner redemption, the sale is annulled and the owner retains title to the property subject to all liens and encumbrances of record except for the deed of trust that was foreclosed (since the owner has paid off this deed upon redemption). In a junior lien holder redemption, the junior lien holder must have a record interest in the property 15 days prior to the expiration of the 75-day owner redemption period. This redemption interest is fully assignable.

Public Trustee's deed. A Public Trustee's deed is issued to the holder of the Certificate of Purchase if there has been no owner redemption and no other intents to redeem have been filed or issued to the last redeeming junior lien holder after the expiration of all the redemption periods.

In both instances, title vests free and clear of all liens and encumbrances junior to the foreclosed lien except omitted parties (i.e., parties not properly notified of the foreclosure), liens created by a municipality, homeowner's assessment liens, mechanic's liens, real estate taxes, and the Homestead Exemption if it was not waived. Any liens, or an omitted party, would appear on subsequent title work.

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