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# Non-Judicial Foreclosures in Oregon

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According to the May 25, 2010 announcement by the Federal Housing and Finance Agency, the Bend-metro area, which includes all of Deschutes County, has seen the nation's largest drop in home prices over the past year, falling 23 percent. Not surprisingly, the number of real estate foreclosure actions increased dramatically in 2009 and is still at higher than normal rates in 2010. We are still seeing confusion as lenders, borrowers, guarantors and potential investors all try to understand the consequences of foreclosure and the relevant 2009 and 2010 Legislative changes. This is a basic summary of Oregon residential real estate trust deed foreclosure law since the recent changes.

### 1. Introduction

Most real estate loans in Oregon are secured by trust deeds. After a default, the keys to determining the rights of a lender, borrower or guarantor are whether the trust deed is a "residential trust deed" and whether the creditor elects to pursue a trustee's sale or a judicial foreclosure.

#### A. Residential Trust Deed

Oregon law has two key definitions. First, a "residential unit" is an improvement designed for residential use. ORS 86.705(4). Second, a "residential trust deed" is a trust deed on property upon which are situated four or fewer residential units and one of the residential units is occupied as the principal residence of the borrower, the borrower's

spouse, or the borrower's minor or dependent child at the time a trust deed foreclosure is commenced. ORS 86.705(3). Oregon statute no longer uses the term "commercial trust deed", but it is common to still hear the term "commercial trust deed" or "non-residential trust deed" as shorthand for all trust deeds that are not residential trust deeds.

#### B. Foreclosure Methods

There are two methods for foreclosing any Oregon trust deed. The first method is a trustee's sale or non-judicial foreclosure. The second method is a judicial foreclosure. Both methods are available to foreclose residential and non-residential trust deeds. The consequences of each foreclosure method can be different, and there are advantages and disadvantages to both methods. This article focuses on the trustee's sale method of foreclosure. Another article will focus on judicial foreclosure.

### 2. Trustee's Sale

A trustee's sale or a non-judicial foreclosure is a sale by the lender's "trustee" following a recorded notice and advertisement. This is a statutory procedure that requires detailed attention to the contents of the notice and service on the borrower, junior lien holders, tenants and other affected parties. The sale occurs in the county where the property is located, and is typically held at the county courthouse or the trustee's office.

After the foreclosure is commenced, the borrower and junior lien holders may cure (remedy) the default or defaults at any time

prior to five days before the date that was last set for the sale. ORS 86.753(1). When a default is due to a failure to pay, it may typically be cured by paying the amounts due at that time, not the full balance of the loan. Most other defaults are cured by essentially paying the entire amount due under the note (otherwise known as full performance). Additionally, in order to cure defaults, all costs and trustee and attorney fees must be paid. Trustee and attorney fees cannot exceed \$1,000 on a residential trust deed foreclosure and reasonable attorney fees on a non-residential trust deed foreclosure. ORS 86.753(1)(a) and (b). After the default or defaults are cured, all the terms of the note and trust deed are reinstated. ORS 86.753(2).

A trustee's sale is by auction to the highest bidder. ORS 86.755(1). The trustee has the discretion to postpone the sale one or more times, not to exceed 180 days from the original sale date. ORS 86.755(2). At the sale the lender may make a credit bid up to the amount owing. The purchase price is paid at the time of the sale and, within 10 days following payment, the trustee shall execute and deliver the trustee's deed to the purchaser. ORS 86.755(3).

The purchaser at the trustee's sale shall be entitled to possession of the property on the 10<sup>th</sup> day following the sale, and any persons remaining in possession after that day under any interest (except one prior to the trust deed or created voluntarily by the borrower or a successor of the borrower) shall be deemed to be tenants at sufferance. ORS 86.755(5). A tenant at sufferance is essentially a tenant who is tolerated for a period of time and can be removed through a civil eviction process by following the procedures set out in ORS 105.105 to 105.168 or other applicable judicial procedure. A tenant under an interest created voluntarily by the borrower or a successor of the borrower must first receive 30 or 60 days' (depending on type of tenancy and whether or not a copy of the lease was provided to trustee) written notice of the intent to remove that person served no earlier than 30 days before the date first set for the sale. ORS 86.755(5).

The trustee's sale conveys borrower's interest in the property. ORS 86.755(4). The sale also forecloses and terminates all interest in the property of all persons to whom notice is given, or in other words, all junior lien holders. ORS 86.770(1).

After the sale is completed the borrower and the junior lien holders do not have any right to redeem or buy back the property from the purchaser. ORS 86.770(1).

Except for limited circumstances where additional collateral was used to secure the loan, after a trustee's sale is complete the foreclosing lender cannot make any further claim against the borrower, guarantor, or any other person obligated on the note and trust deed. ORS 86.770(2). Where there was additional collateral given, the foreclosing lender can bring an action judicially or non-judicially to foreclose the same trust deed as to any other property, or any other trust deeds, mortgages, security agreements, or other consensual or nonconsensual security interest or liens covering any other real or personal property security for the note.

A trustee's sale doesn't necessarily relieve the borrower from all other claims by different lenders. ORS 86.770(2) was recently revised to prohibit other lenders from later suing on the promissory note ONLY where that note was created on the same day as, and used as part of the same purchase or repurchase transaction as the note foreclosed upon; AND the note is owed to or originated by the beneficiary or an affiliate of the beneficiary in the residential trust deed that was subject to the foreclosure. This change was made, in part to give protection to those borrowers who took out the 80% and 20% loans from the same lender. It allows other lenders to pursue actions on the notes, for example, where a relative or friend loaned borrower the down payment and took a junior position lien which gets wiped out by the foreclosure. Those lenders can still pursue an action on their notes even though their lien has essentially been wiped out by the foreclosure.

### 3. Conclusion

If you are in need of specific advice regarding a foreclosure matter, either as a

lender or a borrower, please contact our firm or another reputable firm to make an appointment.

*The information contained in this newsletter is intended for informational purposes only and is not intended to serve as legal advice regarding specific matters nor should it be construed as legal opinion.*

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