

Conducting a Non-Judicial Foreclosure Sale: Basics and Special Considerations

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Slide #1

Notice of Sale
(NRS 107.080(4) and NRS 107.081):

- (1) Preparation
 - (a) Must be in recordable form.
 - (b) Generally identify deed of trust and notice of default.
 - (c) Must provide time and place.
- (2) NRS 107.081 mandates time and place.
 - (a) Time – Must be between 9 am and 5 pm.
 - (b) Place – Varies based on size of county.

Slide #2

Distributing the Notice of Sale: The Three “P’s”:

- (1) Provide
 - (a) Each trustor and person who holds record title (NRS 107.080(3)); **AND**
 - (b) Persons with an interest requesting notice (NRS 107.090(3)(a)); **AND**
 - (c) Holders of subordinate interests (NRS 107.090(3)(b)); **BUT**
 - (d) Not guarantors or sureties (unless under 107.090(3)(a)).
- (2) Post – 20 days, successively, in 3 public places.
- (3) Publish – 3 times, once per week for 3 consecutive weeks.

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Withdrawing or Postponing the Sale
(NRS 107.030 and NRS 107.082):

- (1) Gap Fillers – See the implied covenants of NRS 107.030;
- (2) Covenants must be incorporated, and may be modified (NRS 107.040 and NRS 107.050).
- (3) Covenant 6
 - (a) Allows waiver or withdrawal of Notice of Default and related proceedings; and
 - (b) Allows postponement by proclamation, but not more than three times.
- (4) NRS 107.082 clarifies postponement:
 - (a) Oral postponement must be to later date, same time and location; and
 - (b) After three postponements, must re-notice the sale.

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Conducting the Sale
(NRS 107.030, NRS 107.081, and NRS 107.083):

- (1) By public auction to highest (cash) bidder;
- (2) Beneficiary may credit bid (NRS 107.030 Covenant 6);
- (3) Be prepared.
- (4) Qualifying bidders (see NRS 107.083)

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Special Considerations – Multiple Parcels of Real Property:

One Power of Sale?

- (1) Some jurisdictions may hold a deed of trust has but one power of sale.
- (2) No Nevada case law on point, but statutes suggest otherwise:
 - (a) NRS 107.030 Covenant 6 – “or any portion thereof”
 - (b) NRS 40.430(4)(e) – Exception to one action rule

Other Limits?

- (1) Language of the Deed of Trust.
- (2) Rights of Junior Lienholders

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Special Considerations – Marshalling
(NRS 100.040 and NRS 100.050):

- (1) General Rule – Junior lienholder can make a senior lienholder to look first to other available property before seeking satisfaction from the common collateral.
- (2) Exceptions:
 - (a) Must not impair senior’s rights to full satisfaction
 - (b) Must not do injustice to third parties
- (3) Issues:
 - (a) Demand made by any interested party.
 - (b) Order of resort.
 - (c) Waivers.

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Special Considerations – Chilling the Bid:

- (1) Generally – Activity that tends to suppress bidding at a foreclosure sale, thereby depriving the owner of full value and increasing the risk of a deficiency. Acknowledged in dicta as a potential cause of action in Nevada in Collins v. Union Federal Savings and Loan Assn., 99 Nev. 284 (1983).
- (2) Two Types:
 - (a) Intentional (collusion)
 - (b) Unintentional (negligence)
- (3) Remedies:
 - (a) If intentional, the sale is probably void as a matter of public policy (per case law from other states).
 - (b) If unintentional, the sale is probably voidable if owner can show injury, generally in the form of an inadequate sales price (per case law from other states).

- (4) Truth is a defense.

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Quick Tips:

- (1) Notice everyone who received notice of default;
- (2) Know, incorporate, and modify the 107.030 covenants, as necessary;
- (3) Use postponement as necessary;
- (4) Waive marshalling in subordination agreements;
- (5) “Chill Out” and the truth shall set you free.