

# Amendments to Utah Foreclosure Notice Requirements –

## Traps for the Unwary Apartment, Condominium and Residential Housing Lender

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Against the backdrop of a multifamily construction boom across the Wasatch Front, the Utah State Legislature last year passed Senate Bill 22, amending the notice requirements for foreclosure of residential rental properties and clarifying the rights of residential tenants following foreclosure.

The bill, which went into effect May 10, 2016, requires that, for properties being foreclosed with nine or more residential units, notice of the foreclosure be posted in at least three conspicuous places on the property, rather than only two places as previously required. If the property has fewer than nine units, notice is required to be posted on the primary door of each dwelling unit. Alternatively, regardless of the number of dwelling units, notice of the foreclosure can be mailed to the occupant of each unit on the property to be sold.

In addition, Senate Bill 22 amended the statutory form of notice required to be provided to residential tenants and clarifies the rights available to residential tenants following fore-

closure. Previously, the statutory notice form notifying tenants of the foreclosure referred to tenant rights under federal law to continue to occupy the property until the later of the expiration of the lease agreement term or 90 days after receipt of notice to vacate. However, the federal law which granted these tenant rights (The Protecting Tenants at Foreclosure Act of 2009) expired at the end of 2014. As a result, beginning in 2015, tenants receiving the statutory form of notice were informed of rights under a federal law which no longer existed, leaving the tenants' actual rights following foreclosure unclear.

Senate Bill 22 resolved this uncertainty by creating residential tenant protections under Utah law similar to those previously granted under The Protecting Tenants at Foreclosure Act. Under the new state law, a residential tenant occupying the property under a bona fide residential lease may continue occupying the property following foreclosure until the later of the expiration of the lease agreement or 45 days after service of a notice to vacate. These rights do not apply to a tenant that is

also the trustor under the foreclosed deed of trust—or the trustor's child, spouse or parent. However, outside of the trustor-tenant scenario, so long as a tenant continues to pay rent and comply with the other requirements of the bona fide residential rental agreement, the purchaser at the foreclosure sale is generally prevented from terminating the lease or the tenant's occupancy of the property. Only if the new owner intends to occupy the foreclosed premises as a primary residence can the bona fide tenant's lease agreement and occupancy of the property be terminated, although the 45-day notice period still applies.

From the perspective of a lender foreclosing on residential property in Utah, Senate Bill 22 provides helpful clarity following the expiration of The Protecting Tenants at Foreclosure Act on when and under what circumstances a residential tenant's occupancy of a property may be terminated. Moreover, by cutting the required notice period in half to 45 days, the potential burden of tenants occupying the premises after foreclosure, even if the tenants are not paying rent, is significantly ameliorated.

Lenders anticipating a non-judicial foreclosure must also be aware of additional notice requirements which apply to both residential and non-residential properties. First, to begin the power of sale foreclosure process, the trustee under the deed of trust must file a notice of default in the county records where the property is located. The notice of default, among other factors, must set forth the nature of the breach of the secured obligation, and must also specify that the trustee has elected to sell the property to satisfy such secured obligation. Three months after the trustee records the notice of default, the trustee continues the foreclosure process by giving written notice of the time and place of the sale via publication of the notice of sale on the Utah Legal Notices website (<https://www.utahlegals.com>) at least 30 days before the sale, and once per week for at least three weeks in a newspaper of general circulation in the county where the property is located, with the last publication occurring at least 10, but no more than 30, days before the scheduled sale. In addition, for at least 20 days before the scheduled sale, notice of the sale must be posted on the property and in the applicable county recorder's office.

A signed copy of the notice of default and the notice of sale are each required to be mailed by the trustee via certified or registered mail, return receipt requested, to the trustor and any other party which has filed

a request for notice against the property prior to the recording of the notice of default. The notice of default must be mailed no later than 10 days after the notice of default is recorded, and the notice of sale must be sent after recording the notice of sale and at least 20 days before the date of the scheduled foreclosure.

In total, satisfying these non-judicial foreclosure requirements takes a minimum of 121 days from the date the notice of default is filed to the date of the sale. Even at roughly four months, however, the non-judicial foreclosure process is significantly faster and cheaper than the alternative route of judicial foreclosure—that is, filing a lawsuit and having the foreclosure proceed through the state court system. Judicial foreclosure is rarely used in Utah, but in states where judicial foreclosure is the only option, the foreclosure process can easily take over a year.

However, the primary advantages of non-judicial foreclosure—namely a faster, more streamlined process, with the cost to the lender reduced as a result, as well as avoiding the six-month right of redemption granted to the trustor following a judicial foreclosure sale—can be negated entirely if the foreclosing party does not comply with the applicable state foreclosure laws. The most dramatic result if the statutory notice requirements are not satisfied is that a court can set aside the foreclosure sale completely. The Utah Supreme Court in *Timm v. Dewsnupp* described the standard for setting aside a foreclosure sale because of noncompliance with the statutory notice requirements: “Defects in the notice of foreclosure sale that will authorize the setting aside of the sale must be those that would have the effect of chilling the bidding and causing an inadequacy of price.” The remedy applied in any particular case, whether setting aside the sale in its entirety or some less stringent remedy, would depend on the facts of

the case and the harm caused. Lenders can avoid that ambiguity of such judicial remedies by strictly complying with the applicable notice requirements

Of course, simply having such cases end up in front of a judge indicates that the foreclosing lender largely lost the benefits of the non-judicial foreclosure by being forced to contend with expensive and lengthy litigation challenging the sale. Even if the lender recognizes and resolves a defect in compliance before the foreclosure sale takes place, and is thus able to preclude the filing of a lawsuit seeking to set aside the sale, correcting the defect may require re-noticing the sale and entirely resetting the clock for completion of the foreclosure. Again, the advantages of non-judicial foreclosure are significantly negated. Similarly, failure to satisfy the special notice requirements applicable to residential rental properties, as amended by Senate Bill 22, can cause additional delays in the foreclosing party realizing the full value of its collateral even after foreclosure, as holdover tenants may not be removed until after the requirements have been satisfied. ■



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