

Commercial Foreclosure (NV)

A Practical Guidance® Practice Note by Stephen B. Yoken, Snell & Wilmer L.L.P.



Stephen B. Yoken
Snell & Wilmer L.L.P.

This practice note explains the commercial foreclosure process in Nevada with a focus on nonjudicial foreclosure, the most commonly used method of foreclosure in Nevada. There are additional requirements for foreclosure on residential properties in Nevada that are outside the scope of this practice note.

For related forms, see [Notice of Default and Election to Sell \(Commercial Foreclosure\) \(NV\)](#) and [Notice of Trustee's Sale \(Commercial Foreclosure\) \(NV\)](#).

For general guidance on commercial financing in Nevada, see [Commercial Real Estate Financing \(NV\)](#).

For guidance on deeds of trust, see [Mortgages and Deeds of Trust in Acquisition Loan Transactions](#). For a deed of trust form, see [Deed of Trust, Assignment of Leases and Rents, Security Agreement, and Fixture Filing \(Leasehold\)](#).

Legal and Procedural Overview

The customary security instrument for a commercial or residential real estate loan in Nevada is a deed of trust. Mortgages are also authorized by Nevada statutes but are rarely used, for reasons described below.

A deed of trust is a transfer of property in trust to a trustee securing certain described obligations owed to a beneficiary. Under Nevada law, a power of sale is implied in the deed of trust if it expressly transfers the property in trust to a trustee, even if the words “power of sale” are absent. Nev. Rev. Stat. Ann. § 107.080(1). If such language is absent, the instrument is a mortgage.

The trustee can be a title company, bank, or any other entity that holds a Nevada business license. Nev. Rev. Stat. Ann. § 107.028. Most commonly, the title company that insures the transaction will be named as the trustee. The beneficiary can also act as its own trustee, except for purposes of foreclosure. Some Nevada banks routinely act as their own trustee, substituting in an independent trustee if foreclosure becomes necessary.

Under Nevada law, specifically the Uniform Assignment of Rents Act (Nev. Rev. Stat. Ann. § 107A.010 et seq.), an assignment of rents is implied in all deeds of trust, even if it is not expressly included in the deed of trust. Any assignment of rents, whether express or implied, is treated as a security interest, even if it is phrased as an absolute assignment for archaic legal reasons.

Pre-foreclosure Considerations

Prior to commencing a foreclosure, the beneficiary may send a demand letter to the borrower. This may be required by the terms of the secured obligations. There is no general requirement to send a demand letter prior to foreclosure under Nevada law for commercial properties (although

it may be required in connection with some residential foreclosures). Many lenders will send a demand letter prior to commencing foreclosure even though it is not required, to elicit a response from the borrower and to avoid claims that a borrower is “blindsided” by a foreclosure.

In some cases, particularly in connection with commercial mortgage backed securities transactions, the deed of trust and the secured obligations may have been transferred by the original parties in one or more transfers. The beneficial interest under the deed of trust and ownership of the secured obligations may have been transferred to different parties. All assignments of the deed of trust must be recorded. Nev. Rev. Stat. Ann. § 106.210. The Nevada Supreme Court has held that the beneficiary of the deed of trust and the holder of the note or other secured obligation must be the same at the time of the commencement of a foreclosure, but any discrepancy between such parties that may have existed prior to foreclosure is not a bar to foreclosure. *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 286 P.3d 249 (2012).

Notice of Default and Election to Sell

The procedure for foreclosure by power of sale, also known as a nonjudicial foreclosure, is similar to some other western states. The process is initiated by preparation and recording of a notice of default and election to sell (NOD), sometimes also called a notice of breach and election to sell. Nev. Rev. Stat. Ann. § 107.080(2)(b). The NOD will identify the deed of trust that is the subject of the foreclosure and generally describes the default giving rise to the foreclosure. The NOD must also be mailed by certified mail to the trustor and its successors in interest, to junior lienholders, to any other parties that may have recorded a request for notice, and to guarantors of the loan. Nev. Rev. Stat. Ann. § 107.080(3); Nev. Rev. Stat. Ann. § 107.095.

For a form, see Notice of Default and Election to Sell (Commercial Foreclosure) (NV).

The trustee obtains a trustee's sale guaranty from a title company to identify the parties entitled to notice, other than guarantors, whose interests will not normally be of record. The beneficiary generally notifies the trustee of the names and last known addresses of any guarantors. If any guarantors are not sent timely notice of the foreclosure, their guaranties may be exonerated. Nev. Rev. Stat. Ann. § 107.095.

The borrower has the right to cure any defaults on the secured obligation (if curable) that may have given rise to the foreclosure within 35 days after the mailing of the NOD. If this occurs the NOD must be rescinded. After the 35-day period, the beneficiary has the right to reject any tender of a cure and proceed with the foreclosure.

Since this is a nonjudicial process, if the borrower wants to stop or challenge the foreclosure or contend that no default occurred, the borrower would need to exercise its rights under bankruptcy law to invoke the automatic stay, or commence an action in state or federal court to obtain a temporary restraining order or injunction. The usual standard for such relief requires the borrower to demonstrate, among other things, a likelihood of success on the merits.

Notice of Sale

The NOD starts a three-month period after which the trustee can prepare and record a notice of sale (NOS). The NOS identifies the specific time and place of the sale. By statute, one place in each county is designated for the conducting of all nonjudicial foreclosure sales in that county. In Clark County, which includes Las Vegas, the location is currently 930 South Fourth Street, Las Vegas, Nevada. The NOS must be recorded, posted in a location prescribed by statute, and mailed by certified mail to the same parties that are entitled to receive mailings of the NOD. It must also be published in a local newspaper three times at weekly intervals prior to the foreclosure sale. As a result, the minimum interval between the recording of the NOS and the date of the foreclosure sale is 21 days. See Nev. Rev. Stat. Ann. § 107.090.

For a form, see Notice of Trustee's Sale (Commercial Foreclosure) (NV).

The foreclosure sale can be postponed by announcement at the previously scheduled sale up to three times to a later date at the same time and location. Nev. Rev. Stat. Ann. § 107.082. After three postponements, the trustee must record, post, and mail a new NOS, but a new NOD is not required.

Conducting the Sale

The foreclosure sale is made at auction to the highest bidder and must be made between the hours of 9 a.m. and 5 p.m. The agent holding the sale must not become a purchaser at the sale or be interested in any purchase at such a sale. At the time and place of the sale, before calling the sale, the trustee or its agent qualify funds. The beneficiary can credit

bid up to the amount of the secured obligations. All other bidders must demonstrate the ability to pay the amount of their bids, if successful, immediately upon conclusion of the foreclosure. This is generally handled by displaying cashier's checks up to the bidder's intended maximum bid, which will be signed over to the trustee if the bidder is the successful purchaser of the property.

Post-sale Procedures

Following the sale, the trustee prepares and records a trustee's deed upon sale, transferring the property to the successful bidder without warranty. The trustee's deed must be recorded within 30 days after the sale and must also be posted at the property. Nev. Rev. Stat. Ann. § 107.080(10) and (11).

A transfer tax is due and payable to the county recorder as a condition of recording the trustee's deed. See generally Nev. Rev. Stat. Ann. Ch. 375. The amount of the transfer tax varies by county and is currently 0.51% of the successful bid in Clark County which includes Las Vegas. There are no redemption rights afforded to the borrower or other parties after a nonjudicial foreclosure. Nev. Rev. Stat. Ann. § 107.080(5).

If the trustee or its agent does not substantially comply with the notice and other requirements, an injured party may commence an action within 30 days after the recording of the trustee's deed or 90 days after the foreclosure sale (depending on the nature of the noncompliance). The court in such an action may grant relief including treble damages, injunctive relief, and attorney's fees. Nev. Rev. Stat. Ann. § 107.080(5), (6), (8). In light of these provisions, in order to avoid a post-sale challenge to the foreclosure, a lender should consider working with a trustee (usually a title company or law firm) that is extremely familiar with the foreclosure notice and other requirements.

Judicial Foreclosure

A deed of trust or mortgage can also be foreclosed judicially in Nevada. This is not generally desirable unless the security instrument is deficient, for example, if it does not include a transfer in trust or must be reformed by a court for other reasons, or if a judicial foreclosure is necessary to preserve deficiency rights under the laws of another state. As discussed below, a judicial foreclosure is not required to preserve deficiency rights under Nevada law.

There are several disadvantages of a judicial foreclosure. First, the time required for litigation will often exceed the period of approximately four months that is required for the

nonjudicial foreclosure. Second, the use of a judicial process invites the borrower to assert defenses, which might not be sufficient to support a temporary restraining order or injunction preventing a nonjudicial foreclosure. Third, the sale must be conducted by the local sheriff, who will collect a fee equal to 1% of the secured obligation, which (together with attorney's fees) may be substantially more than the trustee's fees and expenses in a nonjudicial foreclosure.

Finally, a judicial foreclosure sale is subject to a one-year right of redemption afforded to the borrower and certain other parties. Parties with the right to redeem may obtain ownership of the property by paying the amount of the successful bid at the sheriff's sale, plus interest and taxes paid and certain other costs, up until the first anniversary of the sheriff's sale. Thus, at the time of the sale, the sheriff can only provide the purchaser a certificate of sale, not a deed. After the lapse of the one-year redemption period, if no redemption has occurred, the sheriff provides a deed of the property.

Appointment of Receiver; Sale by Receiver

If the property produces substantial income, or if the beneficiary needs to obtain control of the property to maintain security or for other reasons, the beneficiary will sometimes seek appointment of a receiver to manage the property and collect rents during the pendency of the foreclosure process. In the case of a nonjudicial foreclosure, the beneficiary commences an action asking the court to appoint a receiver; this action may or may not include a count for judicial foreclosure.

There are several grounds for appointment of a receiver, one or more of which will usually result in a favorable decision for the beneficiary. First, upon recording the NOD, the beneficiary is entitled to a receiver under Nev. Rev. Stat. Ann. § 107.100 if income from the property is in danger of being lost (e.g., by diversion of rents by the borrower) or if the value of the property is or may be insufficient to cover the amount of the secured loan. Under the Uniform Assignment or Rents Act, Nev. Rev. Stat. Ann. Chapter 107A, an agreement in loan documents for appointment of a receiver to collect rents will be enforced, and the beneficiary also has other grounds for appointment of a receiver. Under the Uniform Commercial Real Estate Receivership Act, Nev. Rev. Stat. Ann. § 32.100 through § 32.370 (Receivership Act), enacted in 2017, the lender has broad rights to obtain appointment of a receiver, including enforcement of an agreement in loan documents and diversion of rents. Nev. Rev. Stat. Ann. § 32.269(2).

The receiver appointed under the Receivership Act has broad statutory powers, including the power to sell the property with court approval. Nev. Rev. Stat. Ann. § 32.100 and Nev. Rev. Stat. Ann. § 32.315. With court approval, the receiver has the power to sell the property free and clear of liens, with the liens attaching to proceeds, similar to a sale in a bankruptcy court. Nev. Rev. Stat. Ann. § 32.315(2) and (3). Unlike a foreclosure sale, the sale by the receiver (if approved by the court) is not required to be a public auction. Nev. Rev. Stat. Ann. § 32.315(4). The Receivership Act resolved a previously disputed issue under Nevada law as the authority of a receiver to sell the property and may provide an attractive alternative to a foreclosure sale.

The receiver is appointed by the court upon the recommendation of the plaintiff-beneficiary and approval of the terms of engagement of the receiver, including its fees. Advances by the beneficiary to the receiver to cover operating expenses are generally added to the secured obligation.

Deficiency Judgments

The beneficiary may also seek a judgment for a deficiency on the secured obligation that remains after foreclosure. Under the Nevada one action rule, Nev. Rev. Stat. Ann. § 40.430, the beneficiary cannot commence an action against the trustor for recovery of the debt prior to completing a foreclosure on the property. This right of the trustor is nonwaivable under Nevada law. Nev. Rev. Stat. Ann. § 40.453. Any such action must be commenced within six months after the foreclosure sale (judicial or nonjudicial). Nev. Rev. Stat. Ann. § 40.455(1).

Under the Nevada fair value rule, Nev. Rev. Stat. Ann. § 40.457, the amount of the recovery is limited to (1) the amount of the secured obligation at the time of the foreclosure sale, (2) less the greater of (a) the successful bid at the foreclosure sale or (b) the fair market value of the property at the time of the foreclosure sale. If the beneficiary underbids the value of the property at the foreclosure sale, the value of the property is still used in calculating the deficiency. In practice, this generally leads to expert testimony from appraisers on the value of the property at the time of the foreclosure sale. Like the one action rule, the fair value rule is not waivable.

Recovery from Guarantors

The Nevada one action and fair value rules also affect recovery from guarantors. Under Nev. Rev. Stat. Ann. § 40.430, a guarantor or other surety has the benefit of the one action rule, but under Nev. Rev. Stat. Ann. § 40.495(2), a guarantor can execute an enforceable waiver of the one action rule. Such waivers are customary in the forms of guaranties commonly used in Nevada. The result of such waiver is that the beneficiary can commence an action against a guarantor before or after commencing a foreclosure on the collateral, or even if the foreclosure is never commenced. The guarantor still has the benefit of the nonwaivable fair value rule, however. In the absence of a foreclosure sale, the amount of the recovery against a guarantor is limited to the amount of the secured obligation at the time of commencement of the action, less the fair market value of the property at the time of commencement of the action.

Stephen B. Yoken, Of Counsel, Snell & Wilmer L.L.P.

Steve Yoken has more than 30 years' experience in Nevada and California representing major national and international companies and financial institutions, as well as regional banks and other lenders and owners, buyers, and tenants. Steve's practice includes real estate finance, including construction lending; purchases, sales, leasing, and development issues; problem loan restructuring, creditors' rights issues and enforcement, and foreclosures; and other business and contract law matters. Steve holds an AV Preeminent® Peer Review Rating from Martindale-Hubbell®.

This document from Practical Guidance®, a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis®. Practical Guidance includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practical-guidance](https://www.lexisnexis.com/practical-guidance). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.