

PUBLICATION

An Overview of Trustee's Sales in the Commonwealth of Virginia

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Lenders most often choose to proceed with the trustee's sale pursuant to the deed of trust because a trustee's sale is faster and cheaper than proceeding with a judicial sale, and it has advantages over accepting a deed in lieu of foreclosure. A trustee's sale is governed by the terms of the deed of trust, various statutory requirements, and the fiduciary duty owed to both the lender and the buyer.

The foreclosure process begins when a default has occurred and the lender asks the trustee (or substitute trustee appointed pursuant to the deed of trust or statutory authority) to accelerate the debt and declare the entire balance due. At that point, the trustee may proceed to a foreclosure sale. The trustee is required to provide written notice of the foreclosure sale, including the time, date, and place, to the property owner, other lienholders, and any other interested parties, including governmental taxing authorities. A notice of the trustee's sale must also be published in a newspaper of general circulation in the city or county in which the property is located. The number of times the notice must be published is determined by the deed of trust, except that the notice must be published not less than once a week for two weeks (if weekly publication is required) or not less than once a day for three days (if daily publication is required). Additionally, the foreclosure sale cannot be held sooner than eight days after the first publication and no more than thirty days after the last publication.

The procedure to be followed during the sale, including the terms of the sale, is generally governed by the deed of trust. But the statute provides some additional guidance. The trustee is required to accept any written one-price bids that are submitted and other bidders are allowed to inspect any written bids. After the sale is concluded, the trustee is required to collect and distribute the proceeds of the sale as follows. First, the trustee shall discharge the expenses incurred while executing the trust, including a reasonable commission for the trustee. Second, the trustee shall discharge all taxes, levies, and assessments. Third, the trustee shall discharge the remaining debts and obligations secured by the property in order of their priority. Finally, if any proceeds remain, the trustee will pay the balance to the debtor.

At the end of the foreclosure process, the trustee is required to account for the transactions taken on behalf of the trust to the Commissioner of Accounts of the Circuit Court for the jurisdiction in which the property is located. When the trustee's deed is recorded, the trustee is required to deliver a copy of the deed to the commissioner. And, within six months of the date of the sale, the trustee is required to account for the proceeds. The trustee's report will include receipts for all expenses incurred in the foreclosure sale, including publication costs and recording fees, as well as the trustee's commission and any other expenses. The trustee will also submit the original promissory note (or an affidavit of lost note); the original certified mail receipts from the notice of sale to the debtor; a copy of the Substitution of Trustee as recorded; and an affidavit from the lender itemizing, as of the date of the sale, the principal balance, the interest owed and dates of accrual, late charges, escrow deficits, and any other charges allowed by the deed of trust. Additionally, the trustee must account for any disbursements to taxing authorities, other lienholders or interested parties, and the debtor. This accounting is usually supported with the original cancelled checks (or front and back copies) and original receipts or vouchers. Upon receipt of all required information, the Commissioner of Accounts settles the accounting and reports the trustee's transactions to the Circuit Court. The commissioner's report is recorded in the records of the circuit court with other fiduciary reports.

This process is more involved than that of some other states because the trustee owes a fiduciary duty to both the lender and the debtor. Accordingly, the trustee may take extra steps to insure that the foreclosure is justified in all respects. The trustee is only authorized to act if the procedures required by the deed of trust and the relevant statutes have been satisfied. If the trustee acts without authority, the sale may be declared void and the trustee may incur liability for any damages. Additionally, the trustee may be required to forfeit the commission and suffer other penalties if the accounting is not complete and timely.