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COMMENTS TO
THE HOUSE SELECT COMMITTEE ON HOMEOWNERS ASSOCIATIONS
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RESPECTFULLY SUBMITTED BY
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My name is Pete Powell. I serve as Legal Counsel for the North Carolina Administrative Office of the Courts, and I have done so for 20 years. In that capacity I advise and teach court officials on a wide variety of aspects of North Carolina law and procedure, including foreclosures, and I have testified hundreds of times before committees and commissions of the General Assembly. I am a former member of the Real Property Section Council of the North Carolina Bar Association, and I currently serve on the board of directors of the home owners association where I live.

GS 47C-3-116 of the North Carolina Condominium Act and GS 47F-3-116 of the North Carolina Planned Community Act provide for liens on behalf of home owner associations based on assessments for the common expenses of the development community. Unfortunately, there is very little specificity, and huge gaps in the legislation which can create defects in title, questionable procedures, and abuses and overcharges by some of the players. In recent years, the legislature has enacted into law a number of protections for homeowners facing foreclosure of deeds of trust. There are no parallel protections regarding home owner association lien foreclosures.

The statute merely provides that home owner association (HOA) liens may be foreclosed "in like manner as a mortgage on real estate under power of sale under Article 2A of Chapter 45." This raises many issues. First, mortgages are quite rare if not non-existent is North Carolina. They provide a direct relationship between the lender and the borrower, with legal title being held by the lender. In that situation, a lender is forbidden by law to bid in at the foreclosure sale. In North Carolina, the common practice in real estate secured loans is to use a deed of trust, with title vesting in an independent trustee. In the event of a foreclosure, the lender can then bid in at the sale.

With title being in the trustee, upon the conclusion of the foreclosure proceedings, the trustee of a deed of trust can convey title to a new buyer. In a judicial sale, such as a partition, or a sale to create assets in an estate, the court appoints a commissioner who is invested with authority to conduct a sale and convey title. That person is a court appointed fiduciary, subject to the supervision and control of the court. If they steal the money or fail to account or complete their duties, the court can find them in contempt and put them in jail until they fix it. In HOA liens, there is no trustee, and there is no mechanism in the statute to insure that the party purporting to convey title to a new buyer actually has the power and authority to do so. Accordingly, there are many thousands of questionable titles out there. Furthermore, if the person conducting the sale acts up, there may be no remedy available to the court to correct the situation since neither the court nor the statute appointed this person, invested him or her with title, or made him or her subject to the court's supervision.

The Notice of Hearing is the initial pleading, and it is itself a problem, as there are no guidelines for what should be included in that document, and what notices or information about consequences should be given to the owner. Unlike foreclosures of deeds of trust, the Notice of Hearing is normally filed by an attorney for the association, not an independent trustee. What are the ethical guidelines under which that person should operate, and where is their source of title? Can that attorney collect both an attorney fee and a commission on the sale, both of which are charged back to the home owner? What should be the limits or guidelines on commissions or attorney fees, and who decides? If the home owner pays the assessment, does he have any right to compel cancellation of the lien of record? If the home owner wants to pay off the lien, at what point can he do so, or, more importantly, at what point does he lose the right to do so. Other foreclosure statutes seem to place that point at the end of the upset bid period. However, we have case law dealing with the recovery of insurance proceeds indicating the homeowner retains rights in the property up until the recording of the trustee's deed. What is the better public policy?

We have some suggestions, but on some matters we can only point out problems and leave the solutions or the policy choices to the wisdom of the General Assembly. Firstly, we would suggest enacting legislation enabling and requiring an HOA to appoint, remove and substitute a trustee by recording an instrument in the office of the register of deeds, and authorizing that trustee, upon completion of the foreclosure proceeding, to conduct the sale, convey title, and report to the court. We also suggest defining the declaration creating the HOA as having the same meaning as a security instrument under Chapter 45. That would clarify exactly what information must be set forth in the Notice of Hearing. You might consider specifying that the HOA can bid in at the lien foreclosure sale, and giving the home owner the same rights to force cancellation of the recorded lien after paying off that lien as a home owner would under the Mortgage Satisfaction Act. We might also suggest specifying exactly when the right to redeem the property expires, perhaps up until the recording of the trustee's deed, and providing a curative statute for sales conducted and deeds signed by the home owner association or their attorneys in the past.

The Commission likely will need to look at the attorney feelcommission situation. It has often been suggested that any **fix** to this procedural nightmare ban attorney fees, if they constitute a separate and additional charge to any commission. Currently, the statute provides for a cap of $1,200 on attorney fees in an HOA foreclosure, if the proceeding is uncontested. What that means is that all unopposed cases end up charging $1,200. There is no mention in the statute of commissions and no guidelines for the allowance of attorney fees, although there are varying percentages allowed if there is a payoff at different stages, but there is no definition of what amount that percentage is figured against.

I have seen proposals to establish a minimum fee, which some people liken to a lawyers relief act. I have seen proposals for a maximum fee, which may result in the General Assembly having to revisit this arena every few years, or to provide a mechanism for adjustment. Frankly, there is little difference between the amount of work needed to prepare the pleadings and conduct a foreclosure on a million dollar condominium and a ten thousand dollar time share. Accordingly we would not suggest a commission based on the value of the property or the amount of the assessment lien. We have seen proposals suggesting that the court establish the compensation in each case applying the standards for fiduciary compensation set forth in GS 32-54. Obviously, that requires additional court proceedings and may drive up the cost. Whatever standard the General Assembly decides to invoke will improve the current unregulated situation.

As always, we deeply appreciate the opportunity to comment on matters being considered by the General Assembly. Thank you for your attention, and I will be happy to answer any questions.