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## Coates' Canons Blog: Tips for Tax Foreclosure Sales

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Carolina County is selling Parcel A at a tax foreclosure sale. The county enters an opening bid of \$4,500, the total taxes and costs owed on the property. Happily for the county, two other bidders, Billy Blue Devil and Wanda Wolfpack, get into a heated competition for the property. Billy Blue Devil is the eventual high bidder at \$25,000.

What happens next? How much money does Billy need to pay at the auction? What if Billy fails to produce the full bid amount? What deposits are required of upset bidders? What happens if an upset bidder defaults on the winning bid? Do the answers change if the foreclosure is “mortgage style” or in rem?

The relevant statutes don't provide clear answers to all of these important questions. Read on for my suggested approaches and advice about best practices from tax foreclosure veterans . . .

### GOVERNING LAW

Tax officials need to review a variety of statutes to learn how foreclosure sales must proceed. Mortgage-style foreclosures are governed by G.S. 105-374 and the “judicial sale” provisions in Article 29A of G.S. Chapter 1. In rem foreclosures are governed by G.S. 105-375 and the “execution sale” provisions in Article 29B of G.S. Chapter 1. (Don't ask me why we need different sale provisions for the two tax foreclosure procedures!)

### DEPOSITS

It's up to the tax office to decide whether the taxpayer must provide a deposit at the initial auction. The mortgage-style tax foreclosure provisions in GS 105-374 state that the attorney conducting the sale (the “commissioner”) *may* require a deposit of up to 20%. The in-rem tax foreclosure provisions in GS 105-375 do not make any mention of deposits. Nor do either the judicial sale provisions or the execution sale provisions.

Mark Bardill, an experienced mortgage-style tax foreclosure attorney, reports that his practice is to require a 20% deposit in cash or certified check at foreclosure auctions. He usually gives the high bidder 30 minutes to produce that deposit. If the bidder fails to do so, Mark will re-open the bidding on the property.

Valerie Curry of the Orange County Tax Office, which has conducted many in rem foreclosure sales over the years, states that her office holds its foreclosure auctions at noon and requires payment of the full winning bid amount in cash or certified check by 3:00 p.m. If the bidder fails to do so, the county will re-advertise and hold another sale of the property at a later date.

During the upset bid process, deposits are required for both types of tax foreclosures. That deposit, which usually is submitted by the bidder to the clerk of court, must be equal to at least 5% of the upset bid or \$750, whichever is greater. See G.S. 1-339.25 (judicial sales) and G.S. 1-339.64 (execution sales). If an upset bid is submitted, Mark Bardill's office will refund the 20% deposit paid by the original high bidder. Valerie Curry's office holds onto the original high bid payment until the upset bid process is closed and then refunds that payment to the original high bidder if another party prevails during the upset bid process.

### DEFAULTING BIDDERS

Both the judicial sale provisions and the execution sale provisions allow for the clerk to order a resale of the property if the

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winning bidder fails to produce full payment of the winning bid within ten days. See G.S. 1-339.30(d)(judicial sales) and G.S. 1-339.69(b)(execution sales). If that occurs, can the tax office keep any deposit submitted by the defaulting bidder? Yes, but only to cover the costs of the resale and to make up any difference between the sale price at the subsequent resale and the high bid at the initial sale. See G.S. 1-339.30(e) (judicial sales) and G.S. 1-339.69(c)(execution sales). The tax office may not apply the deposit to the outstanding taxes and costs and cancel the foreclosure.

Consider the example I used to open this blog post. Billy Blue Devil is the high bidder at the foreclosure auction with a bid \$25,000. He puts down a deposit of \$5,000 that day. No upset bids are submitted, meaning Billy is the final high bidder. When Carolina County reaches out to Billy to inform him of this happy fact and obtain full payment of his \$25,000 winning bid, Billy avoids their telephone calls and is never heard from again. After reasonable efforts to locate Billy including a certified letter and a wait of at least 10 days, Carolina County concludes that Billy has defaulted on his bid.

What should the county do with Billy's \$5,000 deposit? The tax office would like to apply those funds to the \$4,500 in taxes and costs owed on the property. Doing so would eliminate the need for another foreclosure sale. Title to the property would remain in the name of the original taxpayer.

Sadly the judicial and execution sale provisions don't allow for this approach. That means regardless of whether the foreclosure is mortgage-style or in rem, the county needs to re-advertise and resell the property all over again. (The county should probably also reach out to Wanda Wolfpack, the runner-up bidder, to encourage her to attend the resale and bid once again.)

The county may and should use part of Billy's \$5,000 deposit to cover the advertising and any other costs incurred due to the resale. But it cannot touch the rest of the deposit until after the resale occurs, at which time the county can use Billy's deposit to make up any difference between the new sale price and Billy's original winning bid of \$25,000.

Assume that at the resale Wanda is the winning bidder with a high bid of \$23,000. No upset bids are submitted. Costs of the resale were \$300. The county is permitted to reimburse itself \$300 for the resale costs and to take another \$2,000 from Billy's deposit to cover the difference between Billy's bid of \$25,000 and the winning resale bid of \$23,000. That would leave \$2,700 to reimburse to Billy.

Remember that at the end of the day the county is permitted to keep from the foreclosure sale proceeds only enough to cover its taxes and costs. In this situation, it would keep \$4,500 from the \$25,000 sale proceeds (\$23,000 from Wanda, plus \$2,000 from Billy's deposit). The remaining \$20,500 should be turned over to the clerk's office for distribution to either other creditors or the taxpayer.

Orange County reports that it would tap into the original high bidder's deposit only if the subsequent resale did not produce enough to cover taxes and costs; it does not use that deposit to cover the difference between the resale high bid and the original high bid so long as the resale high bid is sufficient to cover taxes and costs.

In the Billy Blue Devil example, Orange County would have kept only \$300 of Billy's deposit to cover the resale costs and would have refunded the remaining \$4,700 rather than apply \$2,000 of those funds to cover the difference between Wanda's winning bid of \$23,000 and Billy's original winning bid of \$25,000. The county is not harmed by this practice because, as I mention above, any sale proceeds over and above the taxes and costs owed on the property are turned over to the clerk for distribution to other creditors or the taxpayer and are not kept by the county. But by not holding Billy responsible for the lower final sale price, the county risks a legal challenge from the parties who would have received those additional surplus funds (meaning either the taxpayer or other creditors).

## **HIGH BIDDERS WITH SECOND THOUGHTS**

What if the high bidder has second thoughts after the auction, perhaps because he/she fails to get title insurance or decides after further investigation that the property is not worth the purchase price? Should the county permit the bidder to withdraw the winning bid?

No. Tax foreclosure auction sales are final and "buyer beware." The county should make that fact clear at the time of auction and on any pre-auction documentation. All material information about the property known by the county (for example, potential environmental contamination due to the presence of underground fuel tanks) should be disclosed in

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writing to all bidders prior to the auction. If the county does so, it should not permit a high bidder to back out of a sale due to subsequent regrets about the purchase.

For details on what happens if the county is the high bidder at the foreclosure auctions, read this post and this one.

## Links

- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=105-374](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=105-374)
- [www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByArticle/Chapter\\_1/Article\\_29A.pdf](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_1/Article_29A.pdf)
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- [www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByArticle/Chapter\\_1/Article\\_29B.pdf](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_1/Article_29B.pdf)
- [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_1/GS\\_1-339.25.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_1/GS_1-339.25.html)
- [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_1/GS\\_1-339.64.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_1/GS_1-339.64.html)
- [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_1/GS\\_1-339.30.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_1/GS_1-339.30.html)
- [www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_1/GS\\_1-339.69.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_1/GS_1-339.69.html)