

## **CHAPTER 35-03 MORTGAGE OF REAL PROPERTY**

### **35-03-01. Mortgage of real property must be in writing - Formalities necessary.**

A mortgage of real property can be created, renewed, or extended only by writing, executed with the formalities required in the case of a grant of real property.

#### **35-03-01.1. Definitions.**

1. A mortgage is a contract by which specific real property capable of being transferred is hypothecated for the performance of an act without requiring a change in possession, and includes a transfer of an interest in real property, other than a trust, made only to secure the performance of an act.
2. A power of sale under a mortgage of real property is a trust and can be executed only in the manner prescribed by the laws of this state governing the foreclosure of mortgages. Such a power may be conferred by a mortgage upon the mortgagee, or any other person, to be exercised after a breach of the obligation for which the mortgage is a security.

#### **35-03-01.2. Nature, extent, and effect of lien - Security not to be impaired.**

1. A mortgage is a lien upon everything that would pass by a grant of the property, and upon nothing more.
2. A mortgage is a lien upon the property mortgaged in the hands of everyone claiming under the mortgagor subsequently to its execution, except purchasers and encumbrancers in good faith without notice and for value.
3. Real property held adversely to the mortgagor may be mortgaged, and such a mortgage takes effect from the time at which the mortgagor or one claiming under the mortgagor obtains possession of the property and has precedence over every lien upon the mortgagor's interest in the property created subsequently to the recording of the mortgage.
4. Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution.
5. In the absence of an express covenant, a mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security.
6. A mortgage does not entitle the mortgagee to the possession of the property, but after the execution of a mortgage, the mortgagor may agree to the change of possession without a new consideration.
7. The assignment of a debt secured by a mortgage carries the security with it.
8. No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security.

#### **35-03-01.3. Mortgages insured or guaranteed by the United States veterans' administration - Notice.**

The following statement must be signed at the time of the loan application by both the borrower and lender on loans that are insured or guaranteed by the United States veterans' administration:

I understand that the veterans' administration may attempt to hold me liable for the guarantee it offers the lending institution on this mortgage. I understand that it may be alleged that I may remain liable for the amount guaranteed by the veterans' administration if this mortgage is foreclosed or if the property is sold by me without first obtaining an approved release of liability from the veterans' administration. I also understand that it may be alleged that North Dakota law governing deficiency judgments may not apply to the collection of loans guaranteed by the veterans' administration. By signing this statement, I am indicating that the contents of this statement have been explained to me by a loan officer representing the lending institution offering this mortgage loan.

**35-03-02. Acknowledgment, certification, and recordation.**

Mortgages of real property may be acknowledged or proved, certified, and recorded in like manner and with like effect as grants of real property.

**35-03-03. Power of attorney to execute mortgages - Requisites.**

A power of attorney to execute a mortgage must be in writing subscribed, acknowledged or proved, certified, and recorded in like manner as powers of attorney for grants of real property.

**35-03-04. Prerequisites for recordation - Post-office address of mortgagee or assignee.**

The recorder may not record a mortgage of real property unless the mortgage contains the post-office address of the mortgagee. An assignment of a mortgage on real property which does not contain the post-office address of the assignee may not be received for record.

**35-03-05. Form of real estate mortgage.**

A mortgage of real property may be made in substantially the following form:

**NORTH DAKOTA STANDARD FORM**

THIS INDENTURE, Made this \_\_\_\_\_ day of \_\_\_\_\_ A.D. Two thousand \_\_\_\_\_ between \_\_\_\_\_ whose post-office address is \_\_\_\_\_ of the county of \_\_\_\_\_ and state of North Dakota, part \_\_\_\_\_ of the first part, and \_\_\_\_\_ whose post-office address is \_\_\_\_\_ of the county of \_\_\_\_\_ and state of North Dakota, party of the second part:

WITNESSETH, That the said part \_\_\_\_\_ of the first part, for and in consideration of the sum of \_\_\_\_\_ dollars to \_\_\_\_\_ in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do \_\_\_\_\_ by these presents grant, bargain, sell, and convey to the said party of the second part, \_\_\_\_\_ heirs, executors, administrators, successors, and assigns, forever, all the following described real estate in the county of \_\_\_\_\_ and state of North Dakota, described as follows, to wit:

\_\_\_\_\_

TO HAVE AND TO HOLD THE SAME, Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, \_\_\_\_\_ heirs, executors, administrators, successors, and assigns, FOREVER. And the said part \_\_\_\_\_ of the first part, do \_\_\_\_\_ covenant with the said party of the second part, \_\_\_\_\_ heirs, executors, administrators, successors, and assigns, as follows: That \_\_\_ he \_\_\_ ha \_\_\_\_\_ good right to convey the same, that the same are free from all encumbrances \_\_\_\_\_

and that the said party of the second part, \_\_\_\_\_ heirs, executors, administrators, successors, and assigns, shall quietly enjoy and possess the same, and that the said part \_\_\_\_\_ of the first part will warrant and defend the title to the same against all lawful claims, hereby relinquishing and conveying all right of homestead, and all contingent claims and rights whatsoever in and to the said premises.

PROVIDED, NEVERTHELESS, That if the said part \_\_\_\_\_ of the first part, \_\_\_\_\_ heirs, executors, or administrators, shall well and truly pay, or cause to be paid, to the said party of the second part, \_\_\_\_\_ heirs, executors, administrators, successors, or assigns, the sum of \_\_\_\_\_ dollars and interest according to the conditions of \_\_\_\_\_ note \_\_\_\_\_ of even date herewith, as follows:

\_\_\_\_\_

payable at the \_\_\_\_\_ with interest from date until maturity, at the rate of \_\_\_\_\_ percent, per annum, payable \_\_\_\_\_ annually and shall also keep and perform all and singular the covenants and agreements herein contained, then this deed to be null and void, and the premises hereby conveyed to be released

at the cost of the said part \_\_\_\_\_ of the first part; otherwise to remain in full force and effect.

And the said part \_\_\_\_\_ of the first part do \_\_\_\_\_ covenant and agree with the said party of the second part, \_\_\_\_\_ heirs, executors, administrators, successors, and assigns to pay the said sum of money and interest thereon as above specified; to pay as a part of the debt hereby secured, in case of each or any foreclosure or commencement of foreclosure of this mortgage, all costs and expenses and statutory attorney's fees in addition to all sums and costs allowed in that behalf by law; to permit no waste, and to do or permit to be done, to said premises, nothing that may in any manner impair or weaken the security under this mortgage; to pay all taxes or assessments that may be assessed against or be a lien on said premises, or any part thereof, or upon this mortgage or note \_\_\_\_\_ or the legal holder thereof, before the same shall become delinquent; to keep the buildings on said premises insured for \_\_\_\_\_ dollars, in companies acceptable, with loss payable to the mortgagee or \_\_\_\_\_ assigns; and in case of failure so to pay said taxes or assessments, or any of the agreements hereunder, or in case there exists any claim, lien, or encumbrance upon said premises, which is prior to this mortgage, the said party of the second part, \_\_\_\_\_ heirs, executors, administrators, successors, or assigns may at \_\_\_\_\_ option, pay and discharge such taxes or other obligation, and the sum or sums of money which may so be paid, with interest from the time of payment at the same rate as said principal sum, shall be deemed and are hereby declared to be a part of the debt secured by this mortgage and shall be immediately due and payable. It is further agreed and understood that this mortgage shall also cover any renewal note for the above described indebtedness or any portion thereof.

But if default shall be made in the payment of said sum of money, or interest, or the taxes, or any part thereof, at the time and in the manner hereinbefore or hereinafter specified for the payment thereof, the said part \_\_\_\_\_ of the first part, in such cases do \_\_\_\_\_ hereby authorize and fully empower the said party of the second part, \_\_\_\_\_ heirs, executors, administrators, successors, or assigns, to sell the said hereby granted premises and convey the same to the purchaser, in fee simple agreeably to the statute in such case made and provided, and out of the moneys arising from such sale to retain the principal and interest which shall then be due on said note \_\_\_\_\_, and all taxes upon said lands, together with all costs and charges, and statutory attorney's fees, and pay the overplus if any to the said part \_\_\_\_\_ of the first part, \_\_\_\_\_ heirs, executors, administrators, or assigns, And if default be made by the part \_\_\_\_\_ of the first part in any of the foregoing provisions it shall be lawful for the party of the second part, \_\_\_\_\_ heirs, executors, administrators, successors, or assigns or \_\_\_\_\_ attorney to declare the whole sum above specified to be due.

IN TESTIMONY WHEREOF, The said part \_\_\_\_\_ of the first part ha \_\_\_ hereunto set \_\_\_\_\_ hand \_\_\_\_\_ the day and year first above written.

Signed and delivered

in presence of

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### **35-03-05.1. Recording and filing assignment of mortgage - Notice to whom.**

An assignment of a mortgage may be recorded or filed in the same manner as a mortgage, and the record thereof operates as notice to all persons subsequently deriving title to the mortgage from the assignor. When the mortgage is executed as security for money due or to become due on a promissory note, bond, or other instrument designated in the mortgage, the record of the assignment of the mortgage is not of itself notice to a mortgagor or a mortgagor's heirs or personal representatives so as to invalidate any payment made by them or either of them to the person holding such note, bond, or other instrument.

### **35-03-06. Fee for recording mortgage - Standard form not mandatory.**

Repealed by S.L. 1953, ch. 113, § 2.

**35-03-07. Record - Notice to whom.**

The record of a mortgage duly made operates as notice to all subsequent purchasers and encumbrancers.

**35-03-08. Papers accompanying mortgage or grant must be recorded.**

Every grant of real property or of any estate therein which appears by any other writing to be intended as a mortgage within the meaning of chapter 35-01 must be recorded as a mortgage. If the grant and other writing explanatory of its true character are not recorded together at the same time and place, the grantee can derive no benefit from such record.

**35-03-09. Defeasance must be recorded - Effect of failure to record.**

When a grant of real property purports to be an absolute conveyance but is intended to be defeasible on the performance of certain conditions, the grant is not defeated or affected as against subsequent purchasers or encumbrancers in good faith and for value, unless an instrument of defeasance duly executed and acknowledged is recorded in the office of the recorder of the county where the property is situated.

**35-03-10. Mortgage for purchase price of real property prior to all liens.**

A mortgage given for the purchase price of real property at the time of its conveyance has priority over all other liens created against the purchaser, subject to the operation of the recording laws.

**35-03-11. Certificate of discharge - How recorded.**

A certificate of the discharge of a mortgage and proof or acknowledgment of the discharge must be recorded at length and a reference made in the record to the book and page or document number where the mortgage is recorded and of the minute of the discharge, made upon the record of the mortgage, to the book and page or document number where the discharge is recorded.

**35-03-12. Successor or devisee must satisfy mortgage out of that person's property - Exception.**

Repealed by S.L. 1973, ch. 257, § 82.

**35-03-13. Discharge of real estate mortgage not renewed or extended of record.**

Repealed by S.L. 1963, ch. 256, § 4.

**35-03-14. Expiration of real estate mortgages.**

Unless extended as specified in section 35-03-15, the lien created by a mortgage of North Dakota real estate and all notice from the record thereof expires as to all persons and for all purposes as follows:

1. If the final maturity date is ascertainable from the record of the mortgage, the lien of the mortgage expires ten years after that date.
2. If the final maturity date of the mortgage is not ascertainable from the record, the lien of the mortgage expires ten years after the date the mortgage is filed for record in the office of the recorder.

Expiration of a mortgage lien under the provisions of this section is equivalent for all purposes to proper discharge of the mortgage of record, and execution or recordation of a discharge instrument is not necessary to terminate a mortgage lien which has so expired. Satisfaction of mortgage in the common form may be recorded at any time.

Expiration of a mortgage lien as provided herein occurs notwithstanding that the right to foreclose the mortgage has not been or might not be barred by the defense of limitations, whether tolled by nonresidence, disability, death, part payment, acknowledgment, extension, new promise, or waiver, and occurs notwithstanding any provisions of the Federal Soldiers' and Sailors' Civil Relief Act.

**35-03-15. Extension of mortgage - Expiration delayed - Retroactivity.**

Expiration of a real estate mortgage lien as provided in section 35-03-14 does not occur if prior to the date such expiration otherwise would become effective:

1. An action or proceeding to foreclose is timely and properly commenced and the summons and complaint in such action are duly filed with the clerk of the court having jurisdiction, and there is duly recorded in the office of the recorder a special notice of the pendency of such action, or of the pendency of a proceeding to foreclose by advertisement;
2. There is duly recorded in the office of the recorder the statutory notice of intention to foreclose with proof of service;
3. A deed in lieu of foreclosure purporting to continue the mortgage lien unmerged in the fee title is duly recorded in the office of the recorder;
4. Actual possession of the mortgaged property is taken and held by the owner of the mortgage; or
5. An instrument by or on behalf of an interested party in affidavit form asserting extension and continuation of the mortgage lien is duly recorded in the office of the recorder of the county in which the affected mortgaged real estate or some portion thereof is situated, provided that no such instrument is effective to postpone expiration of a mortgage lien under this section for more than ten years beyond the date expiration would have become effective.

The provisions of section 35-03-14 and this section apply to all mortgages, including those executed or recorded before the effective date of said sections. The provisions of said sections do not bar any action, preclude foreclosure or enforcement of any lien, or cause any mortgage lien to expire, until January 1, 1964.

**35-03-16. Satisfaction of mortgage - Discharge - Form - Power of attorney.**

A recorded mortgage must be discharged upon the record by the recorder having custody of the mortgage on the presentation of a certificate of discharge signed by the mortgagee, the mortgagee's executors, administrators, guardians, trustees, assigns, personal representatives, or special administrators appointed for that purpose, properly acknowledged or proved and certified as prescribed by chapter 47-19. The certificate of discharge must contain a brief description of the mortgage and must state that the mortgage has been paid in full or otherwise satisfied and discharged and that the officer is authorized to discharge the mortgage of record. Any person executing a certificate of discharge as a personal representative of the mortgagee first shall file and have recorded in the office of the recorder where the mortgage is recorded a power of attorney showing the person's authority to discharge mortgages in behalf of the mortgagee and in the mortgagee's name. The mortgagee shall present the certificate of discharge to the recorder for recording in the county in which the property is located within thirty days after the certificate of discharge is signed. The mortgagee may add the amount of the recording fee to the balance of the debt paid by the mortgagor. A certificate of the satisfaction of a mortgage may be made in substantially the following form:

This certifies that a certain mortgage executed by \_\_\_\_\_ of \_\_\_\_\_, mortgagor, to \_\_\_\_\_ of \_\_\_\_\_, mortgagee, dated the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_, upon the \_\_\_\_\_ (here describe the property covered by the mortgage) and recorded in the office of the recorder in and for the county of \_\_\_\_\_ and state of North Dakota, in book \_\_\_\_\_ of mortgages on page \_\_\_\_\_ or as document number \_\_\_\_\_, is paid and satisfied; and \_\_\_\_\_ hereby authorize and require the recorder to discharge the mortgage of record in the recorder's office.

Witness \_\_\_\_\_ hand this \_\_\_\_ day of \_\_\_\_\_ A.D.  
\_\_\_\_\_ (Acknowledgment).

**35-03-17. Collateral real estate mortgages.**

A mortgage which contains the following statement in printed or typed capital letters: "THE PARTIES AGREE THAT THIS MORTGAGE CONSTITUTES A COLLATERAL REAL ESTATE MORTGAGE PURSUANT TO NORTH DAKOTA CENTURY CODE CHAPTER 35-03" is subject

to the provisions of this section. A mortgage executed pursuant to this section must be entitled in printed or typed capital letters: "MORTGAGE - COLLATERAL REAL ESTATE MORTGAGE". A mortgage made pursuant to this section, notwithstanding the fact that from time to time during the term thereof no indebtedness is due from the mortgagor to the mortgagee, constitutes a continuing lien against the real property covered thereby for the amount stated in the mortgage. Any sums not exceeding the face amount of the mortgage, together with interest thereon as provided in the instrument secured by the mortgage, advanced by the mortgagee during the term of the mortgage have a lien priority as of the date the mortgage was filed. At any time the indebtedness due the mortgagee is zero, the mortgagor may demand in writing that the mortgage be satisfied, and the mortgagee shall within ten days thereafter execute and record a satisfaction thereof. Collateral real estate mortgages may be used to secure commercial, agricultural, or consumer loans or lines of credit including, but not limited to, revolving notes and credits and overdraft checking plans.

A filed collateral real estate mortgage which states a maturity date of the instrument secured thereby of five years or less is effective until such maturity date and thereafter for a period of sixty days. Any other filed collateral real estate mortgage is effective for a period of five years from the date of filing and thereafter for a period of sixty days. A filed collateral real estate mortgage which states that the instrument secured thereby is payable on demand is effective for five years from the date of filing and thereafter for a period of sixty days. The effectiveness of a filed collateral real estate mortgage lapses upon the expiration of the sixty-day period unless an addendum to the collateral real estate mortgage extending its effective date is filed prior to the lapse. If a filed collateral real estate mortgage exists at the time insolvency proceedings are commenced by or against the debtor, the mortgage remains effective until sixty days after termination of the insolvency proceeding or until expiration of the five-year period, whichever occurs later. Upon such lapse, the lien created by the collateral real estate mortgage terminates. An addendum continuing the effectiveness of the lien of the collateral real estate mortgage may be filed by the mortgagee:

1. Within six months before and sixty days after a stated maturity date of five years or less; and
2. Otherwise within six months before and sixty days after the expiration of the five-year effective date period.

An addendum to a collateral real estate mortgage for the sole purpose of continuing the effectiveness of its lien need be signed only by the mortgagee. Upon the timely filing of such an addendum to a collateral real estate mortgage, the effectiveness of the collateral real estate mortgage will be continued for five years after the stated maturity date in those instances in which the original collateral real estate mortgage provided a maturity date or for five years after the expiration of the five-year period whereupon it lapses in the same manner as provided above unless another addendum to the collateral real estate mortgage continuing the effectiveness of its lien is filed prior to such lapse. Succeeding addendums to collateral real estate mortgages may be filed in the same manner to continue the effectiveness of the lien of the collateral real estate mortgage.

### **35-03-18. Request for information concerning payoff and escrow amounts - Penalty - Venue.**

Unless otherwise stated in the loan or mortgage, within seven business days after receipt of a written request that specifies the name of the owner of the property and the loan number assigned to a loan secured by a mortgage on residential real property and that indicates the information is necessary to close a sale of the property, the servicer of a loan secured by a mortgage on residential real property shall provide to the owner of the property or to that person's representative full information concerning the amount necessary on a date specified in the request to pay off the loan and of any amount held in escrow for payment of insurance premiums, taxes, and other costs relating to the real property. The servicer of the loan secured by a mortgage may not charge any fee for providing the information.

If the servicer of the loan fails to deposit with the United States postal service, facsimile, or deliver personally the information requested within seven business days after receipt of the written request for information and the closing date for sale of the property is postponed as a

result of the delay, the servicer of the loan is liable to the owner of the property for all damages sustained because of the delay. Notwithstanding any other law, an action brought to recover damages under this section must be heard in the county where the real property is located or where the plaintiff resides if the residence is within this state.

**35-03-19. Certificate of release - Contents - Execution - Recordation.**

1. As used in this section, unless the context otherwise requires:
  - a. "Mortgage" means a mortgage or mortgage lien covering an interest in real property in this state given to secure a loan in the original principal amount of five hundred thousand dollars or less.
  - b. "Mortgage servicer" means the last person to whom a mortgagor or the mortgagor's successor in interest has been instructed by a mortgagee to send payments on a loan secured by a mortgage. A person transmitting a payoff statement is the mortgage servicer for the mortgage described in the payment statement.
  - c. "Mortgagee" means the grantee of a mortgage or if a mortgage has been assigned of record, the last person to whom the mortgage has been assigned of record.
  - d. "Mortgagor" means the grantor of a mortgage.
  - e. "Payoff statement" means a statement of the amount of the unpaid balance of a loan secured by a mortgage, including principal, interest, and any other charges properly due under or secured by the mortgage and interest on a per day basis for the unpaid balance.
  - f. "Record" means to record with the recorder.
  - g. "Title insurance company" means a corporation or other business entity authorized and licensed to transact the business of insuring titles to interests in real property in this state in accordance with chapter 26.1-20.
2. An officer or duly appointed agent of a title insurance company may execute, on behalf of a mortgagor or a person who acquired from the mortgagor title to all or a part of the property described in a mortgage, a certificate of release that complies with the requirements of this section and record the certificate of release in the real property records of each county in which the mortgage is recorded if a satisfaction or release of the mortgage has not been executed and recorded after the date payment in full of the loan secured by the mortgage was sent in accordance with a payoff statement furnished by the mortgagee or the mortgage servicer.
3. A certificate of release executed under this section must contain substantially all of the following:
  - a. The name of the mortgagor, the name of the original mortgagee, and, if applicable, the mortgage servicer, the date of the mortgage, the date of recording, and volume and page or document number in the real property records where the mortgage is recorded, together with similar information for the last recorded assignment of the mortgage;
  - b. A statement that the mortgage was in the original principal amount of five hundred thousand dollars or less;
  - c. A statement that the person executing the certificate of release is an officer or a duly appointed agent of a title insurance company authorized and licensed to transact the business of insuring titles to interests in real property in this state;
  - d. A statement that the certificate of release is made on behalf of the mortgagor or a person who acquired title from the mortgagor to all or a part of the property described in the mortgage;
  - e. A statement that the mortgagee or mortgage servicer provided a payoff statement which was used to make payment in full of the unpaid balance of the loan secured by the mortgage; and
  - f. A statement that payment in full of the unpaid balance of the loan secured by the mortgage was made in accordance with the written or verbal payoff statement.

4. A certificate of release authorized by this section must be executed and acknowledged as required by law in the case of a deed and may be executed by a duly appointed agent of a title insurance company. The delegation to an agent by a title insurance company does not relieve the title insurance company of any liability for damages caused by its agent for the wrongful or erroneous execution of a certificate of release. The appointment of agent must be executed and acknowledged as required by law in the case of a deed and must state the title insurance company as the grantor, the identity of the person authorized to act as agent to execute and record certificates of release provided for in this section on behalf of the title insurance company, that the agent has the full authority to execute and record certificates of release provided for in this section on behalf of the title insurance company, the term of appointment of the agent, and that the agent has consented to and accepts the terms of the appointment. A single appointment of agent may be recorded in each county in each recorder's office. A separate appointment of agent may not be necessary for each certificate of release. The appointment of agent may be rerecorded when necessary to establish authority of the agent. The authority continues until a revocation of appointment is recorded with the recorder where the appointment of agent was recorded.
5. For purposes of releasing the mortgage, a certificate of release containing the information and statements provided for in this section and executed as provided in this section is prima facie evidence of the facts contained in the certificate, is entitled to be recorded with the recorder, and operates as a release of the mortgage described in the certificate. The recorder shall rely upon the certificate to release the mortgage. Recording of a wrongful or erroneous certificate of release by a title insurance company or its agent does not relieve the mortgagor, or the mortgagor's successors or assigns, from any personal liability on the loan or other obligations secured by the mortgage. In addition to any other remedy provided by law, a title insurance company wrongfully or erroneously recording a certificate of release under this section is liable to the mortgagee for actual damage sustained due to the recording of the certificate of release.
6. If a mortgage is recorded in more than one county and a certificate of release is recorded in one of them, a certified copy of the certificate of release may be recorded in another county with the same effect as the original. In all cases, the certificate of release shall be entered and indexed as satisfactions of mortgage are entered and indexed.