



Mixed Use Development

- Coordinate Neighborhoods
- Encourage Pedestrian Activity
- Acreage for each use
- Improvement completion schedule conditions



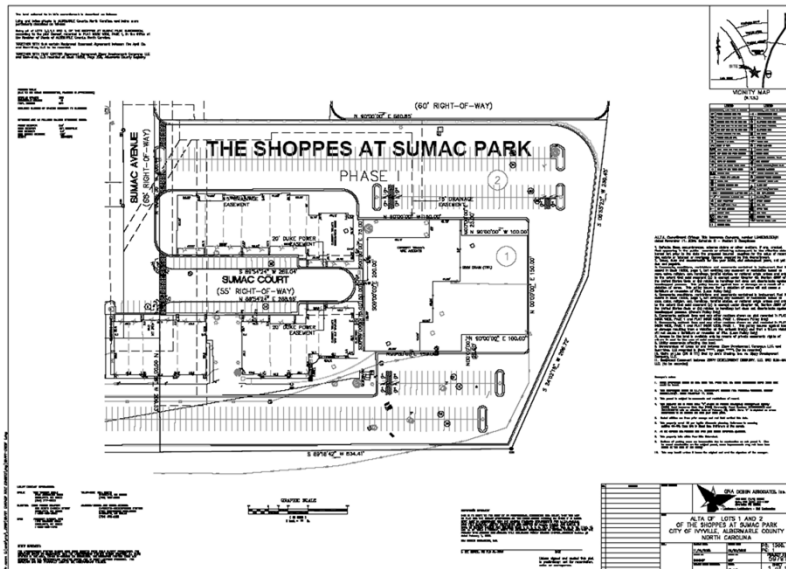
PC Fangs



Way-Out-Waffles



SHOPPES AT SUMAC PARK

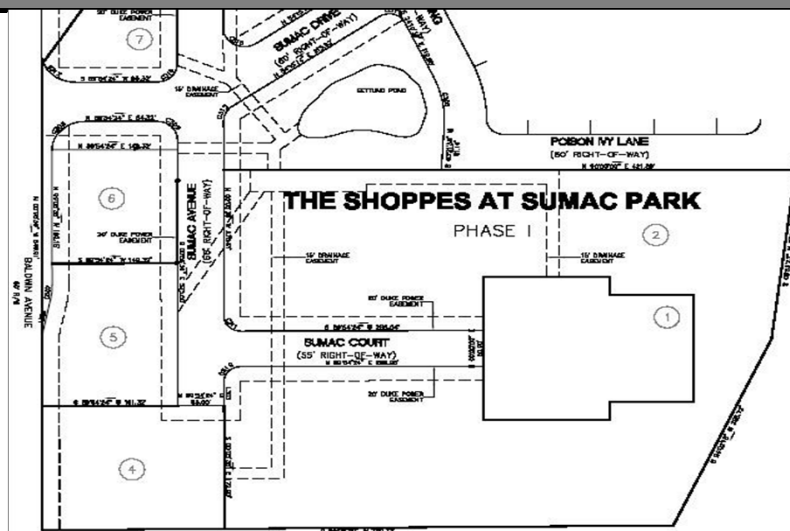


Survey

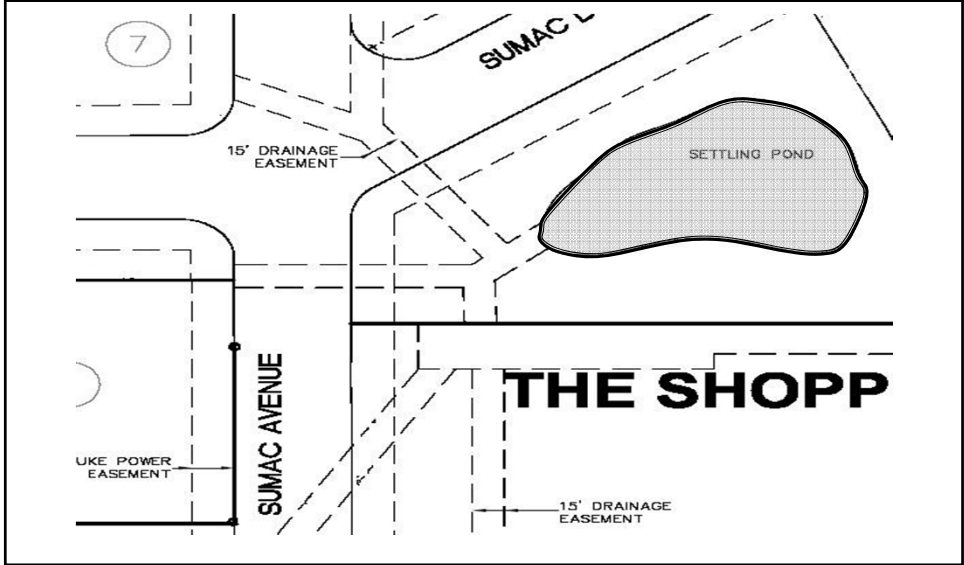
- Common exceptions
 - easements
 - power poles
 - water meters
- Blanket Easements
- Affirmative coverages
 - easement will not interfere with intended use



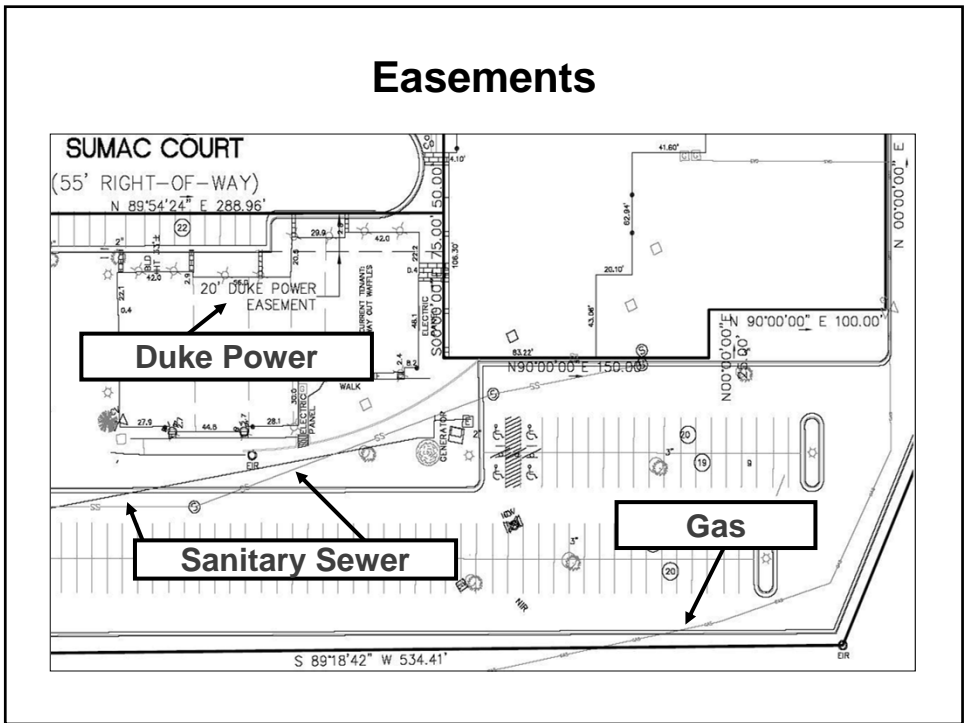
Recorded Plat Access



Recorded Plat Retention Pond



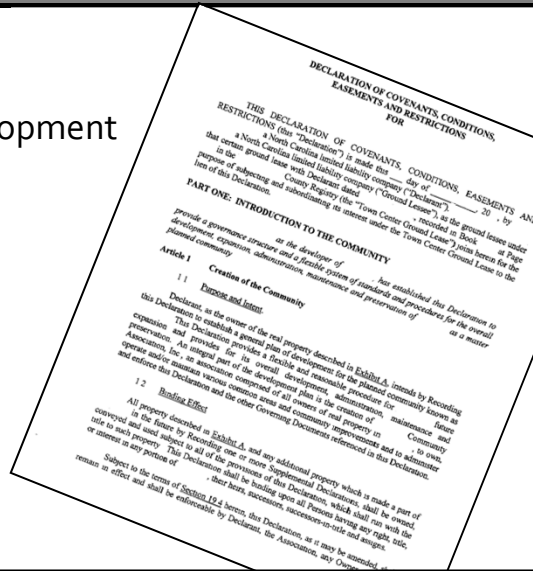
Easements



Covenants, Conditions and Restrictions

Purpose – plan of development

- Use Limitations
- Easements



Reciprocal Easement Agreements – "REA"

- Purpose – Co-exist in a beneficial manner
- Cross easements
- Appurtenant Easements
- Access, Parking...
- Use of Site Plans
- Insurable Interest, Sch. A –
 - Easement
 - Not "benefits"
 - Not non-title issues
 - Not insured unless title
 - Certified & shown in Sch. A
- Exception in Sch B



REA

- In writing – *Tedder v. Alford*, GS 22-2
- Dominant and servient properties described with “reasonable certainty” *Hensley v. Ramsey*
- Location of easement – *Wiggins v. Short*
- Conveyance
- Purpose – authorized & shared uses

THE AMERICAN LAND TITLE ASSOCIATION POLICIES & ENDORSEMENTS



ALTA Endorsement Forms

3-06, 3.1-06 and *proposed* 3.2-06 (Zoning)



- ALTA 3-06 -- Zoning Classification & Approved Uses
- ALTA 3.1 (Improved Land) – Same as ALTA 3 plus coverage regarding enforced removal or alteration of existing improvements for violations of:
 - Area, width, or depth of Land as a building site for structure
 - Floor space area of structure
 - Setback of structure from property lines of the Land
 - Height of structure, or
 - Number of parking spaces.
- *Proposed ALTA 3.2-06 regarding zoning coverage for proposed improvements based on review of plans & specs, being discussed.*

Parking and Setbacks

PARKING TABLE
(DUE TO ON GOING CONSTRUCTION, PARKING IS APPROXIMATE)

REGULAR SPACES	356
ACCESSIBLE SPACES	8
TOTAL SPACES	364

REQUIRED NUMBER OF SPACES UNKNOWN TO SURVEYOR

SETBACKS ARE AS FOLLOWS UNLESS OTHERWISE NOTED:

FRONT SETBACK	0.0'
REAR SETBACK	NOT AVAILABLE
SIDE SETBACK	0.0'
SIDE STREET SETBACK	0.0'
HEIGHT	UNKNOWN

ALTA Endorsement Forms 9, 9.1 and 9.2 (Restrictions, Encroachments, Minerals)



- For the Loan Policy
 - Priority of DT
 - Encroachments
 - Subsurface Minerals
- For the Owner's Policy
 - Violations of covenants, conditions & restrictions



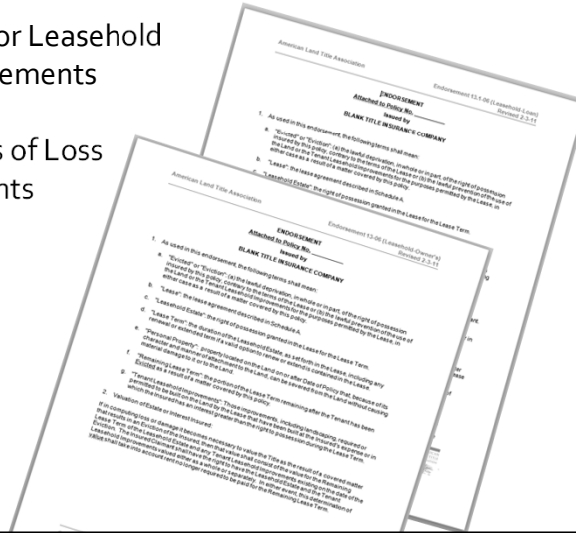
Retail Tenant Restoration Barn



ALTA Endorsement Forms 13 and 13.1 (Leasehold)



- Coverages crafted for Leasehold
- Valuation of Improvements
- Valuation of Estate
- Miscellaneous Items of Loss
- Violation of Covenants



Leasehold Title

- Recorded Memorandum of Lease
 - GS 47-18 & GS 47-118
- Endorsement
- Valuation



Valid Lease Instrument

- In Writing
- More than 3 Years – Must Record
- Memorandum
- Legal Description



Leasehold Mortgages

Security is limited by terms and conditions of the lease agreement.

Some issues in lease which may affect lender's title include:

- ✓ Permission
- ✓ Ability to Cure
- ✓ Term of Lease

Subordination, Non-Disturbance & Attornment (SNDA)

- Relationship: Fee Lender & Leasehold
- Non-Disturbance
- Attornment
- Subordination
- Schedule B II

G.S. 39-6.6 – “given effect in accordance with its terms”

Leasehold Deed of Trust

Leasehold deed of trust must meet all the requirements of a deed of trust on a fee interest.

Authority in lease agreement for mortgage, ability of lender to cure tenant defaults, and term of lease (in excess of mortgage term).

Miller v. Lemon Tree Inn

COMPARE: Lease Exception

- A Lease that has a duration of three (3) years or less (including extensions) beginning immediately need not be in writing and need not be recorded for priority.
 - NCGS Section 47-18
 - Perkins v. Langdon, 237 N.C. 159, 74 S.E.2d 634 (1953).
- Standard Tenant Exception: **Rights of tenants in possession, as tenants only, under unrecorded leases for a duration of less than three (3) years.**
- Owner's affidavit
- Subordination, Non-Disturbance and Attornment

Lease Certification

There are no oral or unrecorded written contracts, leases, easements, deeds, deeds of trust, or agreements relating to or affecting the Property, and there are no persons in possession of or using any portion of the Property other than pursuant to a recorded document.



Leasehold Owner

13-06



Page 1 of 2

ALTA ENDORSEMENT 13-06
Attached to Owner's Policy No.
34 306 SAMPLE
Issued by
CHICAGO TITLE INSURANCE COMPANY

1. As used in this endorsement, the following terms shall mean:
 - a. "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the Land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case as a result of a matter covered by this policy.
 - b. "Lease": the lease agreement described in Schedule A.
 - c. "Leasehold Estate": the right of possession for the Lease Term.
 - d. "Lease Term": the duration of the Leasehold Estate, including any renewal or extended term if a vote to renew or extend is contained in the Lease.
 - e. "Personal Property": chattels located on the Land and property that, because of their character and attachment to the Land, can be severed from the Land without causing appreciable damage to the Land to which they are affixed.
 - f. "Remaining Lease Term": the portion of the Lease Term remaining after the Insured has been Evicted of a matter covered by this policy.
 - g. "Tenant Leasehold Improvements": Those improvements, including landscaping, required or permitted to be built on the Land by the Lease that have been built at the Insured's expense or in which the Insured has an interest greater than the right to possession during the Lease Term.
2. Valuation of Estate or Interest Insured.

If in computing loss or damage it becomes necessary to value the Title as the result of a covered matter that results in an Eviction of the Tenant, then that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The Insured Claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.



Leasehold Owner

13-06



As used in this endorsement, the following terms shall mean:

- a. "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the Land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case as a result of a matter covered by this policy....
- g. "Tenant Leasehold Improvements": Those improvements, including landscaping, required or permitted to be built on the Land by the Lease that have been built at the Insured's expense or in which the Insured has an interest greater than the right to possession during the Lease Term.

Leasehold Owner

13-06



2. Valuation of Estate or Interest Insured:

If in computing loss or damage it becomes necessary to value the Title as the result of a covered matter that results in an Eviction of the Insured, then that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The Insured Claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.



Leasehold Owner

13-06



3. Additional items of loss covered by this endorsement:

If the Insured is Evicted, the following items of loss, if applicable, shall be included in computing loss or damage incurred by the Insured, but not to the extent that the same are included in the valuation of the Title:

- a. The reasonable cost of removing and relocating any Personal Property that the Insured has the right to remove and relocate, situated on the Land at the time of Eviction, the cost of transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, and the reasonable cost of repairing the Personal Property damaged by reason of the removal and relocation.
- b. Rent or damages for use and occupancy of the Land prior to the Eviction that the Insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.
- f. The reasonable cost to obtain land use, zoning, building and occupancy permits, architectural and engineering services and environmental testing and reviews for a leasehold reasonably equivalent to the Leasehold Estate.
- g. If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the Insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering fees, construction management fees, costs of environmental testing and reviews, and landscaping costs.

Leasehold Lender

13.1.-06



Key difference from owner's form 13-06

3. Additional items of loss covered by this endorsement:

If the Insured acquires all or any part of the Title in accordance with the provisions of Section 2 of the Conditions of this policy and thereafter is Evicted, the following items of loss, if applicable, shall be included in computing loss or damage incurred by the Insured, but not to the extent that the same are included in the valuation of the Title:

Commitment

■ Requirements

- Record – Lease Agreement, Deed of Trust, REA
- Cancel, release or subordinate – Deed of Trust, Assign. of L&R, UCC, Claim of Lien...

■ Exceptions

- CCRs, REA, Lease Agreement, Survey, Plat

Prior Memorandum of Lease

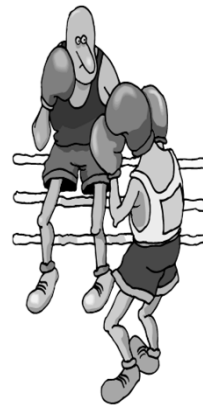
- Notice under NCGS § 47-118
 - Names, Property, Term, Reference to Agreement
- Legal Description – Includes Easements
- Options
 - Subordination
 - Lease Agreement
- Abandonment



Problem – Non Compete or Exclusive Use

- Types – Lists or Service/Product
- Allowed v. Restraint on Trade
- Restriction must be
 - founded on valuable consideration,
 - reasonably necessary to protect legitimate interests, &
 - reasonable as to time & area.
- Title Coverages

Cases
Quadro Stations v. Gilley
Taha v. Thompson



Pre-Existing Liens

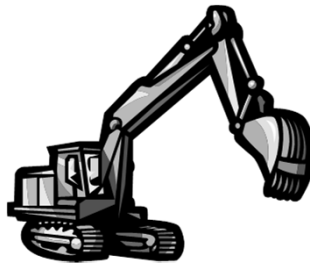
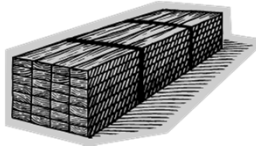
- Cancel/Subordinate/Except
- Assignment of Leases and Rents
 - Cancellation
 - New GS 45-42.3 (“Ancillary instruments”)
- UCC1

The image shows two overlapping legal forms. The top form is a 'UCC FINANCIAL STATEMENT AMENDMENT' with various fields for creditor information and a signature line. The bottom form is a 'SATISFACTION OF SECURITY INSTRUMENT BY SECURED CREDITOR' (N.C.S.A. 45-24.16, N.C.G.S. 45-216(a)(7)). It includes fields for the type of security instrument, original secured parties, recording date, and county. It also has sections for 'INDIVIDUAL SECURED CREDITOR EXECUTE HERE' and 'NONINDIVIDUAL SECURED CREDITOR EXECUTE HERE' with lines for name, title, and date. A date stamp 'October 1, 2003' is visible at the bottom left of the bottom form.



MECHANICS' AND MATERIALMEN'S LIENS

Potential Lien Claimants?



Claim of Lien against Fee Owner (NCGS § 44A-8)

- Contract
- Labor or Materials
- First Furnishing/Last Furnishing
- 120 day/Extension
- Release/Cancel/Bond
- Escrow



Claim of Lien v. Future Advances

- NCGS § 45-68 – priority relates back
- Other States
- IRS Lien



Mechanics' Liens

The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject matter of their labor.

N.C. Constitution, Art. X, Section 3



“Lien Claimant”

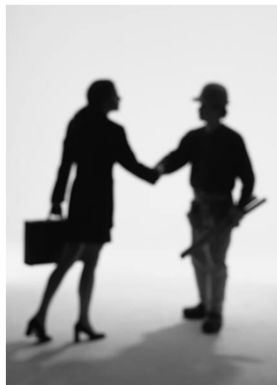
NCGS § 44A-8

Any person who:

- Provides services, labor, professional design, surveying, materials or rental equipment
- Contract [express or implied]
- With *property owner*
- For making improvements on property



Contractor or Subcontractor



- Contractor – contracts directly with owner of property – direct lien on property
- Subcontractor – contracts with contractor (not owner) or another subcontractor
 - Subrogation lien - Can step into contractor’s shoes and enforce lien on property for amount due contractor
 - Lien on funds – notice to owner that they have not been paid/lien on property if funds paid by owner after notice

Distinguish: Licensing definition of “Contractor” - N.C.G.S. 87-1



Mechanics' & Materialmen's Liens

Improve:

- build, effect, alter, repair, or demolish
- excavate, clear, grade, fill or landscape
- construct driveways and private roadways
- furnish materials, including trees and shrubbery
- perform any labor upon such improvements,
- includes architects, engineers, land surveyors and landscape architects
- includes rental of equipment directly utilized on the real property in making the improvement.

NCGS § 44A-7(1)



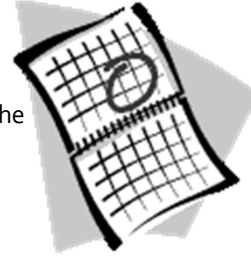
Property

- Property Affected
 - Property to which materials or labor were furnished
 - NCGS 44A-9 - *A claim of lien on real property authorized under this Article shall extend to the improvement and to the lot or tract on which the improvement is situated, to the extent of the interest of the owner.*
 - Infra-structure on subdivision
 - Claimant will go for entire subdivision
 - Multiple lots under one contract
 - When do time periods run?



Mechanics' & Materialmen's Liens

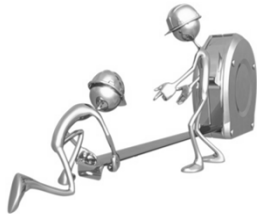
- Effective from first furnishing by the person claiming the lien. ("relation back")
- Claims of lien may be filed
 - After maturity of the obligation
 - Not later than 120 days after the last furnishing by the person claiming the lien.
- Civil action to enforce the lien
 - In any county in which the lien is filed
 - Lis pendens in county of property
 - No later than 180 days after the last furnishing by the person claiming the lien.



PREVENTION:

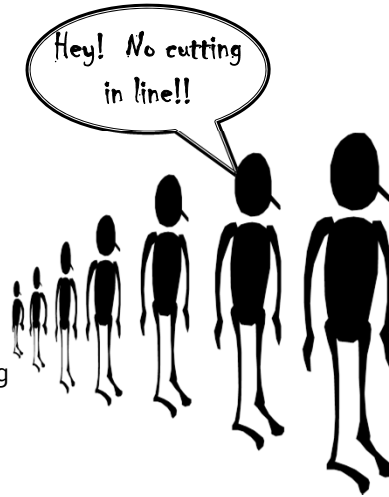
How do we know what is needed?

- How do we know what is needed?
 - What do you know about the deal?
 - New home
 - Renovation
 - Vacant lot in new subdivision
 - New condominium project
 - Commercial space
 - What do you know about the parties?
 - Developer of entire subdivision
 - Builds one home at a time
 - Owns in one entity – builds as another
 - How do they pay their subs?



PROTECTING AGAINST "HIDDEN" LIENS: What to do?

- Parties with lien rights must waive or subordinate their lien rights
 - Labor/materials within 120 days
 - Entered a contract
- Filed claims of lien
 - Must be released
 - Notify title company even if being released
 - Notify title company even if not on the subject property
- Potential to file claims of lien
 - Obtain affidavit waiving or subordinating



For Coverage Against Loss Resulting from Mechanics' & Materialmen's Liens, Title Company **Must** Receive:

NCLTA FORM 1 - OWNER AFFIDAVIT AND INDEMNITY AGREEMENT (NO RECENT IMPROVEMENTS)

Satisfactory evidence should be had that improvements and/or repairs or alterations thereto are completed; that contractor, subcontractors, labor and materialmen are all paid;

NCLTA FORM 2 - OWNER/CONTRACTOR AFFIDAVIT, WAIVER OF LIENS AND INDEMNITY AGREEMENT (CONSTRUCTION RECENTLY COMPLETED)

Waiver of potential liens by any person or entity dealing directly with the owner or potential owner in providing labor, services or materials for improvements to the land, completed within the last 120 days;

NCLTA FORM 3 - OWNER/CONTRACTOR AFFIDAVIT, INDEMNITY AND SUBORDINATION AGREEMENT (FOR CONSTRUCTION IN PROCESS OR IMMEDIATELY CONTEMPLATED) [LENDER COVERAGE ONLY]

Subordination of potential liens by any person or entity dealing directly with the owner or potential owner in providing labor, services or materials for improvements to the land which are currently in process or are to be financed by the loan secured by the deed of trust to be insured.



Mechanics' Liens – NCLTA Forms

Situation	Seller	Buyer/Borrower
Sale – no recent improvements	NCLTA Form 1	
Purchase/Construction	NCLTA Form 1	NCLTA Form 3
Construction only		NCLTA Form 3
Construction loan – mid-construction		NCLTA Form 3 (ongoing) NCLTA Form 2 (completed)
Refinance – no recent improvements		NCLTA Form 1
Sale – recent improvements completed	NCLTA Form 2	



Prevention: Not as easy as you think !!



- Developers should obtain completed lien waivers from all contractors who have completed their jobs – NCLTA Form 2 –
 - See *Electric Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 403 S.E.2d 291 (1991)
 - 2d tier sub's claim jumped up to Contractor, affecting availability of funds to complete project!*
- Interim lien waivers are still recommended, though they do not assure priority*
 - See *Wachovia Bank Nat. Ass'n. v. Superior Const. Corp.*, 2011 WL 2848234, NC COA10-1158 (July 19, 2011)

Typical language...

Now, therefore, the undersigned, for and in consideration of the sum of \$ [____, ____, ____] ..., do hereby waive, relinquish, surrender and release any and all lien, claim, or right to lien on the above said described project and premises, arising under and by virtue of the mechanic's lien laws of the State of North Carolina on account of any labor performed or the furnishing of any material to the above described project and premises up to and including the (day) ____ of (month) ____, (year) 2005. Upon receipt of this month's draw request of \$[____, ____, ____] [Superior Construction] will also waive and release any and all liens or claims, or right to lien on the above project as it relates to the stated draw request.

Affidavit / Indemnity Regarding Contractors

"If any improvements/repairs have been made by a general contractor within 120 days of the date hereof, Owner and General Contractor(s) certify that the General Contractor(s) named above is/are the only party(ies) with whom Owner has dealt regarding the furnishing of labor, services or materials for improvements / repairs to the Property."



NCLTA Form No. 2



OWNER/CONTRACTOR AFFIDAVIT, WAIVER OF LIENS AND INDEMNITY AGREEMENT
(CONSTRUCTION RECENTLY COMPLETED)

PARTIES: All parties identified in this section must execute this Agreement, including any Contractors required to sign Additional Signature Pages which must be attached hereto and are hereby incorporated herein and made a part hereof by reference, as applicable (herein the "Agreement").

Owner: _____
Contractor(s): _____

(NOTE: There can be more than one Owner if the property has been owned by multiple parties or has been conveyed within the 120-Day Lien Period. A separate Agreement is required for each successive owner in the 120-Day Lien Period and the Contractors who have contracted or dealt with that Owner.)

(NOTE: There can be more than one Contractor contracting or dealing with an Owner. All Contractors must be named and execute this Agreement.)

Attached: ADDITIONAL SIGNATURE PAGE(S) for all Contractors providing or who have provided Labor, Services or Materials within the 120-Day Lien Period.

PROPERTY: _____
(Insert street address or brief description and/or attach a description as Exhibit A. Include here any real estate that is a portion of a larger, previously unregistered tract within that area is reasonably necessary for the convenient use and occupation of Improvements on the larger tract.)

DEFINITIONS: The following capitalized terms as used in this Agreement shall have the following meanings:

- Improvement: All or any part of any building, structure, erection, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways on the Property as defined in NCOS Chapter 44A, Article 2.
- Labor, Services or Materials: Labor or professional services including architectural, engineering, landscaping or surveying services or materials or rental equipment for which a lien can be claimed under NCOS Chapter 44A, Article 2.
- Contractor: Any person or entity who has performed or agrees or expects to perform, with the Owner of real property for a CONTRACTOR OR IF A CONTRACTOR IS ALSO A CONTRACTOR OR IF A CONTRACTOR IS SUBSTANTIALLY RELATED TO THAT OWNER CONTRACTOR OR IF A CONTRACTOR IS SUBSTANTIALLY RELATED TO THAT OWNER CONTRACTOR.
- 120-Day Lien Period: The 120 days immediately preceding the date of recording of the deed to the Property.

(CAUTION: IF AN OWNER OF THE PROPERTY ALSO ACTS AS A CONTRACTOR, ALL OTHER CONTRACTORS WHO ENTER INTO A CONTRACT WITH THE PROPERTY MUST EXECUTE THIS AGREEMENT WITH WRITING COUNSEL WITH THE TITLE INSURER PRIOR TO CLOSING.)

_____ and its successor and/or assigns hereby certifies that the above described Property is located in _____ County, State of North Carolina, and that the above described Property is currently contemplated transaction and any improvements placed thereon are the result of the construction contemplated by the parties herein.

Owner: _____ and its successor and/or assigns hereby certifies that the above described Property is located in _____ County, State of North Carolina, and that the above described Property is currently contemplated transaction and any improvements placed thereon are the result of the construction contemplated by the parties herein.

Contractor: _____ and its successor and/or assigns hereby certifies that the above described Property is located in _____ County, State of North Carolina, and that the above described Property is currently contemplated transaction and any improvements placed thereon are the result of the construction contemplated by the parties herein.

NCLTA Form 2 Construction Recently Completed

- Owner signs – indemnifies, identifies all contractors
- Contractor(s) sign – waive lien rights and the rights of those claiming through them
- Owner cannot be contractor
- Do all the contractors make sense for this project?
Are any missing?



NCLTA Form No. 3



OWNER/CONTRACTOR AFFIDAVIT, INDEMNITY AND SUBORDINATION AGREEMENT (FOR CONSTRUCTION IN PROCESS OR IMMEDIATELY CONTEMPLATED) [LENDER COVERAGE ONLY]

PARTIES: All parties identified in this section must execute this Agreement, including any Contractors required to sign Additional Signature Pages which must be attached hereto and are hereby incorporated herein and made a part hereof by reference, as applicable (herein the "Agreement").

Owner: _____
(NOTE: There can be more than one Owner if the property has been owned by multiple parties or has been conveyed within the 120-Day Lien Period. A separate Agreement is required for each successive owner in the 120-Day Lien Period and the Contractors who have contracted or dealt with that Owner.)
Contractor(s): _____

(NOTE: There can be more than one Contractor contracting or dealing with an Owner. All Contractors must be named and execute this Agreement.)
 Attached: ADDITIONAL SIGNATURE PAGE(S) for all Contractors providing or who have provided Labor, Services or Materials within the 120-Day Lien Period.

PROPERTY:
(Insert street address or brief description and/or attach a description as Exhibit A. Include here any real estate that is a portion of a larger, previously unsegregated tract when that area is reasonably necessary for the convenient use and occupation of Improvements on the larger tract.)

DEFINITIONS: The following capitalized terms as used in this Agreement shall have the following meanings:

- **Improvement:** All or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways on the Property as defined in NCGS Chapter 44A, Article 2.
- **Labor, Services or Materials:** Labor or professional design (including architectural, engineering, landscaping) or surveying services or materials or rental equipment for which a lien can be claimed under NCGS Chapter 44A, Article 2.
- **Contractor:** Any person or entity who has performed or is to perform or furnish Labor Services or Materials pursuant to a contract, either in person or through an agent, on the Property, whether or not the Contractor is also an agent of an Owner, then all other Contractors who enter into a contract with the Owner for the same or similar work on the Property. (Note that services by architects, engineers, landscapers, surveyors, and other professionals are often provided before there is visible evidence of construction.)
- **Owner:** Any person or entity, as defined in NCGS Chapter 44A, Article 2, who has or has had any interest in the Property within 120-Day Lien Period. For the purposes of this Agreement, the term Owner includes: (i) a seller of the Property or a borrower under a loan agreement secured by the Property, (ii) a person with rights to purchase the Property under a contract and for whom an improvement is made and who ordered the improvement to be made; and (iii) the Owner's

(CAUTION: IF AN OWNER OF THE PROPERTY ALSO OWNS OR OPERATES OTHER CONTRACTORS WHO ENTER INTO A CONTRACT WITH THE OWNER FOR THE SAME OR SIMILAR WORK ON THE PROPERTY, THE OWNER MUST CONSULT UNDERWRITING COUNSEL WITH THE TITLE INSURANCE COMPANY BEFORE EXECUTING THIS AGREEMENT.)

120-Day Lien Period: The 120 days immediately preceding the closing of the Deed of Trust in the Office of the Register of Deeds of the county in which the Property is located.



Purchase/Construction Loan

Doctrine of instantaneous seisin applies to purchase money *only*, not construction.

Construction portion of the loan is subject to prior liens or encumbrances against the purchaser, including buyer's mechanics' liens.

Dalton Moran Shook, Inc. v.
Pitt Development Company
440 S.E.2d 585 (1994)



NCLTA Form 3

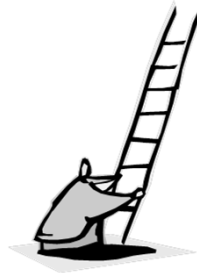
Construction Contemplated or In Process

- *Lender Coverage Only*
- Owner signs – indemnifies, identifies all contractors
- Contractor(s) sign – subordinate lien rights and the rights of those claiming through them to the deed of trust
- Other considerations from Form 2 apply
- Claim that no work has commenced
 - Has contract been entered?
 - Design work by architect or survey work

REMEMBER: CONTRACTOR FOR LIEN PURPOSES IS ANYONE WHO CONTRACTS WITH OWNER (WHETHER OR NOT LICENSED)

Claims of Lien by Second Tier Subcontractor (N.C.G.S. 44A-18 and 44A-20)

- Lien on Funds
- Ripen into Lien on Property
- Rights of Party Next Highest



REMEMBER: CONTRACTOR FOR LIEN PURPOSES IS ANYONE WHO CONTRACTS WITH OWNER (WHETHER OR NOT LICENSED)

Claims of Lien by Second Tier Subcontractor (N.C.G.S. 44A-23)

- Subrogation Lien
- Rights of Contractor
- Ability to Waive/Subordinate
- Prevent Double Pay
- Owner Can Offset



REMEMBER: CONTRACTOR FOR LIEN PURPOSES IS ANYONE WHO CONTRACTS WITH OWNER (WHETHER OR NOT LICENSED)

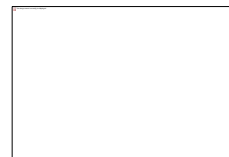
Transfer During Construction

- Change of Ownership
 - Clean cut off from seller's contractors
 - Seller completing construction after transfer
 - Buyer taking over construction
- Require/Consider
 - Escrow –Sufficient funds/control of release
 - Review construction budget
 - Review interim lien waivers
 - Indemnity – need financials

NCLTA Forms 2 & 3: Dilemma of the Related Contractor



- Related owner and contractor
- Can they be treated as the same entity?
- Factors to consider:
 - Construction contracts
 - Separate management
 - Separate maintenance of corporate existence
 - Accounting independence
 - Entity formalities
 - Other relevant information
 - independence
 - arms-length negotiation



Gaines Case

Gaines and Company, Inc., v. Wendell Falls Residential LLC, WL 48974 No. COA10-760 June 21, 2011

- Gaines gave lien waiver
- LLC-developer conveyed 125-acre wastewater pump station (subject to easement for sewer completion) to Wake County
- Gaines worked on sewer project under contract with LLC *not Wake County*
- Gaines filed claim of lien on sewer project, including easement across Wake County property

HOLDING → UNENFORCEABLE AGAINST WAKE COUNTY PROPERTY

Wachovia Bank, N.A. v. Superior Constr. Corp.

- Affidavit in Partial Release of Lien, or
- "Interim lien waiver" did *not* subordinate any upcoming work or change the date of first furnishing for later lien.
- MORAL: **Adequate waiver *and subordination (NCLTA Form 3) &/or clear intention to change first furnishing is required to change priority on payment to contractor!***

Claim of Lien Against Tenant

- Lien is Limited to Interest Owned
- Property Description

Pete Wall Plumbing v. Sandra Anderson Builders,
N.C.App. ___, 708 S.E.2d 157 (2011) COA09-1449

- Contract, Claim of Lien and Civil Action against ground lessee only
 - MORAL #1: CHECK THE TITLE & JOIN ALL PARTIES WITH ANY INTEREST !!!
- Claim of lien on funds might attach to bank's disbursements *after claim of lien filed*
 - MORAL #2: BANKS NEED TO CHECK FOR FILED CLAIMS OF LIEN BEFORE CONSTRUCTION DISBURSING

Lawyers Title Ins. Corp. v. Zogreo, LLC

- MORAL: **Join all potentially interested parties!**
- Claim of Lien and Complaint against owner only and not subsequent encumbrancers:
 - Complies with Ch. 44A, since they are proper but not necessary parties, *BUT* ...
 - Not binding on parties not joined !!
- RESULT: Parties not joined can thereafter bring action to determine *priority*, including relation back vis-à-vis third parties not in original action

Bonding – G.S. 44A-16

... is an **incomplete protection!**
Everyone still ends up involved in the litigation!

*C.R HASSINGER
GRADING CO., INC
Gelder & Associates
George v. Hartford Acc.*

Under section 44A-16(6),
discharge is "conditioned upon the payment of the amount finally due."
Bond does not discharge the property owner; it merely alleviates the land of burden of a lien during the pendency of any lien litigation.
"The owner of the property is obviously a necessary party in an action to enforce a contractor's lien."

PROPOSED LEGISLATION

House Bill 489 (2011)



Thanks



for



joining

us!!

