CHICAGO TITLE INSURANCE COMPANY

2006 CLE Seminar Presentation

From Barns to Big Boxes and Bungalows: Title Insurance Tales of a Mixed Use Development

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RAW LAND ACQUISITION

DEVELOPMENT PHASE

COMMERCIAL DEVELOPMENT LOANS

COMMERCIAL SALES

CONDOMINIUMS

SINGLE FAMILY DEVELOPMENT

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Commitment Chicago Title Insurance Company, number LEASEHOLDEX#1 dated Octobrer 13, 2005, SCHEDULE B – Section 2

Schedule B of the policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company.

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires for the value of record the estate or interest or mortgage thereon covered by this Commitment.

2. Taxes, dues and assessments for the year, and subsequent years, not yet due and payable.

3. Any discrepancies, conflicts, access, shortages in area or boundary lines, encroachments, overlaps, setbacks, easements or claims of easements, riparian rights, and title to land within roads, ways, railroads, watercourses, burial grounds, marshes, dredged or filled areas or land below the mean highwater mark or within the bounds of any adjoining body of water, or other matters which would be revealed by a current inspection and accurate survey of the land.

AS TO PARCEL A ONLY:

4. Loss or damage resulting from the Substitute Trustee in that Foreclosure (04 SP 134) being a principal of the Beneficiary under the foreclosed Deed of Trust.

5. Title to any portion of the land lying within the right of way of BALDWIN AVENUE.

6. Federal Tax Lien filed October 31, 2004 in Judgment Book 175, page 46, in the amount of $10,000.00

7. Variable Width Cut and Fill Easements recorded in Book 12102, page 302.

8. Temporary Construction Easement recorded in Book 12102, page 302

9. Fifty (50) foot setback along Baldwin Avenue recorded in Book 12102, page 302.

10. Easements, setback lines and any other matters shown on plat recorded in Map Book 88, page 32.

AS TO PARCEL B ONLY:

11. Lease with Option recorded in Book 2101, page 37.

12. Title to any crops growing on the property.

13. Title to that portion of the land within the bounds of burial grounds, together with right of ingress, egress and regress thereto.

14. This policy does not insure title to that 50' Ingress and Egress Easement in Deed Book 1027, page 256.

15. Variable Width Cut and Fill Easements recorded in Book 12102, page 302.

16. Temporary Construction Easement recorded in Book 12102, page 302

17. Fifty (50) foot setback along Baldwin Avenue recorded in Book 12102, page 302.

18. Easements, setback lines and any other matters shown on plat recorded in Map Book 88, page 32.

19. Easements, setback lines and any other matters shown on plat recorded in Map Book 88, page 32.

AS TO PARCEL C ONLY:

20. That Deed recorded in Book 9357, page 10 which purports to convey title to Steven Wonder.

21. Twelve (12') foot temporary construction easement recorded in Book 11510, page 143.

22. Fifty (50') foot Carolina Power & Light Company easement recorded in Book 11510, page 143.

23. Easements, setback lines and any other matters shown on plat recorded in Map Book 88, page 32.

AS TO PARCEL D ONLY:

24. Lack of a right of access to and from the land. (Access only over other parcels insured herein)

25. Easement(s) to SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY recorded in Book 900, page 368; Book 900, page 390; Book 907, page 88.

26. Twelve (12') foot temporary construction easement recorded in Book 11510, page 143.

27. Fifty (50') foot Carolina Power & Light Company easement recorded in Book 11510, page 143.

28. Easements, setback lines and any other matters shown on plat recorded in Map Book 88, page 32.

AS TO PARCEL E ONLY:

29. Lack of a right of access to and from the land. (Access only over other Parcels insured herein)

30. That Deed recorded in Book 983, page 411 which purports to convey the land to Juan Jose.

31. Those Restrictive Covenants contained in a Deed recorded in Book 411, page 13, restricting the property to agricultural uses.

32. Twelve (12') foot temporary construction easement recorded in Book 11510, page 143.

33. Fifty (50') foot Carolina Power & Light Company easement recorded in Book 11510, page 143.ue o

AS TO PARCEL F ONLY:

34. Lack of a right of access to and from the land. (Access only over other Parcels insured herein)

35. Easement(s) to SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY recorded in Book 900, page 368; Book 900, page 390; Book 907, page 88.

36. Twelve (12') foot temporary construction easement recorded in Book 11510, page 143.

37. Fifty (50') foot Carolina Power & Light Company easement recorded in Book 11510, page 143.

AS TO PARCEL G ONLY:

38. Lack of a right of access to and from the land. (Access only over other Parcels insured herein)

39. Access to Tract Two is only by way of Jakob Street. (Tract Two Only)

40. Access by way of Highway 577, a controlled access highway, is not insured.

41. Timber Deed to We Cut'Em Timber Company recorded in Book 1525, page 722.

42. Covenants, conditions, restrictions and easements contained in instrument filed for record in Book 1123, page 433, but omitting any covenant or restriction based on race, color, religion, sex, handicap, familial status, or national origin unless and only to the extent that said covenant (a) is exempt under Chapter 42, Section 3607 of the United States Code or (b) relates to handicap but does not discriminate against handicapped persons.

43. Easements, setback lines and any other matters shown on that plat entitled Kathryne's Corner Subdivision recorded in Map Book 80, page 1.

44. One Hundred (100) foot setback along the right of way of Highway 577.

45. Easement(s) to SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY recorded in Book 900, page 368; Book 900, page 390; Book 907, page 88.

46. Easement(s) to DUKE POWER COMPANY recorded in Book 938, page 60.

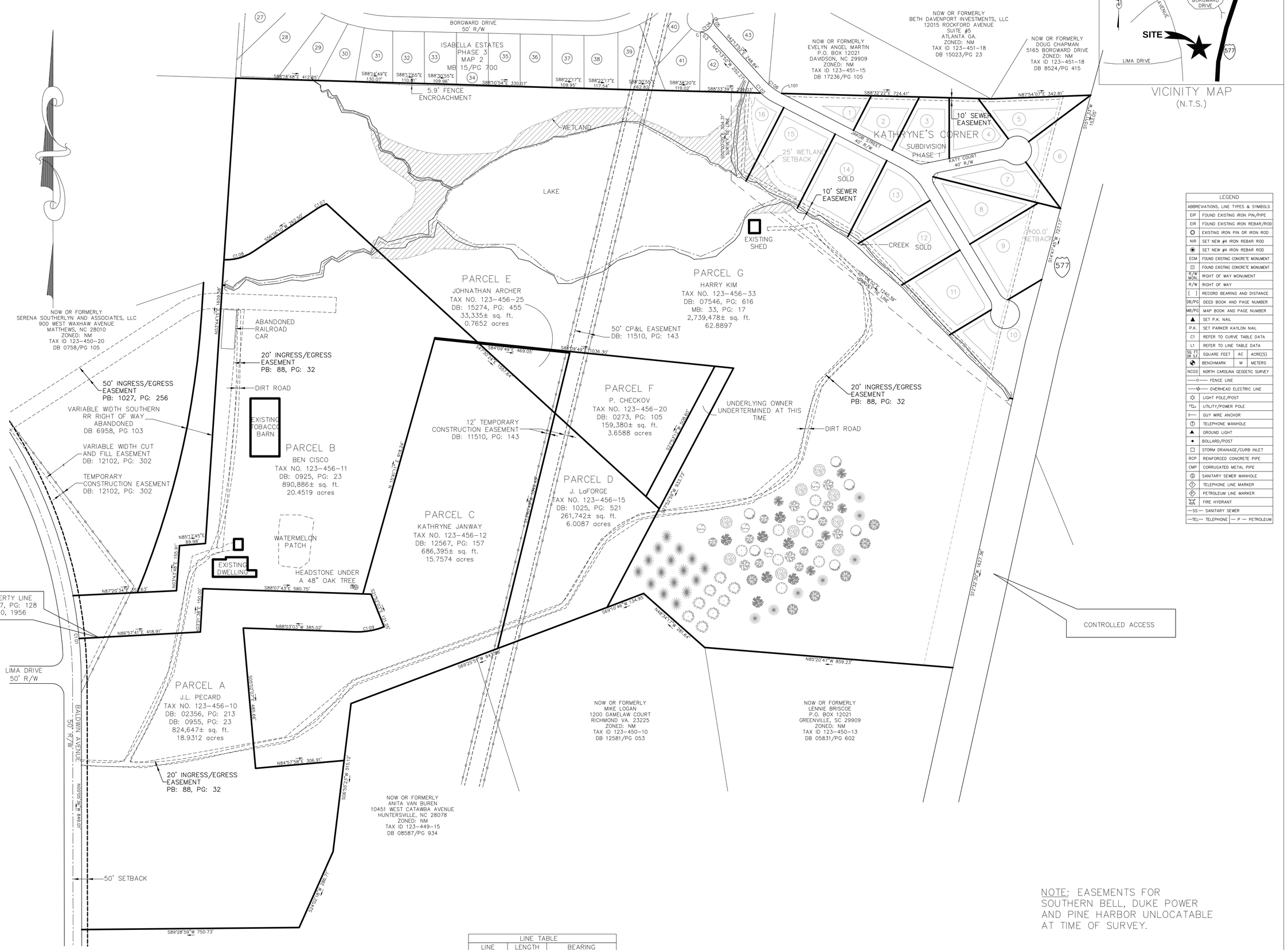
47. Easement(s) to PINE HARBOR TELEPHONE COMPANY recorded in Book 878, page 481.

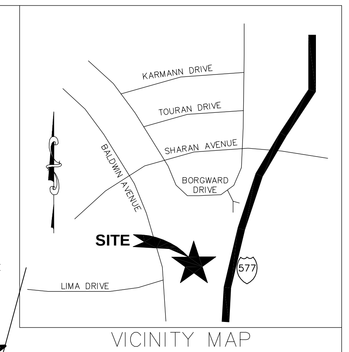
48. Rights of others entitled to the continuous and uninterrupted flow of the waters bounding or crossing the land.

49. Twelve (12') foot temporary construction easement recorded in Book 11510, page 143.

50. Fifty (50') foot Carolina Power & Light Company easement recorded in Book 11510, page 143.

51. Easements, setback lines and any other matters shown on plat recorded in Map Book 88, page 32.





VICINITY MAP
(N.T.S.)

LEGEND	
ABBREVIATIONS, LINE TYPES & SYMBOLS	
EIP	FOUND EXISTING IRON PIN/PIPE
EIR	FOUND EXISTING IRON REBAR/ROD
○	EXISTING IRON PIN OR IRON ROD
NIR	SET NEW #4 IRON REBAR ROD
◉	SET NEW #4 IRON REBAR ROD
ECM	FOUND EXISTING CONCRETE MONUMENT
⊡	FOUND EXISTING CONCRETE MONUMENT
R/W MON.	RIGHT OF WAY MONUMENT
R/W	RIGHT OF WAY
( )	RECORD BEARING AND DISTANCE
DB/PG	DEED BOOK AND PAGE NUMBER
MB/PG	MAP BOOK AND PAGE NUMBER
▲	SET P.K. NAIL
P.K.	SET PARKER KAYLON NAIL
C1	REFER TO CURVE TABLE DATA
L1	REFER TO LINE TABLE DATA
SQ FT / SF	SQUARE FEET
AC	ACRE(S)
⚓	BENCHMARK
M	METERS
NCGS	NORTH CAROLINA GEODETIC SURVEY
—o—	FENCE LINE
—\/—	OVERHEAD ELECTRIC LINE
○	LIGHT POLE/POST
UP	UTILITY/POWER POLE
	GUY WIRE ANCHOR
T	TELEPHONE MANHOLE
▲	GROUND LIGHT
●	BOLLARD/POST
▢	STORM DRAINAGE/CURB INLET
RCP	REINFORCED CONCRETE PIPE
CMP	CORRUGATED METAL PIPE
S	SANITARY SEWER MANHOLE
	TELEPHONE LINE MARKER
	PETROLEUM LINE MARKER
	FIRE HYDRANT
—SS—	SANITARY SEWER
—TEL—	TELEPHONE
—P—	PETROLEUM

LINE TABLE		
LINE	LENGTH	BEARING
L101	2.75	S62°48'38"E

CURVE TABLE						
CURVE	LENGTH	RADIUS	TANGENT	CHORD BEARING	CHORD	DELTA
C101	305.22	1653.92	153.05	N05°22'48"W	304.79	10°34'25"
C102	14.84	200.00	7.42	S44°21'24"E	14.84	4°15'05"
C103	32.74	40.00	17.35	N65°40'50"W	31.84	46°53'56"
C104	70.58	45.00	44.89	N45°56'24"E	63.56	89°51'36"
C105	30.19	40.00	15.85	S20°36'38"E	29.48	43°14'28"
C106	71.84	200.00	36.31	S52°31'15"E	71.45	20°34'46"
C107	37.21	176.50	18.68	S62°08'33"W	37.14	12°04'47"
C108	108.99	173.50	56.36	N74°05'57"E	107.21	35°59'35"

GRAPHIC SCALE

100 0 50 100 200 400

(IN FEET)
1 inch = 100 ft.

NOTE: EASEMENTS FOR SOUTHERN BELL, DUKE POWER AND PINE HARBOR UNLOCATABLE AT TIME OF SURVEY.

Unless signed and sealed this plat is preliminary; not for recordation, sales or conveyance.

NO.	REVISIONS

OWNER ADDRESS:

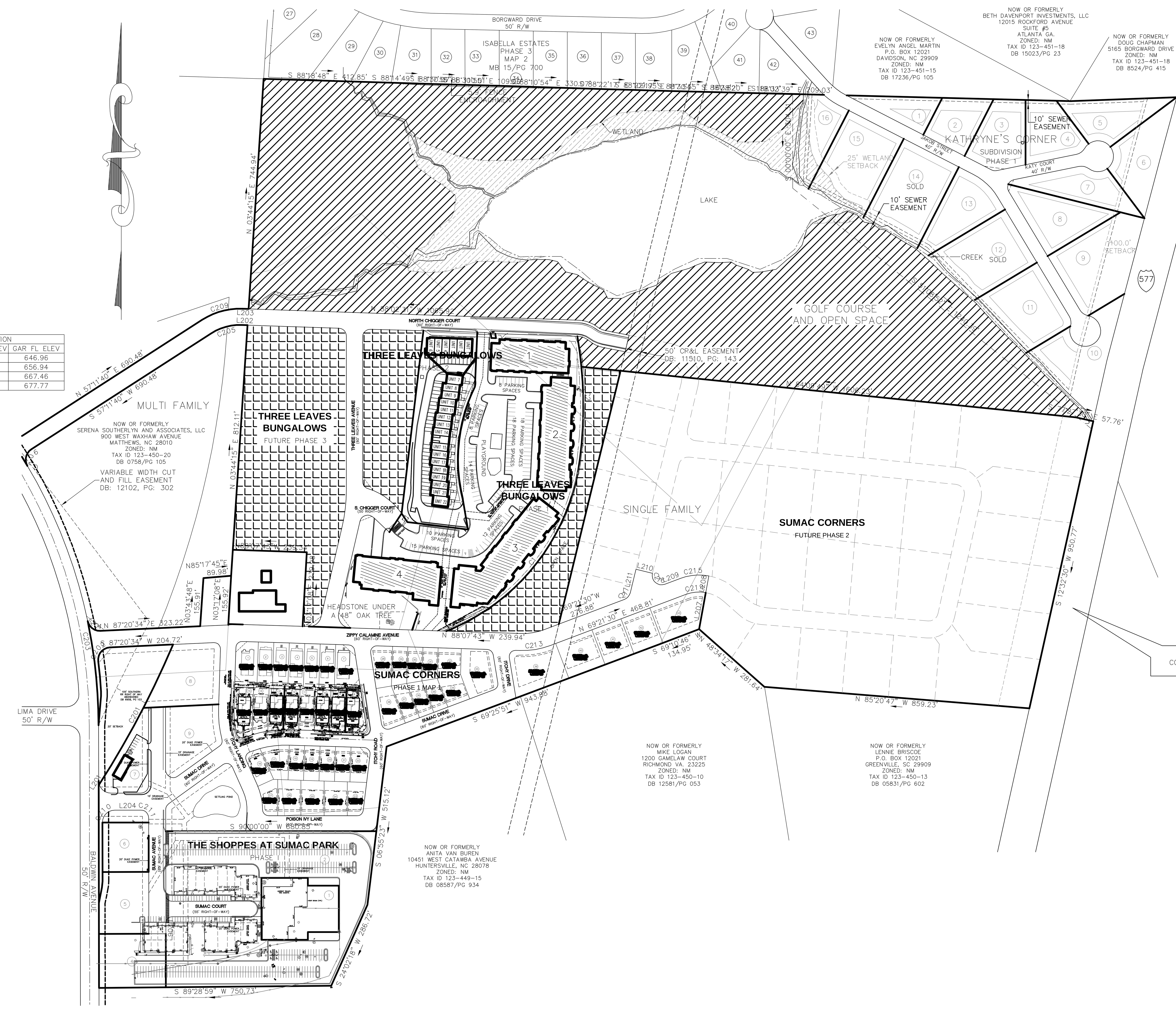
GNA DESIGN ASSOCIATES, Inc.
428 East Fourth Street
Suite 408 (704) 373-1907
Charlotte, NC 28202
Surveying • Landscape Architecture • Civil Engineering

TITLE:

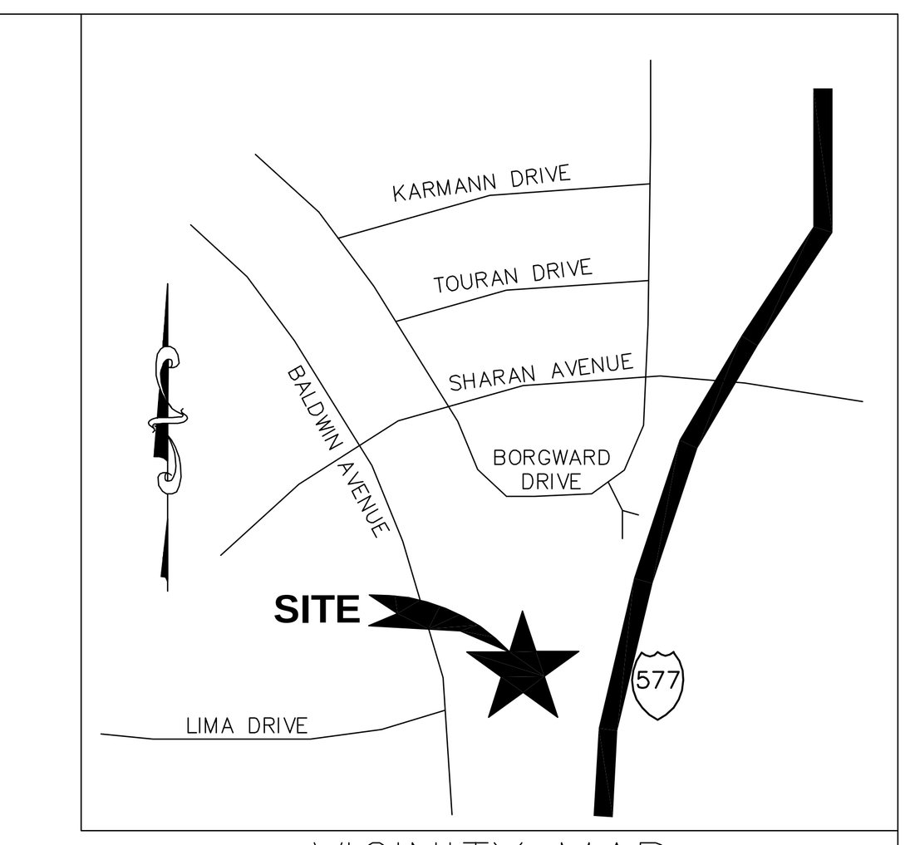
PLAT SHOWING 7 PARCELS OF LAND LYING EAST OF BALDWIN AVENUE CITY OF IVYVILLE, ALBEMARLE COUNTY NORTH CAROLINA

SEAL:

DRAWING DATE:	SURVEY DATE:	
10/13/2005	10/12/2005	
DRAWN BY:	CHECK BY:	PROJECT NO.
DKNOOP	MEF	692001
PROJECT CROSS REFERENCE:	SCALE:	SHEET
	1"=100'	1 of 1



BUILDING INFORMATION			
BLDG NO.	BLDG AREA	FIN FL ELEV	GAR FL ELEV
1	11,044 sq.ft.	657.35	646.96
2	16,443 sq.ft.	664.33	656.94
3	20,753 sq.ft.	678.07	667.46
4	13,735 sq.ft.	688.40	677.77



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(N.T.S.)

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—N— OVERHEAD ELECTRIC LINE			
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	UTILITY/POWER POLE		
	GUY WIRE ANCHOR		
Ⓣ	TELEPHONE MANHOLE		
	GROUND LIGHT		
●	BOLLARD/POST		
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	TELEPHONE LINE MARKER		
	PETROLEUM LINE MARKER		
	FIRE HYDRANT		
—SS— SANITARY SEWER			
—TEL— TELEPHONE	— P — PETROLEUM		

COMMERICAL

SINGLE FAMILY

MULTI FAMILY

GOLF COURSE AND OPEN SPACE

WETLANDS

LINE TABLE		
LINE	LENGTH	BEARING
L201	3.46	N32°39'31"E
L202	18.02	N88°02'31"W
L203	19.65	S88°02'31"E
L204	96.32	N89°54'24"E
L206	35.04	N00°05'36"W
L207	120.04	N10°25'16"E
L208	54.92	N10°25'16"E
L209	52.76	S69°21'30"W
L210	55.00	N76°20'46"W
L211	78.43	S13°39'14"W

CURVE TABLE						
CURVE	LENGTH	RADIUS	TANGENT	CHORD BEARING	CHORD	DELTA
C201	512.33	3065.00	256.76	N27°50'16"E	511.73	9°34'38"
C202	66.03	40.00	43.34	S40°02'58"W	58.79	94°35'12"
C203	132.81	1653.92	66.44	N09°32'40"W	132.77	4°36'03"
C204	56.42	40.00	34.05	S52°15'04"E	51.86	80°48'45"
C205	105.42	173.75	54.39	S74°34'34"W	103.81	34°45'48"
C206	61.27	40.00	38.47	S13°18'55"W	55.45	87°45'31"
C207	129.40	1653.92	64.74	N32°48'20"W	129.37	4°28'58"
C208	61.27	40.00	38.47	S78°55'34"E	55.45	87°45'31"
C209	137.27	226.25	70.82	S74°34'34"W	135.18	34°45'48"
C210	62.83	40.00	40.00	S44°54'24"W	56.57	90°00'00"
C211	39.27	25.00	25.00	N45°05'36"W	35.36	90°00'00"
C213	99.87	255.00	50.59	N80°39'04"E	99.24	22°26'26"
C214	64.91	120.00	33.27	S84°55'33"W	64.12	30°59'26"
C215	94.93	175.00	48.66	S84°53'56"W	93.77	31°04'51"
C216	65.08	30.00	56.77	S48°29'38"E	53.05	124°17'44"
C217	29.17	30.00	15.85	N41°30'22"E	28.03	55°42'16"
C218	31.46	60.00	16.10	N63°47'53"W	31.11	30°02'47"
C219	352.61	75.00	75.82	N03°27'46"W	106.64	269°22'33"
C220	52.63	60.00	28.14	N66°58'47"E	50.96	50°15'38"

GRAPHIC SCALE

100 0 50 100 200 400

(IN FEET)
1 inch = 100 ft.

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NO.	REVISIONS

OWNER ADDRESS:

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TITLE:

PLAT SHOWING 7 PARCELS OF LAND LYING EAST OF BALDWIN AVENUE CITY OF IVYVILLE, ALBEMARLE COUNTY NORTH CAROLINA

SEAL:	DRAWING DATE: 10/25/2005	SURVEY DATE: 00/00/2005	PB: 1000, PG: 1
	DRAWN BY: DKNOOP	CHECK BY: MEF	PROJECT NO. 692001
	PROJECT CROSS REFERENCE:	SCALE: 1"=100'	SHEET 1 of 1

CHICAGO TITLE INSURANCE COMPANY

Raw Land Acquisition

By Jay Williams and Bob Rascoe

NOTE: **Map I** and Commitment (**Exhibits 8 and 9**) are referenced herein.

I. Water and Sewer Assessments (Exhibit 1)

During the course of the title search, it is discovered that there are some assessments which might arise because of water and sewer improvements being installed along Baldwin Avenue by the county. These water and sewer lines will supply water and sewer to the subject property and to other neighboring properties. The seller does not wish to pay for the coming assessments because he will not enjoy the beneficial use of them. Of course, the buyer claims that the seller should pay the assessments. The assessments are payable annually.

Analysis

These assessments become liens on the real property which abuts upon or benefits from the improvement, when confirmed (*See* G.S. 160A-216 *et seq.* regarding cities and G.S. 153A-185 *et seq.* for counties). The lien is superior to all other liens and encumbrances except liens arising from city and county taxes. The land itself is subject to the lien (an *in rem* lien) and, in order to collect, the county must undertake an action in rem (usually in the form of a foreclosure) in order to collect. The statute of limitations is ten years from the date on which the assessment became due and payable or from the date of the earliest installment coming due. If the lien of the assessment is valid as against the owner at the time of title transfer it is valid against the grantee.

It is determined from the county that the assessment resolution provided that the water and sewer assessments could be held in abeyance without interest until such time as improvements on the assessed property are actually connected to the water or sewer system for which the assessment was levied not more than 10 year(s) from the date of confirmation of the assessment roll (*See* G.S. 160A-237 or G.S. 153A-201).

To conclude the matter, the buyer and seller strike an agreement whereby the cost of the assessments is divided between them.

II. Foreclosure Issue (Exhibit 1)

The seller recently acquired a parcel of land from X who had purchased the parcel at a foreclosure sale that occurred approximately 16 months ago. X was the trustee on the

deed of trust and it was also discovered the X owned a 40% interest in Lands Are Us, Inc., the beneficiary under the foreclosed deed of trust.

At the foreclosure sale, X authorized the amount of the bid, sold the land as trustee and actually bid upon the land on behalf of Lands Are Us, Inc. The mortgagor did not challenge the foreclosure though he had a right to do so (See Mills v. Building & Loan Ass'n, 216 NC 664, 6 S.E. 2d 549 (1939); Davis v. Doggett 212 NC 589, 194 S.E.288 (1937)). An attorney for Lands Are Us, Inc. claimed that because the mortgagor had not attempted to have the order set aside after 16 months, the foreclosure sale was good and therefore there was no problem. The attorney for Lands Are Us references the case of Council v. Greensboro Joint Stock Land Bank, 213 NC 329, 196 S.E. 483 (1938) which indicates that "long acquiescence" after full knowledge would defeat the claims of the mortgagor.

The title attorney indicates that the mortgagor should sign a release under seal. The reasoning is that because of the nature of the project the prior mortgagor could cause a problem down the road. In many instances, it is better to let sleeping dogs lie. This is not one of those instances because there are real questions as to whether the mortgagor had any knowledge of the defects in the foreclosure and whether 16 months would constitute long acquiescence.

III. Foreclosure and Tax Liens (Exhibit 1)

The foreclosure sale was conducted on October 14, 2004. A federal tax lien was duly filed in the county on October 31, 2004, within thirty days of the sale. No notice was given to the I.R.S.

Analysis

The law on this point would allow the foreclosure to proceed even though the I.R.S. was not given notice of the sale. If the federal tax lien is filed within thirty days of the foreclosure sale, and the deed of trust being foreclosed has been duly recorded, the tax lien is divested upon foreclosure without any notice to the I.R.S. though the property may still be subject to the right of redemption discussed below (See Treas. Reg. §301.7425-4)

However, had the tax lien been filed more than thirty (30) days before the foreclosure sale, statutory notice must have been given by certified mail to the federal government as a condition precedent to divestiture of the a junior federal tax lien (*See* Treas. Reg.. §301.7425-3). Such notice must have been given not less than 25 days prior to the sale and to the district director for the internal revenue district in which the property to be sold is located. The notice will be deemed adequate if it contains the following information (Treas. Reg. §301.7425-3(d))-:

1. The name and address of the person submitting the notice of sale;

2. A copy of each notice of Federal Tax Lien (Form 668) affecting the property to be sold, or the following information as shown on each such Notice of Federal Tax Lien—
    a. The internal revenue district named thereon,
    b. The name and address of the taxpayer, and
    c. The date and place of filing of the notice;

3. With respect to the property to be sold, the following information—
    a. A detailed description, including location, of the property affected by the notice (in the case of real property, the street address, city, and State and the legal description contained in the title or deed to the property and, if available, a copy of the abstract of title),
    b. The date, time, place, and terms of the proposed sale of the property, and
    c. In the case of a sale of perishable property described in paragraph (c) of this section, a statement of the reasons why the property is believed to be perishable; and
    d. The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses, selling costs, etc.) which may be charged against the sale proceeds.

The failure to give adequate notice to the IRS will result in the failure to discharge the lien. Thus, any buyer of the property at the foreclosure will take the property subject to the lien of the IRS.

In a case where the deed of trust is superior to a federal tax lien and the deed of trust is being foreclosed the IRS has a right of redemption (*See* 26 U.S.C. 7425). The IRS may redeem the property for a period of 120 days from the date of the sale or the period provided for redemption under local law. Generally, it is considered that the 120 period begins at the date of the expiration of any upset bid period.

If the district director elects to exercise the right of redemption the amount to be paid to redeem is set forth in the Treasury Regulations (§301.7425-4(b)). The discussion of the amount to be paid in the regulations is lengthy and beyond the scope of this manuscript. Generally, it is sufficient to state that the intent is to make the purchaser at the foreclosure sale whole by paying the purchase price, certain expenses and payments to senior lien holders (not extinguished by the foreclosure). However, the buyer may not be reimbursed for expenses such as title search fees, professional fees and interest on purchase money financing.

IV. Temporary Construction Easement (Exhibit 1)

The title search reveals that within the last two years, the North Carolina Department of Transportation filed a Temporary Construction Easement along the right of way of Baldwin Avenue. The purpose of the easement was to allow the DOT to move dirt and equipment across the subject property during the improvement of Baldwin Road. The seller claims that DOT has since completed its work on the road. However, the easement was for a term of two years beginning in October of 2004. Thus the term of the easement has not expired.

Analysis

Despite the self-serving assurances of the seller that DOT has completed its project, the title company is hesitant to remove the exception without verification of completion. Seller is able to acquire a photo-copy of a letter from someone at DOT indicating that the project is complete. Title insurer agrees to provide coverage over the easement due to the letter.

Buyer's attorney is concerned about the issue of marketability and advises his client not to accept title insurance over the easement. He is specifically concerned with the client's ability to obtain construction financing and the ability to make any out sales that may occur prior to automatic termination of the easement.

Buyer's counsel objects to the easement and requires that the Seller obtain a release of the easement from the DOT.

V. Residential Home with Lease Option (Exhibit 2)

A has entered into a recorded lease with D for a term of years. The lease expires January 31, 2006. The lease contains an option to purchase the premises plus five acres of surrounding property. When the tenant heard about the proposed sale on the 5th of January, 2006, he gave written notice to A of his exercise the option. Both the seller, A, and the buyer, C, object. Tenant claims that he could give notice of his intent to exercise the option at anytime during the term of the lease.

Analysis

In Catawba Athletics v. Newton Car Wash (53 N.C. App. 708, 281 S.E. 2d 676 (1981)). the court disagreed with the tenant's position. Where the lease clearly stated that the tenant was required to give 30 days notice to landlord of his intent to exercise the option, such notice had to be given at least 30 days prior to the termination of the lease. So, where the lease expired on April 30, 1978, notice had to be given prior to March 30, 1978.

VI. Railroad Car

A railroad car sits on the land on a short segment of track that is not connected to any other track. Then it was discovered that this segment of track was once a spur track for a railway line that has not run for over forty years. The main tracks had been removed and carried off by the railroad. An old railroad agreement is found of record and indicates that only an easement was granted to the now defunct railroad. The underlying fee has been included in the description of the Parcel now being purchased as contained in the prior deeds in the chain of title.

Analysis

Case law indicates that the interest or estate of the railroad ceased and terminated once the railroad removed its track from the land. The railroad easement was thus deemed abandoned (See International Paper Co. v. Hufham, 345 S.E. 2d 231, 81 N.C. App. 606 (1986)). CAUTION. NCGS 1-44.1 creates only a presumption of abandonment and caution should be taken. The presumption is rebuttable and the title insurer in this instance would bear that risk if it agreed to insure the title. (This applies to easement, not fee simple, ownership. McLaurin vs. Winston-Salem Southbound Rwy., 323 N.C. 609, 374 S.E.2c 265 (1988)) However, the title to the underlying reversion remains vested in whoever has taken title *including to the centerline of the track* since the original vesting instrument. This may require searching the title to the adjoining property to assure its legal description has always included this strip of land. If it has been carved out of the legal descriptions back in time, then this strip remains vested in the last owner to receive it and not include it in a conveyance out. McDonald's v. Dwyer, 111 N.C.App. 127, 482 S.E.2d 165, *aff'd* 338 N.C. 445, 450 S.E.2d 888 (1994). That person must receive notice and an opportunity to be heard to prove that they have "good and valid title to the land" as provided under N.C.G.S. § 1-44.2(b), overcoming the presumption of ownership under that statute.

In this case, since the fee title underlying the railroad Parcel has been included in the deeds in the chain of title of the current seller, it can be conveyed in this transaction.

The theory of abandonment would not, however, apply to the railroad car sitting on the abandoned track. The title insurer was hesitant to insure the new owner as to the portion of the insured land. The railroad company is defunct without any evidence that it was acquired by or merged with another company. After carefully reviewing the law and the situation, the title company agrees to insure the title to the land where the railroad car and approximately thirty yards of track lay.

VII. Single Headstone

The survey reveals the unanticipated existence of a single grave stone on the property and it is not known if there are additional unmarked graves on the site. The buyer wanted to simply remove the stone but thankfully was cautioned by his attorney against doing so.

Now the developer and his attorney ask for a recommendation as to the effect of the stone on title and possible effects resulting from its existence.

A search of all available records in an effort to locate information about the person buried on the site or his heirs has been fruitless.

Analysis

There are two methods available to the buyer for dealing with the grave site. At first the buyer expresses his desire to remove the graves and re-inter them elsewhere. G.S. 65-13 provides the procedure for the removal of graves. Under G.S. 65-13(a)(4) the developer would be a party entitled to remove the grave after the approval of the town, city or county. However, the statute requires notice to next of kin (if reasonably ascertainable) and publication of notice at least once a week for 4 successive weeks (with the first publication not more than 30 days prior to disinterment). The developer would then be responsible for the cost of removing the grave and reintering in "suitable" cemetery or burial ground. Then, within 30 days of removal, a written certificate of the removal facts must be filed in the register of deeds in both the county of disinterment and the county of reinterment, if a different county.

The developer expresses several concerns with the idea of removal of the grave. First is the possibility that additional graves may be located in the process. Developer is also concerned about the time delay of undertaking removal. Finally, the developer is concerned about a relative of the deceased appearing after the notice by publication and objecting to the removal.

It is worth noting that the developer may have elected to have a survey of the burial site conducted in order to ascertain the existence and location of any other graves within the site. The use of ground-penetrating radar is a popular method of looking into the soil for gravesites.

The second option for the buyer is to leave the grave in place and to develop around it. Under G.S. 65-74 and 65-75, the developer would then be obliged to provide access to descendants of anyone interred therein and possible others. G.S. 65-75 reads as follows:

> (a) If the consent of the landowner cannot be obtained, any person listed in G.S. 65-74(1), (2), or (3) may commence a special proceeding by petitioning the clerk of superior court of the county in which the petitioner has reasonable grounds to believe the deceased is buried, or in the case of an abandoned public cemetery, in the county in which the abandoned public cemetery is located, for an order allowing the petitioner to enter the property to discover, restore, maintain, or visit the grave or abandoned public cemetery. The petition shall be verified. The special proceeding shall be in accordance with the provisions of Articles 27A and 33 of Chapter 1 of the General Statutes. The clerk shall issue an order allowing the petitioner to enter the property if the clerk finds all of the following:

(1) There are reasonable grounds to believe that the grave or abandoned public cemetery is located on the property or that it is reasonably necessary to enter or cross the landowner's property to reach the grave or abandoned public cemetery.

(2) The petitioner, or his designee, is a descendant of the deceased, or that the petitioner has a special interest in the grave or abandoned public cemetery.

(3) The entry on the property would not unreasonably interfere with the enjoyment of the property by the landowner.

(b) The clerk's order may:

(1) Specify the dates and the daylight hours that the petitioner may enter and remain on the property;

(2) Grant to the petitioner the right to enter the landowner's property periodically, as specified in the order, after the time needed for initial restoration of the grave or abandoned public cemetery; or

(3) Specify a reasonable route from which the petitioner may not deviate in all entries and exits from the property.

Any title policy issued on the property containing the burial ground would have an exception for title to the portion of the land lying within the burial ground together with the rights of ingress, egress and regress thereto.

As an aside, it is worth noting here that had the developer discovered human remains in unmarked graves on the site while excavating the land, all work on the site would have to be suspended. G.S. 70-29 provides that when remains are discovered as a result of construction or agricultural activities, "…disturbance of the remains *shall cease immediately and not resume* without authorization of either the county medical examiner or the Chief Archaeologist…[emphasis added].

VIII. Growing Crops

The Seller has approximately 5 acres of nearly ripe watermelons growing as a crop on his property which he desires to harvest and sell. The Seller is upset about the intent of the developer to start grading the property immediately upon consummation of the sale.

Analysis

The watermelon crop is "fructus industriales" because the crop is a result of annual labor and cultivation which are annually renewed and gathered. These crops are generally considered personalty while growing in the soil. Unless the crop is expressly reserved in the deed, the buyer in this case will own the crop when the sale is consummated. The

buyer is not interested in any agreement wherein the seller excepts or reserves the crop for himself in the sale. (*See* Flynt v. Conrad, 61 N.C. 190 (1867)).

Crops are distinguished from "fructus naturales" which include trees, grasses and shrubs. Fructus naturales are the result of natural and spontaneous growth of nature and are deemed to be real property so long as unsevered. Thus, they pass with title to the premises unless expressly reserved.

IX. Rogue Deed (Exhibit 3)

The title search reveals a deed from a man claiming to be the surviving spouse in a tenancy by the entirety grant. His wife, who is now deceased, was a tenant in common with her brothers and a sister in property they received upon their father's death. The siblings conducted a voluntary partition and exchanged deeds wherein the property in question was conveyed to husband and wife.

Analysis

To create a tenancy by the entirety, the five unities of title must be in place.

1. Unity of time. Husband and wife must take title at the same time.
2. Unity of title. Husband and wife must take title from the same source (under the same deed or will). Tenancy by the entireties must arise by deed or by will and never arises by descent or operation of law.
3. Unity of interest. Husband and wife must have an identical interest in the property.
4. Unity of possession. The possession of either husband or wife is the possession of the husband and wife entity and vice versa.
5. Unity of person. A common law concept that a married couple is viewed under the law as a single person or entity (Webster's §7-4).

The courts have held that where either the husband or wife is a tenant in common with others and a voluntary exchange of deeds takes place amongst the co-tenants, a deed from the co-tenants to one co-tenant and her spouse does not create a new estate in the grantee. Such a grant does sever possession and creates boundaries but does not create a new title. In such a case, there is no unity of title or unity of time and thus no tenancy by the entireties created (*See e.g.* Darden v. Timberlake, 139 N.C. 181, 51 S.E. 895 (1905) and Smith v. Smith, 249 N.C. 462, 160 S.E.2d 308 (1968)).

It is important to note that the presumption against the creation of tenancy by the entireties in this scenario has been modified by statute making it possible to establish entireties in either a voluntary or judicial partition. N.C.G.S. § 39-13.5 provides:

> When either a husband or a wife owns an undivided interest in real property as a tenant in common with some person or persons other than his

> or her spouse and there occurs an actual partition of the property, a tenancy by the entirety may be created in the husband or wife who owned the undivided interest and his or her spouse in the manner hereinafter provided:
>
> (1) In a division by cross-deed or deeds, between or among the tenants in common provided that the intent of the tenant in common to create a tenancy by the entirety with his or her spouse in this exchange of deeds must be clearly stated in the granting clause of the deed or deeds to such tenant and his or her spouse, and further provided that the deed or deeds to such tenant in common and his or her spouse is signed by such tenant in common and is acknowledged before a certifying officer in accordance with G.S. 52-10;
>
> (2) In a judicial proceeding for partition. In such proceeding, both spouses have the right to become parties to the proceeding and to have their pleadings state that the intent of the tenant in common is to create a tenancy by the entirety with his or her spouse. The order of partition shall provide that the real property assigned to such tenant and his or her spouse shall be owned by them as tenants by the entirety.

In order to create tenancy by the entireties or otherwise change the nature of the estate in a partition, technical compliance with the statute is required. That would include both a clear statement of intent in the granting clause of the deed and compliance with N.C.G.S. § §52-10 which requires that contracts between husband and wife be acknowledged by both parties. Compliance would be necessary to create any tenancy in the non-owner spouse whether it be as tenants in common or entireties (*See* Brown v. Brown, 59 N.C. App. 719, 297 S.E.2d 619 (1982)).

Thus, on the facts of our case, the partition deed into husband and wife did not establish tenancy by the entireties and the deed was ineffective to create an entireties estate in the husband.

X. Holographic Will (Exhibit 3)

In the chain of title, one of Seller's predecessor's in title received the property through a holographic will. The will was introduced by the Seller's predecessor, Y, and the will was in Y's possession when the testator died. The decedent has a son who thought he owned the property and gave a deed to a third party for the property the Seller now claims to own. This problem is discovered and the Seller is concerned that he may need to negotiate with the grantees in the deed from the decedent's son to be able to convey good title.

Analysis

NCGS 31-3.4 states that a holographic will is a will that is:

1. Written entirely in the handwriting of the testator;
2. Subscribed by the testator or with his name written in his own handwriting; and
3. Found amongst the valuable papers or effects, or deposited in some place or with some person by the testator for safe-keeping.

In order to validate a holographic will, at least three competent witnesses must say that that handwriting in the will is that of the testator. The beneficiary under the will may be one of these witnesses (*See* In Re Will of Crawford, 246 N.C. 322, 98 S.E.2d 29 (1957) *cited* In re Will of Lamparter, 348 N.C. 45, 497 S.E.2d 692 (1998)).

In our case, the beneficiary, a local bank teller and a church treasurer all were able to testify that the will was written in the hand of the decedent and the will was admitted to probate. However, the son of the testator believes that the will failed because the beneficiary, Y, had the will in his possession, Y was one of the witnesses testifying as to the authenticity of the handwriting and Y was the sole beneficiary. These arguments all appear to fail under the statutes and case law and therefore the deed from the son of the decedent to the third party should convey nothing because Y took title under the will.

The risk of a lawsuit on this matter is a concern for the title insurer and the title attorney. Although it appears that the title of Y is the superior title, neither the title insurer nor the buyer want to bear the cost of proving the point. The title insurer requests that the seller provide an indemnity against claims arising from the holographic will and agrees to provide coverage on that basis.

XI. Re-recording Error and Intervening Judgment (Exhibit 5)

The seller took title to Parcel E from H. H took title from L. Unfortunately, the chain of title reveals that prior to his conveyance to H, L conveyed the same property to M. The record seems to indicate that this was done erroneously because the deed from L to M was later re-recorded to change the legal description of the property. L presently had a judgment entered against both him and his wife in the amount of $58,000.00 for money owed in May of 1998.

Analysis

The first deed from L to M actually affected a transfer of the property and the subsequent re-recording of the deed was invalid to correct the problem. One cannot correct a legal description as an obvious and minor error under N.C.G.S. § §47-36.1(*See* Green v. Crane 96 N.C. App. 654, 386 S.E.2d 757 (1990)). L actually owns Parcel ___ and Seller's chain of title is defective. L acknowledges the error and is willing to sign a non-warranty deed to the Seller but does not wish to have to pay the judgment rendered against him which has now attached to the property.

Because of the age of the judgment and the good financial standing of L, the title insurer would be willing to accept indemnities and hold harmless agreements to insure over the judgment. However, realizing that the judgment poses a marketability problem for his client, Buyer's attorney has objected to the judgment and discouraged Buyer from accepting title insurance over the judgment.

XII. Restriction for Agricultural Uses

On the parcel of land owned by B, the title search reveals a covenant restricting the property to agricultural use, hunting and fishing. Almost half of B's parcel could be affected. The covenant was placed on the property when the Hunt Club of Asheville bought it at a judicial sale. The restriction was placed on the property by the commissioner appointed to conduct the sale.

Analysis

The case of White v. Moore (11 NC App. 534, 181 S.E.2d 734 (1971)) specifically states that the commissioner, whose authority is derived from an order of the court, has no authority to place restrictions on property at the sale unless directed by the court to do so. The restriction is thus null and void and the property is free and clear of the restriction.

XIII. Gap Between Parcels shown on survey

The survey reveals that there is a gap between the eastern line of Parcel F and the line of Parcel G. The northern line of Parcel C also abuts the gap. Title attorney reviewed the legal descriptions in the chains of title for all three parcels back as far as 1900 and the gap has apparently been in existence since then. However, the tax records reveal that Mr. Checkov, the owner of Parcel F, has been paying taxes on the gap parcel. Mr. Chekov reveals that the land within the gap is a wooded area with no improvements.

Analysis

The analysis of a gap between parcels is a fact driven process that requires consideration of a number of factors. Whenever possible, it is most helpful to know the identity of the vested owner of the parcel. If the fee title holder can be identified, often the preferable resolution is to locate that owner and request a quitclaim deed to remove the issue.

More often that not, the vested owner either cannot be identified or cannot be located. In these instances, the decision to proceed becomes a risk analysis. The insurer and/or the title attorney must consider the likelihood that an owner will materialize and make a claim on the gap parcel. The following factors are relevant in that consideration:

1. Do the legal descriptions contained in the deeds of the property on each side of the gap refer each to the other, or to ownership by a third party?
2. Are there elements for an adverse possession claim by the seller? Obviously, if the seller and his predecessors in title have exercised dominion over the property for an appropriate length of time, the risk of a successful claim by the record title holder or his successors and heirs is lessened.
3. Is there any evidence of activity on the property? Evidence that a third party has been using the property (timbering, hunting, fishing) even at irregular intervals may tend to increase the risk of a title claim and loss. Roads, paths and trails across the property may also indicate an easement whether established by deed, necessity or prescription.
4. Do any of the adjacent owners claim the property? This is particularly important where the buyer/insured will not acquire all of the surrounding parcels. Title insurers will frequently require that title searches be performed on adjacent parcels to see if the other neighboring owners may have some claim to the property. Even if that search reveals that none of the neighbors have a claim it is often required that the seller obtain boundary agreements or quitclaim deeds to clearly establish that none of the neighbors will make a claim to the property.
5. Who is/has been paying property taxes on the property? This is an indication of ownership but is not dispositive. It does tend to show that the record title owner is either unaware of his title or no longer around.
6. What use does the buyer intend to make of the property? This issue relates to the cost of a claim for the insurer. If the parcel will sit directly underneath a "big box" retail building, then a claim is likely to far more expensive to resolve than where the parcel will underlie a natural buffer on the outer edge of the property.
7. Will the seller indemnify the buyer and insurer against a claim to title or warrant title?

There are numerous relevant considerations. On the facts of our case, we know that there has not been a claim from the record title holder in at least 100 years. Because the parcel is wooded and unimproved, there is not evidence of any use by an unknown owner. Most importantly, title to all of the surrounding parcels will be acquired by the insured. The title insurer will request deeds from each of the adjoining owners as to the parcel to establish a record of title in the insured.

XIV. Improvements and Use By Third Party (Fishing Shack – Bass R Us)

A large lake is located on the property. Bass Are Us, a group of local fishermen, have been fishing on the property for years and have had several public outings there. They constructed a fishing shack on the property that sleeps eight. The owner gave them permission to fish there years ago and never objected when they built the fishing shack. The club has said that they expect to continue to fish in the lake after the development is started and completed. The club also says that they object to the removal of the fishing

shack. They say that by going onto the property for many years and by building a shack there, they have acquired an easement to the use of this lake.

No recorded easement was found in the title search giving the club a right to be there. The present owner had only told the fishing club that they could fish there (just as the owner's parents had allowed them to do).

Analysis

The interest obtained by Bass Are Us is a mere license and is revocable by the owner. The license does not give rise to the acquisition by the club of any claim to title in the premises.

As to the fishing shack, the club may remove it from the premises. The owner of the property had never questioned the fact that the shack and its contents (rods, boats, motors, bunks) belonged to anyone other than the club. The new purchaser has no right, title or interest in these chattels and may by subject to an action for conversion if he does not allow the club to retrieve them (See Moore Oil Co. v. Cleary, 295 NC 417, 245 S.E. 2d 720 (1978)).

However, the title company may require an indemnity regarding the costs of an ejectment action.

XV. Timber Deed (Exhibit 7)

The title search reveals that 10 acres of the subject property is subject to a deed conveying timber to We Cut'em Timber Company. The deed was recorded in 1997 and provided that We Cut'em was entitled to the removal of standing timber located on the subject property for a period of ten (10) years commencing January 1, 1997. The seller claims that the timber on the 10 acre parcel was all cut and removed several years ago.

Analysis

Standing trees are *fructus naturales* and, therefore, are a part of the realty, and can be conveyed only by such instrument as is sufficient to convey any other realty (Chandler v. Cameron, 229 N.C. 62, 47 S.E. 2d 528; and Williams v. Parsons, 167 N.C. 529, 83 S.E. 914). Timber deeds, as ordinarily drawn, carry an estate of absolute ownership, defeasible as to all timber not cut and removed within the specified period (Timber Co. v. Wells, 171 N.C. 262, 88 S.E. 327). Cases on point hold that standing timber is realty and as much a part of the realty as the soil itself; that deeds and contracts concerning it must be construed as affecting realty; and that in instruments conveying the growing and standing timber to be removed within a specified time, the title to all timber not severed within the time shall revert to the vendor (Midyette v. Grubbs, 145 N.C. 85, 58 S.E. 795). The conveyance in writing, upon a valuable consideration, of specified standing timber with right to cut and remove within a definite time is an executed contract and passes title

to realty (Wilson v. Scarboro, 163 N.C. 380, 79 S.E. 811; Lumber Co. v. Corey, 140 N.C. 462, 53 S.E. 300; Hawkins v. Lumber Co., 139 N.C. 160, 162, 51 S.E. 852).

It is important to distinguish contracts for the sale of timber from deeded title. Such contracts are contracts for the sale of goods governed by the Uniform Commercial Code and can be recorded pursuant to G.S. 25-2-107. While contracts for the sale of timber can be recorded, they need not meet the formalities required for the transfer of realty. The significance of this for the title attorney is that the contract need not specify a time for performance to be enforceable (*See* G.S. 25-2-309).

It is interesting to consider the possibility that a recorded timber deed that is ineffective to transfer title because of some defect, might be enforced as a contract for the sale of goods in which the terms can be supplemented by the UCC. At the time of this writing, we were not able to locate any case law supporting such a theory of enforcement in North Carolina.

In our example, the term for performance by We Cut'em has not yet expired. Although the seller claims that all of the deeded timber has been cut and removed and agrees to execute an affidavit (albeit a very self-serving affidavit) to that effect, the title insurer will likely require additional assurances. Such assurances might include indemnity by the seller, statement from We Cut'em sufficient for estoppel or evidence that there is no more standing timber on the property. The buyer's attorney is concerned about marketability, however, and requires that the seller obtain a quitclaim deed from We Cut'em.

XVI. Controlled Access Highway (Exhibits 4, 5, 6 and 7)

The survey reveals that Highway 577 is a controlled access highway. Thus, Parcel G is a land-locked Parcel without either direct or indirect access. The condemnation of lands for the Highway 577 project was completed several years ago.

Analysis

Controlled access highways are provided for by G.S. 136-89.48 *et seq*. In an action for condemnation, the state is obliged to consider the complete loss of access to a parcel which cannot be damaged or taken without just compensation (*See* G.S. 136-89.52). Presumably, the seller or other prior owner was compensated in the eminent domain proceeding for the lack of access. In the present transaction, this would be a factor in determining the purchase price.

Though the title commitment will except to access for Parcel G, once Parcel G and the other parcels are held in common ownership, assurances can be provided in the policy that Parcel G has access across other lands of the common owner.

The policy must also contain an exception such as: “Access by way of Highway 577, a controlled access highway, is not insured.”

XVII. Fence Encroachment

The survey reveals a minor encroachment of a fence from the residential neighborhood adjoining on the north of Parcel G. The survey also shows that the adjoining subdivision has existed for many years, although the age of the fence is not clear.

Analysis

The title insurer will certainly consider giving coverage against certain encroachments. The title company will consider a number of factors in evaluating a particular encroachment. The nature of the encroachment is one important consideration. Specifically, is it a fence or the wall of a building? There is a great difference in the exposure to the insurer between the two. The age of the encroachment is another relevant factor. Of course, there is less likely a claim against title (adverse possession) to lands underneath the encroachment if it is just a year or two old. The extent of the encroachment is also very important. Is the fence 10 inches or 10 feet into the insured property?

Under our facts the encroachment is minor and is unlikely to impact the insured property in any significant way. Even if the insured were to prove a loss as a result of the encroachment, the loss would be insignificant relative to the value of the insured land. Thus the title insurer agrees to provide affirmative coverage for a lender against the fence encroachment. In addition, the insurer may provide limited affirmative coverage to the purchaser-owner against, for example, loss due to inability to complete contemplated improvements due to the encroachment.

The buyer’s attorney is again concerned about the marketability of the property and about satisfying a demanding lender’s counsel at a later date. He objects to the defect in his title objection letter and requests that the seller either remove the encroachment or have the owner of the encroaching fence execute an encroachment agreement. The encroachment agreement would allow the fence to remain in place and would estop the owner of the fence from claiming title to the real property enclosed by the fence. Further, the agreement would provide that in the event the fence damaged, removed or destroyed that it must be rebuilt outside of the property.

XVIII. Access Road Over Existing “residential” lots (Exhibit 7)

The owner of Parcel G has previously platted a single family residential subdivision called Kathryne’s Corner in the northeast corner of his property. Although 2 of the 16 platted lots were sold to third parties and because of poor sales, Mr. Kim has contracted

to sell the remaining lots and roadway to Buyer. The owners of the 2 lots that were previously sold are not parties to the pending transaction.

The developer is concerned that he be able to extend Jakob Street across Lot 10 and part of Lot 11 into the mixed use development as an additional access point. The buyer's counsel requests that the title insurer provide affirmative coverage that developer will be able to do so.

Analysis

It is clear that a restrictive covenant limiting subdivision lots to residential purposes precludes the use of the lot for the building of a roadway for the purpose of accessing another subdivision (*See* Franzle v. Waters, 18 N.C. App. 371, 197 S.E.2d 15 (1973)).

The appropriate method of addressing the issue on our facts would be for the developer to require that the seller amend the covenants to expressly provide that Lots 11 and 10 may be used to access a subdivision. The covenants must be amended according the provisions in the covenants.

CHICAGO TITLE INSURANCE COMPANY

DEVELOPMENT PHASE

By Nancy Short Ferguson

The development will be created in 3 separate sections – a commercial center, a condominium and a single family neighborhood. The entire development will be subjected to a set of master declarations and a master plat to cover the overall development requirements, common areas and roads. This section will cover the issues of planning for the development phase.

I. PROPERTY TAX ISSUES

A developer developing property creates significant increased values as the development continues. Parcels are subdivided in one year and assigned new tax identifiers the next year, as well as being subject to increased appraisals (if properly listed) in the next and succeeding years. At the time a lot is being conveyed to a third party, either the tax bills may not have been issued for the year or the developer may not want to pay the entire tax bill for the year prior to the day before delinquency. Since the taxes attach as a lien on the property as of January 1, this creates a significant risk for the buyer, their lender and the title insurer; a single lot may be subject to a blanket tax bill on the entire subdivision. And tax offices are adept at finding the deep pocket (the new purchaser) if the developer fails to pay.

a. Increasing / separating listings as developing; increasing listings each January as improvements begun and completed

The developer is responsible to reflect increases in value of properties retained in January of each year, when relisting under N.C.G.S. § 105-285, the valuation being adjusted pursuant to N.C.G.S. § 105-287(a) , if the increase is from one or more of the following:

> (2b) Recognize an increase or decrease in the value of the property resulting from a physical change to the land or to the improvements on the land, other than a change listed in subsection (b) of this section.
>
> (2c) Recognize an increase or decrease in the value of the property resulting from a change in the legally permitted use of the property.
>
> (3) Recognize an increase or decrease in the value of the property resulting from a factor other than one listed in subsection (b).

[NOTE: The subsection (b) "betterments" that do not trigger reappraisal are very limited, i.e. painting, terracing, soil conservation, landscape gardening, protecting forests against fire and water conservation.]

The reappraisal, if made in the first year after the improvements, is not retroactive. But if not appropriately listed and later discovered, it will relate back creating back taxes on all properties improperly listed, pursuant to G.S. 105-312 relating to discovered property.

One exception of interest to developers is subsection (d) with provides that "if a tract of land has been subdivided into lots and more than five acres of the tract remain unsold by the owner of the tract, the assessor may appraise the unsold portion as land acreage rather than as lots. A tract is considered subdivided into lots when the lots are located on streets laid out and open for travel and the lots have been sold or offered for sale as lots since the last appraisal of the property."

b. Homeowners' associations are are tax-exempt.

But once common areas are conveyed to association, valuation of common areas is distributed among developed lots, pursuant to N.C.G.S. § 105-277.8(a), as follows:

> § 105-277.8. Taxation of property of nonprofit homeowners' association
> (a) The value of real and personal property owned by a nonprofit homeowners' association shall be included in the appraisals of property owned by members of the association and shall not be assessed against the association if:
> (1) All property owned by the association is held for the use, benefit, and enjoyment of all members of the association equally;
> (2) Each member of the association has an irrevocable right to use and enjoy, on an equal basis, all property owned by the association, subject to any restrictions imposed by the instruments conveying the right or the rules, regulations, or bylaws of the association; and
> (3) Each irrevocable right to use and enjoy all property owned by the association is appurtenant to taxable real property owned by a member of the association.
> The assessor may allocate the value of the association's property among the property of the association's members on any fair and reasonable basis.

c. Property held as a burial site *may* be exempt.

With regard to graves or burial sites located on property to be developed, N.C.G.S. § § 105-278.2. Burial property, provides as follows:

> (a) Real property set apart for burial purposes shall be exempted from taxation unless it is owned and held for purposes of (i) sale or rental or (ii) sale of burial rights therein.

(b) Taxable real property set apart for human burial purposes is hereby designated a special class of property under authority of Article V, Section 2(2) of the North Carolina Constitution, and it shall be assessed for taxation taking into consideration the following:

(1) The effect on its value by division and development into burial plots;
(2) Whether it is irrevocably dedicated for human burial purposes by plat recorded with the Register of Deeds in the county in which the land is located; and
(3) Whether the owner is prohibited or restricted by law or otherwise from selling, mortgaging, leasing or encumbering the same.

(c) For purposes of this section, the term "real property" includes land, tombs, vaults, monuments, and mausoleums, and the term "burial" includes entombment.

d. Business Personal Property

All real or personal property is subject to taxation under Chapter 105, Subchapter 2, Article 12, N.C.G.S. § 15-274, other than properties specifically excepted under N.C.G.S. § 205-275. Item (16) of that statute specifically exempts:

(16) Non-business Property. -- As used in this subdivision, the term "non-business property" means personal property that is used by the owner of the property for a purpose other than the production of income and is not used in connection with a business. The term includes household furnishings, clothing, pets, lawn tools, and lawn equipment. The term does not include motor vehicles, mobile homes, aircraft, watercraft, or engines for watercraft.

So any business personal property of the developer must be taken into account when determining the potential tax liability assessable to a particular lot or unit being sold or mortgaged to a third party. However, these business personal property taxes can be allocated, pro-rata, among parcels in order to obtain a release a particular tract. *See, e.g.,* Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991). (See "Carveouts" discussion below)

e. Partial Payments

Partial payments are payments of less than the entire amount due, made after the tax bills have issued. Under N.C.G.S. § § 105-358(b):

"(b) Unless otherwise directed by the governing body, the tax collector shall accept partial payments on taxes and issue partial payment receipts therefor.

When a payment is made on the tax for any year or on any installment, it shall first be applied to accrued penalties, interest, and costs and then to the principal amount of the tax or installment. In its discretion, the governing body may

prescribe by uniform regulation the minimum amount or percentage of tax liability that may be accepted as a partial payment."

Note that this is nondiscretionary, i.e. the tax collector shall accept the partial payments, so long as no contrary direction has been given the by the city council, county commissioners, or other applicable governing body. This is an important provision in relation to "Carveouts" discussion below when a developer is conveying out newly subdivided properties.

f. Prepayments

Prepayments are payments made prior to the issuance of the tax bill and determination of the annual liability. These may be accepted by the tax collector at their discretion or as provided by the governing body. However, pursuant to N.C.G.S. § 105-359(b), "No taxing unit shall be required to accept any tender of prepayment until the annual budget estimate has been filed as required by law." In addition, under subsection (d), "such a receipt shall not release property from the tax lien created by G.S. 105-355(a). An official and final receipt shall be made available to the taxpayer as soon as possible after determination that the tax has been fully paid."

g. Carveouts (Release of Separate Parcels)

N.C.G.S. § § 105-362(b) allows for carve-out or release of separate parcels from a tax bill as follows:

(b) Release of Separate Parcels from Tax Lien. –

(1) When the lien of taxes of any taxing unit for any year attaches to two or more parcels of real property owned by the same taxpayer, the lien may be discharged as to any parcel at any time prior to advertisement of tax foreclosure sale in accordance with either subdivision (b)(1)a or subdivision (b)(1)b:

a. Upon payment, by or on behalf of the listing taxpayer, of the taxes for the year on the parcel or parcels to be released, plus all personal property taxes owed by the listing taxpayer for the same year.

b. Upon payment, by or on behalf of any person (other than the listing taxpayer) who has a legal interest in the parcel or parcels to be released, of the taxes for the year on the parcel or parcels to be released, plus a proportionate part of personal property taxes owed by the listing taxpayer for the same year. The proportionate part shall be a percentage of the personal property taxes equal to the percentage of the total assessed valuation of the taxpayer's real property in the taxing unit represented by the assessed valuation of the parcel or parcels to be released.

(2) When real property listed as one parcel is divided, a part thereof may be released as provided in subdivision (b)(1), above, after the assessed valuation of the part to be released has been determined and certified to the tax collector by the tax supervisor.

(3) It shall be the duty of the tax collector accepting a payment made under this

subsection (b) for the purpose of releasing the tax lien from less than all of the taxpayer's real property:

a. To give the person making the payment a receipt setting forth a description of the real property released from the tax lien and bearing a statement that such property is being released from the tax lien.

b. To indicate on the tax receipts, tax records, and other official records of his office what real property has been released from the tax lien.

If the tax collector fails to issue the receipt or make the record entries required by this subdivision (3), the omission may be supplied at any time.

(4) When any parcel of real property has been released under the provisions of this subsection (b) from the lien of taxes of any taxing unit for any year, the property shall not thereafter be subject to the lien of any other regularly levied taxes of the same taxing unit for the same year, whether such other taxes be levied against the listing owner of the property or against some other person acquiring title thereto. No tax foreclosure judgment for such other taxes shall become a lien on the released property; and, upon appropriate request and satisfactory proof of the release by any interested person, the clerk of the superior court shall indicate on the judgment docket that the judgment is not a lien on the released property. However, the failure to make such an entry shall not have the effect of making the judgment a lien on the released property.

Again, note the mandatory provision effectuating the release as found by the U.S. District Court in the case Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

h. Mechanics' Liens and Developer Indemnities

A developer developing property and selling parcels during the year may prefer to defer payment until the end of the year. Again, this may create a significant risk to the purchaser or lenders and possibly their title insurers (if affirmative coverage is provided to the new insureds).

Similarly, if the developer is also the builder, it is *not* the contractor for purposes of Chapter 44A. Instead, the developer is the owner, and anyone contracting with the developer to provides labor, materials or services which are or can be subject to a lien under Chapter 44A, Article 2, is a "contractor" under that statute. So a purported "lien waiver" from the developer is not a waiver at all since, as the owner, the developer has no lien rights to waive.

For this reason, developers counsel periodically request a means to provide additional assurance to the title company regarding these critical matters in order to clarify expectations and obligations, minimize future documentation and facilitate smoother closings. Title insurers look to developer's counsel for assurance that the developer is in good financial standing, paying its bills (especially contractors and taxes) in a regular timely fashion, and are not the subject of continued lien filings (no matter which property is affected) unless the matters are truly and justifiably contested.

II. DECLARATIONS OF COVENANTS, CONDITIONS AND RESTRICTIONS

Since we are dealing with the issues in creating a new development, this manuscript will focus on title insurance issues as affected by Chapter 47F, The Planned Community Act [herein the "PCA"]. Therefore, all references to statutes in Chapter 47F would affect developments which are governed by the Act, in whole or in part. NOTE: Chapter 47F was substantially amended by the Session Laws 2005-422, House Bill 1541, and S.L. 2005-214, Senate Bill 666, effective January 1, 2006. References in this manuscript incorporate these amendments where appropriate. Amendments by S.L. 2005-422 and S.L. 2005-214 in quoted statutory texts are shown in CAPITAL letters, along with the General Assembly edit instruction of "[D> . . . <D]" for deleted portions and "[A> . . . <A]" for added portions.

As noted earlier, this manuscript is directed toward the critical issues that affect title insurance underwriting and claims questions.

PRACTICE COMMENT: Drafting restrictions is as much an art as a science. As the cases show, a thorough understanding of cases, statutes and the developer's actual (or potential) plans, as well as a good eye toward addressing future risks (internal and at the appellate court level), are critical. The ability to combine this comprehensive knowledge with a creative view toward addressing problems is also essential. *See, for example,* North Carolina Bar Association Raw Land to Landscaping: Challenges Facing Today's Real Estate Developers, "Adventures with the REA (a/k/a CCR's and COREA)" by Edward P. Tewkesbury, Brian P. Evans and Taryn G. Mecia (November 9, 2001)

SECOND PRACTICE COMMENT: The attorney should keep near their desktop for references the below resources. This manuscript does not purport to be a rewrite of these resources, but only to cite some either historically significant or recent cases on the issues involved:

- North Carolina Real Estate with Forms (1996, with annual supplements), by Edmund T. Urban and W. Grant Whitney, Jr. (Thomson/West, West Publishing Company, formerly The Harrison Company)

- Webster's Real Estate Law in North Carolina (1997, with annual supplements), by Patrick K. Hetrick and James B. McLaughlin, Jr. (Lexis Law Publishing)

- North Carolina Bar Association CLE manuscripts, including the practical skills course manuscripts provided in November of even-numbered years

- Web sites with useful resources, including:
  Chicago Title Insurance Company, North Carolina web site:
  www.northcarolina.ctt.com

In any review by a title insurer of a development when asked to provide some type of affirmative coverage, whether for initial development issues, later amendments, annexations, access, violations, or other matters, the key concerns are:

1. What are the actual applicable restrictions affecting the parcels (fee and easement) involved?
2. What are the specific provisions at issue?
3. What are the amendment provisions contained in the restrictions?
4. What are the amendment provisions contained in the plat (if plat dedications are affected)?
5. Is this matter part of a uniform scheme of development?
6. Has there been a significant change of circumstance in the development?
7. The risk question: Who is objecting now or likely to object? Will the proposed change be a benefit or a burden to those third parties, whether purchasers or lenders? What is the likelihood of them objecting, to the point of litigating? And, if so, who is expected to be involved and pay the costs?

Restrictions are based in equity, subject to constant litigation and expensive to litigate. So the last question may sometimes be more important to the underwriter than the "technical" legal issues involved in the situation. Relying on a positive outcome at the appellate court level is still a significant cost of fees as well as client time in staying involved in the litigation, so should be undertaken only after serious consideration and discussion with the client(s) who will be involved. Some of the basic legal issues will be outlined below. But, again, consultation to a more detailed legal treatise, such as Urban-Whitney or Webster's, is HIGHLY recommended.

a. Common law and the "Scheme of Development

Construction and determination of applicability and enforceability of restrictions is a very fact-driven process and heavily litigated, as the long list of cases will attest. Restrictions are to be strictly construed in favor of free use of property. *See* Long v. Branham, 271 N.C. 24, 156 S.E.2d 235 (1967). This is especially true in cases involving affirmative obligations, such as assessments (discussed later in this manuscript).

Whether contained in a single deed but encumbering all property, in all deeds in consistent form, or in a single Declaration encumbering multiple properties, covenants, conditions and restrictions can be imposed on properties which continue or "run with the land" and are enforceable by other owners of property in the restricted area. The key conditions are the intent of the developer that they run with the land, that they actually "touch and concern" the land and that the owners have privity of estate, both vertical and horizontal (a "connection of interest"). *See* Runyon v. Paley, 331 N.C. 293, 416 S.E. 2d 177 (1992)

The restrictions may be included in individual deeds, or even in a deed to another lot in the subdivision. *See, e.g.*, Reed v. Elmore, 246 N.C. 221; 98 S.E.2d 360; 1957 N.C. LEXIS 437 (1957) (restriction on Lot 4 contained in deed to third party of Lot 3 was enforceable against Lot 4 when later sold). In contrast, in the case of Humphrey v. Beall,

215 N.C. 15; 200 S.E. 918; 1939 N.C. LEXIS 181 (1939), many of the individual deeds to lot purchasers contained the "further provision that nothing therein contained shall be held to impose any restriction upon any land of the grantor not thereby conveyed." Since not all lots were restricted and many that were contained this provision as well, this defeated the scheme of development, allowing the developer to sell some lots unrestricted, including sale to a dry cleaning establishment.

b. Applicability: Planned Community Act

Of course, some developments created prior to January 1, 1999, may have elected to be and, thus, would still be governed by Chapter 47A, the Unit Ownership Act (designed more for condominiums but available to other types of developments if elected to be so governed), on matters not superseded by the Planned Community Act ("PCA"). Under N.C.G.S. § 47F-1-102(c), the PCA supersedes primarily with regard to some association powers, common area maintenance, assessments and liens, or if the pre-existing association has elected to be governed by the PCA under N.C.G.S. § 47F-1-102(d) by so amending their declarations. The provision is as follows:

> (c) Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-3-102(1) through (6) and (11) through (17) (Powers of owners' association), [A> G.S. 47F-3-103(F) (EXECUTIVE BOARD MEMBERS AND OFFICERS), <A] G.S. 47F-3-107(a), (b), and (c) (Upkeep of planned community; responsibility and assessments for damages), [A> G.S. 47F-3-107.1 (PROCEDURES FOR FINES AND SUSPENSION OF PLANNED COMMUNITY PRIVILEGES OR SERVICES), G.S. 47F-3-108 (MEETINGS), <A] G.S. 47F-3-115 (Assessments for common expenses), [D> and <D] G.S. 47F-3-116 (Lien for assessments), [A> G.S. 47F-3-118 (ASSOCIATION RECORDS), AND G.S. 47C-3-121 (AMERICAN AND STATE FLAGS AND POLITICAL SIGN DISPLAYS) <A] apply to all planned communities created in this State before January 1, 1999, unless the articles of incorporation or the declaration expressly provides to the [D> contrary. <D] [A> CONTRARY, AND G.S. 47F-3-120 (DECLARATION LIMITS ON ATTORNEYS' FEES) APPLIES TO ALL PLANNED COMMUNITIES CREATED IN THIS STATE BEFORE JANUARY 1, 1999. These sections apply only with respect to events and circumstances occurring on or after January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections.

So in earlier developments, the earlier Unit Ownership Act may also need to be consulted in developments governed by that Act, to the extent not superseded by the Planned Community Act.

Otherwise, pursuant to N.C.G.S. § 47F-1-102, all developments created after 1/1/99 are governed by the provisions of the Planned Community Act unless excluded under subsection (b) which provides as follows:

(b) This Chapter does not apply to a planned community created within this State on or after January 1, 1999:

(1) Which contains no more than 20 lots (including all lots which may be added or created by the exercise of development rights) unless the declaration provides or is amended to provide that this Chapter does apply to that planned community; or

(2) In which all lots are restricted exclusively to nonresidential purposes, unless the declaration provides or is amended to provide that this Chapter does apply to that planned community.

Of additional note, the provisions of the PCA are mandatory and may not be varied unless authorized by the act. Specifically, N.C.G.S. § § 47F-1-104. Variation, provides as follows:

(a) Except as specifically provided in specific sections of this Chapter, the provisions of this Chapter may not be varied by the declaration or bylaws.

(b) The provisions of this Chapter may not be varied by agreement; however, after breach of a provision of this Chapter, rights created hereunder may be knowingly waived in writing.

(c) Notwithstanding any of the provisions of this Chapter, a declarant may not act under a power of attorney or proxy or use any other device to evade the limitations or prohibitions of this Chapter, the declaration, or the bylaws.

The good news is N.C.G.S. § 47F-2-103(d):

(d) Title to a lot and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this Chapter. Whether a substantial failure to comply with this Chapter impairs marketability shall be determined by the law of this State relating to marketability.

c. Creating a Master Association, under the Planned Community Act

A potential multi-use or multi-phase development meriting a master association for the entire development, is facilitated under the provisions of the PCA as follows:

§ 47F-2-120. Master associations

If the declaration for a planned community provides that any of the powers described in G.S. 47F-3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation which exercises those or other powers on behalf of one or more other planned communities or for the benefit of the lot owners of one or more other planned communities, all provisions of this act applicable to lot owners' associations apply to any such corporation.

To the extent any matters will apply to the entire development, they may be included in the master Declaration, such as a master association, aesthetic control by the developer or the association, master assessments, dedication of overall easements or common areas, provisions for maintenance of same, reservations of declarant rights (architectural control or approval, future development rights) or developer retained rights (such as rights of first refusal, construction deadlines or requirements, or repurchase options), or the ability to work with the individual sub-associations regarding any of the above.

In addition, creation of the master covenants for the entire development and the master association may assure that all sections are subject to the overall "general scheme of development," enforceable by the master association, even though individual sections or plats have differing use and construction restrictions, separately enforceable by individuals in the particular sections. This is critical because without a uniform scheme, the restrictions are personal covenants and unenforceable by either other owners or the association. *See*, *e.g.*, Beech Mtn. Property Owners' Assoc. v. Current, 35 N.C.app. 135, 240 S.E.2d 503 (1978); Runyon v. Paley, *infra.*

d. Owners' Associations

The Association is, of course, bound by its creating and governing instruments as well as the provisions of the PCA. Any action by the Association must be in conformity with same, so they should be carefully reviewed. The legal details of this governance are outside of the scope of this manuscript. However, a couple of notes are in order.

The Developer typically retains control of the Association, pursuant to N.C.G.S. § 47F-3-1-3(d), including larger voting rights (such as 2-4 votes per lot owned) as a separate class, and possibly even the right to control the board for a specified extended period of time to the extent it still owns a specified number of lots. This is important in the event of initial improvements being reviewed and violations waived.

The Association will need the ability to deal with common areas, via a provision such as:

> "The rights of the association to grant easements and rights of way, to dedicate or transfer all or any part of the Common Area to any public agency, authority or utility (including any entity authorized by the City or County to supply cable television service) for such purposes and subject to such conditions as may be agreed to by the Board of Directors of the Association. No such dedication or transfer shall be effective unless an instrument signed by a majority of the Board of Directors, agreeing to such dedication or transfer, has been recorded."
>
> "Easements for installation and maintenance of utilities (including cable television service) and drainage facilities are reserved as shown on the recorded Plat. Within these easements, no structures, planting or other material shall be placed or permitted to remain, nor will the alteration or removal of any berms, swales or ditches be permitted, which may interfere with the installation and maintenance of utilities, or which may change the direction or flow of drainage

channels in the easements, or which may obstruct or retard the flow of water through drainage channels in the easements."

"The right of the Association to impose and enforce rules and regulations for the use and enjoyment of the Common Area and improvements thereon, which regulations may further restrict the use of the Common Area, and specifically including the right to control access to and use of [named specific amenities], to establish and enforce parking regulations on all streets within the Properties and to establish and enforce environmental regulations consistent with the restrictive covenants applicable to Lots and the applicable ordinances of [City and/or County]. Sanctions may include monetary fines and suspension of the voting rights and easements of enjoyment of any Member or tenant for a period not to exceed sixty (60) consecutive days."

"The right of the Association to exchange portions of Common Area with [Developer] for substantially equal areas of the Properties for the purpose of eliminating unintentional encroachments of houses or other improvements onto portions of the Common Areas."

"In the event that any improvements on a Lot shall encroach upon any Common Area or upon any other Lot for any reason not caused by the purposeful or negligent act of the Owner or agents of such Owner, then an easement appurtenant to such Lot shall exist for the continuance of such encroachment upon the Common Area or other Lot for so long as such encroachment shall naturall exist; and, in the event that any portion fo the Common Area shall encroach upon any Lot, then an easement shall exist for the continuance of such encroachment of the Common Area into any such Lot for so long as such encroachment shall naturally exist."

"The right of the Association to contract (specifically including leasing) with [third parties, either named or generally] concerning rights to and responsibilities for use, operation and maintenance of [named specialized amenities]."

e. Development and use restrictions:

Typically, however, in a multi-use project, the use restrictions may be different for different sub-developments due to differences in the planned neighborhoods. For planning purposes, the drafting attorney must be sure of the following:

1. Depending on the nature of the subdivision, some or all use restrictions may be better set forth in a separate instrument or instruments than the master declaration – possibly in the individual "sub"-development declarations or in a separate set of comprehensive declarations. This is especially true in any commercial phase if there are reasons to avoid applicability of the PCA on that phase.

2. All units or lots in the development must comply with the declarations' requirements, or they should be either replatted or the declarations revised during the planning phase (if possible) to address any variations.
3. All declarations and plats should be consistent internally, as well as in compliance with applicable zoning or subdivision ordinances. Otherwise, lot owners may end up with varying sets of governing requirements, any one of which is bound to be missed in later improvement to and use of the property.
4. It should be noted that the zoning or subdivision ordinances are an independent and separate overlay of requirements and limitations on use of the property. Original imposition, modification or termination of the restrictions is totally independent of and not reliant on the zoning regulations applicable, which must be addressed separately. Neither will a change of zoning effect a change in the enforceability of private restrictions by those in the neighborhood. Hawthorne v. Realty Syndicate, Inc., 43 N.C. App. 436, 259 S.E.2d 591 (1979); Mills v. HTL Enterprises, Inc., 36 N.C. App. 410, 244 S.E.2d 469 (1978).

Restrictions are strictly construed in favor of the free alienability of property. *See*, Long v. Branham, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967)) It is especially critical that any restriction be extremely clear in its definitions and terms, as the above definitions reflect. This became evident in the long line of assessment lien and use restriction cases (outlined below). By way of example, "structures" was held to include radio towers in Black Horse Run Property Owners v. Kaleel, 88 N.C. App. 83, 362 S.E.2d 619 (1987). And, for example, "improvements" may or may not include trees depending upon the definitions contained in the restrictions (if any). In the case of Walters v. Nicolas, 162 N.C. App. 182; 590 S.E.2d 333; 2004 N.C. App. LEXIS 92 (2004), another unpublished decision, reported at 2004 N.C. App. LEXIS 30, the homeowner argued that they could plant trees as a screen or fence without obtaining approval of the architectural review committee. The Court of Appeals recited:

> The fundamental rule in construing restrictive covenants is that the intentions of the parties govern. Donaldson v. Shearin, 142 N.C. App. 102, 106, 541 S.E.2d 777, 780, *aff'd per curiam*, 354 N.C. 207, 552 S.E.2d 142 (2001). The parties' intentions "must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Id*. (quoting Long v. Branham, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967)). Although covenants and agreements restricting the free use of property are strictly construed, "restrictive covenants should not be so strictly construed 'as to defeat the purpose of the restriction.'" *Id*. at 106, 541 S.E.2d at 780 (quoting Robinson v. Pacemaker Investment Co., 19 N.C. App. 590, 594, 200 S.E.2d 59, 61 (1973)**, [*6]** *cert. denied*, 284 N.C. 617, 201 S.E.2d 689 (1974)). "Where the meaning of restrictive covenants is doubtful 'the surrounding circumstances existing at the time of the creation of the restriction are taken into consideration in determining the [parties'] intention.'" Long v. Branham, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967)(quoting V. Woerner, Annotation, *Maintenance, Use, or Grant of Right of Way Over Restricted Property As Violation of Restrictive Covenant*, 25 A.L.R. 2d 904, 905 (1952)).

. . .
In Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970), our Supreme Court noted:

"The word 'improvement' is a relative and very comprehensive term, whose meaning must be ascertained from the context and the subject matter of the instrument in which it is used." The word is sometimes used to refer to any enhancement in value, particularly in relation to non-structural changes to land. But where . . . it is used in context with the words *building* and *structure*, its meaning is otherwise. As used here it connotes the performance of construction work and presupposes the prior existence of some structure to be improved. As used with reference to land, the word improvement presupposes the prior existence of the land itself.

Id. at 132-33, 177 S.E.2d at 281-82 (citations and emphasis omitted).

So, again any drafter of restrictions must be careful to define terms clearly and comprehensively, and any examiner should read them in the broadest possible light in making a risk determination on what constitutes a violation and when pre-approval or waivers may be necessary.

Some common provisions which must be reviewed by the certifying attorney are outlined below:

- Easements and Setbacks should be clearly identified, should link up consistently throughout the development and benefited parties should be clear from the documents or the context. To the extent any blanket easements were in place prior to development, it is highly recommended that these be rescinded and the newer scheme of dedications substituted of record.

- Lot size – re-combinations, re-subdivisions and ARC approval. *See* Callaham v. Arenson, 239 N.C. 619, 80 S.E.2d 619 (1954); Ingle v. Stubbins, 240 N.C. 382, 82 S.E.2d 388 (1954).

- Lot location: A recurring problem in townhouse projects recently has been that the as built units were not as set forth on the initial plat of the lots. One creative provision in declarations has been substantially as follows:

  "As homes are to be constructed on the Lots, the Declarant may, at any time, and from time to time, on or before [presumably outside date when all homes would be completed], re-record the Plat(s) to adjust the boundary lines of Lots owned by the Declarant. Notwithstanding any provision of this Declaration, or of any statutory or common law, which may provide to the contrary, from and after the date of each re-recording of the Plat by the Declarant, the boundary lines of all Lots shall be as the same are shown and depicted on such re-recorded Plat. The right of the Declarant under this provision to re-record the Plat shall terminate at

such time as the Declarant shall have rerecorded the Plat after a home shall have been constructed on each of the Lots. No approval from any member of the Association, or from anyone else whomsoever, shall be required for the Declarant to adjust the boundary lines of the Lots owned by the Declarant pursuant to the provisions hereof."

- Use restrictions such as:
  - "Residential." Edney v. Powers, 224 N.C. 441, 31 S.E.2d 372 (1944)
  - Not be used for "commercial purposes." Ingle v. Stubbins, 240 N.C. 382, 82 S.E.2d 388 (1954), Tull v. Doctor's Bldg., Inc., 255 N.C. 23, 120 S.E.2d 817 (1961), Quadro Staions v. Gilley, 7 N.C.App. 227, 172 S.E.2d 237 (1970)
  - For "single-family dwelling." Bailey v. Jackson-Campbell Co., 191 N.C. 51, 131 S.E. 567 (1926)
  - "Dwelling house." Delaney v. Van Ness, 193 N.C. 721, 138 S.E.28 (1927)
  - Restriction that "there shall not be constructed on said lot more tan one (1) dwelling house" does not limit to residential use or to one building on more than one lot. Scott v. Borad of Missions, 252 N.C. 443, 114 S.E.2d 74 (1960).
  - "Residential use" does <u>not</u> include converting to a road to other residential properties. Long v. Branham, 271 N.C. 264; 156 S.E.2d 235; 1967 N.C. LEXIS 1185 (1967); Franzle v. Waters, 18 N.C. App. 371, 197 S.E.2d 15 (1973) ("residential use" restriction); Easterwood v. Burge 103 N.C. App. 507, 405 S.E.2d 787 (1991), and Easterwood v. Burge, 113 N.C. App. 265, 437 S.E.2d 902 (1994) ("residential purposes only" restriction). This is especially true if the adjoining property is a commercial property. Cleveland Realty Co. v. Hobbs, 261 N.C. 414, 135 S.E.2d 30 (1964). However, a restricted lot could be used for a driveway to an adjoining residential lot. Rivrview Property Owners Ass'n v. Hewett, 90 N.C. App. 53, 370 S.E.2d 53 (1988).
  - "Residential use" does <u>not</u> include using the lot for a drainage easement for an adjoining shopping center. Buie v. High Point Assoc., L.P., 119 N.C. App. 155, 458 S.E.2d 212 (1995), *reh./rev. denied*, 341 N.C. 419, 461 S.E.2d 755 (1995).
  - A restriction that "enclosed heated living area . . . shall cover a ground area of not less than 1,400 square feet" included the "bonus room" or "computer room" over the garage, even though the garage itself would not have qualified. Cumberland Homes v. Carolina Lakes, 158 N.C. App. 518; 581 S.E.2d 94; 2003 N.C. App. LEXIS 1190 (2003).
  - A restriction to only "one detached single family dwelling" on each "lot" even without a separate restriction against resubdivision was, in effect, such a prohibition. Allowing a resubdivion of original Lot 4 into Lots 4(1) and 4(2) and placing a dwelling on each would frustrate the original intent of the restrictions. *See,* Donaldson v. Shearin, 142 N.C. App. 102, 541 S.E.2d 777, 2001 N.C. App. LEXIS 34 2001), *aff'd* 354 N.C. 207, 552 S.E.2d 142, 2001 N.C. LEXIS 938 (2001).

- With regard to resubdivision, contrast the cases of Robinson v. Pacemaker Investment Co., 19 N.C. App. 590,200 S.E. 2d 59 (1973), cert. den., 284 N.C. 617,201 S.E. 2d 689 (1974) and Callaham v. Arenson, 239 N.C. 619, 80 S.E. 2d 619 (1954), where the resubdivided lots complied with the minimum area requirements of the restrictions so were allowed.

- "Mobile home" versus "trailer" versus "manufactured home" restrictions. Angel v. Truitt, 108 N.C.App. 579, 424 S.E.2d 660 (1993), Starr v. Thompson, 96 N.C.App. 369, 385 S.E.2d 535 (1989), Forest Oaks Homeowners Ass'n of Lincoln County v. isenhour, 102 N.C. App. 322,401 S.E.2d 860 (1991), Young v. Lomax, 122 N.C. App. 385, 470 S.E.2d 80 (1996), Bridges v. Rankin, 127 N.C. App. 477, 491 S.E.2d 234 (1997)

- Racial restrictions are completely unenforceable and are illegal in North Carolina and nationally, as are some other types of restriction. Therefore, any old restrictions which contain *only* these restrictions are void. However, some older restrictions contained other provisions which are still enforceable and, therefore, are excepted from coverage by the title insurance policy. In order to clarify that the exception is <u>not</u> about the void racial restriction, the exception may typically have some conditional language, such as:

  > … but omitting any covenants or restrictions, if any, based upon race, color, religion, sex, sexual orientation, familial status, marital status, disability, handicap, national origin, ancestry, or source of income , as set forth in applicable state or federal laws, except to the extent that said covenant or restriction is permitted by applicable law.

- Restrictions will typically include other typical fare of issues, such as defining nuisances, limiting animals to be maintained, parking of vehicles (boats, trailers, recreational vehicles) in visible areas, prohibitions against mobile homes (when permitted by the local zoning ordinance or unless clearly superfluous given the size and construction requirements of the neighborhood). These may not be purely title matters but should be reviewed by the attorney carefully to assure consistency with the other provisions of the Declarations and that they are in keeping with the developer's plan.

- One interesting use restriction (or its attempted enforcement) was addressed during the 2005 Legislature in House Bill 1541. As revised, N.C.G.S. § § 47F-3-121, provides that the display of a U.S. or N.C. flag up to 4' X 6' cannot be restricted unless:

  a. For restrictions registered prior to October 1, 2005, the restriction specifically uses the following terms:
     1. Flag of the United States of America;
     2. American flag;
     3. United States flag; or

4. North Carolina flag.

b. For restrictions registered on or after October 1, 2005, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of the United States or North Carolina flag only if the restriction specifically states: '**THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF THE FLAG OF THE UNITED STATES OF AMERICA OR STATE OF NORTH CAROLINA**'.

This subdivision shall apply to owners of property who display the flag of the United States or North Carolina on property owned exclusively by them and does not apply to common areas, easements, rights-of-way, or other areas owned by others.

In addition, the association cannot:

(2) Regulate or prohibit the indoor or outdoor display of a political sign by an association member on property owned exclusively by the member, unless:

a. For restrictions registered prior to October 1, 2005, the restriction specifically uses the term 'political signs'.

b. For restrictions registered on or after October 1, 2005, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of political signs only if the restriction specifically states: '**THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF THE POLITICAL SIGNS**'.

Even when display of a political sign is permitted under this subdivision, an association (i) may prohibit the display of political signs earlier than 45 days before the day of the election and later than seven days after an election day, and (ii) may regulate the size and number of political signs that may be placed on a member's property if the association's regulation is no more restrictive than any applicable city, town, or county ordinance that regulates the size and number of political signs on residential property. If the local government in which the property is located does not regulate the size and number of political signs on residential property, the association shall permit at least one political sign with the maximum dimensions of 24 inches by 24 inches on a member's property. For the purposes of this subdivision, 'political sign' means a sign that attempts to influence the outcome of an election, including supporting or opposing an issue on the election ballot. This subdivision shall apply to owners of property who display political signs on property owned exclusively by them and does not apply to common areas, easements, rights-of-way, or other areas owned by others."

- Rights of first refusal or penalties for failure to commence and/or complete construction of improvements and landscaping can be enforceable. They should be drawn so as not to be subject to the Uniform Rule Against Perpetuities. However, the closing attorney should never assume they are unenforceable if violated, and should obtain the necessary waivers (below).

- Potential waivers of violations should be clearly addressed in the Declarations, including provisions for minor variations (and definitions of that term) or approval of deminimus or initial improvements, as well as later waivers by the Association or Architectural Review Committee (more below). All waivers should be in writing, with recitals of the specific book and page of restrictions, the particular restriction being waived, and the authority of the signer to provide the waiver, signed, acknowledged before a notary and recorded within the chain of title of the named owner for whom the waiver was provided.

f. Transfer of declarant's rights:

Frequently, a developer desires to transfer all or the remaining number of lots and properties in a proposed developer – sometimes due to interest by a purchaser willing to pay the price; other times due to workout in foreclosure or bankruptcy. Especially if the property to be conveyed represents a substantial amount of the development, the purchaser will want a transfer of any developer (declarant) rights under the subdivision documents. N.C.G.S. § 47F-1-103 (28) provides the statutory definition as:

> rights reserved for the benefit of a declarant including, without limitation, any right (i) to complete improvements indicated on plats and plans filed with the declaration; (ii) to exercise any development right; (iii) to maintain sales offices, management offices, signs advertising the planned community, and models; (iv) to use easements through the common elements for the purpose of making improvements within the planned community or within real estate which may be added to the planned community; (v) to make the planned community part of a larger planned community or group of planned communities; (vi) to make the planned community subject to a master association; or (vii) to appoint or remove any officer or executive board member of the association or any master association during any period of declarant control.

Pursuant to N.C.G.S. § § 47F-3-104. Transfer of special declarant rights:

> Except for transfer of declarant rights pursuant to foreclosure, no special declarant right (G.S. 47F-1-103(28)) may be transferred except by an instrument evidencing the transfer recorded in every county in which any portion of the planned community is located. The instrument is not effective unless executed by the transferee.

Of course, the developer may have also reserved other rights as seller, not just as declarant, such as rights of first refusal or contract or easement rights which interests in real property or under separate individual contract and should be treated (and conveyed) as such.

g. Architectural Review / Control Committee

The authority of the Committee in representing the Board, as well as composition of its membership, must be clearly set out in the Declarations and must be followed consistently. All terms to be enforced should be clearly set forth in both the use restrictions above and in their authority definitions in the Declaration. A failure to include the details of this authority may render any purported governance by the Committee unenforceable.

However, architectural review and approval requirements have been upheld where clearly stated (in the restrictions or in standards set in compliance with the scheme of development) and applied reasonably and in good faith (a hard standard to litigate). *See, e.g.*, Boiling Spring Lakes v. Coastal Servs. Corp., 27 N.C. App. 191, 218 S.E.2d 476 (1974), Black Horse Run Property Owners v. Kaleel, 88 N.C. App. 83, 362 .E.2d 619 (1987), Christopher Props., Inc. v. Postell, 106 N.C. App. 180, 415 S.E.2d 786 (1992), Raintree Homeowners As'n v. Bleiman, 116 N.C. App. 561, 449 S.E.2d 13 (1994), *rev'd* 341 N.C. 417, 463 S.E.2d 72 (1995)

The typical provision may cover "improvements, alterations, repairs, change of paint colors, plantings, excavations, changes in grade or other work which in any way alters the exterior of the Dwelling, Lot or improvements located thereon from its natural or improved state existing on the date the Dwelling on such Lot was first occupied as a residence/completed" and/or requiring pre-approval of plans and specifications "showing the nature, kind, shape, height, materials and location" of any proposed "improvement, alteration or change"

The approval process should be automatic, provided within a limited time frame, and waived if no response is provided to the applicant within the time frame.

h. Assessment liens

G.S. 47F-3-115 applies common area assessment obligations and liens to all lots or units in a planned community, whether created before or after January 1, 1999. The charges on property should be clearly defined in the Declarations, including addressing limited common elements, allocations among units, interest charges (no more than 18%), attorneys' fees, court costs, along with the authority to impose them, for example:

> "The Declarant, for each Lot owned within the Properties, hereby covenants, and each Owner for any Lot, by acceptance of a deed therefore, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association

(1) annual assessments or charges; (2) special assessments for capital improvements, such assessments to be established and collected as hereinafter provided; (3) a fine of [$---] for [particular types of violations, such as failure to commence construction within the time frames of the Declaration, or failure to complete dwelling or landscaping, or for misuse of common areas]; and (4) a prorate share of ad valorem taxes levied against the Common Areas and a pro rata share of the assessments for public improvements to or for the benefit of the Common Areas if the Association shall default in the payment of either or both for a period of six (6) months, all as [thereinafter specifically] provided. The annual and special assessments, any construction fee, fine or other charge, together with interest, costs and reasonable attorney's fees, shall be a charge on the land and shall be a continuing lien upon the Lot against which each such assessment is made. Each such assessment and charge, together with interest, costs and reasonable attorney's fees, shall also be the personal obligation of the person who was the Owner of such Lot at the time when the assessment or charge fell due. The personal obligation for the delinquent assessments shall not pass to his successors in title unless expressly assumed by them." The determination of amount, maximums, minimums, bases for determining regular and special assessments should be spelled out completely and in detail in the Declarations in order to avoid any ambiguities. Of specific concern to title examiners and title insurers are the right to obtain a definitive payoff amount as of a current date, as well as the subordination of the lien to mortgages, below.

In addition, under 2005 revisions to N.C.G.S. § § 47F-3-116

Section 47F-3-116. Lien for assessments.

(a) Any assessment levied against a lot remaining unpaid for a period of 30 days or longer shall constitute a lien on that lot when a claim of lien is filed of record in the office of the clerk of superior court of the county in which the lot is located in the manner provided herein. [A> UNLESS THE DECLARATION OTHERWISE PROVIDES, FEES, CHARGES, LATE CHARGES, AND OTHER CHARGES IMPOSED PURSUANT TO G.S. 47F-3-102, 47F-3-107, 47F-3-107.1, AND 47F-3-115 ARE ENFORCEABLE AS ASSESSMENTS UNDER THIS SECTION. <A] [D> The <D] [A> EXCEPT AS PROVIDED IN SUBSECTIONS (A1) AND (A2) OF THIS SECTION, THE <A] association may foreclose the claim of lien in like manner as a mortgage on real estate under power of sale under Article 2A of Chapter 45 of the General Statutes. [D> Unless the declaration otherwise provides, fees, charges, late charges, fines, interest, and other charges imposed pursuant to G.S. 47F-3-102, 47F-3-107, 47F-3-107.1, and 47F-3-115 are enforceable as assessments under this section. <D]

[A> (A1) AN ASSOCIATION MAY NOT FORECLOSE AN ASSOCIATION ASSESSMENT LIEN UNDER ARTICLE 2A OF CHAPTER 45 OF THE GENERAL STATUTES IF THE DEBT SECURING THE LIEN CONSISTS SOLELY OF FINES IMPOSED BY THE ASSOCIATION, INTEREST ON

UNPAID FINES, OR ATTORNEYS' FEES INCURRED BY THE ASSOCIATION SOLELY ASSOCIATED WITH FINES IMPOSED BY THE ASSOCIATION. THE ASSOCIATION, HOWEVER, MAY ENFORCE THE LIEN BY JUDICIAL FORECLOSURE AS PROVIDED IN ARTICLE 29A OF CHAPTER 1 OF THE GENERAL STATUTES. <A]

[A> (A2) AN ASSOCIATION SHALL NOT LEVY, CHARGE, OR ATTEMPT TO COLLECT A SERVICE, COLLECTION, CONSULTING, OR ADMINISTRATION FEE FROM ANY LOT OWNER UNLESS THE FEE IS EXPRESSLY ALLOWED IN THE DECLARATION. ANY LIEN SECURING A DEBT CONSISTING SOLELY OF THESE FEES MAY ONLY BE ENFORCED BY JUDICIAL FORECLOSURE AS PROVIDED IN ARTICLE 29A OF CHAPTER 1 OF THE GENERAL STATUTES. <A]

(b) The lien under this section is prior to all liens and encumbrances on a lot except (i) liens and encumbrances (specifically including, but not limited to, a mortgage or deed of trust on the lot) recorded before the docketing of the claim of lien in the office of the clerk of superior court, and (ii) liens for real estate taxes and other governmental assessments and charges against the lot. This subsection does not affect the priority of mechanics' or materialmen's liens.

(c) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the docketing of the claim of lien in the office of the clerk of superior court.

(d) This section does not prohibit other actions to recover the sums for which subsection (a) of this section creates a lien or prohibit an association taking a deed in lieu of foreclosure.

(e) A judgment, decree, or order in any action brought under this section shallinclude costs and reasonable attorneys' fees for the prevailing party. [A> IF THE LOT OWNER DOES NOT CONTEST THE COLLECTION OF DEBT AND ENFORCEMENT OF A LIEN AFTER THE EXPIRATION OF THE 15-DAY PERIOD FOLLOWING NOTICE AS REQUIRED IN SUBSECTION (E1) OF THIS SECTION, THEN REASONABLE ATTORNEYS' FEES SHALL NOT EXCEED ONE THOUSAND TWO HUNDRED DOLLARS ($ 1,200), NOT INCLUDING COSTS OR EXPENSES INCURRED. THE COLLECTION OF DEBT AND ENFORCEMENT OF A LIEN REMAIN UNCONTESTED AS LONG AS THE LOT OWNER DOES NOT DISPUTE, CONTEST, OR RAISE ANY OBJECTION, DEFENSE, OFFSET, OR COUNTERCLAIM AS TO THE AMOUNT OR VALIDITY OF THE DEBT AND LIEN ASSERTED OR THE ASSOCIATION'S RIGHT TO COLLECT THE DEBT AND ENFORCE THE LIEN AS PROVIDED IN THIS SECTION. THE ATTORNEYS' FEE LIMITATION IN THIS SUBSECTION SHALL NOT APPLY TO JUDICIAL FORECLOSURES OR TO PROCEEDINGS AUTHORIZED UNDER SUBSECTION (D) OF THIS SECTION OR G.S. 47F-3-120. <A]

[A> (E1) A LOT OWNER MAY NOT BE REQUIRED TO PAY ATTORNEYS' FEES AND COURT COSTS UNTIL THE LOT OWNER IS NOTIFIED IN WRITING OF THE ASSOCIATION'S INTENT TO SEEK PAYMENT OF ATTORNEYS' FEES AND COURT COSTS. THE NOTICE MUST BE SENT BY FIRST-CLASS MAIL TO THE PROPERTY ADDRESS AND, IF DIFFERENT, TO THE MAILING ADDRESS FOR THE LOT OWNER IN THE ASSOCIATION'S RECORDS. THE NOTICE SHALL SET OUT THE OUTSTANDING BALANCE DUE AS OF THE DATE OF THE NOTICE AND STATE THAT THE LOT OWNER HAS 15 DAYS FROM THE MAILING OF THE NOTICE BY FIRST-CLASS MAIL TO PAY THE OUTSTANDING BALANCE WITHOUT THE ATTORNEYS' FEES AND COURT COSTS. IF THE LOT OWNER PAYS THE OUTSTANDING BALANCE WITHIN THIS PERIOD, THEN THE LOT OWNER SHALL HAVE NO OBLIGATION TO PAY ATTORNEYS' FEES AND COURT COSTS. THE NOTICE SHALL ALSO INFORM THE LOT OWNER OF THE OPPORTUNITY TO CONTACT A REPRESENTATIVE OF THE ASSOCIATION TO DISCUSS A PAYMENT SCHEDULE FOR THE OUTSTANDING BALANCE AS PROVIDED IN SUBSECTION (E2) OF THIS SECTION AND SHALL PROVIDE THE NAME AND TELEPHONE NUMBER OF THE REPRESENTATIVE. <A]

[A> (E2) THE ASSOCIATION, ACTING THROUGH ITS EXECUTIVE BOARD AND IN THE BOARD'S SOLE DISCRETION, MAY AGREE TO ALLOW PAYMENT OF AN OUTSTANDING BALANCE IN INSTALLMENTS. NEITHER THE ASSOCIATION NOR THE LOT OWNER IS OBLIGATED TO OFFER OR ACCEPT ANY PROPOSED INSTALLMENT SCHEDULE. REASONABLE ADMINISTRATIVE FEES AND COSTS FOR ACCEPTING AND PROCESSING INSTALLMENTS MAY BE ADDED TO THE OUTSTANDING BALANCE AND INCLUDED IN AN INSTALLMENT PAYMENT SCHEDULE. REASONABLE ATTORNEYS' FEES MAY BE ADDED TO THE OUTSTANDING BALANCE AND INCLUDED IN AN INSTALLMENT SCHEDULE ONLY AFTER THE LOT OWNER HAS BEEN GIVEN NOTICE AS REQUIRED IN SUBSECTION (E1) OF THIS SECTION. <A]

(f) Where the holder of a first mortgage or first deed of trust of record, or other purchaser of a lot obtains title to the lot as a result of foreclosure of a first mortgage or first deed of trust, such purchaser and its heirs, successors, and assigns, shall not be liable for the assessments against such lot which became due prior to the acquisition of title to such lot by such purchaser. Such unpaid assessments shall be deemed to be common expenses collectible from all the lot owners including such purchaser, its heirs, successors, and assigns.

(g) A claim of lien shall set forth the name and address of the association, the name of the record owner of the lot at the time the claim of lien is filed, a description of the lot, and the amount of the lien claimed."

PRACTICE NOTE RE PRIOR ASSESSMENTS AND STATUTES OF LIMITATIONS: Under the PCA, the assessments only become an actual lien on the title to the lot upon filing of the claim of lien with the Clerk of Superior Court. However, there appears to be no required time frame within which the claim of lien must be filed, just sometime after an assessment is over 30 days overdue. And the 3-year limitations period for filing an enforcement action only begins on the date of docketing of the claim of lien. So a purchaser taking title without checking assessments with the association may be purchasing the unit subject to potential future attachment of a lien for substantial back assessments. Though the purchaser may not be personally liable for the seller's back assessments, the unit will be encumbered with them. The only super-priority (pre-docketing) protection is in subsection (b) which provides for priority only of mortgages and taxes.

For the sub-developments within the master development, each set of Declarations should contain a reference to the Master Declarations and the Master Association to assure conformity with both. Such a provision might include:

> "In addition to the covenant for assessments to the [within] Association set out in this Declaration, every Owner of a Lot within the Property, by acceptance of a deed therefore, whether or not so expressed in such deed, is deemed to covenant and agree to pay to the Master Association all assessments imposed upon its Members by the Master Association under the Master Declaration [with book and page reference either at this reference or in the Definitions section of these Declarations]. The lien rights created under the Master Declaration shall apply to the Property."

Declarations creating affirmative obligations are even more strictly construed than use restrictions pursuant to a line of cases, including Beech Mtn. Property Owners' Association v. Seifart, 48 N.C.App. 286, 269 S.E.2d 178 (1980). In the case of Allen v. Sea Gate Association, Inc., 119 N.C.App.761, 460 S.E.2d 197 (1995), the Court of appeals recited the applicable precedent:

> "Covenants that impose affirmative obligations on property owners are strictly construed and unenforceable unless the obligations are imposed "in clear and unambiguous language" that is "sufficiently definite" to assist courts in its application. Beech Mountain Property Owners' Ass'n, Inc. v. Seifart, 48 N.C. App. 286, 295, 269 S.E.2d 178, 183 (1980). To be enforceable, such covenants must contain "some ascertainable **[***5]** standard" by which a court "can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant." *Id*. Assessment provisions in restrictive covenants (1) must contain a "'sufficient standard by which to measure . . . liability for assessments,'" . . . (2) "must identify with particularity the property to be maintained," and (3) "must provide guidance to a reviewing court as to which facilities and properties the . . . association . . . chooses to maintain." Figure Eight Beach Homeowners' Ass'n, Inc. v. Parker, 62 N.C. App. 367, 376, 303 S.E.2d 336,

341 (1983)(quoting and citing Beech Mountain, 48 N.C. App. at 295-96, 269 S.E.2d at 183-84), *disc. review denied*, 309 N.C. 320, 307 S.E.2d 170 (1983)." (also citing Snug Harbor Property Owners Association v. Curran, 55 N.C. App. 199, 284 S.E.2d 752 (1981), *disc. review denied*, 305 N.C. 302, 291 S.E.2d 151 (1982) in which the assessments for "the maintenance and improvement of Snug Harbor and its appearance, sanitation, easements, recreation areas and parks." were held void and unenforceable for indefiniteness."

By contrast, in the case of Parker v. Figure "8" Beach Homeowners' Association, Inc., 611 S.E.2d 874; 2005 N.C. App. LEXIS 907 (N.C. Ct. App., May 3, 2005), the court held that an amendment to add assessments for maintenance costs of a relocated inlet (channel dredging and beach renourishment) was sufficiently specific, despite "[t]he fact that an area involved in the assessment was not named or depicted in the covenants."

For an interesting case regarding the need for prior notice for additional fees and costs (including attorneys' fees) to be an enforceable part of the assessment lien, *see* McGinnis Point Owners Ass'n v. Joyner, 135 N.C. App. 752; 522 S.E.2d 317 (1999).

Priority of Mortgages on the Property:

Pursuant to N.C.G.S. § 47C-3-116(b) and (f) and 47F-3-116(b) and (f), the lien of the assessments should be subordinate to the lien of *any* deed of trust recorded prior to the filing of a claim of lien for the assessments with the Office of the Clerk of Superior Court. (NOTE: That this is a much broader subordination provision than those of G.S. 47A-22(c) and many provisions in restrictions which subordinate assessment liens only to first mortgages.)

> 47C-3-116 (b) The lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances (specifically including, but not limited to, a mortgage or deed of trust on the unit) recorded before the docketing of the lien in the office of the clerk of superior court, and (ii) liens for real estate taxes and other governmental assessments or charges against the unit. This subsection does not affect the priority of mechanics' or materialmen's liens.
> . . .
> (f) Where the holder of a first mortgage or first deed of trust of record, or other purchaser of a unit, obtains title to the unit as a result of foreclosure of a first mortgage or first deed of trust, such purchaser, and its heirs, successors and assigns, shall not be liable for the assessments against such unit which became due prior to acquisition of title to such unit by such purchaser. Such unpaid assessments shall be deemed to be common expenses collectible from all the unit owners including such purchaser, and its heirs, successors and assigns.
>
> 47F-3-116(b) The lien under this section is prior to all liens and encumbrances on a lot except (i) liens and encumbrances (specifically including, but not limited to, a mortgage or deed of trust on the lot) recorded before the docketing of the claim of lien in the office of the clerk of superior court, and (ii) liens for real estate taxes

> and other governmental assessments and charges against the lot. This subsection does not affect the priority of mechanics' or materialmen's liens.
> . . .
> (f) Where the holder of a first mortgage or first deed of trust of record, or other purchaser of a lot obtains title to the lot as a result of foreclosure of a first mortgage or first deed of trust, such purchaser and its heirs, successors, and assigns, shall not be liable for the assessments against such lot which became due prior to the acquisition of title to such lot by such purchaser. Such unpaid assessments shall be deemed to be common expenses collectible from all the lot owners including such purchaser, its heirs, successors, and assigns.

PRACTICE NOTE: Foreclosure of the mortgage or deed of trust only extinguishes the portion of the liens which became outstanding and for which no claim of lien had been filed prior to the recording of the deed of trust, through the actual sale or transfer through the foreclosure. In situations of delayed filing of the Substitute Trustee's deed, the closing attorney must be extremely careful to assure that the Association is bound by the amount paid at the attorney's closing to assure that the purchaser is not later charged with a recalculated amount due to the delay in recording.

NOTE: Owner's title insurance policies typically take exception to, but do not provide affirmative coverage regarding, the Declarations, including the lien of outstanding owners' association dues and assessments.

Certificate from Association of Balance Outstanding:
It is incumbent upon the closing attorney to obtain a certification from the Association regarding the amount off outstanding assessments and to assure that these are paid current through the closing, prorating between buyer and seller for any amounts due for the month of closing. A typical provision in the Declaration would provide:

> "The Association shall, upon demand, and for a reasonable charge, furnish a certificate sined by an officer of the Association setting forth whether the assessments on a specified Lot have been paid."

Enforcement:
The Association should typically enforce the liens. Under N.C.G.S. § § 47F-3-116(a), they can be enforced "in like manner as a mortgage on real estate under power of sale under Article 2A of Chapter 45 of the General Statutes." However, if the debt "consists solely of fines imposed by the association, interest on unpaid fines, or attorneys' fees incurred by the association solely associated with fines imposed by the association," or fees for "a service, collection, consulting or administration fee" the means of enforcement would be "by judicial foreclosure under Article 29A of Chapter 1 of the General Statutes," under N.C.G.S. § § 47F-3-116(a1) and (a2).

Under N.C.G.S. § § 47F-3-116(c), "A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the docketing of the claim of lien in the office of the clerk of superior court." However, if timely filed (or no

statute of limitations defense is raised), then the judgment will be effective for 10 years as any other judgment.

Another 2005 amendment addresses attorneys' fees (collectibility and cap of $1,200) and the notice requirement for any attorneys' fees to be collectible. N.C.G.S. § § 47F-3-116(e) and (e1)

i. Amendments and Modifications

Absent a provision otherwise in the restrictions themselves or unless governed by the PCA (discussed below), amendments must be approved by 100% of the owners within the restricted "scheme of development." This can be a significant burden in older neighborhoods where neighboring tracts are being developed so access is needed through restricted lots or in older high-end neighborhoods in which re-subdivision into smaller lots is desirable in the economic climate. These types of changes are hotly litigated. So any lesser standard for resubdivision should be undertaken only after serious consideration of the risk ramifications.

For some restrictions, determining the number of votes required for an amendment may be tricky. For example, compare the requirement for "majority vote of the then owners within the subdivision" vs. "majority vote of the owners of a majority of lots within the subdivision," both of which are commonly used. The presumption of most owners would be that the percentage would be based on lot ownership. However, if one entity owns a significant number of lots, is it equitable for that individual to unilaterally change the neighborhood via change of restrictions?

Though the amendment must be signed or at least approved (depending on the exact phraseology of the declarations) by the requisite percentage, but typically only the association's execution is notarized for recordation. (See comments regarding indexing issues, *infra*).

Under the PCA, applicable only to developments created on or after 1/1/99 or electing to be so governed,

> § 47F-2-117. Amendment of declaration
>
> (a) Except in cases of amendments that may be executed by a declarant under the terms of the declaration or by certain lot owners under G.S. 47F-2-118(b), the declaration may be amended only by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated, or any larger majority the declaration specifies or by the declarant if necessary for the exercise of any development right. The declaration may specify a smaller number only if all of the lots are restricted exclusively to nonresidential use.

(b) No action to challenge the validity of an amendment adopted pursuant to this section may be brought more than one year after the amendment is recorded. [Nice, sets a statute of limitations]

(e) Amendments to the declaration required by this Chapter to be recorded by the association shall be prepared, executed, recorded, and certified in accordance with G.S. 47-41. [NOTE: G.S. 47-41 was repealed in 1991, therefore, presumably the attorney should rely upon other applicable acknowledgment forms, such as G.S. 47-41.01 or G.S. 10B-26 instead]

Reservation by the developer of a right to amend the restrictions (as opposed to waiving only minor violations) is risky. A minor change may be acceptable, based on a "reasonableness" standard. *See* Rosi v. McCoy, 79 N.C.App. 311, 338 S.E.2 792 (1986), *aff'd in part and modified in part on other grounds*, 319 N.C. 589, 356 S.E.2d 568 (1987) (waiving a 15' setback for a 12' setback). However, exercise in a more substantial way may destroy the uniform scheme of development, rendering the restrictions unenforceable other than as personal covenants between the purchaser and developer. *See* Maples v. Horton, 239 N.C. 394; 80 S.E.2d 38; 1954 N.C. LEXIS 382 (1954) (where the developer retained "the right to release any of said conditions and to sell any part of its (*sic*) remaining land free from all or any conditions at their discretion" no general plan or scheme of development existed and the restrictions were a mere personal covenant) and Humphrey v. Beall, 215 N.C. 15; 200 S.E. 918; 1939 N.C. LEXIS 181 (1939)

As noted above, any amendment affecting easements, setbacks or other matters shown on the plat should be coordinated with the plat or the area replatted for consistency. This may involve cross-deeds if boundary lines are affected, or it may require signatures of other owners if some properties affected have been conveyed to third parties.

In addition, most Declarations provide for notice provisions to institutional first mortgage lenders regarding certain types of matters, upon request filed by the institutional lender. This was historically a requirement of FannieMae and HUD to approve insuring loans in a development. Thus, owners are often required by the declarations to file with the association the names and addresses of lenders holding deeds of trust on their lots. Though this may be a matter of significant concern to the lender in the event of a significant change in the status of the development, the owners probably rarely file this information with the Association in practice. Typically, this would provide that the Association would send annual financial reports to the lenders they had on file, as well as notify them of any proposed abandonment or termination of the association, of any condemnation of common areas or substantial damage to common area amenities, or of any proposed alienation, release, transfer, hypothecation or encumbrance of common areas other than the rather routine rights retained to the Association in the Declaration (such as exchanging common elements or granting utility easements).

Automatic renewal provisions may also be of concern. For example, a provision that the restrictions automatically renew for successive periods may include a provision such as "unless an instrument signed by a majority of the then owners of the lots has been

recorded, agreeing to change said covenants in whole or in part" or (as in the case of Brown v. Woodrun below) "except that they may be changed, altered, amended or revoked in whole or in part". The questions that have arisen involve when the amendment can be done and when it takes effect – i.e. whether immediately or at time of next renewal, in each case.

j. Expirations and Extensions

It is critical to distinguish the expiration provision from the ability to amend, modify or extend the restrictions. The careful drafting attorney should assure that the expiration is addressed, which is often done by providing for automatic renewal (for example, if not terminated by the owners of at least 2/3 of the lots in the particular subdivision or sub-development affected by the restrictions). Otherwise, N.C.G.S. § 47B-3(13) of the Marketable Title Act, preserves only the residential provisions of restrictions from being presumptively extinguished under section 47B-2(c) of the Act.

For example, in the recent case of Brown w. Woodrun, 157 N.C. App. 121, 577 S.E. 2d 708, *cert. den.*, 357 N.C. 457; 585 S.E.2d 384 (2003), the operative language in the original restrictive covenants provided:

> "All of the restrictions, conditions, covenants and agreements contained herein shall continue until January 1, 1992, except that they may be changed, altered, amended or revoked in whole or in part by the record owners of the lots in the sub-division whenever the individual and corporate record owners of at least 2/3 of said platted lots so agree in writing."

The Association executed a restatement purporting to extend the restrictions past their stated expiration, but filed same several months after the expiration date stated in the original restrictions. The restatement purported to extend the restrictions past the termination date of the original declaration. The Court of Appeals held that the purported extension was ineffective because filed after the restrictions had already terminated. The Court included a comment that "we have found no North Carolina authority stating that equitable remedies are available to a party in this particular situation." So reliance on equitable remedies such as "clean hands" is highly questionable.

As an interesting comparison, the Brown court referenced the case of Miles v. Carolina Forest Ass'n, 141 N.C.App. 707, 541 S.E.2d 739 (2001), and its reprise at 167 N.C. App. 28; 604 S.E.2d 327 (2004). The applicable covenant provided: *"All of the restrictions, conditions, covenants and agreements contained herein shall continue until January 1, 1990, except that they may be changed, altered, amended or revoked in whole or in part by the record."* Though holding that the restrictions had expired, the Court found an implied contract based on need for the road maintenance providing access and benefiting value of all owners' properties, subject to a 3-year statute of limitations.

In addition, in the case of Allen v. Sea Gate Association, Inc., 119 N.C.App.761, 460 S.E.2d 197 (1995), in addition to voiding the assessment provisions for indefiniteness (discussed later herein), the Court of appeals held both that:

(1) Extension was not authorized under the provision that "All of the restrictions, conditions, covenants and agreements contained herein shall continue until January 1, 1992, except that they may be changed, altered, amended or revoked in whole or in part by the record owners of the lots in the Subdivision whenever the individual and corporate record owners of at least 2/3 of said platted lots so agree in writing." And

(3) Notwithstanding the arguments for application of the 3-year statute of limitations under N.C.G.S. § § 1-52(1) (on restrictive covenant violations other than assessments which clearly are subject to 3-year limitation), and for application of the 10-year statute of limitations for documents under seal, the Court of Appeals held that the 6-year statute of limitations under N.C.G.S. § § 1-50(3) is applicable to violations of restrictions as earlier affirmed in the case of Hawthorne v. Realty Syndicate, Inc., 43 N.C. App. 436, 440, 259 S.E.2d 591, 593 (1979), *aff'd*, 300 N.C. 660, 268 S.E.2d 494 (1980)

Continuing in this line of cases, in the case of Moore v. Twin Harbors, 2005 N.C. App. LEXIS 811, *aff'd* 612 S.E.2d 693; 2005 N.C. App. LEXIS 869 (N.C. Ct. App., Apr. 19, 2005), an unreported case, the original 1977 restrictions provided that they were effective "until May 1, 1997, except that they may be changed, altered, amended or revoked in whole or in part by the SELLER and the Board of Directors of the Association (after assignment to it)[.]" However, in 1988, the Association filed new restrictions (revoking any prior restrictions) effective through 2008. Then in 1996 these 1988 restrictions were amended to "automatically be extended for successive ten year periods[.]" The plaintiffs argued that the 1977 restrictions were now void (which the Court affirmed) and that they had combined and reconfigured initial multiple lots so their new configuration was only *one* "lot" under the declarations now (for which the trial court made no finding). The case ultimately did not decide on the effectiveness of the 1998 or 1996 amendments due to lack of finding at the trial court level. But it is an interesting study in (1) the importance of complying with time lines, (2) the willingness of the Court to find expiration based on the provisions of the restrictions themselves, and (3) the need for Declaration drafters to be clear how a "lot" for allocation of assessments is defined.

However, a closing attorney should not assume the restrictions have expired or are unenforceable. The attorney should disclose and discuss the issue with their title insurer prior to closing on the basis that they do not apply. Since these are equitable instruments, and since the maintenance of the subdivision amenities may be totally reliant upon their enforceability, it is more prudent to assume they do still apply absent clear evidence otherwise.

k. Terminations

Under PCA, applicable to developments created after 1/1/99 or electing to be so governed,

§ 47F-2-118. Termination of planned community

(a) Except in the case of taking of all the lots by eminent domain (G.S. 47F-1-107), a planned community may be terminated only by agreement of lot owners of lots to which at least eighty percent (80%) of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the lots in the planned community are restricted exclusively to nonresidential uses.

(b) An agreement to terminate shall be evidenced by the execution of a termination agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of lot owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications thereof shall be recorded in every county in which a portion of the planned community is situated and is effective only upon recordation.

(c) A termination agreement may provide for sale of the common elements, but may not require that the lots be sold following termination, unless the declaration as originally recorded provided otherwise or unless all the lot owners consent to the sale. If, pursuant to the agreement, any real estate in the planned community is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

(d) The association, on behalf of the lot owners, may contract for the sale of real estate in the planned community, but the contract is not binding until approved pursuant to subsections (a) and (b) of this section. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to lot owners and lienholders as their interests may appear, as provided in the termination agreement.

(e) If the real estate constituting the planned community is not to be sold following termination, title to the common elements vests in the lot owners upon termination as tenants in common in proportion to their respective interests as provided in the termination agreement.

(f) Following termination of the planned community, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for lot owners and holders of liens on the lots as their interests may appear. All other creditors of the association are to be treated as if they had perfected liens on the common elements immediately before termination.

(g) If the termination agreement does not provide for the distribution of sales proceeds pursuant to subsection (d) of this section or the vesting of title pursuant to subsection (e) of this section, sales proceeds shall be distributed and title shall vest in accordance with each lot owner's allocated share of common expense liability.

(h) Except as provided in subsection (i) of this section, foreclosure or enforcement of a lien or encumbrance against the common elements does not of itself terminate the planned community, and foreclosure or enforcement of a lien or encumbrance against a portion of the common elements other than withdrawable real estate does not withdraw that portion from the planned community. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the planned community, but the person taking title thereto has the right to require from the association, upon request, an amendment excluding the real estate from the planned community.

(i) If a lien or encumbrance against a portion of the real estate comprising the planned community has priority over the declaration and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance may, upon foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the planned community.
[North Carolina Comment provides: "Rights under subsection (i) are lost upon the partial release of any lien or encumbrance by its holder. Subsection (i) is consistent with the Uniform Planned Community Act."]

l. Change of circumstances

Some cases have allowed for termination of particular restrictions due to significant changes in the character or uses of the neighborhood, such that it would be inequitable to enforce them against a particular property. This is an equitable right, determined by a court, based on the original document, the intent of the parties and acquiescence of others in the neighborhood to the changes and violations. However, an attorney should not rely upon this as a basis to assume the restrictions are no longer enforceable, especially restrictions regarding residential use.

In a neighborhood famous for litigation regarding restrictions, a battle between homeowners and beneficial institutions (church and college), created the latest case involved "changed circumstances" terminating restrictions. Medearis v. Trustees of Meyers [sic] Park Baptist Church, 148 N.C. App. 1, 558 S.E.2d 199, 2001 N.C. App. LEXIS 1265 (2002), *discr. rev. den.* 355 N.C. 493; 563 S.E.2d 190; 2002 N.C. LEXIS 514 (2002). The Court of Appeals, after a basic overview of schemes of development case law, held that conversion to parking and office use on several lots was sufficient change of circumstances to nullify the particular restrictions within the subdivision affected, in the particular circumstances of the case. (This finding was, according to the Court, distinguishable from a contrary finding in the earlier case involving Myers Park lots used for parking, in the case of Tull v. Doctors Bldg., Inc., 255 N.C. 23, 120 S.E.2d

817 (1961).) In Medearis, the Court of Appeals reviewed applicable principles as follows:

> Restrictive covenants are generally not favored by the courts; therefore, ambiguities will be construed in favor of the unrestricted use of the land. Black Horse Run Prop. Owners Ass'n v. Kaleel, 88 N.C. App. 83, 85, 362 S.E.2d 619, 621 (1987). However, "such covenants must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction." *Id.* (citing Long v. Branham, 271 N.C. 264, 156 S.E.2d 235 (1967)). When enforced, restrictive covenants will be enforced to the same extent as any valid contractual relationship. Karner v. Roy White Flowers, Inc., 351 N.C. 433, 436, 527 S.E.2d 40, 42 (2000). Restrictive covenants may be enforced by and against any grantee "'where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement . . . .'" Sedberry v. Parsons, 232 N.C. 707, 710, 62 S.E.2d 88, 90 (1950). *Id.* Restrictions under a general plan of development may be enforced against subsequent purchasers of the land who take with notice of the restriction. *Id.* at 711, 62 S.E.2d at 91. The test for determining whether a general plan of development exists is whether substantially common restrictions apply to all similarly situated lots. *Id.*
>
> Restrictive covenants may be terminated in several ways. Covenants may be terminated when they provide for their own termination. *See* Tull v. Doctors Bldg., Inc., 255 N.C. 23, 120 S.E.2d 817 (1961). Covenants may also be terminated when changes within the covenanted area are "so radical as practically to destroy the essential objects and purposes of the agreement." *Id.* at 39, 120 S.E.2d at 828 (quoting Rombauer v. Compton Heights Christian Church, 328 Mo. 1, 40 S.W.2d 545, 553 (Mo. 1931)). Absent the termination of a restrictive covenant, the party against whom the covenant is sought to be enforced may still prevail on theories such as waiver, estoppel or laches. *See, e.g.*, Williams v. Paley, 114 N.C. App. 571, 442 S.E.2d 558 (1994) (holding that intermittent violation of restrictive covenant did not waive plaintiff's right to enforce covenant); Williamson v. Pope, 60 N.C. App. 539, 299 S.E.2d 661 (1983) (holding that prior waiver of right to object to violation of restrictive covenant did not waive right to object to subsequent and more radical departure from permitted use); Rodgerson v. Davis, 27 N.C. App. 173, 218 S.E.2d 471 (1975) (holding that all parties waived their rights to enforce set-back restrictions by either violating restrictive covenant or failing to object to violations).

The case highlights the possibility for a finding of changed circumstances, but the difficulty of presenting sufficient proof as well as the inability to predict the finding in any particular case.

m. Annexing additional "future development" areas or adjoining properties

Adjoining properties or tracts noted as "for future development" on the initial plats of the development may be desirable to include within the development. A sample provision would include:

> "Additional property and Common area may be annexed to the Properties with the consent of [percentage, typically 2/3 vote] of each class of members; and additional land within the area described within the metes and bounds description attached to this Declaration or shown as "for future development" may but shall not be required to be annexed by the Developer without the consent of Members on or before [date certain, allowing time for Developer to consider].

This type of provision would typically be included within the Master Declarations, as well as any phased development, such as condominium projects which would be ongoing. The later phases would then be annexed in by Supplemental Declarations recorded at the time of the recording of the additional phase's plat and before conveyance of any of the new lots to third parties. If the annexation was based only upon the consent of certain classes of members, rather than being a right reserved to the develop only, the Supplemental Declarations should recite verification that the meeting was duly called and votes of the requisite owners and classes of members were cast in favor of the annexation, if necessary. A common practice is to simply attach and incorporate a copy of the minutes of the meeting.

The annexation amendment must clearly address the percentage liability for assessments for both the existing and the new lots, as well any rights or submission to the association of common areas, roads or other amenities in the overall development. Of course, any common areas must be deeded to the association as well.

The right of the developer to reserve properties for "future development" without restriction has long been established, however. *See* Humphrey v. Beall, 215 N.C. 15; 200 S.E. 918; 1939 N.C. LEXIS 181 (1939). The drafter should be sure that the declarations create an enforceable scheme of development only with regard to intended properties, separate from the reserved future development tracts.

n. Indexing provisions – different under condo vs. PCA vs. PUD

In 2005, the indexing standards for recording about all subsequent instruments were changed substantially to provide more indexing and prior book and page references for many documents not previously so referenced. In addition, new instruments will be indexed only in the names shown on the subsequent instrument and the registers will no longer go back to the prior instrument itself to check and add entries. Revised N.C.G.S. § 161-14.1 took effect October 1, 2005, and provides as follows:

> (a) As used in this section, the following terms mean:
>
> (1) Original instrument. – The previously recorded instrument that is modified, amended, supplemented, assigned, satisfied, terminated, revoked, or cancelled by a subsequent instrument.

(2) Recording data. – The book and page number or document number that indicates where an instrument is recorded in the office of the register of deeds.

(3) Subsequent instrument. – Any instrument presented for registration that indicates in its title or within the first two pages of its text that it is intended or purports to modify, amend, supplement, assign, satisfy, terminate, revoke, or cancel a previously registered instrument. Examples of subsequent instruments include the appointment or designation of a substitute trustee in a deed of trust; an affidavit extending the life of a deed of trust; the cancellation of a Notice of Inactive Hazardous Substance or Waste Disposal Site registered pursuant to G.S. 130A-310.8(f); a record of satisfaction or other instrument purporting to satisfy a security instrument registered pursuant to G.S. 45-37 or G.S. 45-37.2; a notice of foreclosure registered pursuant to G.S. 45-38; an assignment of a security instrument or lease; a modification agreement; a release or partial release of property from the lien of a security instrument; an assumption agreement; a subordination agreement; an instrument terminating future optional advances registered pursuant to G.S. 45-72; the revocation of a power of attorney; any instrument authorized or directed by law to be indexed under the provisions of this section; and any instrument for which the register of deeds is authorized or directed by law to make a subsequent entry upon the margin of the record of an original instrument.

(b) The register of deeds shall register each subsequent instrument as a separate instrument and do all of the following:

(1) Index the parties to the subsequent instrument.

(2) If the subsequent instrument names one or more of the original parties to the original instrument, index the original parties to the original instrument as they are named in the subsequent instrument.

(3) If the subsequent instrument states the recording data for the original instrument, reference the recording data of the original instrument as that recording data is stated in the subsequent instrument to each name so indexed.

(c) The register of deeds shall not be required to (i) read or examine any page of an instrument, other than the first two pages, to determine whether it is a subsequent instrument within the meaning of this section, or (ii) verify or make inquiry concerning the accuracy, sufficiency, or completeness of information about an original instrument contained in any subsequent instrument. The register of deeds is expressly authorized to rely solely on the information contained in the subsequent instrument, including, but not limited to, the names of the original parties to the original instrument and the recording data for the original instrument."

The Planned Community Act provides the following indexing provisions:

> N.C.G.S. § § 47F-2-101. Creation of the planned community. A declaration creating a planned community shall be executed in the same manner as a deed, shall be recorded in every county in which any portion of the planned community is located, and shall be indexed in the Grantee index in the name of the planned community and the association and in the Grantor index in the name of each person executing the declaration.
>
> N.C.G.S. § § 47F-2-117(c) Every amendment to the declaration shall be recorded in every county in which any portion of the planned community is located and is effective only upon recordation. An amendment shall be indexed in the Grantee index in the name of the planned community and the association and in the Grantor index in the name of each person executing the amendment.

Similarly, mortgage or other encumbrances on common areas are indexed only in the name of the association, not all of the individual owners of lots or units (which is especially significant in the condominium situation).

Problem: This is not how a title examiner would intuitively look for declarations. Fortunately, most Registers are aware of this and index in association or planned community name as grantor and grantee. The new subsequent instrument indexing under N.C.G.S. § 161.14.1 should somewhat alleviate the problem, assuming a title examiner is doublechecking "related documents" indexing for the Declarations at least, in counties in which that indexing is available in the Register's computerized indexing system. But the related problem is that many examiners typically search titles only under the name of the person owning the lot or unit, and *not under the Association*, which is a continuing concern and source of disputes among owners, their attorneys and their associations.

o. Common areas:

The common areas must be conveyed to and owned by the owners' association, which maintains and manages it pursuant to the Declarations and other governing documents. N.C.G.S. § 47F-3-107. The association has limited ability to convey property. *See* the recent case of NC DOT v. Stagecoach Village, 166 N.C. App. 272; 601 S.E.2d 279; 2004 N.C. App. LEXIS 1647, *vac'd & remanded* 619 S.E.2d 495; 2005 N.C. LEXIS 996 (2004) in which the Superior Court requirement that all 106 owners in a townhouse development be served with condemnation notice for 1-acre of common area was upheld by the N.C. Supreme Court.

Restricting the land to golf course use, absent any reasonable showing of intent otherwise, prevents the later granting of an easement for ingress and egress for adjoining landowners. Craven County v. First Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620 (193), Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949), East Side Bldrs. V. Brown, 234 N.C. 517, 67 S.E.2d 489 (1951).

Some critical issues which should be addressed in the declarations include:

- Granting and changing easements, developed lots and common areas (including roads, parking, amenities)
- Private roads, park or recreational areas, retention ponds, parking, clubhouse, beach and other common areas
- Title and conveyance to association
- Use restrictions
- Specific governance issues, in addition to provisions of N.C.G.S. § 47F-3-107
- Cross easements necessary for future development areas or other parts of the development
- Exchanges for initial improvements
- Easements for encroachments of some initial improvements
- Modification provisions
- Specific provisions regarding mortgages, sales, & other liens on common areas, including authority & signatories
- Parking – shared, for common area facilities or for private roads
- Lake ownership and dam regulations – state authority
- Consistency with implied easements based on plats, including defining limited common areas (per unit) or specific common areas (per phase / section of development) or overall common areas for all development property owners
- Compliance with any FannieMae, HUD or VA requirements applicable

For developments other than condominiums, the common areas should be conveyed to Association, and release deed from any and all deeds of trust of the developer affecting the property, immediately upon recordation of the plat and restrictions, and prior to the first conveyance of a unit to an individual purchaser

Pursuant to 47F-3-102(8), a PCA association may "Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, provided that common elements may be conveyed or subjected to a security interest only pursuant to G.S. 47F-3-112"

> § 47F-3-112. Conveyance or encumbrance of common elements
> (a) Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least eighty percent (80%) of the votes in the association, or any larger percentage the declaration specifies, agree in writing to that action; provided that all the owners of lots to which any limited common element is allocated shall agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all the lots are restricted exclusively to nonresidential uses. Distribution of proceeds of the sale of a limited common element shall be as provided by agreement between the lot owners to which it is allocated and the association. Proceeds of the sale or financing of a common element (other than a limited common element) shall be an asset of the association.

(b) The association, on behalf of the lot owners, may contract to convey common elements or subject them to a security interest, but the contract is not enforceable against the association until approved pursuant to subsection (a) of this section. Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, free and clear of any interest of any lot owner or the association in or to the common element conveyed or encumbered, including the power to execute deeds or other instruments.
(c) Any purported conveyance, encumbrance, or other voluntary transfer of common elements, unless made pursuant to this section is void.
(d) No conveyance or encumbrance of common elements pursuant to this section may deprive any lot of its rights of access and support.

The above is applicable only to planned communities created after 1/1/99 or which have elected to have the Act applicable by amendment to their declarations under § 47F-1-102(d). This provision is not retroactive. So any previously created communities would be governed solely by their organizational documents, or the Unit Ownership Act if they had so elected.

Also, attorneys should be alerted to the indexing issue mentioned above, as this conveyance would be indexed in the name of the association, not the respective unit owners. A failure to examine the title of the association may result in missed encumbrances or out conveyances on the common areas, of significant interest to a proposed purchaser.

p. Consent of Lender

Without the joinder of the lender in the organizational documents of the development, a lender's foreclosure may extinguish the organizational structure of the development. The failure to join the lender may have substantial detrimental effects on those who have purchased within the development. In many cases, the subsequent purchaser at foreclosure may *choose* to ratify the documents creating the development's structure. But, that would be a choice made post-foreclosure, rather than a binding obligation. If there are substantial undeveloped areas, including those that theoretically would have been used for common areas, the lender and purchaser may find disavowal of the development structure more beneficial to recoup losses and maximize the development potential of the remaining encumbered properties, to the detriment of those who have already purchased.

III. PLATS

A plat of a subdivision is basically a representation of the outer perimeter of the property being subdivided, the metes and bounds of lots being subdivided on the plat as well as common areas, easements and appurtenances shown thereon. Typically, it does *not* reflect actual improvements or matters on the ground which would be revealed by a survey, but rather is a representation of the proposed changes to the legal descriptions and dimensions of the properties. Once a plat is recorded, the rules of construction of legal descriptions give a plat reference first place in the list of matters to consider in construing an ambiguous legal description.

G.S. 47-30 sets out the specific requirements for a plat to be recorded, including size, format, surveyor's certification, and, most importantly, the details to be provided, including:

> (f) Plat to Contain Specific Information. -- Every plat shall contain the following specific information:
>
> (1) An accurately positioned north arrow coordinated with any bearings shown on the plat. Indication shall be made as to whether the north index is true, magnetic, North Carolina grid ("NAD 83" or "NAD 27"), or is referenced to old deed or plat bearings. If the north index is magnetic or referenced to old deed or plat bearings, the date and the source (if known) the index was originally determined shall be clearly indicated.
>
> (2) The azimuth or course and distance of every property line surveyed shall be shown. Distances shall be in feet or meters and decimals thereof. The number of decimal places shall be appropriate to the class of survey required.
>
> (3) All plat distances shall be by horizontal or grid measurements. All lines shown on the plat shall be correctly plotted to the scale shown. Enlargement of portions of a plat are acceptable in the interest of clarity, where shown as inserts. Where the North Carolina grid system is used the grid factor shall be shown on the face of the plat. If grid distances are used, it must be shown on the plat.
>
> (4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature to the point of tangency shall be shown as standard curve data, or as a traverse of bearings and distances around the curve. If standard curve data is used the bearing and distance of the long chord (from point of curvature to point of tangency) must be shown on the plat.
>
> (5) Where a subdivision of land is set out on the plat, all streets and lots shall be accurately plotted with dimension lines indicating widths and all other information pertinent to reestablishing all lines in the field. This shall include bearings and distances sufficient to form a continuous closure of the entire perimeter.

(6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3, and 39-32.4, as amended, the location and pertinent information as required in the reference statute shall be plotted on the plat. All other corners which are marked by monument or natural object shall be so identified on all plats, and where practical all corners of adjacent owners along the boundary lines of the subject tract which are marked by monument or natural object shall be shown.

(7) The names of adjacent landowners, or lot, block, parcel, subdivision designations or other legal reference where applicable, shall be shown where they could be determined by the surveyor.

(8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown.

(9) Where the plat is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to and coordinated with a horizontal control monument of some United States or State Agency survey system, such as the North Carolina Geodetic Survey where the monument is within 2,000 feet of the subject property. Where the North Carolina Grid System coordinates of the monument are on file in the North Carolina Office of State Budget and Management, the coordinates of both the referenced corner and the monuments used shall be shown in X (easting) and Y (northing) coordinates on the plat. The coordinates shall be identified as based on "NAD 83," indicating North American Datum of 1983, or as "NAD 27,"indicating North American Datum of 1927. The tie lines to the monuments shall also be sufficient to establish true north or grid north bearings for the plat if the monuments exist in pairs. Within a previously recorded subdivision that has been tied to grid control, control monuments within the subdivision may be used in lieu of additional ties to grid control. Within a previously recorded subdivision that has not been tied to grid control, if horizontal control monuments are available within 2,000 feet, the above requirements shall be met; but in the interest of bearing consistency with previously recorded plats, existing bearing control should be used where practical. In the absence of Grid Control, other appropriate natural monuments or landmarks shall be used. In all cases, the tie lines shall be sufficient to accurately reproduce the subject lands from the control or reference points used.

(10) A vicinity map (location map) shall appear on the plat.

(11) Notwithstanding any other provision contained in this section, it is the duty of the surveyor, by a certificate on the face of the plat, to certify to one of the following:

a. That the survey creates a subdivision of land within the area of a county or

municipality that has an ordinance that regulates parcels of land;

b. That the survey is located in a portion of a county or municipality that is unregulated as to an ordinance that regulates parcels of land;

c. Any one of the following:

1. That the survey is of an existing parcel or parcels of land and does not create a new street or change an existing street;

2. That the survey is of an existing building or other structure, or natural feature, such as a watercourse; or

3. That the survey is a control survey.

d. That the survey is of another category, such as the recombination of existing parcels, a court-ordered survey, or other exception to the definition of subdivision;

e. That the information available to the surveyor is such that the surveyor is unable to make a determination to the best of the surveyor's professional ability as to provisions contained in (a) through (d) above.

However, if the plat contains the certificate of a surveyor as stated in a., d., or e. above, then the plat shall have, in addition to said surveyor's certificate, a certification of approval, or no approval required, as may be required by local ordinance from the appropriate government authority before the plat is presented for recordation. If the plat contains the certificate of a surveyor as stated in b. or c. above, nothing shall prevent the recordation of the plat if all other provisions have been met.

In addition, as most attorneys are well aware, surveys can be attached to deeds, but they must comply with the provisions of G.S. 47-30(m) or (n), as follows:

(m) Maps attached to deeds or other instruments and submitted for recording in that form must be no larger than 8 1/2 inches by 14 inches and comply with either this subsection or subsection (n) of this section. Such a map shall either (i) have the original signature of a registered land surveyor and the surveyor's seal as approved by the State Board of Registration for Professional Engineers and Land Surveyors, or (ii) be a copy of a map, already on file in the public records, that is certified by the custodian of the public record to be a true and accurate copy of a map bearing an original personal signature and original seal. The presence of the original personal signature and seal shall constitute a certification that the map conforms to the standards of practice for land surveying in North Carolina, as defined in the rules of the North Carolina State Board of Registration for

Professional Engineers and Land Surveyors.

(n) A map that does not meet the requirements of subsection (m) of this section may be attached to a deed or other instrument submitted for recording in that form for illustrative purposes only if it meets both of the following requirements:
(1) It is no larger than 8 1/2 inches by 14 inches.
(2) It is conspicuously labelled, "THIS MAP IS NOT A CERTIFIED SURVEY AND HAS NOT BEEN REVIEWED BY A LOCAL GOVERNMENT AGENCY FOR COMPLIANCE WITH ANY APPLICABLE LAND DEVELOPMENT REGULATIONS."

Of significant concern to developer's counsel, and to later counsel who will be reviewing restrictions for violations, waiver, or amendments, the plat should be consistent and tied in with the Declarations. All setbacks, easements, common areas and other matters shown on the plat should be synchronized with the master and specific subdivision Declarations. Of significant later importance are how the plat and Declarations are coordinated or cross-referenced for determining the votes required for amendments to matters shown on the plat, such as waivers of setback violations or changing easements or roads or providing additional users on amenities, or for annexation of additional "future development" areas (or the unilateral decision of the developer not to annex them). A failure to coordinate the documents may result in a Declaration allowing majority or supermajority votes for amendments, but a plat that has no amendment provision, thus requiring unanimous vote of all owners.

Of significant importance to developers is assuring that adjoining undeveloped land still owned by the developer retains access over subdivided roads, especially for continued development. *See* the recent case of Hensley v. Samel, 163 N.C.App. 303, 593 S.E.2d 411 (2004), in which the Court of Appeals confirmed this continuing right.

Rights of way may be created in various ways, from the clarity of a recorded plat, to the relative indefiniteness of deed references in the lots to a "road" not clearly defined of record. Recent cases have dealt with several of the frequent (and frequently litigated) issues, below:

Most clearly, the plat creates implied dedication of matters shown thereon, both to purchasers based on the map as well as to the public. See, for example, the recent cases of Wall v. Fry, 162 N.C. App. 73; 590 S.E.2d 283; 2004 N.C. App. LEXIS 61 (2004) (fraud action based on obligation of developer to complete amenities, boat ramp, since selling base on plat showing same) and Stanley v. Laughter, 162 N.C. App. 322, 590 S.E.2d 429 (2004). In the Stanley case, the Court of Appeals quoted long-standing and often-quoted law applicable to implied dedications by plat, to wit:

> Our Supreme Court, in *Wofford v. Highway Commission*, stated [HN2] the general rule of dedication by plat reference and held, "where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into

subdivisions of streets and lots, such streets become dedicated to public use, and the purchaser of the lot or lots acquires the right to have all and each of the streets kept open." 263 N.C. 677, 683, 140 S.E.2d 376, 381 (1965). Our Supreme Court further held,

> "it is a settled principle that if the owner of land, located within or without a city or town, has it subdivided and platted into lots and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them, to the use of the purchasers, and those claiming under them, and of the public.
>
> . . . .
>
> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened. . . . There is a dedication, and, if they are not actually opened at the time of the sale, they must be kept at all times free to be opened as occasion may require . . . .

Insurance Co. v. Carolina Beach, 216 N.C. 778, 785-786, 7 S.E.2d 13, 18-19 (1940) (internal citations omitted).

In *Collins v. Land Co.*, our Supreme Court held,

> a map or plat, referred to in a deed, becomes a part of the deed as if it were written therein, and that, therefore, the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat, or map, kept open.

128 N.C. 563, 565-566, 39 S.E. 21, 22 (1901).

Similarly, but taking this one step further with regard to both the issues of adequacy of description and implied dedication, see the recent unpublished case of Adams v. Overcash, 166 N.C. App. 763; 604 S.E.2d 695; 2004 N.C. App. LEXIS 2048 (2004), *discr. rev. denied* 359 N.C. 280; 609 S.E.2d 227 (2005) (an unpublished decision, reported at 2004 N.C. App. LEXIS 2033), in which the Court of Appeals again relied on well-established case law as follows:

> Our Supreme Court has set out certain principles concerning the establishment of an appurtenant easement by the use of a plat map as follows:
>
> > Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets . . ., a purchaser of a lot or lots acquires the right to have the streets . . . kept open for his

> reasonable use, and this right is not subject to revocation except by agreement. . . . Such streets . . . are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not **[*5]** to a part of the public. It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets . . . may not be extinguished, altered or diminished except by agreement or estoppel. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. Thus, a street . . . may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated.
>
> Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964) (internal citations omitted).
>
> In the instant case, the uncontested findings of fact by the trial court make clear that Griffin, the developer, owned lots 1, 2, and 3 as well as the disputed right-of-way. The deeds conveying the lots owned by plaintiffs and the lot owned by defendants referenced, respectively, a plat and map that designated the existence of a right-of-way and set forth the boundaries of the land with respect to that right-of-way. The trial court made an uncontested finding of fact that defendants had actual knowledge of the existence of the right-of-way, despite the fact that neither the map nor the plat was recorded. Moreover, the lack of recordation would not affect the outcome under these facts. *See* Collins v. Land Co., 128 N.C. 563, 566-67, 39 S.E. 21, 22 (1901) (holding that registration of a plat is not essential and observing that the defendant had actual notice of the plat and was, therefore, fixed with notice of the dedication of the streets).

See also, the case of Apple Mountain HOA v. Scott, 156 N.C. App. 427; 577 S.E.2d 717; 2003 N.C. App. LEXIS 167, (2003), another unpublished decision reported at 2003 N.C. App. LEXIS 510, in which the Court of Appeals found standing in Association and sufficient description for conveyance of easement rights based on record references to corners and points and to an unrecorded survey in various deeds of record and the restrictions, even though not shown on a recorded plat.

For existing roads needed, note the new special proceeding created by N.C.G.S. § 136-96.1 for roads under unrecorded plats, that have been in use.

And least reliable, therefore most potentially subject to litigation is the “prescriptive easement” over “farm lane,” as elaborated in the case of Cannon v. Day, 359 N.C. 67; 604 S.E.2d 309;
2004 N.C. LEXIS 1457 (2004), another unpublished opinion reported at 2004 N.C. App. LEXIS 1166, in which the Court of Appeals again quoted long-established case law, to wit:

In order to establish the existence of a prescriptive easement, the party claiming the easement must prove four elements: "'(1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.'" Perry v. Williams, 84 N.C. App. 527, 528-29, 353 S.E.2d 226, 227 (1987) (quoting Potts v. Burnette, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981)). Defendants have argued only that plaintiffs presented insufficient evidence to show that the Garners' use of the farm lane was hostile, adverse, or under a claim of right.

> [Footnote 2: Defendants do not challenge the duration of the easement. We note, parenthetically, that ***HN7*** "possession, not title, is the relevant consideration" in determining the period of adverse use. Dickinson, 284 N.C. at 586, 201 S.E.2d at 903. Thus, although Mrs. Garner conveyed the tract to Robin Cannon in 1985, because she remained in possession and continued to use the lane until 1996, her adverse use of the lane totaled 30 years. Since "'one who succeeds to the possession of a dominant tenement thereby succeeds to the privileges of use of the servient tenement authorized by the easement[,]'" any prescriptive easement passed to Robin Cannon, and later, the Whitlows when they took possession of the Garner tract. *Id.* at 585, 201 S.E.2d at 903 (quoting 5 Restatement of Property § 487 (1944)).]

There is a presumption that a party's use is permissive and not adverse. Orange Grocery Co. v. CPHC Investors, 63 N.C. App. 136, 138, 304 S.E.2d 259, 260 (1983). In order to rebut the presumption of permissive use, "there must be some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription." Dickinson v. Pake, 284 N.C. 576, 581, 201 S.E.2d 897, 900 (1974) (internal citation omitted). Nevertheless, as our Supreme Court has explained:

> To establish that the use is "hostile" rather than permissive, "it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate." A "hostile" use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.

Dulin v. Faires, 266 N.C. 257, 260-61, 145 S.E.2d 873, 875 (1966) **[***12]** (quoting 17A Am. Jur. *Easements* § 76, p. 691).

Therefore, the better practice is, of course, to clearly identify any rights-of-way, easements or other implied dedications (and any limitations thereon) on the recorded plat.

Potential future development areas should be clearly noted as such with reservation not to develop or to develop as determined at sole discretion of developer, consistent with the Master Declaration and any sub-development Declarations provisions for adding future development areas and restructuring assessments. In addition, cross-easements affecting either existing or future developments should be clearly addressed on each plat to assure that the future development areas continue to have access across previously platted roads. *See*, N.C.G.S. § 39-6.4 (enacted in 1997 but effective both retroactively and prospectively). This becomes critically important when these roads and easements are private (such as common areas in a townhome or condominium project) but are needed for access to future development areas as part of the overall plan.

Properties shown with some designation on the plat such as “park” or “beach” or “boat ramp” or “golf links” or “open space” or other common element types of designations may similarly be subject to an equitable servitude in favor of all purchasers of the property. *See*, *for example*, the recent case of Harry v. Crescent Resources, Inc., 136 N.C.App. 71, 523 S.E.2d 118, 1999 N.C.App. LEXIS 1315 (1999), with a followup unreported decision at 145 N.C. App. 203, 550 S.E.2d 49, 2001 N.C. App. LEXIS 614 (2001), thought finding the remnant parcels at issue had no such designation, the Court of Appeals recited a significant list of such cases and applicable law as follows:

> An appurtenant easement is an easement created for the purpose of benefitting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land. Gibbs v. Wright, 17 N.C. App. 495, 195 S.E.2d 40 (1973). It is well settled in this jurisdiction that an easement may be created by dedication. This dedication may be either a formal or informal transfer and may be either implied or express. Spaugh v. Charlotte, 239 N.C. 149, 79 S.E.2d 748 (1954).
>
> Shear v. Stevens Building Co., 107 N.C. App. 154, 161-62, 418 S.E.2d 841, 846 (1992). HN2 When a developer sells residential lots in a subdivision by reference to a recorded subdivision plat which divides the tract of land into "streets, lots, parks and playgrounds," a purchaser of one of the residential lots "acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement." Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964) (citations omitted). The right acquired by the purchaser, whether **[***6]** it be characterized **[*75]** as a dedication or as an appurtenant easement, may not be revoked over the objection of the purchaser because "the existence of the right was an inducement to and a part of the consideration for the purchase of the lots." *Id.* With two exceptions which we will discuss below, North Carolina appellate decisions have dealt with appurtenant easements in the context of subdivision plats on which the various tracts had been labeled to designate the particular uses for which the tract was intended. For example, in *Realty* **[**121]** *Co. v. Hobbs*, the land in question was designated for "golf links and playgrounds." In Conrad v. Land Co., 126 N.C. 776, 36 S.E. 282 (1900), an area on the plat was marked as "Grace Court," and was surrounded by areas designated for streets. Our Supreme Court held that

> Grace Court and the streets shown on the plat "should forever be open to the purchasers and to the public." Conrad, 126 N.C. at 780, 36 S.E. at 283.
>
> The Court reasoned that the purchasers "had been induced to buy under the map and plat, and the sale was based not merely on the price paid for the lots, but there was the further consideration that the streets **[***7]** and public grounds designated on the map should forever be open to the purchasers and their assigns." Id. (emphasis added). See also Stines v. Willyng, Inc., 81 N.C. App. 98, 344 S.E.2d 546 (1986) (area on plat designated as "Park Property" burdened with easement in favor of purchasers of lots, but areas not shown on plat not sufficiently described to be burdened with an easement), Hinson v. Smith, 89 N.C. App. 127, 365 S.E.2d 166, disc. review denied, 323 N.C. 365, 373 S.E.2d 545 (1988) (area in question shown on plat as "Beach"); Gregory v. Floyd, 112 N.C. App. 470, 435 S.E.2d 808 (1993) (on amended plat, location of the boat ramp indicated by an arrow, and "BEACH" written in the unsubdivided part of the property); and Whichard v. Oliver, 56 N.C. App. 219, 287 S.E.2d 461 (1982) (plats showed "streets, lots, parks and beaches").

With regard to the city or county's acceptance of any dedication, see N.C.G.S. § 153A-333 and N.C.G.S. § 160A-374, which provide that "[t]he approval of a **plat** does not constitute or effect the acceptance by the [county in N.C.G.S. § 153A-333 and city in N.C.G.S. § 160A-374] or the public of the dedication of any street or other ground, public utility line, or other public facility shown on the **plat** and shall not be construed to do so." N.C.G.S. § 160A-374 goes on to provide that "any city council may by resolution accept any dedication made to the public of lands or facilities for streets, parks, public utility lines, or other public purposes, when the lands or facilities are located within its subdivision-regulation jurisdiction. . ."

Frequently, corrected plats or deminimus re-subdivision of some lots is required. This may affect both the actual "dirt" between the lots so the attorney correcting must assure that all owners of any slivers of "dirt" have joined in both the plat and the cross-conveyances, that deeds of trust are corrected to encumber only the reconfigured parcel and that title opinions have been provided to the title insurers to obtain appropriate endorsements to the policies on the affected properties (for owners and lenders).

Townhouse plats are, of course, recorded for "lots" prior to construction; they are not typically "as built" plats (as a condominium would be). Resurveying post-construction or at least at the foundation stage is highly recommended, so that any needed re-platting can be completed, recorded and used as the basis for outconveyances. Some drafting attorneys have begun reserving this re-platting right in the Declarations (discussed above).

A plat may (intentionally or unintentionally) also convert purely physical or regulatory matters into record title matters. For example, a recorded plat of a septic area or a debris dump or an "old road" creates a record issue that will have to be addressed on later development of the property. Re-platting or recorded waivers may be necessary. The

developer is best served to assure that these matters are not shown on the recorded plat unless required by statute or local ordinance.

Similarly, the inclusion of address numbers (which may be changed by the post office) on individual lots or units on the plat should be carefully considered and only included if clearly useful in the particular situation. Including addresses makes them a matter of public record, but does not bind the post office and may create ambiguities at a later time. However, developments where the plat is numbered differently (or even in reverse order) to the actual addresses have created significant problems for owners purchasing by unit number assuming that is in sync with address. Several developments have recently required substantial cross-conveyancing, releases of deed of trust liens, etc. in order to rectify misunderstandings about the units owned due to reliance on address rather than plat numbering.

"Section 160A-371. Subdivision regulation.

A city may by ordinance regulate the subdivision of land within its territorial jurisdiction. [A> IN ADDITION TO FINAL PLAT APPROVAL, THE ORDINANCE MAY INCLUDE PROVISIONS FOR REVIEW AND APPROVAL OF SKETCH PLANS AND PRELIMINARY PLATS. THE ORDINANCE MAY PROVIDE FOR DIFFERENT REVIEW PROCEDURES FOR DIFFERING CLASSES OF SUBDIVISIONS. THE ORDINANCE MAY BE ADOPTED AS PART OF A UNIFIED DEVELOPMENT ORDINANCE OR AS A SEPARATE SUBDIVISION ORDINANCE. DECISIONS ON APPROVAL OR DENIAL OF PRELIMINARY OR FINAL PLATS MAY BE MADE ONLY ON THE BASIS OF STANDARDS EXPLICITLY SET FORTH IN THE SUBDIVISION OR UNIFIED DEVELOPMENT ORDINANCE. WHENEVER THE ORDINANCE INCLUDES CRITERIA FOR DECISION THAT REQUIRE APPLICATION OF JUDGMENT, THOSE CRITERIA MUST PROVIDE ADEQUATE GUIDING STANDARDS FOR THE ENTITY CHARGED WITH PLAT APPROVAL. <A] "

[*2xb] SECTION 2.(b) G.S. 153A-330 reads as rewritten:

"Section 153A-330. Subdivision regulation.

A county may by ordinance regulate the subdivision of land within its territorial jurisdiction. If a county, pursuant to G.S. 153A-342, has adopted a zoning ordinance that applies only to one or more designated portions of its territorial jurisdiction, it may adopt subdivision regulations that apply only within the areas so zoned and need not regulate the subdivision of land in the rest of its jurisdiction. [A> IN ADDITION TO FINAL PLAT APPROVAL, THE ORDINANCE MAY INCLUDE PROVISIONS FOR REVIEW AND APPROVAL OF SKETCH PLANS AND PRELIMINARY PLATS. THE ORDINANCE MAY PROVIDE FOR DIFFERENT REVIEW PROCEDURES FOR DIFFERING CLASSES OF SUBDIVISIONS. THE ORDINANCE MAY BE ADOPTED AS PART OF A UNIFIED DEVELOPMENT ORDINANCE OR AS A SEPARATE SUBDIVISION ORDINANCE. DECISIONS ON APPROVAL OR

DENIAL OF PRELIMINARY OR FINAL PLATS MAY BE MADE ONLY ON THE BASIS OF STANDARDS EXPLICITLY SET FORTH IN THE SUBDIVISION OR UNIFIED DEVELOPMENT ORDINANCE. WHENEVER THE ORDINANCE INCLUDES CRITERIA FOR DECISION THAT REQUIRE APPLICATION OF JUDGMENT, THOSE CRITERIA MUST PROVIDE ADEQUATE GUIDING STANDARDS FOR THE ENTITY CHARGED WITH PLAT APPROVAL. <A] "

IV. SURVEYS

Copies should be provided to the surveyor to completely map out the property and all matters affecting it prior to purchase, or at lease prior to platting the property. (See **Map I** as an example.)

a. Survey Matters

Some significant issues that affect the property are outlined below:

1. Zoning, including setbacks and uses.

2. Access must be sufficient, both based on the breadth of the specific language in the legal granting or reservation documents, but also to provide the access required by local zoning and subdivision ordinances.

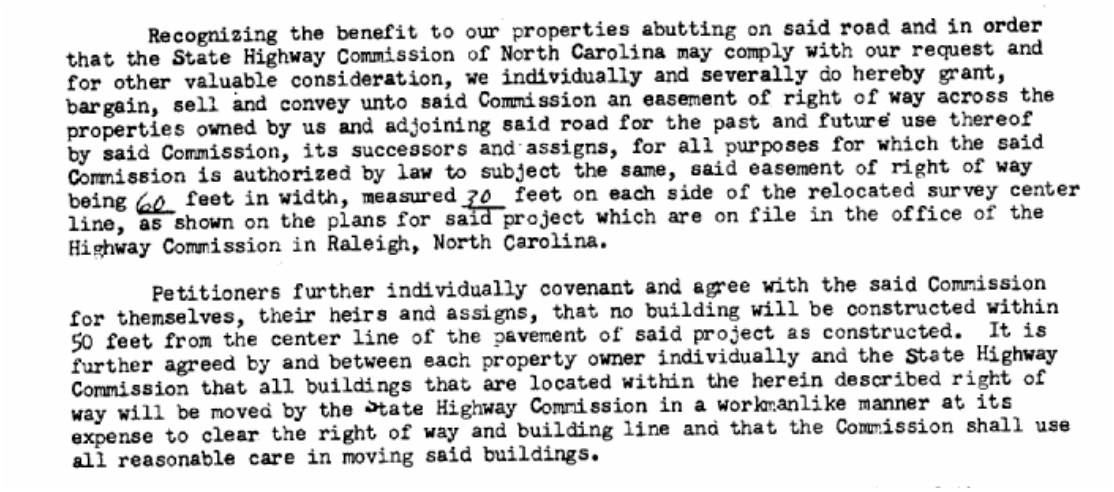
Publicly dedicated road rights-of-way cannot be used for non-road purpose, such as visitor center, Moore's Ferry Development vs. City of Hickory, 166 N.C. App. 441, 601 S.E.2d 900 (2004)

3. Contiguity or gaps and gores between tracts is a significant issue in a multi-tract development. These must be separately analyzed based on the "four corners" of the granting documents to assure that the gap is just a variance in calls between adjoining tracts, rather than an intentional strip of property owned by a third party and separating the tracts to be insured. In one example, the references in the larger tracts were not clearly enough checked and, in fact, the tracts were not contiguous; a 10' strip was intentionally not included in the earlier conveyances and was owned by a third party, effectively preventing development of the larger tracts until the issue could be adequately addressed.

Note: Quitclaim deed from known non-owners will *not* establish color of title. Deeds from all parties which clearly reference their boundaries as being coincident with the boundaries of other involved parties are highly recommended. In addition, a developer's attorney should exercise due diligence to obtain verification that no other intervening owners are known to any of these parties, currently or historically. Boundary line agreements between all parties with a potential interest. Compare the boundary line (or processioning) proceeding under Chapter 38 of the North Carolina General Statutes (*see* especially the post-judgment survey requirement under N.C.G.S. § 38-3(c)) with the necessity for a quiet title action in situations where actual title to the disputed area may be an issue, under N.C.G.S. § 41-10.

4. Controlled or limited access adjoining rights-of-way such as interstate highways or other large corridors may border the property. These may be provided in the actual highway right-of-way documents of record or on recorded maps referenced in those rights-of-way. All must be closely examined to assure that all matters contained therein are addressed.

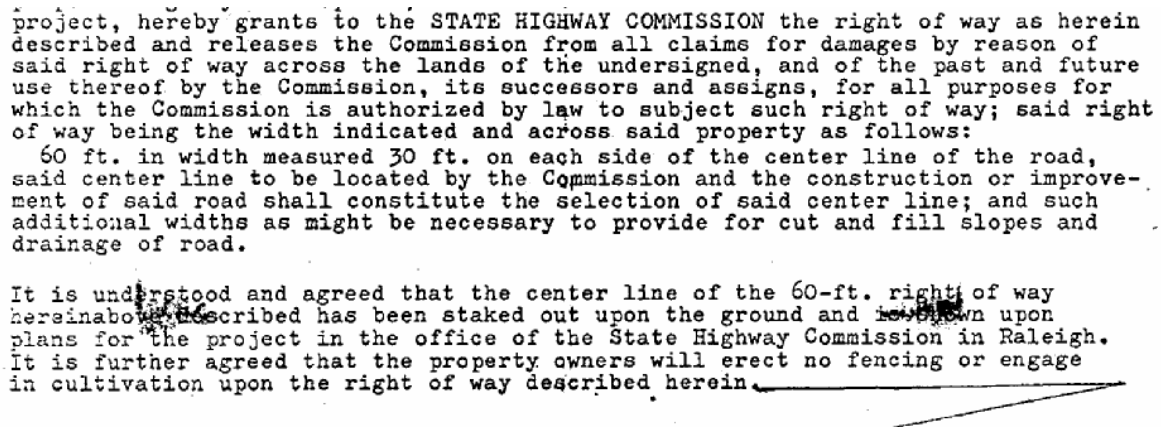
5. State Highway Commission and Department of Transportation rights-of-way often contain additional provisions, including but not limited to buffers, setbacks, as well as construction, cut-and-fill or drainage easements, similar to any of the following:



Recognizing the benefit to our properties abutting on said road and in order that the State Highway Commission of North Carolina may comply with our request and for other valuable consideration, we individually and severally do hereby grant, bargain, sell and convey unto said Commission an easement of right of way across the properties owned by us and adjoining said road for the past and future use thereof by said Commission, its successors and assigns, for all purposes for which the said Commission is authorized by law to subject the same, said easement of right of way being 60 feet in width, measured 30 feet on each side of the relocated survey center line, as shown on the plans for said project which are on file in the office of the Highway Commission in Raleigh, North Carolina.

Petitioners further individually covenant and agree with the said Commission for themselves, their heirs and assigns, that no building will be constructed within 50 feet from the center line of the pavement of said project as constructed. It is further agreed by and between each property owner individually and the State Highway Commission that all buildings that are located within the herein described right of way will be moved by the State Highway Commission in a workmanlike manner at its expense to clear the right of way and building line and that the Commission shall use all reasonable care in moving said buildings.

Or another sample:



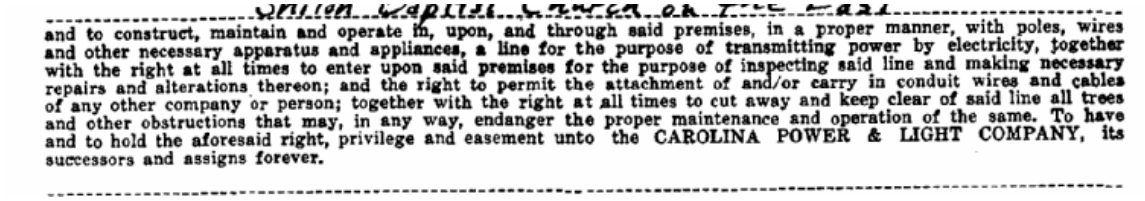
project, hereby grants to the STATE HIGHWAY COMMISSION the right of way as herein described and releases the Commission from all claims for damages by reason of said right of way across the lands of the undersigned, and of the past and future use thereof by the Commission, its successors and assigns, for all purposes for which the Commission is authorized by law to subject such right of way; said right of way being the width indicated and across said property as follows:
60 ft. in width measured 30 ft. on each side of the center line of the road, said center line to be located by the Commission and the construction or improvement of said road shall constitute the selection of said center line; and such additional widths as might be necessary to provide for cut and fill slopes and drainage of road.

It is understood and agreed that the center line of the 60-ft. right of way hereinabove described has been staked out upon the ground and shown upon plans for the project in the office of the State Highway Commission in Raleigh. It is further agreed that the property owners will erect no fencing or engage in cultivation upon the right of way described herein.

It is critical that the survey not just locate the 60' or 100' wide right-of-way conveyed, but also the setbacks, as well as the construction, slope-and-fill and/or maintenance easements and any other matters identified in the right-of-way agreement. These matters may affect the property even if the right-of-way itself is carved out of the legal description to be conveyed, platted and insured.

Development and configuration of lots must be based on loss of these areas for improvements. In addition, purchasers should be advised of their rights (or lack thereof) with regard to these properties.

6. Utility rights-of-way may be based on documents identifying specific rights-of-way, by plats locating the rights-of-way of record or by grants of nonspecific easements, based on the location of power lines (current or future), such as the following:



and to construct, maintain and operate in, upon, and through said premises, in a proper manner, with poles, wires and other necessary apparatus and appliances, a line for the purpose of transmitting power by electricity, together with the right at all times to enter upon said premises for the purpose of inspecting said line and making necessary repairs and alterations thereon; and the right to permit the attachment of and/or carry in conduit wires and cables of any other company or person; together with the right at all times to cut away and keep clear of said line all trees and other obstructions that may, in any way, endanger the proper maintenance and operation of the same. To have and to hold the aforesaid right, privilege and easement unto the CAROLINA POWER & LIGHT COMPANY, its successors and assigns forever.

Typically, the title company would determine if the lines, poles and other facilities were actually located on the property at all. In the case of new development, the developer would often be negotiating for specific easement locations to assure that development could proceed as planned. The specific locations might be by plat or a more definite easement agreement, to identify locations where lines are or will actually be located, and rescinding and replacing the older nonspecific one (above). In addition, pursuant to the Court of Appeals decision of Keener v. Arnold, 151 N.C. App. 634, 589 S.E. 2d 731 (2003):

> "When the width of an easement is not specifically defined in the grant, . . . then the 'previously undefined width is then established by the rule of reasonable enjoyment.' Under the doctrine of reasonable enjoyment, the width of an undefined easement is determined by considering the purpose of the easement and establishing a width necessary to effectuate that purpose. Intermount Distrib'n, Inc. v. Public Serv. Co. of N.C. Inc., 150 NC. App. 539, 542, 562 S.E.2d 626, 629 (2002) [other citations omitted]"

Any city resolution purporting to abandon a road right-of-way typically reserves the utility easements which may lie within the right-of-way. So these must be specifically addressed.

7. Rivers, creeks, branches, wetlands, floodways may indicate significant issues affected the development of the property. In comparing the old legal descriptions with the location of waterways currently, the surveyor should be consulted to determine if avulsion, reliction or other natural or articial changes to the course of the waterway may create adverse title concerns. *See, for example*¸ the recent unpublished case of King v. Popkins & Associates, 605 S.E.2d 742; 2004 N.C. App. LEXIS 2437 (2004), reported at 2004 N.C. App. LEXIS 2242, in which the Court of Appeals, again reciting long-standing common law in North Carolina, found that the disputed location of "Big Branch" was critical to a determination of the ownership, noting:

> It has been the law in this State since 1795 that a natural boundary called for in a deed is controlling. *See* Sandifer v. Foster, 2 N.C. 237, 1 Hayw. 237 (1795). In Lance v. Cogdill, 236 N.C. 134, 71 S.E.2d 918 (1952), the North Carolina Supreme Court held:
>
> > Whenever natural objects, such as rivers, creeks, rocks and the like, are distinctly called for and satisfactorily proved, they become landmarks, to which preference must be given because the certainty which they afford

excludes the possibility of mistake. It follows that in case of a conflict, a call for courses and distances must yield to one for a natural object. The course and distance controls only in the event the natural object cannot be located.

Id. at 136, 71 S.E.2d at 919 (citing Cherry v. Slade, 7 N.C. 82, 1819 N.C. LEXIS 16 (1819); Brown v. Hodges, 233 N.C. 617, 65 S.E. 2d 144 (1951)).

8. Acreage is typically shown on the survey. This becomes critical if the purchase price of the property is based on acreage, not just a set price.

9. Items on the ground should be shown, interests of parties therein addressed. The title insurer should be informed of any adverse rights (recorded or unrecorded) in order to assure how they should be addressed in the policy. If improvements are to be removed which may otherwise indicate encroachments, for example, the title insurer may need assurance of the removal prior to providing affirmative coverage for the matter.

Note that an "old road" should not be assumed abandoned solely because of non-use for some period of time. The interests of adjoiners along that road, their access via other means and the potential for them to reclaim that interest in the future must be carefully reviewed. *See* unpublished decision of Yates v. Bradley. 160 N.C. App. 251; 584 S.E.2d 108; 2003 N.C. App. LEXIS 1717 (2003), reported at 2003 N.C. App. LEXIS 1683

10. When graves or cemeteries are located on the property, depending on the type and ownership of the graves, state law contains varying provisions regarding notice, mapping, access easements, provisions for maintenance, and possible removal of the remains. This issue may be identified because the surveyor notices headstones, or old maps (recorded or unrecorded) indicate a graveyard or because the grader suddenly encounters human bones when beginning the work on the project! Key statutory provisions include:

- "The Unmarked Human Burial and Human Skeletal Remains Protection Act, N.C.G.S. § Chapter 70, Article 3
- "The Cemetery Act," N.C.G.S. § Chapter 65, Article 9
- G.S. 65-13 regarding removal and visit by family
- Easements pursuant to N.C.G.S. § 65-74 or 65-75

11. Railways located on property can have varying ramifications, including:

- Presumptions of right-of-way abandonment, such that the fee would revert to the owner of the underlying fee (if the railway had only a right-of-way), *See*, McDonald's v. Dwyer, 338 N.C. 445, *; 450 S.E.2d 888, **; 1994 N.C. LEXIS 706, ***; 61 A.L.R.5th 927 (1994), or could be conveyed by the railway company (usually by quitclaim deed) if the railway company owned the fee, under N.C.G.S. § 1-44.2. .
- Presumptions of right-of-way width, based on statute or charter
- Presumption (or lack thereof) of right to a railway crossing. *See*
    a. Summerlin v. Norfolk Southern, 161 N.C. App. 170; 588 S.E.2d 30; 2003 N.C. App. LEXIS 2000 (2003)

For more detail, see Chicago Title Insurance Company "Railroads" located online at:
http://www.northcarolina.ctt.com/docs/pdf/RAILROADS%202001.pdf

For more detailed information on the type of information relevant to the attorney and client that a survey would contain, please see "Chicago Title Insurance Company, Plats and Surveys" available on the Chicago Title North Carolina web site at:
http://www.northcarolina.ctt.com/chicagobulls.asp#surveys

b. Legal Descriptions

Legal descriptions should be based on the surveyed description, if possible. It is not unusual in larger commercial transactions for the sellers to provide both a warranty of the description by which they received title and a non-warranty or quitclaim using the newly surveyed description. The attorney should only certify title to the composite tract based upon a survey which identifies the tracts of which this is composed consistently with the granting deeds to the developer. Under no circumstances should an attorney try to "craft" a legal description based on trying to combine separately surveyed parcels. This is a situation fraught with risk since magnetic north is not always consistent and survey have been known to be 10 or more degrees off when describing exactly the same property by perimeter adjoiners and permanent monuments. Descriptions should reference permanent monuments, must be "linked to the earth" and will be construed by reference to the "four corners" of the document to determine the intent of the parties, pursuant to N.C.G.S. § 39-1.1. *See*, the recent cases of Baker v. Moorefield, 154 N.C. App. 134, 571 S.E.2d 680, 2002 N.C. App. LEXIS 1416, (2002), *aff'd* 357 N.C. 156; 579 S.E.2d 269, 2003 N.C. LEXIS 419 (2003); Stanley v. Laughter, Apple Mountain HOA v. Scott and Adams v. Overcash cases *infra*; Matthew v. Lake (involving poor descriptions and clerical errors); and Knott v. Dixie Denning, 358 N.C. 376; 597 S.E.2d 132; 2004 N.C. LEXIS 635 (2004), *discr. rev. den.* 358 N.C. 376; 597 S.E.2d 132; 2004 N.C. LEXIS 635 (2004) (unpublished decision reported at 2004 N.C. App. LEXIS 21*)* (the latest case reconfirming the "four corners" construction of ambiguous legal descriptions).

c. Surveys and Survey Coverage for Clients

Attorneys determining what survey coverage is appropriate for their clients should consider the risk their clients undertake if no survey is obtained. See, for example, attached **Exhibit 29**, "Owners Need Surveys -- Still! (Or, The Risks To You and Your Client of Lender's 'Survey Coverage without a Survey)'" on-line at Chicago Title's North Carolina web site, page for Bulls, Bulletins, Articles and Forms, under "surveys and plats" at: http://www.northcarolina.ctt.com/bull_owners_survey.asp#

Some law firms have created their own survey brochures, such as Sherman and Smith in Wilmington, NC. An attorney should be cautious in advising a client that a prior owner's survey has any reliability since the new owner would have no privity of contract. Similarly, an attorney should disclose and discuss but not rely upon the recorded plat as a

source of information that a survey would show, since the plat (other than a condominium plat) does not contain most of the important information that a survey would reveal, such as improvements or encroachments.

d. NC Surveying standards and statutes of limitations

Surveyors are bound by rules of professional conduct pursuant to N.C.G.S. § 89C-20 and NCAC Chapter 21, including Rule 21.56.1602. These are available on-line at: http://www.ncbels.org/. *See* the recent case of Associated v. Fleming, 359 N.C. 296; 608 S.E.2d 757; 2005 N.C. LEXIS 201 (2004).

In addition, the rather ambiguous statutes of limitations applicable to acts of surveyors performing their professional duties are either:

- Three years as provided in N.C.G.S. § 1-52(18) "[a]gainst any registered land **surveyor** as defined in G.S. 89C-3(9) or any person acting under his supervision and control for physical damage or economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting as defined in G.S. 1-47(6)." Or
- Ten years as provided in N.C.G.S. § 1-47(6): "a. Against any registered land surveyor as defined in G.S. 89C-3(9) or any person acting under his supervision and control for physical damage or for economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting, within 10 years after the last act or omission giving rise to the cause of action. b. For purposes of this subdivision, "surveying and platting" means boundary surveys, topographical surveys, surveys of property lines, and any other measurement or surveying of real property and the consequent graphic representation thereof. c. The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c) and G.S. 1-52(16)."

For more detailed information on the type of information relevant to the attorney and client that a survey would contain, please see "Chicago Title Insurance Company, Plats and Surveys" available on the Chicago Title North Carolina web site at: http://www.northcarolina.ctt.com/chicagobulls.asp#surveys

e. ALTA/ACSM Standards

The 2005 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys as adopted by the American Land Title Association and National Society of Professional Surveyors (a member organization of the American Congress on Surveying and Mapping), revised effective January 1, 2006, are on-line at: http://www.alta.org/standards/standards.cfm and are attached as **Exhibit 10**.

f. HOT TOPIC: Contracting to sell unplatted lots!!

In S.L.2005-426, Senate Bill 814, relevant parts of which are effective January 2006, the restrictions in N.C.G.S. § Sections 160A-375, 160A-376, 153A-334 and 153A-335 on sale of properties prior to recordation of the subdivision plat were somewhat modified as follows:

Sections 160A-375 and 160A-376, as rewritten, provide:

"Section 160A-375. Penalties for transferring lots in unapproved subdivisions. [A> (A) <A] If a city adopts an ordinance regulating the subdivision of land as authorized herein, any person who, being the owner or agent of the owner of any land located within the jurisdiction of that city, thereafter subdivides his land in violation of the ordinance or transfers or sells land by reference to, exhibition of, or any other use of a plat showing a subdivision of the land before the plat has been properly approved under such ordinance and recorded in the office of the appropriate register of deeds, shall be guilty of a Class 1 misdemeanor. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring land shall not exempt the transaction from this penalty. The city may bring an action for injunction of any illegal subdivision, transfer, conveyance, or sale of land, and the court shall, upon appropriate findings, issue an injunction and order requiring the offending party to comply with the subdivision ordinance. [A> BUILDING PERMITS REQUIRED PURSUANT TO G.S. 160A-417 MAY BE DENIED FOR LOTS THAT HAVE BEEN ILLEGALLY SUBDIVIDED. IN ADDITION TO OTHER REMEDIES, A CITY MAY INSTITUTE ANY APPROPRIATE ACTION OR PROCEEDINGS TO PREVENT THE UNLAWFUL SUBDIVISION OF LAND, TO RESTRAIN, CORRECT, OR ABATE THE VIOLATION, OR TO PREVENT ANY ILLEGAL ACT OR CONDUCT. <A]

[A> (B) THE PROVISIONS OF THIS SECTION SHALL NOT PROHIBIT ANY OWNER OR ITS AGENT FROM ENTERING INTO CONTRACTS TO SELL OR LEASE BY REFERENCE TO AN APPROVED PRELIMINARY PLAT FOR WHICH A FINAL PLAT HAS NOT YET BEEN PROPERLY APPROVED UNDER THE SUBDIVISION ORDINANCE OR RECORDED WITH THE REGISTER OF DEEDS, PROVIDED THE CONTRACT DOES ALL OF THE FOLLOWING: <A]

[A> (1) INCORPORATES AS AN ATTACHMENT A COPY OF THE PRELIMINARY PLAT REFERENCED IN THE CONTRACT AND OBLIGATES THE OWNER TO DELIVER TO THE BUYER A COPY OF THE RECORDED PLAT PRIOR TO CLOSING AND CONVEYANCE. <A]

[A> (2) PLAINLY AND CONSPICUOUSLY NOTIFIES THE PROSPECTIVE BUYER OR LESSEE THAT A FINAL SUBDIVISION PLAT HAS NOT BEEN APPROVED OR RECORDED AT THE TIME OF THE CONTRACT, THAT NO GOVERNMENTAL BODY WILL INCUR ANY OBLIGATION TO THE PROSPECTIVE BUYER OR LESSEE WITH RESPECT TO THE APPROVAL OF THE FINAL SUBDIVISION PLAT, THAT CHANGES BETWEEN THE PRELIMINARY AND FINAL PLATS ARE POSSIBLE, AND THAT THE CONTRACT OR LEASE MAY BE TERMINATED WITHOUT BREACH BY THE BUYER OR LESSEE IF THE FINAL RECORDED PLAT DIFFERS IN

ANY MATERIAL RESPECT FROM THE PRELIMINARY PLAT. <A]

[A> (3) PROVIDES THAT IF THE APPROVED AND RECORDED FINAL PLAT DOES NOT DIFFER IN ANY MATERIAL RESPECT FROM THE PLAT REFERRED TO IN THE CONTRACT, THE BUYER OR LESSEE MAY NOT BE REQUIRED BY THE SELLER OR LESSOR TO CLOSE ANY EARLIER THAN FIVE DAYS AFTER THE DELIVERY OF A COPY OF THE FINAL RECORDED PLAT. <A]

[A> (4) PROVIDES THAT IF THE APPROVED AND RECORDED FINAL PLAT DIFFERS IN ANY MATERIAL RESPECT FROM THE PRELIMINARY PLAT REFERRED TO IN THE CONTRACT, THE BUYER OR LESSEE MAY NOT BE REQUIRED BY THE SELLER OR LESSOR TO CLOSE ANY EARLIER THAN 15 DAYS AFTER THE DELIVERY OF THE FINAL RECORDED PLAT, DURING WHICH 15-DAY PERIOD THE BUYER OR LESSEE MAY TERMINATE THE CONTRACT WITHOUT BREACH OR ANY FURTHER OBLIGATION AND MAY RECEIVE A REFUND OF ALL EARNEST MONEY OR PREPAID PURCHASE PRICE. <A]

[A> (C) THE PROVISIONS OF THIS SECTION SHALL NOT PROHIBIT ANY OWNER OR ITS AGENT FROM ENTERING INTO CONTRACTS TO SELL OR LEASE LAND BY REFERENCE TO AN APPROVED PRELIMINARY PLAT FOR WHICH A FINAL PLAT HAS NOT BEEN PROPERLY APPROVED UNDER THE SUBDIVISION ORDINANCE OR RECORDED WITH THE REGISTER OF DEEDS WHERE THE BUYER OR LESSEE IS ANY PERSON WHO HAS CONTRACTED TO ACQUIRE OR LEASE THE LAND FOR THE PURPOSE OF ENGAGING IN THE BUSINESS OF CONSTRUCTION OF RESIDENTIAL, COMMERCIAL, OR INDUSTRIAL BUILDINGS ON THE LAND, OR FOR THE PURPOSE OF RESALE OR LEASE OF THE LAND TO PERSONS ENGAGED IN THAT KIND OF BUSINESS, PROVIDED THAT NO CONVEYANCE OF THAT LAND MAY OCCUR AND NO CONTRACT TO LEASE IT MAY BECOME EFFECTIVE UNTIL AFTER THE FINAL PLAT HAS BEEN PROPERLY APPROVED UNDER THE SUBDIVISION ORDINANCE AND RECORDED WITH THE REGISTER OF DEEDS. <A] "

"Section 160A-376. Definition.
[A> (A) <A] For the purpose of this Part, "subdivision" means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions [A> WHEN ANY ONE OR MORE OF THOSE DIVISIONS IS CREATED <A] for the purpose of sale or building development (whether immediate or future) and shall include all divisions of land involving the dedication of a new street or a change in existing streets; but the following shall not be included within this definition nor be subject to the regulations authorized by this Part:

(1) The combination or recombination of portions of previously subdivided and

recorded lots where the total number of lots is not increased and the resultant lots are equal to or exceed the standards of the municipality as shown in its subdivision [D> regulations; <D] [A> REGULATIONS. <A]

(2) The division of land into parcels greater than 10 acres where no street right-of-way dedication is [D> involved; <D] [A> INVOLVED. <A]

(3) The public acquisition by purchase of strips of land for the widening or opening of streets or for public transportation system [D> corridors; and <D] [A> CORRIDORS. <A]

(4) The division of a tract in single ownership whose entire area is no greater than two acres into not more than three lots, where no street right-of-way dedication is involved and where the resultant lots are equal to or exceed the standards of the municipality, as shown in its subdivision regulations.

[A> (B) A CITY MAY PROVIDE FOR EXPEDITED REVIEW OF SPECIFIED CLASSES OF SUBDIVISIONS. <A] "

And N.C.G.S. § Sections 153A-334 and 153A-335, as rewritten, provide as follows:

"Section 153A-334. Penalties for transferring lots in unapproved subdivisions. [A> (A) <A] If a person who is the owner or the agent of the owner of any land located within the territorial jurisdiction of a county that has adopted a subdivision regulation ordinance subdivides his land in violation of the ordinance or transfers or sells land by reference to, exhibition of, or any other use of a plat showing a subdivision of the land before the plat has been properly approved under the ordinance and recorded in the office of the appropriate register of deeds, he is guilty of a Class 1 misdemeanor. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring land does not exempt the transaction from this penalty. The county may bring an action for injunction of any illegal subdivision, transfer, conveyance, or sale of land, and the court shall, upon appropriate findings, issue an injunction and order requiring the offending party to comply with the subdivision ordinance. [A> BUILDING PERMITS REQUIRED PURSUANT TO G.S. 153A-357 MAY BE DENIED FOR LOTS THAT HAVE BEEN ILLEGALLY SUBDIVIDED. IN ADDITION TO OTHER REMEDIES, A COUNTY MAY INSTITUTE ANY APPROPRIATE ACTION OR PROCEEDINGS TO PREVENT THE UNLAWFUL SUBDIVISION OF LAND, TO RESTRAIN, CORRECT, OR ABATE THE VIOLATION, OR TO PREVENT ANY ILLEGAL ACT OR CONDUCT. <A]

[A> (B) THE PROVISIONS OF THIS SECTION SHALL NOT PROHIBIT ANY OWNER OR ITS AGENT FROM ENTERING INTO CONTRACTS TO SELL OR LEASE BY REFERENCE TO AN APPROVED PRELIMINARY PLAT FOR WHICH A FINAL PLAT HAS NOT YET BEEN PROPERLY

APPROVED UNDER THE SUBDIVISION ORDINANCE OR RECORDED WITH THE REGISTER OF DEEDS, PROVIDED THE CONTRACT DOES ALL OF THE FOLLOWING: <A]

[A> (1) INCORPORATES AS AN ATTACHMENT A COPY OF THE PRELIMINARY PLAT REFERENCED IN THE CONTRACT AND OBLIGATES THE OWNER TO DELIVER TO THE BUYER A COPY OF THE RECORDED PLAT PRIOR TO CLOSING AND CONVEYANCE. <A]

[A> (2) PLAINLY AND CONSPICUOUSLY NOTIFIES THE PROSPECTIVE BUYER OR LESSEE THAT A FINAL SUBDIVISION PLAT HAS NOT BEEN APPROVED OR RECORDED AT THE TIME OF THE CONTRACT, THAT NO GOVERNMENTAL BODY WILL INCUR ANY OBLIGATION TO THE PROSPECTIVE BUYER OR LESSEE WITH RESPECT TO THE APPROVAL OF THE FINAL SUBDIVISION PLAT, THAT CHANGES BETWEEN THE PRELIMINARY AND FINAL PLATS ARE POSSIBLE, AND THAT THE CONTRACT OR LEASE MAY BE TERMINATED WITHOUT BREACH BY THE BUYER OR LESSEE IF THE FINAL RECORDED PLAT DIFFERS IN ANY MATERIAL RESPECT FROM THE PRELIMINARY PLAT. <A]

[A> (3) PROVIDES THAT IF THE APPROVED AND RECORDED FINAL PLAT DOES NOT DIFFER IN ANY MATERIAL RESPECT FROM THE PLAT REFERRED TO IN THE CONTRACT, THE BUYER OR LESSEE MAY NOT BE REQUIRED BY THE SELLER OR LESSOR TO CLOSE ANY EARLIER THAN FIVE DAYS AFTER THE DELIVERY OF A COPY OF THE FINAL RECORDED PLAT. <A]

[A> (4) PROVIDES THAT IF THE APPROVED AND RECORDED FINAL PLAT DIFFERS IN ANY MATERIAL RESPECT FROM THE PRELIMINARY PLAT REFERRED TO IN THE CONTRACT, THE BUYER OR LESSEE MAY NOT BE REQUIRED BY THE SELLER OR LESSOR TO CLOSE ANY EARLIER THAN 15 DAYS AFTER THE DELIVERY OF THE FINAL RECORDED PLAT, DURING WHICH 15-DAY PERIOD THE BUYER OR LESSEE MAY TERMINATE THE CONTRACT WITHOUT BREACH OR ANY FURTHER OBLIGATION AND MAY RECEIVE A REFUND OF ALL EARNEST MONEY OR PREPAID PURCHASE PRICE. <A]

[A> (C) THE PROVISIONS OF THIS SECTION SHALL NOT PROHIBIT ANY OWNER OR ITS AGENT FROM ENTERING INTO CONTRACTS TO SELL OR LEASE LAND BY REFERENCE TO AN APPROVED PRELIMINARY PLAT FOR WHICH A FINAL PLAT HAS NOT BEEN PROPERLY APPROVED UNDER THE SUBDIVISION ORDINANCE OR RECORDED WITH THE REGISTER OF DEEDS WHERE THE BUYER OR LESSEE IS ANY PERSON WHO HAS CONTRACTED TO ACQUIRE OR LEASE THE LAND FOR THE PURPOSE OF ENGAGING IN THE BUSINESS OF CONSTRUCTION OF RESIDENTIAL, COMMERCIAL, OR INDUSTRIAL

BUILDINGS ON THE LAND, OR FOR THE PURPOSE OF RESALE OR LEASE OF THE LAND TO PERSONS ENGAGED IN THAT KIND OF BUSINESS, PROVIDED THAT NO CONVEYANCE OF THAT LAND MAY OCCUR AND NO CONTRACT TO LEASE IT MAY BECOME EFFECTIVE UNTIL AFTER THE FINAL PLAT HAS BEEN PROPERLY APPROVED UNDER THE SUBDIVISION ORDINANCE AND RECORDED WITH THE REGISTER OF DEEDS. <A] "

"Section 153A-335. "Subdivision" defined.
[A> (A) <A] For purposes of this Part, "subdivision" means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions [A> WHEN ANY ONE OR MORE OF THOSE DIVISIONS ARE CREATED <A] for the purpose of sale or building development (whether immediate or future) and includes all division of land involving the dedication of a new street or a change in existing streets; however, the following is not included within this definition and is not subject to any regulations enacted pursuant to this Part:

(1) The combination or recombination of portions of previously subdivided and recorded lots if the total number of lots is not increased and the resultant lots are equal to or exceed the standards of the county as shown in its subdivision [D> regulations; <D] [A> REGULATIONS. <A]

(2) The division of land into parcels greater than 10 acres if no street right-of-way dedication is [D> involved; <D] [A> INVOLVED. <A]

(3) The public acquisition by purchase of strips of land for widening or opening streets or for public transportation system [D> corridors; and <D] [A> CORRIDORS. <A]

(4) The division of a tract in single ownership the entire area of which is no greater than two acres into not more than three lots, if no street right-of-way dedication is involved and if the resultant lots are equal to or exceed the standards of the county as shown by its subdivision regulations.

[A> (B) A COUNTY MAY PROVIDE FOR EXPEDITED REVIEW OF SPECIFIED CLASSES OF SUBDIVISIONS. <A] "

CHICAGO TITLE INSURANCE COMPANY

Commercial Development Loan

By Scott Mansfield

Some weeks following the acquisition of the property (as previously described), our Developer, Zippy Development Company, LLC, has received a loan commitment from MegaBank (the "Lender"), for a development/construction loan which will allow for future advances up to a maximum principal amount of $20,000,000.00. The purpose of the loan is to fund the construction and development of three "sub-developments" within our Mixed Use Project---Retail, Condominium, and Single Family Residential. Additionally, four (4) tracts are being subdivided and reserved for future development (perhaps office, industrial, golf/recreation). The initial construction and development costs will include development of infrastructure and roads, grading, surveying, zoning, and subdivision work. The balance of the proceeds will be used to construct retail buildings and parking and common areas, and to develop lots for residential construction. The further development of these projects will be discussed at length in the next section.

Developer's counsel has updated title to all seven (7) tracts acquired, tacking to the owner's policy obtained by Developer (as discussed in detail in the previous section). Developer's counsel has sent in their preliminary title opinion to Title Company, and requested that the Title Company issue a loan commitment for a construction loan in the amount of $20,000,000. The commitment (**Exhibit 11**) is generated, based on the preliminary opinion and prior policy, without any special coverage, and with no endorsements attached. This commitment is then delivered to the Lender and their counsel. Lender's counsel reviews the initial commitment, which insures the Property based on the seven separate legal descriptions from the vesting deeds for each of the seven parcels initially acquired (which together comprise the entire project).

Lender's counsel follows with a detailed title objection/instruction letter (the "Instruction Letter") addressed to Developer's attorney and the Title Company, setting forth Lender's requirements for the Loan Policy. Lender will not close the loan and fund the initial draw until Title Company has issued a *pro forma* policy (with endorsements) (**Exhibits 12, 13, and 14**) which meets these requirements. This section will address various issues in the context of the Loan Policy and the Lender's title requirements.

I. Loan Policy Underwriting Philosophy

Unlike under an Owner's Policy of title insurance (under which a title defect can result in an immediate monetary claim for the insured owner), coverage under a Loan Policy will result in the payment of a claim to the insured lender only when (i) the insured lender has accelerated the underlying indebtedness upon a default by the Borrower on the secured obligation, (ii) the lender has foreclosed or otherwise exhausted its remedies with respect to the real property that is covered by the policy, and has not received full payment of the amount it is owed on the underlying indebtedness, AND (iii) the lender has proven to the Title Company, under the terms of the Policy, that a defect that is covered by the title policy resulted in the shortfall in recovery. It is because of the more remote nature of claims under a loan policy that title companies are much more liberal in offering affirmative coverage on loan policies than on owner's policies (*for instance*, survey coverage without a survey, affirmative coverage over the enforcement of easements and encroachments).

II. The Deed of Trust

On lender's loan policies, deeds of trust are insured under the ALTA Loan Policy (Forms 1970 and 1992). In addition to the "title" coverage afforded by the owner's policy, the Loan Policy has insuring clauses which insure a Lender against loss arising from (i) the invalidity or unenforceability of the lien of the deed of trust, (ii) loss of priority of the deed of trust over and lien or encumbrance not excepted in the policy, and (iii) loss of priority to mechanics' liens arising from work commenced prior to the recording of the deed of trust.

Our lender's Instruction Letter begins with a general statement about the title policy, as follows:

> "Prior to authorizing funding, Lender shall receive a *pro-forma* extended coverage loan policy from Title Insurance Company evidencing that the insured Deed of Trust has been recorded, that the requirements set forth in Schedule B-I of the Commitment have been satisfied, that the Deed of Trust constitutes a first lien on the real property described therein, without exception for unfiled mechanics' and materialmen's liens, subject only to the permitted exceptions set forth in this letter, and committing Title Insurance Company to issue a 1992 ALTA Form Loan Policy in favor of the Lender, in strict accordance with the requirements set forth in this letter. Said Deed of Trust secures future advances, and the same shall be insured with the same priority as though advanced on the date of recordation of the Deed of Trust."

a. Extended Coverage

Many out-of-state Lenders will make a point to request an "extended coverage" policy. Extended coverage refers to the pre-printed exclusions contained in a "standard" owner's policy. They are:

> i. Taxes and assessments not shown on the records of the taxing authority or the public records.

ii. Rights or claims of parties not shown by the public records and which could be ascertained by an inspection of the property. (This would include tenants with unrecorded leases, those claiming by adverse possession, and those who are in possession and claiming under some other theory.)
iii. Easements or claims of easements or encumbrances not shown by the public records.
iv. Encroachments, overlaps, shortage of area, boundary line disputes and any other matter which would be disclosed by an accurate survey of the property.
v. Unpatented mining claims, reservations in patents, water rights, claims or title to water.
vi. Any rights to mechanics' and materialmen's liens not shown by public records.

When extended coverage is purchased, these six exclusions are deleted; in other words, you have insurance coverage against these six items. As a general rule, title insurers in North Carolina do not include the pre-printed standard exceptions in a policy. These are items not shown by the public record, and that becomes an assumed risk. Unless otherwise specifically excepted to in Schedule B, these matters are insured, and no additional premium is required as it would be in some states. However, some of these exceptions may, as a matter of practice, be specifically inserted into the Schedule B exceptions in commitments and policies generated by title companies in North Carolina. On almost any commercial loan policy, these exceptions will be unacceptable, and requesting "extended coverage" is the Lender's way of making that clear in the Instruction Letter.

b. Future Advances Construction Loan/ Revolving Line of Credit

The Instruction Letter also states that the Policy is to insure future advances under the Deed of Trust. In our financing scenario, periodic advances shall be made by the lender to fund construction costs. These advances will occur long after the recording of the insured Deed of Trust. A future advances deed of trust is a deed of trust which is intended to secure repayment of funds loaned after it is executed, recorded and delivered to the lender. North Carolina law (N.C.G.S. § § 45-68**)** requires that the future advances deed of trust state *(1) it is given wholly or partly secure future obligations which may be incurred thereunder, (2) the present and maximum principal amounts, including present and future obligations, which may be secured at one time, and (3) the period within which such future obligations may be incurred, which shall not be longer than fifteen (15) years.* (For lines of credit, another alternative governing provision is the equity line of credit under Article 9, Chapter 45 of the North Carolina General Statutes. However, this is rarely used; G.S. 45-82 specifically requires that the first page of the deed of trust show "on its face that it secures an equity line of credit governed by the provisions of this Article")

In North Carolina, we generally see two types of future advances deeds of trust:

1. Construction Loans - This is a future advances deed of trust in which advances are made during the construction of a building on the property. Upon completion of the construction, the deed of trust is often converted to a permanent deed of trust, so that there will be no new future advances.

2. Revolving Credit Lines - Lender agrees to make advances up to a certain limit. Thereafter, further advances will be made only to the extent that the borrower pays back the sums already loaned.

For commitments, the typical requirement would be:

> If coverage is to include the priority as of the date of recording of the insured deed of trust for advances made after recording, the deed of trust must include notice that it will secure future advances (including revolving line of credit, if applicable), state the maximum principal amount and, as applicable, state either (1) the current amount advanced at closing and specify that all advances must be made within 15 years from the date thereof (in compliance with N.C.G.S. § 45-67 et seq.) for future advance or construction loan transactions or (2) that it secures an equity line of credit and that it is governed by the provisions of Chapter 45, Article 9 of the North Carolina General Statutes (N.C.G.S. § 45-81 et seq.) for an equity line of credit.

Priority/Coverage: Under North Carolina law, as long as the above described statutory requirements are met, the future advances deed of trust will secure repayment of future advances with the same priority as if the funds were loaned on the date of recordation. However, under the strict terms of the Conditions and Stipulations of the Title Policy, the priority of any advances made by the lender subsequent to the date of the loan policy (recording date of the deed of trust) are not insured unless, as stated in Paragraph 8(d) under the Conditions and Stipulations, (a) the advances are made to protect the lien of the insured mortgage or prevent the deterioration of the improvements; or (b) any construction loan advances secured by the deed of trust at the Date of Policy and which the lender was obligated to advance after the date of the policy. Also, any losses which the lender may suffer because of the loss of priority of a disbursement to an intervening lien creditor whose lien attaches between the recording of the insured deed of trust and the subsequent disbursements may be excluded from coverage as a post-policy matter under Paragraph 3(d) of the Exclusions from Coverage.

Revolving Credit/ Future Advances Endorsement: Lenders often request a revolving credit or future advances endorsement to a loan policy insuring deed of trust that secured future advances or a revolving line of credit. If the future advances deed of trust satisfies the North Carolina requirements (above), then such an endorsement can be given. The Future Advances Endorsement insures the Lender against loss or damages resulting from the invalidity, unenforceability or loss of priority of the insured deed of trust due to provisions in the mortgage which allow for a change in the interest rate or future advances. The endorsement insures that future advances will have the same priority as if they were made on the date of the policy. This provision precludes the need for date downs requested by lenders on construction loans—however, see the discussion on *Date-Down Endorsements* below. The Future Advances Endorsement assures a lender that its borrower can make repayments of the indebtedness during the term of the loan without jeopardizing the priority or enforceability of the deed of trust.

ALTA Endorsement Form 14 (Future Advance - Priority) (Adopted 10/22/03) provides for continued priority of future advances. ALTA Endorsement Form 14.1 (Future Advance -- Knowledge) (Adopted 10/22/03) provides the same coverage as Form 14, but excludes coverage

for advances made after insured has knowledge of an intervening lien, encumbrance or other matter affecting title. The ALTA 14 would be the preferred form for North Carolina transactions since our future advance statute does not have a requirement that advances be "without knowledge" of an adverse interest. However, even without an exception for matters "known to" the insured lender, the lender or counsel should consult with the title insurer prior to any advances to assure the lender does not inadvertently prejudice their coverage, whether by inappropriately applying future advances, or especially in the face of an IRS lien which is excluded from the endorsement coverage.

Pending Disbursements Exception: A pending disbursements exception must be included in Schedule B of the loan policy, in order to clearly limit liability to the amounts actually disbursed under a future advances or a revolving credit line deed of trust. Such a provision reads essentially as follows:

> **"Pending disbursement of the full proceeds of the loan secured by the deed of trust insured, this policy insures only to the extent of the amount actually disbursed, but increases as each disbursement is made *in good faith and without knowledge of any defects in, or objections to the title,* up to the face amount of the policy."**

It is worth noting that the italicized language above is somewhat inconsistent with North Carolina's future advance statute, which does not have a requirement that advances be "without knowledge" of an adverse interest in order to enjoy priority. It also adds a "knowledge" qualifier that is not present in the ALTA 14 endorsement. For this reason, even with an ALTA 14 Future Advances Endorsement, a lender is likely to be concerned about subsequent title matters about which it becomes aware, and will likely seek the Title Company's acknowledgment in writing that future advances will be covered, notwithstanding the Lender's and Title Company's knowledge of the matter. So, again, the lender or counsel should consult with the title insurer prior to any advances to assure the lender does not inadvertently prejudice their coverage, whether by inappropriately applying future advances, or especially in the face of an IRS lien which is excluded from the endorsement coverage.

c. First Lien Priority

The Instruction Letter states that the loan policy must insure that the Deed of Trust constitutes a "first lien" on the insured property. In our scenario, the property was initially purchased with cash. But in the majority of commercial finance situations, there will be liens on the property that will need to be satisfied in order to insure first lien priority. For instance, there could have been seller financing arrangements which were secured by deeds of trust on one or more of the tracts purchased by Developer at the outset. These liens would be revealed in the preliminary opinion on title, and set forth in Schedule B-I, Requirements, as items to be cancelled or satisfied. The preliminary opinion should specify whether a particular lien is to be paid/cancelled at closing, should remain as a prior lien, or should be shown as a subordinate item. The following chart sets forth suggested actions with respect to prior liens:

Planned handling of Deed of Trust at closing	**Suggested action by closing paralegal and attorney**	**Additional notation on Preliminary Opinion**
To be paid at closing (and canceled by the closing attorney soon thereafter)	Get payoff in writing directly from the lender and send in with your payoff letter and check by verifiable delivery (such as Federal Express or UPS) NOTE: *Attorney's payoff letter must say to apply payment, even if short, and notify of shortage immediately!* To payoff an equity line deed of trust, include: • Buyer's "freeze" request • Verification that no further draws or checks • Require return of documents for cancellation as soon as possible	
Release deed from the trustee and beneficiary will be obtained and recorded at closing.	Obtain written terms from the beneficiary or actual release deed *prior to closing*. Do not rely on verbal assurance.	
Subordination agreement executed by the beneficiary (and trustee if possible) will be obtained and recorded at closing.	Must clearly identify your new loan to which the old lien is to be subordinated, by name, date, and amount at minimum. Obtain written terms from the beneficiary or actual recordable subordination *prior to closing*. Do not rely on verbal assurance. Final opinion must include recording information and deed of trust to which it relates.	"Subordination Agreement to be recorded at closing"
Deed of trust will remain a prior lien and exception on the final policies to be issued		"To remain a prior lien"

Planned handling of Deed of Trust at closing	**Suggested action by closing paralegal and attorney**	**Additional notation on Preliminary Opinion**
Paid in full at a prior closing, to be canceled.	Disclose the deed of trust. Provide evidence of zero balance. Identify *who is responsible for obtaining cancellation and verify that they are following up on same*, preferably in writing. Request (do not assume) prior written affirmative coverage of the title insurer. (Remember: A prior loan policy "disappears" once that loan is paid off. So do not rely on it to protect you, your lender or the new title company.) NOTE: Often the title company can help you reach the right people or make the right demands to get these cancellations done – quickly!	"Paid in full on _____ by _____, closing attorney. Zero balance confirmed. [Provide copy or note about who has been contacted to follow up or any correspondence.] OR "Paid in full, but not yet canceled of record — see attached _____." (evidence of payment should be discussed with title insurer and approved prior to closing)

d. Release Provisions

Because of the nature of our mixed-use development, and the fact that our Developer will ultimately desire to convey portions of the development to other developers (i.e. condominium developers, retail developers, and single-family residential developers, all to be discussed in detail later), it is important that the Deed of Trust (or at least the Loan Agreement, with a cross-reference in the Deed of Trust) contain carefully-negotiated Release provisions. A sample release provision follows:

> "Release Terms and Fees. Provided no Event of Default then exists, Lender agrees to release the lien of the Deed of Trust on each Lot or Parcel sold upon (i) delivery to the Lender of the form of release instrument to be executed by the Lender and appropriate easements, if necessary, over the Lot or Parcel to be released for ingress, egress, and utilities for the remaining property subject to the Deed of Trust that are in form and substance satisfactory to the Lender, (ii) delivery to Lender of a copy of the final recorded plat containing such Lot approved by the appropriate Governmental Authorities which must be satisfactory to Lender, and (iii) delivery to the Lender of the closing statement for the applicable Lot and payment to the Lender of a release fee equal to [Calculation/Index]. Payments made for releases shall be applied by Lender against the outstanding principal of the Loan unless the release payment is calculated to take into account allocable interest or other constituent costs or accruals, in which event Lender may apply the release payment in accordance with such calculations. Borrower agrees to reimburse Lender for all out-of-pocket fees and costs, including, without limitation, reasonable legal fees, in connection with the granting of such releases and shall provide Lender with any and all information requested by Lender with respect to the lot to be

released. Provided no Event of Default then exists, Lender agrees to release the lien of the Deed of Trust on (i) sewer easements and utility easements as necessary in the ordinary course of the Borrower's business, (ii) any areas designated by the Borrower as common open space, and (iii) any dedicated roads."

III. Date-Down requirements

Although the Loan Policy insures the priority of future advances, our Lender has indicated that it will require Date-Down Endorsements in connection with each advance under the Deed of Trust. This means that title will be updated to the date of each proposed advance, and the effective date of the Loan Policy will be changed to said date. Any intervening title matters will be reflected (probably as Schedule B-II subordinate items). These date-downs will also reflect any out-conveyances by Developer (and the Lender will be able to ascertain whether release fees were paid and releases were recorded as required in the Release Provisions of the Deed of Trust or Loan Agreement). The Date-Down Endorsement would modify the insured legal description to reflect that any such released tracts are removed from coverage under the policy. Additionally, although subsequent liens may not have priority over the insured Deed of Trust (i.e. subsequent claims of lien that do not relate back and take priority over the Deed of Trust, and which are shown as subordinate items), knowledge of subsequent title matters can be significant to the Lender from a credit underwriting standpoint. If a Developer/Borrower is not paying its contractors on time, the Lender will want to know that, and may not want to advance any more funds until the issue is investigated. Lastly, the "pending disbursements" clause states that the coverage under the policy only increases as each disbursement is made "***in good faith and without knowledge of any defects in, or objections to the title.***" Because of this provision, Lenders will not want to advance additional sums when they are aware of new title matters, unless assurances are received from the Title Company that the priority of such advances will be insured, *notwithstanding the title matter*.

Another reason that lenders may require date-down endorsements is because of a particular risk posed by Federal tax liens. In North Carolina, the Notice of a Federal Tax Lien is filed in the office of the Clerk of Superior Court wherein the taxpayer owns real property. As a general rule, future advances in North Carolina will assume the same priority as the recorded Deed of Trust. Federal tax liens obtain their priority based on when they are filed (unlike the "super-priority" of a real property tax lien). However, an exception to this rule is that any advance made forty-five (45) days or more following the filing of a Notice of Federal Tax Lien will lose out in priority to the Federal tax lien even though the lender's Deed of Trust was on record before the filing of the tax lien. ***See* 26 U.S.C. 6321-6323(c)(4).** In this instance the future advances are not given the protection of the Deed of Trust's recording and priority. But for the pending disbursements clause, this could be a covered title matter, since the Notice of Federal Tax Lien arises after the date of the recording of the insured Deed of Trust, and yet has priority over certain advances made under said Deed of Trust (which would otherwise be covered by the initial priority of the Deed of Trust and insured). Because of the language in the pending disbursements clause, if the Lender is aware of a filed federal tax lien, it is arguable that subsequent advances are not covered by the policy. Additionally, the future advance and line of credit endorsements both have an exclusion for federal tax liens. In any event, it is important to remember that subsequent federal tax liens against a Borrower are matters that could obtain priority over certain future advances

under a Deed of Trust, if made over 45 days after the recording of the Notice of Federal Tax Lien.

IV. Insurance over Mechanics' and Materialmen's Liens

The Instruction Letter states that the Loan Policy must provide coverage over unfiled mechanics' and materialmen's liens arising from work done on the property prior to the effective date of the policy. Under Chapter 44A of the North Carolina General Statutes, the priority of a properly filed and perfected mechanics' lien relates back to the time of "first furnishing of labor or materials at the site of the improvement by the person claiming the lien." Therefore even claims of lien that are filed after the date of the recording of the insured Deed of Trust could take priority over the Deed of Trust. The basic provisions of Chapter 44A are as follows:

Under NCGS § 44A-8:

> Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment **pursuant to a contract, either express or implied, with the owner** of real property **for the making of an improvement thereon** shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to such contract.

Under NCGS § 44A-7(1):

> "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or skilled services furnished by **architects, engineers, land surveyors and landscape architects** registered under Chapter 83A, 89A or 89C of the General Statutes, and **rental of equipment** directly utilized on the real property in making the improvement.

Under NCGS § 44A-10:

> Liens granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the lien.

Under NCGS § 44A-10:

> Liens granted by this Article shall be perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12 and may be enforced pursuant to G.S. 44A-13.

Under NCGS § 44A-10:

(a) Place of Filing. – All claims of lien against any real property must be filed in the office of the clerk of superior court in each county wherein the real property subject to the claim of lien is located. The clerk of superior court shall note the claim of lien on the judgment docket and index the same under the name of the record owner of the real property at the time the claim of lien is filed. An additional copy of the claim of lien may also be filed with any receiver, referee in bankruptcy or assignee for benefit of creditors who obtains legal authority over the real property.

(b) Time of Filing. – Claims of lien may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

Under NCGS § 44A-10:

Where and When Action Instituted. – An action to enforce the lien created by this Article may be instituted in any county in which the lien is filed. No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

In order to issue a loan policy without exception for unfiled mechanics' liens relating to work begun, under contract with the owner, prior to the effective date of the policy, the Title Company must be provided with appropriate affidavits, indemnities, waivers and/or subordinations. The standard requirement in every commitment is as follows:

"Satisfactory evidence should be had that improvements and/or repairs or alterations thereto are completed; that contractor, subcontractors, labor and materialmen are all paid. **NOTE: This item will be deleted upon receipt of satisfactory evidence that such liens cannot obtain priority over the lien of the instrument(s) to be insured**."

Or, more specifically:

Receipt of properly executed Chicago Title Insurance Company Owner/Seller/Contractor Affidavit(s) and Indemnification(s) (or other documentation providing comparable assurances) including (1) 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 and/or (2) 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.

Under our facts, the Owner and "General Contractor" are at this point the same entity. Therefore we must be concerned with any contractor that has provided labor or services to the property, as described in N.C.G.S. § Section 44A-7(1) and 44A-8 (above). This includes contractors that are

customarily considered subcontractors, if they have a contract with the contractor. Work has begun on the project, under a contract with Developer. Developer has contracted with a grading company, and to take advantage of a scheduling opening, the grading has begun (prior to the recording of our insured Deed of Trust). Owner has also employed services of a surveyor and a landscape architect to work in conjunction with the grading project. All of these contractors have outstanding invoices (not delinquent, but not yet paid). Although the attorney's title search revealed no filed claims of lien, in accordance with the requirement set forth above, the attorney is required to provide evidence to the Title Company that there are no inchoate lien rights which could take priority over the insured Deed of Trust as of the closing date, or subordination of those rights.

Title Company has provided the Developer's attorney with its form "Owner/Seller/Contractor Affidavit and Indemnity." Section 3 of this document addresses mechanics' liens. Since attorney is aware that there are contractors that have contracted directly with the Developer, this form will need to be executed by the Developer, as owner, and by each of these contractors with whom Developer has contracted. By signing the affidavit, Developer and each general contractor certify that "*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*."

The options with respect to liens are as follows:

1. (___) No Improvements/Repairs (work or materials) Within Last 120 Days OR Improvements/Repairs Completed Within Last 120 Days And Paid For In Full

Owner and General Contractor (if any) hereby certify that at no time within 120 days of the date hereof has any work, service, or labor been done, or any fixture, apparatus or material been furnished in connection with, or to, the Property, except such material, fixture, work, apparatus, labor or service as has been paid for in full. Improvements/repairs to the Property, if any, have been completed and accepted by Owner. There is no claim outstanding which would entitle the holder thereof to a claim of lien against the Property, whether of record or otherwise. General Contractor (if any) hereby waives and releases his right to file a mechanics' or materialmen's lien against the Property.

2. (___) Bills Unpaid For Improvements/Repairs (work or materials) Completed Within Last 120 Days

Owner and General Contractor (if any) hereby certify that any work, service, or labor which has been done, or any fixture, apparatus or material which has been furnished in connection with, or to, the Property has been paid in full EXCEPT those furnished by persons, firms or corporations whose names appear on the WAIVER OF LIENS or SUBORDINATION OF LIENS section of this affidavit and indemnification. General Contractor (if any) hereby waives and releases his right to file a mechanics' or materialmen's lien against the Property.

3. (___) Construction Contemplated But Not Commenced

Owner and General Contractor (if any) hereby certify that no construction has taken place at the time of or prior to recording of the "Deed of Trust" executed (or to be executed) as security for the loan to finance construction of improvements/repairs. Construction as used herein means to build, effect, alter, repair or demolish any improvement upon, connected with, or on or beneath the surface of the Property, or to excavate, clear, grade, fill or landscape the Property; site preparation (including soil tests, site survey, removal of trees or brush); offsite construction (including installation of water, utilities, sewer or other drainage, and grading or paving of streets or private roadways); and, delivery of building materials (including trees and shrubbery) or construction equipment to the Property. General Contractor (if any) hereby agrees that the Deed of Trust shall constitute a first lien for all amounts which have been or may be advanced thereunder and subordinates to the Deed of Trust any lien, claim of lien or other interest whatsoever which General Contractor or anyone claiming through it might have in the Property.

4. (X) Construction in Progress But Not Complete

Owner and General Contractor (if any) hereby certify that prior to recording of the "Deed of Trust" executed (or to be executed) as security for the loan to finance construction of improvements/repairs, materials have been furnished and/or labor performed by General Contractor and/or those persons, firms, or corporations whose names appear on the SUBORDINATION OF LIENS section of this affidavit and indemnification. **General Contractor (if any) hereby agrees that the Deed of Trust shall constitute a first lien for all amounts which have been or may be advanced thereunder and subordinates to the Deed of Trust any lien, claim of lien or other interest whatsoever which General Contractor or anyone claiming through it might have in the Property.**

The attorney for our Developer has this form signed by each of the surveyor and landscape architect, as General Contractors. Option #4 is selected. Based on the delivery of the affidavit and subordination instrument, Title Company will issue its policy without exception for unfiled mechanics' and materialmen's liens. And there are no claims of lien filed as of the effective date of the policy. However, unbeknownst to the Title Company, the attorney and Developer neglect to have the document executed by the grading company. This could become an issue, and result in a claim under the policy, if the grading contractor files a claim of lien within 120 days of the date of last furnishing services to the Property, because the priority of such lien would relate back to the date on which the grading contractor first began working on the Property, which we now know was before the recording of the Deed of Trust. This will likely become an issue in later phases of development, as policies are procured for outsales, leases, etc. This is the same result that would have arisen if the Developer had hidden the fact that it had contracted with parties that had begun work (or if the attorney had simply failed to completely explain the terms of the affidavit and indemnity, and the underlying mechanics' lien law, to the Developer/Owner). This underscores the importance of the closing attorney in the process, as the Title Company relies on the attorney to certify compliance with the requirement set forth above (from Schedule B-I).

Because our Developer is the owner at the time this loan is being made, it is clear that we must be concerned with potential claims of lien against the Developer. We must also be concerned about judgments against the Developer, the liens of which would have attached the instant the Developer took title to the Property. Luckily there are none.

However, if this were a purchase scenario, the Lender would have some protection from claims against the Developer—which attach at the instant the Developer takes title, based on the doctrine of instantaneous seisin and the protection afforded to lenders for loans representing purchase money. Although this protection is limited to purchase money liens, it is worth discussion. The doctrine of instantaneous seisin "is a legal fiction which provides that when a deed and a purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the title conveyed by the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others." Dalton Moran Shook, Inc. v. Pitt Development Company, 440 S.E.2d 585 (1994). It is always important to remember that the protections afforded the seller or the third-party lender under the doctrine are extended only to those funds actually used to purchase the property. Therefore, the protection does not extend to construction loan proceeds. (*See* Carolina Builders, Corp., v. Howard-Veasey Homes, Inc., 72 NC App 224). One twist to look out for involves a purchase money deed of trust that is also a construction loan. In the Pitt Development Company case, the Court of Appeals held that the purchase money portion of the loan received priority under instantaneous seisin, but that the future advances for the construction portion of the loan did not receive priority and were subject to prior liens against the purchaser. In this case, the purchaser's architect had begun work prior to the purchaser taking title. Though paid from time to time, their entire lien related back prior to the purchaser taking title. So when the purchaser did not pay the architect, the architect's lien was subordinate to the purchase money portion of the deed of trust, but had priority over the construction loan advances under the same deed of trust!

V. Insured Legal Description

The prior policy to which our attorney tacked insured a legal description made up of the various metes and bounds descriptions from the seven (7) vesting deeds of the various sellers. This is the description to which our title attorney has certified in his preliminary opinion for the Development Loan policy. In the Instruction Letter, the Lender requires Title Company to insure a composite legal description based on a current ALTA/ACSM survey.

In order to insure on this basis, the Title Company requires certification from the attorney or from the surveyor that the property shown on the survey and described in the composite legal description is the same property as that described in the multiple legal descriptions covered by the prior policy.

Although the Instruction Letter also states that Lender requires a Contiguity endorsement, the need for this endorsement is obviated by the fact that the composite legal description, which describes the overall boundary surrounding all seven (7) tracts which make up the entire parcel, is being insured. Nevertheless, a zealous lender's counsel may still request a Contiguity endorsement to insure that the component parcels are indeed contiguous. ALTA Endorsement

Form 19 (Contiguity – Multiple Parcels) (Adopted 10/22/03) provides assurances regarding contiguous boundary lines of multiple parcels being insured.

The initial commitment also took exception as follows:

> "The correctness of the square footage/acreage computation contained in the description of the land is not insured."

The Lender has requested that this exception be deleted. Title Companies will usually agree to this for a Lender, particularly if the insured legal descriptions contain language such as "approximately" or "more or less" before reciting acreage or square footage, or if the legal description is derived from an ALTA/ACSM survey that certifies as to the square footage area of the property. Title Company agrees to delete this exception for the Lender because the composite legal description is derived from a survey that certifies acreage of the Property and uses the words "more or less."

Title companies are less likely to delete such an exception on an owner's policy, because acreage is often how fair market values are computed. Therefore any inaccuracy in a legal description could give rise to an immediate claim if the insured receives an offer to purchase that is based on price per acre.

VI. Access/ Insured Appurtenances

a. Direct Access.

Unless otherwise specifically stated, access coverage only provides that the owner can get to a public road from the property. The standard insuring clause in the policy jacket states that the insured is covered against loss sustained by reason of "lack of right of access to and from the land." This is interpreted to mean simply "legal access to a public road." The standard policy language does not insure the exact location of the access or that there is actual vehicular access without additional insuring provisions, endorsements or a description of specific access. On our certifying attorney's preliminary opinion, direct access to a public right of way is certified. The initial commitment provided to Lender took no exception to access. However, no particular quality or type of access was insured. Therefore in the Instruction Letter the lender's counsel has requested an ALTA 17 Endorsement. This endorsement provides coverage against lack of actual vehicular and pedestrian access to a named open, public street, including curb cuts.

For issuance of ALTA Endorsement 17 (Access and Entry) (Adopted 10/22/03), the Title Company requires:

> Verification satisfactory to Company and current survey reflecting: (1) The name of the public street which provides access to the land; (2) that the street is in fact a physically open public street, maintained by a public authority (city or state); (3) that the land abuts thereon; (4) that access is not prohibited or limited in any way, either legally (such as controlled access) or physically (i.e. no physical impediment to vehicular or pedestrian

access) and (5) insured has right to use existing curb cuts or entries, if any, along that portion of the street abutting the land.

Our attorney is able to provide this certification with respect to one of the direct access points which it wants insured. However, the second access point is Highway 577 on the east. With respect to this access point, Title Company is only able to give a "Land Abuts Physically Open Street" endorsement. Although the Property is contiguous to this road, it is a controlled access highway. Controlled access highways are public roads on which a governing authority has placed a negative easement. The negative easement either completely prevents access or limits the location that the property owner can access the highway. In the case of a large divided highway, the granting of access is highly unlikely

b. Indirect Access over Easement.

Although the Property has direct access to a public right of way, an apparent access easement further north to Baldwin Avenue also benefits the Property and gives it access to another public right of way in the rear of the Property. This easement was reserved by the seller at the time it conveyed a contiguous tract to a third party (a tract not included within our Property). It is anticipated by the Developer and the Lender that this could benefit the property in the future. The Instruction Letter states as follows:

> "50' Access Easement to Baldwin Avenue. We believe this access easement is appurtenant to the Premises and should be added to the insured legal description. In the Deed out from the owner of the Cisco tract to the party which now owns the tract to the North, it was stated that the Grantor [Cisco] "reserves a permanent nonexclusive right and easement to use a portion of the land conveyed by this deed as a fifty foot roadway for the purposes of having access from Baldwin Road to other real property owned by Grantor and adjoining the tract of land conveyed by this deed." We believe the reference to "other real property owned by Grantor" includes the property to be insured, purchased from Cisco. We ask that this easement tract be insured "together with" the fee tract."

An appurtenant easement occurs when an owner of a tract of property acquires an easement which benefits or serves his or her property by granting a limited use or enjoyment of adjoining property. The property which benefits is called the "dominant estate." The property which is burdened is called the "servient estate." An appurtenant easement is said to "run with the land." This means that if the property is conveyed/ transferred to another owner, the easement also is conveyed/transferred, even if no mention is made of the easement in the instrument of conveyance. An appurtenant easement cannot be separated from the dominant tract.

In order to insure an appurtenant easement, the Title Company requires that the easement rights are specifically included in the title search of the attorney and are specifically itemized in Schedule A as part of the legal description. This means that title to the appurtenant tract must be searched, at least up to the point of the creation of the easement. In our situation, it is likely that the attorney's search on the dominant tract picked up matters affecting the servient tract as well, since it was once part of the same owner's property. However, the Title Company will require the attorney to certify to this specifically. The concern is that a lien or encumbrance which

affected only the servient tract could have arisen prior to the creation of the easement, and that foreclosure of such a lien could extinguish the easement rights of the insured.

In addition to insuring the easement as part of the insured legal description, the Lender has asked for an ALTA Endorsement Form 17.1. The ALTA 17.1 insures particular access over an easement as follows, by reference to the "Easement Tract" which is part of the insured description:

> "The Company insures against loss or damage sustained by the insured if, at Date of Policy: (i) the easement identified as Access Easement Parcel in Schedule A (the 'Easement") does not provide that portion of the land identified [as Parcel _____] in Schedule A both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the 'Street"), (ii) the Street is not physically open and publicly maintained, or (iii) the insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Easement."

For issuance of ALTA Endorsement 17.1 (Indirect Access and Entry) (Adopted 1/17/04), the Title Company requires:

> Verification satisfactory to Company and current survey reflecting: (1) The name or identification of the private access easement ("easement") to be insured and name of the public street ("street") to which such easement provides access; (2) that the easement is created by duly recorded instrument; (3) title to the easement is certified such that same can be identified as an insured parcel under Schedule A of the policy, and exception taken to any relevant matters related thereto including the terms and conditions of the creating instrument; (4) that the street is in fact a physically open public street, maintained by a public authority (city or state); (5) that the land abuts the easement and the easement abuts the street; (6) that access over the easement onto the street is not prohibited or limited in any way, either legally (such as controlled access) or physically (i.e. no physical impediment to vehicular or pedestrian access) and (6) insured has the right to use existing curb cuts or entries, if any, along the easement or street.

Our attorney has made proper certifications, and therefore this "Access Easement Parcel" is going to be insured, and an ALTA 17.1 Endorsement issued with respect thereto. Note that the policy will contain exceptions for "terms and conditions of the easement" and "rights of others in and to the use thereof" (if the easement is non-exclusive). In addition, this easement is appurtenant only to the particular tract, not the rest of the development. And, though insuring title, the policy does *not* insure the breadth or use of the easement, including any overburdening caused by potential increases in use from development or construction. It may well be necessary for the developer to renegotiate this easement if it is intended for any long-term or major development use, a matter which would not typically be covered by a title insurance policy.

c. Rights under Master Declaration.

Prior to the date of the Development Loan closing, our Developer has subjected the entire seven-tract Property to a Master Declaration of Covenants, Conditions, Restrictions and Easements. At

the time the entire Property is owned by Developer. However, it is clear under North Carolina statutes that the fee owner of real property may subject the same to easements, restrictions, or conditions, even before the estates which will be benefitted and burdened by such rights are held by different entities. In the case of Tower Development Partners v. Zell, the North Carolina Court of Appeals struck down a Master Declaration of Easements because the owner who placed the document of record was the owner of the servient and dominant estates at the time of recording. Tower Development Partners v. Zell, 120 N.C. App. 136, 461 S.E.2d 17 (1995). In response to the outcome of Zell, the legislature passed N.C.G.S. § Sec. 39-6.4 which states as follows:

> a) The holder of legal or equitable title of an interest in real property may create, grant, reserve, or declare valid easements, restrictions, or conditions of record burdening or benefiting the same interest in real property.
>
> b) Subsection (a) of this section shall not affect the application of the doctrine of merger after the severance and subsequent reunification of title to all of the benefited or burdened real property or interests therein.

It is common for Lenders to require that any appurtenant rights under easement and restriction agreements be insured "together with" the description of the real property that is owned in fee simple. Our Instruction Letter requires that Developer's rights under the Master Declaration be insured. Often this would involve insuring easements which run over and restrictions which involve other properties outside the boundaries of the insured Property. In such cases, title to the "appurtenant tracts" must be searched. In our case, this is unnecessary since the Developer owns the entirety of the Property. This will become an issue later in the development process as separate parcels are conveyed out and subjected to leaseholds (and single tracts are insured separately, likely for new owners, lessees and lenders), the Master Declaration is amended and modified, and specific Restriction and Easement Agreements are recorded (with respect to the Retail Center, the Condominium Development, and the Single-Family Residential neighborhood).

VII. Affirmative Coverage over Exceptions

a. General Utility Easements.

Various general utility easements were excepted to in our prior policy (sewer & water, gas, electricity, telephone). However, the existing ALTA/ACSM survey does not reveal the location of many of them, and the surveyor has noted that they "cannot be plotted with specificity." At the time of our closing, there are not yet any utility lines that run across or service the property since the improvements and specific development easements have yet to be designated and platted.

The Instruction Letter states as follows: "Please issue a CLTA Endorsement Form 103.1 covering exceptions __ through __, all of which are general utility easements which can not be located on the survey with specificity."

Since our survey confirms that, at least in the opinion of the surveyor, these easements are indeed "blanket" and general in nature, this coverage will be afforded to the Lender. Title Companies generally rely on the findings and certifications of registered land surveyors. However, it is incumbent upon development counsel to review these documents in detail (to be discussed later).

The CLTA 103.1 coverage is as follows:

> "The Company hereby insures the owner of the indebtedness secured by the mortgage referred to in paragraph 4 of Schedule A against loss which the insured shall sustain as a result of any exercise of the right of use or maintenance of the easement referred to in paragraph ***[INSERT SCHEDULE B PARAGRAPH NUMBER EXCEPTING EASEMENT]*** of Schedule B over or through the land."

b. Specific Easements.

Specific easements are ones that can be plotted with specificity on the survey. In some cases, surveys will even reveal actual power or water lines that were revealed in a physical inspection of the premises. We are often asked to give affirmative coverage for the effect that a specific easement has or could have on the insured property. Lenders in particular like to have assurance that the scope of an easement is limited. In many cases we can give Lenders the affirmative coverage requested, but underwriting support must be consulted. The following examples describe the various degrees of affirmative coverage:

a. Company insures that the easement will not interfere with the intended use of the land or the improvements located thereon for an easement.
b. Company insures that the easement will not adversely affect the land and that the improvements are not located within the easement.
c. Company insures that the exercise, maintenance or attempted enforcement of the easement will not cause loss or damage.
d. Company insures against forced removal of improvements constructed or to be constructed on the property as a result of the enforcement of the easement.

A title insurance company may wish to limit its liability and eliminate its duty to defend by identifying a title defect and providing affirmative coverage against loss or damage "sustained or incurred by the insured upon entry of a final judgment or decree of a court of competent jurisdiction [sustaining, permitting, allowing, prohibiting or enforcing] the matter insured against." This limited affirmative coverage was devised to protect the title insurance company from the expense of its duty to defend. The insured will bear the expense of litigating a claim against the title, and if the insured loses and suffers loss or damage, the title company is responsible for the loss. One downside for the title insurance company is that the title insurer cannot control the quality or diligence of the litigation for the insured even though the title insurer is responsible for an adverse outcome. This type of coverage is more common on owner's policies, as most lenders will ask for and receive more meaningful coverage, for the reasons discussed previously with respect to title underwriting philosophy.

c. Encroachment.

Our survey has revealed a fence appearing on the survey that encroaches significantly onto our property from property to the North. Lender has requested the following:

> "Provide the following language after Exception No. ___, items b and c: Provided, the Company hereby insures the owner of the indebtedness secured by the mortgage referred to in paragraph 4 of Schedule A against loss or damage which the insured shall sustain by the existence of said fence encroachment(s) onto the subject property, or any adverse possession of any portion of the subject property, as ordered by a court of competent jurisdiction."

It is apparent that the fence encroaches in an area that is outside of the areas where our development is taking place. Therefore it is likely that this coverage would be granted. Notably, it is unlikely that such coverage would be given on an owner's policy, unless the encroachment were very minor.

d. Access to Burial Ground.

Our survey and preliminary opinion reveal that there is a gravesite on the property. Some Lenders will request that a gravesite be "less and excepted" from the insured description. The Lender's instruction letter states only "We ask that affirmative coverage be given over the existence of the gravesite, and any rights of others to access same."

Title Companies are very cautious when it comes to burial grounds. Cemeteries and burial grounds are dedicated lands used for burial of the dead and are not generally insurable. Family burial grounds are also granted, by law, an easement, roadway or means of access so that relatives can visit the grounds or so that additional family members can be buried therein.

The initial commitment took exception as follows: "*Title to that portion of the land within the bounds of burial grounds, recorded or unrecorded, together with rights of ingress, egress and regress thereto.*" Title Company added affirmative language as follows: "Provided, Company insures Lender that the existence of said gravesite shall not render invalid the lien of the insured Deed of Trust."

VIII. Survey Coverage

Due to the size of this loan, and the fact that its purpose is construction, Title Company has taken a general survey exception in the initial commitment, which reads as follows:

> "Any discrepancies, conflicts, access, shortages in area or boundary lines, encroachments, overlaps, setbacks, easements or claims of easements, riparian rights, and title to land within roads, ways, railroads, watercourses, burial grounds, marshes, dredged or filled areas or land below the mean highwater mark or within the bounds of any adjoining body of water, or other matters which would be revealed by a current inspection and accurate survey of the land."

Although Title Companies will often give survey coverage to a lender without a survey, this is reserved for cases where the loan amounts are much smaller than our development loan, and no construction is contemplated (i.e. improvements have been in existence for some time). In this case, Lender has attached the most recent ALTA/ACSM survey, and asked that the matters revealed thereon be set forth specifically. Since this is a very recent survey (one (1) month old at the time of delivery to the Title Company), no exception for "subsequent matters which would be revealed by a current and accurate survey" will be taken. This is considered a current survey. If the survey were older (such as over six (6) months), Title Company would have either taken such a limited exception, or required receipt of a satisfactory survey affidavit and indemnity certifying that there have been no alterations, repairs or improvements made to insured land or adjoining properties subsequent to the date of the survey. This is an underwriting decision which title companies handle on a case-by-case basis, depending on the actual age of the survey (there is no "bright-line rule" on how old is too old), the facts of the case (i.e. whether it is known to the Title Company that there has been recent construction), the coverage amount, and the identity of the proposed affiant/indemnitor.

In order to give a "Same as Survey" endorsement, as required by the Lender, Title Company requires "*Review of specified survey and determination that the land depicted on the survey is identical to the land insured under the policy*." In our case this is an easy decision because (a) our insured legal description is the legal description derived from the survey itself, and (b) the surveyor has included in his certification a statement that the property shown on the survey is identical to the property covered by the Title Commitment. This is a fairly common statement in surveyor's certifications, and will ordinarily be given if requested. In addition, as discussed previously, the surveyor has certified that the land depicted on the survey is the same as the land covered by the prior policy – the seven (7) separate tracts that were conveyed to Developer.

For Title Company's purposes, the survey must be dated, signed and sealed by a licensed or registered land surveyor. The survey should contain a metes and bounds description of the property. Although a surveyor's certification is rarely required on a residential survey, the Title Company does generally require a certification on commercial transactions.

On an ALTA/ACSM survey, the certificate appears on face of the survey. The certificate provides significant additional assurances not usually shown on the plat of survey itself, such as indications of who is in possession of the property (possibly indicating if a tenant exception is applicable) and whether recent improvements were evident (indicating a contractor's lien waiver is appropriate). It should be noted that an ALTA/ACSM survey is not required for Title Company to give survey coverage, although on transactions as sizeable as our development loan, Lenders would likely require it. It should be noted that ALTA/ACSM surveys are relatively expensive compared to surveys that don't meet their strict requirements. More detail on the ALTA/ACSM survey provisions will be discussed later.

IX. Tenants

Our initial Commitment, which was based on the acquisition owner's policy, took exception to ta recorded lease with option that was found of record, but expiring January 30. Lender's

Instruction Letter has stated that "this exception must be deleted, or moved to Schedule B-II as a subordinate item, assuring its subordination to the deed of trust insured in Schedule A." If the lease had not expired, the Title Company would require execution of a satisfactory Subordination, Non-Disturbance and Attornment Agreement by the tenant. It should be noted that the recording of such subordinations is usually asked for initially by the Title Company and should be shown as a subordinate matter since the lease was recorded prior to the deed of trust and is a matter of record. (However, it is not always required for the Company to show a lease as a subordinate item. The company will require delivery of a duly executed copy of the subordination though.)

Additionally, a general exception was inserted as follows: "*Rights of tenants in possession, as tenants only, under unrecorded leases for a duration of less than three (3) years*." In North Carolina, 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. See NCGS Section 47-18; Perkins v. Langdon, 237 N.C. 159, 74 S.E.2d 634 (1953). If our owner defaults and foreclosure proceedings are begun by our insured Lender, a tenant in possession and in compliance with its lease has the right to remain in possession until the end of the three-year period notwithstanding the foreclosure.

If this were a shopping center with multiple tenants, it would not be uncommon for a Lender to require that the tenant exception be limited to tenants as shown on an approved list or current "rent roll," if it is apparent that subordinations would not be obtained from all tenants such as to allow their rights as tenants to be shown as subordinate items on Schedule B-II. Also, if there is an exception to tenants which is not to be moved to Schedule B-II, lenders will often require that the exception contain the following language: "*None of the leases under which such tenants are occupying space contain any options to purchase or rights of first refusal covering any portion of the fee interest in the insured land or the buildings thereon, if any*." This requires certification from an attorney.

What is required to give such coverage? We have an Owners / Sellers / Contractors Affidavit and Indemnity from our Developer that states that "*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*." Additionally, the survey reveals no structures other than the farmhouse, which we know is subject to the recorded lease. Therefore, upon expiration of the lease without timely exercise of the option, this exception is deleted.

X. Zoning

Paragraph 1(a)(i) and (ii) of the Title Policy Jacket contains an exclusion from coverage for loss or damages sustained "**by reason of any law, ordinance or governmental regulation which restricts, regulates or prohibits the occupancy or use and enjoyment of the land as well as the character or location of improvements situated on the insured property**." These governmental restrictions include but are not limited to building and zoning laws, ordinances or regulations. In other words, compliance with local zoning ordinances is not an insured matter.

This is the reason for the Zoning Endorsement. At the request of certain national lenders and large commercial customers, the ALTA forms committee devised the ALTA Endorsements 3.0 and 3.1 which provide limited coverage as to zoning matters. An ALTA 3.0 may be issued with a policy insuring title to land regardless of whether the insured property is vacant, improvements are under construction or are completed. ALTA 3.1 may only be issued if a completed structure exists on the insured property.

Paragraph 1(a) of the ALTA 3.0 and 3.1 insures that according to applicable zoning ordinances and amendments thereto, the land is placed in specific zoning classification, e.g., R-1, R-2, MX. Paragraph 1(b) of the ALTA 3.0 and 3.1 insures that the uses listed in the blank space therein are allowed under the zone classification identified in 1(a). The permitted uses shown in paragraph 1(b) are copied verbatim from the zoning ordinance. The Title Company is not likely to interpret or elaborate on the permitted zoning use even if requested by the insured. It should be noted that the ALTA 3.0 and 3.1 do not insure compliance with building codes or other municipal departmental regulations. These endorsements will also not be issued to insure against known violations of zoning ordinances nor will it be used to insure a permitted use which was created solely by variance. Variances are frequently attacked by neighbors.

The ALTA 3.1 differs from the ALTA 3.0 in that it contains paragraph number 2. In addition to the above-described paragraphs, ALTA 3.1 insures against loss due to the insured property's non-compliance with certain specified requirements of the applicable zoning ordinance such as floor space area, structure height, and number of parking spaces required. The ALTA 3.1 will become relevant in our discussion of the specific commercial and residential development of our Property.

Our Lender's Instruction Letter requests an ALTA 3.0 endorsement (our parcel is essentially vacant land at this time). The Lender specifies that it wants assurance that the entire parcel is zoned "MX", in this jurisdiction meaning "mixed use." Classifications vary greatly from jurisdiction to jurisdiction, but the "mixed use" classification is becoming more and more common. In our situation, MX classification ordinance lists permitted uses as "Neighborhood commercial, multi-family residential, and single-family residential."

The Title Company required the following:

> "For issuance of ALTA 3.0 Endorsement: Satisfactory verification (1) of the current zoning classification of the land; (2) that the land has been so zoned for at least two months; and (3) of the specific Permitted Use for which the land is currently or intended to be used, cited exactly as set forth in the applicable zoning ordinance or regulation."

"Satisfactory verification" essentially means either an attorney certification or an official letter from the appropriate city or county zoning or planning department. The certifying attorney either needs to examine the proper zoning ordinances and maps on their own, or needs to provide the title company with a zoning letter from the zoning department, in order to identify the insured property, its zoning classification, its permitted uses, that the appeal period for any recent rezoning has expired and, if issuing a 3.1, that the current use of the property is a permitted use and no violations of the zoning ordinances exist. Some city/county planning & zoning

departments will refuse to verify zoning compliance at all; others will give limited zoning letters but will not address specific items such as parking requirements. Some will do so only upon complete review of a current survey, so additional time must be allowed. Since zoning is highly technical, many real estate attorneys are unfamiliar with the detailed requirements and procedures for zoning compliance so are (or should be) unwilling to issue opinions on the matter. All of the above determinations must be made based on the most current version of all zoning or subdivision regulations or ordinances applicable to the property. Therefore, each situation must be approached on a case-by-case basis, based on whatever reliable information is provided and available. The survey may also have significant zoning and subdivision information, and may include sufficient information to verify the above, especially number of partking spaces. It should be checked for consistency with other information received.

Since this is an extraordinary coverage with special risks, an additional premium is usually charged for a Zoning Endorsement (for instance, $0.10 per $1000 of coverage).

XI. Subdivision

The Instruction Letter also requires the issuance of a Subdivision Endorsement. Under the exclusion in paragraph 1(a)(i) and (ii) of the Title Policy Jacket discussed above with respect to zoning, compliance with local subdivision ordinances and regulations is not an insured matter.

The Title Company has made a requirement as follows:

> "For issuance of a Subdivision Endorsement: Receipt of (i) a satisfactory survey setting forth compliance with all applicable subdivision laws, ordinances, resolutions, regulations and rules, or (ii) certification from an attorney or surveyor that the insured land is in compliance with all applicable subdivision laws, ordinances, resolutions, regulations and rules."

This endorsement is only applicable in locations where a subdivision ordinance governs development of the land. It provides coverage against loss or damage in the event any conveyance in the underlying title might have been in violation of a law, ordinance or regulation pertaining to subdivision, separation of ownership of any parcel or parcels of land or any change in the area or dimensions of any parcel or parcels of land. In North Carolina, many cities and counties (but not all) have local zoning and subdivision regulations. They can be quite complex (similar to issues involved in zoning determinations). So title companies require either an attorney's or surveyor's opinion that the property is in compliance with applicable ordinances in order to issue this endorsement, unless the property: (i) is greater than 10 acres where no street right-of-way dedication is involved (exempt from subdivision regulation under N.C.G.S. § 153A-335, Counties, and N.C.G.S. § 160A-376, Cities and Towns) or (ii) has been a separate parcel for many years through multiple conveyances without further division.

Each of our Developer's parcels, as indicated on the recombination plat, is either well over 10 acres in area or intact as purchased or was previously subdivided appropriately. Additionally, the recorded master plat (if recorded) is or will be properly approved by the appropriate

authorities and filed in accordance with N.C.G.S. § Section 47-30. The surveyor has also indicated on the ALTA/ACSM survey that the parcel comprises a "lawful subdivision of land." The endorsement is issued.

XII. Tax Parcels

Our Property was purchased as seven (7) separate tracts, each with their own tax parcel identification number. The Instruction Letter requests a Tax Parcel endorsement, insuring that the entire property is a single separate tax parcel, not included within a larger parcel. Basically the Lender wants assurance that no additional properties are included in the tax bill (no carveouts, no road rights-of-way or other partial interests) and that the tax bill includes all of the land to be insured (including any additions over time or from settlements with adjoining property owners).

Title Company has required the following:

> "For issuance of ALTA Endorsement 18 (Adopted 10-22-03): Certification from attorney that all of insured land is covered within the tax parcel number(s) assigned to said land and that the number(s) do(es) not include any additional land**."**

At the time of closing, taxes are still being assessed against the seven (7) separate tracts. This will not change until taxes are re-assessed on January 1 of the next year (even though a plat has been or will be recorded prior to that time which will reflect the proper recombination of the tracts into a single parcel).

Title Company agrees to issue a modified ALTA Endorsement Form 18 stating that "as of January 1, 2006," the assurances contained therein will be true. In order to issue this coverage, Title Company requires an official letter from the appropriate city or county tax department which acknowledges the recombination of the parcels and the recorded plat, and states that the entire parcel will be covered under a single tax parcel identification number effective January 1, 2006. In our case, the Tax Department has determined that it will consolidate all seven tracts into one of the existing tax parcel identification numbers, so the tax parcel number for purposes of the endorsement is known at the time of closing.

Given that the property contains multiple tracts for the current year and the lender has requested affirmative coverage regarding the appurtenant easement to Baldwin Avenue, consideration should be given to use of an ALTA 18.1, the requirement for which is:

> For issuance of ALTA 18.1 (Multiple Tax Parcel) (Adopted 10/22/03): Certification from attorney as to tax identification numbers covering insured land, that all of insured land is covered within said numbers and that the numbers do not include any additional land. NOTE: If an easement is to be insured, the easement interest should be listed for ad valorem tax purposes in the name of the proposed insured easement owner.

XIII. Creditors' Rights

Lenders often request "Creditors' Rights" coverage (whether by endorsement or use of a 1970 policy) in order to obtain protection against loss of their lien (or any portion thereof) based on claims of any creditors of the seller or borrower that they did not receive full value in the transaction, and that it was, therefore, a fraudulent conveyance or a preference in bankruptcy (for example). Similarly, the owner might request the coverage for protection against creditors of the seller claiming fraudulent conveyance or preference. In the late 1980's and early 1990's, these sorts of claims became a tremendous source of potential losses to the title industry, as there was no exclusion in the ALTA form policy (i.e. the 1970 ALTA form) with respect to creditors' rights.

Title insurers believed and still believe that these are not covered matters under the policy. However, the exclusions were added to clearly confirm this in future coverages. The ALTA Owner's Policy (10-17-92) and the ALTA Loan Policy (10-17-92) were revised to include a creditors' rights exclusion in the pre-printed language for this reason. Paragraph 4 in the ALTA Owner's Policy and Paragraph 7 in the ALTA Loan Policy exclude from coverage any claim arising out of the transaction which vested title in the insured owner or lender by reason of federal bankruptcy, state insolvency or similar creditors' rights law.

Paragraph 4(a) in the Owner's Policy and 7(a) in the Loan Policy state that the title company will not protect the insured owner or lender if the transaction which created the insured's interest or estate in the land is characterized as a fraudulent conveyance. Pursuant to the Bankruptcy Code, the bankruptcy trustee possesses the power to void any transfer for less than reasonably equivalent value if made when the transferor is insolvent, engaged in a business having unreasonably inadequate capital, or intended to incur debts beyond its ability to pay. The definition of "transfer" can encompass a mortgage or foreclosure. The time frame within which a bankruptcy trustee can label a transfer as a fraudulent conveyance is one (1) year before the bankruptcy petition is filed.

Paragraph 4(b) in the ALTA Owner's Policy and Paragraph 7(c) in the ALTA Loan Policy address voidable preferential transfers. A preference, according to the Bankruptcy Code, is a transfer to a creditor made on account of a debt incurred by the debtor prior to filing a bankruptcy petition. The transfer must be made within ninety (90) days of the filing of the petition or within one (1) year if the transferee is an insider.

The Lender Instruction Letter has requested that either a 1970 ALTA Form Title Policy be issued (which has no creditors' rights exclusion), or that if a 1992 ALTA form policy is issued, it will contain a Deletion of Creditors' Right Exclusion Endorsement.

The Title Company makes a requirement as follows:

> "For issuance of Creditors' Rights Endorsement: Authorization from our regional and/or national counsel may be required in order to issue a Creditors' Rights Endorsement. In order to obtain that authorization, the following must be provided to Company: A

description of the nature of the transaction, which needs to include, but not be limited to (a) the structure of the transaction (antecedent debt, upstream or downstream financing, sale-leaseback, leverage buyout, etc.); (b) names and affiliations of parties to or connected with the transaction; (c) the consideration to be paid, including the source of funds (if any); (d) the intended use of proceeds of any loan to be insured; (e) any facts which bear upon the financial status of the borrower or seller; and (f) any additional information which may materially affect the nature of the risk to be insured. Upon receipt of this information, our commitment is subject to additional requirements and exceptions arising from a review of said disclosure."

The Lender and our Developer state that 100% of the proceeds of the loan are being used "for construction and the development of the property into a mixed-use development." However, review by Title Company's Regional Counsel of the proposed Closing Statement reveals that funds at closing are being disbursed directly to certain members of the Developer (a limited liability company). In other words, it appears that loan funds are being disbursed to individuals, with no limitation on the use of such funds.

Title Company's regional counsel asks the attorney if the payment is some sort of dividend or distribution, or rather just reimbursement for development expenses already incurred, or repayment of a valid debt incurred by the developer in connection with the development of the property. Developer produces a copy of certain promissory notes it gave to the members in order to obtain funds to pay for grading, surveying and landscaping work that was started on the project before the development loan was obtained. Because the funds are being used to repay a valid debt incurred in connection with development of the property encumbered by the insured Deed of Trust (the very purpose for which the loan is being made), the coverage is approved.

XIV. Entities

a. Names -- Record Title

Our Developer/Borrower is Zippy Development, LLC, a Georgia limited liability company. This is the borrowing entity on the all of the loan documents. However, per our prior policy and on our commitment, the record owner is Zippy Development, a Georgia limited partnership. We are told that the entity converted under Georgia law to an LLC, and then changed its name. Nothing is picked up in the search at the Register of Deeds, or in a corporate search at the North Carolina Secretary of State.

The merger is, of course, recognized under North Carolina law under N.C.G.S. § N.C.G.S. § 55-11-10(d). If a corporate entity has merged or otherwise changed its name, a Certificate of Merger or Name Change issued by the Secretary of State of the home state of the corporation must be recorded in the office of the Register of Deeds in each county in which the corporation owns real property in order to complete the record chain of title. Pursuant to N.C.G.S. § 47-18.1(a): "(a) If title to real property in this State is vested by operation of law in another entity upon the merger, consolidation, or conversion of an entity, such vesting is effective against lien creditors or purchasers for a valuable consideration from the entity formerly owning the

property, only from the time of registration of a certificate thereof as provided in this section, in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county." In addition, N.C.G.S. § 55D-26(a) provides:

> (a) A certificate issued by the Secretary of State as described in subsection (b) of this section must be recorded when:
>
> (1) The name of any domestic corporation, nonprofit corporation, limited liability company, limited partnership, or registered limited liability partnership or foreign corporation, foreign nonprofit corporation, foreign limited liability company, foreign limited partnership, or foreign limited liability partnership that holds title to real property in this State is changed upon amendment to its articles of incorporation or organization, its certificate of limited partnership, or its registration as a limited liability partnership or foreign limited liability partnership; or
>
> (2) Title to real property in this State held by any entity listed in subdivision (1) of this subsection is vested by operation of law in another entity upon merger, consolidation, or conversion of the entity.

In addition, the deed should contain a reference to the grantor including the vested name, any interim names and the current name of the entity now mortgaging or conveying title. As between the parties, title passes by operation of law on the date of the filing of the Articles of Merger with the Secretary of State. However, the record title to the property remains "at risk" until the Certificate has been filed with the appropriate Register(s) of Deeds. N.C.G.S. § 47-18 and 47-20.

Title Company requires the recordation of a certified copy of the Certificate of Conversion and Name Change from the Secretary of State of Georgia. By recording this document and having it properly indexed under both the old and new names, the "gap" in the chain of title is remedied.

Of course, since the developer will be continuing to operate in North Carolina, it will be incumbent upon them to qualify to do business by relevant filing with the Secretary of State as well. N.C.G.S. § 57C-7-02.

b. Power of Attorney for Managing Member (out of country)

Our Developer is a limited liability company, and its Bylaws indicate that the signature of the managing member will be necessary on the Deed of Trust and other loan documents. The managing member of our Developer has just left the country for an extended period and has given his power of attorney to his business partner for the purpose of executing the documents necessary to effectuate the development loan. The Title Company requires that documents be "duly authorized and executed." If nothing is specifically mentioned by the attorney in their opinion, it will be assumed that the attorney is certifying that the documents were duly

authorized and properly executed. This power of attorney arrangement is somewhat unusual and should be carefully reviewed and scrutinized by the certifying attorney.

The individual power of attorney of a person who is also an officer of a corporation, trustee of a trust or in some other type of fiduciary capacity does not authorize that attorney in fact to act for the individual principal in their fiduciary capacity. That authority must come directly from the entity's bylaws, operating agreement, resolution, trust agreement or other organizational instrument. *See* N.C.G.S. § 57C-3-24An entity – a corporation through its board of directors, a limited liability company through its members, a partnership by resolution signed by the partners required under their partnership agreement, for example – can appoint an attorney in fact to act on their behalf with regard to a certain matter or certain types of matters if authorized by the partners, members or board of directors. Depending on whether the transaction is in the ordinary course of business (such as a developer selling lots) or an extraordinary transaction (mortgaging substantially all of the entity's assets), the power of attorney should comply with the same types of formalities as would be required if the entity were actually doing the transaction itself rather than through an attorney-in-fact.

In our case the power of attorney is an individual one, and does not properly authorize the attorney in fact to execute documents on behalf of the Developer (in the managing member's fiduciary capacity). Luckily, in addition to the individual power of attorney granted by the managing member to his partner, our Developer has produced a Written Consent signed by all of the members, authorizing the partner to sign all documents necessary to effectuate the loan. This written consent can constitute an appointment as a "manager" within the definition of the statute, for this limited purpose under N.C.G.S. § 57C-103-13(ii): "with respect to a foreign limited liability company, any person authorized to act for and bind the foreign limited liability company." However, consideration should be given to recordation of the consent with separately (if in recordable form) or with the deed of trust to be recorded, since the signer is not an overall manager of the LLC, as listed on the filed Annual Reports, and thus does not have the presumptive authority of N.C.G.S. § 57C-3-25(a).

XV. Gap Coverage

Unlike the custom in North Carolina, in many states, even if documents are presented for recording, it may be weeks or months before they are confirmed to have been recorded and posted to the public records. Title Companies receive requests for this type of coverage on some commercial transactions, especially large national transactions involving multiple sites. This is often called a "New York Style" or "Gap" closing. In North Carolina, we are sometimes asked to give Gap coverage in that we are required to irrevocably commit to a pro forma policy or marked commitment before a Lender will fund, and before our insured instrument has been recorded. There is, of course, a significant risk that something will appear of record between the time we commit to a pro forma or mark up and the time we are on record-- hence the "Gap."

North Carolina is a "pure race" state so that if an intervening purchaser or lender records prior to our customer's documents being presented for recording, title is presumably lost to the third party. *See* N.C.G.S. § 47-18 and N.C.G.S. § 47-20. Actual recordation is a critical protection.

Therefore, the initial commitment provided to the Lender contained, in Schedule B-II, the following pre-printed exception (the "Gap Exception"):

> "Defects, liens, encumbrances, adverse claims or other matters, if any, created first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment."

The Lender's Instruction Letter makes it clear that the Lender will not fund so long as this Gap Exception remains in the commitment. The Letter states:

> "The Title Company shall be in a position to issue, and the Title Company hereby irrevocably commits to issue the title insurance policy to the Lender, its successors and its assigns to be dated as of the later of the time of the recording of the applicable Mortgage or funding, containing recording information with respect to the above referenced documents being recorded and otherwise in form identical to the marked title commitment or pro forma policy described on attached Exhibit ___, including without limitation the endorsements attached thereto, and containing so-called "gap coverage" in which the Title Company insures the period between the funding of the Loan Proceeds and the recording of the Record Documents (the "Committed Title Policy")."

The Lender will not fund until the Title Company has committed to issue its policy (with endorsements) in the exact form required by the Lender. After much revision, the pro forma policy has been revised to the point that the lender is satisfied, including the deletion of the Gap Exception. At the time of funding, all of the other requirements (from Schedule B-I of the commitment, and in connection with the issuance of endorsements) of the Title Company must have been satisfied. The attorney initially thought the Lender would be satisfied with recording prior to disbursement, and that the Gap requirement would become a moot point. At the last moment it becomes clear that documents are not quite ready for recording, and the Lender must fund before 2:00 E.S.T. in order for the Borrower to remain within a "rate lock" period. The Lender requires the Title Company's signature on the final Closing Instruction Letter before it will fund or consider the loan "closed." If funding/closing occurs after 2:00 E.S.T., the Lender's loan commitment is withdrawn and the Borrower will be subjected to a significantly higher interest rate on the loan. Therefore the parties focus (for the first time) on the Title Company's requirements for Gap coverage.

In order to provide Gap insurance, Title Company requires execution of a Gap Indemnity, which indemnifies the Title Company from loss arising from a claim which results from a title matter first appearing of record during the Gap period. The Title Company may also require satisfactory verification of financial stability of the indemnitor before it will accept an indemnity in lieu of recording prior to disbursement. The Title Company also requires that title be updated as close as possible to the actual disbursement (within 24 hours) and that the documents be recorded within 24 hours post-closing. This minimizes the risk posed to the Title Company by the Gap period.

In addition, pursuant to RPC 191, attorneys handling the transaction cannot actually *disburse* the closing proceeds until after they can comply with the lender's requirements, including recordation of the deed of trust. So the attorney closing system adds this additional protection, if the attorney is also handling disbursement, limiting losses to the lender and the insurer in the event something is recorded within the gap period.

For there to be a title "loss" to the Lender as the result of something that has arisen in the title record during the Gap period, the Borrower would have to be without means to make the Lender whole. Therefore an indemnity from our Developer/Borrower would likely be self-serving and insufficient. So, in order to insure the Gap period and facilitate closing, the parties have to find another source for the indemnification. The risk is mitigated somewhat by the fact that the Lender is only advancing $1,500,000 on the day of closing, as opposed to the entire $20,000,000.00 which the policy insures. In the end, one of the individual members agrees to sign a Gap Indemnity in his personal capacity. This gentleman's balance sheet reveals liquid assets in excess of $10,000,000.00 (likely the result of many years of turning barns into big boxes!). The Title Company is satisfied with a faxed indemnity, the final Escrow Instruction Letter is signed and faxed to the Lender, and the Lender funds at 1:57 E.S.T., with three minutes to spare.

XVI. Other Endorsements

Our Lender's Instruction Letter initially contained the following list of requested endorsements. This is a fairly standard "laundry list" of endorsements. Many are being issued in the case of our Development Loan policy, as discussed above. Others were inapplicable. These will be discussed as time permits.

- Same as Survey
- Alta 9/ Comprehensive
- Tax Sale/ Foreclosure
- Access
- Mechanics' Lien
- Usury
- Street Address/ Designation of Improvements
- Separate Tax Parcel
- Zoning (3.0)
- Subdivision
- Doing Business
- Deletion of Arbitration Clause
- Deletion of Creditors' Rights Exclusion
- Environmental (Alta 8.1)
- Mortgage Tax
- Anti-Taint
- Rate Hedge/ Swap
- GAP
- Contiguity
- Encroachment
- CLTA 103.1 Blanket Easement
- Street Assessments
- Utility Facility
- First Loss
- Last Dollar

CHICAGO TITLE INSURANCE COMPANY

COMMERCIAL SALES

By Jeff Hrdlicka

The *"Development"* of the raw land has now been completed. There are now master restrictive covenants for the entire subdivision. The commercial neighborhood has been platted. The plat includes a large tract for the shopping center and a few outparcels. The large tract includes a separate "pad" tract. One area adjoining the platted property is designated "future development area". Access roads are in place.

Construction of The Shoppes at Sumac Park – The Zippy Development, LLC ("Zippy") has entered into two ground leases. One ground lease is for a single tract (more of a pad with parking) to The April Company. The April Company ("April Co".) plans to construct and operate a high-end department store. The second ground lease is to the Sum-Mac, LLC ("Sum-Mac") and includes the remainder of the commercial tracts. Sum-Mac plans to construct and lease out retail shops and restaurants. This will include outparcels. Both April Co. and Sum-Mac will need loans to construct the shopping center. Both companies and their lenders will need title insurance policies with leasehold endorsements. This section will focus on ground lease issues and a Reciprocal Easement Agreement between April Co. and Sum-Mac.

Leases to Retail Tenants – Sum-Mac will lease the retail space. This will include recorded leases to Restoration Barn and Way-Out Waffles. Other smaller tenants will have unrecorded leases. There will be leasehold policies (by endorsement) for Restoration Barn and its lenders. This section will focus on various claims of lien situations.

Sales of Outparcel – Zippy will sell an outparcel to PC Fangs. There will be policies to the outparcel purchasers and their lenders. Issues will focus on non-compete or exclusive use provisions.

This manuscript will address the title issues reported on the preliminary opinions for each of the above transactions. Repetitive issues will only be addressed once.

I. Construction of The Shoppes at Sumac Park

Preliminary Number 1 – Ground lease from Zippy to Sum-Mac, LLC. (attached as **Exhibit 15** with Commitment as **Exhibit 16**)

Sum-Mac plans to, but is not obligated to, construct the main shopping center tract and outparcels with the intention of leasing it to various retailers. They will need a construction loan.

Preliminary Number 2 - Ground lease to The April Co. (attached as **Exhibit 17** with Commitment as **Exhibit 18**)
It will have mostly the same issues as the Sum-Mac Preliminary.

The plat of the commercial neighborhood is attached as **Map III**. This plat includes the tracts covered by preliminaries 1 and 2.

A. Master Covenants, Conditions and Restrictions:

The Master Covenants, Conditions and Restrictions ("CCRs") for the entire subdivision were recorded prior to this transaction; therefore, they appear as an exception to title on the preliminary opinion. They will affect the continued development, use and enjoyment of the property. A title insurance policy will take exception to the CCRs, but may also provide certain affirmative coverages.

Discussion: The purpose of the CCRs is to establish a plan of development for the planned community known as Itchy Landing. The CCRs establish the governing owners association, common area, limited common area, easements, use limitations, set backs, and buffer zones. They provide reasonable growth, management and preservation of the various neighborhoods in the subdivision.

Use Limitations: The CCRs must be reviewed to assure that the proposed use (commercial retail) by Sum-Mac is allowed. The definitions section of the CCRs will presumably address the following:

- Nonresidential Neighborhood – A Neighborhood comprised exclusively of nonresidential units.

- Nonresidential Units – A portion of the real property comprising Itchy Landing which is intended for individual ownership, development and use for any permitted nonresidential purpose including, without limitation, offices, retail stores, neighborhood businesses, hotels, motels, churches, schools, and retirement or assisted living facilities….

Easements: Other matters which are of importance to Sum-Mac, as a grantee under a ground lease, include access to the property, utility easements, setbacks and buffer zones. These matters should be reviewed to assure that they will not detrimentally affect the use of the property. The following is an example of language that reserves access easements across roads and sidewalks within the subdivision:

> The declarant reserves for itself and hereby grants to the Association and each owner within Itchy Landing a perpetual, mutual, reciprocal and non-exclusive

easement of passage and use, both vehicular and pedestrian, over, across and through any and all sidewalks, streets, roadways, access areas, biking/walking/jogging trails which are located on any owners tract and which are intended for general use by the public.

The importance of addressing these matters in the master CCRs is best demonstrated by the case of Buie v. High Pont Assocs. Ltd. Partnership, 119 N.C. App. 155, 458 S.E. 2nd 111, 1995 N.C. App. Lexis 386 (1995). In the Buie case, the Court of Appeals held that the use of residentially restricted property for a drainage system which benefits an adjoining commercial tract violated the restriction and ordered an injunction. The adjoining commercial tract was not residentially restricted. Quoting Starmount Co. v. Memorial Park, 223 N.C. 613, 65 S.E. 2nd 134 (1951), the Court of Appeals stated "a covenant limiting property to residential use implies the property is not to be put into service incident to a forbidden commercial enterprise, even if the enterprise is located on adjacent unrestricted property." Starmount at 616, 65 S.E. 2nd at 137. The nature of a multi-use subdivision requires the coexistence of residential and nonresidential neighborhoods. Matters such as drainage/retention ponds often require easements across adjoining property. By establishing the required easements for the various neighborhoods in a master CCR, the problem in the Buie case is avoided.

Coverages related to CCRs: The ALTA Endorsement Forms 9, 9.1 and 9.2 (attached as **Exhibit 18A**) contain certain assurances relating to CCRs. These endorsements are called "comprehensive" because they give affirmative coverage on a variety of matters (see below).

The ALTA 9 is designed to offer additional coverages to a loan policy for certain matters regarding CCRs, encroachments and mineral rights. Among other items, these endorsements provide coverage against:

1. The priority or validity of the insured deed of trust being impaired by any restrictive covenants affecting the property;
2. Encroachments from the insured property onto adjacent land, or encroachments from adjacent land into the insured property;
3. Encroachments of improvements on the insured property into easements;
4. Environmental protection liens being filed against the insured property; and
5. Rights of others to use the surface of the insured property to extract minerals, etc.

The ALTA 9.1 is designed to offer specific coverages to an owner of unimproved property. The ALTA 9.1 provides similar, although less extensive, coverage for the owner as the ALTA 9 does for the lender. Among others, the coverage includes present violations of CCRs, encroachments onto adjoining land, and damage to buildings constructed after the date of the policy as a result of an exercise of mineral rights which existed at the Date of the Policy.

The ALTA 9.2 is designed to offer specific coverages to an owner of improved property. The 9.2 offers very similar coverages for the owner as the ALTA 9 does for the lender (though, again, less extensive). It also focuses on CCRs, encroachments and mineral right issues, but does not address any validity, priority or divestment issues.

Requirements for issuance of an ALTA 9 include:

> Receipt of satisfactory verification that no violation of any covenants, conditions or restrictions, no violation of any building setback lines, and no encroachment onto insured land or easements of improvements appurtenant to adjoining lands; and (2) certification from attorney that (a) the covenants, conditions or restrictions do not provide for an option to purchase, right of first refusal or the prior approval of a future purchaser or occupant, and do not provide a right of reentry, possibility of reverter or right of forfeiture; and (b) no third party currently has the present or future right to any minerals located on insured land. Owners' association dues and special assessments, if any are applicable, must be paid current through closing.

Requirements for issuance of an ALTA 9.1 include:

> Receipt of (1) current and accurate survey of the land evidencing no violation of any covenants, conditions or restrictions, no violation of any building setback lines, and no encroachment onto insured land or easements of improvements appurtenant to adjoining lands; and (2) certification from attorney that (a) the covenants, conditions or restrictions do not provide for an option to purchase, right of first refusal or the prior approval of a future purchaser or occupant, and do not provide a right of reentry, possibility of reverter or right of forfeiture; and (b) no third party currently has the present or future right to any minerals located on insured land.

Requirements for issuance of an ALTA 9.2 include:

> Receipt of (1) current and accurate survey of the land evidencing no violation of any covenants, conditions or restrictions, no violation of any building setback lines, no encroachment of improvements appurtenant to insured land onto adjoining lands or easements and no encroachment onto insured land or easements of improvements appurtenant to adjoining lands; and (2) certification from attorney that (a) the covenants, conditions or restrictions do not provide for an option to purchase, right of first refusal or the prior approval of a future purchaser or occupant, and do not provide a right of reentry, possibility of reverter or right of forfeiture; and (b) no third party currently has the present or future right to any minerals located on insured land.

Resolution: Exceptions for the master CCRs will be included on both the owners and loan policies. The exception for the loan policy will contain affirmative coverage relating to violations and forfeitures. A sample of the affirmative coverages is as follows: “This

policy insures against loss or damages as a result of a violation of same. This policy insures that a violation of same will not cause a forfeiture or reversion of title."

An ALTA 9 and/or 9.1 may be issued if the above requirements are satisfied.

B. Recorded Plat Issues:

Any plat of the property must be reviewed to determine matters which will affect the use and enjoyment of the property. These may include access to the property, easements which benefit or burden the property, set backs and buffer zones. In the plat for The Shoppes at Sumac Park there is a question of access to Lot 1 (The April Co. lot – Preliminary #2) and an issue regarding an easement to retention pond.

Discussion:
Access: When a plat is recorded for a subdivision which shows roads and owners purchase lots as shown on the plat, the plat acts as a dedication of an easement over the roads in favor of the lot owners on the plat. Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E. 2d 102 (1960). Once owners purchase lots as shown on the plat, they have relied on the plat and the developer cannot interfere with or deny the owner's rights of ingress and egress over the streets in the subdivision. Oliver v. Ernul, 277 N.C. 591, 178 S.E. 2d 393 (1971).

In the plat for The Shoppes at Sumac Park, all the lots on the plat abut a platted road. As a result, all lots do have access to a public right of way. When older plats are involved, access to lots is not always created by the plat. Lots often must rely upon another form of access. Easements may also be created by an express grant, reservation or implication. Other easements needed for the shopping center tract will be created under a Reciprocal Easement Agreement in a later section.

Easement to Retention Pond: The plat of The Shoppes at Sumac Park indicates that an easement to a retention pond does exist. However, the complete easement and pond is not on the actual platted property. Questions may exist as to whether or not the developer appropriately created this easement across other neighborhoods in the subdivision. Restrictions on the burdened and conveyances of the burdened property may prevent the proper creation of the easement. Title to the burdened tract may need to be searched to determine that the developer still ha ability to create the easement.

Resolution:
Access: The Plat creates access to a public right of way for the subject lots of this transaction.

Easement to Retention Pond: In the present transactions, Zippy still owned all the property burdened by the easement and properly created the easement in plats to other neighborhoods and in the Master CCRs.

C. Pre-existing Deed of Trust:

Zippy has granted a deed of trust on the fee to the property on the entire plat of The Shoppes at Sumac Park to Bob's Big Bank. As the deed of trust is recorded, it appears as an exception to title in both Preliminaries #1 and #2. Also recorded immediately following the deed of trust are an Assignment of Leases and Rents and a UCC 1.

Discussion: A prior deed of trust as a lien on the property is rarely acceptable as exception to title, so this lien must be subordinated, canceled, or the property must be released. In a purchase of a fee interest, the deed of trust will need to be paid and canceled/marked satisfied of record. (The Mortgage Satisfaction Act is discussed in the Residential Sales section of the manuscript, though it applies to commercial transactions as well in North Carolina.) In a leasehold transaction, the fee owner usually does not plan to satisfy the deed of trust. A common solution is a Subordination Non-Disturbance and Attornment Agreement ("SNDA"). The SNDA is discussed below.

Does cancellation of a Deed of Trust also cancel an Assignment of Leases and Rents? In commercial transactions, it is common that an assignment of leases and rents is recorded immediately following a deed of trust. The assignment acts as further security for the underlying debt and addresses the lender's rights with regards to any leases placed on the property by the borrower. Cancellation or release of a pre-existing assignment will be required on a commitment where a prior deed of trust is also being canceled or released. This is best accomplished by including cancellation or release of the assignment language in the cancellation or release of the deed of trust. A common problem occurs when the deed of trust is canceled and nothing is placed of record regarding the assignment. Many times the terms of the assignment are clear that the cancellation of the deed of trust doe,s in fact, cancel or release the assignment. As a result of a low risk of claim from an uncanceled assignment, title insurers may insure without exception for the assignment, if the related deed of trust is canceled.

Resolution: A requirement would be included in the commitment for the cancellation or release of any pre-existing deed of trust, assignment of leases and rents, and UCC 1s.

D. Claim of Lien against Fee Owner:

A claim of lien has been filed against the fee owner, Zippy Development, LLC ("Zippy"). The claimant is the grading company, Joe's Grading, Inc.("Joe's Grading"). The claim of lien appears as an exception on the title opinion.

Discussion: As a practical matter, the filed claim must be reviewed to determine the status of the parties involved, whether or not it applies directly to this property, and whether or not it is still in effect. In the present case, the claim is made by a party, Joe's Grading, that contracted directly with the owner of the fee, Zippy. This entitles Joe's Grading to a lien on the real property involved pursuant to NCGS § 44A-8, which states:

> Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on the property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to such contract.

This type of lien is often referred to as a "prime or general contractor's lien". It differs from other liens in that it is based upon a contract (express or implied) directly with the owner of the real property, even though we typically think of a grading contractor as a "subcontractor." This type of claim is entitled to a lien directly on the real property. Other liens must rely upon indirect matters, such as a lien on funds, to obtain a lien on the real property. (Other claims of lien were discussed earlier in the context of development financing and are discussed later in this section.)

The priority of the claim of lien will relate back until the date of the first furnishing of labor or materials ("first furnishing") to the real property being improved. As a result, the lien may "relate back" and obtain priority over a deed to a new owner or a deed of trust for the benefit of a new lender. This ability to "relate back" necessitates accurate lien waivers or affidavits regarding recent improvements to real property involved in a conveyance.

In order to perfect its lien, Joe's Grading must file a claim of lien within 120 days of the last furnishing of labor or materials ("last furnishing") to the real property being improved. The last furnishing date may be extended by returning to the site to complete minor items, if the additional work was 1) contemplated in the contract; 2) required or consented to by the owner; 3) not "trivial" in nature; and 4) not merely done for the purpose of extending the 120 day limit. Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963) **citing** Beaman v. Elizabeth City Hotel Corp., 202 N.C. 418 (1932), . The claim of lien must be filed in the Clerk of Superior Court's Office in the county in which the subject property is located.

The claim of lien must contain the following information:

1. Name and address of the contractor claiming the lien;
2. Name and address of the owner of the subject real property at the time the lien is filed;
3. Description of the real property subject to the lien (Street address, tax parcel number or other means are sufficient so long as they reasonably describe the property. Mebane Lumber Co. v. Avery and Bullock Builders, Inc., 270 N.C. 377 (1967))
4. Date of first furnishing of labor or materials.
5. Date of last furnishing of labor or materials.
6. General description of the labor or services provided.

7. The amount claimed.

The contents of the claim of lien are normally strictly construed. Inaccurate information will result in the invalidation of the claim of lien. For example, in Brown v. Middleton, 86 N.C. 63 (1987), the Court invalidated a claim of lien which incorrectly stated the last date of furnishing (the correct date resulting in the claim being filed after 120 days). An exception for minor or obvious errors may exist to this rule. The Mebane case did not invalidate a claim of lien which misstated the first furnishing date (a month after the date of the filing of the claim). Claim of lien cannot be amended. A new claim must be filed within the 120 day period.

The claim of lien is enforced by the filing of a civil lawsuit. The lawsuit must be filed within 180 days of the date of last furnishing. The lawsuit is normally filed in the county in which the claim of lien was filed, but may be filed in a different county so long as the claimant files a lis pendens in each county in which real property subject to the lien is located. N.C.G.S. § § 44A-13(c).

In the present transaction, the claim of lien by Joe's Grading was timely filed and a lawsuit to enforce is filed and pending. The claim does apply to the subject property. Zippy disputes the validity of the claim upon a number of grounds (most of which have merit). As a result, a requirement for the cancellation/release/subordination of the claim of lien will be included in the commitment. Under N.C.G.S. § § 44A-16, a lien may be discharged by the following methods:

1. The claimant, his attorney or agent may release by his signature given in the presence of the Clerk;
2. The owner may provide to the Clerk an instrument of satisfaction or release of claims, stating that the indebtedness has been paid in full and acknowledged by the claimant of record;
3. Failure of the claimant to file a lawsuit to enforce the claim within the 180 day period (Lapse);
4. Docketing of a judgment in favor of the owner;
5. Payment of all sums owed to the clerk;
6. Purchase of a surety bond equal to 125% of the amount of the claim which bond must be deposited with the clerk.

Upon compliance with one of the above methods, the real property may be treated as free and clear of the claim of lien.

In some cases, a title insurer may be willing to hold funds in escrow in order to "insure over" a claim of lien. Due to the risk involved and the potential claims, title insurers are extremely limited in their ability to hold escrow in these situations. Since the property would not be released from the lien by the escrow, the new proposed insured will presumably be a necessary party to any litigation, requiring defense costs which may be significant, as well as uncertain outcomes including complete loss of title to the property.

An additional matter to consider is the effect of claims of liens which do not have priority over the subject conveyance. For example, a deed of trust which is recorded prior to the first furnishing date, but will make disbursements under future advances provisions after the first furnishing. So long as the deed of trust includes the language required by N.C.G.S. § § 45-68 to create a future advances deed of trust, the priority of the advances will relate back to the recording of the deed of trust and, thus, have priority over the claim of lien. Perry v. Carolina Builders Corp., 128 N.C. 143, 493 S.E.2d 814 (1997). To meet the requirements of N.C.G.G. § 45-68 the deed of trust must show (a) that it is given wholly or partially to secure future obligations; (b) the amount of present obligations secured, and the maximum principal amount, including present and future obligations, which may be secured at any one time; and (c) the period within which such future obligations may be incurred, which shall not be more than 15 years beyond the date of the security instrument. If the amount of an advance is in excess of the maximum principal amount, then the priority of amount in excess will not relate back to the original recording date. In addition, it is important to note that an IRS lien will take priority over advances made more than 45 days after the filing of said lien. 26 USCS § 6321

Claims of liens which do not involve the subject property, but are against the owner or general contractor should also be considered. These may indicate a financial problem with the individual which will eventually extend to liens on the subject property. The title insurer should be consulted.

Resolution: In order to satisfy the requirement for the cancellation or release of the claim of lien, Zippy obtains and deposits a surety bond with the Clerk.

E. Prior Memorandum of Lease:

Preliminary #1 (Sum-Mac transaction) reports that a Memorandum of Lease in which The April Co. is the lessee appears of record. The legal description for the Memorandum includes all the lots contained on the plat of The Shoppes at Sumac Park.

Discussion: The reason this memorandum of lease is an issue for the lease to Sum-Mac is that the legal description includes the property (Lots 1-8) that is to be leased to Sum-Mac. The April Co. plans only to lease Lot 1 of the Shoppes at Sumac Park; however, in order to obtain rights all easements affecting Lot 1, they required the entire shopping center tract be included in the legal description in the memorandum.

In order to serve as proper notice to third parties, N.C.G.S. § § 47-118 requires that a memorandum of lease include

1. Names of the parties thereto;
2. A description of the property leased
3. The term of the lease, including extensions, renewals and options to purchase, if any; and
4. Reference sufficient to identify the complete agreement between the parties.

If these requirements are met, and the lessor named is the fee owner of the property such that the memorandum will appear in the chain of title of the property, then the memorandum shall be sufficient notice and same the force and effect as if the entire written lease had been registered. N.C.G.S. § § 47-120.

Assume that in the present transaction The April Co. memorandum of lease meets the above statutory requirements. As such, it is clearly notice of a prior claim to title that must be addressed. Because the description was included for easement purposes, The April Co. may be willing to subordinate its interest in the Lots 2-8, other than the easement interests. This would allow the title insurer to treat the memorandum of lease as a subordinate matter on its policies for Lots 2-8. The title insurer would have to except to any easement interests burdening Lots 2-8.

A second solution may exist, if the memorandum of lease contains a statement that any discrepancies between the entire lease agreement and the memorandum thereof will be controlled by the lease agreement. In this case if the lease agreement only contains Lot 1 as it legal description, then the title insurer may be able to insure without exception for the memorandum. Satisfactory verification of the contents of the lease agreement and interests of The April Co. would be required. An indemnity from the lessor may also be required. Exception would also be needed for any easements which burden Lots 2-8.

Any additional terms and conditions contained in any memorandum of lease must be carefully examined to insure they do affect title to property involved in a transaction. For example, options to purchase, use limitations and other matters may be contained in a memorandum of lease. These matters are more particularly discussed in other sections of the manuscript.

Abandonment of Lease Agreement: Whether or not a prior lease agreement has been abandoned can be a difficult matter to establish. The terms of the lease agreement should always be reviewed. Surrender of possession must be verified. In addition, affidavits and indemnities may be required prior to obtaining title insurance over prior lease agreement which has reportedly been abandoned.

Resolution: The April Co. agrees to execute and record a subordination agreement regarding its interest in Lots 2-8.

F. Zoning:

The lender for Sum-Mac requires a zoning endorsement. Sum-Mac also requires this endorsement. (See **Exhibit 18B**)

Discussion: Zoning matters normally fall within Exclusions from Coverage #1 of both the ALTA Loan Policy (10-17-92) and the ALTA Owners Policy (10-17-92). This exclusion addresses any law, ordinance or governmental regulation. In order to obtain coverage over zoning matters a policy must be endorsed. The ALTA 3 and 3.1 are designed to address certain zoning coverages.

The ALTA 3 endorsement is designed to inform the insured owner and lender of the zoning classification under which the land falls. It also insures against loss or damage that may be sustained by reason of inaccuracies in the information supplied or a final determination invalidating the zoning ordinance establishing the classification and resulting prohibition of such uses. It is generally issued on policies with vacant land, but may also be issued when the land includes improvements under construction or completed.

Requirements for issuance of an ALTA 3 include the following:

> Satisfactory verification (1) of the current zoning classification of the land; (2) that the land has been so zoned for at least two months; and (3) of the specific Permitted Use for which the land is currently or intended to be used, cited exactly as set forth in the applicable zoning ordinance or regulation. In North Carolina, title companies rely upon attorneys for the party requesting the endorsement to provide the required information. The attorney may certify to these matters, provide a zoning letter from the appropriate governmental authority, provide a zoning opinion letter from an approved engineering or surveying firm, or provide clear evidence, such as the current zoning map and applicable ordinance, which identifies the zoning classification and permitted uses. The title company, in its discretion, will determine what form of verification is appropriate with regards to each property.

The title company will require that the proposed use by the insured to be entered in the endorsement be an exact match to one of the permitted uses under the zoning ordinance. For example, in the transaction described by Preliminary #2, The April Co. plans to use the land for a "department store" and the ordinance allows the land to be used for "shopping centers", then the permitted use inserted in the endorsement will be "shopping centers".

In determining the zoning classification of a property, the certifying party should consider the constitutionality of the ordinance under both federal and state constitutions, and the compliance of all state laws in the process of the adoption of the ordinance for the property. This includes, but is not limited to, propriety of notice, compliance with "open meeting" laws, presence of a quorum of necessary officials, approval of an appropriate majority of officials, approval of any other public officials or bodies, proper recordation or filing of classification, if necessary, and the expiration of any appeal period. As a risk matter, the longer the particular zoning has been in place, the lower the risk and the less concerned the title insurer would be with this procedural verification.

The ALTA 3.1 endorsement provides the same coverages as the ALTA 3. It also insures against losses from final decrees prohibiting the use of the land for the specified purposes allowed under the zoning classification because certain physical characteristics of either the land or structure located on it violate the ordinance, or requiring the removal or alteration of the structure located on the land due to these violations. The physical

characteristics addressed are (i) area, width or depth of the land as a building site for the structure; (ii) floor space area of the structure; (iii) setback of the structure from property lines of the land; (iv) height of the structure; and, (v) number of parking spaces. The endorsement may only be issued with improved land.

Requirements for issuance of an ALTA 3.1 include the same requirements as an ALTA 3 as well as verification that the land is in compliance with all applicable zoning regulations, specifically including the physical characteristics described above. For certification of these matters, the title company will rely upon the same methods as described under the requirement for the issuance of an ALTA 3. In determining the additional requirement (regarding physical characteristics of the property) for issuance of an ALTA 3.1, certifying party must analyze the zoning ordinance regulations regarding the building site, the floor area of the structure, setbacks, height of the structure, and the number of parking spaces. If such regulations exist, then a current and accurate survey will be required to evaluate compliance with the regulations.

The properties for The Shoppes at Sumac Park and The April Co. are zoned for "mixed use". This zoning classification allows "retail sales establishments" as an accepted use. Certification of the information will allow an ALTA 3 to be issued. Once the property is improved and requirements regarding the improvements have been satisfied, then an ALTA 3.1 could be issued.

Mixed Use Ordinances: A Mixed Use zoning district provides an alternative to most current zoning districts, which separate areas into only commercial or only residential use. Mixed Use attempts to coordinate both uses in neighboring properties and encourage pedestrian activity. The plan also reduces reliance on individual vehicle, foster transit usage, and enhance environmental quality. The success of such developments in various locations has helped increase their popularity in North Carolina.

Mixed Use ordinances usually contain extensive regulations. In addition to normal site, floor space, height, setbacks and parking matters. Mixed Use ordinances may address the exact percentage of acreage dedicated to the variety of allowed uses. For phased projects, the percentages of a completed use may be regulated during construction. For example, no one use may occupy more than 60% of the constructed acreage. This means before one use, such as commercial, is complete, a sufficient amount of acreage for another use, such as residential, must also be complete. This has potential to cause great and expensive delays in construction as well as tight negotiation if different parties are involved in the commercial versus the residential construction. Extra care and planning should be employed to insure timely compliance with the ordinance.

Resolution: An ALTA 3 may be issued upon verification of the zoning classification and permitted use.

G. Reciprocal Easement Agreement:

Both Sum-Mac and The April Co. wish to enter into a Reciprocal Easement Agreement ("REA"). This agreement will create interests, some of which may be insured, and burdens that will require exceptions in the applicable title insurance policies.

Discussion: A key element to success for all parties involved in The Shoppes at Sumac Park is the ability to co-exist in a manner that is beneficial all the parties' business interests. This will require the establishment of cross easements, parking agreements, and other matters affecting the use of and title to the property. An REA will address these matters. In addition, the REA may address the use of common area and limited common area, construction requirements, signage, responsibility for construction of easements, development of outparcels, modifications to the shopping center, and a variety of other matters.

In the present case Sum-Mac and The April Co. have entered into an REA. Zippy has also executed the agreement as the fee owner. The REA addresses numerous matters. For the sake of example, this manuscript will discuss ingress and egress easements and parking plans. The REA acts as an express grant of easement. An express grant of easement requires the following to create a valid easement:

1. The easement must be in writing, as it is an interest in real property and subject the Statute of Frauds. Tedder v. Alford, 128 N.C. App. 27, 493 S.E.2d 487 (1997);
2. The dominant property and servient property should be "described with reasonable certainty." Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1977);
3. The easement document must be "sufficiently certain to permit the identification and location of the easement with reasonable certainty." Wiggins v. Short, 122 N.C. App. 322, 327, 469 S.E.2d 571 (1996).

The REA contains and incorporates a site plan which sufficiently identifies the dominant and servient property and the location of the easements. The following is a sample of REA language addressing easements across common areas:

> Each party hereby conveys and grants to the other party, and its respective tenants, licensees, invitees, customers, agents and employees a non-exclusive easement and right of way for pedestrian and vehicular traffic over and upon the Parking Areas, Perimeter Sidewalks and other sidewalks, walkways and roadways on the Grantor's tract including (without limitation) the access drives and other roadways shown on the Site Plan, together with the right to use such Parking Areas, sidewalks, walkways, access drives and other roadways for adequate and unobstructed pedestrian and vehicular passage, for access to and from and between the Grantee's respective tract and the streets, highways and alleys adjacent to and abutting the Shopping Center Site and to and from the individual parking spaces in the Parking Areas on the Shopping Center Site.

Other language in the REA indicates that all easements created by the agreement are appurtenant.

The REA addresses any modifications to the easements created by the agreement. This usually requires the consent of all parties to the agreement. However, in some cases, the agreement may provide that one party can unilaterally modify an easement. The validity of such authority may be in question.

Insurable Interests: Both Sum-Mac and The April Company and their lenders request that all easements created by the REA be a part of the insured legal description. In order to insure such easement, the title company will require a certifying attorney to certify that the easements are properly created and to search the servient tract for any encumbrances which may affect the easement.

In many cases where the easements are being created by a new REA, confusion arises as to who is responsible for certifying the easements. Local counsel has been retained to search the title to the property, but has not been asked to give opinion on the easements in the REA, which has yet to be recorded. While out of state counsel will often look to the title company to review the documents for insurability. The negotiation of the coverage needed and the responsibility for opinions and title certifications must be clearly understood by all.

An additional issue which periodically arises is a request for insurance of "all rights" under an REA or other more generic language. A title insurance policy insures only real estate title interests, not related personal property or personal obligations which may also be contained in the REA instrument.

REA as exception: Because the REA contains easements and other provisions which affect title to an insured property, exception for the terms and conditions of the REA will be included on any policy insuring title to property which is the subject of an REA.

Resolution: Appurtenant Easements created by the REA between The April Co., Sum-Mac, and Zippy will be included in the legal description. This accomplished by including the following language in the Schedule C of the policy: "Together with that certain Reciprocal Easement Agreement between The April Co., Sum-Mac, and Zippy recorded at Book **, Page ** of the ** County Registry." Exception for the terms and conditions of the REA will be included in all policies.

H. Survey Matters:

Sum-Mac has obtained a survey of the property which it plans to lease. The survey reflects a number of items which affect the property and are listed in the survey exception to the title commitment. See attached **Map IV**, a survey for Lot 2 of the Shoppes at Sumac Park. Sum-Mac's lender insists upon a "clean" title commitment and objects to numerous matters contained in the survey exception.

Discussion:
(Note: General survey requirements, including ALTA/ACSM matters, are discussed in the Development and Financing section of this manuscript.)

In addition to matters reflected on the plat of the property, the survey includes easements of record (including those from the REA) parking spaces and areas, pedestrian areas, curb and gutter, power poles, fire hydrants, water meters, power lines, telephone lines, dump pad, and RCPs. Title insurers are often asked to remove the above-described matters from their exceptions to title. Removing the matters which affect title to the property can result in a claim against the policy. For example, a lender may object to a utility easement which burdens the property. Removing the easement from the commitment does not remove it from title to the property. If the easement is exercised by the beneficial party, the use of the insured property may be limited or otherwise damaged. This could result in the insured and the title insurer suffering a loss or damage. Without the exception the title insurer would be responsible for the diminution in value to the property, but may not be responsible for post-policy collateral losses to the insured.

A common approach to resolve this problem is to include the specific survey exception with affirmative coverage over the matter which is the true concern of the insured. For example, the actual existence of the utility easement may not be the concern of the lender, but rather that the easement will somehow interfere with the improvement or the properties' intended use. Whether or not an easement will interfere with improvements can be determined with a survey of the property which includes the location of the improvements and easement. If the easement does not directly affect the improvements and easement agreement has been reviewed for adverse matters, then affirmative coverage language may be included. Examples of such language include:

> NOTE: This policy insures that the foregoing easement(s) will not interfere with the intended use of the land or improvements located thereon.
>
> NOTE: The Company hereby insures that the improvements are not located on said easement(s) and said easement(s) do(es) not adversely affect the land.
>
> NOTE: This policy insures against loss or damage resulting from the exercise, maintenance or attempted enforcement of said easement(s).

In most cases the affirmative coverage is acceptable to the lender and the title company.

Affirmative coverage may also be used with easements which are non-specific with regards to location. These are generally referred to as blanket easements and are used by utility companies to provide services to the improvements located on the property. These easements may be noted on the survey, but cannot be plotted. Examples of affirmative language include:

NOTE: The foregoing easement(s) is/are non-specific as to location; but the Company insures that the exercise of rights granted by said easement(s) will not interfere with the intended use of the land or improvements located thereon.

Resolution: Each specific exception from the survey will be addressed to determine its affect on title to the property. Affirmative coverage will be included where appropriate.

I. Requirement for a Valid Lease Agreement and Deed of Trust:

The Commitment requires the recordation of a lease agreement (or a memorandum thereof) between Sum-Mac and Zippy. It also requires the recordation of a deed of trust encumbering Sum-Mac's leasehold interest. Title insurers rely upon the certifying attorney to determine that a lease agreement creates a valid leasehold interest and that deed of trust creates a valid lean upon the leasehold interest.

Discussion: The basics of creating a valid lease agreement are not overly complicated under North Carolina law. The North Carolina Statute of Frauds requires that a lease for a term of greater than three must be in writing and signed by the parties charged to be valid. N.C.G.S. § § 22-2. For a lease with a term greater than three years, either the lease agreement or a memorandum thereof pursuant to NCGS § 47-118, must be recorded in order to act as notice and establish the priority of the leasehold interest. NCGS § 47-18. (See subsection E above for more discussion regarding the memorandum of lease.)

In addition, the lease agreement must include an acceptable legal description of the leased property. The test for an acceptable legal description is whether or not the property can be located on the ground. Many lease agreements only contain site plans which may show the dimensions of the leased premises, but not the exact location. This form of legal description is not acceptable for title insurance.

The more complicated issues regarding lease agreements arise in the commercial context. Commercial leases are not only used as a means of obtaining space in which to operate a business, but also as a device to finance those operations. Sum-Mac and The April Co. are tenants who will mortgage their leasehold estates as security for loans. This security – the leasehold deed of trust – grants the lender only the interest that the tenant has in the property. In other words, the security is limited by the terms and conditions of the lease agreement. If for any reason the lease is terminated, the entire security for the loan may be lost. As a result, lenders will require that certain terms and conditions be included in the lease agreement. Examples of issues which may affect the lender's title under the deed of trust include, but are not limited to, the following:

1. Permission – The lease agreement must allow the leasehold interest to be mortgaged and cannot contain restrictions which exclude potential lenders. Permission is deemed granted if the lease agreement is silent on the issue. Miller v. Lemon Tree Inn, 32 N.C. App. 524, 233 S.E.2d 69 (1977). It is the best practice to include express permission. If the lease agreement prohibits

assignments and is silent on mortgage permission, an argument can be made that the mortgage is an assignment prohibited by the terms of the lease.

2. Ability to Cure – The lease agreement must provide the lender the ability to cure tenant defaults. Without this, the lender's security is totally at the mercy of the non-performance of the tenant-borrower.
3. Term of the Lease – The term of the lease should be in excess of the maturity of the loan. This will prevent the security from disappearing prior to repayment of the debt. In addition, any statutory requirements must be complied with. For example, N.C.G.S. § § 58-7-179(a) requires a term of at least 30 years for a loan made by a North Carolina insurance company on leasehold interest.

Title insurers require that the lease agreement include permission for the mortgage as their policy insures the validity and enforceability of the interest and lien created by the leasehold deed of trust. Title insurers also require that the lease agreement and leasehold deed of trust also comply with any statutory requirements, such as the length of term. Matters such as the lender's ability to cure are not required as the longevity of the security is not insured. To be clear on this point, title insurers will except for the terms and conditions of the lease agreement.

Subordination Non-Disturbance and Attornment Agreement – Any pre-existing lien against the fee estate of the landlord will affect the leasehold interest of the tenant and its lender. For example, Zippy has placed a deed of trust of record prior to entering the lease agreement with Sum-Mac. A foreclosure of this deed of trust would cut off the leasehold interest. This is unacceptable to Sum-Mac and its lender. One solution to this problem is to require the fee interest to be unencumbered or that its encumberances be specifically subordinated to the leasehold interest. This may be unacceptable to the fee lienholders.

An alternative solution is to enter a Non-Disturbance and Attornment Agreement ("NDA"). Under the NDA, the fee lienholder agrees not to disturb the tenant's possession of the property, so long as the tenant is not in default under the terms of the lease. In return, the tenant agrees to attorn to and recognize the fee lienholder as the landlord under the lease in the event the fee lienholder takes possession of the fee interest as a result of foreclosure or other default by the landlord under the fee deed of trust. A sample attornment provision is as follows:

> If Lender shall succeed to the rights of the Landlord under the Lease through possession or foreclosure action, delivery of a deed or otherwise, or another person purchases the premises upon or following foreclosure of the mortgage, then at request of the Lender or such purchaser ("Successor Landord), Tenant shall attorn to and recognize Successor Landlord as Tenant's landlord under the Lease and shall promptly execute and deliver any instrument that Successor Landlord may reasonably request to evidence such attornment. Upon attornment, the Lease shall continue in full force and effect as a direct lease between Successor Landlord and Tenant…

In some cases, a Subordination Non-Disturbance and Attornment agreement ("SNDA") is needed from the tenant, subordinating to the new fee lender The SNDA is used to subordinate a pre-existing leasehold interest to a new deed of trust on the fee interest. For example, if Zippy refinanced their loan on the fee interest, the new lender would object to being junior in priority to Sum-Mac's leasehold interest. The SNDA would subordinate the leasehold interest to the lien of the new deed of trust. It would also include non-disturbance provisions. The SNDA would allow the leasehold interest to be shown as a subordinate matter on the new loan policy for the deed of trust. However, the title insurer would take exception to the terms and conditions of the SNDA as it contains obligations on the part of the lender.

The SNDA may also be drafted in such a manner as to subordinate the lien of the fee lender to the leasehold interest. This occurs when required by the leasehold owner or their lender. The fee lender obviously must agree to the subordination. They may be willing to do so, because the property is more valuable with a tenant under a long term lease agreement. Again, the title insurer would take exception to the terms and conditions of the SNDA as it contains obligations on the part of the lender and tenant.

NOTE: By statutory provision created in 2003, the requirements for a valid and enforcemable subordination have been broadened to a "four corners" approach pursuant to N.C.G.S. § 39-6.

Requirements for a Leasehold Deed of Trust - The leasehold deed of trust must meet all the requirements of a deed of trust on a fee interest. These include:

1. Must be in **writing**.
2. Must be **dated,** the same date as the Note.
3. **Grantor-Lessee** must be named and be ALL of the owners of the leasehold interest in the property. To avoid ambiguity, this should include all potential leasehold ownership interests, such as spouses, life tenants and remaindermen. Grantor must be capable of granting interest, not a minor or incompetent, and an entity must be in duly formed and in good standing in the state of their registration or incorporation
4. Must name a **trustee**, if a DT. (If a true mortgage, then no trustee need be named.) Trustee must be capable of holding title to property and be someone other than the beneficiary. It can be any entity (corporation, partnership, limited liability company or individual), from North Carolina or elsewhere
5. Must name the **beneficiary** (or "bearer"). Must be the same person or entity as the Note.
6. Must contain **granting clause/operative words of conveyance** (e.g. "the Grantor has bargained, sold, given, granted and conveyed and does by these presents bargain, sell, give, grant and convey to said Trustee, his heirs, or successors, and assigns, the parcel of land situated . . .).
7. Must contain sufficient **legal description** of the property. Must be the same property certified, usually the same as in the deed into the Grantor of the deed of trust. This should include reference to the particular lease and its recordation.

8. Must recite the **indebtedness** (sum certain) and refer to the **Promissory Note**, including **maturity date** of said Note. If for future advances, it must state that it is intended to secure future advances, has a stated maximum amount, a stated current outstanding amount and that all advances must be made within 15 years.
9. Must state that the DT/Mortgage is to **secure the payment** of the indebtedness.
10. Must contain a **defeasance clause** (e.g. "If the Grantor shall pay the Note secured hereby in accordance with its terms, . . . and shall comply with all of the covenants, terms and conditions of this Deed of Trust, then this conveyance shall be null and void and may be canceled of record at the request and expense of the Grantor.").
11. Should contain **power of sale** provisions, if a DT (e.g. if there is a default in payment of sums due under the Note or a default in any other covenants, terms or conditions of the Note or Deed of Trust, . . . then it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the herein land conveyed at public auction for cash . . . and convey title to the purchaser.).
12. Must be properly **executed** by grantor and acknowledged by a **notary public**. Use statutory forms for acknowledgments wherever possible, including the statutorily defined officers, to assure that conveyances are recordable and marketable.
13. Individual or partnership "Seals" are no longer required on conveyances. However, **corporate seals** should still be affixed in order to have the benefit of the statutory presumption of authority of the signing officers.
14. Must be **recorded** in all counties where any portion of the property is located.

Resolution: The lease agreements for Sum-Mac and The April Co. must comply with all statutory requirements, contain permission to mortgage, and should also contain any other terms and conditions required by their lenders.

J. Leasehold Endorsements:

Sum-Mac and The April Co. both want title insurance for their respective ground lease interests. Both of their lenders require title insurance on their deeds of trust. The standard owners and loan policies (dated 10-17-92) are designed to insure fee interests in real property. The coverages and damage valuations are based upon expected issues which may affect fee interests. (See **Exhibit 18C)**

Discussion: Leasehold interests created by a satisfactory recorded lease agreement (or memorandum pursuant to N.C.G.S. § 47-118) and the lien of a deed of trust encumbering that recorded leasehold interest may be insured. As with a fee interest in real property, title insurance is based upon a title opinion from an approved attorney. All prior liens or defects reported on the attorney's opinion for the lessor's interest should be included as exceptions on Schedule B of the policy.

From 1975 until to 2001, ALTA had approved policy forms for designed for usage when the insured interest was a leasehold interest or a loan on a leasehold interest. These policies were designed to provide insurance for space tenants that had no significant

investment in tenant improvements. As a result, they did not provide compensation for the value of improvements, if lost, or legitimate uses, if they are impaired as a result of a matter covered by the policies. In 2001 ALTA addressed these problems by adopting the ALTA 13 and 13.1 endorsements. Leasehold interests are now insured by inclusion of an ALTA Endorsement Form 13 (Owner) or 13.1 (Loan) with the standard ALTA title insurance policy applicable. (NOTE: The prior leasehold policies are no longer approved ALTA forms.)

The endorsements provide all existing coverages under the prior policies and coverage for the following matters:

1. Value of Improvements: The endorsements define leasehold improvements as "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." The value of any such "Leasehold improvements", which are not salvageable, are included in the calculation of losses resulting from eviction based on a matter insured by the policy.
2. Valuation of Estate or Insured Interest: The endorsements provide that after the insured has been evicted, the loss or damage shall consist of the value of the remaining portion of the duration of the lease and any Tenant Leasehold Improvements existing on the date of the eviction. These matters should be considered in determining the amount of insurance.
3. Miscellaneous Items of Loss: Various miscellaneous items of loss are also included in computing loss or damage. These include removing and relocating any personal property, rents or damages for use or occupancy of the land prior to the eviction which the insured is obligated to pay, expenses incurred in securing replacement leasehold, and various other matters.
4. Violation of Covenants or Restrictions of Record: The endorsements provide for recognition of loss an insured may sustain if it cannot use the premises for the intended purpose, if the lease allowed such purpose, as a result of a matter covered by the policy. This coverage relates to the enforcement of covenants and restrictions. It does not include coverage over zoning ordinances unless accompanied with a special endorsement, such as an ALTA 3.1.

ALTA Endorsement Form 13 (Leasehold - Owners) (Rev. 1/17/04) is an endorsement providing additional tailored coverages for the lessee-owner of a leasehold estate, replacing the former ALTA Leasehold Owner's Policy. Requirements for issuance of ALTA Endorsement Form 13 (Leasehold-Owners) (Revised 1/17/04):

> Receipt of verification of recordation of satisfactory lease (or memorandum thereof) evidencing the leasehold interest to be insured.

ALTA Endorsement Form 13.1 (Leasehold -- Loan) (Rev. 1/17/04) is an endorsement providing additional tailored coverages for the lender for which the security interest is in

a leasehold estate, replacing the former ALTA Leasehold Loan Policy. Requirements for issuance of ALTA Endorsement Form 13.1 (Leasehold-Loan) (Revised 1/17/04):

> Receipt of verification of recordation of satisfactory lease (or memorandum thereof) and leasehold deed of trust evidencing the leasehold interest to be insured.

Resolution: Upon certification that a valid lease exists and said lease or a memorandum thereof has been recorded, the leasehold owner's endorsement (ALTA Form 13) will be issued. Upon certification of the recordation of a deed of trust which encumbers the leasehold property, the leasehold lender's endorsement (ALTA Form 13.1) will be issued.

II. Lease to Retail Tenant

Preliminary Number 3 – Lease between Sum-Mac and Restoration Barn for a large retail space which is a portion of Lot 2 of The Shoppes at Sumac Park. Sum-Mac is in process of leasing out other retail space contained within Lot 2. (Note – Restoration Barn will face many of the same issues and concerns as Sum-Mac and The April Co. Issues that have previously been discussed will not be readdressed. These include CCRs, REAs, prior liens against the fee interest, access and other issues.) (See **Exhibits 19 and 20**)

A. Claims of Lien against Sum-Mac:

A claim of lien has been filed against Sum-Mac by Barry's Electrical, a second tier subcontractor. A second claim of lien has been filed by Upfitters R Us against Way-Out Waffles. This claim also names Sum-Mac. Both claims appear as exceptions on the preliminary opinion.

Discussion: A subcontractor is a party which has contracted with another contractor, rather than the owner, to provide labor or materials for the improvement of real property. A first tier subcontractor contracts with a general contractor, who has contracted directly with the owner of the property. A second tier subcontractor contracts with a first tier subcontractor. The North Carolina statutes provide two methods for lien rights to be enforced by first, second and third tier subcontractors. The first method is by a lien upon funds. The second method is by a subrogation lien. Subcontractors more remote than third tier subcontractors are limited to a lien upon funds.

Lien Upon Funds - Under N.C.G.S. § § 44A-18, any party who contracts to provide labor or material is entitled to a lien on the funds owed to the party with whom they contracted. This does not automatically create a lien upon the real property involved, but has the potential to become such a lien.

The lien is perfected by filing a Notice of Claim of Lien Upon funds pursuant to N.C.G.S. § § 44A-19. The notice shall be served upon the party obligated (the "obligor") to pay the higher tiered subcontractor or contractor. N.C.G.S. § 44A § 19(d). This party may be the property owner, contractor, or higher tiered subcontractor. A copy of the notice shall be

attached to any claim of lien filed pursuant to N.C.G.S. § § 44A-20(d). Upon receipt of the notice the obligor is under a duty to retain any funds subject to the lien. N.C.G.S. § § 44A-20(a). If the obligor should fail to do so, then "the lien upon the funds will continue in the hands of the contractor or subcontractor who received payment, and in addition the obligor shall be personally liable to the person or persons entitled to the lien up to the amount of such wrongful payments…." N.C.G.S. §§ 44A-20(b).

This lien may ripen into a lien on the real property being improved if the obligor is the owner of such property and is personally liable under N.C.G.S. § § 44A-20 (b) as a result of making payments in the face of the notice. N.C.G.S. § § 44A–20(d). This lien is enforced in the same manner as claim of lien by a contractor dealing directly with the owner under N.C.G.S. § §§ 44A-7 through 44A-16. N.C.G.S. § § 44A-20(d) also provides "…which lien shall be entitled to the same priorities and subject to the same filing requirements and periods of limitation applicable to the contractor." As a result, the time limitations for filing such a claim of lien and the priority of the claim are controlled by the first furnishing and last furnishing dates of the contractor.

It is important to note that a direct lien upon funds under this section is limited to the amount owed to the entity directly above the claimant in the construction chain. For example, if no amount is owed by the general contractor to the first tier subcontractor and that subcontractor had provided a lien waiver to the general contractor, then the second tier subcontractor has no right to enforce its lien. *But see* Electric Supply Co. v. Swain Electric Co., 97 N.C. App. 479, 389 S.E.2d 128 (1991), *aff'd* 328 N.C. 651, 403 S.E.2d 291 (1991) (discussed below). Please note that the subrogation lien under this section and N.C.G.S. § 44A-23 is <u>not</u> limited to the amount owed to the entity directly above the claimant in the construction chain.

<u>Subrogation Lien</u>: N.C.G.S. § § 44A-23 provides subcontractors a separate lien against the improved real property. Under this section first, second and third tier subcontractors, who file a notice of claim of lien, may enforce the lien of the contractor created under Part 1 of Article 2 of Chapter 44A. This allows the subcontractors to step into the shoes of the contractor and use its lien against the real property to the extent the subcontractor is owed funds. The manner of enforcement is the same method as set out in §§ 44A-7 through 44A-16 for the enforcement of a lien by a contractor. As a result, the time limitations for filing the claim and the priority of the claim are controlled by the first and last furnishing dates of the contractor.

The Electric Supply Co. v. Swain Electric Co. case was significant in determining that the subrogation rights established under this section are separate from the lien upon funds established under §§ 44A-18 and 44A-20. In the case a second tier subcontractor was entitled to a right of subrogation of the contractor's lien rights, even where the first tier subcontractor was not owed any money. The contractor's rights are the key factor. If they still exist, then the subcontractor may be subrogated. However, if the contractor has waived or subordinated their rights prior to the filing of the subcontractor's notice of lien, then the subrogation right is cut off. N.C.G.S. § § 44A-23(a) does prevent the contractor

from doing anything to prejudice the subcontractor's rights, without consent, upon the filing of the notice and claim of lien and the commencement of the action.

N.C.G.S. § § 44A-23(b) establishes a method for the contractor to give notice to lower tier subcontractors of its payments to the first tier subcontractor. This allows the contractor to limit its liability to lower tier subcontractors. The statute is a result of the Electric Supply Co. v. Swain Electric Co. case, under which the contractor could run the risk of having to pay twice for work done by a lower tiered subcontractor when the first tier subcontractor failed to pay the lower tiered subcontractor. In this scenario, the lower tiered subcontractor could enforce the lien rights of the contractor to satisfy the amount they are owed.

The Watson Electrical Construction Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87 (2003), case further tied the subrogation right to the rights of the contractor. In this case the owner was allowed to offset amounts it was due from the contractor against amounts it owed the contractor. The Court held that if the offset results in the contractor being owed no funds, then the subcontractors subrogation rights are extinguished. The subcontractor's rights are dependent upon the contractor's lien rights.

Claim of Barry's Electric: In our present transaction, the claim of lien by Barry's Electric, a second tier subcontractor, is an unacceptable title exception. In order to remove the exception, the lien must be released, bonded off, or satisfactory evidence must be provided that the general contractor no longer has any lien rights to enforce against the property. This is why having the general contractor sign a waiver or subordination at closing is of such great importance.

Claim of Upfitters R Us: This is really a claim against a tenant in The Shoppes at Sumac Park. It is included in the preliminary opinion because it describes Lot 2 (our current property is a portion of Lot 2) and names Sum-Mac. Upon further investigation, it becomes clear that Sum-Mac did not contract with this claimant. Only the tenant contracted with the claimant. Claims of lien only extend to the obligor's interest in the property. Therefore, the claim against tenant does not reach the fee interest in the property and is limited to the leasehold premises. As a result, this claim cannot affect the proposed property to be leased by Restoration Barn.

Resolution: Requirements are added to the commitment for the release or cancellation of Barry's Electric claim of lien. The Upfitters R Us claim of lien does not appear as an exception to title, but should be noted in any exception to the interest of the obligor-tenant.

III. Sale of Outparcel

Preliminary Number 4 – Purchase by PC Fangs of an outparcel from Zippy and Sum-Mac. (See **Exhibits 21 and 22**) They will need both a lenders and an owners policy. As most issues, or very similar issues, have been addressed above, this section will discuss non-compete use limitations.

A. **Non-Compete or Exclusive Use Limitation:**

The preliminary reports a memorandum of lease to Way-Out Waffles. The premises that are the subject of the Way-Out Waffles lease does not include any portion of Lot 6 (the outparcel being sold to PC Fangs); however, the lease does contain a restriction which prohibits the operation of other restaurants within The Shoppes at Sumac Park without the consent of Way-Out Waffles.

Discussion: Just as a residential use only clause in CCRs can prevent property from being used for non-residential purposes, an exclusive use provision in a lease agreement can prevent specified retail uses. Tenants with the bargaining power to do so insist on exclusive use provisions not only to assure competitive advantage in a location, but also to protect the tenant's investment in constructing, upfitting and stocking a store. The provisions may be based upon the type and/or percentage of specific goods sold or may include a list of named prohibited competitors.

Exclusive use provisions have been recognized as enforceable by the courts of North Carolina. Quadro Stations v. Gilley, 7 NC App. 227, 132 S.E.2d 237 (1970). In Quadro Stations case, the Court of Appeals recognized that in certain circumstances a restriction by the lessor will be valid. The Court also indicated that such a restriction would have to be balanced against unreasonable restraints upon trade. The restriction must be (1) founded upon valuable consideration, (2) reasonably necessary to protect legitimate interests, and (3) reasonable as to time and area.

Difficulty often arises in determining what uses are prohibited. For example, if a drug store incidentally sells a limited amount of candy or other food products, does this violate an exclusive use given to a grocery store? While cases vary, there does seem to be a reluctance to strictly enforce the exact language of the provision. In Taha v Thompson, 120 N.C. App. 697, 463 S.E.2d 553 (1995), the Court of Appeals recognized the exclusive prohibition, but found it to be ambiguous when attempting to enforce it against a potential competitor.

Title insurers are often asked to insure over existing exclusive use provisions. Whether or not the title insurer will do so depends upon how clear the prohibited activity is. If the title insurer is comfortable that the proposed insured's activity will not violate the prohibition, then affirmative coverage can be drafted. The affirmative coverage will be limited to the proposed activity and the prohibited activity.

In the present case, the exclusive use provision includes a list of competitors which operate pancake houses, such as Perkins and IHOP. PC Fangs is not included on the list.

Resolution: The exclusive use provision may be insured over with affirmative language because it does not prohibit use by PC Fangs. The exception is included in the commitment and policy as other future uses may be prohibited (Perkins buys out PC Fangs).

CHICAGO TITLE INSURANCE COMPANY

Condominiums

By Mark Griffith

Grove Development Company, LLC ("Grove"), a respected residential condominium developer, enters into a land purchase agreement with Zippy Development Company, LLC ("Zippy Development") to purchase 1.2 acres of undeveloped land (on two contiguous tracts) for $850,000.00 on which to construct 23 residential condominium units in two buildings ("Phase 2"). Grove also enters into an option to purchase an additional .8 acres on which to construct two additional buildings with 23 residential condominium units ("Phase 3"). The complex will be known as Three Leaves Bungalows ("Leaves"). (See **Maps V and VI)**

The units of Leaves will ultimately be situated among four buildings with six to 17 units to each building with each building having two floors. The units will range from 950 heated square feet to 2200 heated square feet with pricing from $190,000.00 per unit up to $525,000.00 per unit. The common areas will contain standard amenities (paved parking areas containing marked surface parking spaces, walkways, landscaped areas, etc.) as well as a pool, clubhouse, and two tennis courts. Each unit owner will own an undivided percentage interest of the common areas based on the ratio of the unit owner's heated square footage in his unit to the total heated square footage of all of the units.

Furthermore, as a condition to closing, a cross access easement (the "Cross Access Easement") was entered into between Grove and Zippy Development allowing Three Leaves residents (and their guests) to have vehicular access through Leaves and residents and guests of residents of Leaves to have vehicular access through Itchy Landing.

I. Purchase of Undeveloped Land

a. Title Insurance Policies (Owner and Loan)

Grove and its legal counsel, Dewey Cheatham, have both had a long-standing relationship with Chicago Title Insurance Company ("Chicago Title"), and Dewey thus submits a preliminary opinion to Chicago Title's local office manager for coverage of the purchase of the 1.2 acres of undeveloped land and related financing, and coverage of the option to purchase the additional .8 acres. Dewey's preliminary opinion is attached hereto as **Exhibit 23**. With his preliminary opinion, Dewey presents a survey of Itchy Landing (which includes the 1.2 and .8 acres) from 2002, and a copy of the existing title policy issued to Zippy Development when it purchased the Itchy Landing site**.** Dewey asks for the following: i) same as survey coverage for both the owner and lender; ii) an

access and entry endorsement (ALTA 17) for the owner and lender; iii) an environmental lien protection endorsement (ALTA 8.1) for the lender; iv) a future advances endorsement (ALTA 14) for the lender; v) a multiple tax parcel endorsement (ALTA 18.1) for the lender and owner; vi) a continguity endorsement (ALTA 19) for the lender and owner; and vii) a creditors' rights endorsement (ALTA 21) for the lender. Dewey also asks that he be allowed to tack to the owners policy issued to Zippy Development**.**

First, Chicago Title agrees that Dewey may tack to the policy issued to Zippy Development because it is an owners policy based on an opinion from a Chicago Title approved attorney; provided that Chicago Title will not agree to any affirmative coverages given in the Zippy Development title policy other than those independently agreed to herein. In response to Dewey's other requests, Chicago Title responds as follows: i) granting survey coverage for the owner and lender on the 1.2 acres subject to, among other general things, an affidavit and indemnity from Zippy Development that A) the 1.2 acres have not been improved since the date of the survey, and B) that no work has been performed or services provided during the last 120 days on the subject property; ii) granting an access and entry endorsement based on, and subject to, the Cross Access Easement which allows access to Three Leaves Avenue**;** iii) granting an environmental lien protection endorsement based on further certifications of nonexistence of any relevant environmental liens from Dewey; iv) granting a future advances endorsement for the lender subject to Dewey supplementing his opinion to confirm that the deed of trust meets the requirements of N.C.G.S. § 45-67 et seq.; v) granting a tax parcel endorsement stating that the two tracts being purchased are part of only two distinct tax parcels**;** vi) granting a contiguity endorsement based on the survey submitted and Dewey's opinion; and (vii) granting a deletion of the creditor's rights exception based on affirmations from Dewey that all of the funds from the financing will be used for the purchase of the tracts and construction of the condominium (*i.e.,* that none of the funds will be used as preferential payments to any member of Zippy Development, or any shareholder of Grove). A copy of the final commitment submitted to Dewey containing more explicitly the requirements for the issuance of each endorsement is attached hereto as **Exhibit 24.**

Chicago Title, in order to issue its owners and lenders coverage without exception, requires that the 1.2 acres to be insured be released from the existing deed of trust of Zippy Development. Thus, Zippy Development, its lender, and the trustee must enter into and record a modification of the existing deed of trust or a release deed releasing the 1.2 acres then subject to the deed of trust contemporaneously with the recording of the deed from Zippy Development to Grove for the same.

b. Option to Purchase

Chicago Title also agrees to insure Grove's option to purchase the .8 acres associated with Phase 3 subject to the following conditions: i) the option (or a memorandum thereof) must be recorded; ii) as an option in gross the term of the option must be for less than 30 years; iii) the option must not be given as part of a mortgage or sale/leaseback transaction; and iv) consent of the beneficiary (lender) to the Zippy Development deed of

trust must be obtained regarding the issuance of the option. An option in gross is an option to purchase in which the holder of the option does not own any leasehold or other interest in the land which is the subject of the option. N.C.G.S. § 41-28(2). An option in gross becomes invalid if not exercised within 30 years of its creation. N.C.G.S. § 41-29. In this case, an owner's policy with an option endorsement, such as **Exhibit 25** attached hereto, would be issued to Grove as the insured, with the title to the fee estate still being shown on the policy as vested in its current owner, Zippy Development.

The policy insures Grove that its option to purchase is valid and enforceable and that the rights of Grove thereunder are vested, all subject to the terms of the option agreement and Grove's compliance with the terms thereof. A recorded option creates a priority right in the subject property over later-recorded instruments pursuant to N.C.G.S. § 47-18. However, if the option is exercised, as a practical matter, the proceeds of the sale must be used to pay all liens on the property in order of their priority, even if subsequent to the option. Title to the fee does not relate back to the recording of the option when it is exercised. The policy covers expenses necessary to a judicial determination or defense of the validity and enforceability of the option, but does not cover any expenses required to enforce the option and obtain a transfer of title.

II. Purchase of Individual Units

Under North Carolina law, a condominium is defined as real estate, portions of which are designated for separate ownership ("units") and the remainder of which is designated for common ownership solely by the owners of those portions. N.C.G.S. § 47C-1-103(7). (In contrast, in a planned unit development (or "PUD"), the homeowners' association typically owns the common elements with each unit owner having membership in the association and membership or easement rights in the common elements. PUDs are governed by the North Carolina Planned Community Act, Chapter 47F of the North Carolina General Statutes.) Since October 1, 1986, condominiums in North Carolina have been created and generally governed by the North Carolina Condominium Act (the "Condominium Act"), Chapter 47C of the North Carolina General Statutes. All condominiums created on or after October 1, 1986, the effective date of the Condominium Act, are governed by the Condominium Act. Some provisions of the Act apply retroactively. Any condominium created prior to October 1, 1986 is governed by the Unit Ownership Act, Chapter 47A of the North Carolina General Statutes, if they had so elected. N.C.G.S. § 47C-1-102

a. Public Offering Statement

Grove is anxious to presell the units, and through its President, "Big" Time, engages the area's dominant residential real estate agency, High Price Realty ("High Price"). High Price informs Big that none of its agents can offer a unit to the public without first delivering a public offering statement as required by Section 47C-4-102 of the North Carolina Condominium Act. More specifically, the Condominium Act requires that the

public offering statement be delivered before the contract to purchase is executed. N.C.G.S. § 47C-4-108(a). Section 47C-4-108(a) further provides that no conveyance pursuant to the contract to purchase may occur until seven calendar days following the execution of the contract, and during such seven day waiting period, the purchaser has the absolute right to cancel the contract at any time, without penalty and with a full refund.

Big is furious with Dewey for not discussing the public offering statement or right to cancel. Dewey comforts Big by telling him that his first draft of the public offering statement is almost complete, and that they have not lost any ground in their sales efforts because the proposed condominium declaration (discussed below) has not been finalized. Nonetheless, Dewey explains to Big that the public offering statement must contain or accurately disclose numerous things, including a general description of the condominium and its schedule of commencement and completion of construction, the number of units, copies of the proposed condominium declaration, any current balance sheet and projected budget for the condominium owners association, any initial or special fee due from the purchaser at closing, a description of any known or recorded liens, encumbrances, or defects affecting title to the condominium, the terms and limitations of any warranties provided by the declarant, and a statement explaining the purchaser's right to receive the public offering statement and the purchaser's seven-day absolute right to cancel the purchase contract. N.C.G.S. § 47C-4-103. Dewey informs Big that the Condominium Act provides that the preparer of any part of the public offering statement is liable for any false or misleading statement or omission of material fact therefrom with respect to that part of the public offering statement which he prepared. N.C.G.S. § 47C-4-102. Dewey emphasizes that the public offering statement has a good purpose. It is meant to ensure that the prospective unit owner has enough information to properly evaluate the benefits and detriments of such unit ownership.

b. Contracts to sell units

Two weeks later, Dewey finalizes the declaration and public offering statement while overseeing the administration of construction contracts between the owner and general contractor, and compliance with the construction loan. (Though the declaration must be recorded before an interest in any unit may be conveyed, a contract for sale of such unit may be executed prior to the filing of the declaration. N.C.G.S. § 47C-4-102.) See, however, N.C.G.S. § 160A-375 and N.C.G.S. § 153A-334 which provide that contracting for sale prior to approval of the plat may constitute a Class I misdemeanor, unless a preliminary plat has been approved and the contract complies with *all* of the following:

(1) Incorporates as an attachment a copy of the preliminary plat referenced in the contract and obligates the owner to deliver to the buyer a copy of the recorded plat prior to closing and conveyance.

(2) Plainly and conspicuously notifies the prospective buyer or lessee that a final subdivision plat has not been approved or recorded at the time of the contract, that no governmental body will incur any obligation to the prospective buyer or lessee with respect to the approval of the final subdivision plat, that changes between the preliminary and final plats

are possible, and that the contract or lease may be terminated without breach by the buyer or lessee if the final recorded plat differs in any material respect from the preliminary plat.

(3) Provides that if the approved and recorded final plat does not differ in any material respect from the plat referred to in the contract, the buyer or lessee may not be required by the seller or lessor to close any earlier than five days after the delivery of a copy of the final recorded plat.

(4) Provides that if the approved and recorded final plat differs in any material respect from the preliminary plat referred to in the contract, the buyer or lessee may not be required by the seller or lessor to close any earlier than 15 days after the delivery of the final recorded plat, during which 15-day period the buyer or lessee may terminate the contract without breach or any further obligation and may receive a refund of all earnest money or prepaid purchase price.

High Price begins its sales efforts. Sales are brisk, and fairly quickly, up to two-thirds of the completed units are under contract.

III. Declarations and Plat

With the completion of Buildings 1 and 2, Dewey files a Declaration Creating Unit Ownership and Establishing Restrictions, Covenants, and Conditions for Three Leaves Condominiums (the "Declaration"), the "as built" plat and the "as built" plans regarding the same in accordance with the Condominium Act. A condominium is created under the Condominium Act by recording a declaration in the office of the Register of Deeds of the county in which which the condominium is located. As required by the Condominium Act, the plat (the first page of which is attached as **Map V**) will be accompanied by plans containing certifications from the project architect and land surveyor regarding the accuracy of the plans' depiction of the improvements, as built.

The Condominium Act provides that the declaration may not be filed unless the structural and mechanical systems of all buildings containing or comprising units are substantially completed in accordance with the plans as certified by a licensed architect or engineer. N.C.G.S. § 47C-2-101(a). The Declaration, as required by the Condominium Act, contains, among other things, the name of the condominium, a legal description of the real estate, the maximum number of units to be created, a description of each unit by reference to the plans and the unit's identifying number, and information about reserved development rights, the allocation of common elements (and if applicable, limited common elements) to each unit, and any use restrictions. N.C.G.S. § 47C-2-105.

The declarant, Grove, reserves development rights within the Declaration, to develop the two additional buildings substantially identical to the first two buildings, and to record a revised set of plans describing such new buildings to be certified by the project architect and land surveyor. Contemporaneously with the filing of the Declaration, Grove's lender executes and records a consent and subordination to the Declaration thereby consenting

to its terms and subordinating the interest of its deed of trust to the terms of the Declaration. Note, however, that as with most condominium declarations, it will be confirmed therein that the developer's deed of trust will be superior to the lien of any unpaid assessments levied pursuant to the subject declaration.

IV. Owners' Association

In addition, prior to the first closing, as required by N.C.G.S. § 47C-3-101, Dewey coordinates the formation of the owners association of Leaves to act in all matters affecting common elements and management of the condominium. Unlike the North Carolina Unit Ownership Act, the Condominium Act goes to great lengths in addressing the responsibilities of the owners association. The Condominum Act provides that the owners association must be organized no later than the date that the first unit is conveyed. The owners association is typically a non-profit corporation organized and governed under Chapter 55A of the North Carolina General States, except to the extent specifically governed by the Condominium Act. N.C.G.S. § 47C-3-101. Each unit owner is automatically a member of the owners association and, in accordance with the bylaws of the owners association, is allocated one vote for each unit owned. The bylaws also provide for a board of directors to manage the affairs of the owners association with such directors being elected by plurality vote by the members of the owners association. However, as is standard in most condominium declarations, the Declaration in general provides that for so long as the declarant, Grove, has the right to exercise its reserved development rights, it shall have the ability to appoint and remove any members of the association's board of directors. The Condominium Act provides that the members of the association must meet at least once per year, and sets forth mechanisms by which special meetings of the association may be called.

V. Purchaser and Lender Title Insurance Policies

High Price steers all of the closings to Engelbert & Humperdink, PLLC ("Closing Counsel"). In a short period of time, depending upon the scheduled closings, Closing Counsel sends its preliminary opinions for the completed units to the Raleigh office of Chicago Title. With each preliminary opinion, Closing Counsel requests an ALTA 4 (Condominium Endorsement) for the owner and lender, an ALTA 8.1 (Environmental Lien Protection) for the lender, an ALTA 9 (Restrictions and Encroachments) for the lender, and a Closing Protection Letter, a copy of is attached hereto as part of **Exhibit 28**. A copy of the preliminary opinion generally submitted by Closing Counsel is attached hereto as **Exhibit 26**.

The ALTA 4 is designed to provide special comprehensive title protection as to matters peculiar to condominiums. Such endorsement is available to both owners and lenders, subject to review of each item of coverage; provided, however, that the endorsement is not intended to insure the title of the developer. For issuance of the ALTA 4, Closing Counsel certifies to the title insurer that the condominium has been duly formed and managed in compliance with applicable law, that the Declaration does not contain a forfeiture or reversion clause, and that any rights of first refusal, options to purchase,

violations of restrictions and encroachments of existing improvements onto easements have been subordinated or waived in favor of the interests of the proposed insureds. Closing Counsel should also verify that no association dues or special assessments allocated to the unit remain outstanding at the time of closing.

The recorded condominium plat, must, according to N.C.G.S. § 47C-2-109, be certified by an architect and surveyor as an "as built" plat. Therefore, no survey exception is necessary or appropriate.

The ALTA 8.1 insures the lender against loss by reason of lack of priority of the lender's lien because of environmental protection liens recorded in those records which, under state statutes, impart constructive notice of matters relating to real estate or which are filed in the records of the Clerk of the United States District Court, and any environmental protection lien provided for in any state statute in effect at the date of the policy. For issuance of the ALTA 8.1, Closing Counsel certifies that no environmental protection lien is recorded in those records that by state law impart constructive notice of such matters to purchasers for value, or in the records of the Clerk of the United States District Court for the district in which the land is located.

The ALTA 9 provides a lender with an assortment of coverages dealing with violations of restrictions, encroachments and mineral rights. For issuance of the ALTA 9, the title insurer relies upon Closing Counsel to disclose existing covenant violations, or encroachments, to reflect in the title opinion if the Declaration provides for a right of first refusal, option to purchase, or right of reentry or forfeiture, and to verify that no association dues or special assessments allocated to the unit are outstanding as of the date of closing.

With each preliminary opinion, Closing Counsel affirms that the deed of trust of Grove's lender is subordinate to the Declaration, and acknowledges that the unit for sale will be released from the deed of trust of Grove's lender by a properly executed release deed recorded contemporaneously with the subject closing. Each deed from Grove to the new owner sets forth the name of Leaves as the condominium, the recording data of the Declaration, as amended, and the unit's identifying number, in accordance with N.C.G.S. § 47C-2-104. According to Section 47C-2-104, a description of the unit owner's interest in the common elements is not required. However, the best practice is to include within the legal description the appurtenant undivided interest in the common elements with reference to the Declarations and the plat. A form of the commitment generally issued to Closing Counsel in connection with the initial unit sales is attached hereto as **Exhibit 27**

VI. Isolated Issues with Some Unit Sales

In certain instances, Closing Counsel, in preparing its preliminary title opinion, discovers the following issues in the sale of certain units:

a. Incorrect Unit Number.

In one case, Closing Counsel discovers that the unit thought to be sold by Grove to the purchaser was not the actual unit intended to be sold to such purchaser. The purchaser had signed a purchase contract to purchase a unit described according to its legal description (i.e., by its unit number as stated on the plat). Little did High Price and the prospective purchaser know, however, that the street address and unit number did not match. The purchaser had actually signed a contract to buy one unit with the anticipation of buying another unit. In this case, because the irregularity was discovered early, the confusion was resolved, and due to the lack of any true difference between the units at issue, the closing occurred. However, suppose five years had passed before the irregularity had been discovered, and all of the owners in Building 1 had taken possession pursuant to their unit's street address rather than actual legal description? In order to issue owner's and lender's policies in connection with a resale, title to the condominiums (the condominium truly being sold and the condominium thought to have been sold) would have to be resolved between the misplaced condominium owners through no less than two quitclaim deeds, and substitutions of collateral on the outstanding deeds of trust along with release a of the erroneously described parcel.

b. Association Mechanics' Liens/Encumbrances.

Closing Counsel remembers that failing to search in the name of the owners association had burned him previously when an owners association had erected a new super high dive for the swimming pool and had installed a tanning booth in the clubhouse. In erecting the new super high dive and installing the new tanning booth, the owners association, pursuant to N.C.G.S. § 47C-3-112, had pledged the swimming pool and other common areas to the lender for funding these common area improvements. Section 47C-3-112 provides that common elements may be encumbered upon the vote of 80% of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, in addition to the vote of all owners of limited common elements which may be affected by the lien or encumbrance. Individual units can be released from such liens only upon payment of their share of the lien based on their percentage obligation for assessments. The deed of trust in such matter will be indexed in the name of the owners' association, not the individual owners.

In the case remembered by Closing Counsel, the owners association had obtained the necessary votes and proceeded with its project. Unbeknownst to Closing Counsel, however, the owners association at the time was engaged in a heated argument with the tanning bed installer over performance and payment, and as a result, a claim of lien had been filed against the owners association. Closing Counsel, when searching for his client, a prospective unit purchaser, never knew about the claim of lien or the pledge because he had not searched under the name of the owners association.

Mechanics liens, judgments, and other encumbrances against an owners association are indexed in the name of the owners association, and become liens against all units. N.C.G.S. § 47C-3-117. In this case, Closing Counsel, with lesson learned, not only

searches under the name of the owners association, but also, in situations which *may* involve recent common area improvements, presents to Chicago Title an affidavit and indemnity or other verification from the owners association confirming the lack of any mechanics liens and unpaid services over the last 120 days.

c. Association Assessments.

Common expenses are paid through assessments by the owners association, except during that period of time when such assessments are paid by the declarant. N.C.G.S. § 47C-3-115. Section 47C-3-116 provides that any assessments levied against a unit remaining unpaid for a period of 30 days or longer shall constitute a lien on that unit when filed of record in the office of the clerk of superior court of the county in which the unit is located. Such lien may be foreclosed in like manner as a mortgage on real estate under power of sale. Furthermore, according to N.C.G.S. § 47C-3-116, the lien is superior to all other liens except for liens for real estate taxes, and sums unpaid on deeds of trust and other encumbrances duly of record prior to the docketing of the aforesaid lien.

Some years later after the initial unit sales, Closing Counsel, in connection with a resale, searches in the office of the clerk of superior court for any ongoing actions, and discovers an assessment lien against the seller's unit. The assessment was for several monthly assessments for maintenance of the common areas. In this particular case, however, the closing occurs exactly three years and 12 days after the docketing of the lien - 12 days after the lien expired by law because no proceedings to enforce the lien had been instituted. The lien has thus expired, allowing the title insurer to issue its title policy without exception. 47C-3-116 (c).

In another case, Closing Counsel discovers an assessment lien against a unit that has not expired. The assessment was apparently for repairs to the pool and surrounding common area caused by the stampede of unit owners and guests from the pool after Carl Spackler, on a hot summer day, stealthly threw his Baby Ruth candy bar into the deep end, and then at the top of his lungs told everyone that his neighbor, Otis Campbell, currently submerged in the deep end, was the culprit. Spackler was assessed all of the damages from the spectacle. Spackler argued with Closing Counsel, however, that the assessment should have been allocated among all of the unit owners, and that he would be willing to escrow with Chicago Title his due allocation. Closing Counsel discussed the situation with Title Counsel who refused to accept Carl's offer. According to N.C.G.S. § 47C-3-115, any common expense caused by the misconduct of any unit owner, may be assessed exclusively against his unit.

d. Association Fines.

Closing Counsel discovers a rather large lien against the unit to be sold by Jeremy Nolife. It seems that Jeremy has been in an all out war with the owners association about exterior changes he made to his front door the day after UNC won the 2005 NCAA Basketball crown. Jeremy graduated from a rival institution and when he was not slaving away as an associate at Death & Star, PLLC, he was in front of his television or on the internet

researching all he could against the Tarheels or in favor of his alma mater. When CBS showed UNC cutting down the nets with Dean Smith and Michael Jordan smiling in the background, Jeremy could not take it any longer and felt that he had to make a statement. He spent all night painting his front door a dark blue with a satanic image of his alma mater's basketball coach pouncing on Roy Williams. The next day, Jeremy's neighbors were livid, and contacted members of the association board of directors. Jeremy, in violation of the declaration, had not obtained the prior written consent of the board to make such a dramatic change to the exterior of his unit. When told of the violation, and that the front door had to be fixed, Jeremy refused.

After proper notice and a hearing on the matter, as required by the association's bylaws and N.C.G.S. § 47C-3-107.1, the association, through its board of directors, found Jeremy in violation of the condominium documents and voted to assess a fine against his unit of $100 for each day the violation continued. (According to N.C.G.S. § 47C-3-107.1: "The bylaws of the association may provide for a hearing before an adjudicatory panel to determine if a unit owner should be fined not to exceed one hundred fifty dollars ($150.00) for a violation of the declaration, bylaws or rules and regulations of the association. Such panel shall accord to the party charged with the violation notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. Such a fine shall be an assessment secured by lien under G.S. 47C-3-116.")

When Jeremy put his unit up for sale, the association filed a claim of lien against his property, pursuant to N.C.G.S. § 47C-3-116, to secure its right to payment of the amount of the fine. Jeremy told Closing Counsel that the board was full of UNC graduates and that his artistry made his unit more valuable. Jeremy conceded, however, that the condominium documents required that he obtain the board's consent to make such an exterior change, but that he only owed $100 for the violation not the $9,000 that the association claimed to date.

Closing Counsel informed Title Counsel that Jeremy would escrow $100 with Chicago Title and indemnify it for any legal fees incurred in connection with the lien if it would insure over the lien. Title Counsel (by chance also a graduate of Jeremy's alma mater) pointed Closing Counsel to Stewart v. Kopp, 118 N.C. App. 161, 454 S.E.2d 672 *writ of supersedeas den'd* 340 N.C. 263; 456 S.E.2d 838 (1995), in which the Court of Appeals interpreted N.C.G.S. § 47C-3-107.1 to allow an association the right to levy a "daily" fine of up to $150 for noncompliance with rules related to the exterior appearance of a condominium unit. In Stewart, the unit owner had replaced her solid panel front door with a 15-glass-pane French door without obtaining proper consent. The Court of Appeals concluded that § 47C-3-107.1 allowed for a hefty daily fine otherwise the violator would simply pay a one-time fine and continue the violation. Title Counsel informed Closing Counsel that Jeremy had to resolve the situation in order for his buyer to obtain a clean title policy because the amount of the ever-increasing fine was outside of what Chicago Title would allow Jeremy to indemnify.

e. Encroachments.

Closing Counsel discovers that the balcony of his client's end unit encroaches onto the swimming pool area. He asks title insurer to grant owner's and lender's coverage over such encroachment. Title insurer agrees to insure over the encroachment because Section 47C-2-114 of the Condominium Act provides an easement to the extent any unit or common element encroaches on any other unit or common element; provided, however, that the easement does not relieve a unit owner of liability in the case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to the plats and plans. In a similar instance, however, Chicago Title did not grant the new owner such coverage in the instance where the selling owner had built a slide from his unit to the deep end of the swimming pool – an obvious instance of willful misconduct.

f. Relocation of Boundaries.

Closing Counsel, in connection with a resale, discovers that the unit his client intends to purchase from its current owner measures, according to his client's appraiser, 400 square feet more than the dimensions set forth in the Declaration. Closing Counsel brings it to the attention of the seller, Buddy Love. According to Buddy, he has been romantically linked with his neighbor, So Gullible, for the last two years, and during that time they have basically lived together in both units. During that two year span they increased the size of Buddy's kitchen while decreasing So's guest bedroom, thus increasing Buddy's unit by 400 square feet while decreasing So's unit by the same. Buddy, however, unbeknownst to So, has met another woman, Betty Bigbucks, and intends on moving in with her. Closing Counsel informs Title Counsel about the situation, and as Closing Counsel expected, Chicago Title cannot issue a policy until the boundary issue is resolved.

N.C.G.S. § 47C-2-112 provides that the boundaries between adjoining units may be relocated upon application to the owners association by the owners of those units. The application must include information reasonably required by the association and be accompanied by a plat prepared by a properly licensed architect detailing the relocation of the boundaries between the affected units. Unless the board determines within 30 days of submittal of the application that the reallocations are unreasonable, the association, at the expense of the owners filing the application, shall prepare and record an amendment to the declaration detailing the reallocations.

Title Counsel informs Closing Counsel that he cannot issue a clean title policy or provide an escrow mechanism for doing the same because until the Declaration is amended or the boundary changes reversed, there will not be a correct legal description for the unit for sale. Furthermore, there seem to be two clear impediments to Buddy selling his newly-designed unit: 1) So's agreement to file the application with the association, and 2) the association's determination that the reallocation is unreasonable.

g. User Fees.

In preparing its preliminary opinion for a resale, Closing Counsel discovers an assessment lien for fines assessed for failure of the unit owner to pay "user fees" charged to pool guests unaccompanied by the unit owner. The unit owner, Herb Tarlek, was constantly inviting numerous guests to the pool unaccompanied by Herb. The association charged such pool guests special fees for use of the common areas with the bill for such charges being sent directly to Herb as unit owner. Moreover, the Declaration provides that the unit owner shall guarantee any fees or fines assessed against a guest, invitee, or lessee of a unit owner, with any failure to pay such amount within 30 days of such assessment being considered a violation of the condominium documents subject to a fine that may be assessed pursuant to N.C.G.S. § 47C-3-107.1. Closing Counsel inquires with Title Counsel as to the legality of the user fees because the Declaration does not provide specifically for such pool user fees or even generally for their issuance (other than a unit owner's guarantee of the same). Title Counsel informs Closing Counsel that though neither the Declaration nor any other condominium document explicitly provides that the association may charge such user fees, Section 47C-3-102(10) of the Condominium Act, allows the association to impose such fines, a specific change from the Unit Ownership Act, and the subject of Miesch v. Ocean Dunes Homeowners Association, Inc., 120 N.C. App. 559, 464 S.E.2d 64 (1995). Title Counsel explains to Closing Counsel that if Leaves were governed under the Unit Ownership Act, such user fees would not be allowed unless specifically allowed in the condominium documents.

h. Incorrect Tax Parcel Number.

Pursuant to N.C.G.S. § 47C-1-105, the tax parcels will be allocated and assigned to individual units only after at least one unit has been sold to a third party. Until that time, they will be in the name of the developer. So it is important for Closing Counsel to assure, if possible, that the allocated tax parcel relates to the particular unit. If the parcel numbers have not been assigned since the units are selling so quickly, it will be critical for Closing Counsel to determine how to carveout or obtain a release on the individual unit. It will also be important for the buyer at the beginning of the next year to review the first tax bill issued, to verify the correct unit number and reasonably realistic valuation.

VII. Phase 3 of the Condominium Development; Purchase and Credit Line Deed of Trust Modification

a. Loan Modification for purchase and construction

Five months after Grove completed the construction of Buildings 1 and 2, it exercises its option to purchase the third tract from Zippy Development containing .8 acres, and begin Phase 3, the construction and completion of Buildings 3 and 4. Big contacts Dewey and asks him to move forward with Phase 3, and, most importantly, the paperwork necessary to obtain the increased funding needed by Grove from its existing lender to acquire the .8

acres. Grove contacts its loan representative, Lots O' Money, and negotiates an increase to its credit facility in order to acquire the .8 acres. Unfortunately, the maximum principal amount secured by the deed of trust does not cover the amount of funding necessary for Phase 3.

Dewey contacts his Chicago Title representative and informs him of the status of the increased funding. Most importantly, Dewey wants an owners policy for the new .8 acres, and for Grove's lender, a datedown endorsement with an amendment to the existing deed of trust and loan policy to add the .8 acres as additional collateral and increase the maximum principal amount that may be secured thereunder. Title Counsel tells Dewey that the most immediate issues to consider are that the datedown endorsement will require a title update, and that the contemplated modification of the existing deed of trust will affect its priority at least with regard to the additional amount financed. In this case, Grove had entered into a one-year revolver (to be renegotiated each year). With the purchase of the .8 acres, the maximum principal amount financed by the lender will increase, and thus, the monthly interest payments will increase. All other provisions of the original note and deed of trust remain unchanged.

North Carolina law concerning the effect of the modification of a deed of trust on its lien priority is very uncertain. In general, if the parties intended the original debt to continue, the original lien priority will also continue against intervening lienors. If, however, the original debtors intended that the original debt be discharged, a novation occurs and the lien priority of the original instrument is extinguished. Urban and Whitney, North Carolina Real Estate Section 21-79 (1996). For instance, an extension of time to make payments on a deed of trust will not alone result in the loss of priority of the deed of trust. In this case, however, the facts are more difficult. Here, the parties are increasing the maximum principal amount of the debt without any reservation for the same in the original deed of trust. At best, the additional amount added to the deed of trust will be subordinate to intervening liens, and at the worst, the priority of the entire amount will be lost. Id. In this case, Title Counsel explains the situation to Dewey and recommends that Dewey document the increased amount separately as a new loan with a new deed of trust thus ensuring the priority of the original deed of trust, and rely on the title update and a new affidavit and indemnity from Grove to secure the priority of the second deed of trust immediately behind the first deed of trust. Title Counsel notes that if in anticipation of the takedown of the additional .8 acres, the first deed of trust had provided for a maximum amount that included the additional funding amount contemplated, no modification would even have been necessary. The parties could have proceeded under the original deed of trust with increased amounts of funding being determined with each draw request.

b. Supplemental Declaration, Plats, Public Offering Statement

Upon completion of Phase 3, Dewey will record a supplement to the Declaration recognizing the completion of Buildings 3 and 4, as well as "as built" plats (with plans and specifications, and certifications from the architect and surveyor) on record to include Buildings 3 and 4, as built. Of course, a revised public offering statement will be

required and Grove's lender will again need to subordinate its development lien to the terms of the Declaration, as revised. The sales effort for Phase 3 should then take shape in a manner very similar to that with Phase 2, and with similar isolated issues discussed earlier. Of course, as with Phase 2, existing title issues that were excepted from the initial policy of Zippy Development (e.g., railroad car, watermelon patch, headstones) will need to be reviewed and, if necessary, resolved.

SINGLE FAMILY DEVELOPMENT

By Al Gardner and Tom Wagg

We have now come to the last of the development of the original tracts that were put together and then divided into the various types of land use that we see all over our country. Single-family housing developments are certainly the most numerous of all land developments and present their own real property questions and solutions. Many of the solutions to the real property questions will involve title insurance that can provide protection for owners and lenders against actual loss.

I.. PURCHASE BY A BUILDER

a. Restrictive Covenants and Conditions

To begin, the attorney must ascertain whether or not more than one set of restrictions exists. The restrictive covenants placed of record at the time of recording the plat will apply to all of the lots of the subdivision or perhaps there will be multiple recordings restricting each of various sections of the subdivision. The developer of the entire multi-use project may also have imposed restrictions on the entire development tract that will apply in some respect to the platted lots. In addition, the deed to the builder from the developer may contain restrictions or references to restrictions. In other words any owner of land may impose restrictions, conditions, and covenants upon the land. Owners and developers will restrict land to certain types of use, such as a “residential only” restriction, and may impose certain styles, sizes, prices and other restrictions upon the use of the land. While restrictions, conditions and covenants are sometimes used together to limit how land can be used, the terms have different meanings and violations cause different results. Violation of a condition in a deed may result in forfeiture of title, while violation of restrictions or covenants generally are enforced by judicial action in the nature of an injunction or money damages.

Modern day developers may also impose restrictive covenants and conditions that contain organizational instructions for homeowners associations, assessments, common areas, and bylaws for the operations of the associations formed in the documents. If the streets on the property are to remain private, the covenants usually provide how they are to be maintained. Many builders, because more and more buyers want larger homes, want to combine two or more lots in the subdivision. It is therefore important to know whether the restrictions prohibit the combination of the platted lots. Even if the restrictions do not prohibit the combination of lots, side setbacks and utility easements that were dedicated by the developer on the plat will present problems for the combining of lots.

Using platted lots in a subdivision for rights of way to other tracts where the restrictive covenants provide that the lots will be used for residential purposes only have brought different court decisions. The court will usually hold that the establishment of the right of way must not be inconsistent with the use contemplated by the restrictive covenants. Therefore the language in the restrictions must be examined in light of what is to be the purpose of the right of way and the conditions of the surrounding premises. Long v. Branham, 271 N. C. 264, 156 S.E. 2d 235 (1967). It was held that a right of way across a residential lot to connect to another subdivision and create a thoroughfare was not contemplated by the restrictions, Franzle v. Waters, 18 N. C. App. 371, 197 S. E. 2d 15 (1973), but the court approved a fifteen-foot wide driveway that was to provide access to only one other lot. Bank v. Morris, 45 N.C. App. 281, 262 S. E. 2d 674 (1980). In those incidences where a right of way will disturb the "quiet residential" purpose of the subdivision the court will determine that the restrictive covenants have been violated.

As in so much of the real estate practice it is important to keep the client informed (and most preferably before the closing) to what the title search has revealed. This was graphically shown by a recent case in which the client sued his attorney for not letting him know that restrictive covenants encumbering the property restricted the use to residential purposes when the client had indicated he wanted the real property for commercial uses. The case was decided on the basis of expiration of the applicable statute of limitations but shows the importance of informing clients of the information found in the title search. Does the attorney have a duty to inform the client that the land is not suitable for his client's intended use?

b. The Recorded Plat (Map VII)

The lots on which single-family homes will be built have been platted by the developer, approved by the local government and the plat recorded in the Register of Deeds Office. The builder has chosen the lot or lots on which he intends to build finished houses for sale. He now is reviewing all of the documents of record to be sure the purchase of the lots will provide to him the type of lots he needs to build a profitable house. The plat contains information that is an integral part of the title search and must be "abstracted" in much the same way as other documents in the chain of title. Care should be taken to be sure that the address that has been provided to the closing attorney and the lot number (and the tax map number in most cases) all refer to the same lot(s). There is an important measure of safety in providing a copy of the plat, even if at closing, for the buyer (builder or individual) to affirm that the lot he is being conveyed is the lot he is expecting to buy.

The information on the plat will provide necessary information about the particular lot and information concerning the approval of the subdivision itself. Generally the General Statutes (N.C. Gen. Stat. 160A-372 et seq.) have given authority to the municipalities to develop ordinances requiring a developer to prepare and file a plat showing sufficient data for many things including the location, size, streets and boundaries of all of the lots

of the subdivision. River Birch Assocs. V. City of Raleigh, 326 N.C. 100, 388 S. E. 2d 538 (1990).

1. The plat must show the name of the platted property and various necessary approvals. These approvals will include the name and seal of the surveyor and a statement that he actually surveyed the property. The owner of the property must certify on the face of the plat that he adopts the plan of the subdivision, dedicates the streets, the public improvement easements and other lot restrictions. The proper officer of the municipality will certify that the plat meets statutory requirements for recording and his signature is acknowledged. The municipality in many locations will certify that the required utilities have been properly set out on the plat and either built or the building of such has been guaranteed. For some subdivisions State approval of roads will be necessary. The Register of Deeds will certify that the plat has been properly executed in recordable form and accept it for recording.

2. The surveyor will most often provide a legend setting forth the definition of terms and symbols as shown throughout the plat. Each lot will be designated by its lot number and all of the boundaries of each lot will show a metes and bounds. Most times easements for utilities and setback requirements are shown on each lot, but may be defined in the notes or legends. A vicinity map showing a larger scale location of the property is usually required. The recorded book and page of the deed vesting title in the owner/subdivider is included in the notes. There can be many more notes covering information about and restricting the use of the lots.

3. It is very important to notice whether the plat sets forth some type of restrictive covenants. This was not unique in older subdivisions but in newer subdivisions covenants are sometimes placed on the plat. Many times plats are revised after the first plat has been recorded. The revision can be for many different reasons but it is very important that the legal description refer to the revised plat and not the old plat. Assuming the lot's parameters are consistent on both plats, many attorneys will refer to the old plat and the revised plat and their respective recording data. It is a practice that will save the attorney from having to spend time correcting errors.

4. Access to the property can be over public or private easements and that will be shown on the plat. Whether public or private access can make a dramatic difference in the responsibilities of the buyer. Public streets will be maintained by the municipality or the state, but private streets have to be maintained by the owners of the subdivision. This will require assessments to be levied from time to time. Most of the provisions for the maintenance of private streets are set out in the restrictive covenants.

c. The Survey (Map VIII and Exhibit 29)

After the survey has been received from the buyer's surveyor it should be compared to the subdivision plat to make certain that each conforms to the other. It has become a practice in many areas not to urge your client to have a survey. Immediately after new construction is an essential time for a new lot survey to be made. Encroachments, either from or onto neighboring lots, violations of setback requirements and encroachments into easements are commonplace.

The encroachments by small structures onto other lots can be remedied by removal of the encroachment. Most typically the seller will ask the neighbor to waive a minor encroachment, or in the case of a more substantial encroachment, the seller may ask for an easement from the neighbor. The waiver, usually not meant to be recorded, may allow the title company to provide coverage without exception. Encroachments onto the subject lot can be handled in much the same way but the type and severity of the encroachment must be assessed. An agreement with the next door neighbor, verbal or written, and not recorded, will not be enforceable against a new neighbor. Does the problem need to be settled by formal recorded agreement? Many buyers will want to close and come back to the problem if it arises later. The typical owner's title insurance policy will not cover any loss resulting from this situation and the buyer should be made aware of this and the fact that he may be forced later on to remove the encroachment at his expense.

Encroachments of buildings into utility easements are commonplace but serious nonetheless. The usual remedy is to have all of the public utilities in the area determine that they have no need for the area of the easement in which the encroachment exists and by release have that portion of the easement removed from dedication. This removal from dedication will require a procedure usually set out in the ordinances of the municipality.

The violation of setback lines is a problem that attorneys come upon frequently and usually occur when the builder has not allowed a surveyor to set the locations of the foundations, or the builder or the surveyor have simply erred in their computations. Situations can many times be solved because the developer has provided in the restrictive covenants that minor violations may be waived by the developer with (and sometimes without) the permission of the adjoining neighbors (among others). The best procedure is to have these types of waivers recorded. The waivers should include the parties and "their successors and assigns" so that the waivers will be binding on future owners. In some instances the title company will give coverage from loss to the owner if certain waivers are obtained and the violations are not major and unintentional. It should also be noted that there are minimum setback requirements contained in various ordinances of the municipalities and they must be taken into consideration. Usually when the plat has been approved by the municipality, the municipality will have determined that the setbacks shown on the plat do not violate the municipal setback requirements. (Many single-family tracts in older sections of a municipality will be subject to municipal setbacks.)

II. PURCHASE BY INDIVIDUAL HOMEOWNER (Exhibit 30)

a. Vesting title in the new owner

Titles are held by the purchasers of the lots in the subdivision in several different entities that meet the needs of the buyers who have sought their attorney's advice concerning their estate plans and tax and personal situations.

1. Individual Owner – When title vests in an individual who purchases a lot, who then secures a loan with the proceeds being used exclusively for the payment of some or all of the purchase price (and the deed and the purchase money deed of trust were delivered and recorded at the same time), the interests of the lender will be superior to any prior liens against the individual because of the doctrine of instantaneous seisin. If the individual owner is married, and still chooses to take title alone, the individual spouse may execute the purchase money deed of trust without the joinder of the spouse.

2. Tenants by the Entirety – Married persons may take title to the lot and hold their interests in the entirety. This tenancy is exclusively for married persons to hold title. If the deed vests title in married persons then, nothing else showing, these persons take as tenants by the entirety. The spouses must take their interests at the same time and have the same interests, have unity of possession and unity of person, meaning they act as one legal entity. Liens against one of the tenants will not attach to entirety-held property (with the exception of Federal Tax liens, see U.S. v. Craft, 122 S. Ct. 1414 (2002).) Tenants by the entirety may not convey their interest without the joinder of the other tenant and the tenants share a right of survivorship that operates exclusively from any devise or estate inheritance that the tenant may have.

3. Judgments against the Buyer -- Do you during your title examination search the purchasers for judgments and liens? Why should this be a common practice? Purchasers may have a valid prior judgment lien filed against him or them. As we know a valid judgment lien will not have priority over the lien of the properly executed and recorded purchase money deed of trust, but what of the equity-line type deed of trust recorded three days after the closing. With this type of situation the lien of the equity-line deed of trust does not benefit from the purchase money priority rule and the judgment liens will attach before the lien of the deed of trust. It is very important to know of these judgments and whether you are faced with a purchase money loan or not. Could attachment of the lien be avoided by structuring the purchase differently? Is the debtor-purchaser one of several co-tenant purchasers, such that his liens could prejudice a later sale or refinance of the entire ownership, even for the non-debtor co-owners?

4. Couples purchasing prior to marriage -- In these days many couples purchase their home before getting married. Many of these couples want to be vested with title

as tenants by the entirety. If the closing takes place before the marriage the couple should be advised that after marriage a new deed will have to be executed to themselves as husband and wife to create the entirety tenancy. There is usually no problem concerning the acceleration clause in the existing deed of trust because of this new deed.

5. Tenants in Common – Tenants in common, two or more, will hold title in separate undivided interests in the whole with equal rights of possession. If the tenants in common are married but the individual tenants hold title as individuals then their spouses must join in any conveyance. Some married persons may want be vested with title as tenants in common rather that tenants by the entirety for estate tax purposes or other reasons. If this is to be the case the deed must clearly show in the granting clause that the property is to be held as tenants in common.

6. Joint Tenants with Right of Survivorship – Many people who are not related will purchase property together and become vested with title as joint tenants with right of survivorship. The importance of this type of tenancy is that upon the death of one joint tenant, his interest in the property jointly owned inures to the benefit of the surviving joint tenant(s). The heirs or the spouse of the deceased joint tenant take nothing at his death and he cannot devise his interest at his death. This tenancy is allowed in North Carolina only by statutory authority given in N.C. Gen. Stat. 41-2 and must be carefully drafted. The granting clause must state with certainness that the grantees are taking title as "joint tenants with rights of survivorship."

7. Life Estates – When title is to be vested in a person for life, the life estate must be created in the deed with proper, clear language and intent. It is best to recite in the deed the responsibility of the life tenant regarding various expenses and other matters. You should help your clients choose which areas are likely to be the subjects for future disagreements. For instance, ad valorem taxes are usually the responsibility of the life tenant but public improvement assessments are the responsibility of the remainderman. Other areas where an agreement will help include repairs, insurance, and existing encumbrances.

8. Trusts – On occasion the buyers will inform the closing attorney that title should be vested in a trust. Frequently these trusts have been set up for estate and tax purposes. It is very important that the title vest in the trustee named in the trust and not in the trust itself. North Carolina has adopted a revised version of the Uniform Trust Code effective January 1, 2006. N. C. Gen. Stat. 36C-1-101 et seq. This is a very comprehensive and broad statute covering many types of trusts, trust provisions and how trusts should be administered. Basically we are writing here about the authority of the trustee and how the attorney can rely on the powers given by the trust and administrated by the trustee. The statute requires that the trustee must be loyal to and act for the benefit of the beneficiaries and not for himself or his personal gain. N. C. Gen Stat. 36C-8-802. Listed as general powers of the trustee (N.C. Gen. Stat. 36C-8-815) are broad powers to achieve the proper

management, investment, administration and distribution of the trust property. Listed as specific powers of the trustee, among others, (N. C. Gen. Stat. 36C-8-816) are powers that allow a trustee to fully act as if he were the owner of the property, including the power to borrow money and use the property as security for the debt. For the purposes of the closing attorney and others the act bestows broad protection of any person other than the beneficiary "who in good faith and for value deals with the trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, (and that person) is protected from liability as if the trustee properly exercised the power." N. C. Gen. Stat. 36C-10-1012. Further, if the person dealing with the trustee has acted in good faith, without knowledge and for value, the person is not required to inquire into the extent of the trustee's powers, ensure that delivered assets are properly applied nor determine if the trustee's term has expired. The statute provides a "safe harbor" through obtaining a certification of trust, rather than providing the entire trust instrument. However, "[a] person is not required to obtain a certification under G.S. 36C-10-1013 in order to be entitled to the protections of this section." N.C. Gen. Stat. 36C-10-1012. Both of these sections will provide direction for the closing attorney to decide what may be needed in addition to a mere execution of the document by a trustee. The statute provides good direction on how to proceed with problems arising from the execution of documents by a trustee.

9. Powers of Attorney – Frequently principals will execute documents by authorizing an attorney-in-fact to sign in their stead under the provisions of a power of attorney. The problem confronting the closing attorney can concern the authority of the attorney-in-fact to act under the powers set forth in the power of attorney. A new statute, effective October 1, 2005, (N. C. Stat. 32A-35a) offers help for this situation. It sets out that unless a person has actual knowledge that a writing is not a valid power of attorney, or that the action taken or to be taken by the attorney-in-fact named in a writing that purports to confer a power of attorney is beyond the apparent power or authority as granted in the writing, a person who in good faith relies on a writing that on its face is duly signed, acknowledged and otherwise appears regular, and purports to confer a power of attorney, durable or otherwise, shall be protected to the full extent of the powers and authority that reasonably appear to be granted to the attorney-in-fact. No person so dealing in good faith with the attorney-in-fact shall be held responsible for any breach of fiduciary duty by the attorney-in-fact including breach of loyalty, any act of self-dealing or any misapplication of money or other property paid or transferred as directed by the attorney-in-fact. This subsection (a) applies without regard to whether or not the person dealing with the attorney-in-fact demands or receives an affidavit under N. C. Gen. Stat. 32A-35(b). However, the affidavit under subsection (b) provides a safe harbor for those relying on the acts of the attorney-in-fact, and specifically itemizes the contents of the affidavit that can be required from the attorney-in-fact. The contents will state that the attorney-in-fact has no knowledge that the power of attorney was not executed by the principal, has no knowledge that his power has been revoked, has no knowledge that the principal

is not alive nor is incompetent, and has no knowledge that the power of attorney is not a legal, valid power of attorney.

The closing attorney must still make considered opinions about the powers given in the power of attorney but this statute helps greatly in allowing the closing attorney to rely on the document he is offered. A recent case illustrates the need for the closing attorney to look and decide what the powers set forth in the power of attorney actually allow. In Conlon v. Self, a recent and unpublished case, the attorney-in-fact made a gift of his wife's share of real property to himself pursuant to a broad general power of attorney. The court held in invalidating the conveyance that an attorney-in-fact acting pursuant to a broad power of attorney lacks the authority to make a gift of the principal's real property unless that power is expressly conferred. As a general rule gifts to one's self (or encumbering the principal's property for the benefit of the attorney-in-fact or their affiliates) or gifts made for charitable purposes will not pass the test when only general powers are set out in the power of attorney.

10. Minors and incompetents - As a general rule it is important to advise clients not to allow title to be vested in minors or incompetents. The procedure for selling the property, and in our present case encumbering the property, can be a difficult, expensive and lengthy process pursuant to N.C.G.S. § 35-1301 *et seq*. Clients will sometimes demand that property be vested in persons without legal competence and skillful advice should be used to avoid the situation.

III. TAXES AND ASSESSMENTS

Generally, ad valorem taxes are levied by county governments and local municipalities on all real property in North Carolina. The taxes are determined by the Tax Collector in each county who sets a value on each parcel of real estate and the Board of County Commissioners or the governing body of the municipality that annually set the tax rate to be charged. Newly formed tax parcels are continually being valued, but all of the real estate in each county must be revalued at least every eight years. While tax rates are set on or before July 1, the beginning of the fiscal year for local governing bodies, the payment of taxes is determined and prorated between buyers and sellers on the calendar year. Unpaid taxes are liens, not in personam against the owner, but rather a claim and lien in rem against the land. The title searcher must determine that taxes have been paid (or are owed) going back for a period of ten years because the taxing authority can bring an action to collect the taxes based on a ten-year statute of limitations. Ad valorem tax liens are superior to all other liens. N. C. Gen. Stat. 105-356.

1. Purchase from developer – The developer has purchased several tracts of land all of which were listed for taxes. It is important that all of the various tracts that make up the subdivision tract are searched for unpaid taxes. Some of the tracts may have been given a deferred tax status by the tax collector because a

former owner showed that he was using the property for agricultural, horticultural or marketable timber purposes under the definitions set forth in the statute. N. C. Gen. Stat. 105-277.2 et seq. A deferred tax status applies only to the value of the land not the improvements. At the time of the sale of the property the deferred taxes plus all accrued interest, based on the full value of the property, will be owed for the current tax year and three years prior to the current tax year.

2. Purchase from builder – The subdivision plat has been recorded and your client is buying a lot from the builder who has purchased several lots from the developer of the subdivision. You can be confronted with several issues regarding taxes according to what part of the year the closing takes place and in what stage of completion the real property was when the last tax evaluation was made. Assuming that a loan has been made to the buyers to provide for some or all of the purchase price, more times than not, the lender will require that an escrow for the payment of taxes be added to the monthly payment. Your task is to see that all taxes are prorated fairly between the buyer and the seller.

3. Prepayments, partial payments, personal property and carveouts -- If the seller owes taxes on the raw tract for the year of closing, proration and payment of the taxes can present problems. Prorations may be made on the purchase price if no other value is available or on the value of the property on January 1 if the construction was not yet complete. After the plat has been recorded, and according to N. C. Gen. Stat. 105-362, the tax collector upon request will determine the assessed value of the lot that is the subject of the closing and allow payment on that assessment of value. Upon payment the Tax Collector will issue a receipt of the payment and note on the tax records that the lot is no longer subject to the tax lien. If the taxpayer owes personal property taxes, a prorata share of those taxes must be paid also. The new amount of taxes paid for the divided parcel can be easily used to set up the lender's escrow amount. Partial payments made to the Tax Collector under N.C. Gen. Stat. 105-358 to release the lot from the tax lien are of limited effect since the balance of the taxes owed still remain liens.

4. Valuation by the tax department – When a new subdivision is platted it must be determined what part of the subdivision has been valued for ad valorem taxes by the tax collector. Taxes are determined on the valuation of the property as it existed on January 1 of each year. If the subdivision has been recorded after the first of January, the tax valuation will have been determined on the tract of land that has now become the subdivision. The closing attorney must ask the tax collector to determine the value of the lot (and the house if it is built) using the provisions of N. C. Gen. Stat. 105-362. If the subdivision has been platted before January 1 and the house is partially completed the tax collector will provide a partial value for the present tax year. It should be

> noted that the taxes will be prorated on this value and therefore lender's escrow account should be figured appropriately, the lender notified that the property will have an increased value the following year and that the monthly escrow amount will increase accordingly. If it is late in the year and the escrow amount must be figured to provide the usual cushion required by the lender, the purchase price may be used for this computation.

Public improvement assessments are liens against real property and superior to all others except ad valorem taxes. These assessments are made by the local governing body and used to pay for improvements such as paving roads, curbs and gutters and water and sewer mains and pipes. Pending assessments are those where the intention of the governing body to make improvements has been established, but the Assessment Roll has not yet been confirmed by the governing body. Pending assessments are not liens against the real property. Nevertheless pending assessments should always be reported because they can be the source of disagreement between buyers and sellers when confirmed and may be a shocking surprise to your client. The assessment lien attaches to the real property at the time the Assessment Roll is confirmed by the governing body and the clerk of the governing body sets the time of the favorable vote. N. C. Gen. Stat. 160A-216, 217 and 228. It should be noted then that recent assessment roll confirmations may only show on the minutes of the meeting of the governing body because the action of the governing body has not yet been transferred to a permanent lien docket. If pending assessments are found, the follow-up to search the minutes of the governing body becomes necessary. Non-paid assessments carry a ten-year statute of limitations for collection.

IV. MECHANICS', LABORERS' AND MATERIALMEN'S LIENS

a. Services provided to the owner of the property

> "Any person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract, either express or implied, with the OWNER (emphasis added) of real property, for the making of an improvement thereon shall, upon complying with the provisions of the Article, have a lien on such real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished pursuant to such contract." N. C. Gen. Stat. 44A-8

This statute provides more risk to the title insurance company than any other, because everyone (as provided by the statute) who has "improved" the real estate by dealing directly with the owner can obtain a direct lien against the real estate. Therefore, when the developer/builder is the owner and is the entity who is "improving" the property, a release of lien rights should be obtained from everyone who is entitled to a lien in order to insure that the property is free and clear of liens for construction of improvements on the property. Unless such releases are obtained by the developer/ builder owner at the time the "improvements" are completed and paid for, it may be extremely difficult to

locate and get an executed release of lien rights. If this is not possible, the certifying attorney should contact the title insurance company to determine if lien coverage will be available and if so, what will be required in order to obtain lien coverage.

b. Services provided to a contractor on behalf of the owner

One who furnishes labor or materials for improvement to real property who deals with a contractor, and not the owner of the property, is referred to as a subcontractor. A subcontractor's rights under the lien law of North Carolina fall into three categories:

a) a lien on funds due from the owner to the contractor.
b) a lien upon the owner's interest in the property by reason of a subcontractor's right of subrogation (or right to step into the position of the contractor)
c) a lien upon the owner's interest in the property by reason of direct liability of the owner to subcontractor.

If the owner and general contractor execute a lien affidavit which states that all persons who have provided "improvements" to the property have been paid in full and that all work contemplated under the contract between the parties has been completed, then the title company will usually be able to issue a title policy without an exception for lien rights of parties who have made "improvements" to the property.

Attorneys certifying title and title insurance companies must work together in order to insure that no lien rights for "improvements" to the property exist at the time the policy is issued. Since title companies must rely on the opinion on title that is furnished to them by the certifying attorney when issuing a policy, certifying attorneys should discuss with the title company what they know about the status of the property (new construction, recent repairs, etc.) as well as the title to the property when deciding what the title company will need by way of documentation/affidavits from the owner or contractor or subcontractors before issuing the policy. The certifying attorney should make the title company aware of any liens or judgments against the owner or contractor discovered during the title search even if those liens and/or judgments have been released and otherwise satisfied. This will allow the attorney and title company to determine whether lien rights can be insured and if so what documentation/affidavits the title company will require in order to insure such rights.

V. HOMEOWNERS' ASSOCIATIONS

The real and personal property making up the common area and that is vested in the association is not taxed directly to or paid by the association. The values of real and personal property owned by a non-profit homeowners' association shall be included in the appraisals of the real property owned by the members of the association and shall not be assessed against the association if: 1) all property owned by the association is held for the use and benefit of all of the members of the association equally; 2) each member has an irrevocable right to use and enjoy, on an equal basis, all of the property of the

association; and 3) the right to use and enjoy all the property is appurtenant to taxable real property owned by a member of the association. N. C. Gen. Stat. 105-277.8

There are usually homeowners' association dues that are required to be paid regularly. And the association usually has the authority to collect assessments from time to time. A written certificate should be secured from the association or its management company indicating the status of these charges. If not paid, the dues and assessments can ultimately become liens on the property.

The closing attorney should include in his search of his client's property the property of the homeowners' association itself to determine whether the association has mortgaged the association property. The buyer should know that this encumbrance exists and the potential for how and when it will be paid and if there will be any special assessments forthcoming.

VI. TITLE INSURANCE POLICIES

a. Loan policies

1. **Construction Loan Policy (10-17-92)**: This policy differs from the loan policy in that it contemplates that no construction has begun on the property and the title insurance company will require that no lienable work has begun on the property prior to the effective date of the policy. This policy is frequently issued with a twenty four (24) month limitation and is therefore primarily used for residential construction loans. One of the main advantages to this type of policy is that the premium is considerably lower than for a loan policy.

2. **ALTA Loan Policy (10-17-92)**: This policy insures the lender that the lender has a valid first lien on the property (unless otherwise stated) and that the borrower has good title to the property that is security for the loan. The coverage amount of the policy is the amount of the loan and the liability of the title company, should a claim result, is reduced as payments are made on the loan. When the loan is paid in full, the title company has no further liability under the policy. This type of policy is transferable and a subsequent holder of the indebtedness will be covered by the original policy.

3. **ALTA Short Form Residential Loan Policy (10-21-2000)**

b. Owner's Policies

1. **ALTA Owner's Policy (10-17-92) -** Without a title insurance policy the owner may not be fully protected against errors in public records, hidden defects not disclosed by the public records, or mistakes in examination of the title of the property. As a result, the owner may be held fully accountable for any prior liens, judgments or claims brought against the property. However, the policy

insures that if such an occasion arises, the owner will be defended free of charge against all covered claims. A few of the most common hidden risks that can cause loss of title or create an encumbrance on title are:

a) False impersonation of the true owner of the property.
b) Forged deeds, releases or wills.
c) Undisclosed or missing heirs.
d) Instruments executed under an invalid or expired power of attorney.
e) Mistakes in recording legal documents.
f) Misinterpretations of wills
g) Deeds by incompetent persons, minors or by persons supposedly single, but in fact married.
h) Liens for unpaid estate, inheritance, income or gift taxes.
i) Fraud.

2. **ALTA Residential Owner's Policy (6-1-87)**: This policy is available only for residential property consisting of one (1) to four (4) family residences. It expands the coverage provided in the regular loan policy at no additional premium to the owner. The policy is written in a language that should be easier for the insured owner to understand.

3. **ALTA Homeowner's Policy of Title Insurance for One-to-Four Family Residence (Adopted 10/17/98 Revised 10/22/2003)**: This is a relatively new policy that offers additional coverage not offered in the regular or plain English policies. There is a small additional premium for the issuance of this type of policy. The additional coverages provided by the expanded coverage policy are outlined on an **Exhibit 31**.

VII. DEEDS OF TRUST AND MORTGAGES

At closing the attorney will have determined any existing deeds of trust and the amount needed to pay off these liens. It is then the attorney's responsibility to see that the paid deeds of trust are properly canceled of record. This task has for many years caused a great deal of difficulty for the attorney trying to get lenders to take more responsibility to see that the paid deeds of trust are canceled of record. While some lenders would take some responsibility for the satisfaction of record, many lenders would not.

The new mortgage satisfaction law (N.C. Gen. Stat. 45-36.2 et seq.) became effective on October 1, 2005, and it provides important provisions to help the attorney have satisfied deeds of trust canceled of record and provides a reliable method to secure written payoff statements. The old law has been streamlined and many additions and revisions have been added. In addition, changes have been made to the provisions concerning the review by the Register of Deeds of documents prior to recording N.C. Gen Stat. 47-14, 47-46.1, 47-46.2 and 47-46.3, and requirements for Registers of Deeds indexing subsequent instruments. N. C. Gen. Stat. 161-14.1. Since the entire bill (Senate Bill 734) can be seen

at the North Carolina General Assembly website and has been published by advance subscription services these locations are recommended to everyone to study in depth. The changes and the new and revised sections are lengthy and complete. It is not the intention of this writing to be a complete comment on the new provisions.

The provisions of the statute address the following (the references are to section numbers of the statute, all of which are in chapter 45, unless otherwise noted):

- Penalties for lenders failing to effect satisfactions. (section 36.3)
- An extensive list of definitions. (section 36.4)
- How notification is given and when it is effective. (section 36.5)
- The effect and liability of erroneous satisfactions. (section 36.6)
- Payoff statements, contents, entitled persons. (section 36.7)
- Correcting an understated payoff statement and reliance on the statement. (section 36.8)
- Penalties for lender failing to satisfy the security instrument. (section 36.9)
- The contents of the satisfaction and when the register of deeds must accept it. (section 36.10)
- Non-exclusive form for satisfaction. (section 36.11)
- Only licensed North Carolina attorneys can be satisfaction agents. (section 36.13)
- Affidavit of satisfaction, notification to secured lender, intention to satisfy. (section 36.14)
- Affidavit by satisfaction agent that secured party has failed to effect satisfaction or has authorized agent to satisfy. (section 36.15)
- Outlines the contents of the affidavit of satisfaction. (section 36.16)
- Non-exclusive form of the affidavit of satisfaction. (section 36.17)
- Outlines the effect of the affidavit, which satisfies the security instrument, but which does not, by itself, discharge the personal obligation. (section 36.18)
- Outlines the liability of the satisfaction agent. (section 36.19)
- Outlines the content and effect of a trustee's satisfaction. (section 36.20)
- Non-exclusive form of trustee's satisfaction. (section 36.21)
- The old cancellation statute where conforming changes have been made. (section 37)
- Recording and indexing the satisfaction. (section 37.2)
- Presence of proof or acknowledgement by register of deeds. (N. C. Gen. Stat. 47-14)
- Forms that can be used for several methods of satisfaction. (N. C. Gen. Stat. 47-46.1ff)
- Indexing may be in the names of the grantor and beneficiary rather than grantor and trustee as before. (N.C. Gen. Stat. 161.22(d))

The forms and basic instructions are available on-line at: http://www.northcarolina.ctt.com/chicagobulls.asp#deedoftrust and are attached hereto as **Exhibit 32**.

See "Satisfactions, recordings, re-recordings, indexing and more under the new North Carolina Mortgage Satisfaction Act (SL 2005-123, S734)" By: Nancy Short Ferguson, North Carolina Bar Association Real Property Section Newsletter, November 2005 (attached as **Exhibit 33**).