

# **Title Insurance Issues for Developers**

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## **I. Introduction**

Title insurance is an excellent and critical supplement to the various services and protections that a developer needs in purchasing, developing and selling property – from raw land to final outsales. Based on your certification of record title, it provides coverage of loss or damage, and possibly costs of litigation, regarding matters which may not appear of record. Based on your advice to your client (owner and/or lender), it may contain affirmative assurances about matters important to the development process, such as survey and legal access.

This manuscript looks in two directions:

- Retrospectively: What cures or affirmative coverages should you seek on behalf of your developer client to assure it will be able to continue its developer without title issues?
- Prospectively: What title issues should you address with your developer client to assure that the future of the development is protected, both while your client owns and develops and after purchase by third parties?

Some critical provisos:

### A. Title insurance – benefits and limitations:

1. Title insurance is certainly a beneficial protection and a critical component in any package of services and products needed to protect your developer client. In the event of a title claim on a covered matter, it may provide both defense costs and, if a loss, then reimbursement of certain portions of that loss. In some situations, the title insurer through warranties, indemnities or escrows, may facilitate the continuance of the development process during negotiations or even litigation, which may continue for several years prior to resolution.

Example: The Catawba Indians cases in South Carolina went on for over 15 years, including two trips to the United States Supreme Court and were finally resolved by a Treaty in Congress.

Example: When Adams Farm Company was unable to continue development, litigation ensued between competing creditors, threatening investment values for hundreds of owners if this were no longer a viable community. Through escrows and indemnities or large national insurers, development (under new management, of course) continued during the several years while the lawsuit was pending.

2. Title insurance is an indemnity in the event that something goes wrong. It is not a guarantee that a claim will not occur, even on a covered matter.
3. Good title is better than a good title insurance policy. Or, more accurately in the prioritization of preferences: Good title is better than Marketable Title (Chapter 47B of the North Carolina General Statutes) is better than insurable title (the willingness of a reputable title insurance company to issue a policy, with exceptions). Like fire insurance, medical insurance or casualty insurance, it would be poor judgment not to have the best coverage available. But it would be better not to have a fire or an illness or a wreck at all!
4. Unlike fire or casualty, most title insurance claims situations are completely avoidable.
5. Most claims arise from the most basic legal premises – like recording in order of priority, having all parties with an interest sign and notarize documents, obtaining lien waivers from contractors, checking surveys against restrictions and plats, reviewing new instruments in title updates, even spelling the names of the parties correctly.
6. If a claim occurs, your client will suffer loss of time, profits, aggravation, sales and other costs that are *not* covered by the title insurance policy and may far exceed the policy coverage.
7. Title insurance underwriters and underwriting counsel are a resource for discussion of particular situations, legal issues involved and, more importantly, what risks *your client* is undertaking, with or without title insurance affirmative coverage. We are not the arbiters of right versus wrong, or legal versus illegal.

B. The continuing value of quality legal counsel

1. Title insurance is not a substitute for quality comprehensive legal advice! It is not a means to shortcut the valuable investigation by and advice of counsel in making decisions and protecting the developer, the lenders and the ultimate purchasers of lots and homes.
2. The most important concern of your client is not whether they will probably win if they go to court. Your client does not want to go to court or have to stop development to negotiate at all! Your education of your client on what protection and services they need and the risks if they try to cut those costs may be the best advice you provide them (and the best protection for you and your firm).
3. Counsel representing developers should *never* blindly rely upon the much overused, abused and misunderstood adage: “It’s okay because it’s covered by title insurance.” Your client has far too much at stake!

## **II. Important Note Regarding North Carolina Case Law (or lack thereof)**

This manuscript is not intended to be a comprehensive overview of real estate law, even if this author were capable of such a feat – in a 45-minute presentation. Most situations referenced in this manuscript are from the claims and underwriting experience of this author. Some examples below may have their basis in existing ongoing claims. So the issues may be adjusted and names are anonymous for obvious reasons. When we are very lucky, they do not rise to the level of an appellate court decision! When an issue seriously needs legal clarification or involves a substantial sum, new case law will result.

Always remember: **Title insurers [and clients] do not like making new case law!**

## **III. Important Title Insurance Resources**

Obviously, this manuscript cannot include a detailed outline of all terms, conditions, cases or possible cases involving title insurance policies. Nor is it intended to do so.

Palomar, Joyce, D., Title Insurance Law (Clark, Boardman Callaghan Publishers, Inc., 1994, updated regularly)

Ellis, Robert E., Title Insurance Law Handbook, Second Edition (LawText Publishing Company, 2000)

Nielsen, J. Bushnell, Title and Escrow Claims Guide (Woodridge Legal Publishers, 1996 with 2000 supplement)

Burke, Jr., D. Barlow, Law of Title Insurance, Second Edition (Aspen Publishers, with periodic supplements)

American Land Title Association, ALTA Policy Forms Handbook, which is updated frequently. (You can purchase on-line at [www.alta.org](http://www.alta.org).)

The California Land Title Association has adopted a long list of endorsements from which commercial owners' and lenders' counsel draw regularly, contained within their manual, CLTA Policy and Endorsement Forms Book. (You can purchase on-line at [www.clta.org](http://www.clta.org).)

Web sites for most national title insurance companies and some local agencies have underwriting sections with newsletters, articles by prominent company counsel, manuscripts from seminars and other helpful information available on-line.

#### IV. American Land Title Association (ALTA) Policies

The primary policies used in today's market are shown below. In this manuscript, I will refer to the particular policies as follows:

ALTA Loan Policy (10-17-92) (herein the "Loan Policy", Exhibit A attached hereto)	Any loan transaction. Can be used for temporary or permanent construction loan as well as development or permanent loan. Also serves as the basis for the ALTA Short Form Residential Loan Policy (10-17-92), used for many single family residential loans. <i>NOT</i> owner's coverage. Terminates as soon as the loan is paid in full or the insured property is released from the insured lien, whichever first occurs.
ALTA Owner Policy (10-17-92) (herein the "Owner's Policy", Exhibit B attached hereto)	Commercial and vacant land transactions. Continues as long as the insured owns <i>or has liability under its warranties</i>
ALTA 1-4 Family Residential Owner's Policy (6-1-87) (herein the "Residential Owner's Policy", Exhibit C attached hereto)	Only appropriate for 1-4 family residential properties, such as single family detached homes, townhouses, condominiums. Additional coverages for residential owners, over and above the 1992 policy above.

The basic structure of the Policies is substantially the same, though the terms will differ considerably, especially between owner and loan policies. In any situation, the terms of the particular policy *must* be carefully reviewed to assure that all parties are considered, all properties (and easements) joined, all title existing or potential title issues that may affect future development are addressed adequately, and sufficient coverage is obtained.

One way to assure that all bases are covered at the purchase and development stage is to consider the questions that would be asked if a claim was filed.

1. Has a policy been issued? If not, is a commitment still outstanding and viable, for which the premium has been paid and all requirements met?
2. Is the claimant the insured?
3. Does the claim or lawsuit allege a matter involving the land insured?
4. Does the claim or lawsuit allege a title matter, as opposed to a tort or other claim?

5. Is the matter a covered risk?
6. Is the matter an Exclusion?
7. Is the matter an Excepted matter?
8. If Excepted or Excluded, was affirmative coverage or an Endorsement issued regarding the matter?
9. Has the insured prejudiced the ability to defend or pursue the claim by delay in notice and filing of the claim? By separate negotiation with the adverse party? By admissions?
10. Is the insured honoring its duty to cooperate?
11. If the issue is or may be covered, alternative issues include:
  - a. Is it within the duty to defend?
  - b. Pay policy limits?
  - c. Pay less than policy limits (diminution in value)?
  - d. Pay a third party?
  - e. Action to clear title?
  - f. Obtain an easement or other instrument from a third party?
  - g. Pay salvage value?
  - h. Arbitrate with the insured?

If the matter is critical to the developer or potential purchasers, then the potential for affirmative coverage, the type of affirmative coverage, the real effect (if sufficient) of having affirmative coverage and the potential need for addressing and curing the issue *now* should be completely and deliberately discussed by all parties.

## **V. Schedule A:**

### A. Effective Date:

Remember, the entire development process is “post policy”! Therefore, as of the date and time that our insured takes title, no new matters are covered. Any post-policy matters are not covered absent subsequent endorsements regarding the changes, such

- later construction in violation of the setbacks in restrictions or plats
- modifications to the insured deed of trust

- pending assessments finally being assessed and billed (which are a matter of contract between seller and buyer)

Lenders often request downdate (or update) endorsements, notwithstanding that the priority of their deed of trust is already “covered” under the original since it complies with our future advance statute. The endorsements may be requested for a variety of reasons -- to verify no claims of lien or subordinate deeds of trust have been filed about which they are unaware, to include coverage regarding an updated survey obtained, to confirm lots as yet unreleased of record, to identify restrictions, easements, plats or other matters executed and recorded by the developer, but not yet shown in their loan policy.

Developers may want to avail themselves of the additional coverage that this might allow them, given the usually nominal expense of the endorsement and the substantial risk of underinsurance triggering the Coinsurance provisions of Item #7.b. of the Conditions and Stipulations. The title insurer would not be responsible for matters “suffered, assumed or agreed to” by the developer (such as mechanics’ liens). However, matters revealed by the new survey could be addressed specifically, providing survey coverage for matters that otherwise would have been either excluded entirely or “post policy”. CAUTION: The update for the developer should only be on property still owned by the developer as of the new effective date. Do not delete the existing coverage on other properties already sold; just do not update their coverage since your title certification would necessarily reflect they are no longer owned by the developer.

Will your client need downdate endorsements as development progresses for new survey matters or boundary line agreements, additional exceptions or affirmative coverages for easements, restrictions or plats recorded, or to add additional tracts?

B. Coverage Amount: Is your client obtaining owner’s coverage or just loan coverage? Is it enough to cover the owner now, throughout the development, through the deed warranty liabilities to purchasers? Some increments of value to be considered include:

- Temporary construction only (lender, not owner’s coverage)
- Value of land
- Value of improvements
- Planned improvement values
- Multiple tracts (See “Tie-In Endorsements” discussions below)
- Consequential, collateral, delay and “profit” losses (Synergism case, below)
- Timing – claims “costs” including owners out of work, choosing counsel, allegations on matters which are not “title” matters

In making this determination, take careful note of the Coinsurance provision of the Owner’s Policy, which is similar to that contained in other fire and casualty policies. Conditions and Stipulations Item #7.b., provides as follows:

*b. In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the land, whichever is less, or if subsequent to the Date of Policy an*

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*improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following:*

- i. where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy; or*
- ii. where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement.*

*The provisions of this paragraph shall not apply to costs, attorney's fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A.*

**B. The "Insured":**

Does the owner have coverage? Are there any anticipated transfers? Notice that the definition of "insured" under the policy includes only those who take title by operation of law, not conveyance. Item #1.a. of the Conditions and Stipulations defines "insured" as "the name insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors." If your developer will be making transfers of properties among its affiliates as part of the development process, are all parties in the chain covered by separate policies? What about the owners' association(s) created for new developments?

**D. Insured property:**

Does the description include all parcels? Are any appurtenant easements required for the development? Are options on other parcels a critical part of the development plan?

Consider whether separate policies with Tie-in (Aggregation) Endorsements would be preferable to one large single policy on all parcels. It is of key importance to assure that the coverages of all parcels in at least a first phase, if not the entire development, are aggregated. The loss of a single parcel may affect significantly the entire development, not just the price tag on that parcel itself. For example, one tract may cost only \$20,000, but may be critical to road layout, density, access to another parcel. Or if the seller of the \$20,000 tract had substantial properties on the same tax bill or substantial business personal property, and tract was not segregated and released under N.C.G.S. 105-362, the potential loss could easily exceed the coverage on a separate \$20,000 policy on just this parcel.

If all of the parcels comprising the development are closing in a tight time frame, the easiest method is probably to obtain a single policy with multiple parcels. The total coverage would

include all purchase prices, plus any additional improvement or other values determined by the attorney and insured as appropriate and desirable.

If, however, the purchases are taking place over time, Tie-In or Aggregation Endorsements can be obtained. This is more costly because the endorsements for *all* policies will need to be updated each time a new policy is added, for which an additional fee will probably be required. But it does allow for more flexibility. See Exhibit L: Tie-In (Aggregation) Endorsement -- ALTA Endorsement Form 12 (10-14-96).

When drafting a legal description, think long-term. Will this description survive the test of time? Will your client have a density problem or loss of critical acreage and location if a neighbor objects to a boundary line or a creek bed moves or a street is widened in the near future? Be inclusive of permanent monuments *and current metes and bounds*. You are establishing the base for many future owners and a substantial future investment by your client. This is the most critical stage! The collateral and consequential damages *will* be many times more than the initial investment!

You and your client are taking a serious risk if you take title using old legal descriptions or do not obtain new survey coverage with at least a quitclaim conveyance at the purchase closing. This is especially so if the boundaries with adjoining are not clearly evidenced and visible on the ground, or if the record title of any purportedly adjoining properties are not clearly referencing each of their respective boundaries consistently one with the other, or if the acreage is either the means of calculating the purchase price or critical to the planned development. Gaps or gores can have devastating effects in lost profits and consequential damages which are not covered by title insurance. (See "Determination of Loss Under Policy" below.)

Future parcels or phases must be considered *now*, before even the first parcel is taken down, if they are critical to the success of the parcel. Do not put off complete study, title work and assurances on additional parcels if your client cannot risk having to complete the project without them.

## **VI. Policy Covered Risks:**

Owner's coverage includes the four basic coverages: vesting in the named owner, no additional liens or encumbrances, marketability of title and access. Lender's coverage adds coverage for validity, enforceability and priority of the insured deed of trust and assignments specifically shown, as well as creditors' rights issues created by the loan transaction underlying the deed of trust. The Residential Owner's policy adds substantial additional coverages for consumers, including coverage against enforced removal of improvements due to violations of zoning or subdivision regulations or restrictive covenants.

Of course, all coverages are specifically subject to the Exceptions, Exclusions from Coverage, and Conditions and Stipulations of the policy.



## **VII. Exclusions from Coverage:**

The Owner's Policy excludes coverage for the following critical matters: Governmental regulation, police power or rights of eminent domain, including regulations and proceedings regarding zoning, subdivision, environmental, condemnation; creditors' rights issues (insolvency or bankruptcy); and the most important, for purposes of this manuscript, Exclusion #3, as follows:

*Defects, liens, encumbrances, adverse claims or other matters:*

- a. *whether or not recorded in the public records at Date of Policy, but created, suffered, assumed or agreed to by the insured claimant;*
- b. *not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;*
- c. *resulting in no loss or damage to the insured claimant;*
- d. *attaching or created subsequent to Date of Policy [known as "Post-Policy"]; or*
- e. *resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage or for the estate or interest insured by this policy.*

The Loan Policy contains similar mirror exclusions to the above, as well as additional exclusions for losses due to failure of the lender to comply with the doing business laws of the State, as well as any loss due to failure to comply with any usury or consumer protection laws.

Most of these are matters clearly within the control of the insured and not the title insurer, thus the rationale for the exclusions.

Under item a., the classic example involves unrecorded mechanics' liens incurred by the insured owner. See, for example, Electric Supply Co. of Durham, Inc. v. Swain Electrical Co., Inc., 97 N.C.App. 479, 389 S.E.2d 128 (1990), aff'd 328 N.C. 651, 403 S.E.2d 291 (1991), which presumably would not have been a covered matter for the owner.

Under item b., the classic examples involve matters which would be revealed by survey or physical inspection of the property. The owner would presumably have visited the property and may know of an encroachment, violation or other matter that should have been reflected by a survey, of which the title insurer would be unaware.

Under item c., often a technical claim has no actual loss in value or may even render the property *more* valuable – for example, where payment is made by another party or access is obtained to a landlocked parcel. In other cases, the claim is filed, the title company honors its duty to defend title, and the title is ultimately ruled to be as insured. The insured may have been involved in the litigation over some period of time. But no loss or damage is ultimately incurred with regard to the indemnity provisions of the policy, because ultimately the title is vindicated. A more surprising example of this provision is where the borrower did not pay value for the property (such as a gift) and, therefore, has no loss even with a total failure of title!

Under item d., violations of restrictions or encroachments created by improvements placed on the property after the effective or taxes assessed or assessments confirmed but not paid for periods subsequent to the date of the policy are not covered matters. They are wholly within the control of the insured.

Under item e., pursuant to N.C.G.S. 47-18 and 47-20, of course, we all rely upon protection against the rights and claims of third parties as well as parties to the transaction by recordation of instruments vesting title in bona fide purchasers for value.

## **VIII. Conditions and Stipulations:**

### **A. Duty to Defend under the Policy**

Upon presentation of a claim by an insured, the Company must investigate and make a choice on how to handle its obligations under the policy -- whether to litigate, to pay policy limits or to exercise its other options outlines below. If the claim is already in litigation, the issue is whether there is *potential* for coverage (and not exception or exclusion) under the policy, not whether the Complaint (or counterclaim) clearly states a title issue. The duty to defend applies even if the claim is frivolous and without merit. A common adage is that “the duty to defend is broader than the duty to pay.”

Under Item #4 of the Conditions and Stipulations, if the choice is to defend (rather than pay policy limits) the Company can appoint counsel of its choosing, pursue the litigation in the name of the insured through and including appeal to the last appellate court with jurisdiction. It is the insured’s duty to cooperate in all of this fully or risk loss of its coverage. In addition, if the litigation involves matters other than title matters (as is often the case), the title insurer can choose to fund only the title litigation, leaving the insured responsible for paying for and possibly retaining separate counsel to defend the non-title matters. Item #4 of the Conditions and Stipulations of the Owner’s Policy provides as follows:

4. *Defense and Prosecution of Actions; Duty of Insured Claimant to Cooperate.*
  - a. *Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.*

- b. *The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.*
- c. *Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.*
- d. *In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid:
  - i. *in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and*
  - ii. *in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured.**

*If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.*

This duty to defend is a separate coverage from the indemnity coverage of paying for loss or damage (discussed below). For example, if litigation is pursued to final determination that the title is as insured, no indemnity liability may be involved at all. In many situations, the duty to defend may exist where no indemnity liability is determinable at the initiation of the claim.

*Example:* An easement is included as insured property under Schedule A. Exception to the terms and conditions of the creating instrument is taken in Schedule B. The developer-insured is later subjected to a suit for overburdening the easement. To the

extent the claim is invalidity of the easement, the title insurer may be liable under its duty to defend. But if this loss is due to the post-policy actions of the developer in violating the terms and conditions of (i.e. overburdening) the easement, does the duty to defend continue and, if the easement right is lost, is this a loss under the policy? One case in another state involves a multi-million dollar potential loss!

The insurer may insist on a quiet title action, even where the insured would prefer another resolution such as payment of a claimed amount immediately. Though litigation can and often does take years to pursue, causing substantial delay for the insured's development project, it is the option of the title insurer to pursue – and the duty of the insured to cooperate. Pursuant to Item #9 of the Conditions and Stipulations of the Owner's Policy (substantially similar to Item #8 of the Conditions and Stipulations of the Loan Policy):

9. *Limitation of Liability.*

a. *If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.*

b. *In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title as insured.*

This right of the insurer to pursue litigation, and release of further liability upon successful result, notwithstanding "depreciation in value" of the property, loss of profits, delay damages, time and investment in the project has been upheld by many courts. First Federal Savings Bank v. Stewart Title Guar. Co., 451 S.E.2d 916 (S.C.App. 1994); Lawyers Title Insurance Corporation v. Synergism One Corp. et al, 572 So.2d 517 (Florida, 1990) (discussed below).

Should the insured decide to pursue remedies on its own, whether before filing the claim or afterward, note Item #9.c. of the Conditions and Stipulations:

c. *The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.*

A voluntary payment by the insured of a claim which is not yet finalized, or purchase of a "replacement" parcel at an inflated price, as two examples, could be subject to claim denial as "voluntary" payments by the insured.

Also, note that the insurer has subrogation rights under the Owner's Policy and the Loan Policy. Therefore, a release of a third party potentially liable for the claim, may result in a denial of liability by the insurer. This most often arises under Loan Policies where the lender desires

payment under the policy but does not want to antagonize a customer-borrower (who should make a claim under the Owner's Policy, *if it has one!*)

And, again, the insured has a *duty to cooperate* even if it disagrees with the method chosen! Otherwise, its entire coverage will be jeopardized.

## B. Determination of Loss Under the Policy

Under the Owner's Policy, Item #6 of the Conditions & Stipulations, in addition to the right to litigate (above) until a potential determination of title as insured, the title insurer has several options in determining payment of liability under the policy (the indemnification provisions):

- a. *To Pay or Tender Payment of the Amount of Insurance.*
  - i. *To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay.*
  - ii. *Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other than to make the payment required, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.*
- b. *To Pay or Otherwise Settle with Parties Other than the Insured or with the Insured Claimant.*
  - i. *To pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or*
  - ii. *to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.*

*Upon the exercise by the Company of either of the options provided for in paragraphs b.i. or b.ii., the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.*

In other words, the title insurer can at any point determine that litigation is too expensive, pay to the insured the coverage amount of the policy plus attorneys' fees and costs to date and terminate the coverage (*i.e.*, "pay policy limits and walk away"). This is an unusual provision not contained in most other types of insurance.

If the loss is less than policy limits, the determination of loss value is based on "diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is then being devoted." Overholtzer v. Northern

Counties Title Ins. Co., 116 Ca.App.2d 113, 253 P.2d 116, 125 (1953). Though a multitude of cases have addressed the issue, the most prevalent time for determination of these values appears to be the date of discovery of the defect, as in the Overholtzer case. The valuation would be based on “the use to which the property is then being devoted” rather than its “highest and best use.”

NOTE: The loss is *not* the value of the parcel or interest for which the loss is being claimed, especially at an inflated “ransom” price. Rather the measure is of the entire insured property, as insured, versus the entire insured property subject to the encumbrance claimed or less the portion affected by the adverse claim if entire title to a portion is lost.

As a practical matter, appraisals are routinely requested to make these value determinations under alternative methods.

Just as the title insurer can require litigation under the duty to defend, the title insurer can negotiate and settle with third parties, again whether or not the insured would prefer that method.

The critical issues above are, again,

*Example:* A policy insures access as a primary covered risk, but does not insure a particular access. If the preferred access of the insured is contested, the title insurer can negotiate an alternate access thereby satisfying its coverage under the policy, even if the insured does not prefer the alternate. Even if a particular access easement was insured, the title insurer can negotiate an alternate access route in partial or full mitigation of its liability to the insured under the policy.

CAUTION: Many consequential damages or collateral losses, such as lost profits, carrying costs of delays in construction or development, interim taxes, debt service, falling market prices, the developer’s time in appearing at meetings with counsel, depositions and trial or otherwise serving as a party to the action, are *not* included in the above list of losses payable by the title insurer, so long as the insurer pursues the remedy diligently and within a reasonable time.

*Example:* A developer purchased a tract of land based on a survey showing a pepper patch in a corner. As construction began, the pepper farmer claimed ownership of several acres which had been a critical part of the development. Over three years of litigation, the developer decided to build one less building so that the rest of the project could continue. The title insurer defended the lawsuit vigorously and ultimately title was finally determined to be in the developer. The title insurer paid the legal defense expenses and court costs all along. However, the title insurer was not liable for the delays, the time and expense of the developer’s staff in participating in the lawsuit, the loss in profits from revamping the project or the other consequential damages. Lawyers Title Insurance Corporation v. Synergism One Corp. et al, 572 So.2d 517 (Florida, 1990).

NOTE: A title insurer is not obligated to issue a new policy to a new purchaser or to provide “affirmative coverage” to the new purchaser once a claim issue has arisen! This requires an

individual discussion and analysis of the situation. Is the liability being increased? What effect will the fact that the new purchaser is no longer a “bona fide purchaser *without knowledge*” have on the defense of the claim? Have events subsequent to the existing policy exacerbated the problem and the defense of the claim? Is it even in the best interests of the purchaser to purchase the property under the circumstances, prior to complete resolution of the title issue? Is it just a money issue? Is a statute of repose about to expire making the issue moot? *The borrower and the lender must be notified, even if affirmative coverage is to be provided, if any federally insured loan is involved.*

Also, recall the Coinsurance provision limiting payment of loss on a claim where the property was underinsured from the beginning.

On a Loan Policy, the determination of loss is even a further step developed: The lender does not suffer a loss under the policy, technically, until it has exhausted its remedies against the property and the borrower, *and* the loss is due to the title issue and not to bad debt. If the property was already encumbered above its value by *known* prior liens, the lender has incurred no loss. If the title defect does not cause a diminution in value, the lender has incurred no loss. If the diminution in value amount is less than the outstanding balance of the loan, the loss is limited to the diminution in value, not the entire loan. If the property is simply worth less than the debt, no *title* loss is incurred. At most, the loss is the amount of the outstanding debt at the time of the loss, not the policy limits if they are higher.

## **IX. Schedule B -- Exceptions:**

These are the itemized specific exceptions to title based on the attorney’s Opinion on Title, the survey (or lack thereof), the lien waiver (or lack thereof) and other matters presented by the attorney. These are the matters about which treatises are written and in which courts at all levels are continually involved. These are the core of your client’s ability (or inability) to develop the property as planned. A few warnings based on actual claims and underwriting experience may assist the developer’s counsel.

1. Title search and certification. Full Search is highly recommended. If you rely on tacking, be conscientious about the disclosure requirements of RPC 99. Educate your client about the risks they are undertaking. Your client is about to invest substantial amounts in the property, far more than the raw land prior policy liability.
2. Review of documents of title and encumbrances. Copy, review, read, discuss with your client *all* exceptions to title. Be sure that they are located on the ground, certain and will not interfere with your client’s planned development. Consider negotiating blanket or unlocatable easements into specific defined areas with the easement holder. Title insurers often are requested to issue endorsements either identifying the location of the easement (as shown on the survey) or verifying access to particular types of utilities (such as water, sewer, electricity, gas, etc.) This coverage is dependent on your and the title insurers’ reading of the recorded instrument and the location of the facilities on a current survey. Absent specific affirmative coverage within the policy, these matters are exceptions to title and are *not* covered by the policy. Thus, any loss resulting from them is not covered.

3. Survey. Again, be persistent in insisting upon a current, complete, accurate survey of the property. CAUTION: Lender survey coverage without a survey gives no protection to the owner!
4. Boundary lines. Cautiously compare the descriptions along boundaries of tracts or easements to be purchased with the descriptions of the adjoining owners. Obtain boundary line agreements if there are any discrepancies or if the boundaries are not clear and identifiable on the ground.
5. Access or other uses of appurtenant easements may be critical to your client's development plan.
  - a. The particular appurtenant access easement should be included as insured property in Schedule A, based on the attorney's opinion on title, and exception should be taken in Schedule B to the terms and conditions of the particular instrument creating the easement. Modified Access Endorsement can typically be obtained providing substantially as shown on Exhibits D and E.
  - b. Be sure that you have searched the title to any private easements. Your title opinion will be necessary to obtain affirmative insurance of the easement in Schedule A. Recall that unless a *specific* easement is included in the legal description in Schedule A, the policy only insures a reasonable (undefined) means of access to a public road.
  - c. Carefully review the creating instruments (as recorded) to assure that the benefits needed by your client are clearly allowed under the instrument. Given that your client is about to invest a substantial sum in the property, new agreements should probably be negotiated in most cases, to assure the long-term viability of the plan.
  - d. Overburdening can take three primary forms:
    1. Attempting to use the easement across the servient tract to benefit more properties than the originally agreed dominant tract.
    2. Attempting to subdivide the dominant tract, thereby increasing the usage and users originally negotiated.
    3. Attempting to use the easement for more than the specified use in the creating instrument (i.e. using an access easement for utilities).
  - e. Since a tax foreclosure of the servient tract would extinguish the easement in North Carolina. Therefore, if the easement is critical, any newly drafted easement agreement should include provision for payment of taxes by the owner of the dominant tract. This comes up frequently on multi-state transactions where lender's counsel seek "Tax Foreclosure" endorsements.
  - f. Absent a specific provision otherwise, one North Carolina case held, in dictum, that the access insured is that which is "reasonable under the circumstances." Marriott Financial



Services, Inc. v. Capitol Funds, Inc., 23 N.C.App. 377, 209 S.E.2c 423 (1974), aff'd 288 N.C. 122, 217 S.E.2d 551 (1974) This is not the majority position nationally. And, in fact, in this case the liability was denied on other grounds in any event since it involved a post-policy municipal regulation, falling within both the post-policy, the police power and the governmental regulation exclusions.

6. Mechanics' and materialmen's liens continue to be a source of claims. Especially in the new development context, the following key risk areas should be discussed with your client:
  - a. Typically, by the time the developer client takes title, substantial planning is already in place. If the funding is a purchase-construction loan, subordinations are needed from all of the potential lien claimants who will be continuing to serve the project, such as surveyors, architects, contractors dealing with the purchaser-developer. See Dalton Moran Shook v. Pitt Development Co., 113 N.C.App. 707, 440 S.E.2d 585 (1994), wherein the court basically "split" the deed of trust into the purchase money increment (with priority under instantaneous seisin) and future advance construction funds (which were subordinate to the future liens of claimants who had already begun work at the time of closing).
  - b. Owners are well-advised to obtain interim lien waivers upon each payment to any contractor (as defined under Chapter 44A of the North Carolina General States), to assure that they are not forced to cover the same debt twice if a subcontractor defaults. See Electric Supply Co. of Durham, Inc. v. Swain Electrical Co., Inc., 97 N.C.App. 479, 389 S.E.2d 128 (1990), aff'd 328 N.C. 651, 403 S.E.2d 291 (1991), wherein the contractor and owner were forced to pay a second-tier subcontractor for work for which they had already paid the defaulted first-tier subcontractor.

7. Development Loan:

Release provisions must be clear, binding upon payment of the fee and enforceable in order to facilitate future outsales by the developer.

Similarly, the development lender should be clear about the need to join in subordinations to development documentation, such as restrictions and plats. Otherwise, a later foreclosure of the development loan may destroy the entire scheme of development and, with it, the value of the neighborhood.

Certainly the future advance provision must comply with N.C.G.S. 45-67 *et seq.*, or the future advances are at risk of being deemed unsecured. This is a serious risk where bankruptcy court is involved and is a frequent (and winning) argument.

8. Options or contracts to purchase additional parcels: Options or contracts to purchase additional properties can and should be insured if they are critical to the development. Memoranda must be properly executed, notarized and recorded. If at all possible, property should be conveyed to a third party escrow agent to avoid the risk of the seller incurring future liabilities which exceed the value and agreed price on the property. The purchaser

may have the legal prior right to purchase for set terms and price. But several recent cases, the sellers' new liens have exceeded the sales price and portions of the price have been paid directly to the seller over time. Court action will probably be required to complete the transaction as contracted and vest clear title in the purchaser. Option endorsements are attached as Exhibits H and I.

9. **Restrictions:** In draft the Declaration for any new development, no matter how large or small, emphasis must be on long-term flexibility, clarity, consistency with other development documentation (such as the plat). The key areas where discrepancies, claims and lawsuits arise include failure to follow the below basic recommendations:
  - a. Assure that all setbacks, easements and other terms are consistent with all platted lots and within all development documentation, including the declarations of restrictions, the plat, the association documentation, *and* the applicable subdivision ordinance, or specifically address any exceptions. Restrictions in conflict with the plat and the lie of a lot have rendered more than a few lots unbuildable without approval of disgruntled neighbors!
  - b. Define all terms, no matter how self-evident they may be. Conflict arise constantly over the appropriate uses or restrictions which apply to “conservation easements,” “waterfront” versus “waterview” versus “lakeside,” “watershed” setbacks or easements, “mobile homes” or even “setbacks”. (Does a setback include an open garage or front porch or small detached utility building?)
  - c. Modification provisions should define vote requirements, usually in terms of number of lots owned rather than number of owners (since some like the developer may own multiple lots). Staggered percentages are recommended, depending on the clearly defined severity level of the type of change or waiver. Should the architectural review committee or the Association have the authority or obligation to make the decision? CAUTION: Allowing the developer to retain the right, and the developer's exercise of that right, may jeopardize the scheme of development.
  - d. Plan for future phases if they are at all possible, to be able to add, to change the types of restrictions or even the type of neighborhood, but no obligation for any of these.
  - e. If an architectural review committee will be appointed, set it up from the beginning even if staffed only by the developer, or set a time frame and mechanism. Give it true powers *in the organizational documents recorded*.
  - f. Common areas should be clearly defined, with potential for exchanges of areas with homeowners whose lots are not at best lie, easements for encroachments, and recordation of liens to assure proper notice.
  - g. Association organizations should be set up from the beginning, including conveyance of common areas of platted phases before the first lot is sold and title insurance, to comply with FNMA, FHLMC, HUD, and VA requirements. The Association should have the power to exchange properties, to buy, sell or mortgage (under strict conditions), to make

improvements or complete those to be done by the developer if incomplete for whatever reason.

- h. Assessment obligations of all owners, including the developer, should be clearly defined, including lien and enforcement rights, and subordination to the lien of at least any first mortgage on any unit unless the specific past due claim of lien was already filed.
- i. Plan for flexibility if at all possible. Cutting density or minimum setback space to the limit may result in an unbuildable lot if, for example, a boundary is disputed or an easement is claimed larger or in a different place than originally considered.
- j. Lender consent and subordination is critical to assure that a foreclosure does not jeopardize the scheme of development for owners who have already purchased.

10. Plat:

- a. Assure the plat is consistent with the declaration and all other organizational documents.
- b. If any specific terms are to appear on the plat, they should follow *all* of the same rules as for restrictions above. Do not have separate restrictions on a plat without retaining the flexibility to manage the development unless the plat is clearly made subject to the modification provisions of the declarations!
- c. When is a plat sufficient for a survey? When it shows the location of all permanent monuments, boundary evidence, easements affecting the property (old or revised, as recorded and as they lie on or in the ground) and other matters that an actual survey would show and which your client needs to know and assess.
- d. Replatted lots must be carefully reviewed before sold.
  - (1) If the lines change, this is *not* the same property as on the earlier plat and would necessarily affect the title to nearby lots, *if the developer still owns them! If not, the replatting cannot be done without cross-conveyances and releases of liens on the "moved" portions!*
  - (2) In many counties, the indexing system does not include plats chronologically within out conveyances, so a third party may not realize the replat has been done and may prepare and close based on the old plat.
  - (3) Easements (roads, common areas or others) may be affected in which other purchasers already have vested rights by purchase of lots under the earlier plat. These rights must be considered. Waivers may be necessary.

*Example:* Common areas cannot be decreased since those easement rights have vested.

*Example:* Sewer line easement across a lot already sold is set where it lies. The new location created on a replat of lots retained by the developer may not line up with the set easement location on the lots already sold pursuant to the old plat.

## **X. Endorsements:**

Endorsements are additions to the policy to provide *affirmative* coverage of matters that are either not clearly included within the coverage provisions (Schedule A), or which are removed from coverage by the Schedule B Exceptions or the Exclusions from Coverage.

*Example:* Affirmative coverage of not only title to a private easement (Schedule A, legal description) but availability of access over the easement to a public road (an Endorsement), subject of course to the terms and conditions of the easement itself (an exception in Schedule B).

*Example:* Affirmative assurance against enforced removal of a particular encroachment onto an easement (again excepted in Schedule B).

Counsel should be very cautious in advising that Endorsements or “affirmative coverage” are sufficient. Be clear as well on what “affirmative coverage” will actually suffice to assist your client. Mere indemnity of loss calculated by diminution of the existing property may not be enough when profits may be lost and the development may need reconfiguration. Some issues may be resolvable through payment of funds (old deeds of trust, judgments or taxes); others may not be resolvable at all (minors’ interests, missing heirs, incompetents’ conveyances).

Tie-in (or Aggregation), Contiguity, Same as Survey, Access and Option Endorsements are commonly requested. They are discussed elsewhere in this manuscript. Samples are attached as Exhibits at the end of the manuscript.

Though of limited use in the development setting, ALTA Endorsement Forms 3 and 3.1, regarding Zoning, are attached as Exhibits M and N. Given the zoning exclusion in the Owner’s and Loan Policies, the endorsement can provide some limited coverage as of the policy effective date. The Residential Owner’s Coverage itself provides limited “enforced removal” coverage.

If a matter affecting title is critical to the success of your client’s project, discuss with your client and title insurer the possible endorsements for your developer’s owner’s policies. The list is long and constantly increasing. The forms are constantly being refined for particular states and situations, depending on the needs of the client.

Most lenders’ counsel are very aware of the endorsements they need and request them with regularity.

## **XI. Development example**

See Exhibit O for an example of a development proposal to consider issues involved.

## EXHIBITS

<b><u>Exhibit Letter</u></b>	<b><u>Title of Exhibit</u></b>	<b><u>Page</u></b>
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Exhibit B	ALTA Owners Policy (10-17-92)	34
Exhibit C	ALTA Residential Title Insurance Policy (6-1-87) One-to-Four Family Residences Policy of Title Insurance	44
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Exhibit M	Zoning – ALTA Endorsement Form 3	62
Exhibit N	Zoning – ALTA Endorsement Form 3.1 (Complete Improvements)	63
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**Exhibit A:**  
ALTA LOAN POLICY (10-17-92)  
POLICY OF TITLE INSURANCE

Issued by

TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, TITLE INSURANCE COMPANY, a \_\_\_\_\_ corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of right of access to and from the land;
5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage, said mortgage being shown in Schedule B in the order of its priority;
7. Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws;
8. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens. The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

IN WITNESS WHEREOF the Company has caused this policy to be signed and sealed, to be valid when Schedule A is countersigned by an authorized officer or agent of the Company, all in accordance with its By-Laws.

Title Insurance Company

Attest: \_\_\_\_\_ By: \_\_\_\_\_

**EXCLUSIONS FROM COVERAGE**

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. a. Any law, ordinance or governmental regulations (including but not limited to building or zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to
  - i. the occupancy, use, or enjoyment of the land;
  - ii. the character, dimensions or location of any improvement now or hereafter erected on the land;

- iii. a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or
  - iv. environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
- b. Any governmental police power not excluded by (a.) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
3. Defects, liens, encumbrances, adverse claims or other matters:
- a. whether or not recorded in the public records at Date of Policy, but created, suffered, assumed or agreed to by the insured claimant;
  - b. not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
  - c. resulting in no loss or damage to the insured claimant;
  - d. attaching or created subsequent to Date of Policy; or
  - e. resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage or for the estate or interest insured by this policy.
4. Unenforceability of the lien of the insured mortgage because of the inability or failure of the insured at Date of Policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with the applicable doing business laws of the state in which the land is situated.
5. Invalidity or unenforceability of the lien of the insured mortgage, or claim thereof, which arises out of the transaction evidenced by the insured mortgage and is based upon usury or any consumer credit protection or truth in lending law.
6. Any claim, which arises out of the transaction vesting in the insured the estate of interest insured by this policy or the transaction creating the interest of the insured lender, by reason of the operation of federal bankruptcy, state insolvency or similar creditors' rights laws.
7. Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
- a. the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
  - b. the subordination of the interest of the insured mortgagee as a result of the application of the doctrine or equitable subordination; or
  - c. the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
    - i. to timely record the instrument of transfer; or
    - ii. of such recordation to impart notice to a purchaser for value or a judgement or lien creditor.



SCHEDULE A

CASE NUMBER

POLICY DATE

AMOUNT OF INSURANCE

ENDORSEMENTS

POLICY NUMBER

1. Name of Insured:
  
2. The estate or interest in the land which is encumbered by the insured mortgage is:
  
3. Title to the estate or interest in the land is vested in:
  
4. The insured mortgage and assignments thereof, if any, are described as follows:
  
5. The land referred to in this policy is described as follows:

Issued at (Location): \_\_\_\_\_

\_\_\_\_\_  
Countersignature of Authorized Officer or Agent

SCHEDULE B  
PART I  
EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

[Here insert specific exceptions to title found in title search or shown on survey]

PART II

In addition to the matters set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule A is subject to the following matters, if any be shown, but the Company insures that these matters are subordinate to the lien or charge of the insured mortgage upon the estate or interest:

[Here insert specific exceptions to title found in title search or shown on survey, which are subordinate to the insured deed of trust shown in Schedule A.]

## CONDITIONS AND STIPULATIONS

### 1. Definition of Terms.

The following terms when used in this policy mean:

- a. "insured": the insured named in Schedule A. The term "insured" also includes:
  - i. the owner of the indebtedness secured by the insured mortgage and each successor in ownership of the indebtedness except a successor who is an obligor under the provisions of Section 12.c. of these Conditions and Stipulations (reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor insured, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land);
  - ii. any governmental agency or governmental instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage, or any part thereof, whether named as an insured herein or not;
  - iii. the parties designated in Section 2.a. of these Conditions and Stipulations.
- b. "insured claimant": an insured claiming loss or damage.
- c. "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.
- d. "land": the land described or referred to in Schedule [A][C], and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule [A][C], nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.
- e. "mortgage": mortgage, deed of trust, trust deed, or other security instrument.
- f. "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1.a.(iv) of the Exclusions From Coverage, "public records' halls" also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.
- g. "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

### 2. Continuation of Insurance.

- a. After Acquisition of Title. If this policy insures the owner of the indebtedness secured by the insured mortgage, the coverage of this policy shall continue in force as of Date of Policy in favor of:
  - i. such insured lender who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage;
  - ii. a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured

corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and

- iii. any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.
- b. After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from an insured of either:
  - i. an estate or interest in the land, or
  - ii. an indebtedness secured by a purchase money mortgage given to an insured.
- c. Amount of Insurance. The amount of insurance after the acquisition or after the conveyance by an insured lender shall in neither event exceed the least of:
  - i. The amount of insurance stated in Schedule A;
  - ii. The amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made; or
  - iii. The amount paid by any governmental agency or governmental instrumentality, if the agency or the instrumentality is the insured claimant, in the acquisition of the estate or interest in satisfaction of its insurance contract or guaranty.
3. Notice of Claim to be Given by Insured Claimant.  
The insured shall notify the Company promptly in writing:
  - a. in case of any litigation as set forth in (4.a.) below,
  - b. in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or
  - c. if title to the estate or interest or the lien of the insured mortgage, as insured, is rejected as unmarketable.If prompt notice shall not be given to the Company, then as to that insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.
4. Defense and Prosecution of Actions; Duty of Insured Claimant to Cooperate.
  - a. Upon written request by an insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of such insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall

have the right to select counsel of its choice (subject to the right of such insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The company will not pay any fees, costs or expenses incurred by an insured in the defense of those causes of action which allege matters not insured against by this policy.

b. The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to an insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

c. Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgement or order.

d. In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, an insured shall secure to the Company the right to prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such insured for this purpose. Whenever requested by the Company, an insured, at the Company's expense, shall give the Company all reasonable aid:

- i. in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and
- ii. in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured.

If the Company is prejudiced by the failure of an insured to furnish the required cooperation, the Company's obligations to such insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

#### 5. Proof of Loss or Damage.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by each insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of an insured claimant to provide the required proof of loss or damage, the Company's obligations to such insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, an insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and

memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by an insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of an insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that insured for that claim.

6. Options to Pay or Otherwise Settle Claims; Termination of Liability.

In case of a claim under this policy, the Company shall have the following additional options:

- a. To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.
  - i. to pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay; or
  - ii. in case loss or damage is claimed under this policy by the owner of the indebtedness secured by the insured mortgage, to purchase the indebtedness secured by the insured mortgage for the amount owing thereon together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of purchase and which the Company is obligated to pay.

If the Company offers to purchase the indebtedness as herein provided, the owner of the indebtedness shall transfer, assign, and convey the indebtedness and the insured mortgage, together with any collateral security, to the Company upon payment therefor.

Upon the exercise by the Company of either option provided for in paragraphs a.i. or a.ii., all liability and obligations to the insured under this policy, other than to make the payment required in those paragraphs, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

- b. To Pay or Otherwise Settle with Parties Other than the Insured or with the Insured Claimant.
  - i. to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or
  - ii. to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs b.i. or b.ii., the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. Determination and Extent of Liability.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

a. The liability of the Company under this policy to an insured lender shall not exceed the least of:

- i. the Amount of Insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in Section 2.c. of these Conditions and Stipulations;
- ii. the amount of the unpaid principal indebtedness secured by the insured mortgage as limited or provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or
- iii. the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

b. In the event the insured lender has acquired the estate or interest in the manner described in Section 2.a. of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7.a. of these Conditions and Stipulations.

c. The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. Limitation of Liability.

a. If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, or otherwise establishes the lien of the insured mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

b. In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title, or, if applicable, to the lien of the insured mortgage, as insured.

c. The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

d. The Company shall not be liable to an insured lender for:

- i. any indebtedness created subsequent to Date of Policy except for advances made to protect the lien of the insured mortgage and secured thereby and reasonable amounts expended to prevent deterioration of improvements; or
- ii. construction loan advances made subsequent to Date of Policy, except construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the land which at Date of Policy were secured by the insured mortgage and which the insured was and continued to be obligated to advance at and after Date of Policy.

9. Reduction of Insurance; Reduction or Termination of Liability.

a. All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of insurance pro tanto. However, as to an insured lender, any

payments made prior to the acquisition of title to the estate or interest as provided in Section 2.a. of these Conditions and Stipulations shall not reduce pro tanto the amount of insurance afforded under this policy as to any such insured, except to the extent that the payments reduce the amount of the indebtedness secured by the insured mortgage.

b. Payment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto. The amount of insurance may thereafter be increased by accruing interest and advances made to protect the lien of the insured mortgage and secured thereby, with interest thereon, provided in no event shall the amount of insurance be greater than the Amount of Insurance stated in Schedule A.

c. Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company to an insured lender except as provided in Section 2.a. of these Conditions and Stipulations.

#### 10. Liability Noncumulative.

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

#### 11. Payment of Loss.

a. No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

b. When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

#### 12. Subrogation Upon Payment or Settlement.

##### a. The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated (i) as to an insured owner, to all rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss; and (ii) as to an insured lender, to all rights and remedies of the insured claimant after the insured claimant shall have recovered its principal, interest, and costs of collection.



If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

b. The Insured's Rights and Limitations.

Notwithstanding the foregoing, the owner of the indebtedness secured by an insured mortgage, provided the priority of the lien of the insured mortgage or its enforceability is not affected, may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness.

When the permitted acts of the insured claimant occur and the insured has knowledge of any claim of title or interest adverse to the title to the estate or interest or the priority or enforceability of the lien of an insured mortgage, as insured, the Company shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

c. The Company's Rights Against Non-Insured Obligors.

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

The Company's right of subrogation shall not be avoided by acquisition of an insured mortgage by an obligor (except an obligor described in Section 1.a.ii. of these Conditions and Stipulations) who acquires the insured mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond and the obligor will not be an insured under this policy, notwithstanding Section 1.a.i. of these Conditions and Stipulations.

13. Arbitration.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is \$1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of \$1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

14. Liability Limited to This Policy; Policy Entire Contract.

- a. This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.
- b. Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.
- c. No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

15. Severability.

In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

16. Notices, Where Sent.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at its Corporate Headquarters at

**Exhibit B:**  
ALTA OWNERS POLICY (10-17-92)  
POLICY OF TITLE INSURANCE

Issued by

TITLE INSURANCE COMPANY

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, TITLE INSURANCE COMPANY, a \_\_\_\_\_ corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of right of access to and from the land;

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

IN WITNESS WHEREOF the Company has caused this policy to be signed and sealed, to be valid when Schedule A is countersigned by an authorized officer or agent of the Company, all in accordance with its By-Laws.

Title Insurance Company

Attest: \_\_\_\_\_ By: \_\_\_\_\_

Exclusions from Coverage

**EXCLUSIONS FROM COVERAGE**

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. a. Any law, ordinance or governmental regulations (including but not limited to building or zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to
  - i. the occupancy, use, or enjoyment of the land;
  - ii. the character, dimensions or location of any improvement now or hereafter erected on the land;
  - iii. a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or
  - iv. environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

- b. Any governmental police power not excluded by (a.) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
- 2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
- 3. Defects, liens, encumbrances, adverse claims or other matters:
  - a. whether or not recorded in the public records at Date of Policy, but created, suffered, assumed or agreed to by the insured claimant;
  - b. not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
  - c. resulting in no loss or damage to the insured claimant;
  - d. attaching or created subsequent to Date of Policy; or
  - e. resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage or for the estate or interest insured by this policy.
- 4. Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
  - a. the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or
  - b. the transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure:
    - i. to timely record the instrument of transfer; or
    - ii. of such recordation to impart notice to a purchaser for value or a judgement or lien creditor.

SCHEDULE A

CASE NUMBER

POLICY DATE

AMOUNT OF INSURANCE

ENDORSEMENTS

POLICY NUMBER

1. Name of Insured:
  
2. The estate or interest in the land which is covered by this policy is:
  
3. Title to the estate or interest in the land is vested in:
  
4. The land referred to in this policy is described as follows:

Issued at (Location): \_\_\_\_\_

\_\_\_\_\_  
Countersignature of Authorized Officer or Agent

SCHEDULE B

CASE NUMBER

POLICY NUMBER

PART I

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

[Here insert specific exceptions to title found in title search or shown on survey]

## CONDITIONS AND STIPULATIONS

### 1. Definition of Terms.

The following terms when used in this policy mean:

- a. “insured”: the insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the name insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.
- b. “insured claimant”: an insured claiming loss or damage.
- c. “knowledge” or “known”: actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.
- d. “land”: the land described or referred to in Schedule A and improvements affixed thereto which by law constitute real property. The term “land” does not include any property beyond the lines of the area described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.
- e. “mortgage”: mortgage, deed of trust, trust deed, or other security instrument.
- f. “public records”: records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1.a.iv. of the Exclusions From Coverage, “public records” shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.
- g. “unmarketability of the title”: an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

### 2. Continuation of Insurance after Conveyance of Title.

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either:

- a. An estate or interest in the land, or
- b. An indebtedness secured by a purchase money mortgage given to the insured.

### 3. Notice of Claim to be Given by Insured Claimant.

The insured shall notify the Company promptly in writing:

- a. In case of any litigation as set forth in Section 4.a. below,
- b. In case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or
- c. If title to the estate or interest, as insured, is rejected as unmarketable.

If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is

required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. Defense and Prosecution of Actions; Duty of Insured Claimant to Cooperate.

a. Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

b. The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

c. Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

d. In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid:

- i. in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and
- ii. in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured.

If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. Proof of Loss or Damage.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to



the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph shall terminate any liability of the Company under this policy as to that claim.

6. Options to Pay or Otherwise Settle Claims; Termination of Liability.

In case of a claim under this policy, the Company shall have the following additional options:

- a. To Pay or Tender Payment of the Amount of Insurance.
  - i. To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay.
  - ii. Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other than to make the payment required, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.
- b. To Pay or Otherwise Settle with Parties Other than the Insured or with the Insured Claimant.
  - i. To pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or
  - ii. to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs b.i. or b.ii., the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. Determination, Extent of Liability and Coinsurance.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

- a. The liability of the Company under this policy shall not exceed the least of:
  - i. the Amount of Insurance stated in Schedule A; or,
  - ii. the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.
- b. In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the land, whichever is less, or if subsequent to the Date of Policy an improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following:
  - i. where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy; or
  - ii. where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement.

The provisions of this paragraph shall not apply to costs, attorney's fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A.

- c. The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

#### 8. Apportionment.

If the land described in Schedule [A][C] consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of the parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement or by an endorsement attached to this policy.

#### 9. Limitation of Liability.

- a. If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.
- b. In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title as insured.
- c. The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

10. Reduction of Insurance; Reduction or Termination of Liability.

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto.

11. Liability Noncumulative.

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

12. Payment of Loss.

a. No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

b. When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

13. Subrogation upon Payment or Settlement.

a. The Company's Right of Subrogation. Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

b. The Company's Rights Against Non-insured Obligors. The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

14. Arbitration.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association.

Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All

arbitrable matters when the Amount of Insurance is \$1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of \$1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorney's fees to a prevailing party. Judgement upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules. A copy of the Rules may be obtained from the Company upon request.

15. Liability Limited to this Policy; Policy Entire Contract.

a. This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

b. Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by action asserting such claim, shall be restricted to this policy.

c. No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

16. Severability.

In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

17. Notices, Where Sent.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at \_\_\_\_\_.

**Exhibit C:**

ALTA RESIDENTIAL TITLE INSURANCE POLICY (6-1-87)  
ONE-TO-FOUR FAMILY RESIDENCES POLICY OF TITLE INSURANCE

Issued by  
TITLE INSURANCE COMPANY  
OWNER'S INFORMATION SHEET

Your Title Insurance Policy is a legal contract between you and Title Insurance Company. It applies only to a one-to-four family residential lot or condominium unit. If your land is not either of these, contact us immediately.

The policy insures you against certain risks to your land title. These risks are listed on page one of the policy. The policy is limited by:

1. Exclusions.
2. Exceptions on Schedule B.
3. Conditions.

You should keep the policy even if you transfer the title to your land.

If you want to make a claim, see Item 3 under Conditions.

You do not owe any more premiums for the policy.

This sheet is not your insurance policy. It is only a brief outline of some of the important policy features. The policy explains in detail your rights and obligations and our rights and obligations. Since the policy—and not this sheet—is the legal document, **YOU SHOULD READ THE POLICY VERY CAREFULLY.**

If you have any questions about your policy, contact: \_\_\_\_\_.

Owner's Coverage Statement

**OWNER'S COVERAGE STATEMENT**

This policy insures your title to the land described in Schedule A—if that land is a one-to-four family residential lot or condominium unit.

Your insurance, as described in this Coverage Statement, is effective on the policy date shown in Schedule A.

Your insurance is limited by the following:

1. Exclusions.
2. Exceptions in Schedule B.
3. Conditions.

We insure you against actual loss resulting from:

1. Any title risks covered by this policy—up to the policy amount, and
2. Any costs, attorneys' fees and expenses we have to pay under this policy.

**COVERED TITLE RISKS**

This policy covers the following title risks, if they affect your title on the policy date:

1. Someone else owns an interest in your title.
2. A document is not properly signed, sealed, acknowledged, or delivered.
3. Forgery, fraud, duress, incompetency, incapacity or impersonation.
4. Defective recording of any document.
5. You do not have any legal right of access to and from the land.

6. There are restrictive covenants limiting your use of the land.
7. There is a lien on your title because of:
  - a. A mortgage or deed of trust.
  - b. A judgment, tax, or special assessment.
  - c. A charge by a homeowner's or condominium association.
8. There are liens on your title, arising now or later, for labor and material furnished before the policy date—unless you agreed to pay for the labor and material.
9. Others have rights arising out of leases, contracts, or options.
10. Someone else has an easement on your land.
11. Your title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease or to make a mortgage loan.
12. You are forced to remove your existing structure—other than a boundary wall or fence—because:
  - a. It extends on to adjoining land or on to any easement.
  - b. It violates a restriction shown in Schedule B.
  - c. It violates an existing zoning law.
13. You cannot use the land because use as a single-family residence violates a restriction shown in Schedule B or an existing zoning law.
14. Other defects, liens, or encumbrances.

**COMPANY'S DUTY TO DEFEND AGAINST COURT CASES**

We will defend your title in any court case as to that part of the case that is based on a covered title risk insured against by this policy. We will pay the costs, attorneys' fees, and expenses we incur in that defense.

We can end this duty to defend your title by exercising any of our options listed in Item 4 of the Conditions.

This policy is not complete without Schedule A and B.

[Witness clause optional]

Title Insurance Company

Attest: \_\_\_\_\_ By: \_\_\_\_\_

**EXCLUSIONS FROM COVERAGE**

In addition to the Exceptions in Schedule B, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

1. Governmental police power, and the existence or violation of any law or government regulation. This includes building and zoning ordinances and also laws and regulations concerning:
  - a. Land use.
  - b. Improvements on the land.
  - c. Land division.
  - d. Environmental protection.

This exclusion does not apply to violations or the enforcement of these matters which appear in the public records at policy date.

This exclusion does not limit the zoning coverage described in Items 12 and 13 of Covered Title Risks.

2. The right to take the land by condemning it, unless:
  - a. A notice of exercising the right appears in the public records on the policy date.
  - b. The taking happened prior to the policy date and is binding on you if you bought the land without knowing of the taking.
3. Title risks:
  - a. That are created, allowed, or agreed to by you.
  - b. That are known to you, but not to us, on the policy date--unless they appeared in the public records.
  - c. That result in no loss to you.
  - d. That first affect your title after the policy date--this does not limit the labor and material lien coverage in Item 8 of Covered Title Risks.
4. Failure to pay value for your title.
5. Lack of a right:
  - a. To any land outside the area specifically described and referred to in Item 3 of Schedule A, or
  - b. In streets, alleys, or waterways that touch your land.

This exclusion does not limit the access coverage in Item 5 of Covered Title Risks.

SCHEDULE A

CASE NUMBER

POLICY DATE

AMOUNT OF INSURANCE

PREMIUM

POLICY NUMBER

1. Name of Insured:
  
2. Your interest in the land covered by this Policy is:
  
3. The land referred to in this Policy is described as follows:

Issued at (Location): \_\_\_\_\_

\_\_\_\_\_  
Countersignature of Authorized Officer or Agent

This Schedule A is valid only when attached to the Residential Title Insurance Policy and Schedule B.



SCHEDULE B  
EXCEPTIONS FROM COVERAGE

CASE NUMBER  
POLICY NUMBER

In addition to the Exclusions, you are not insured against loss, costs, attorneys' fees, and expenses resulting from:

[Here insert specific exceptions to title found in title search or shown on survey]

## CONDITIONS AND STIPULATIONS

### 1. Definitions.

- a. “easement”: the right of someone else to use your land for a special purpose.
- b. “land”: the land or condominium unit described in Schedule A and any improvements on the land which are real property.
- c. “mortgage”: a mortgage, deed of trust, trust deed or other security instrument.
- d. “public records”: title records that give constructive notice of matters affecting your title—according to the state statutes where your land is located.
- e. “title”: the ownership of your interest in the land, as shown in Schedule A.

### 2. Continuation of Coverage.

This policy protects you as long as you:

- a. Own your title, or
- b. Own a mortgage from anyone who buys your land, or
- c. Are liable for any title warranties you make.

This policy protects anyone who receives your title because of your death.

### 3. How to Make a Claim.

#### a. You Must Give The Company Notice Of Your Claim.

- i. if anyone claims a right against your insured title, you must notify us promptly in writing.
- ii. send the notice to \_\_\_\_\_. Please include the policy number shown in Schedule A, and the county and state where the land is located.
- iii. our obligation to you could be reduced if:
  - (1) you fail to give prompt notice, and
  - (2) your failure affects our ability to dispose of or to defend you against the claim.

#### b. Proof Of Your Loss Must Be Given To The Company.

- i. You must give us a written statement to prove your claim of loss. This statement must be given to us not later than 90 days after you know the facts which will let you establish the amount of your loss.
- ii. The statement must have the following facts:
  - (1) the covered title risks which resulted in your loss.
  - (2) the dollar amount of your loss.
  - (3) the method you used to compute the amount of your loss.
- iii. You may want to provide us with an appraisal of your loss by a professional appraiser as a part of your statement of loss.
- iv. We may require you to show us your records, checks, letters, contracts, and other papers which relate to your claim of loss. We may make copies of these papers.
- v. We may require you to answer questions under oath.
- vi. Our obligation to you could be reduced if you fail or refuse to:
  - (1) provide a statement of loss, or
  - (2) answer our questions under oath, or
  - (3) show us the papers we request, and your failure or refusal affects our ability to dispose of or to defend you against the claim.

### 4. Our Choices When You Notify Us of a Claim.

After we receive your claim notice or in any other way learn of a matter for which we are liable, we can do one or more of the following:

- a. Pay the claim against your title.
  - b. Negotiate a settlement.
  - c. Prosecute or defend a court case related to the claim.
  - d. Pay you the amount required by this policy.
  - e. Take other action which will protect you.
  - f. Cancel this policy by paying the policy amount, then in force, and only those costs, attorneys' fees and expenses incurred up to that time which we are obligated to pay.
5. Handling a Claim or Court Case.
- a. You must cooperate with us in handling any claim or court case and give us all relevant information.
  - b. We are required to repay you only for those settlement costs, attorneys' fees and expenses that we approve in advance.
  - c. When we defend your title, we have a right to choose the attorney. We can appeal any decision to the highest court. We do not have to pay your claim until your case is finally decided.
6. Limitation of the Company's Liability.
- a. We will pay up to your actual loss or the policy amount in force when the claim is made—whichever is less.
  - b. If we remove the claim against your title within a reasonable time after receiving notice of it, we will have no further liability for it.
  - c. If you cannot use any of your land because of a claim against your title, and you rent reasonable substitute land or facilities, we will repay you for your actual rent until:
    - i. the cause of the claim is removed, or
    - ii. we settle your claim.
  - d. The policy amount will be reduced by all payments made under this policy—except for costs, attorneys' fees and expenses.
  - e. The policy amount will be reduced by any amount we pay to our insured holder of any mortgage shown in this policy or a later mortgage given by you.
  - f. If you do anything to affect any right of recovery you may have, we can subtract from our liability the amount by which you reduced the value of that right.
7. Transfer of Your Rights.
- a. When we settle a claim, we have all the rights you had against any person or property related to the claim. You must transfer these rights to us when we ask, and you must not do anything to affect these rights. You must let us use your name in enforcing these rights.
  - b. We will not be liable to you if we do not pursue these rights or if we do not recover any amount that might be recoverable.
  - c. With the money we recover from enforcing these rights, we will pay whatever part of your loss we have not paid. We have a right to keep what is left.
8. Arbitration.
- a. If it is permitted in your state, you or the Company may demand arbitration.
  - b. The arbitration shall be binding on both you and the Company. The arbitration shall decide any matter in dispute between you and the Company.
  - c. The arbitration award may:
    - i. include attorneys' fees if allowed by state law.
    - ii. be entered as a judgment in the proper court.

- iii. The arbitration shall be under the Title Insurance Arbitration Rules of the American Arbitration Association. You may choose current rules or rules in existence on policy date.
  - iv. The law used in the arbitration is the law of the place where the property is located.
  - v. You can get a copy of the Rules from the Company.
9. Our Liability is Limited to this Policy.

This Policy, plus any endorsements, is the entire contract between you and the Company. Any claim you make against us must be made under this policy and is subject to its terms.

**EXHIBIT D:**  
**ACCESS ENDORSEMENT**

Attached to Policy No.

Issued by

[Chicago Title Insurance Company  
Ticor Title Insurance Company  
Security Union Title Insurance Company]

The Company hereby insures the Insured against loss or damage by reason the failure of the land to abut a physically open street known as

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

IN WITNESS WHEREOF, the Company has caused its corporate name and seal to be affixed hereto its duly authorized officers.

[Chicago Title Insurance Company  
Ticor Title Insurance Company  
Security Union Title Insurance Company]

BY: \_\_\_\_\_

(Land Abuts Physically Open Street Endorsement)

**EXHIBIT E:**  
**ACCESS EASEMENT ENDORSEMENT**  
**ATTACHED TO POLICY NUMBER \_\_\_\_\_**  
**ISSUED BY**  
**CHICAGO TITLE INSURANCE COMPANY**

**Contiguity Endorsement 3**

THE COMPANY HEREBY INSURES THE INSURED AGAINST LOSS OR DAMAGE WHICH THE INSURED SHALL SUSTAIN BY REASON OF ANY INACCURACIES IN THE FOLLOWING ASSURANCE:

1. THE EASEMENT DESCRIBED AS PARCEL \_\_\_\_\_ IN SCHEDULE A IS CONTIGUOUS TO A PHYSICALLY OPEN STREET KNOWN AS \_\_\_\_\_.

THIS ENDORSEMENT IS MADE A PART OF THE POLICY AND IS SUBJECT TO ALL OF THE TERMS AND PROVISIONS THEREOF AND OF ANY PRIOR ENDORSEMENTS THERETO. EXCEPT TO THE EXTENT EXPRESSLY STATED, IT NEITHER MODIFIES ANY OF THE TERMS AND PROVISIONS OF THE POLICY AND ANY PRIOR ENDORSEMENTS, NOR DOES IT EXTEND THE EFFECTIVE DATE OF THE POLICY AND ANY PRIOR ENDORSEMENTS, NOR DOES IT INCREASE THE FACE AMOUNT THEREOF.

CHICAGO TITLE INSURANCE COMPANY

BY \_\_\_\_\_  
AUTHORIZED SIGNATORY

*NOTE: This endorsement shall not be valid or binding until countersigned by an authorized signatory.*

**EXHIBIT F:**  
**CONTIGUITY ENDORSEMENT**

Attached to Policy No.

Issued by

[Chicago Title Insurance Company  
Ticor Title Insurance Company  
Security Union Title Insurance Company]

The Company hereby insures the Insured against loss or damage sustained by the Insured by reason of the failure of the lands described in Schedule A to be contiguous to each other and, taken as a tract, constituting one parcel of land.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

IN WITNESS WHEREOF, the Company has caused its corporate name and seal to be affixed hereto by its duly authorized officers.

[Chicago Title Insurance Company  
Ticor Title Insurance Company  
Security Union Title Insurance Company]

BY: \_\_\_\_\_

**EXHIBIT G:**  
CONTIGUITY ENDORSEMENT

Attached to Policy No.

Issued By

CHICAGO TITLE INSURANCE COMPANY

The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of the failure of the land described in Schedule \_\_\_\_ to be contiguous to\*

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

CHICAGO TITLE INSURANCE COMPANY

Dated: \_\_\_\_\_ By: \_\_\_\_\_

\* Describe land contiguous to subject land by legal description or by reference to a recorded instrument.

Contiguity of Parcels  
CLTA Form 116.4 (Rev. 6-14-96)  
ALTA or CLTA - Owner or Lender



**EXHIBIT H:**  
**OPTION ENDORSEMENT (FORM A)**

Attached to Policy No.  
Issued by  
Chicago Title Insurance Company

The Company hereby assures the Insured that the option to purchase referred to in paragraph \_\_\_ of Schedule B (“Option”) is at the date hereof valid, and that the rights of the optionee under the Option are vested in the Insured subject to the terms and provisions thereof.

The insurance contained herein and in the policy of which this endorsement is a part shall cease and terminate upon the exercise of the Option or on \_\_\_\_\_, whichever occurs first.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

IN WITNESS WHEREOF, the Company has caused its corporate name and seal to be affixed hereto its duly authorized officers.

Chicago Title Insurance Company

BY: \_\_\_\_\_

(Option to Purchase Endorsement - Form A)

**EXHIBIT I:**  
**OPTION ENDORSEMENT (FORM B)**

Attached to Policy No.  
Issued by  
Chicago Title Insurance Company

The Company hereby insures that the rights of the Insured under the Option described in Paragraph \_\_\_ of Schedule B (“Option”) are vested in the Insured subject to the terms and provisions of the option.

The Company further insures against loss or damage which the Insured may sustain resulting from:

1. The unenforceability of the right to exercise the Option except to the extent that such unenforceability or claim thereof is based on the failure of the Insured to have fulfilled the terms and conditions of the Option.
2. The priority over the Option of any conveyance made of the fee simple estate in the land or of any liens or encumbrances created thereon after the date of policy, excepting such liens or encumbrances that would affect the Insured had the Insured been the owner of the fee simple title instead of an Option as of date of policy, including, without limitation, real estate taxes, special assessments, demolition liens, drainage liens and water liens.
3. The entry of any court order or judgment which constitutes a final determination and requires the Insured, as condition to receiving specific performance of the Option, to pay a sum in excess of the Option price, other than attorney’s fees and costs of litigation.

Nothing contained in this endorsement shall be construed as insuring the Insured against loss or damage sustained or incurred by reason of:

- (a) Rejection of the Option under the provisions of the Federal Bankruptcy Code or state insolvency laws.
- (b) The failure of the Insured to receive all or part of an award entered in a condemnation proceeding unless failure to share in said award stems solely from a court order or judgment which constitutes a final determination and adjudges option invalid or incapable of specific performance.

- (c) The failure of the Insured at the time of payment of the Option price either to have obtained proper conveyances and releases from all person then having an interest in said land or a lien or encumbrance thereon (the determination as to the identity of such persons and the nature of the interest, lien or encumbrance owned or claimed to be at the expense of the Insured) or to have obtained a court order or judgment which constitutes a final determination and determines those persons and interests entitled to receive the option price.
- (d) Attorney's fees and costs in connection with the proceedings mentioned in subparagraph (c) immediately above, or in connection with an action to enforce the Option, excluding attorney's fees incurred to defend an attack on the validity or enforceability of said Option.
- (e) Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished and imposed by law.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

IN WITNESS WHEREOF, the Company has caused its corporate name and seal to be affixed hereto it duly authorized officers.

Chicago Title Insurance Company

BY: \_\_\_\_\_

(Option to Purchase Endorsement - Form B)

**EXHIBIT J:**  
SAME AS SURVEY ENDORSEMENT

Attached to Policy No.

Issued By

CHICAGO TITLE INSURANCE COMPANY

The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of the failure of the land to be the same as that delineated on the plat of a survey made by \_\_\_\_\_ on \_\_\_\_\_, designated Job No. \_\_\_\_\_.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

CHICAGO TITLE INSURANCE COMPANY

Dated: \_\_\_\_\_ By: \_\_\_\_\_

Survey  
CLTA Form 116.1 (Rev. 6-14-96)  
ALTA or CLTA - Owner

**EXHIBIT K:**  
**SAME AS SURVEY ENDORSEMENT**

Attached to Policy No.

Issued by

[Chicago Title Insurance Company  
Ticor Title Insurance Company  
Security Union Title Insurance Company]

**Survey Endorsement**

The Company hereby insures the Insured against loss or damage sustained by the Insured by reason of the failure of the insured property to be the same as that delineated on the plat of survey prepared by \_\_\_\_\_ date \_\_\_\_\_ designated as Job No. :

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

IN WITNESS WHEREOF, the Company has caused its corporate name and seal to be affixed hereto by its duly authorized officers.

[Chicago Title Insurance Company  
Ticor Title Insurance Company  
Security Union Title Insurance Company]

BY: \_\_\_\_\_

**EXHIBIT L:**  
**TIE-IN (AGGREGATION) ENDORSEMENT**

Attached to Policy No.  
Issued by  
Chicago Title Insurance Company

The following policies are issued in conjunction with one another:

<b>POLICY NUMBER:</b>	<b>COUNTY:</b>	<b>STATE:</b>	<b>AMOUNT:</b>
-----	-----	-----	-----
-----	-----	-----	-----
-----	-----	-----	-----
-----	-----	-----	-----

Notwithstanding the provisions of Section 7(a)(i) of the Conditions and Stipulations of the policy, the Amount of Insurance available to cover the Company's liability for loss or damage under this policy at the time of Payment of Loss hereunder shall be the aggregate of the Amount of Insurance under this policy and the other policies identified above. At no time shall the Amount of Insurance under this policy and the other policies identified above exceed in the aggregate \$\_\_\_\_\_. Subject to the provisions of Section [9(a) of the Conditions and Stipulations of these loan policies] [10 of the Conditions and Stipulations of these owner's policies], all payments made by the Company under this policy or any of the other policies identified above, except the payments made for costs, attorney's fees and expenses, shall reduce the aggregate Amount of Insurance pro tanto.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

IN WITNESS WHEREOF, the Company has caused its corporate name and seal to be affixed hereto affixed by its duly authorized officers.

Chicago Title Insurance Company

BY: \_\_\_\_\_

ALTA Endorsement - Form 12 (Aggregation Endorsement) (10/14/96)

**EXHIBIT M:**  
**ZONING ENDORSEMENT**

Attached to Policy No.

Issued by  
Chicago Title Insurance Company

The Company insures the insured against loss or damage sustained in the event that, at Date of Policy:

1. According to applicable zoning ordinances and amendments thereto, the land is not classified Zone \_\_\_\_\_.
2. The following use or uses are not allowed under that classification:

There shall be no liability under this endorsement based on:

- (a) Lack of compliance with any conditions, restrictions or requirements contained in the zoning ordinances and amendments thereto mentioned above, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.
- (b) The invalidity of the ordinances and amendments thereto mentioned above until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses.
- (c) The refusal of any person to purchase, lease or lend money on the estate or interest covered by this policy.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

IN WITNESS WHEREOF, the Company has caused its corporate name and seal to be affixed hereto by its duly authorized officers.

Chicago Title Insurance Company

BY: \_\_\_\_\_

ALTA Endorsement - Form 3 (Zoning) (10/17/98)

**EXHIBIT N:**  
**ZONING ENDORSEMENT (Completed Improvements)**

Attached to Policy No.  
Issued by  
Chicago Title Insurance Company

1. The Company insures the insured against loss or damage sustained in the event that, at Date of Policy:
  - (a) According to applicable zoning ordinances and amendments thereto, the land is not classified Zone \_\_\_\_\_.
  - (b) The following use or uses are not allowed under that classification:

and there shall be no liability under this paragraph 1(b) if the use or uses are not allowed as a result of any lack of compliance with any conditions, restrictions, or requirements contained in the zoning ordinances and amendments thereto mentioned above, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.
  
2. The Company further insures the insured against loss or damage arising from a final decree of a court of competent jurisdiction
  - (a) prohibiting the use of the land, with any structure presently located thereon, as insured in paragraph 1(b); or
  - (b) requiring the removal or alteration of the structure

on the basis that, at Date of Policy, the ordinances and amendments thereto have been violated with respect to any of the following matters:

  - (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 the property lines of the land;
  - (iv) Height of the structure; or
  - (v) Number of parking spaces.

There shall be no liability under this endorsement based on:

- (a) The invalidity of the ordinances and amendments thereto mentioned above until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses.



- (b) The refusal of any person to purchase, lease or lend money on the estate or interest covered by this policy.

This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

IN WITNESS WHEREOF, the Company has caused its corporate name and seal to be affixed hereto by its duly authorized officers.

Chicago Title Insurance Company

BY: \_\_\_\_\_

ALTA Endorsement - Form 3.1 (Zoning – Completed Structure) (10-17-98)

**Exhibit O:**  
**Development Example**

EXAMPLE: Developer is purchasing multiple tracts of land, easements and options. The property is located in a hilly rural area, adjoining a national protected area, with access over a public road. The developer can obtain access to public water and sewer systems, but will have to purchase easements and lay substantial connecting lines

Developer will obtain a development loan of \$3,000,000, to finance parts of the above purchase and the installation of improvements – roads, water, sewer, street lighting, common areas, clubhouse, pool.

The plan is to develop an upscale development complete with common areas, clubhouse & pool, private roads. Developer has an option on an adjoining tract containing an additional 150 acres, with a 5-year term, at \$300,000. Of course, minimal additional investment in common areas would be required while the price of the lots would have increased due to the prior development.

Tract A	15 acres	Access by private easement across adjoiner to the rear (whose land is <i>not</i> a part of this development plan)	\$30,000
Tract B	10 acres	Carve-out of larger partially-developed tract owned by sellers, comprising all their land on this side of creek. No access, wooded	\$20,000
Tract C	50 acres	No access, used as pasture land	\$50,000
Tract D	2 acres	Road frontage to a key major road; old home to be removed	\$50,000
Tract E	73 acres	Several farm fields, rundown tenant houses, farm roads, access to two minor public roads	\$150,000
Tract F	Easements	For water and sewer lines	\$30,000
<b>TOTAL</b>	<b>150 acres</b>	<b>TOTAL INITIAL LAND INVESTMENT</b>	<b>\$330,000</b>
<b>Option</b>	<b>150 acres</b>	For future phases	<b>\$300,000</b>
<b>TOTAL</b>	<b>300 acres</b>	<b>TOTAL LAND INVESTMENT</b>	<b>\$630,000</b>
<b>Loan #1</b>		Infrastructure improvements	<b>\$3,000,000</b>
<b>Other</b>		Other building and general development	<b>1,000,000</b>
		<b>TOTAL INVESTMENT</b>	<b>\$4,630,000</b>
		<b>GROSS SALES PRICE GOAL</b>	<b>\$10,000,000</b>
		<b>NET PROFIT GOAL (before any other unanticipated, in-house or “soft” costs – if all goes perfectly)</b>	<b>\$5,370,000</b>
		<b>TIME TO BUILD OUT – GOAL</b>	<b>4 YEARS</b>