CHAPTER 7

TITLE PROBLEMS AND CURES:
TITLE INSURANCE UNDERWRITING PERSPECTIVE

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This chapter provides an overview of the basic underwriting questions relating to many legal topics affecting real property law and title insurance. It is not intended to be a comprehensive coverage of the many specific legal issues, statutes and court cases affecting the particular issues. Key cases and statutes are included.

Title insurance is about risk assessment as much or more than the "black letter law" which may apply. In any situation where a title issue arises, the attorney and title insurer should discuss three questions:

(1) What is the applicable "black letter" law?
(2) What is the risk situation – both for a current claim or litigation and for long-term marketability of title? Your client may not want to be the litigant in a "test" case.
(3) Lastly, what will be the risks to the client that will not be covered by title insurance?

A title insurer relies upon the attorney to search and certify title as well as perform the closing according to the requirements of the clients of the attorney – whether the lender, buyer, borrower or others. Title insurers rely upon the closing attorney to verify these matters through the closing process and typically do not require additional documentation (or often even know of any issues), unless the attorney specifically requests advice. But ultimately the client looks to the attorney and the attorney's primary responsibility is to the client to assure adequate steps are taken to protect their interests – a much higher standard than just insurability of the title.

Any number of possibilities or types of remedies, corrections or curative actions may apply, depending on the facts of a particular case, including:

- Minor clerical error correction by the drafting attorney and re-recording pursuant to G.S. 47-36.1
- Purchase of property from a third party

- Title insurer's payment of the diminution in value loss
- Reinstatement of a dissolved institution
- Voluntary agreements, such as boundary line, roadway or easement or family settlement agreements (including potential owners and lien holders)
- Curative conveyances from multiple parties who *may* have an interest to assure estoppel (such as other heirs in an estate situation or last shareholders, officers and directors in a dissolved corporation)
- Re-recording of documents in the appropriate chain of title according to G.S. 47-18 and G.S. 47-20 (as compared to title by estoppel which is only an estoppel as between the parties and not binding upon third parties)
- Obtaining and recording necessary documents, such as certified copies of orders of the U.S. Bankruptcy Court or of articles of conversion, merger or name change amendment from the applicable Secretary of State
- Civil actions, such as reformation, quiet title, declaratory judgment, adverse possession (or easement by prescription) or judicial sale (G.S. 29A-1 *et seq.*) actions, which may be quite simple or may involve multiple parties, appointments of guardians ad litem, joinder of lien creditors or other parties, and may offer a platform for defenses that might otherwise not be raised (such as betterments or consumer protection violations)
- Special proceedings, such as partition actions (G.S. 46-1 *et seq.*), cartways (G.S. 136-68 *et seq.*), neighborhood public road (G.S. 136-67), boundary proceedings (G.S. 38-1 *et seq*) or a petition to sell property to pay debts in an open but insolvent estate
- Passage of time, such as expiration of life estate on death of the life tenant, statutes of limitations on lien enforcement, failure of surviving spouse to exercise election under G.S. 29-30, affirmation (or failure to disaffirm) by a minor within 3 years after reaching the age of majority
- "Affirmative coverage" on a title insurance policy, in appropriate circumstances

The legal principles (below) must be analyzed. An evaluation is required of all the parties or potential parties involved and their willingness or ability to cooperate. Then, based upon the actual facts involved, the attorney must determine which of the above (or other) potential cures may be most appropriate in a *particular* case. Each case is, in effect, as unique as the parties and places involved.

I. PARTIES, GENERALLY

The primary considerations regarding any party and the documentation necessary for closing are:

(1) Identification of all owners of any present or future interest, as well as the proposed purchaser(s),
(2) Execution in current correct legal names, based on search of the appropriate office(s) of the Secretary of State for entities,
(3) Record evidence and indexing of names as originally vested, reflecting any interim changes (such as marriage or merger) and clarifying any erroneous references (*See* Tomika Investments, Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, inc., 136 N.C.App. 493, 524 S.E.2d 591 (2000)) for a clear chain of title,
(4) Joinder by all persons and entities with an interest (and spouses),
(5) Competency of the person or good standing of the entity, (*See* Gifford v. Linnell, 357 N.C. 458; 585 S.E.2d 754 (2003),
(6) Appropriate capacity of the persons executing the instruments,
(7) Appropriate approvals or joinders by others, especially in transactions which are not apparently for the purpose of carrying on the regular business of the entity,
(8) Creditors' rights if the transaction is other than arms length for full value (in situations where creditors, lienholders or federal, state or local taxing authorities may have an interest in the equity of the grantor) and
(9) Potential claims of other interested persons (in situations of potential self-dealing between, for example, attorney-in-fact, fiduciary, officer, director or manager, and their principal).

NOTE: The "insured" under a title insurance policy includes on the named insured and those who take by operation of law, such as merger or inheritance. It will not extend to those taking by conveyance, such as a conveyance by the named insured to a related entity or a family limited partnership except under limited conditions.

The title search should include out conveyances, judgments and indexes under all names of each individual or entity. Encumbrances may include liens of creditors of any persons who obtained title as tenants in common (for example through an estate or inheritance) as well as matters affecting the buyer's potential ownership of or interest in the property. Rules of indexing for the office of the Register of Deeds are based on the Minimum Standards for Indexing Real Property Instruments, Revised November, 1996, Effective January 1, 1997. Prior to that time, Registers are required to post their earlier standards but have not consistently done so. However, the Administrative Office of the Courts and local tax or assessment offices are not bound by these recording standards.

NOTE: One of the highest risk activities for an attorney in title certification is searching in counties with which they are not totally familiar! All 100 counties have differing processes for Register, Clerk, Tax, Assessment, Planning and other departments (even though all have statewide legislative and, with the Clerk, administrative governance) and each county may have a myriad of incorporated cities or towns with even further variations and requirements.

II. INDIVIDUALS.

Any competent individual, 18 years or older, may hold or convey title. If their name has changed since the vesting instrument, any mortgage or conveyance should include both the current correct name, any intervening names and the prior vested name and should be indexed by the Register of Deeds in all such names. Washburn v. Washburn, 234 N.C. 370, 67 S.E.2d 264 (1951) Also, note that voluntary partition deeds do not create a tenancy by the entireties between a former tenant in common and their spouse unless they expressly so state and are signed by the tenant in common. G.S. 39-13.5.

The non-title-holding spouse of any individual must join in the conveyance, absent a satisfactory recorded prenuptial agreement (pursuant to N.C.G.S. Chapter 52B) or a satisfactory recorded marital property agreement (pursuant to N.C.G.S. 52-10 *et seq)*. A simple deed from one spouse to the other will not, in and of itself, waive the contingent statutory marital rights that attach, unless it specifically provides for full disclosure of assets, waiver of all such rights, and is executed by both spouses and recorded in compliance with N.C.G.S. 52-10. Suggested comprehensive language for this purpose is included as Form A.

III. CORPORATIONS.

The corporation's name must be *exactly* as shown in its filed Articles of Incorporation. The name, current standing and named officers can be checked with the Office of the North Carolina Secretary of State or for out-of-state corporations by locating the secretary of state (or equivalent) of their home state at the National Association of Secretaries of State. The state of incorporation is, in many cases, a key piece of identifying information needed on record instruments. Many corporations have related entities with the same or similar names, but incorporated in different states. If a corporation has merged or otherwise changed its name, a certified copy of the Articles of Amendment or Articles of Merger must be recorded in the office of the Register of Deeds in each county in which the corporation owns real property in order to complete the record chain of title. G.S. 47-18.1, 55D-26, 55-11-10(d). In addition, the deed should contain a reference to the grantor including the vested name, any interim names and the current name of the entity now mortgaging or conveying title. The official corporate seal should be affixed when available to lend the legal presumption of authority. G.S. 47-18.3(b). Catawba County Horsemen's Association, Inc. v. Deal, 107 N.C.App. 213, 419 S.E.2d 185 (1992)

Any mortgage or a sale, lease or conveyance for the apparent purpose of carrying on the ordinary business of the corporation (such as a developer selling lots), may be made by authority of the board of directors without shareholder approval. G.S. 55-12-01. In the case of a sale, lease or exchange of all or substantially all of the corporation's property otherwise than in the usual and regular course of business, the attorney should verify that the appropriate shareholders' and directors' votes have been obtained pursuant to N.C.G.S. 55-12-02, as in the situation where a developer-builder contemplates a bulk sale of undeveloped lots or property is being conveyed from the corporation to a shareholder. The presumption of self-dealing on conveyances to officers and directors taints such conveyances. Mountain Top Youth Camp, Inc. v. Lyon, 20 N.C.App. 694, 202 S.E.2d 498 (1974), Poore v. Swan Quarter Farms, Inc., 95 N.C.App. 449, 382 S.E.2d 835 (1989).

If a corporation has been administratively or voluntarily dissolved, but has not otherwise conveyed away title, record title remains in the corporation. G.S. 55-14-05. However, the corporation is only empowered to distribute the property to shareholders or convey to a third party, acts consistent with the winding up of its affairs. It cannot purchase, refinance or otherwise act as if it were continuing in business, unless the charter is reinstated. Piedmont and Western Investment Corporation v. Carnes-Miller Gear Co., 96 N.C.App. 105, 384 S.E.2d 687 (1989), *cert. denied* 326 N.C. 49, 389 S.E.2d 93 (1990); G.S. 55-114 prior to 1990, now G.S. 55-14-22; G.S. 105-230 *et seq*. (revised 10/1/01). And any foreign corporation may not be able to enforce contracts made while its North Carolina authority was suspended. Ben Johnson Homes, Inc. v. Watkins, 142 N.C. App. 162, 541 S.E.2d 769 (2001), *aff'd without precedential value*, 2001 N.C. LEXIS 1227 (2001).

IV. LIMITED LIABILITY COMPANIES.

The Operating Agreement should be consulted for any limited liability company participating in a closing. Limited liability company conveyances are executed by managers (which may include officers or directions, depending on the Operating Agreement) as defined by G.S. 57C-1-03(13), G.S. 57C-2-02(10), G.S. 57C-3-22 and G.S. 57C-3-25(c). Any bona fide purchaser or mortgagee is conclusively entitled to rely upon the status and managers identified on the last filed Annual Report in the office of the Secretary of State. G.S. 57C-3-25(a). Any conveyance apparently for carrying on in the usual way the business of the limited liability company, even if for all or substantially all of the assets of the company, can be executed by a single manager, G.S. 57C-3-23, unless the third party knows the manager lacks authority. Otherwise, the conveyance must be joined by all

managers or any lesser number authorized by the Operating Agreement. G.S. 57C-3-23, G.S. 57C-3-03. Upon dissolution, title to the real property is not automatically conveyed. G.S. 57C-6-04(c). Self-dealing such as conveyances between limited liability company and member or manager should be carefully reviewed and discussed with the title company prior to closing. G.S. 57C-4-05 and G.S. 57C-4-06. A certified copy of the Articles of Merger, Conversion, Consolidation or Amendment changing the name of the owning entity must be recorded in the office of the Register of Deeds where real property is located. G.S. 55D-26, G.S. 57C-9A-03(d), G.S. 57C-9A-12(c), G.S. 57C-2-34(a), G.S. 57C-9A-22 & -23, G.S. 47-18.1. As with corporations, the office of the Secretary of State of both North Carolina and the home state of the limited liability company (if different) should be consulted.

V. GENERAL PARTNERSHIPS.

Property vested in the name of the partnership may be conveyed by the partnership. Property vested in some or all partners for the partnership benefit must be conveyed by both the vested record owners (and spouses) and the partnership. G. S. 59-39 and G.S. 59-40. The Partnership Agreement should be carefully reviewed and any requirements of consent or notice complied with. Absent a provision otherwise in the Agreement, any conveyance not apparently for the carrying on in the usual way of the business of the partnership requires the joinder of all general partners. G.S. 59-39(b). An Assumed Name Certificate pursuant to G.S. 66-68 should be recorded and verified as still current at time of closing to identify all partners of the partnership, and an amended Certificate recorded for any changes. G.S. 66-68 and G.S.59-84.1. Upon merger, consolidation or conversion of a general partnership with another entity required to file with the Secretary of State, a certified copy of the Articles of Merger, Consolidation or Conversion changing the name of the owning entity must be recorded in the office of the Register of Deeds in any county where real property is located. G.S. 55D-26, G.S. 59-35.1(d), G.S. 59-73.12(c) and G.S. 59-73.22(c).

VI. LIMITED PARTNERSHIPS.

A limited partnership is formed by filing a Certificate of Limited Partnership with the Secretary of State, pursuant to G.S. 59-201 *et seq.* Any inadequacy or failure to file as required renders the entity a general partnership, so these requirements must be strictly followed. However, a validly formed foreign limited partnership is not rendered a general partnership in North Carolina solely because of failure to obtain a Certificate of Authority. G.S. 59-907(e) Existence, amendments and current standing of the limited partnership, in North Carolina and in its home state

(if a foreign limited partnership), should be verified with the respective Secretaries of State as with corporations (above). A certified copy of any Articles of Merger, Conversion or Amendment changing the name of the owning entity must be recorded in the office of the Register of Deeds in each county in which the limited partnership owns real property. G.S. 55D-26, G.S. 59-1052(d), G.S. 59-1062(c), G.S. 47-18.1.

VII. NONPROFIT CORPORATIONS.

Unless the Articles of Incorporation provides otherwise, a nonprofit corporation can sell, lease, mortgage or encumber any or all property, whether in the usual course of carrying on its business or not, without approval except by the Board of Directors. G.S. 55A-12-01(a). Upon any merger or change of name, the Articles should be recorded with the office of the Register of Deeds of the county in which property is located. G.S. 55D-26, G.S. 55A-11-09(d), G.S. 47-18.1. Upon dissolution, title remains in the corporation unless and until conveyed out by it. G.S. 55A-14-06(b)(1). (But see special provisions for Churches, below.)

VIII. TRUSTS

A trust created by an express Trust Agreement or pursuant to a testamentary trust in a will should name the trustee(s) and describe their responsibilities and authority. ("Blind" or "undesignated" trusts, Business Trusts and voluntary organizations are discussed separately below.) Trusts take title in the name of the trustees, not the trust itself. The closing attorney must verify from the Trust Agreement or will itself :

- Identity of the *current* trustees: These may be substitute or successor trustees.
- Whether or not the trust has expired or completed its purpose: If the trust has by its terms expired or it has completed its purpose, the better practice is to record distribution deeds from the trustee and have the current transaction completed by the actual distributees.
- Responsibilities of the trustee in order to verify whether the trust is an active or passive trust.
- Authority of the trustee to enter into the transaction: If the trust does not specifically authorize purchase, sale, or mortgage of real estate, Chapter 36A of the North Carolina General Statutes provides for implicit authority of the trustees to enter into real estate transactions to the extent not inconsistent with the trust agreement or testamentary trust itself, but pursuant to approval of the Clerk of Superior Court under G.S. 36A-139 *et seq*.

Restrictions regarding transactions between trustee and trust are contained in G.S. 36A-64 to –68, in the event the contemplated transaction involves such a situation. Judgments against either the beneficiaries or the trustees must be cautiously analyzed to determine if they attach and in what priority. The title insurer should be consulted.

IX. "BLIND", "NAKED" OR "UNDESIGNATED" TRUSTS.

N.C.G.S. 43-63 provides for a type of trust ownership, often referred to as a "blind" or "undesignated" trust, as follows:

> "When any instrument affecting title to real estate describes a party as trustee or agent, or otherwise indicates that a party is or may be acting as trustee or agent, but does not indicate any beneficial interest, set forth his powers or specify some other recorded instrument setting forth such powers and the place in the public records where it is recorded, and there is no recorded instrument in the record chain of title to such real estate setting forth such powers, then the description or indication shall not be notice to any person thereafter dealing with the real estate of any limitation upon the powers of the party nor require any inquiry or investigation as to such trust or agency. Such trustee or agent shall be deemed to have full power to convey or otherwise dispose of the real estate; and no person interested under such trust or agency shall be entitled to make any claim against the real estate based upon notice given by such description or indication. This Article shall not prevent claims against the trustee or agent or against property other than the real estate.

However, the terms of this provision must be followed exactly in designating the grantee and the trust in the vesting instrument. The deed out from the trust must be made on the assumption that either the trust exists with powers based on the above statute or the trust does not exist or is passive (since no trust or trustee responsibilities are designated). Therefore, the parties joining in the deed should include the trustee's spouse, if any, and judgment creditors of the trustee may have rights which must be waived or extinguished. Again, contact your title insurer.

X. BUSINESS TRUSTS

Though rare in North Carolina, G.S. 39-44 *et seq*. allow for operation of a Massachusetts Business Trust in North Carolina, holding title in its own name *or* its trustees in order to carry on a trade or business under a written trust instrument. Pursuant to G.S. 39-44, a memorandum of trust complying with G.S. 39-46 must

be recorded in the office of the Register of Deeds of each county in which real property is owned. Conveyances are executed by trustees (if title is held by trustee) and or by officers, with attestation, similar to corporations, if title is held in the trust's common name, pursuant to G.S. 39-46. The trust agreement as well as the execution and indexing of recorded instruments must be cautiously reviewed by the closing attorney.

XI. VOLUNTARY ORGANIZATIONS.

Charitable, fraternal, religious or social organizations can be organized as trusts, holding title in the entity name or the name of the trustees. Conveyances must be authorized by resolution and signed by trustees (if they hold title) or by officers similar to a corporation if title is held by the entity itself, "when such conveyance is authorized by resolution of the body duly constituted and held". G.S. 39-24 *et seq.* (See special provisions below regarding Churches.)

XII. CHURCHES

A church may hold title as a voluntary association, a nonprofit corporation or by and through its trustees, as briefly described above. However, churches are, in addition, subject to the provisions of Chapter 61 of the North Carolina General Statutes. G.S. 61-4 specifically provides that "[t]he trustees of any religious body may mortgage or sell and convey in fee simple any land owned by such body, when directed so to do by such church, congregation, society or denomination, or its committee, board or body having charge of its finances . . ."

Churches affiliated with larger organizations (often referred to as "connectional" churches) must also comply with the rules of their denomination. All property of the Catholic Church is held in the name of the Bishop of the Diocese (or Archbishop of the Archdiocese in Charlotte) as "corporation sole," whoever such individual person is at the time of conveyance. Many of their organizational documents, including rules regarding conveyance of church property, are available on the internet. However, in Fire Baptized Holiness Church of God of the Americas, Inc. v. McSwain, 134 N.C.App. 676, 518 S.E.2d 558 (1999), the N.C. Court of Appeals found that a church could be connectional for some purposes, congregational for others. *See also* Western North Carolina Conference v. Tally, 229 N.C. 1, 7 S.E.2d 467 (1948). Therefore, the cautious closing attorney should obtain:

(1) Verification of the good standing of the church from the office of the Secretary of State, if incorporated;

(2) Copies of congregational organizational documentation of the local church, identifying necessary procedures to enter into the contemplated transaction;
(3) A certified copy of the congregational resolution of the local church approving the transaction and designating the individuals authorized to sign necessary documentation;
(4) Copies of the connectional organizational documentation of the denominational oversight organization regarding the particular type of transaction;
(5) Connectional approval in accordance with the overseeing denominational structure, if one;
(6) If property is being purchased, compliance with the denominational requirements regarding trust language in deeds, if any; and
(7) If an original unincorporated church has now incorporated, a deed from the original vested unincorporated entity to the new church prior to completion of the new transaction to be insured.

In addition, since many conveyances to churches and other religious and charitable groups are gifts containing reversions or restrictions, all such vesting instruments should be closely reviewed and appropriate waivers obtained in order to be insurable.

XIII. ATTORNEYS-IN-FACT

A power of attorney must be recorded in the county of the property being conveyed (G.S. 47-28) and must grant specific authority to sell, mortgage, or convey real estate. (See attached Limited Power of Attorney to Sell Real Estate, Form B.) Chapter 32A of the North Carolina General Statutes provides an optional form for this purpose, though it is not exclusive. However, the certification form of acknowledgment should be that provided in G.S. 47-43, rather than the traditional notary form. Since this is an agency relationship, the principal must be alive at the time of the conveyance. (See attached Alive and Well Certification, Form C.) If the principal is incompetent, the power of attorney must contain the requisite survival language, i.e. it must be a durable power of attorney. Cautious attorneys should question why the principal will not appear at closing. Many lenders will not authorize any closing, refinance or sale, using a power of attorney as they are at high risk of fraud.

The attorney-in-fact does not ordinarily have the authority to convey property to himself ("self-dealing") unless the power of attorney specifically authorizes such a conveyance. Other potential heirs or devisees, as well as potential or actual

creditors (including funeral services, doctors, hospitals, N. C. Department of Health and Human Services, N. C. Department of Revenue, and IRS) might have an interest in setting aside a transaction that might infringe on their ability to receive assets or payments from the principal or through the principal's estate when the principal dies. In appropriate circumstances, conveyances of the "interest" (an expectancy) and indemnities regarding creditors may enable the conveyance to be insurable. However, in the event the person dies and these people inherit, the title passes immediately at death, and though estoppel may be argued, these "deeds" are outside the chain of title of the property. They must be either filed as waivers of right to inherit in the estate file, or reconfirmed and rerecorded after the death of the decedent when the conveying beneficiaries of the estate have title to convey – a highly risky proposition. *See* the Conner Act, G.S. 47-18 and G.S. 47-20 *et seq.*, and Schuman v. Roger Baker & Associates, 70 N.C.App. 313, 319 S.E.2d 308 (1984), regarding failure of priority of deeds outside the chain of title. Without express authority in the power of attorney, the attorney-in-fact has no power to make a gift of property, real or personal. *See* Whitford v. Gaskill, 119 N.C.App. 790, 460 S.E.2d 346 (1995), *rev'd and remanded*, 345 N.C. 475, 480 S.E.2d 690 (1997), *rehearing*, 345 N.C. 762, 489 S.E.2d 177 (1997). *Compare* Honeycutt v. Farmers & Merchants Bank, 126 N.C. App. 816, 487 S.E.2d 166 (1997). N.C.G.S. 32A-14.1(a), effective October 1, 1995, expands this power, but only if the power of attorney specifically authorizes gifts, including gifts to *or for the benefit of* the attorney-in-fact, "in accordance with the principal's personal history of making or joining in the making of lifetime gifts." NOTE: A deed of trust given by an attorney-in-fact for whose personal benefit the loan proceeds are being borrowed is not insurable and should not be closed by the attorney without adequate assurances of the fiduciary purposes of the encumbrance, disclosure to the lender and title insurer and specific written authority from the principal.

XIV. DECEDENTS' ESTATES.

When an owner of an interest in property dies while owning the property, the title passes through the estate. If the estate is fully administered, all debts and taxes have been paid and the estate file has been closed, then any further conveyance of the decedent's interest would be by the beneficiaries of the estate (and spouses) in whom title vested, effective at decedent's date of death. If the property is held as a tenancy by the entireties and the decedent is the first spouse to die, the surviving spouse may convey free of estate claims *so long as* the surviving spouse's 9-month disclaimer period pursuant to G.S. 31B-2 has expired or is satisfactorily waived. If the Decedent had contracted to sell property prior to death, the fiduciary of the

estate is authorized to comply with the contract pursuant to G.S. 28A-17-9. However, under any other circumstances, if either the estate was never fully administered or if the estate file remains open and incomplete, the following questions should be discussed to both the satisfaction of the closing attorney and the title insurer.

(1) What was the Decedent's date of death? More than 2 years past? More than 10 years past?

(2) Did the Decedent leave a Will? If so, has it been probated? What powers and directives are given the personal representative regarding the property to be insured? The powers of G.S. 32-27 are deemed by many real estate practitioners to be insufficient to authorize the Executor to convey without joinder of the devisees or beneficiaries of the estate under any circumstances, notwithstanding G.S. 28A-15-1(c). However a devise of the proceeds and not the property coupled with a directive to the Executor to sell the property may overcome this reservation.

(3) Who are the devisees under the Will?

(4) Who are the "natural objects of the decedent's bounty" – the intestate heirs pursuant to the Intestate Succession Act, Chapter 29 of the North Carolina General Statutes? Are they the same as the devisees under the will, if any? If not, what evidence is available of the intention of the testator in making this change and verifying the testator's sound mind at the time of his/her execution of the Will? The statute of limitations for filing of a caveat proceeding by those "disinherited" is 3 years from date of probate of the will. G.S. 31-32.

(5) Since title vests in the heirs (G.S. § 28A-15-2(b)) or devisees (G.S. § 28A-15-2(b)) at death of the decedent, all out conveyances, judgments and other matters regarding these owners under paragraphs 3 and 4 must be addressed as part of the title search. Chamberlain v. Beam, 63 N.C.App. 377, 304 S.E.2d 770 (1983); Washburn v. Washburn, 234 N.C. 370, 67 S.E.2d 264 (1951)

(6) If the Decedent's death was within 2 years of closing, has the Notice to Creditors been published pursuant to 28A-17-12 such that the devisees or heirs and fiduciary could convey free of liens? Is so, has time for filing claims passed? Have any claims been filed? Have all debts been paid? If debts or taxes are still outstanding, what assurance will be obtained from the Executor or Administrator and beneficiaries of the estate that they will be filed and paid and the estate closed as required by law.

(7) If the Decedent's death was within 10 years of closing, will any inheritance/estate taxes still remain due pursuant to G.S. 105-20? If yes, have they been paid and what evidence of payment will be furnished? If not paid at

or before closing, approximately what amount will be due? What assurance will be provided that they will be paid as and when due?

(8) Were any gifts of the insured property made within 3 years prior to the decedent's death? Was the Decedent a beneficiary of Medicaid benefits and, if so, has the potential for filing of a Medicaid lien been addressed pursuant to G.S. 108A-58 and G.S. 108A-70.5? In addition, have the gifts been fully accounted for in the filing of the estate tax returns?

(9) Are any trusts the devisee of any interest in the property to be insured? If so, what powers and authority are granted to the trustee?

(10) If no estate has been administered, what evidence will be provided verifying the intestate heirs of the Decedent and that no Will was found? Affidavits of reliable, disinterested parties may often bolster the marketability and insurability of the title.

If the estate is still open, at a minimum, all heirs, devisees, their spouses and the executor or administrator of the estate must sign any conveyance of property, and satisfactory indemnities be delivered to the title insurer. RECOMMENDATION: Discuss any questions or outstanding issues with the title insurance company attorney before drawing the documents and distributing them for execution in order to avoid any complications later.

XV. GUARDIANSHIPS FOR MINORS OR INCOMPETENTS

Minors and incompetents can receive and hold title to real property. However, any conveyance or mortgage by a minor, an incompetent or the guardians of the property are voidable until the date 3 years following the date the minor reaches 18 years of age or the incompetent regains *legal* competency, G.S. 1-17, with three exceptions: (1) Entry of an Order by the Clerk of Superior Court in a special proceeding to sell, mortgage or convey the property and, in the case of a minor, approval by a Superior Court Judge (N.C.G.S. 35A-1301, *et seq*), or (2) Waiver by a minor of his or her contingent statutory marital rights in property actually owned by their adult spouse, or joinder with their adult spouse in a mortgage or sale of property held as tenants by the entireties or other joint tenancy, N.C.G.S. 39-13.2, or (3) Conveyance by a competent spouse of his or her separate property without joinder of the incompetent spouse, *if* a guardian has been appointed for the incompetent and joins in the conveyance, pursuant to N.C.G.S. 39-7(b). Once a minor reaches the age of 18, or an incompetent regains competency, they have 3 years to disaffirm any conveyance or contract during their legal disability or the expiration of the otherwise applicable statute of limitations, notwithstanding the incompetency, whichever is later.

Pursuant to either the Uniform Custodial Trust Act, N.C.G.S. Chapter 33B (if under $100,000) or the Uniform Transfers to Minors Act, N.C.G.S. Chapter 33A (if under $10,000), property conveyed to a Custodian or Trustee (as defined in the relevant statute) can be conveyed out by the Custodian or Trustee (again, subject to the statute's limits). The custodianship or trust will last until the minor is aged 21, unless the gift specifies otherwise.

XVI. PERSONAL PROPERTY

Personal property is *not* covered by title insurance unless and until it is permanently affixed to and incorporated in the real estate and has become real property, at law. Two specific examples are:

(1) Fixtures which, by statutory definition, remain removable personal property governed by the Uniform Commercial Code, and
(2) Mobile or manufactured homes, which remain personal property unless permanently affixed, listed for ad valorem tax purposes as real estate, de-titled with the Division of Motor Vehicles pursuant to N.C.G.S. 20-109.2 and either an Affidavit or a Declaration recorded with the Register of Deeds pursuant to N.C.G.S. 47-20.6 and 47-20.7, respectively. See Form D attached.

XVII. LEGAL DESCRIPTION (the insured "land")

The property insured can be no more than the parcels (fee or easement) included within the attorney's opinion on title. G.S. 58-26-1(a). The property must locatable and identifiable "on the ground" using any information contained in the recorded instruments, such as in the recorded legal description itself, elsewhere in the recorded document or in other referenced recorded instruments (such as a recorded plat or prior deed). The description of all fee and easement parcels must describe a unique property and not be ambiguous that it could be one of several. The legal description must be mapped to assure it closes and should be checked against the survey to assure they conform. If a description is ambiguous, courts have established rules of construction. The different aspects of the description control the determination of the actual property lines in the following order of priority:

(1) Lot on recorded plat, referencing by plat book and page of recording;
(2) Reference to property as the same as a previously recorded instrument;
(3) Natural or Permanent adjoining monuments (adjoining landowners, river);
(4) Artificial or less permanent monuments (street, concrete monument, existing iron pipe);
(5) Courses (directional call);

(6) Distances;
(7) Acreage or quantity of land.

Other descriptive references may also be sufficient under circumstances where they clearly identify a definable property, such as street, numbers, address, or reference to a prior conveyance, an identifiable source of title or a recognized common name. However, any discrepancy with the descriptions of adjoining owners may need resolution by boundary line agreements, a boundary proceeding (G.S. 38-1 *et seq.*) or even an action to quiet title.

If easements are to be included as important and appurtenant title rights, the attorney should address (1) terms and conditions of recorded instrument creating the easement, including time limitations, physical location and connections, assignability or appurtenance to fee parcel, burden authorized and benefit conferred; (2) location and identification on survey, (3) title certification, and (4) adequate description. (*See* Section XXIII. EASEMENTS, GENERALLY, below)

Recurring claims involve: missing or erroneous calls, wrong property, not including all of the property or all easements (i.e. clearly not enough for a house or lacking a necessary well or right-of-way easement), including too much property (i.e. entire subdivision rather than just a particular lot), referencing the wrong plat, not attaching the Exhibit containing the legal description, wrong lot number, failing to note that property in multiple counties (and to record in both, including easements), inconsistent with other documents of search or closing (such as prior policies or multiple deeds vesting different tracts), missing revised or inconsistent recorded plats affecting the property.

XVIII. TYPE OF DEED

Since the recourse of the purchaser back against the seller or their predecessors in title (and the liability of the title insurer through subrogation to rights of the insured) is defined by the warranties in the deed of conveyance, a general warranty deed is the preferable vesting instrument. Any situation involving a special warranty or nonwarranty (quitclaim) deed should be analyzed closely.

Foreclosure sales under power of sale in a deed of trust must comply with Chapter 45 of the North Carolina General Statutes, especially if the trustee's deed was recorded within the last year or an IRS lien is purported to be extinguished. Particular high risk elements are inadequate service on the borrowers or guarantors

of any notice, defects in publishing or posting or failure to comply with IRS notice requirements.

Conveyance by deed in lieu of foreclosure must be voluntary and for adequate consideration, in order to overcome the presumption of fraud, Hinton v. West, 210 N.C. 712, 188 S.E. 410 (1936), Massengill v. Oliver, 221 N.C. 132, 19 S.E.2d 253 (1942), or the creditors' rights risk of treatment as a preference in an impending bankruptcy. Appraisal information may be required and is usually obtained by the lender in anticipation of the transaction.

Tax foreclosure or sheriff's deeds are often totally uninsurable because of inadequacies of listing, notice and procedure, especially failure to provide adequate notice to all owners of the property. Therefore, these entire proceedings must be carefully reviewed prior to closing.

Deeds from bankrupts are a serious concern, especially when judgment liens were docketed prior to the filing of the bankruptcy proceeding. Any order of sale from the relevant Bankruptcy Court, whether Chapter 7, 11, 13, etc., must specify that it is "free and clear of liens" and all judgment or other lien creditors must have been duly notified and given due process rights before their lien is extinguished by a duly ordered sale in the event their lien is not paid in full through the closing. A certified copy of the Order should be recorded in the office of the Register of Deeds of the county in which the property is located for purposes of notifying future title examiners of the authority for the sale. G.S. 47-29.

NOTE: A general discharge of the debtor in bankruptcy does *not* extinguish the lien of a judgment of real estate that attached pre-bankruptcy; it only discharges the personal liability of the bankrupt debtor. (An analogy is a nonrecourse mortgage, where the property is subject to the lien, but the borrower has no personal liability for the debt.) Property acquired *after* discharge is free and clear of the judgment lien since it did not attach prior to personal liability being discharged. Clowney v. North Carolina National Bank, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

XIX. CONDITIONS, COVENANTS AND RESTRICTIONS

All documents in the chain of title of the property to be certified and insured must be carefully checked to assure that any reservations, restrictions, easements or other matters that may affect title to the property are excepted in the attorney's title opinion. Runyon v. Paley, 331 N.C. 293, 416 S.E.2d 1777 (1992), Smith v. Butler Mtn. Estates Property Owners' Association, 324 N.C. 80, 375 S.E.2d 905 (1989).

Frequent sources of title problems include encumbrances contained in: (1) prior out conveyances of the particular parcel, (2) prior conveyances from a common owner of other properties (especially nearby properties or those shown on the same recorded plat of subdivision which might impose restrictions on other properties), Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957), (3) plats of subdivision, (4) documents referenced in the documents directly affecting the parcel being searched, (5) multiple sets of restrictions, (6) the documents of closing, the special provisions of which are not disclosed to the title insurer. If disclosed in the title opinions, the title insurance policy will reflect these items as exceptions in Schedule B of the final owner's and loan policies. Since the title insurer is rarely provided a copy of the documents and typically does not request them, the insurer will rely upon the closing attorney to disclose the exceptions and either verify that the restrictions have not been violated or to disclose any violations prior to closing to assure the lender and owner will be satisfied with any exceptions or coverages available.

Items which should be carefully reviewed at closing include, among other items:

- Owner's association dues or assessments, which must be checked, paid current at closing and disclosed to the buyer to alert them to future payment
- Violations of setbacks and easements, especially with new construction
- Inconsistencies between plat and restrictions regarding setbacks, easements or other matters
- Restrictions on use, such as disallowing use over a residentially restricted lot as access to another property, Easterwood v. Burge, 103 N.C.App. 507, 405 S.E.2d 787 (1991), *aff'd* 113 N.C.App. 265, 437 S.E.2d 902 (1994).
- Restrictions on or requirements for approval of future improvements, such as architectural review
- Ambiguities in interpretation that may affect the purchaser. Conflicts 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? See, for example, the ongoing debate about the definitions of homes and interpretations of restrictions contained in the mobile home cases of Starr v. Thompson, 96 N.C.App. 369, 385 S.E.2d 535 (1989), Angel v. Truitt, 108 N.C.App. 679, 424 S.E.2d 660 (1993), Young v. Lomax, 122 N.C.App. 385, 470 S.E.2d 80 (1996), and Briggs v. Rankin, 127 N.C.App. 477, 491 S.E.2d 234 (1997) *aff'd per curiam,* 348 N.C. 686, 500 S.E.2d 663 (1998)
- Reversions, for which recordable releases must be obtained prior to closing

- Rights of First Refusal, for which recordable waivers must be obtained prior to closing
- Organization of and conveyance of common areas to the owner's association, released from any liens of the developer. NOTE: Common areas are not covered by the title insurance policy of a lot owner (other than a condominium owner's undivided interest). So deeds of trust or other liens of the Association will only be disclosed to the client by the attorney's title opinion, if the Association title is searched by the attorney.
- Lender consent and subordination of any outstanding deeds of trust encumbering the common elements and any lots included in the affected phases of the development.

In the event of existing violations or questions regarding amendment, waiver, change of circumstances, expiration or unenforceability, underwriting counsel should be contacted prior to closing to determine what coverages are recommended or even available and upon what terms. The 6-year statute of limitations for enforcing violations of incorporeal hereditaments may prevent enforcement against old violations, but still prevent future changes or development in violation of restrictions. G.S. 10-50(3). This is an area where the *risk assessment* – for example, the activist history of the neighbors or neighborhood association, the degree of nonconformity of the insured property or its usage, other violations in the neighborhood, the unpredictability of court decisions -- is probably as important as the legal analysis of the restriction itself. The attorney should specifically discuss restrictions with the client in the event they contemplate future additions, changes or improvements. These future post-policy actions would not be covered by the title insurance policy.

XX. ACCESS TO A PUBLIC RIGHT-OF-WAY

Access is a Covered Title Risk (unless specifically excepted in Schedule B) in all ALTA policies and is a critical need for an owner or lender. 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 since it involved a post-policy municipal regulation, falling within both the post-policy, the police power and the governmental regulation exclusions. The questions for the closing attorney include:

(1) Does property abut a public road? If so, does the property have actual access, or is this a limited access highway (such as I-40)? Is that public road their preferred or sole means of access, or do they use or need another access provided by a private easement?

(2) If by private easement, what is the creating document for each easement – a recorded plat, a reference in a deed from a common grantor of the fee and "together with" the easement, or a separate easement agreement? Is access by way of a single easement? Or is it over multiple easements reaching from the dominant tract across multiple servient tracts to the public road? What are the uses of the easement important to the client? Are they *specifically authorized* by the creating instrument? (See "Easements" section below)

NOTE: Title insurance policies insure legal access. They do not insure the quality or maintenance of the access. They do not insure a specific access unless by specific endorsement or inclusion of a specifically described tract of "land" in Schedule A. Nor do they protect against governmental regulations (such as subdivision ordinances or zoning requirements) affecting the use of that access.

XXI. PUBLIC ROADS AND HIGHWAYS

Public rights-of-way have been at some time created by conveyance to North Carolina Department of Transportation (formerly the State Highway Commission or the Board of Transportation) or to the governing city authority, or by condemnation and recordation of a judgment conveying title to these public entities, or by recordation of a plat showing proposed public roads (see below). Agreements regarding ancient rights-of-way may not be of record and may not even be locatable. Since the 1960's, condemnation proceedings by the Department of Transportation are usually evidenced by a Memorandum of Action at the beginning of the proceeding, then a Judgment or Consent Order at its completion,

both being filed in the office of the Register of Deeds. G.S. 136-103 *et seq.* Such instruments should be carefully read and the surveyor of the property consulted to verify adjoining construction, repair or utility easements or controlled access provisions affecting the balance of the property.

Abandonment of a public right-of-way by a city (160A-299) or the State (153A-241) terminates the public easement, once the procedure is complete and the appeal period has expired. A certified copy of the resolution must be recorded in the office of the Register of Deeds. Two cautions apply: (1) These resolutions of abandonment frequently reserve easements for utilities lying within the abandoned rights-of-way. (2) In addition, this public abandonment does not terminate any potential private easement rights, such as those of purchasers of lots on a recorded plat showing the road or those reliant on the abandoned roadway for public access. Nor does the abandonment terminate the underlying fee ownership of the dedicator of such a plat. (See Termination of Easement below.)

XXII. NEIGHBORHOOD PUBLIC ROADS

Neighborhood Public Roads are defined under G.S. 136-67 *et seq.*, including 3 categories of roads which are currently open and in general or public use as a "necessary means of ingress and egress from the dwelling house of one or more families."

XXIII. EASEMENTS, GENERALLY

For title insurance purposes, three primary issues arise with regard to easements: (1) Are the easements exceptions to title on the insured tract(s) to be itemized under Schedule B? (2) Are the easements necessary for access from the property to a public right-of-way or for utilities? (3) Are the easements appurtenances to the insured fee parcel and to be added as insured "land" under Schedule A – Legal Description in the policy?

Easements can be created in many ways. The easement may be reserved for the benefit of other property in a prior conveyance of the property to be insured (for example, a deed of a neighboring tract, "together with" an easement described across our parcel). The easement may have been reserved across other property for the benefit (or as appurtenances to) the property to be insured (for example, a prior deed in our chain of title which includes a provision that it is "together with" an easement across an adjoining parcel). Or the easement may be created by separate instrument such as an easement agreement, declaration of restrictions, reciprocal easement agreement, or plat. The easement language may be quite simple such as

access over the existing farm road or may entail a many-page instrument defining rights and with complicated legal descriptions, so long as the parcel constituting the easement can be clearly located and the rights (or limitations thereof) defined. (See Legal Description discussion above)

Exception will be taken in Schedule B of the policies to any easement affecting title to any of the "lands" insured as shown in Schedule A of the policy. For recorded easements reflected by the attorney's title opinion, this would take the form of an exception reciting the beneficiary, book and page. Other easements might be shown with reference to a plat, or as contained in restrictions, or as shown on a survey provided to the title insurer. If the size and extent of the easement is of critical concern to the attorney or the client, a survey reflecting the easement and a copy of the easement document should be provided to the title insurer for review to determine what specific details might be included in the exception or specific affirmative coverage given. If location is critical to the client's use or planned development of the property, be sure that the easements are located on the ground. Consider renegotiating blanket or unlocatable easements into specific defined areas with the easement holder.

XXIV. PLATS AND EASEMENTS BY DEDICATION

Roads, easements or common areas shown on a recorded plat and located upon property owned by the person signing the plat are impliedly dedicated to the benefit of the future owners of properties sold referencing the plat, such as lots sold referencing a subdivision plat. Thus, these future owners have a vested interest in these roads, easements or common areas. Oliver v. Ernul, 277 N.C. 591, 178 S.E.2d 393 (1971). And if these roads or easements are not specifically reserved as private, they are also impliedly dedicated to the public. However, they do not become a part of the public maintenance system until accepted by the governing city, utility systems or the State of North Carolina. This acceptance is not a matter of local public record but can (and should, if uncertain) be verified with the appropriate authority. Steadman v. Town of Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960).

The certifying attorney, in reviewing the title documentation, should assure that the plat is consistent with the declaration and all other organizational documents. If any specific terms appear on the plat, they should be compared to the restrictions and the survey. Any inconsistencies should be specifically noted.

Replatted lots must be carefully reviewed before sold. In many counties, the indexing system does not include plats chronologically within out conveyances, so the searching attorney must be cognizant of the recording practices of the particular county to assure they locate any replat and prepare and close based on the new plat. 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. For example, if the lot lines change on a replat, the affected lots are *not* the same property as on the earlier plat. This 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! As another example, roads, easements and common areas cannot be unilaterally decreased or moved by the developer after a lot or lots are sold with reference to the earlier plat since those easement rights have vested. In a third example, a sewer line easement across a lots already sold with reference to a first plat becomes vested as shown on that plat. 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 first plat.

An adequate Withdrawal of Dedication of a street platted but not opened within 15 years pursuant to G.S. 136-96 may revoke the private rights in the easement, upon compliance with the strict statutory requirements. The Withdrawal must be signed by dedicator, who is presumably the owner (of his or her successors in interest) of the fee parcel underlying the easement, unless the dedicator was a corporation which has since been dissolved. The withdrawal does not apply to any use necessary for convenient ingress and egress to a platted lot shown on the plat. In order to properly appear in the chain of title of each owner and to resolve any ambiguity regarding the withdrawal, the instrument should be executed and acknowledged by and indexed in the names of each of the owners of property along the withdrawn street. According to the statute, "right, title and interest in said strip, piece, or parcel of land shall be conclusively presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent thereto" (*possibly as tenants in common and not necessarily in adjoining owners to the center line of the road,* as the public road abandonment statute provides*).*

XXV. EXPRESS EASEMENTS, BY GRANT OR RESERVATION.

All easements affecting the title, but especially appurtenant easements *benefiting* the primary (dominant) parcel, should be reviewed carefully to assure that they continue to the benefit of successors in title and that they allow the burdens

anticipated. Recall that unless a *specific* appurtenant easement is included in the legal description in Schedule A, the policy only insures a reasonable (undefined) means of access to a public road and no access to public utilities is insured. If the attorney certifies title to the easement parcel, the particular appurtenant access easement could then be included as insured property in Schedule A, and exception would be taken in Schedule B to the terms and conditions of the particular instrument creating the easement. Once the easement right is created of record in its "final" form, satisfactory to the client's needs, the titles of the fee and easement are together in the client. But any periods of time prior to the recordation of the final easement agreement, the chains of title (and encumbrances) may be different and must be addressed separately. Basically these should be considered two separate parcels for title and certification purposes – one fee and one easement. And the quality of the title search, documents of title and other requirements for the easement parcel are substantially the same as for a fee parcel.

The recorded instrument creating the easement should be carefully reviewed to assure the anticipated needs of the owner will not overburden the easement. Overburdening can take three primary forms:

- Attempting to use the easement across the servient tract to benefit more properties than the originally agreed dominant tract.
- Attempting to subdivide the dominant tract, thereby increasing the usage and users originally negotiated.
- Attempting to use the easement for more than the specified use in the creating instrument (i.e. using an access easement for utilities, Swaim v. Simpson, 120 N.C.App. 863, 463 S.E.2d 785 (1995)).

If the easement does not clearly provide for the uses, or increased usage, anticipated by the client, the attorney should consider negotiating an amended and restated easement agreement with the owners of all interests in the burdened servient parcel. In addition, any newly drafted easement agreement should include provision for payment of taxes by the owner of the dominant tract, since a tax foreclosure of the servient tract would extinguish the easement in North Carolina.

XXVI. CARTWAYS

A cartway proceeding may be instituted under G.S. 136-69 to establish an 18-foot wide accessway for very limited commercial purposes (or for residential purposes during the limited period July 29, 1995 to July 1, 1997). These rights are only insurable according to the terms of the final judgment, upon payment of the

charges, certification by the closing attorney of compliance of the proceeding with the statutory procedure and recordation of the judgment in the office of the Register of Deeds of the appropriate county.

XXVII. EASEMENTS IN GROSS

Easements in gross are, historically, considered personal property and not real estate. However, case law in many states has developed that they can be considered real property if for commercial purposes and granted to an entity with perpetual existence, such as public utility systems. Title insurance is rarely sought but may be available upon analysis of the particular case.

XXVIII. EASEMENTS BY PRESCRIPTION

As with adverse possession of a fee parcel, easements claimed by prescription require that the use be adverse (not by consent, implied or actual), hostile or under a claim of right (not mistake), open and notorious, continuous and uninterrupted, for 20 years (plus any period during which the record owner of the property was under a disability), in a substantially identifiable location. Also, as with adverse possession, such potential easements are fact-driven and subject to interpretation by a court. They are not final until an order of the appropriate court so states. Thus, if a client is reliant upon the "easement" to benefit their fee parcel (such as for access or utilities), they are highly unreliable and should be considered by the attorney only after serious review and discussion with both the client, the title insurer and potentially neighbors. In addition, issues such as maintenance and physical condition are of serious concern to the owner and lender and are not, in any event, covered by title insurance. An express recorded easement agreement among owners of adjoining properties using the easement and the fee owner is highly recommended. Any such easements which cross or burden the client's property and are disclosed (whether by survey or otherwise) will, however, need to be shown as exceptions in the attorney's opinion, on the survey and in Schedule B of the title insurance policy.

XXIX. EASEMENTS BY NECESSITY

In the very limited situation where a common grantor conveys a landlocked parcel, which can be accessed only across the retained land of the grantor (or property of strangers to title) which do have public access, an easement by necessity can be claimed by the grantee of the landlocked parcel across the lands of the grantor. The grantee must show necessity, not mere convenience. The grantor, however, may choose the location. Oliver v. Ernul, 277 N.C. 591, 178 S.E.2d 393 (1971). In North Carolina, a grantor may have a similar right against lands conveyed to the

grantee, landlocking the grantor's retained lands. Ciesko v. Clark, 92 N.C.App 290, 374 S.E.2d 456 (1988). As with easements by prescription above, the easement is fact-driven and not final until a court so determines. An express agreement is highly recommended for title and future maintenance purposes.

XXX. QUASI-EASEMENTS; "DOCTRINE OF VISIBLE EASEMENTS
Where an apparent and visible usage of a grantor's retained lands is reasonably necessary for the beneficial enjoyment of lands conveyed by that grantor to a grantee, a court may imply a quasi-easement or easement implied from prior use. Cash v. Craver, 62 N.C.App. 257, 302 S.E.2d 819 (1983), Hodges v. Winchester, 86 N.C.App. 473, 358 S.E.2d 81 (1987). A similar easement may be implied in favor of a grantor under the higher standard of "strict or imperious necessity." Goldstein v. Wachovia Bank & Trust Co., 241 N.C. 583, 86 S.E.2d 84 (1955). Again, the easement is fact-driven and not final until a court so determines. An express agreement is highly recommended for title and future maintenance purposes.

XXXI. EASEMENTS BY ESTOPPEL.
Easements by estoppel are typically presumed from evidence on the actual property of use by another, such as utility lines or existing roads, even though no recorded instrument is found. Packard v. Smart, 224 N.C. 480, 31 S.E.2d 517 (1944). Exception will be taken to the easement in Schedule B of the title insurance policy. And, again, the easement is fact-driven and not final until a court so determines. An express agreement is highly recommended for title and future maintenance purposes.

XXXII. PARTY WALL AGREEMENTS.
Party wall agreements are in the nature of reciprocal easements both benefiting and burdening the two parcels. Therefore, any title insurance covering the party wall easement rights (i.e. including them as "land" under Schedule A) would be subject to a title examination, review of documentation and certification by the attorney regarding both parcels, and exceptions would be taken in Schedule B, as with any appurtenant easement coverage (discussed above).

XXXIII. TERMINATION OF EASEMENTS.
Absent a specific recorded termination of easement signed by all parties with an interest in the easement, title insurers would continue to take exception to the easement. Any specific facts supporting an implied abandonment, such as removal of tracks, poles, rails or other evidences of the easement, unrecorded

documentation, affidavits or other evidence should be discussed with the title insurer prior to closing.

XXXIV. RAILROADS

The attorney's opinion and the title insurance policy exception should include *all* rights of the railroad company, not just an unidentified "right-of-way. The attorney should assure that the survey is consistent with the the known documents, the applicable statutory presumption and the right-of-way actually claimed by the railroad company, and should address any inconsistencies.

A. Source of Right-of-way.

A railroad company's interest may substantially affect the value and usability of property for its intended purpose. The interest may become apparent from reviewing the record legal descriptions of property to be conveyed, recorded maps of the property, a current survey, or other right-of-way or documents in the chain of title. The document creating the railroad right-of-way determines, directly or indirectly, both the ownership rights of the railroad company and the width of the right-of-way conveyed. The term "right-of-way" may encompass a limited purpose easement, or it may involve the entire fee simple absolute. The terms (whether easement or fee, conditions, restrictions, and even width of the right-of-way) are determined, in order of priority, as outlined below. Tighe v. Railroad, 176 N.C. 244; Griffith v. Southern Railway Company, 191 N.C. 84 (1925).

1. Voluntary grant – Deed: The attorney must carefully read the actual granting instrument, if it is locatable, and apply the general rules of construction for interpreting conveyances. *See, e.g.*, N.C.G.S. 39-1. A conveyance of bargain and sale or without any indication of limited purpose or restriction on use can be a fee simple, as any other conveyance. Many of these old documents creating the railroad company rights were in the 1800's; it may be virtually impossible to determine which document relates to which railroad section of track or which to a particular real estate tract that has been substantially divided over time.

The deed or right-of-way instrument may clearly define a right-of-way width, such as 200 feet. Or the instrument may define the width based on the tracks and grades as constructed, the usual provisions in 19th century railroad deeds. These typically described the interest

conveyed similar to: "all right, title and claim to so much of our lands as may be occupied by the said Rail Road, its banks, ditches and works." Under the case of Hendrix v. Southern Railway Company, 162 N.C. 7 (1913), this may be expanded to the full width provided in the railroad company's charter (discussed below).

2. Involuntary grant – Condemnation under Eminent Domain: In contrast, condemnations under eminent domain must be specific about the property condemned and the title interest conveyed. Property interests acquired by condemnation will be for an easement for railroad purposes only, and not the full fee, since they are by definition involuntary. North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972). Beach v. Wilmington & Weldon Railroad, 120N. C. 498, 263 S.E. 703 (1897). Condemnation rights are provided under N.C.G.S. 40A-3 (4) (and former 40-29 (repealed 1981) and C.S. 1733, Subsection 1, and C.S. 440, subsections 1 and 2). For railroad companies, "[t]he width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width." In cities, they have to have license from the board of aldermen, board of commissioners, or other governing authorities of such town or city. Under N.C.G.S. 62-220(5), the powers of railroad corporations include the right to condemn or purchase railroad roadbeds and "to lay out its road, not exceeding 100 feet in width, and to construct the same; to take, for the purpose of cuttings and embankments, as much more land as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road . . . "

3. Railroad charter: The railroad charter granted to the railroad by the state may provide for a wider right-of-way. Griffith v. Southern Rwy., 191 N.C. 84, 131 S.E. 413 (1926). Many railroad companies, such as Seaboard Air Line Railroad and Southern Railway Company, have charters significantly larger (i.e., "one hundred feet on each side of the main track of the road, measuring from the centre of the same" for a total of 200 feet in width). In addition, many "conveyances" are simply presumed because (a) no conveyance is on record, (b) the

tracks and works are in place, and (c) the owner has not begun an action for compensation within 2 year of the completion of the rail road. The terms of the conveyance would be according to the terms of the railroad company's charter. Keziah v. Seaboard Air Line Railroad Company, 272 N.C. 299. Often, reported appellate cases under the railroad's name may identify the year and Session Law of the Charter, to obtain a copy from the State Library. (Remember that old cases tend to abbreviate Railway or Railroad as "rr" or "rwy.")

4. Statutory presumptions: If no specific granting instrument (whether deed or condemnation) is locatable and the charter does not limit or define the rights or width of rights-of-way for the particular railroad company, the statutory presumptions would apply. Statutes in effect at least in the period from 1885 to 1900 provided for rights-of-way 100' wide inside the city (as defined at that time) and 200' wide outside of the city (again, as determined at that time). But the proof of which provision applies can be difficult to obtain and an onerous burden to a certifying attorney.

B. Contacting Railroad Company: The attorney (or client or surveyor, depending on the circumstances) can and should contact the railroad company directly and request information about particular segments of their track. They will probably take the most conservative approach (that they own the largest right-of-way possible) and they may be slow to respond. But certainly information about what they claim their right-of-way to encompass may save problems and even litigation for the client / insured owner in the future. Current information can be obtained from the Secretary of State corporate web site or from the North Carolina Department of Transportation Rail Division.

C. Streets – crossings and alongside.

City streets have priority over railroads, even if the railroads were there first. The North Carolina Supreme Court has held this philosophy through many cases, feeling that railroads were developed to facilitate commerce, so they should be subject to the other needs that develop because of that commerce. But the city cannot seriously impede the railroad's ability to use the tracks. N.C.G.S. 160A-298. Utilities share this ability to use and priority over railroads. N.C.G.S. 62-237. However, on state-system roads (any public

roads other than city streets), the Secretary of Transportation is the final arbiter of these matters. N.C.G.S. 136-20.

D. Abandonment: Since railroads are in interstate commerce, an Order of Abandonment should be issued by the U.S. Surface Transportation Board since 1996 (created pursuant to 49 U.S.C. Sections 701-706, 721-727 and 10101-11901, with abandonment procedures at 10903-10906) or, previously, the Interstate Commerce Commission (188701995). However, these are never recorded in the local office of the various Register of Deeds. And no adverse possession claim will lie against a railroad. N.C.G.S. 1-44

If the vesting instrument creates in the railroad company a *fee simple absolute* ownership, then like any other owner, they can convey the right-of-way property, subject to any restrictions or encumbrances and subject to their corporate authority. If they abandon the right-of-way, the title reverts to the owners of property on each side of the track to the centerline of the right-of-way, or to the public road edge if a public road runs along one side of the track. N.C.G.S. 1-44.2. Since they own the fee, a quitclaim deed should be obtained, for which the companies typically charge a fee.

If the vesting instrument creates only an easement (or something less than fee simple absolute ownership) in the railroad company, N.C.G.S. 1-44.1 provides that the right-of-way is presumed abandoned if the tracks are removed and not replaced and the property is not used for railroad purposes for 7 years after removal. (This applies to easement, not fee simple, ownership. McLaurin vs. Winston-Salem Southbound Rwy., 323 N.C. 609, 374 S.E.2c 265 (1988)) However, the title to the underlying reversion remains vested in whoever has taken title *including to the centerline of the track* since the original vesting instrument. This may require searching the title to the adjoining property to assure its legal description has always included this strip of land. If it has been carved out of the legal descriptions back in time, then this strip remains vested in the last owner to receive it and not include it in a conveyance out. McDonald's v. Dwyer, 111 N.C.App. 127, 482 S.E.2d 165, *aff'd* 338 N.C. 445, 450 S.E.2d 888 (1994). That person must receive notice and an opportunity to be heard to prove that they have "good and valid title to the land" as provided under N.C.G.S. 1-44.2(b), overcoming the presumption of ownership under that statute.

Many abandoned railroad rights-of-way are being conveyed to local rails-to-trails conservation authorities pursuant to the National Trails System Act of 1983, 16 U.S.C.A. 1241 *et seq*. and, in North Carolina, the "Rail Corridor Preservation Act" of 1988, enacted as N.C.G.S. 136-44.36A to –44.36D (1993) These conveyances, and the necessary parties to join into the conveyances, are governed under the same conveyancing rules outlined above. If the railroad company only owns an easement (whether by granting instrument or because of condemnation), then the owners of the underlying fee and other interests must join in the conveyance.

CAUTION: As with street abandonments, often utility companies have been granted easements and licenses along even abandoned railroad rights-of-way. This is especially true with the fiber optic cable installations today. They are underground and, therefore, not necessarily visible easements. So this question should be asked, or an exception made until proven otherwise, as follows: "Rights-of-way of utility companies, if any, in and to the _____ [width] abandoned railroad right-of-way [as shown on survey, etc.]"

XXXV. SURVEYS.

Owners are frequently surprised (and dismayed) to learn that they do not have survey coverage. They closed based on "survey coverage without a survey" providing affirmative coverage to the lender, but not the owner. See attached Form E, Owners Still Need Surveys. If no survey is obtained, the attorney should clearly and adequately advise their client of the risk. See attached Form F, Affidavit Regarding Waiver of Survey. If and when the survey arrives, even if at the last minute, it should be carefully compared to title search matters, including plats, restrictions, easements (appurtenant and exceptions), especially in situations of planned or newly completed construction.

XXXVI. "AFFIRMATIVE COVERAGE" and SPECIAL ENDORSEMENTS FOR ADDITIONAL COVERAGE.

Title insurers receive frequent requests for "affirmative coverage" about any number of matters, including encroachments, outstanding uncanceled liens, open estates, lender survey coverage, and many other defects, liens or encumbrances. The attorney should discuss with the title insurer:

(1) The nature of the defect (creating documents, history, severity, how identified),
(2) what investigation has been made to remove the defect,
(3) what curative actions are suggested,
(4) what indemnities or waivers may be available and

(5) the nature of the risk to the insurer *and to the client*.

Counsel should be very cautious in advising that Endorsements or "affirmative coverage" are sufficient. 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). 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 losses payable by the title insurer, so long as the insurer pursues the cure diligently and within a reasonable time. Lawyers Title Insurance Corporation v. Synergism One Corp. et al, 572 So.2d 517 (Florida, 1990). The coinsurance provisions of the policy may further limit the client's coverage.

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, absent a specific endorsement to that effect! Nor is the title insurer obligated to increase its liability. TCX Incorporated v. Commonwealth Land Title Insurance Company, 86 F.3d 1152 (4th Cir. 1996) (regarding the Catawba Indian treaty problems in South Carolina).

When surveys are obtained, they may reflect encroachments of fences, driveways, or even buildings onto easements, setbacks or even across property lines. Title insurers will typically provide affirmative coverage in loan policies for minor encroachments such as fences, driveways or even decks. (See Agreement and Indemnification Regarding Encroachments, Form G attached.) A more substantial encroachment, whether in the size or visibility or because it is the permanent structure, may require waivers from neighbors or the developer, amendment to the restrictions or plat, or easements. For a utility easement, this could include waiver by all of the utility companies providing service through the easement.. Such information could include a copy of the survey, applicable plats or restrictions creating the easement or setback, factual information about other similar violations in the neighborhood or waivers provided, any background of activist neighbors on this issue and any other information that might assist the title insurer in weighing the risk of providing affirmative coverage.

Affirmative coverage may take any number of forms, but the typical coverage is for "loss or damage incurred by the insured as a result of enforced removal of the

encroachment or violation." Ultimately, the existence of the violation or the unwillingness of a future purchaser to purchase the property will *not* trigger liability of the title insurer. Only an action to seek enforced removal of the encroachment or violation will trigger a loss covered by the policy. Since exception to the violation is taken in the policy, the Covered Title Risk for marketability of title will also not extend to this situation.

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. 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. Additional premiums may apply to many of these coverages.