

Title Insurance Issues – How to Prevent Them and How to Fix Them

I. Title Insurance

A. What is Title Insurance?

Title Insurance is a policy issued by an insurance company guaranteeing that the title to a parcel of real property is clear and properly in the name of the title owner and that the owner has the right to deed the property (convey or sell) to another. Should a problem later arise with the title, the insurance company will pay the damages to the new title holder or secured lender, or take steps to correct the problem. Title Insurance is by nature a "risk elimination" form of coverage, as opposed to the "assumption of risk" involved in virtually all other lines of insurance. Casualty coverage, such as car, life, or homeowner's insurance, looks forward in time. By contrast, a title policy looks backward from a specific moment in time, insuring an owner or a lender against "actual" monetary loss or damage arising out of defects to or liens on title, provided such encumbrances are not excepted to or excluded from coverage by the terms of the policy.

The policy does not represent the status of title, but is instead, an agreement to indemnify the policyholder, up to the face amount of the policy, for losses caused by on- or off-record defects found in the title or interest in the insured property to have existed on the date of issuance. "Indemnity" is defined as "the right which a person has who has been compelled to pay what another should be bound to *pay* in full." *Connecticut Attorneys Title Ins. Co. v. McDonough*, 1996 Conn. Super. LEXIS 3312 (Conn. Super. Dec. 4, 1996). Thus, a title policy is a collateral contract where the insurer agrees to reimburse the insured for damages caused by a third party's actions.

Title coverage is not a substitute for the warranties contained in the seller's deed. These warranties include a warranty that the Seller is seized of the premises, has the right to convey the premises, and the title to the premises is marketable and free of encumbrances. Marketability means free from encumbrances with the ability to sell. An encumbrance is any right of another in property which may diminish the value. A buyer may have concerns that the seller could die, or become insolvent or otherwise judgment proof, leaving the conveyed warranties of little valueless. Despite the fact that the title policy itself is, in effect, a warranty or covenant against encumbrances, title insurance does not insure the representations of the seller, it insures only the warranty of title contained in the deed. *White v. Lawyers Title Ins. Corp.*, 399 S.E.2d 526, 528 (Ga. Ct. App. 1990).

B. Title Insurance Commitment.

1. Purpose. The title insurance commitment, or binder, is a pledge from the company to issue its policy of coverage in favor of the proposed insured once the requirements listed therein have been met. The commitment is not effective until (1) the proposed insured is specifically identified, (2) the amount of the policy is determined, and (3) the document itself has been signed by an authorized officer or agent of the insurer. Because the commitment is a concise listing both of requirements for the issuance of coverage and of specific proposed exceptions thereto, it proves to be a valuable tool for the purchaser. In commercial transactions, the title commitment and the survey (as discussed below) are the primary documents used by the counsel as a guide in raising and curing objections to title.

2. Structure. The body of the commitment consists of Schedule A, Schedule B - Section 1, Schedule B - Section 2, and, if necessary, Schedule C. "Conditions and Stipulations" are normally reflected by the jacket into which the original binder is placed upon issuance.

i. *Schedule A.* Paragraph 1 of Schedule A states the effective date of the binder, which will be the date, hour, and minute through which the opining attorney has searched the public records and examined title. Paragraphs 2.A. and 2.B. name the insured owner and/or lender, specify which form of policy will be issued for each insured once all requirements of the company have been satisfied, and designate the amount of coverage being afforded to each. The insured interest (fee simple, leasehold, etc.) and the name of the owner of the insured property on the effective date of the commitment are set forth in Paragraph 3. Paragraph 4 contains the legal description of the subject property or, in the case of a lengthy description, refers to an attached Schedule C. If coverage is desired for appurtenant easements that benefit the insured parcel(s), such easements must be clearly identified in "TOGETHER WITH" paragraph(s) immediately following the legal description. The certifying attorney must search and opine to title on the easements with the same degree of thoroughness as is applied to the abstract and opinion relative to the insured tract(s).

ii. *Schedule B - Section 1.* This section of the binder lists the specific requirements that must be met in order for the title insurance company to issue its policy. Every commitment has two standard requirements: (1) that payment be made to the grantor(s) or mortgagor(s) of the full consideration for the estate to be insured, and (2) that the proper instruments must be executed and recorded to establish the estate to be insured. The remaining requirements are dependent upon the exceptions to title reported by the certifying attorney and upon the needs of the title insurer. It is common practice to require that outstanding liens be canceled or subordinated of record, that a mechanics' and materialmen's lien waiver be executed by the grantor(s) or mortgagor(s), that the payment of ad valorem taxes be brought current, and, in most commercial transactions, that the company be provided with an updated ALTA/ACSM *survey*.

iii. *Schedule B - Section 2.* This is the section of the commitment listing the specific exceptions to title reported by the opinion of the certifying attorney that will, if not cured, be contained in the final policy. One exception that is a standard in all binders is "defects, liens, encumbrances, adverse claims, or other matters, if any, created first appearing in the public records or attaching subsequent to the effective date (of the binder) but prior to the date the proposed insured acquires for value of record the estate or interest or mortgage thereon covered by (the) commitment." This wording is referred to as the "*gap exception*," meaning that the insurer is unwilling to insure over or become liable for any title defect occurring between the effective date of the binder and the recording of the insured deed and/or deed of trust.

iv. *Schedule C.* No Schedule C will be included in or attached to the commitment unless the legal description of the insured property is too lengthy to be inserted into Schedule A.

v. *Conditions and Stipulations (Reflected by Jacket).* These stipulations allow the company, among other things, to revise the commitment should it subsequently become aware of undisclosed additional exceptions to title. No liability is assumed for loss or damage arising from failure of the proposed insured possessing knowledge thereof to disclose the same. Liability of the insurer is limited to actual loss, not to exceed the face amount of the policy, incurred by the insured in (1) complying with the requirements of the commitment, (2)

eliminating exceptions appearing in Schedule B - Section 2, or (3) acquiring the insured interest.

North Carolina insurers issue commitments and policies, and in most instances, endorsements, in the form approved by the American Land Title Association ("ALTA"). Standardization occurred in response to lender demand for predictable forms that would not need to be read and negotiated.

3. Insuring Clauses. The following insuring clauses are contained in a title policy:
- (a) Title to the insured estate or interest being vested other than as stated in the policy;
 - (b) Any defect in or lien or encumbrance on the title;
 - (c) Unmarketability of title; and
 - (d) Lack of a right of access to and from the land

C. What "hidden risks" are protected under a title policy?

The following is a list of hidden risks that are protected under a title insurance policy.

- 1. False impersonation of the true owner of the property by the seller or other persons previously in title. (ex. Forged deeds, releases and other documents.)
- 2. Deeds by persons of unsound mind.
- 3. Deeds by minors.
- 4. Invalid documents completed by an expired power of attorney.
- 5. Invalid deeds delivered after the death of the grantor.
- 6. Deeds by supposedly single persons but actually married.
- 7. Fraud.
- 8. Claims for unpaid estate inheritance and gift taxes against prior owners of your home.
- 9. Unrecorded easements - giving one party the right to enter another party's property.
- 10. Undisclosed descendents of former owners of the Property.

D. When is Title Insurance effective?

Title Insurance insures the chain of title during the search period performed by the

certifying attorney.

E. Endorsements To Title Policy.

In addition to the standard coverage provided by a title insurance policy, endorsements may be added to the policy addressing specific issues. A list of ALTA endorsements that may be available and added to a title policy are listed on attached Exhibit A titled "Endorsements".

II. Surveys and Title Insurance.

A. Survey.

A survey is very helpful in locating easements, encroachments, flood zones, and otherwise providing the pictorial reference of the property. Often clients desire to save money and do not wish to order a new survey if an older survey is available from the seller. However, it is advisable that a new survey be ordered as this allows a survey to be certified to your client, provides a current snapshot of the property, and allows elimination of the exception to the title policy which excepts coverage as to any matters which would be shown on a recent survey.

B. Boundary Surveys.

Land surveying is governed by Chapter 89C of the North Carolina General Statutes, titled "Engineering and Land Surveying." Unless clearly marked as "Preliminary Plat – Not for recordation, conveyances, or sales," boundary surveys shall be sealed, signed and dated by the Professional Land Surveyor and shall contain the following requirements:

1. An accurately positioned north arrow.
2. Courses and distances of every line surveyed must be shown. Distances must be in feet or meters.
3. All plat lines must be horizontal or grid measurements, and all lines must be plotted to scale.
4. Curved boundaries must be shown with "actual survey data" or as a series of subcords with bearings and distances around the curve.

5. If a subdivision of land is set out, all streets and lots must be accurately plotted with widths and other pertinent information.
6. Control corners established under NCGS §39-32.1 et. seq. and all other corners marked by monuments or natural objects must be shown.
7. Where possible, one of the following must be shown: names of adjacent land owners; lot, block, parcel and subdivision designations; or other legal reference where applicable.
8. All visible and apparent rights-of-way, easements, watercourses, utilities, roadways, and other such improvements must be shown where crossing or forming a boundary line of the property.
9. If the property is within 2000 feet of some United States or State Agency survey system, such as the North Carolina Geodetic Survey, one or more corners must be tied to a horizontal control monument. However, control monuments within a previously recorded subdivision may be used in lieu of grid control, and an existing bearing control may be used where practical. In the absence of a Grid Control, other natural or artificial monuments or landmarks must be used.
10. The survey must contain a vicinity map.
11. The survey must contain the property designation, the name of the owner or prospective owner, location (town, county, state), dates of the survey, a scale, a bar graph, the name, address, license number and seal of the surveyor, the title source and a legend.

C. Recording.

If the survey is to be recorded, it must comply with NCGS §47-30. Most of the requirements of §47-30 are virtually identical to those set forth in 26 NCAC 56 § 1600 et. seq. pertaining to the Profession of Land Surveying. However, NCGS §47-30 contains several additional requirements, including: (1) plat size requirements (§47-30(a)); (2) plat material requirements (§47-30(b)); (3) a certification requirement; (4) a statement certifying the survey *type* (*e.g.*, the survey creates a subdivision or recombination); and (5) if required, a certification of approval by the appropriate governmental authority.

D. ALTA Survey.

An ALTA (American Land Title Association) survey is a survey which meets the "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys". The

following is a summary of the "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys (1999)". Specifically:

1. The client must request an "ALTA/ACSM Land Title Survey." The request must include which of the optional items listed in Table A to the 1999 requirements are to be incorporated. Table A include such items as: vicinity map, flood zone designation, land area, building set back lines, and location of utilities. The client must supply copies of title documents.
2. Surveyor information, including: name, address, telephone number, signature, official seal and registration number, date of survey and revisions, and the caption "ALTA/ACSM Land Title Survey" with the required certification.
3. The survey must comply with the latest "Accuracy Standards" as adopted by ALTA/ACSM and NSPS.
4. Boundaries must be drawn to scale and the survey must include a graphic scale, a north arrow, and a legend for symbols. The survey must be at least 8 x by 11 inches in size.
5. The survey must be performed on the ground, and must include:
 - (a) Mathematical dimensions of all boundaries, a point of beginning, and a bearing base that refers to a well-fixed bearing line.
 - (b) If record bearings, angles or distances differ from field measurements, both must be shown.
 - (c) Distances to nearest rights-of way from parcel corners. Names and widths of streets abutting the property, and observable evidence of access. Observable evidence of private roads. Rights-of-way described in Record Documents but not physically opened.
 - (d) Titles of all recorded plats and maps with recording data. Platted setback or building restriction lines. Contiguity, gores and overlaps along exterior boundaries.
 - (e) Evidence of monuments.
 - (f) The character of any and all evidence of possession.
 - (g) Locations of all buildings.
 - (h) All easements of record, both burdening and benefiting the property. Observable evidence of any and all easements, roads, rights-of-way, water courses, drains, telephone, telegraph or electric lines, water, sewer, oil or gas pipe lines, and surface indications of any underground easements or servitudes.
 - (i) The character and location of all walls, fences, buildings, and other visible improvements within five feet of all boundary lines. Physical evidence of all encroachments (without expressing a legal opinion).
 - (j) Driveways and alleys, including evidence of use by other than the occupants of the property.

- (k) Cemeteries and burial grounds (from title documents or observation).
 - (l) Ponds, lakes, springs, rivers.
6. The surveyor must furnish two sets of prints of the survey and two sets of a boundary description. Where practicable, the boundary description must be on the face of the survey. If the property includes a water boundary, the date of measurement of the water boundary must be noted and the survey must include a note that the boundary is subject to change from natural causes.
 7. The survey must include an ALTA/ACSM certification.

III. Title Insurance Issues – How to Prevent Them and How to Fix Them.

The following is a non-exclusive list of issues that may affect title to property and thus the insurability of such title, and suggestions on how to either prevent or cure the issue.

- A. **Purchase Contract.** Modify the purchase contract to provide that the Examination Period does not start until receipt of all documents pertaining to the property from the seller (ex. title policy, survey, maps, plats, easements, leases, estoppel certificates, list of security deposits). Identify the documents to be delivered by the seller and attach as a separate exhibit and attach the exhibit to the purchase contract.
- B. **Survey.** Obtaining a recent survey is an essential step in identifying issues and matters affecting the title to property. Generally, to avoid a survey exception on an owner's policy, you will need to obtain and deliver to the title company a new survey. A survey exception significantly impairs the value of obtaining title insurance as it makes exception to all matters which may be shown on a current and accurate survey of the property. Boundary lines disputes, wetlands, improvements encroaching onto easements, and other rather obvious and significant title issues are often something that could be physically shown on a survey.
- C. **Zoning.** Obtain from the local municipality a zoning verification letter specifying the property's current zoning classification, whether the current use is compliant with current

zoning, and what other uses fall under the particular zoning classification. The zoning letter may also be used to obtain a 3.1 zoning endorsement to the title insurance policy.

D. **Encroachments.** Encroachments may be either public (setbacks imposed by a governmental authority) or private (restrictive covenants). With respect to minor violations of governmental requirements, obtain a variance for the particular matter, or if a private landowner, negotiate a permanent easement permitting encroachment to continue. Negotiate with the title insurance company for an endorsement providing affirmative coverage for forced removal of any improvements and a comprehensive endorsement.

Private covenants often will contain setback and impervious surface requirements for any improvements on the affected property that are more stringent than the municipal zoning regulations. For example, the municipal zoning requirement for that particular zoning classification may require a thirty foot rear yard setback while the private covenants require a forty foot setback. A building that satisfies municipal zoning may still encroach into the setbacks required under the private declaration. It is imperative to determine whether the building your client is purchasing encroaches onto a neighboring property or an easement.

North Carolina law has consistently held that the encroaching party must remove the portion of its improvements encroaching onto the land of another. In *Williams v. South & South Rentals*, 82 N.C. App. 378 (1986), the court required the defendants to remove a corner of an apartment building which encroached approximately one square foot over the plaintiff's property line.

E. **Easements.** All easements, whether benefiting or burdening the property, must be identified. This entails a review of the public records and a physical inspection of the property. Be mindful of prescriptive easements which can arise through use of the property, and easement

by necessity for land locked lots. With respect to blanket utility easements, the location of such easements may be determined by contacting the utility company and requesting a copy of the particular drawing identified in the easement. Further, an extended blanket easement endorsement may be obtained for the title policy.

F. **Tax Parcels.** Verify whether the property consist of a single tax parcel or multiple parcels.

G. **Water Boundary.** Verify the date of measurement of the water boundary (must be shown on an ALTA survey).

H **Environmental.** Perform a Phase I and if needed a Phase II environmental analysis on the Property. Recently we had a transaction where the surveyor discovered underground storage tanks in an old survey that was not recorded. The underground tanks were not visible from a physical inspection of the Property and the Seller was unaware of such tanks existence. The buyer's lender may also require an 8.1 Environmental Lien Endorsement to the title policy.

I. **Judgments.** When the seller has a judgment against him/her, a payoff may be obtained from the Clerk of Court in the county where the judgment is docketed. If the seller has previously tendered the amount of the judgment to the judgment creditor, a civil action for clouding title may be filed against the judgment creditor for failing to cancel the judgment.

J. **Civil Actions.** Ascertain from the seller whether he is currently a party to any litigation and negotiate a warranty into the purchase contract covering this issue.

K. **Transfer of less than all of Property.** Ascertain whether the property to be released is encumbered by a deed of trust. If so, contact the lender to negotiate a release of the property to be conveyed. In addition, an endorsement must be obtained for the existing title insurance policy, verification whether cross assess easements are needed, and new tax parcel ID numbers

obtained. A subdivision plat will need to be prepared, approved and recorded if the property to be transferred is part of a larger tract.

L. **Leases.** Negotiate in the purchase contract a warranty from the seller which provides that there are no unrecorded leases. If a recorded lease exists, a subordination agreement must be obtained from the tenant of such lease to be recorded with the Register of Deeds in the county where the property is located.

M. **Affidavit from Owner, Contractor Regarding Liens and Payment.**

N. **Liens.** Liens filed against the property must be either removed or bonded off by paying the funds in dispute (the lien amount) to the Clerk of Court where the lien is filed of record. An affidavit regarding liens should be obtained from both the owner and contractor.

O. **Railroads.** The existence of railroads may be discovered by visual inspection of the property or a survey. The rail road has an absolute right of way for its tracks. If a railroad track lies adjacent to, but not on the property, a survey should still be obtained to determine the location of the rail road right of way.

P. **Access.** Does the property have accessed to public or private road? Is the property land locked? If access is by way of an easement, determine whether the easement runs with land. Negotiate an ALTA 17 and 17.1 Endorsement to the title policy which ensures legal access and vehicular access, the use of existing curb cuts and entries and the status of the public road either abutting the subject property or assessed by private easement.

Q. **Property Held by Defunct Company.** When drafting the sales contract and the seller is a corporation or limited liability company, make sure to include a warranty from the seller that the company is in good standing with the state of incorporation. If the company has been

dissolved or is no longer in good standing, the company must be brought back in good standing in order to convey title by way of a warranty deed.

R. **Tax Liens** (State or Federal). A payoff must be obtained from taxing authority which requires written authorization.

S. **Property pledged as bond.** Seller pledged his land valued at \$170,000.00 along with other family members to come up with the \$1,000,000 required to get his pregnant grown daughter out of federal prison. The lien was for the full value of the \$1,000,000 bond. A release must be obtained from the bonding company in order to transfer the property.

T. **Municipal Assessments.** Contact the local municipality to determine whether there are pending or threatened assessments for water, sewer, sidewalks, or street widening. If the assessment has not been determined, funds may be escrowed at closing to cover the assessment and a street assessment endorsement may be obtained.

EXHIBIT A
Endorsements to Title Policy

ALTA Endorsement Form 1 - Street Assessments

ALTA Endorsement Form 2 - Truth in Lending

ALTA Endorsement Form 3 - Zoning

ALTA Endorsement Form 3.1 - Zoning Completed Structure

ALTA Endorsement Form 4 - Condominium

ALTA Endorsement Form 4.1 - Condominium

ALTA Endorsement Form 5 - Planned Unit Development

ALTA Endorsement Form 5.1 - Planned Unit Development

ALTA Endorsement Form 6 - Variable Rate Mortgage

ALTA Endorsement Form 6.1 - Variable Rate Mortgage Regulations

ALTA Endorsement Form 6.2 - Variable Rate Mortgage Negative Amortization ALTA

Endorsement Form 7 - Manufactured Housing Unit

ALTA Endorsement Form 8.1 - Environmental Protection

ALTA Endorsement Form 9 - Restrictions, Encroachments, Minerals

ALTA Endorsement Form 9.1 - Restrictions, Encroachments, Minerals Owner's Policy:
Unimproved Land

ALTA Endorsement Form 9.2 - Restrictions, Encroachments, and Minerals - Owner's Policy:
Improved Land

ALTA Endorsement Form 10 - Assignment

ALTA Endorsement Form 10.1 - Assignment and Date Down

ALTA Endorsement Form 11 - Mortgage Modification

ALTA Endorsement Form 12 - Aggregation

ALTA Endorsement Form 13 - Leasehold Owners

ALTA Endorsement Form 13.1 - Leasehold Loan

ALTA Endorsement Form 14 - Future Advance Priority

ALTA Endorsement Form 14.1 - Future Advance Knowledge

ALTA Endorsement Form 14.2 - Future Advance Letter of Credit

ALTA Endorsement Form 15.1 - Non-Imputation Additional Insured

ALTA Endorsement Form 15.2 - Non-Imputation Partial Equity Transfer

ALTA Endorsement Form 16 - Mezzanine Financing

ALTA Endorsement Form 17 - Access and Entry

ALTA Endorsement Form 18 - Single Tax Parcel

ALTA Endorsement Form 19 - Contiguity Multiple Parcels

ALTA Endorsement Form 19.1 - Contiguity-Single Parcel

ALTA Endorsement Form 20 - First Loss Multiple Parcel Transactions

ALTA Endorsement Form 21 - Creditors' Rights

ALTA Endorsement Form JR1 - Supplemental Coverage

ALTA Endorsement Form JR2 - Revolving Credit / Variable Rate