TITLE CLAIMS UPDATE 2019

Chicago Title CLE Seminar
Securing the Castle 2019

Top 4 (2005)

1. Mortgage Fraud schemes
2. Deeds of Trust: Releases, cancellations, subordinations, equity lines, purchase money
3. Mechanics' Liens & Construction Loans
4. Mobile Homes

Top 4 (2018)

1. Deeds of Trust uncanceled, especially fraudulent satisfactions and equity lines!
2. Legal Description Errors
3. Fraud/Forgery/Lack of Authority-Capacity
4. Developments – Restrictions, Golf Courses & Defective Condos

NOTE: Mobile Homes (frequent but now easier to repair!)

For the next hour …

- Understanding the Policy … and claims
  - It's NOT just about stroking a check!
- Claims stories
  - Recurring
  - Most costly
  - Most frequent
  - Most frustrating for clients

PRACTICAL TIPS

- "Insuring over" may not be enough.
- Know what your client needs.
- Finish the file, incl. cancellations, before you close it.
- Respond promptly to issues or concerns. Contact Insurer.
- Know who you are insuring and a sufficient amount for their protection.

How the Title Policy and, thus, the Claims Analysis works!

Starting the Process: The Title Insurer's Counsel

- Understanding the Policy
  - Schedule A – Date, Insured, Land and title interest
  - Schedule B – Exceptions, liens, encumbrances
  - Endorsements – Affirmative Coverages
  - Covered Risks, Exclusion, Conditions
- Insurance *only* –
  - NOT a guarantee of the title
    - What are your client's timing and business needs?
  - Right to file a claim, which may involve ongoing litigation – NOT what your client wants!

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Lender vs. Owner Protection

	Loan Policy	Owners Policy
Coverage Amount:	Decreases as loan paid	Same or increases
Loss Determined:	After foreclosure AND title claim (not default) causes loss	Immediately at claim
Terminates:	Loan paid OR sale to third party at foreclosure	So long as insured owns property OR has ***liability for warranties***

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Lender vs. Owner: Claims Comparison

Owner's Policy

Title defect may result in an *immediate* monetary claim or litigation for owner/insured.

Loan Policy

Title defect results in a claim ONLY when:

1. Debt accelerated
2. Lender foreclosed or exhausted remedies
3. Lender has not received full payment of amount owed
4. Lender shows that covered title defect *caused* the shortfall in recovery

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Title Insurer's options

- Defend third party's litigation
- Initiate litigation to cure title defect
- Appeal (or not)
- Choose/approve counsel
- Pay Policy Limits
- Settle with third party
- Settle with Insured

"Loss" & Amount of Insurance

- Actual (not speculative)
- Diminution in value
- *Approved* court costs & attorney fees
- Payment reduces remaining coverage for other title claims.
- *Not* include delayed development or sale so long as claim timely pursued.

NOTE: If insurer initiates litigation to cure title & is unsuccessful, additional 10% plus intervening loss.

"Title Company is already on the hook" – *OR NOT!*

- Who is Insured?
- Are they suffering a loss?
- Are they liable on their warranties … still?
  - Intervening conveyances
  - Intervening foreclosure
    (non-warranty REO)
  - 10-year statute of limitations

REMINDER:

Statutes of limitation are affirmative defenses –

What if you (or your client) do not know about the adverse issue until it's too late to defend?

Red Flags

- They're family
- Don't get along with neighbors
- Marital dispute

"Red flags" You MUST investigate further!

- "Powers of attorney" to cancel
- "Trusts"
- Borrowers suddenly obtain cancellations on substantial debt without any visible source of funds (refinance, inheritance, etc.)

Supervision of EVERYONE whose work you rely on

- Are you maintaining & constantly updating *their* training?
- Do *they* know how to recognize these risks?
- Are you regularly reviewing their work?
- Are they truly accountable to you?
- Do you have a signature stamp?
- Do you do this for ALL of the individuals on whose work you rely for your legal representation and opinions?

RISK AREA #1: DEEDS OF TRUST

- Uncanceled
- Fraudulently canceled
- Equity Lines
- HUD "Partial Claim" or "Subordinate" Deeds of Trust

Unsatisfied Deeds of Trust

- Hear it again for the "very first time":
  - These *will* STOP a closing!
  - HUD, FannieMae, FreddieMac, SECU will not accept the property
  - NC DOT will not pay condemnation award
  - HELOC lender will not loan to client
- UNPAID deeds of trust
  - Short searches
  - Tacking to loan policy & missing outstanding 2d or HELOC
  - HELOCs drawn back up, sometimes by prior owner
  - No PROOF of payment

Beware payoffs to "private investors"

- Hard to verify (Fraud!)
- Often don't cancel
- Conveniently "forget" having been paid years later when you try to clear but all proof of payment is gone – especially if your new buyer is several conveyances later!

Prepared By: ALEX VAN AKEN
After Recording, Return To:
[redacted]
FHA Case No. [redacted]

SUBORDINATE DEED OF TRUST

THIS SUBORDINATE DEED OF TRUST ("Security Instrument") is given on July 14, 2014. The Borrowers are [redacted] AN UNMARRIED PERSON whose address is [redacted] NORTH CAROLINA 27587. The Security Instrument is given to the Secretary of Housing and Urban Development, whose address is Washington, D.C. 20410 ("Lender").

When recorded mail to: [redacted]
Loss Mitigation Title Services 449 6
P.O. Box 27670
Santa Ana, CA 92799
[redacted]

Prepared by:
Laura E.F. Thompson
c/o Middleberg Riddle Group
717 N. Harwood, Suite 2400
Dallas, TX 75201

[Space Above This Line For Recording Data]

Loan No. [redacted]
Borrower [redacted]

Data ID: 757

FHA Case No. [redacted]

PARTIAL CLAIM DEED OF TRUST

CAUTION: "Subordinate" or "Partial Claim" Deeds of Trust & Modifications

- Part of federal HAMP & other workout loans and modifications
- May not show up on payoff statement – *separate payoff statement from the GSE!*
- Owed directly to the GSE (usually FHA)
- Have same loan number as original deed of trust loan

PROBLEMS

- Failure to cancel of record
- No *written* payoff or release terms
- Not following requirements
- Not "freezing" equity lines
- Not obtaining updated payoff amounts
- Failure to obtain & record subordinations & releases
- Short payoff

PROBLEMS (cont'd)

- Failure to send payoff letter with instructions to apply and contact immediately regarding shortage
- Failure to follow up post-closing
- Subordinated or paid off wrong deed of trust
- Release of wrong property
- Missed deeds of trust

Q: *How does a $50,000 equity line become a $250,000 loss?*

A: When the equity line was not canceled, is prior to our insured $250,000 "first", so no request for notice is filed and the equity line forecloses.

Especially if:

- Parents of borrower buy "cheap" at equity line foreclosure & want kids to get it back!
- Investor bought "cheap" and wants to make a quick profit!

Settlement Procedure Examples

The "HELOC of Horror"

Bob the Borrower refinances his house located in Asheville.

The approved attorney, Amy, sees Bob's line of credit HELOC.

The closing agent, Carl, makes sure the HELOC is paid off at closing, but fails to send a close-out/ "kill letter" to the HELOC lender.

Bob, to his great surprise, gets a call from his HELOC lender 6 months later and reminds him that he has a HELOC with a zero balance.

Bob finally gets that bass boat he's been wanting.

Bob defaults on both loans after his wife leaves him and takes the boat.

The prior HELOC attempts to foreclose over the insured deed of trust.

Ouch!

CHICAGO TITLE

Equity Lines

- "Freeze" or termination letter signed by borrower - G.S. 45-81
- Payoff is not enough!
- This is NOT "purchase money" financing because future advances

RISK AREA #2:
Legal Description Errors

Property Descriptions

PRELIMINARY OPINION ON TITLE

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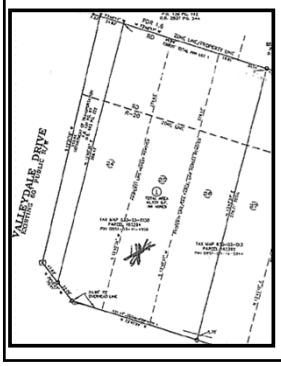
The undersigned has examined the record title on the Onslow assessment records if within a municipality) for the period shown be described below, and gives the following opinion of status:

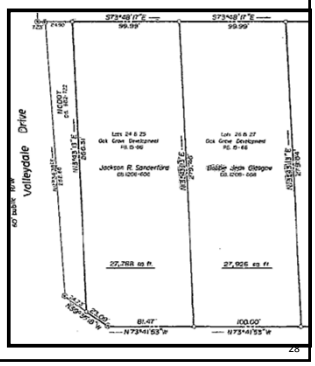
Owner(s): Jones Venters & Associates, Inc.
Interest or estate: Marketable Fee Simple
Property Description: (or attach copy of legal description)

Being all of Lot 84 as shown on that certain survey map entitled "HERI Onslow County, NC Prepared for Jones Venters & Associates, Inc.

QUITCLAIM DEED-QD-1 | Being all of Lot 45, as show

Where's YOUR Boundary?
Was there a recombination?





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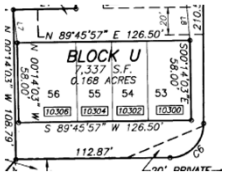
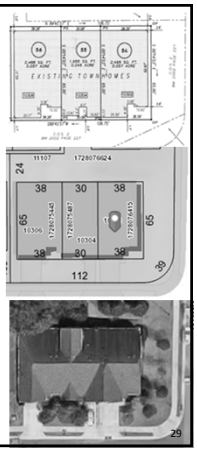
Do you have the right plat?



GIS Aerials!



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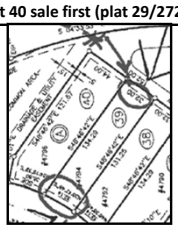
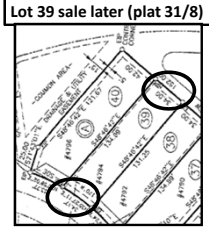
"Revised" townhouse plat:
Just because it was from the developer doesn't make it *right*!

Lot 40 sale first (plat 29/272)



Lot 39 sale later (plat 31/8)



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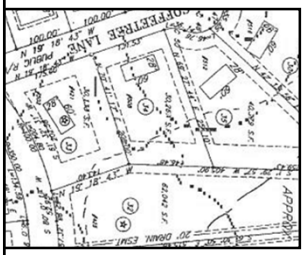
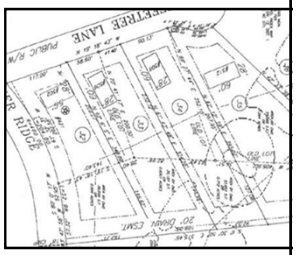
“Revised” / Recombination plat – What is the legal description? What title searched?

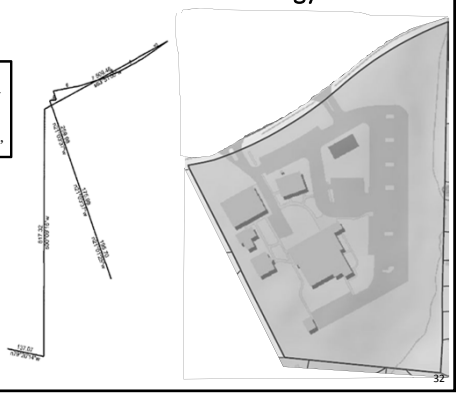


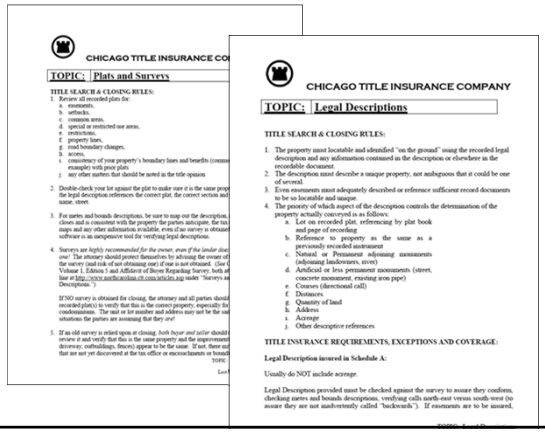


Too much reliance on technology?

Monument located S 63-61-00 W 509.46’ from USGS Monument “yyy”

Monument stands N 83-30-04 E 24.65’ from USGS Monument “xxx”





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TOPIC: Plats and Surveys

TITLE SEARCH & CLOSING RULES:

1. Review all recorded plats for:
   a. easements,
   b. setbacks,
   c. common areas,
   d. special or restricted use areas,
   e. restrictions,
   f. property lines,
   g. road boundary changes,
   h. access,
   i. consistency of your property’s boundary lines and benefits (consist example) with prior plats
   j. any other matters that should be noted in the title opinion
2. Double-check your lot against the plat to make sure it is the same prop the legal description references the correct plat, the correct section and name, street.
3. For metes and bounds descriptions, be sure to map-out the description, closes and is consistent with the property the parties anticipate, the tax maps and any other information available, even if no survey is obtained software is an inexpensive tool for verifying legal descriptions.
4. Surveys are *highly recommended for the owner, even if the lender does one!* The attorney should protect themselves by advising the owners of the survey (and risk of not obtaining one) if one is not obtained. (See Volume 1, Edition 5 and Affidavit of Buyer Regarding Survey, both av base at http://www.northcarolina.ctt.com/articles.asp under “Surveys an Descriptions.”)

   IF NO survey is obtained for closing, the attorney and all parties should recorded plat(s) to verify that this is the correct property, especially for condominiums. The start or let number and address may not be the sam situations the parties are assuming that they *are*!
5. If an old survey is relied upon at closing, *both buyer and seller* should review it and verify that this is the same property and the improvement driveway, outbuildings, fences) appear to be the same. If not, there ma that are not yet discovered at the tax office or encroachments or bound

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TOPIC: Legal Descriptions

TITLE SEARCH & CLOSING RULES:

1. The property must locatable and identified “on the ground” using the recorded legal description and any information contained in the description or elsewhere in the recordable document.
2. The description must describe a unique property, not ambiguous that it could be one of several.
3. Even easements must adequately described or reference sufficient record documents to be so locatable and unique.
4. The proximity of which aspect of the description controls the determination of the property actually conveyed is as follows:
   a. Lot on recorded plat, referencing by plat book and page of recording
   b. Reference to property as the same as a previously recorded instrument
   c. Natural or Permanent adjoining monuments (adjoining landowners, river)
   d. Artificial or less permanent monuments (street, concrete monument, existing iron pipe)
   e. Courses (directional call)
   f. Distances
   g. Quantity of land
   h. Address
   i. Acreage
   j. Other descriptive references

TITLE INSURANCE REQUIREMENTS, EXCEPTIONS AND COVERAGE:

Legal Description insured in Schedule A:

Usually do NOT include acreage.

Legal Description provided must be checked against the survey to assure they conform, checking metes and bounds descriptions, verifying calls north-east versus south-west (to assure they are not inadvertently called “backwards”). If easements are to be insured,

RISK AREA #3:

Fraud, Forgery, Authority & Lack of Capacity

Unauthorized actions:
LLCs, Corporations & Partnerships

- Good standing
- Capacity of signers
- Organizational docs
- Resolutions
- Self-dealing?
- Foreign executions?
- Proper notarial certificates

Review of organizational documents, Consent of all Principals and Loans with Principals …
NOT to be ignored!

In re Foreclosure of Fox Den Development, LLC, unpublished,
245 N.C.App. 328,
782 S.E.2d 122 (2016)

Non-existent Counsel

- Private lender "friend" brings Borrower to Attorney for "emergency" loan
- Borrower in default, provides docs to Attorney from Foreclosure-Firm by Lawyer Smith
- Attorney calls Lawyer Smith, gets payoff & wire instructions - $220,000
- 1 year later, *new* notice of default, Attorney calls Foreclosure-Firm,

NEVER A LAWYER SMITH!

Who is that Masked "Manager"? The Importance of Reviewing the Filed (and not filed) Docs!

LLC documents from fraudster, who purported to be managing member of Nevada LLC.

Reviewed the LLC information on the Nevada Secretary of State's website,

- confirmed LLC was active in good standing
- did not scroll down to

determine managing members.

Over $1 million.

Matchmaker, Matchmaker, Make me a Catch!

Matchmaker, Matchmaker, … Part 1

- Private money refinancing lender provides payoff statement for prior mortgage & wiring instructions, purportedly from individual Assignee
- Assignee is in divorce proceedings with spouse
- Estranged Wife has on-line dating relationship with Bereaved Widower who agrees to pose as assignee, provide his account for wiring and give on-line Estranged Wife the proceeds (along with a lot of his personal funds)

FAST ACTION BY ATTORNEY, FBI, SBI & "HONEST" BEREAVED WIDOWER GOT MOST OF MONEY BACK!

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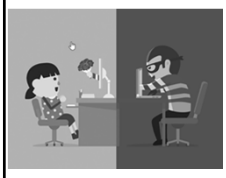
Matchmaker, Matchmaker, … Part 2



- Closing Agent in on-line dating relationship
- "Lends" him her own funds & some from her escrow account for a "temporary emergency"

$380,000

CAUTION WHEN HIRING!
CHECK PRIOR EMPLOYERS' REFERENCES!
Unless / until convicted,
NOTHING MAY SHOW UP IN THEIR CREDIT OR CRIMINAL BACKGROUND CHECKS!

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Beware of Business Giving "Gifts" … *Outside of Closing*!

- Title to vested in a limited partnership.
- Prior to closing, *gift deed* from the limited partnership to the borrower, an individual.
- Title Affidavit provided (no tenancies, no liens, etc.)
- Gift deed dated December 23, but acknowledgment September 24, *3 months earlier.*
- Gift deed purportedly signed by "partner", not "General Partner"

$300,000.00 TFOT!

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Red Flags: Authority issues

- Recent change in state filings or change in the trust instrument or partnership/LLC agreement, adding or deleting parties with authority
- Any transaction involving conveyance or mortgage of Land by or to an officer of a corporation, partner of a partnership, member of an LLC or parties to a trust.
- Foreign Executions when entity officials or owners are not located in the United States.
- Any recent amendment to the entity documents adding or deleting partners, members, managing members, trustees or beneficiaries.
- Any variation in name, no matter how minor, in chain of title or the documentation submitted to support the chain of title.
- Any recent conveyance without corresponding financing.

RISK AREA #4: Developments

- Restrictions
- Golf Courses – Change of Use
- Defective Condos

LOOK AT WHAT'S ALREADY IN THE NEIGHBORHOOD BEFORE YOU LEAP!

OLD RESTRICTIONS …
STILL VIABLE & *FREQUENTLY* LITIGATED!

- ❖ Single family only
- ❖ Residential use only
- ❖ Residential dwellings only
- ❖ Setbacks
- ❖ Golf course, tennis club or clubhouse rights
- ❖ Options & Rights of first refusal
- ❖ No amendment provisions
- ❖ Protecting old neighborhoods … *perpetually!*

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Golf Conversions: BEWARE!!
Read the cases!
Know the facts!

Restrictions – reference golf course
Plats – show golf course adjoining
Deeds with reversions or restrictions
News reports
Rezoning petitions
HOA or owners active
Recent operations

Sample Cases:
Crooked Creek
Echo Farms
MidSouth Golf / Fairfield Harbour HOA

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Survey Claims Stories

- ➢No survey → No survey coverage
- ➢Alleyway to nowhere
- ➢Title but not use – The "sleeping" easement
- ➢Use – What title? What burden? Who benefits?
- ➢Bad plats → Bad condos!
- ➢Plats → the devil's in the details (unexpected golf courses & common areas)
- ➢Where is the condo? Where is the parking space? Where are the common areas? Where are elevations? *Does a condo even exist??*
- ➢Mobile home?
- ➢Septic tank or well on adjoining property?
- ➢Tombstones!
- ➢100' lots on 1920's plat may not be 100' precisely!

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The "Sleeping" Easement

Bluffs at Buffalo Creek,
Johnston County
1987 - 180' easement

Tacking: Condominium Risk Cases

- Errors in development documents
  - Failure to review Declarations and plats *carefully*
    - Significant noncompliance
  - Wrong unit
  - Wrong association
- Prior policy has errors
  - Failure of prior attorney to appreciate title issues, such as association deeds of trust on common areas or payment of association dues
- Inadequate review of prior policy and exceptions
- Endorsement requirements not met
- Problems not addressed *prior to* closing

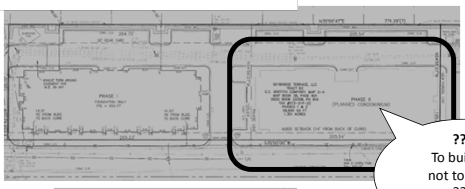
Legal Description: "undivided interests in common elements"

ONLY for
"***CONDOMINIUM"****

**OR duplex TIC's*

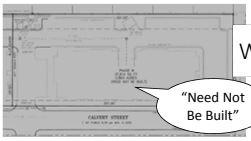
Conley's Creek v. Smoky Mountain Country Club, ___ N.C.App. ___, 805 S.E.2d 147 (2017)

What is there?
Condos GS 47C-2-109



???
To build or
not to build
???
And WHEN ???

What is not?



"Need Not
Be Built"

Skybridge Terrace
245 N.C.App. 489,
786 S.E.2d 5 (2016)
Litigation began 2012

CONDOMINIUMS

CONDOMINIUM DOCUMENT CHECKLIST

DECLARATIONS must provide (N.C. Gen. Stat. § 47C-2-105(a):

(1) The name of the condominium, which must include the word "condominium" or be followed by the words "a condominium", and the name of the association;

(2) The name of every county in which any part of the condominium is situated;

(3) A legally sufficient description of the real estate included in the condominium;

(4) A statement of the maximum number of units which the declarant reserves the right to create;

(5) A description (by reference to the plats or plans) of the boundaries of each unit created by the declaration, including the unit's identifying number;

(6) A description of any limited common elements, other than N.C. Gen. Stat. § 47C-2-102 (2) and (4), i.e.
(2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated exclusively to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.
(4) Any shutters, awnings, window boxes, doorsteps, stoops, decks, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit but located outside the unit's boundaries are limited common elements allocated exclusively to that unit.
(N.C. Gen. Stat. § 47C-2-109(b)(7))

(7) A description of any real estate (except real estate subject to development rights) which may be allocated subsequently as limited common elements, other than limited common elements specified in subsections 47C-2-102(2) and (4) (mentioned above), together with a statement that they may be so allocated;

(8) A description of any development rights and other special declarant rights reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

PLAT & PLANS must (N.C. Gen. Stat. § 47C-2-109)

ed in each county where the condominium is located

ared a part of the declaration but shall be recorded separately

me and a survey or general schematic map of the entire condominium;

cation and dimensions of all real estate not subject to development rights ject only to the development right to withdraw and the location and sions of all existing improvements within that real estate;

cation and dimensions of any real estate subject to development rights, d to identify the rights applicable to each parcel;

tent of any encroachments by or upon any portion of the condominium;

cation and dimensions of all easements having specific location and sions and serving or burdening any portion of the condominium;

rified statement of an architect licensed under the provisions of Chapter the General Statutes or an engineer registered under the provisions of er 89C of the General Statutes certifying that such plats or plans fully and stely depict the layout, location, ceiling and floor elevations, unit numbers mensions of the units, as built;

ertificate by a registered land surveyor licensed under the provisions of er 89C of the General Statutes stating that the plats or plans accurately the legal boundaries and the physical location of the units and other vements relative to those boundaries;

cations and dimensions of limited common elements; however, parking s and the limited common elements described in subsections 47C-2- and (4) need not be shown, except for decks, stoops, porches, ees, and patios;

lly sufficient description of any real estate in which the unit owners will tly an estate for years, labeled as "leasehold real estate";

stance between noncontiguous parcels of real estate comprising the minium;

RISK AREA #4: Mobile Home

- Either G.S. 47-20.6 (if DMV title) or 47-20.7 (if no DMV title) applies to convert title to RP
- Must appear of record at Register of Deeds after 1/1/02 or conversion not completed
- www.northcarolina.ctt.com/docs/word/MOBILEHOMES5-4-02.doc

BONUS ROUND!

- Deeds in lieu – DO NOT EXTINGUISH SUBSEQUENT MATTERS!
- Mobile homes → New curatives
- No survey → no owner's survey coverage: Owner built garage post-policy
- Lender claim for *their* prior uncanceled (but paid) deed of trust
- Owner making claims about *their* prior deed of trust not canceled!
- Post-policy issues – planned construction?
- Look at civil actions → lest your client become a defendant!
- Legal access vs. *preferred* access (not insured)

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SURVEYS PROVIDE:

- ✓Verification of how property *should* look to compare with plat
- ✓Verification of legal description
- ✓Survey v. record legal
- ✓Multi-county properties
- ✓Verify access (legal direct v. private means)
- ✓General exceptions v. specific exceptions
  - boundary line disputes
  - easements
  - encroachments
- ✓Commercial context – provide information needed for certain endorsements such as access, location, survey, contiguity
- ✓Location of improvements, encroachments, easements, boundary line claims

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PROTECT or ADVISE YOUR CLIENT!

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