

Negotiating Title Commitments

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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!

Lender vs. Owner Protection

Owner's Policy

Core Coverages:

1. **Title not vested in Owner**
2. **Any defect, lien or encumbrance on title**
3. **Unmarketability of title**
4. **Lack of right of access to and from the land**

Loan Policy

Core Coverages:

1. **Title not vested in Owner**
2. **Any defect, lien or encumbrance on title**
3. **Unmarketability of title**
4. **Lack of right of access to and from the land**
5. **Invalidity or Unenforceability of lien**
6. **Priority of any lien/encumbrance over insured mortgage**
7. **Lack of priority against Mechanics/ Materialmen's liens**
8. **Invalidity or Unenforceability of any assignment of the insured mortgage if assignment shown in Schedule A.**

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

Lender vs. Owner: Claims Comparison

Owner's Policy

Title defect may result in an immediate monetary claim by owner/insured.

Lender's Policy

Title defect results in a claim ONLY when:

1. Debt accelerated by lender
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

Borrower's Counsel Perspective: Client/Borrower's Perspective

"JUST INSURE IT" *

- ? no survey,
- ? no (or generic) exceptions,
- ? add in some affirmative coverage,
- ? only a limited title search,
- ? at a re-issue rate!

*with credit to Nike

Starting the Process: The Lender's Counsel

- Title insurer: financial strength
- "Insuring over" v. Correcting.
- Is the lender relying on the credit or the collateral?

CCR's, PLATS and other title documents

- READ & ANALYZE for *this* client and *this* project
- Operational matters
- Restrictions
- Lien Rights
- Declarant Control Period
- Estoppel Certificate

REMEMBER THE NEED TO READ!!

- Funeral home
- Golf course
- Other tenant leases (CVS)
- Private right (Nationwide)

Affirmative Coverage: The New Forms in the ALTA 9 Series

Coverage	Lender	Owner
Covenants, Conditions & Restrictions (not private rights)	9-06 9.3-06 9.7-06 (Land Under Dev) 9.10-06 (current violations)	9.1-06 (Unimproved) 9.2-06 (Improved) 9.8-06 (Land Under Dev)
Private rights (assessments, options, rights of first refusal & rights of prior approval)	9.6-06 9.6.1-06	9.9-06
Encroachments over boundaries or onto easements	9-06 9.7-06 (Land Under Dev) 9.10-06 (current violations) ALTA 28 series	ALTA 28 series
Mineral & subsurface rights	9-06 9.7-06 (Land Under Dev) 9.10-06 (current violations) ALTA 35 series	ALTA 35 series

Private Rights

- Private rights must be specifically identified in exception
- Prior ALTA 9 (now moved to ALTA 9.6)
 - provided insurance coverage for “any loss arising from any instrument referenced in Schedule B that contains both covenants, conditions, or restrictions, as well as, among other items, an option to purchase, a right of first refusal, or a prior approval of a future purchaser or occupant.” It did “not restrict its coverage to specific provisions within such instruments.”
 - *Nationwide v. Commonwealth*, 579 F.3d 304 (2009),

Easements

Blanket Easements

For new construction,
LOCATE THE
EASEMENTS &
UTILITIES!!



Easements



- Utilities access available?
- Cost and procedures?

But, see, Swaim v. Simpson

ALTA Endorsement Forms Series 28, in a Nutshell

	Improvement	Encroachment	Coverages
28	Existing Building	Onto easement	<ul style="list-style-type: none"> • Damage or enforced removal/relocation <i>by easement holder</i>
28.1 (Existing Building) 28.2 (Described Improvement) 28.3 (Specific Plans)	Building / Improvement on the Land	Onto adjoiner or easement	<ul style="list-style-type: none"> • Enforced removal/relocation <i>by easement holder or adjoiner</i> • <i>Loss or Damage (if no exc. In Sch. B)</i>
28.1	Existing Building on Adjoining land	Onto Land	<ul style="list-style-type: none"> • <i>Loss or Damage (if no exc. In Sch. B)</i>
28.2	Described Improvement on adjoining land	Onto Land	<ul style="list-style-type: none"> • <i>Loss or Damage (if no exc. In Sch. B)</i>

ALTA 34 – Identified Risk Coverage

- “All purpose” basic format for affirmative coverage, conforming to Alliance case
 - “Identified Risk” (such as particular type of violation, use or encroachment) for which affirmative coverage is requested,
 - Specific type of affirmative coverage - such as enforced removal or enforcement for a particular type of use, loss or damage for enforcement of restriction
 - Recorded instrument in Schedule B Exception
- Coverages:
 - Final decree
 - Insurability
 - Defense (subject to Conditions)



Identified Risks - Family Feuds??



Man comes home to find neighbor has taken half his driveway



Feud between N.C. neighbors escalates with wall of tires

By Tribune News Service

PLEASANT GARDEN — Two feuding North Carolina families took their dispute to the next level this month, with the creation of a fence between them made entirely of used tires from the local landfill.

It's more than 200 feet long and contains between 150 and 250 tires, depending on which of the two families is doing the talking. And neither family minds talking about it, as long as they're not talking to each other.

Karen McKinney says she hasn't spoken to neighbor Jennifer Best Guyer

since September 2017. McKinney believes Guyer's "tire fence" was put up as an act of revenge.

"This is not a fence," McKinney said. "It is a solid waste spiteful pile of trash, hazardous to the environment and an eyesore to look at."

Not true, says Guyer, a former crafts store manager who created it.

"It is a work of art," Guyer said. "I don't think it's ugly. I love it."

Her creation, which stands four tires high, can be found in the Pleasant Garden community, outside Marion. Both families say they have lived there

for years.

Trying to pinpoint how their disagreements began isn't easy, but it seems to have bubbled over in a dispute over someone using somebody else's private driveway. That led to hiring a surveyor to check the property lines, and that led to a belief a fence might be a good idea.

Guyer says she got the idea for a tire fence off the crafts site Pinterest. She adds that it's the only type of fence she can afford.

Her plan was to have it up indefinitely, like a monument, but things changed abruptly in the past day, she says.

News of the fence reached McDowell County officials, and Guyer says she was told Thursday she has 30 days to take it down. After that, she says, she'll be fined \$50.

McKinney, who has lived in the area 21 years, is not convinced that will settle things, however, and she

says she's braced for Guyer might do next. "As long as it's environmental friendly and isn't an eyesore, we don't care," McKinney says. "If they will stay on their own property, mind their own business, leave us alone, we can all live in peace and it will all be fine."

Guyer said she's already

making plans.

If the tires have to go, "other art will be going there," Guyer says. "Especially now that I know it's not about the tires or my fence. It's how (McKinney) don't like anything I put there. I am trying to come up with other 'art' and my wheels are turning!"



New Court Documents Reveal Details of Yard Dispute That Hospitalized Rand Paul

Kentucky senator repeatedly stacked branches by property line, angering neighbor



**ORIGINAL
E-RECORDING**

E-Recording

- Delivery method, but requirements same as “paper”
 - Originals held by Submitter
- Expedite recordings, especially in multiple counties & states
- Minimize the “gap” for gap closings
- Title examination “gap” in updating between availability and currency of physical filings and records
 - expanding in paper and electronic world

*NC Closing Attorney /
Best Practices Task Force
webinar for more details*

Title Search & Tacking

- Disclosure to and Informed Consent of Client
- Client's intended future use, especially developer:
 - Would an error in the prior policy affect?
- Close review of prior policy, all exceptions, limitations
- Prior insurer - still around? Solid enough to back up your planned future use and coverage?
- Title warranties still in place, or not?
 - Post foreclosure, prior warranties no longer viable

Millisecond Rule of Priority

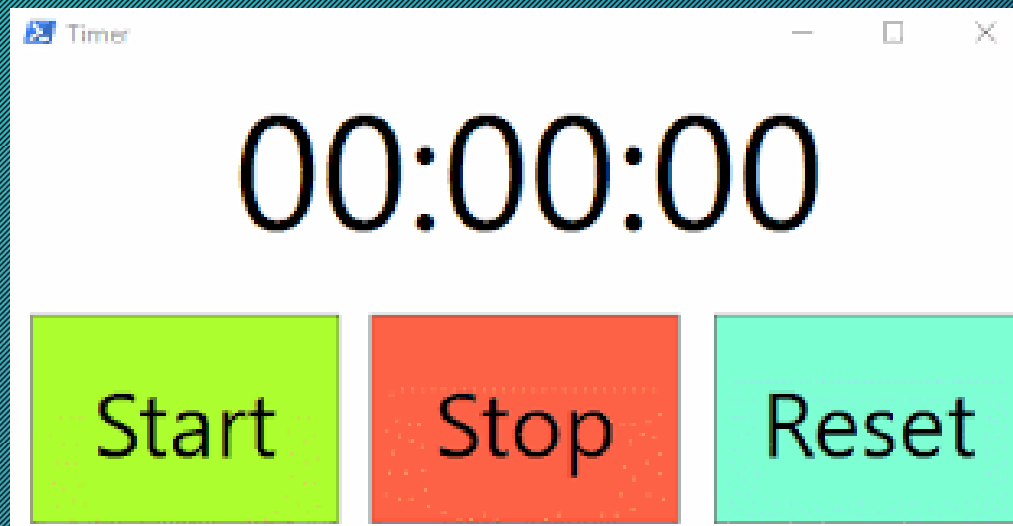
Priority:

- G.S. 47-18
- G.S. 47-20

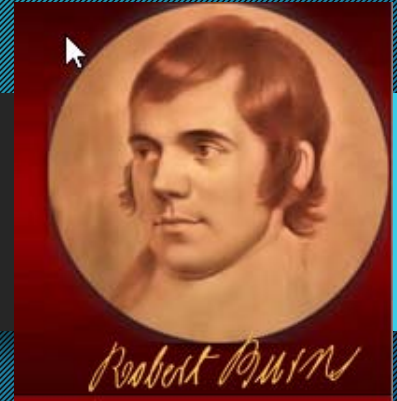
Photo Credit: Kayla Shepherd,
University of Alaska Southeast
(Juneau), 9/11/18



Milliseconds Rule of Priority



Tam o' Shanter



But pleasures are like poppies spread:
You seize the flower, its bloom is shed;
Or like the snow fall on the river,
A moment white - then melts forever,
Or like the Aurora Borealis rays,
That move before you can point to their place;
Or like the rainbow's lovely form,
Vanishing amid the storm.
No man can tether time or tide,
The hour approaches Tom must ride:
That hour, of night's black arch - the key-stone,
That dreary hour he mounts his beast in
And such a night he takes to the road in
As never a poor sinner had been out in.

Rights of First Refusal

- *Anderson v. Walker*
- Lender vs. Owner coverage - and Due Process
- No statutory form under G.S. 47-18

Railroads

- Type and Title:
 - Fee
 - Easement
 - Reversionary interests
 - Charter vs. express grant
- Extent
 - Width
 - Relocations
- Abandonment
 - Tracks removed
 - National Surface Transportation Board (former ICC) withdrawal in The Federal Register

If the right-of-way details
matter to your client,
CONTACT THE RAILROAD!

Railroads

Set expectations:

- Title searches take a lot of time.
- There may not be a definitive “answer”.
- Without formal agreement with the railroad, some risks may be uninsurable.

Railroads: Width

- Do not rely on the visible evidence of the width.
- The railroad does not need to use the entire corridor to have an interest.
- Source of railroad's interest: Charter, Deed, Condemnation.

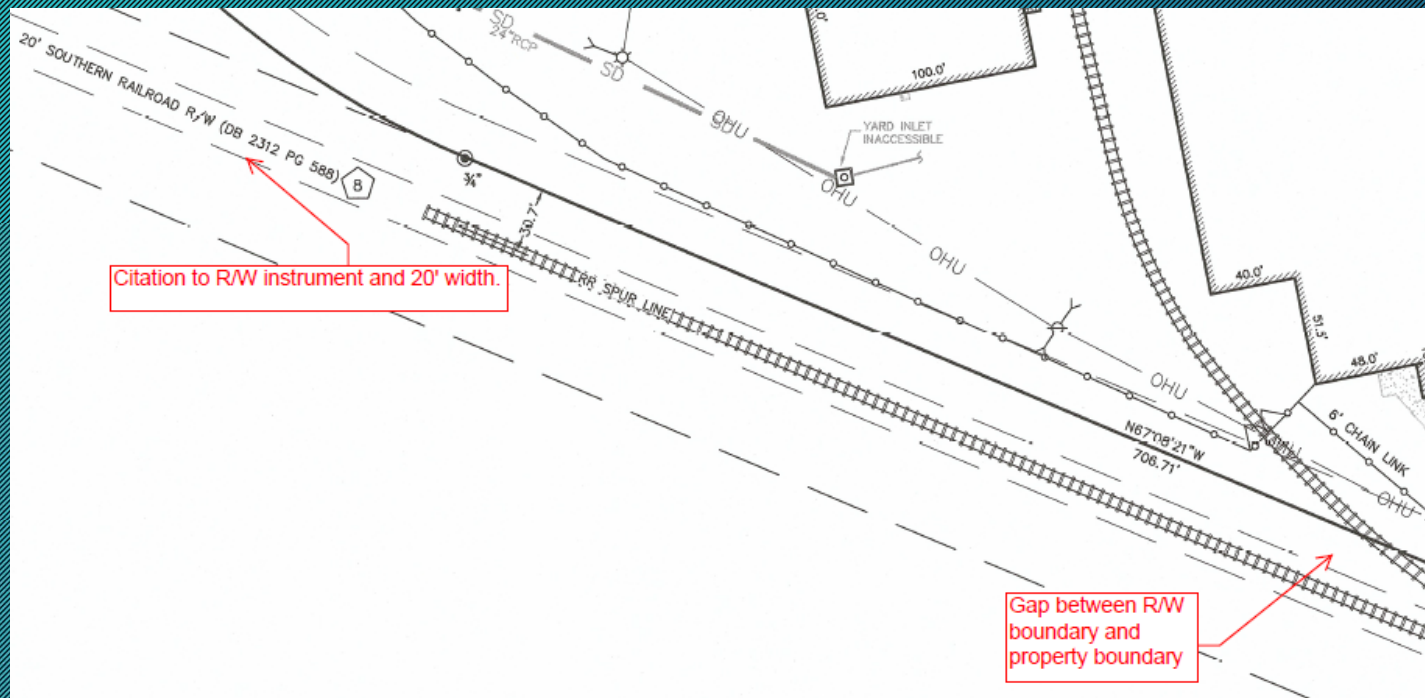
Railroads: Width

What if you want the rail corridor to abut a property line?

Be mindful of. . . .

“Gaps and Gores”

What to do about a gap?



Railroads: No Right to a Crossing!

- Existing crossings may be closed.
- Source of title claims.

TIP: Get an access endorsement insuring the specific access point.

Railroads: Crossings

Establishing a Crossing by Right:

- Reservation by Deed?
- Easement by Necessity?
- Written Crossing Agreement with Railroad?

Leasehold Coverages & Endorsements

- Memorandum - G.S. 47-18 and G.S. 47-118
- Schedule A: Insured, estate insured, Land,
- Schedule B: Terms & Conditions (rent, insurance, waste, term, assignability, use restrictions)
- ALTA 13 and ALTA 13.1 Endorsements - additional coverage
- Calculating the coverage
- Assignments - Landlord approvals & estoppels

Common Commercial Endorsements

Series	Coverage	Owner	Loan
3	Zoning	X	X
8	Environmental	X	X
9	CCR's	X	X
14	Future Advances		X
17	Access	X	X
19	Contiguity	X	X
22	Location	X	X
24	Doing Business		X
25	Same as Survey	X	X
26	Subdivision	X	X
27	Usury		X
28	Encroachments	X	X
34	Identified Risk	X	X

Title Insurance Underwriting Review



CHICAGO TITLE

TOPIC: American Land Title Association (ALTA) Endorsements
North Carolina Coverages Adopted as of 8-1-2017

Below are brief descriptions of coverage and the title insurance requirement for each of the current ALTA® Endorsements.

NOTE #1: Endorsements for use with 2006 ALTA Owner's and Loan policy forms include an "-06" extension. Most changes in these endorsements from comparably numbered endorsements for pre-06 ALTA policy forms are for consistency in paragraph references, capitalizing and other stylistic issues with the new 2006 Owner's Policy and 2006 Loan Policy, unless otherwise noted.

NOTE #2: For purposes of these endorsements, the "attorney" means the North Carolina licensed certifying attorney unless otherwise approved by the title insurer and allowed under applicable law.

NOTE #3: The North Carolina Land Title Association (NCLTA) files the ALTA forms for use by member underwriters and agents upon final adoption, after which the companies can issue the policies as filed, so long as the companies are also licensed with ALTA.

NOTE #4: Defined terms in the ALTA 2006 policies and the ALTA adopted endorsements are reflected by capitalizing the terms herein, such as "Land," "Insured Mortgage", "Date of Policy" and "Insured."

ALTA® Endorsement Form 1-06 (Street Assessments) (Adopted 06/17/06)

This endorsement is designed to insure the lender against loss or damage which it might sustain by reason of any assessments for street improvements either under construction or completed at the date of the policy which could gain priority over the Insured Mortgage.

For issuance of ALTA Endorsement Form 1-06 (Street Assessments) (Adopted 6/17/06): Attorney certification that, as of Date of Policy, the Land is not affected or encumbered by any pending or confirmed assessments for street improvements, under construction or completed. **NOTE:** Some coverage is provided in the 2006 policies.

ALTA® Endorsement Form 2-06 (Truth in Lending) (Adopted 06/17/06)

Decertified 12-01-2013. This endorsement was designed to insure affirmatively an Insured under a loan policy against loss or damage sustained by reason of the exercise of the right of rescission conferred upon a mortgage borrower under the Federal Truth in Lending Act, as implemented by Regulation Z. This coverage was rarely given in North Carolina as it would require additional and complex attorney's certification in a residential context.

For issuance of ALTA Endorsement Form 2-06 (Truth-in-Lending) (Adopted 6/17/06): Certification that the borrowers are not individuals; that the loan is not governed by the Real Estate Settlement Procedures Act ("RESPA"), Truth-in-Lending Act or Usury Laws; or certification that the loan is in full compliance with applicable Truth-in-Lending requirements.

TOPIC: American Land Title Association (

The ALTA Commercial Endorsements



CHICAGO TITLE
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Drafting and Revising Endorsements

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Alliance Mortgage Company v. Rothwell

"The Company assures the insured that at the date of this policy there is located on said land 4-unit Residence known as 447 Haight Street, # 1, 2, 3, 4, San Francisco, California 94117. The Company hereby insures the insured against loss which said Insured shall sustain in the event that the assurance herein shall prove to be incorrect."

Distinguish between
guarantee of a state of facts
rather than
indemnity insurance.

Construction Loans, Lien Agents & Mechanics' Lien Coverage (Lender vs. Owner)

- Future Advance Clause – MAKE IT BROAD AND BIG!
- Lender protection: Require appointment of Lien Agent and posting of Appointment at the project site prior to closing, for protection of construction deed of trust
 - Appointment required at first contract (architect? Surveyor?)
 - Faster permitting
 - Fewer signers on subordinations
 - **RECOMMEND**: Record deed of trust before draws
 - Fewer signers on waivers for later sale or refi
- Cancellation process coming 10/1/18



CAUTION

Authority: Proof of existence and authority of signatories

- Secretary of State - North Carolina
- Secretary of State (equivalent) - state of organization
- Annual Reports
- Other documents executed
- Resolutions
- Statutes (depending on entity)
- Revised G.S. 47-18.3 (a partially cured protection)

