Fund Assembly

2017 Conference MANUAL

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Fund Assembly
Speaker Topics

Thursday, May 11

Tales from the Claims Files 1

Welcome Remarks 36

Economic Forecast for the Florida Real Estate Attorney 38

General Counsel's Perspective 83

The Fund and the 4th Floor: A Behind the Scenes Discussion on the 2017 Florida Legislative Session 85

Title Teasers 87

Friday, May 12

Breakouts

Communicating the Benefits of Owner's Title Insurance 140

OMG! Oil, Mineral and Gas Rights in Florida: A Guide for Real Estate Attorneys 143

Title Policy Endorsements: An Examination of Florida Approved Forms 171

Using Fund Resources to Maximize Your Closing Practice 239

Protecting Your and Your Clients' Most Precious Asset, Their Private Information ... 281

Condominium Terminator: Land Vulture or Urban Rehabilitator? Arnold Schwarzenegger or Dr. Albert Schweitzer? 313

Practice of Law: Run it like a Business 338

A Practical Guide to Reading Surveys 389

General Session

Business Email Compromise: A White Collar Crime Perspective 542

Lien On Me, But Not Forever: Perfecting, Duration and Extension of Judgments, Federal Tax, Municipal and Code Enforcement Liens 551

2017 Legislative Update 643

Quiz on Real Property Cases 645

Do it Right. Sleep Well at Night. Ethical Considerations for the Real Estate Attorney 659

Saturday, May 13

Residential Track

Learn to Love the FR/BAR Contracts 832

Evolution of the Closing Process – 2017 Regulations and Technology Update 906

Residential Survey Problems and Form 9 Endorsements 910

Commercial Track

Making the Project Work 1051

Developer's Perspective 1052

Starts with a 'B': Benefits and Burdens of the Project's Existing Covenants and How to Manage Them 1061

Choice of Entity - What Works Best for My Project? 1071

Construction Lien Considerations 1084

Key Contract Drafting Considerations and Land Use Considerations in Acquiring a Mixed-Use Project 1099

Commercial Surveys, 'General' & ALTA: The New NSPS Standards, What to Order, How to Examine and What is Objectionable 1189

Counsel Beware - How Far Can and Should You Go in Your Counsel Opinion Letter 1261

Accreditation ..... A-J

Back to Speaker Topics

Fund Assembly

Tales from the Claims Files

George Perez, *Claims Manager, The Fund*

Back to Speaker Topics

Speaker Information

Tales from the Claims Files

George Perez,
Claims Manager, The Fund

George Perez is The Fund's Claims Manager. He graduated from the University of Central Florida and Brooklyn Law School. Prior to joining The Fund, Mr. Perez was in private practice where he was involved in transactional real estate for both residential and commercial properties, as well as representing institutional lenders. He was also a real estate and title insurance litigator representing a number of title insurance underwriters.

During his years of private practice, Mr. Perez was also involved in estate planning/probate and trust administration as well as business law. He has taught in Valencia College's ABA accredited paralegal studies program in addition to being a regular speaker at The Fund's New Member Training program. He is a member of the Florida Bar.

THERE'S NO PLACE LIKE HOME..STEAD!

BY, GEORGE PEREZ, FUND CLAIMS MANAGER

C. Procedure under Sec. 734.1025, F.S.

The importance of Sec. 734.1025, F.S., is limited, because of its $50,000 jurisdictional limit. As amended by the 2001 legislature, the current statute permits the foreign (domiciliary) personal representative to petition the Florida probate court to admit the will to probate in Florida by filing authenticated copies of the will and sufficient portions of the domiciliary estate administration transcript as is necessary to show the beneficiaries of the estate as required by the Florida Probate Rules. The petitioning foreign personal representative must show that the gross value of all property in Florida subject to administration does not exceed $50,000, and the petition must be filed within two years of the decedent's death. The foreign personal representative may also publish and serve a notice to creditors complying with Ch. 733, F.S., and if any claim is filed then a Florida personal representative qualified to act in Florida must be appointed. For purposes of insuring the title of a purchaser for value who takes from an estate administered under Sec. 734.1025, F.S., The Fund requires all of the following: (1) the purchase price may not exceed $50,000; (2) the conveyance must be made by the devisees as shown in the will which is admitted to probate under this section; and (3) the court file must contain proof of publication and service of notice to creditors without any claims having been filed or two years must have elapsed since the decedent’s death without any claims having been filed.

SC 2.06 Homestead

TN 2.06.01 Personal Representative's Deed — Homestead (Rev. 12/14)

Art. X, Sec. 4(c), Fla. Const. 1968 (as amended), provides that the homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except that the homestead may be devised to the owner's spouse if there is no minor child. When the decedent is not survived by either a spouse or a minor child, the decedent’s homestead is freely devisable. Homestead property descending to the decedent’s spouse or minor children or other persons under intestacy is not an asset of the probate estate. Similarly, homestead property devised to persons who would otherwise be in a class of intestate heirs, is not an asset of the estate. The following discussion identifies where the personal representative may sell the apparent homestead of the decedent and where the personal representative may not.

A. Intestate estate

Sec. 733.608, F.S., specifically excepts the protected homestead from the real property that is an asset in the hands of the personal representative for administration of the estate of the decedent. Also, Sec. 733.607, F.S., specifically excepts the protected homestead from the real property of which the personal representative shall take possession or control. Therefore, if the real property descends to the heirs at law, the personal

representative cannot convey it or mortgage it. See *Bayview Loan Servicing LLC v. Giblin*, 9 So.3d 1276 (Fla. 4th DCA, 2009). In situations where the homestead status of the apparent homestead real property has not been judicially determined, for issuing a title policy, a deed or mortgage from the heirs, together with a deed or mortgage from the personal representative pursuant to court order is acceptable. Fund Members should keep in mind that since the heirs are the owners of the apparent homestead property, it is necessary to perform an appropriate name search for each heir and clear all general liens that are revealed by the name searches of the heirs.

B. Testate estate

Since title depends upon the probate proceedings for its confirmation and validity by virtue of being devised, the will must be admitted to probate and recorded together with a copy of the order admitting it. See Sec. 733.103, F.S. The question becomes who has the authority to convey the decedent's homestead real property. This is determined by whether or not the real property is an asset of the estate under prevailing law.

1. Homestead devised to beneficiaries who would otherwise be heirs.

   To the extent that homestead is devised to any person included in any class set forth in Sec. 732.103, F.S., (the intestacy statute), the homestead is protected homestead as defined in Sec. 731.201, F.S. As such it is not an estate asset available to pay the debts of the deceased owner. *Snyder v. Davis*, 699 So.2d 999 (Fla. 1997); *Public Health Tr. of Dade Cty. v. Lopez*, 531 So.2d 946 (Fla. 1988). It is not an asset which the personal representative has authority to convey, even if the will contains a general power of sale in favor of the personal representative. Sec. 733.608(1), F.S. Nor is it an asset which the personal representative has authority to convey, even if the personal representative can take possession of the protected homestead under Sec. 733.608(2), F.S. *Harrell v. Snyder*, 913 So.2d 749 (Fla. 5th DCA 2005). If the protected homestead has vested in a beneficiary within the class set forth in the intestacy statute, the personal representative has no authority to convey the property and it must be conveyed by the beneficiary. This applies even if the beneficiary is a residuary devisee. See *McKean v. Warburton*, 919 So.2d 341 (Fla. 2006). To establish a clear record where there is uncertainty whether the property is homestead or not, deeds must be obtained from any and all devisees of an interest in the decedent's homestead who are included under the intestacy statute, and also from the personal representative. Additionally, an affidavit must be obtained from a disinterested knowledgeable third party establishing that the decedent was not survived by either a spouse or minor child. If the homestead is devised solely to the surviving spouse, the affidavit should attest to there being no surviving minor child. The personal representative's deed must be given pursuant to either a power as contained in the will or a

recorded court order. Even though the interest of the devisee is not subject to general creditors' claims against the estate, it is necessary to perform a name search for each such devisee/grantor and to clear all liens against such devisee/grantor revealed by the name search.

2. Direction in will to sell homestead property.

If the will directs that the homestead be sold and the net proceeds distributed to the beneficiaries who are any of the persons categorized under Sec. 732.103.F.S., the personal representative may convey the homestead without the joinder of beneficiaries. See *In re Estate of Price v. West Florida Hospital, Inc.*, 513 So.2d 767 (Fla. 1st DCA 1987), case dism., 518 So.2d 1274 (Fla. 1987); *Knadle v. Estate of Knadle*, 686 So.2d 631 (Fla. 1st DCA 1996); Title Standard 18.10.

3. Homestead devised to beneficiaries who are not heirs.

Homestead exemptions do not inure to persons who are not included within Sec. 732.103, F.S. In accordance with current case law, any interest in the decedent's homestead which is properly devised to any person who is not included within Sec. 732.103, F.S., may be conveyed by the personal representative. See *Snyder v. Davis*, 699 So.2d 999 (Fla. 1997); *City Nat. Bank of Florida v. Tescher*, 557 So.2d 615 (Fla. 3d DCA 1990), *aff'd*, 578 So.2d 701 (Fla. 1991).

4. Homestead devised to trustee of a trust created under the will or devised to a trustee of a trust which is already in existence by separate trust agreement.

If the beneficiaries of a valid and active trust would otherwise be heirs at law under Sec. 732.103, F.S., a deed must be obtained from the trustee of the trust to which the homestead is devised as well as the personal representative if there has been no determination of homestead. If the trustee is also a beneficiary of the trust, the deed must also be signed by the trustee in an individual capacity and joined by the trustee's spouse, if any, if the trustee or any member of the trustee's family resides at the property.

C. Personal representative's lien

For estates of decedents dying on or after June 12, 2003, recorded proof is required to eliminate the possibility of a personal representative's lien before title to the property can be insured. See **TN 2.06.07**.

such action for injunction was barred by 26 U.S.C. Sec. 3653 (1939), now 26 U.S.C. Sec. 7421 (1954), holding that the tax lien could be enforced against the homestead property. See also *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962), cert. den., 372 U.S. 913 (1963); *In re McFadyen*, 216 B.R. 1006 (Bkrtcy. M.D. Fla. 1998). See also **TN 30.02.01**.

SC 16.04 Homestead Status

TN 16.04.01 Contiguous Parcels as Homestead (Rev. 12/02)

An owner held title to two parcels of land outside a municipality. The parcels are contiguous. One parcel consists of 40 acres and the other consists of 80 acres. The owner claimed homestead tax exemption only for the 40-acre parcel. The owner deeded the 80-acre parcel, but his spouse did not join in the deed.

For issuing a title policy, prudence dictates that the assumption be made that all parcels contiguous to the homestead are in fact homestead. Thus joinder of the grantor's spouse was required and a new deed with spousal joinder is necessary. See *In re McLachlan,* 266 B.R. 220 (Bkrtcy. Fla. M.D. Fla. 2001). Failure to claim homestead tax exemption is not sufficient evidence that the entire 120 acres was not homestead. *In re Jackson,* 169 B.R. 742 (Bkrtcy. N.D. Fla. 1994). See Op. Att'y Gen. Fla. 96-79 (1996) in which platted lots separated by a dedicated street are considered "contiguous" for homestead tax exemption. The term, "spouse," should be construed to include a same-sex spouse.

TN 16.04.02 Reserved for New Title Note

TN 16.04.03 Code Enforcement Board Liens and Homestead (12/14)

A certified copy of a county code enforcement lien was recorded against a married couple for a zoning code violation on Blackacre. They are selling Whiteacre which they claim is their homestead. May an affidavit of homestead status be relied on to eliminate the lien as an exception in a policy on Whiteacre?

Under Sec. 162.09, F.S., a CEB order imposing a fine creates a lien against the land on which the violation exists and on any other real property owned by the violator when a copy of the order certified by the board's record custodian is recorded. *Monroe County v. McCormick,* 692 So.2d 214 (Fla. 3d DCA 1997). Thus, the lien would have attached to Whiteacre as well as Blackacre. See **TN 18.06.02**. However, the statute further provides that no CEB lien may be enforced against homestead property. In fact, the court in *Demura v. County of Volusia,* 618 So.2d 754 (Fla. 5th DCA 1993), held that the Florida Constitution prohibits the creation of CEB liens against homestead property. See also *Miskin v. City of Fort Lauderdale,* 661 So.2d 415 (Fla. 4th DCA 1995); *Fong v. Town of Bay Harbor Islands,* 864 So.2d 76 (Fla. 3d DCA 2003).

For issuing a title policy, a homestead affidavit may be relied on to establish the homestead status of Whiteacre under the same factual conditions as are set forth in **TN 16.04.08.** For insurance purposes, use of a homestead affidavit is limited to transactions involving real property other than that which was the subject of the actual code violations.

TN 16.04.04 Reserved for New Title Note

TN 16.04.05 Mortgage Executed Without Joinder of Spouse (Rev. 12/14)

A mortgage executed by the owner of homestead property without spousal joinder has been held not to be void ab initio but merely ineffectual as a lien until such time as the spouse joins in the mortgage or the property loses its homestead status, provided the mortgage contains covenants of warranty. *Pitts v. Pastore,* 561 So.2d 297 (Fla. 2d DCA 1990). The term, "spouse," should be construed to include a same-sex spouse.

TN 16.04.06 Mortgage on Unimproved Lot to Finance Construction of Home

Spouses are separated but not divorced. One spouse owns an unimproved lot on which the plan is to construct a residence, but the owner spouse needs construction financing. There has been no clearing of the land or other manifestation of the intent to construct a homestead. The question is whether a mortgage taken out by the owner without joinder of spouse may be insured when there is knowledge that the property is expected to be used as a home in the future.

The Fund's opinion is that under the circumstances the property could not acquire the status of homestead until something more is done to manifest the intent to construct a homestead. A title policy covering a mortgage to be executed unilaterally by the married person and recorded while the property is still unimproved may be issued.

For future reference, an affidavit should be obtained and recorded, establishing that the property was unimproved and unoccupied at the time the mortgage was recorded. *Drucker v. Rosenstein,* 19 Fla. 191 (1882); *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So.2d 201, at 206 (Fla. 1962); *Semple v. Semple*, 89 So. 638 (Fla. 1921). The term, "spouse," should be construed to include a same-sex spouse.

TN 16.04.07 Reserved for New Title Note

TN 16.04.11 Time of Creation in Relation to Judgment Against Owner (Rev. 12/14)

A homestead created prior to entry of a judgment is exempt from enforcement of the judgment, even though the action resulting in the judgment was pending when the homestead was created. *Heddon v. Jones,* 154 So. 891 (Fla. 1934). A homestead created after entry of a judgment but prior to recording a certified copy thereof is likewise exempt. *Owen v. Owen,* 111 S.Ct. 1833 (1991); and *Steinbrecher v. Cannon,* 501 So.2d 659 (Fla. 1st DCA 1987).

Where the homestead right and the lien attach simultaneously, as in the case of purchase or inheritance of land by a judgment debtor, the homestead right takes priority over the judgment lien. *Bowers v. Mozingo,* 399 So.2d 492 (Fla. 3d DCA 1981); *Quigley v. Kennedy & Ely Insurance, Inc.,* 207 So.2d 431 (Fla. 1968). However, the homestead status at the time of purchase or inheritance should be judicially determined before a title policy is issued. Alternatively, a credible homestead affidavit would be acceptable under the conditions discussed in **TN 16.04.08**.

The lien of a judgment against an owner of nonhomestead property is not lost by subsequent occupancy by the homesteader whereby the property acquires the status of homestead. *Pasco v. Harley,* 75 So. 30 (Fla. 1917); *Porter-Mallard Co. v. Dugger,* 157 So. 429 (Fla. 1934); *Schaller v. Bruce N. Balk, A. I. A., P. A.,* 708 So.2d 299 (Fla. 2d DCA 1998).

TN 16.04.12 Limit on Size of Homestead (12/94)

The Florida Constitution places a limit on the size of property which may be considered homestead. Art. X, Sec. 4, Fla. Const. 1968 (as amended), provides that "a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon . . . or if located within a municipality, to the extent of one-half acre of contiguous land . . ." Property in excess of these limits may have homestead status as to part of the property and nonhomestead status as to the remainder. To the extent that the proposed-insured property does not all qualify as exempt homestead, the parties needed to execute conveyances may vary.

The following scenario is a common situation in which the size limitation should be considered:

> *A city lot consists of three-quarters of an acre of land. While residing on the property, the owner died, having devised the property to his brother. The open probate of his estate reflects that the decedent was survived by a spouse and no lineal descendants and that the property may have had homestead status.*

DID YOU EVER KNOW THAT YOU'RE MY HERO? OR "ACCESS MAN!"

BY, GEORGE PEREZ, FUND CLAIMS MANAGER

No, unless (A) an affidavit by the county engineer is obtained and recorded stating that the road has been regularly maintained or repaired for the immediate past seven years by the county and that there is no known contest as to the road being public and (B) a survey shows that the land to be insured abuts the road.

Effective July 14, 2003, Sec. 95.361(2), F.S., provides a presumed dedication upon the passage of seven years of regular maintenance and repair by a governmental entity, regardless of who (private or public entity) constructed the road. Persons claiming an interest in the lands affected by Sec. 95.361(2), F.S., were given one year from the effective date to file a claim opposing the presumed dedication. Sec. 95.361(4), F.S.

Provided that there was no litigation during the one-year period expiring July 14, 2004, Sec. 95.361(2), F.S., may be relied on to insure access.

See also **TN 24.01.02**.

F. Public Prescriptive Easements

May a public road based solely on prescription be relied on as access?

No, unless its status as a public road and its extent as an easement have been judicially determined. The Fund Member is responsible for ascertaining that the judicial determination contains an exact legal description of the easement so that it may be located from the official records alone without a physical examination of the land or the use of an unrecorded survey. See *Jones v. Orem*, 605 So.2d 1017 (Fla. 5th DCA 1992). An affidavit reciting facts tending to establish a public prescriptive easement may not be relied on for the purpose of insuring access. The examination of the status of the public road should include a determination that the road has not been vacated or relocated.

TN 3.02.03 Private Easements (Rev. 12/05)

A. Title to Private Easement Must Be Searched

If the access depends on a private recorded easement, the title to the easement must be examined in addition to the examination of the title to the land being insured.

B. Common Law and Statutory Ways of Necessity Easements

The owner of Blueacre conveyed to Smith the west half of Blueacre. Access to Blueacre was by frontage on a public road along the east side of Blueacre. May the west half be insured without an exception for access?

No. Although Smith may have acquired a common-law way of necessity over the east half, access may not be insured. Common law and statutory ways of necessity provided by Sec. 704.01, F.S., may not be relied on as access unless the extent of the easement has been judicially determined or is evidenced by a recorded easement between the owners of the dominant and servient estates. For a situation in which the owner mortgages the west half of Blueacre, see **TN 3.04.01**.

The Fund Member is responsible for ascertaining that the judicial determination or recorded easement contains an exact legal description so that it may be located from the official records alone without a physical examination of the land or the use of an unrecorded survey. See *McCone v. Butts*, 616 So.2d 535 (Fla. 5th DCA 1993).

Title to the way of necessity must be searched. If there is a mortgage or other lien prior to the adjudicated way of necessity, an appropriate exception must be made. A mortgage prior to an adjudicated way of necessity may be foreclosed, eliminating the way of necessity easement. *Bush v. Duff*, 754 P.2d 159 (Wyo. 1988).

A way of necessity is terminated at the time the necessity ceases. For example, the dominant estate acquires contiguous property that has access to a public road or a subsequently platted road provides access to a dominant estate. *Fox Investments v. Thomas*, 431 So.2d 1021 (Fla. 2d DCA 1983); *Jonita, Inc. v. Lewis*, 368 So.2d 114 (Fla. 1st DCA 1979); *Hereford v. Gingo-Morgan Park*, 551 So.2d 918 (Ala. 1989). See also CLARK, SURVEYING AND BOUNDARIES (6th ed. 1992), Sec. 27.19.

Since a way of necessity may terminate without record notice, special caution should be exercised when using a prior policy which relies on an adjudicated way of necessity for access; the easement may have terminated.

The Marketable Record Title Act may operate to extinguish common law ways of necessity. *H & F Land, Inc. v. Panama City*, 706 So.2d 327 (Fla. 1st DCA 1998); *app'd*, 736 So.2d 1167 (Fla. 1999). In *Blanton v. City of Pinellas Park*, 887 So.2d 1224 (Fla. 2004), the Supreme Court held that statutory ways of necessity are not subject to the provisions of MRTA. The Blanton case involved an un-adjudicated statutory way. The court did not opine whether the Marketable Record Title Act would eliminate an adjudicated statutory way of necessity. See also *Cirelli v. Ent*, 885 So.2d 423 (Fla. 5th DCA 2004).

C. Appurtenant Easements

As a general rule, appurtenant easements (1) involve both a servient (burdened) and dominant (benefitted) estate, (2) attach to the dominant estate, (3) may not exist apart from the dominant estate, (4) may not be transferred without a transfer of the dominant estate, and (5) are transferred with the dominant estate whether or not mentioned in the conveyance. 20 FLA. JUR.2d, Easements, Sec. 6; 25 AM. JUR. 2d, Easements and Licenses, Sec. 11; and 28 C.J.S. Easements, Secs. 45 and 46.

A well-drafted appurtenant easement (1) describes both the servient and dominant estate and (2) states that it is appurtenant to the dominant estate [or that "it runs with the land"] and that it shall be binding on and shall inure to the benefit of the parties, their heirs, successors, and assigns. The easement may be described in a deed conveying a fee, such as, "the NW 1/4 of the NW 1/4 of Section 25, Township 17 South, 24 East, together with a perpetual, non-exclusive easement for ingress, egress, and utilities over and across

the West 30 feet of the SW 1/4 of the NW 1/4 of Section 25, Township 17 South, 24 East, which easement shall be appurtenant to the fee conveyed by this instrument." The easement may also be by a separate grant of easement.

An easement that *purports* to burden the property to be insured but that does not rise to the level of draftsmanship set forth herein should nevertheless be shown as a Schedule B exception in a title policy insuring the burdened property.

If access depends on an easement not described in every link in the chain, access may be insured if the Fund Member determines that the easement is appurtenant. However, the easement must be described in the deed in the current transaction.

D. "Subject to**"** Easements

The owner conveyed the north half of Blackacre subject to an easement over west 25 feet thereof. The owner then conveyed the south half of Blackacre together with an easement over the west 25 feet of the north half.

May a title policy insure the south half together with the purported easement over the west 25 feet of the north half? No. May a title policy insure the north half without an exception for the purported easement over the west 25 feet? No.

The words "subject to an easement" were held insufficient in and of themselves to reserve or create an easement in *Procacci v. Zacco*, 324 So.2d 180 (Fla. 4th DCA 1975), *Robertia v. Pine Tree Water Control Dist.*, 516 So.2d 1012 (Fla. 4th DCA 1987), and *Marchman v. Perdue*, 543 So.2d 1286 (Fla. 1st DCA 1989). On the other hand, in *Behm v. Saeli*, 560 So.2d 431 (Fla. 5th DCA 1990), similar wording was held to create an easement. Whether "subject to an easement" creates or reserves an easement is a question of fact involving the intent of the parties. Usually this means litigation. A "subject to" easement across the land of another should not be relied on as a private easement until the existence and extent of the easement has been judicially determined or is evidenced by a recorded easement between the owners of the dominant and servient estates. Similarly, a "subject to" easement across the land to be insured should not be ignored.

E. Dedications to the Public

The most common ways to express one's intention to dedicate lands for public use is by:

> *"(1) written instrument executed for that purpose; (2) filing a plat or map of one's property designating thereon streets, alleys, parks, etc.; (3) platting one's lands and selling lots and blocks pursuant to said plat indicating thereon places for parks, streets, public grounds, etc.; (4) recitals in a deed by which the rights of the public are recognized; (5) oral declarations followed by acts consistent therewith; (6) affirmative acts of the owner with reference to his property, such as throwing it open in a town, fencing and designating streets thereon; (7) acquiescence of the owner in the use of his property by the public for public purposes." City of*

Palmetto v. Katsch, 98 So.2d 352 (Fla. 1923); *Brevard County v. Blasky*, 875 So.2d 6 (Fla. 5th DCA 2004).

This title note concerns (1) above, a "stand-alone" instrument, not part of a plat, often called a "Dedication to the Public."

Unilateral dedications to the public, not formally accepted by a governmental entity, may be accepted by public use. The mere fact of use by the public for an extended period of time without the consent or objection of the owner does not show intent to dedicate. The public must accept the tender of dedication with a reasonable time before the withdrawal of the offer. *Kirkland v. City of Tampa*, 78 So. 17 (Fla. 1918); *City of Miami Beach v. Miami Beach Improvement Co.*, 14 So.2nd 172 (Fla. 1943). Proof of facts constituting an acceptance must be clear, satisfactory, and unequivocal. *Robinson v. Town of Riviera*, 25 So. 277 (Fla. 1946); *Mumaw v. Roberson*, 60 So.2nd 741 (Fla. 1952).

In *Southeast Seminole Civic Assn. v. Adkins*, 604 So.2d 523 (Fla. 5th DCA 1992), owners were conveyed lots in the unrecorded plat of Chula Vista in Seminole County. The developer recorded two "stand-alone" dedications. The 1978 dedication was "for the benefit of the General Public and the real property known as the Unrecorded Plat of Chula Vista" (Emphasis Added.) The 1986 dedication was "for the benefit of all the real property known as the Unrecorded Plat of Chula Vista," describing the roads and land by exhibits. The court held that owners of lots in Chula Vista acquired, by implication of law, an easement over and across the lands designated as roadways in Chula Vista when they bought lots in that subdivision. The rationale was the "private rights" discussed in **TN 24.01.01**. The court did say, in dicta, that acceptance of a common law dedication may be by use by the public. However, the court did not hold that the public accepted by use the roads in the unrecorded subdivision of Chula Vista.

Since timely acceptance by the public is an off-the-record question of fact, great care is required for insuring access by "stand-alone" dedications. Access may not be insured solely upon the recording of a Dedication to the Public. Each situation must be determined by its own particular facts. See also **TN 24.01.01**; 26 C.J.S. Dedication, Sec. 10.

F. Private Prescriptive Easements

Is an "Affidavit of Prescriptive Easement," reciting facts tending to show a prescriptive easement, a sufficient basis for insuring access?

No, unless the extent of the easement has been judicially determined or is evidenced by a recorded easement between the owners of the dominant and servient estates. But see **TN 3.02.02E2**. See *Alexander v. Cleveland*, 79 So.2d 852 (Fla. 1955), involving affidavits tending to show possession of land. See also **TN 13.02.01**.

The Fund Member is responsible for ascertaining that the judicial determination or recorded easement contains an exact legal description of the easement so that it may be located from the official records alone without a physical examination of the land or the use of

an unrecorded survey. See *Butts v. McCone*, 616 So.2d 535 (Fla. 5th DCA 1993); *Jones v. Orem*, 605 So.2d 1017 (Fla. 5th DCA 1992); and other cases discussed in **TN 3.02.02 F**.

TN 3.02.04 Railroad Crossing Agreements and Other Licenses

A license is similar to an easement to the extent that it is a permit to use another's land. However, a license is not an interest in land; an easement is. Usually, a license is revocable at the licensor's will; an easement is not. Generally, a license is not assignable. *Seaboard Air Line Ry. Co. v. Dorsey*, 149 So. 759 (Fla. 1933); *Dotson v. Wolfe*, 391 So.2d 757 (Fla. 5th DCA 1980); 20 FLA. JUR.2d, Easements, Sec. 1, et seq.; and CLARK, SURVEYING AND BOUNDARIES (6th ed. 1992), Sec. 27.19.The most frequently encountered access license is the private railroad crossing agreement or license. If the Fund Member is using a prior policy, he must examine the license to determine if it is assignable. Usually, they are not. If the license is assignable, it is only with the written consent of the licensor. Whether the old license is assigned or a new license obtained, if the only access is by a private railroad crossing agreement or license, an appropriate exception must be made in the commitment and Schedule B of the policy to the effect that "Access is restricted to or by a private railroad crossing agreement or license recorded at O.R. ____Page ____, of the Public Records of _____ County, Florida." Since the policy does not insure the license but only access, the license should not be referred to in the legal description in Schedule A.

TN 3.02.05 No Access and Limitations on Access (Rev. 12/95)

A. No Access

If there is no right of access, the commitment and Schedule B of the policy being issued must contain an exception as to the lack of a right of access. The exception in the 2006 policy should state "Notwithstanding Covered Risk Number 4 on the jacket of this policy, this policy does not insure any right of access to and from the land."

B. Width Limitations

If the width of the right of access is so narrow that it might not constitute legal access, the commitment and Schedule B of the policy must contain an exception stating the limited width. Although there is no unanimity among the courts as to the required minimum width for legal access, the court in *Holloway v. Gargano*, 657 So.2d 1231 (Fla. 3d DCA 1995), held that a road of at least 20 feet in width was required as a matter of law to comply with the Monroe County Fire Code and to otherwise provide the landowners with reasonable access to their properties. But see *Index, Inc. v. Moon*, 534 So.2d 879 (Fla. 3d DCA 1988); *Dotson v. Wolfe*, 391 So.2d 757 (Fla. 5th DCA 1980); *Filardo v. Lazo*, 241 So.2d 869 (Fla. 2d DCA 1970); and *Little River Investments, Inc. v. Fowler*, 266 So.2d 68 (Fla. 3d DCA 1972). Fund Members report that some counties require more than a 20-foot width. The insured or his attorney is responsible for determining how such width limitations and governmental regulations affect the insured's interests.

TITLE ACTION NEWS

BY, SCOTT JACKSON, FUND UNDERWRITING ATTORNEY

FOURTH REVISED FLORIDA MUTUAL INDEMNIFICATION AGREEMENT

In order to expedite the closing of real estate transactions, facilitate the meeting of potential outstanding policy obligations and limit the need to obtain individual letters of indemnity, the companies that now or hereafter become signatories to this Fourth Revised Florida Mutual Indemnification Agreement ("Agreement"), in consideration of their mutual promises and the performance hereunder, do hereby agree with one another, as follows:

INDEMNITY:

Each party to this Agreement (an "Indemnitor"), subject to the terms and conditions of this Agreement, agrees to indemnify any current or future party to this Agreement (an "Indemnitee") against loss or damage which may be suffered under an Indemnitee's owner's or loan title insurance policy(ies) (the "Indemnitee's Policy"), provided:

1. The loss or damage arose by reason of one or more of those "POTENTIAL DEFECTS" described below;
2. It reasonably appears that the Indemnitor issued a loan or owner's title policy (including but not limited to a Form A policy), a copy of which is retained in the Indemnitee's or Indemnitee's agent's file, insuring the transferor or mortgagor of the Land in the current transaction (the "Indemnitor's Policy");
3. The Indemnitor's Policy covers some or all of the land insured under the Indemnitee's Policy (the "Land");
4. The Indemnitor's Policy was issued without exception for the POTENTIAL DEFECT as to the portion of the Land affected by the POTENTIAL DEFECT; and
5. The Indemnitee's Policy insures the transferee or mortgagee of the Insured under the Indemnitor's Policy;

It is understood and agreed that once the relationship of Indemnitor and Indemnitee is established hereunder, it shall continue in force so long as the Indemnitee has liability under Indemnitee's Policy or under any indemnity (whether under this Agreement or a specific indemnity agreement) to subsequent insurers for a POTENTIAL DEFECT covered by the Indemnitor's Policy, subject to the limitations of this Agreement.

POTENTIAL DEFECTS:

I. Doubt as to whether the spouse of a prior grantor has a homestead interest in the Land, as set forth in Section A below; or

II. Doubt as to whether a recorded judgment, federal tax lien or state tax lien or warrant constitutes an unsatisfied lien against the Land, as set forth in Section B below; or

III. Doubt as to whether a recorded mortgage has been satisfied or released as a lien against the Land, as set forth in Section C below; or

IV. Doubt as to whether due process was afforded to certain defendants in court cases involving probate, foreclosure, quiet title or other proceedings, as set forth under Section D below; or

FOURTH REVISED FLORIDA MUTUAL INDEMNIFICATION AGREEMENT

V. Doubt as to whether a trustee or attorney-in-fact or purported representative of a legal entity had the requisite authority to convey or mortgage title to the Land to a bona fide 3rd party purchaser for value, as set forth in Section E below; or

VI. Doubt as to whether an individual in the chain of title, who did not convey his or her entire interest in the Land while alive, is deceased, as set forth in Section F below; or

VII. Doubt as to whether there is a potential lien outstanding in favor of the state or federal government arising from the death of an individual in the chain of title, as set forth in Section G below; or

VIII. Possible invalidity of any deed in the chain of title to the Land due to a lack of subscribing witnesses, as set forth in Section H below; or

IX. Possible failure of any deed or mortgage in the chain of title to the Land to be accorded the protections and benefits of Section 695.01, Florida Statutes, otherwise known as the recording statute, due to an insufficient or incomplete (but not an absent) acknowledgment for one or more of the grantors or makers of the deed or mortgage, as set forth in Section I below; or

X. Doubt as to the validity of any deed in the chain of title to the Land or the insured mortgage due to a lack of a corporate seal affixed thereon, as set forth in Section J below.

Section A (Homestead):

Item I, above, shall mean that a deed or mortgage, in the chain of title to the Land prior to the date of or insured by the Indemnitor's Policy, does not contain either:

1. Joinder by the spouse of the grantor or mortgagor; or

2. A statement in the deed or mortgage that the grantor or mortgagor is a single person; or

3. A statement in the deed or mortgage or other recorded instrument that the Land conveyed or encumbered by the deed or mortgage is not the homestead of the grantor or mortgagor.

Section B (Judgments or Federal or State Tax Liens or Warrants):

Item II, above, shall mean a recorded judgment lien(s), from the face of which it appears that the principal is a sum certain, or a recorded federal tax lien or state tax lien or warrant which may have attached to the Land prior to the date of the Indemnitor's Policy (the "Lien(s)"), provided:

1. The Lien(s) is not against the insured under the Indemnitor's Policy;

2. The face amount of the Lien(s) does not exceed (in the aggregate) $500,000.00;

3. No notice of any proceedings or levy to collect the Lien(s) appears of record; and

4. The Lien(s) is not a child support certificate of delinquency filed pursuant to Section 61.14, Florida Statutes.

FOURTH REVISED FLORIDA MUTUAL INDEMNIFICATION AGREEMENT

Section C (Mortgages):

Item III, above, shall mean a recorded mortgage(s) which appears of record prior to the date of Indemnitor's Policy, provided:

There appear no pending foreclosure proceedings respecting the mortgage;

2. The mortgage secures a principal amount of not more than $500,000.00; and

3. The mortgage does not appear, from the record, to secure a revolving credit or equity line of credit loan.

Section D (Due Process Issues Arising Out of Past Litigation):

Item IV, above, shall apply only to court proceedings which predate the date of the Indemnitor's Policy and shall mean one or more of the following:

1. Failure to appoint a guardian or attorney *ad litem* to represent the interest of an absent defendant(s) in a probate, foreclosure, quiet title, partition suit, divorce or other proceeding that has ended in a final judgment affecting title to the Land (the "Case").

2. Deficiencies in, or the absence of, a diligent search affidavit filed in the Case prior to service upon defendant by publication as may be required by law.

3. Deficiencies in, or the absence of, an affidavit of non-military service filed in the Case.

Section E (Authority to Sign - Business Entities, Trustees and Attorneys-In-Fact):

Item V, above, shall mean a conveyance or mortgage of the Land prior to the date of or insured by the Indemnitor's Policy insuring the current seller or mortgagee of the Land, and there appears insufficient or no record notice that the conveyance or mortgage was made by one with proper authority, provided that there appears no notice of record in the county where the Land lies of any proceeding to attack or set aside the conveyance or mortgage.

Section F (Lack of Recorded Death Certificate):

Item VI, above, shall mean an original death certificate is not of record in the county in which the Land is located, in order to eliminate the interest of an individual in the prior chain of title or the homestead interest of a spouse of an individual prior to the date of the Indemnitor's Policy.

Section G (Florida and Federal Estate Tax Liens):

Item VII, above, shall mean that there is an absence of satisfactory proof of record in the county in which the Land is located that there are no estate tax liens in favor of the State of Florida or the United States of America which have attached or could have attached to the insured Land due to death of a party prior to the date of the Indemnitor's Policy.

FOURTH REVISED FLORIDA MUTUAL INDEMNIFICATION AGREEMENT

Section H (Lack of Subscribing Witnesses):

Item VIII, above, shall mean that any deed in the chain of title to the Land, prior to the date of or insured by the Indemnitor's Policy, does not contain two subscribing witnesses for each grantor.

Section I (Incomplete or Insufficient Acknowledgments):

Item IX, above, shall mean that the deed or mortgage affecting the chain of title to the Land contains a defective acknowledgment as to one or more parties. Defects covered by this Section include, but are not limited to, one or more of the following:

1. The failure to include a notarial seal or stamp as required by Section 695.03, Florida Statutes;

2. The failure to affirmatively state that one or all of the parties executing appeared before the individual taking the acknowledgment;

3. The failure to include a translation into English of any portion of the acknowledgement that is in a language other than English;

4. The failure of the individual taking the acknowledgment to designate in the instrument whether one or more of the parties executing the instrument possessed a statutorily acceptable form of identification or, in the alternative, was personally known to the individual taking the acknowledgment;

5. The acknowledgment was taken by an individual not having the authority to acknowledge instruments to be recorded in the public records of counties in the State of Florida, as set forth in Section 695.03, Florida Statutes; or

6. The erroneous use of a jurat instead of the statutorily prescribed form of acknowledgment.

Section J (Corporate Seals):

Item X, above, shall mean that a deed or mortgage, in the chain of title to the Land, prior to the date of or insured by the Indemnitor's Policy, was executed by a corporation without its corporate seal affixed.

CONDITIONS:

The indemnity provision of this Agreement is subject to the following conditions:

A. The Agreement is only applicable to policies issued on Florida property;

B. The Indemnitor's Policy is at least six (6) months old;

C. The Indemnitee is not required to authenticate a policy of the Indemnitor that appears valid on its face; however, if requested by the Indemnitor, the Indemnitee shall provide a copy of the policy on demand as a condition to making a claim under this Agreement.

D. The liability of the Indemnitor is limited to the face amount and the terms of the Indemnitor's Policy or $500,000.00, whichever is less;

FOURTH REVISED FLORIDA MUTUAL INDEMNIFICATION AGREEMENT

E. The Indemnitor shall be notified of a claim under this Agreement, at the address of its claims department, as if the Indemnitee is an insured claimant under the Indemnitor's Policy;

F. For any claim being made under this Agreement, the Indemnitor agrees to perform in accordance with the terms hereof, promptly and in good faith; however, until an Indemnitor is notified of a claim hereunder, there is no obligation to take any action allowed or required under the Indemnitor's Policy;

G. This Agreement may be supplemented or superseded by any specific written indemnity agreements by and between any of the parties hereto, and such specific agreement shall not be deemed to suspend, cancel or otherwise terminate any of the rights or obligations of the parties under this Agreement as to policies which may be written by the Indemnitee in the future; and

H. Any signatory may withdraw from this Agreement upon written notice given to the Notice Agent identified below after thirty (30) days from the date of the mailing of such notice. Notice Agent shall promptly notify all parties of the withdrawal. However, such withdrawal shall not diminish or impair any of the indemnities arising under this Agreement prior to the expiration of such thirty (30) day period.

SIGNATORIES AND EFFECTIVE DATE:

This Agreement shall be open to participation by any title insurance company licensed or previously licensed to do business in the State of Florida. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and such counterparts shall together constitute but one agreement.

The Effective Date of this Agreement shall be November 10, 2016, as to any company that signs the Agreement. As to signatories as of the Effective Date, all policies, issued before or after the Effective Date, are deemed to be Indemnitor's Policies. Thereafter, a title insurance company who was not a signatory as of the Effective Date may join and become a party to the Agreement ("New Signatory"). A title insurer becomes a New Signatory by signing the Agreement and delivering the original signed counterpart to:

Executive Director
Florida Land Title Association
249 East Virginia Street
Tallahassee, FL 32303

(the "Notice Agent")

Upon receipt of an original counterpart signature, the Notice Agent shall promptly send a copy thereof together with written notice to all Indemnitors advising each of the date Notice Agent received the signed counterpart original. Thereafter all policies of New Signatory, regardless of issue date, shall be deemed to be an Indemnitor's Policy under this Agreement.

By signing this Agreement each Indemnitor agrees that its receipt of the Notice sent by the Notice Agent shall be proof that this Agreement is in effect as to a New Signatory. Notice Agent shall retain in safekeeping the original and any original counterparts to this Agreement at the Florida Land Title Association headquarters in Tallahassee, Florida.

FOURTH REVISED FLORIDA MUTUAL INDEMNIFICATION AGREEMENT

Nothing herein shall be construed to release any obligations which may have attached under any prior versions of this mutual indemnification agreement prior to the Effective Date of this Agreement, as to both the Indemnitor and Indemnitee, in each particular instance. Indemnity obligations arising after both the Indemnitor and Indemnitee have joined this Agreement shall be governed solely by this Agreement and not by any prior versions.

Various Indemnitors have acquired other title insurers, changed corporate names, merged entities, assumed policies by contract or reinsurance, and otherwise become responsible for policy obligations not issued in the name of the Indemnitor, yet desire to avail themselves of the benefits of this Agreement as to those policies. Accordingly, each Indemnitor agrees that this Agreement and its obligation to indemnify hereunder will apply as to any title insurance policy issued by any of the entities (if any) listed as to that Indemnitor on Schedule A as fully as if such policy had been issued directly by the Indemnitor.

NOW, WITH THE INTENT TO BE BOUND BY ALL THE TERMS AND PROVISIONS HEREOF, WITNESS the signature of the INDEMNITORS shown below:

INDEMNITORS:

Alliant National Title Insurance Company
By: _____
Robert J. Grubb
Its: President & Chief Executive Officer
Date: November 10, 2016

Attorneys' Title Insurance Fund, Inc.
By: _____
John H. Simmons
Its: President
Date: November 10, 2016

Chicago Title Insurance Company
for itself and those entities listed on Schedule A
By: _____
Patricia J. Hancock
Its: Senior Vice President & State Underwriting Counsel
Date: November 10, 2016

FOURTH REVISED FLORIDA MUTUAL INDEMNIFICATION AGREEMENT

Commonwealth Land Title Insurance Company
for itself and those entities listed on Schedule A

By: _____
Patricia J. Hancock
Its: Senior Vice President & State Underwriting Counsel
Date: November 10, 2016

Fidelity National Title Insurance Company
for itself and those entities listed on Schedule A

By: _____
Patricia J. Hancock
Its: Senior Vice President & State Underwriting Counsel
Date: November 10, 2016

First American Title Insurance Company

By: _____
Alan K. McCall
Its: Vice President & Southeast Regional Underwriting Counsel
Date: November 10, 2016

First National Title Insurance Company

By: _____
D.J. Horn
Its: Vice President, National Agency Manager
Date: November 10, 2016

National Title Insurance Company of New York Inc.

By: _____
Patricia J. Hancock
Its: Senior Vice President & Underwriting Counsel

North American Title Insurance Company
for itself and those entities listed on Schedule A

By: _____
Valarie Jahn-Grandin
Its: Chief Underwriting Counsel + EVP
Date: November 10-2, 2016

FOURTH REVISED FLORIDA MUTUAL INDEMNIFICATION AGREEMENT

Old Republic National Title Insurance Company
for itself and those entities listed on Schedule A

By: _____
James C. Russick
Its: Vice President, Florida State & Gov't Affairs Counsel
Date: November 10, 2016

Stewart Title Guaranty Company
for itself and those entities listed on Schedule A

By: _____
Barry Alan Scholnik
Its: Vice President
Date: November 10, 2016

Title Resources Guaranty Company

By: _____
Michael E. Godat
Its: Vice President & Eastern Region Underwriting Counsel
Date: November 10, 2016

Westcor Land Title Insurance Company

By: _____
Sabine R. Seidel
Its: Florida State Counsel
Date: November 10, 2016

WFG National Title Insurance Company
for itself and those entities listed on Schedule A

By: _____
Joseph J. Tschida
Its: Vice President & Florida State Counsel
Date: November 10, 2016

FOURTH REVISED FLORIDA MUTUAL INDEMNIFICATION AGREEMENT

SCHEDULE A
TO FOURTH REVISED MUTUAL INDEMNIFICATION AGREEMENT

Chicago Title Insurance Company includes:

American Pioneer Title Insurance Company
Security Union Title Insurance Company
Ticor Title Insurance Company
Ticor Title Insurance Company of Florida

Commonwealth Land Title Insurance Company includes:

Industrial Valley Title Insurance Company
Title and Trust Company of Florida
Transnation Title Insurance Company

Fidelity National Title Insurance Company includes:

American Title Insurance Company
City Title Guaranty Company
City Title Insurance Company
Fidelity National Title Insurance Company of New York
Lawyers Title Insurance Corporation
Life Title Insurance Company of New York
Meridian Title Insurance Company
National Attorney's Title Insurance Company
Nations Title Insurance of New York, Inc.
Nations Title, Inc.

New York TRW Title Insurance
New York TRW Title Insurance, Inc.
Security Title and Guaranty Corporation
Title USA Insurance Corporation of New York
Title USA Insurance of New York, Inc.
TRW Title Insurance
TRW Title Insurance of New York, Inc.
TRW Title, Inc.
US Life Title Insurance Company of New York

North American Title Insurance Company includes:

North American Title Insurance Corporation

Old Republic National Title Insurance Company includes:

Attorneys' Title Insurance Fund, Inc.
Minnesota Title Insurance Company

FOURTH REVISED FLORIDA MUTUAL INDEMNIFICATION AGREEMENT

Stewart Title Guaranty Company includes:

Alliance Title of America

WFG National Title Insurance Company includes:

WFG Title Insurance Company
Transunion Title Insurance Company
Transunion National Title Insurance Company
Atlantic Title Insurance Company
Diversified Title Insurance Company
South Carolina Title Insurance Company
Northern Counties Title Insurance Company (as to policies issued subsequent to 1/1/1990)

enforceable by a Florida court under the full faith and credit clause of the United States Constitution if the foreign court had personal jurisdiction over the parties. *Pinebrook v. Pinebrook*, 329 So.2d 343 (Fla. 4th DCA 1976). An order merely requiring a forced sale of real property and an equal distribution of property without directing the parties to sell is in effect a partition judgment and is not entitled to full faith and credit. *Sammons v. Sammons*, 479 So.2d 223 (Fla. 3d DCA 1985); *Wentworthe v. Cusumano*, 689 So.2d 1167 (Fla. 4th DCA 1997).

Based on these authorities, The Fund's position is that titles dependent solely upon the operation of foreign judgments should not be insured.

TN 14.03.02 Transfer by Judgment (Rev. 12/12)

When property distribution is not settled by agreement between the parties it may be awarded as lump-sum alimony, or as special equity. Fla. R. Civ. P. 1.570 governs the means of conveying property which is awarded as lump-sum alimony or special equity and in addition Sec. 61.075, F.S., effective October 1, 1988, governs the award of property pursuant to equitable distribution. How and when the property was awarded pursuant to these legal doctrines will oftentimes determine its insurability.

Note: Special equity was abolished effective July 1, 2008. Sec. 61.075(11), F.S.

If the judgment purports to operate as a conveyance without the necessity of a deed, then pursuant to Fla. R. Civ. P. 1.570(d), a title policy can be issued based on a judgment operating as a conveyance.

Under Sec. 61.075, F.S., real property may be awarded based on equitable distribution. A judgment distributing assets has the effect of a duly executed instrument of conveyance when the judgment is recorded in the county where the property is located. For a title policy to be issued based on this type of judgment it is necessary that the final judgment of dissolution state that the basis for the award of the property is based on equitable distribution, the property rights be at issue in the dissolution proceeding, and if service of process is by constructive service, that the notice of publication contain a description of the property. See Sec. 61.075(4), F.S.; Fla. R. Civ. P. 1.570(d); *Montano v. Montano*, 520 So.2d 52 (Fla. 3d DCA 1988); *Hadden v. Cirelli*, 675 So.2d 1003 (Fla. 5th DCA 1996).

TN 14.03.03 Transfer by Property Settlement Agreement (Rev. 12/07)

Real property can be awarded to one spouse in a number of different ways. Oftentimes the title examiner will find a dissolution judgment into which a property settlement agreement is incorporated. Property settlement agreements are not usually recorded in the official record books, and in order to ensure that the provisions within the agreement have been complied with, the court files should be examined. If the agreement itself awards the property to one spouse, then the final judgment operates as the document of conveyance,

and title may be insured to that spouse's grantee or mortgagee. Conversely, if the agreement requires that deeds be exchanged between the parties, then title is not insurable until a deed between the former spouses has been executed and recorded. See *In re Jose Sergio Hoyo, Jr.*, 340 B.R. 100 (M.D. Fla. 2006); *Siegel v. Siegel*, 750 So. 2d 699 (Fla. 5th DCA 2000).

In addition, in a current transaction, if the property settlement agreement awards the property to one spouse but gives the other spouse a percentage of the proceeds when the property is sold, then a release must be obtained from the spouse who is awarded a percentage of the proceeds, before insuring a subsequent purchaser or mortgagee. Likewise, when title is awarded by judgment and there is something of value given in exchange for the award, then an interest may have been created which could give rise to litigation to establish an equitable lien. Therefore, the interest must be released for issuing a policy.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JAMES OBER,
Appellant,

v.

TOWN OF LAUDERDALE-BY-THE-SEA a Florida Municipality,
Appellee.

No. 4D14-4597

[January 25, 2017]

ON MOTION FOR REHEARING

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch, IV, Judge; L.T. Case No. 14-006782(05).

Manuel Farach of McGlinchey Stafford, Fort Lauderdale, for appellant.

Susan L. Trevarthen, Laura K. Wendell, Eric P. Hockman and Adam A. Schwartzbaum of Weiss Serota Helfman Cole & Bierman, P.L., Coral Gables, for appellee.

Heather K. Judd and Jordan R. Wolfgram, Assistant City Attorneys, Office of the City Attorney For The City of St. Petersburg, St. Petersburg, for Amicus Curiae City of St. Petersburg.

Alexander L. Palenzuela of Law Offices of Alexander L. Palenzuela, P.A., for Amicus Curiae City of Coral Gables.

Chris W. Altenbernd, Marty J. Solomon and Nicholas A. Brown of Carlton Fields Jorden Burt, P.A., Tampa, for Amicus Curiae The Florida Land Title Association.

Irwin R. Gilbert of Kelley Kronenberg, West Palm Beach, for Amicus Curiae The Business Law Section of the Florida Bar.

Joseph E. Foster and Carrie Ann Wozniak of Akerman LLP, Orlando, and Richard H. Martin of Akerman LLP, Tampa, for Amicus Curiae Florida Bankers Association.

Kenneth B. Bell and John W. Little, III of Gunster, West Palm Beach, and Robert W. Goldman of Goldman, Felcoski & Stone, P.A., Naples, for Amicus Curiae The Real Property Probate & Trust Law Section of the Florida Bar.

David Rosenberg and Robert R. Edwards of Robertson, Anschutz & Schneid, PL, Boca Raton, Andrea R. Tromberg and Jason Joseph of Gladstone Law Group, P.A., Boca Raton, and David Newman and Ari Miller of Choice Legal Group, P.A., Fort Lauderdale, for Amicus Curiae The American Legal and Financial Network.

Julia C. Mandell, City Attorney, City of Tampa, and Ernest Mueller, Senior Assistant City Attorney, Tampa, and Victoria Méndez, City Attorney, City of Miami, Miami, for Amicus Curiae City of Tampa, and The City, County and Local Government Section of the Florida Bar.

PER CURIAM.

We grant appellant James Ober's motion for rehearing, withdraw our opinion of August 24, 2016, and substitute the following.

This case involves the application of section 48.23, Florida Statutes (2014), the lis pendens statute, to liens placed on property between a final judgment of foreclosure and a judicial sale. We hold that such liens are discharged by section 48.23(1)(d).

Background

On November 26, 2007, a bank, which is not a party in this lawsuit, recorded a lis pendens on certain property as part of a foreclosure lawsuit against a homeowner, also not a party in this case. On September 22, 2008, the bank obtained a final judgment of foreclosure. From July 13, 2009 through October 27, 2011, appellee Town of Lauderdale-by-the-Sea, recorded seven liens on the subject property related to various code violations occurring after the entry of the final judgment.

On September 27, 2012, the bank purchased the property at a foreclosure sale. It later sold the property to Ober.

Ober filed suit to quiet title, attempting to strike the liens against his property. The Town's counterclaim sought to foreclose the liens. The trial court granted the Town's motion, denied Ober's motion, and entered a final judgment of foreclosure on the seven liens recorded prior to the judicial sale, as well as on three liens imposed after the sale of the property. Ober

does not argue that those three post-judicial sale liens were discharged, and on remand the trial court may enter judgment on them.

Analysis

Insofar as this case concerns the interpretation of a statute, the standard of review is de novo. *Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 4th DCA 2011). Section 48.23(1)(d) states, in pertinent part:

> [T]he recording of . . . notice of lis pendens . . . constitutes a bar to the enforcement against the property described in the notice of *all* interests and liens . . . unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and *if such proceedings are prosecuted to a judicial sale* of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens.

(Emphasis added).

We reject the Town's argument that the statute applies only to liens existing or accruing *prior* to the date of the final judgment. The language of the statute is broad, applying to "all interests and liens." Significantly, the statute expressly contemplates that its preclusive operation continues through a "judicial sale." This is consistent with how foreclosure suits operate in the real world. As the amicus brief of the Florida Bankers Association points out, foreclosures are unlike many civil lawsuits in that "much remains to be accomplished after entry of final judgment, including the foreclosure sale, the issuance of certificates of sale and title, and, in many instances, the prosecution of a deficiency claim, all under court supervision." In a foreclosure lawsuit, the final judgment is not the end of the road, but merely a way station to the final result. *See Park Fin. of Broward, Inc. v. Jones*, 94 So. 3d 617, 618 (Fla. 4th DCA 2011) (stating that mortgage foreclosure actions are different from typical civil actions).

A proper reading of section 48.23(1)(d) is, as the Florida Land Title Association suggests, that "when a foreclosure action is prosecuted to a judicial sale, that sale discharges all liens, whether recorded before the final judgment or after, if the lienor does not intervene in the action within 30 days" after the recording of the notice of lis pendens.

This view is in accord with Form 1.996(a) of the Florida Rules of Civil Procedure. The form provides a sample foreclosure judgment, with a provision stating:

> On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property . . ., except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any.

As the Business Law Section of the Florida Bar notes, this form reflects the common understanding of the operation of the lis pendens statute. *See Hancock Advert., Inc. v. Dep't of Transp.*, 549 So. 2d 1086, 1089 (holding that the court is "entitled to consider" the "practical construction which has in fact been adopted by the industry" when dealing with a statutory interpretation issue). The form was first adopted in 1971. *See In re Fla. Rules of Civil Procedure*, 253 So. 2d 404, 419 (Fla. 1971). It has been reviewed and revised by the Florida Supreme Court since 1971, most recently in January 2016. *See In re Amendments to Fla. Rules of Civil Procedure*, 190 So. 3d 999 (Fla. 2016). The January 2016 revisions maintained the language quoted above. *Id.* at 1010.

Conclusion

The practical problem in this case is the long lag time between the foreclosure judgment and the foreclosure sale. Resolution of the competing interests—of the Town, the lending and title insurance industries, property owners, and buyers at foreclosure sales—is in the province of the legislature.

We reverse the final judgment and remand to the circuit court for further proceedings.

GROSS, FORST and KLINGENSMITH, JJ., concur.

* * *

law as if the daughter, B, had died prior to the death of A. The disclaimer was done to comply with 26 U.S.C. Sec. 2518 so that federal estate taxes would not be assessed against the daughter.

If the disclaimer by the co–personal representatives complied with all of the requirements and provisions of Ch. 739, F.S., a policy could be issued insuring title to real property that came through A's estate by conveyance from B's children and the personal representative of A's estate without an exception for the lien of estate taxes for B's estate.

SC 2.09 Records

TN 2.09.01 Reserved for New Title Note

TN 2.09.02 Reserved for New Title Note

TN 2.09.03 Transcripts — What and Where to Record (Rev. 12/08)

The Fund receives many inquiries about recording estate administration transcripts. The issue has become especially acute in recent years because clerks in some counties destroy probate files pursuant to Rule 2.430, Fla. Rules of Judicial Administration. The destruction of files can seriously interfere with the marketability of title and in some cases can render it unmarketable.

For insuring title derived from estates, The Fund requires the following, based in part upon PRACTICE UNDER FLORIDA PROBATE CODE (CLE 5th ed. 2007), Sec. 2.38. For insuring purposes, these documents should be recorded in any county where real property previously owned by the decedent is located.

In a testate estate, the transcript should include, at a minimum, the will, order admitting the will to probate, letters of administration, and order closing the estate and discharging the personal representative unless the estate administration is still open. If there is a sale of the estate property by a personal representative, other instruments and pleadings documenting the personal representative's authority may be necessary.

In an intestate estate, record the petition for administration, letters of administration, and order closing the estate and discharging the personal representative if the estate has been closed. If there is a sale of estate property by the personal representative, an order of the probate court authorizing the sale by the personal representative must be obtained and recorded.

THE ABC'S OF CYBERFRAUD

BY, JAY ST. LAWRENCE, FUND LEGAL EDUCATION ATTORNEY

FRAUD ALERT!

BY MARGARET A. (PEGGY) WILLIAMS, FUND RISK MANAGER

We would like to alert you to a fraud scheme that could result in the theft of money from your accounts. Here is how the scheme works:

1. The fraudster hacks into the e-mail accounts of real estate agents without their knowledge.
2. The fraudster monitors the real estate agent's e-mails to find details of upcoming closings.
3. The fraudster learns the parties' names, the amount of the deposit, the entity holding the deposit, and other details.
4. The fraudster sends an e-mail to the entity holding the deposit from the real estate agent's e-mail address. The e-mail looks normal in every way and appears to be from the real estate agent. The e-mail may also include legitimate attachments that match the documents in your file.
5. The fraudster's e-mail directs the entity holding the deposit to wire the deposit to another closing or title agency office. In reality, the wire instructions are to an account controlled by the fraudster.
6. If the money is wired as instructed, it is gone for good, and has been stolen from your trust or escrow account by fraud.

Do not let this happen to you!

1. Always verify any e-mails requesting you to transfer deposits. Verify the instructions with the real estate agent and all other involved parties by phone using known legitimate phone numbers. Do not use the phone number in the deposit transfer request e-mail.
2. Be very cautious if the wiring instructions request the funds go to a bank branch or account outside Florida.
3. Talk to your real estate agent customers about this scheme and ask them to be on the lookout for responses to e-mails they have not sent. This may be a sign that their e-mail account has been hacked.

If you have questions, please contact The Fund's Risk Management Department at 800-432-9594.

Back to Speaker Topics

Fund Assembly

Welcome Remarks

Jimmy Jones, *President and Chief Executive Officer, The Fund*

Back to Speaker Topics

Speaker Information

Welcome Remarks

Jimmy Jones,

President and Chief Executive Officer, The Fund

Mr. Jones has been with The Fund for almost three decades now. He has been dedicated to serving The Fund in many roles and providing clarity for whatever role he serves. As CEO, Mr. Jones spends time with Fund Members across the State listening to the various needs and desires of Florida real estate attorneys, which vary by both geography and size of the firm. It is his job, then, to cast the Vision for The Fund and develop long-term strategies to make sure Florida real estate attorneys remain equipped to serve the public.

Back to Speaker Topics

Fund Assembly

Economic Forecast for the Florida Real Estate Attorney

Sean Snaith, Ph.D., *Director, Institute for Economic Competitiveness, College of Business Administration, University of Central Florida*

Back to Speaker Topics

Speaker Information

Economic Forecast for the Florida Real Estate Attorney

Sean Snaith, Ph.D.,

Director, Institute for Economic Competitiveness, College of Business Administration, University of Central Florida

Sean Snaith, Ph.D., is the director of the University of Central Florida's Institute for Economic Competitiveness and a nationally recognized economist in the field of business and economic forecasting.

Snaith is the recipient of multiple awards for the accuracy of his forecasts, his research and his teaching. He has served as a consultant for local governments and multi-national corporations such as Compaq, Dell and IBM. Before joining UCF's College of Business Administration, he held teaching positions at Pennsylvania State University, American University in Cairo, the University of North Dakota and the University of the Pacific.

Snaith is frequently interviewed in international, national and regional media He has been quoted in The Wall Street Journal, USA Today, The New York Times, The Economist, The Guardian and has appeared on CNBC, Fox Business Network, The Nightly News with Brian Williams, Al Jazeera, the BBC and CBC, China Central TV, Sky News, Nippon TV and the Business News Network, based in Toronto.

Snaith is a sought-after speaker known for his engaging and humorous presentations. He has built, via word of mouth, a national reputation for his unique ability to explain complex subject matter in a digestible manner. He earned praise from one business editor for "(having) an uncanny knack of making economics not only understandable but interesting."

Snaith is a member of several economic organizations and national economic forecasting panels, including The Wall Street Journal's Economic Forecasting Survey, the Associated Press' Economy Survey, CNNMoney.com's Survey of Leading Economists, USA Today's Survey of Top Economists, Federal Reserve Bank of Philadelphia's Survey of Professional Forecasters, Bloomberg and Reuters.

Snaith holds a B.S. in Economics from Allegheny College and an M.A. and Ph.D. in Economics from Pennsylvania State University.

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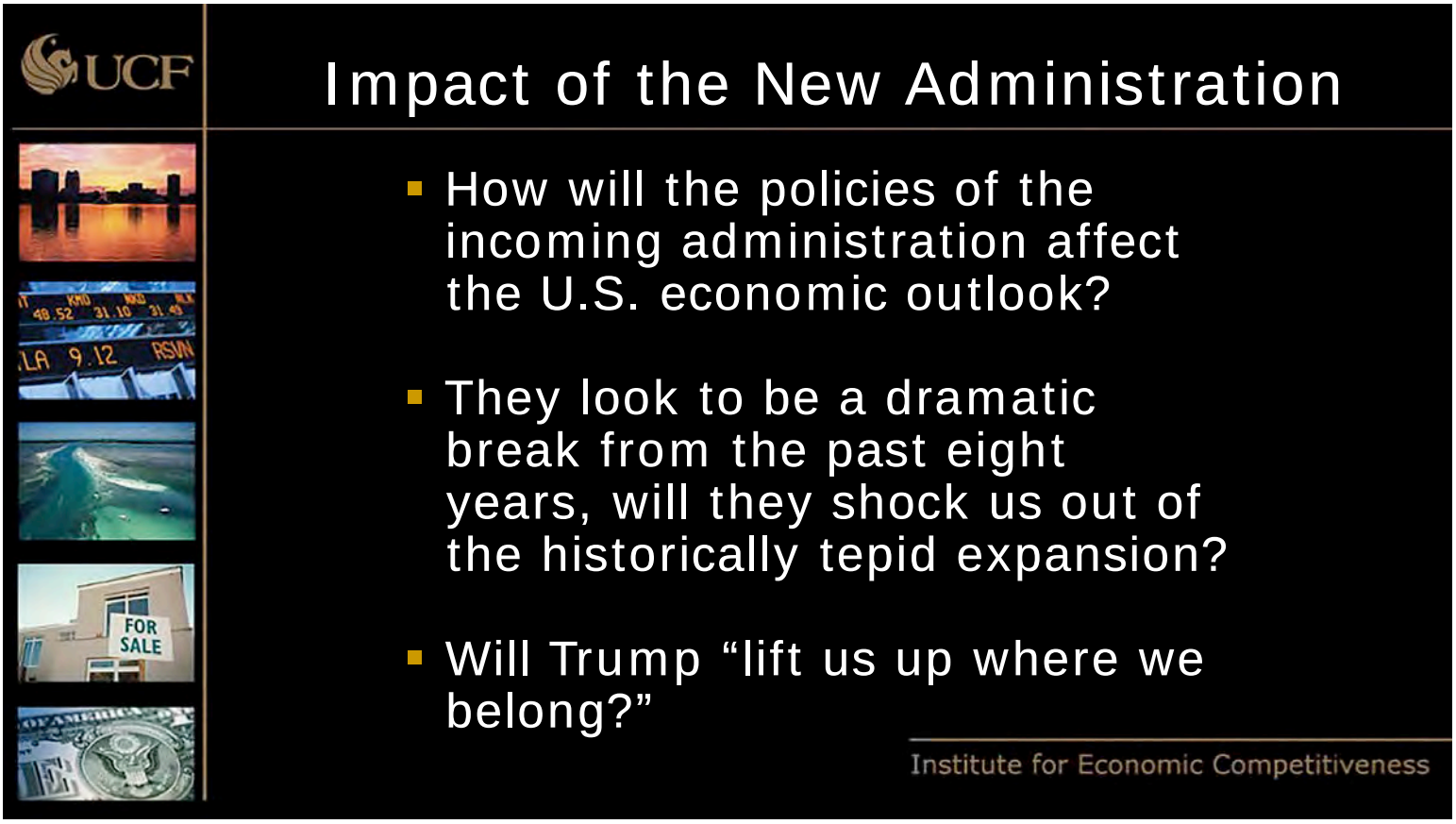
Economic Forecast for the Florida Real Estate Attorney
FA Fund Assembly
Orlando, FL
May 11th, 2017
Institute for Economic Competitiveness


UCF
Impact of the New Administration
How will the policies of the incoming administration affect the U.S. economic outlook?
They look to be a dramatic break from the past eight years, will they shock us out of the historically tepid expansion?
Will Trump "lift us up where we belong?"
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Impact of the New Administration
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UCF
Impact of the New Administration
FOR SALE
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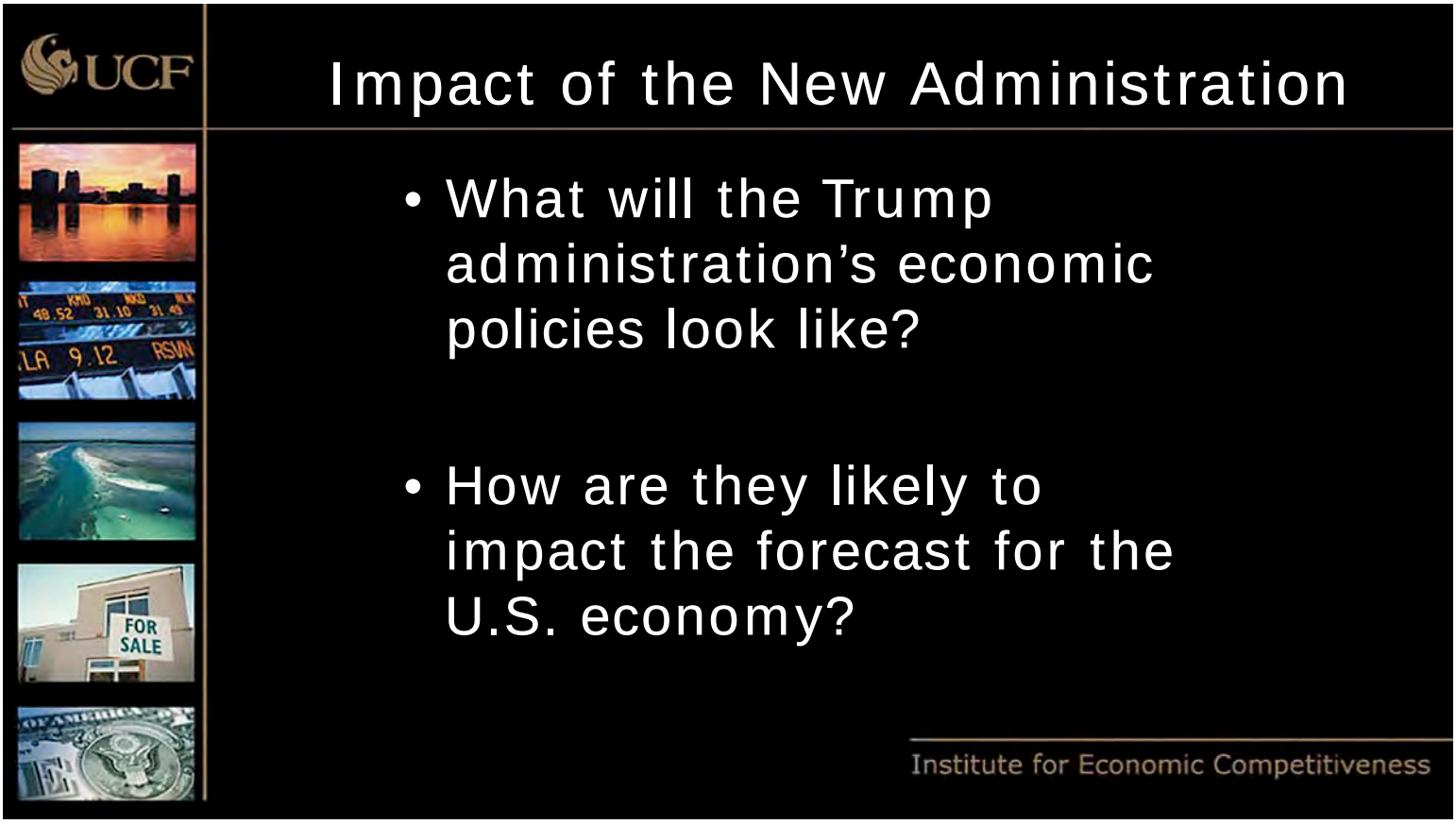
UCF
Impact of the New Administration
• What will the Trump administration's economic policies look like?
• How are they likely to impact the forecast for the U.S. economy?
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Impact of the New Administration
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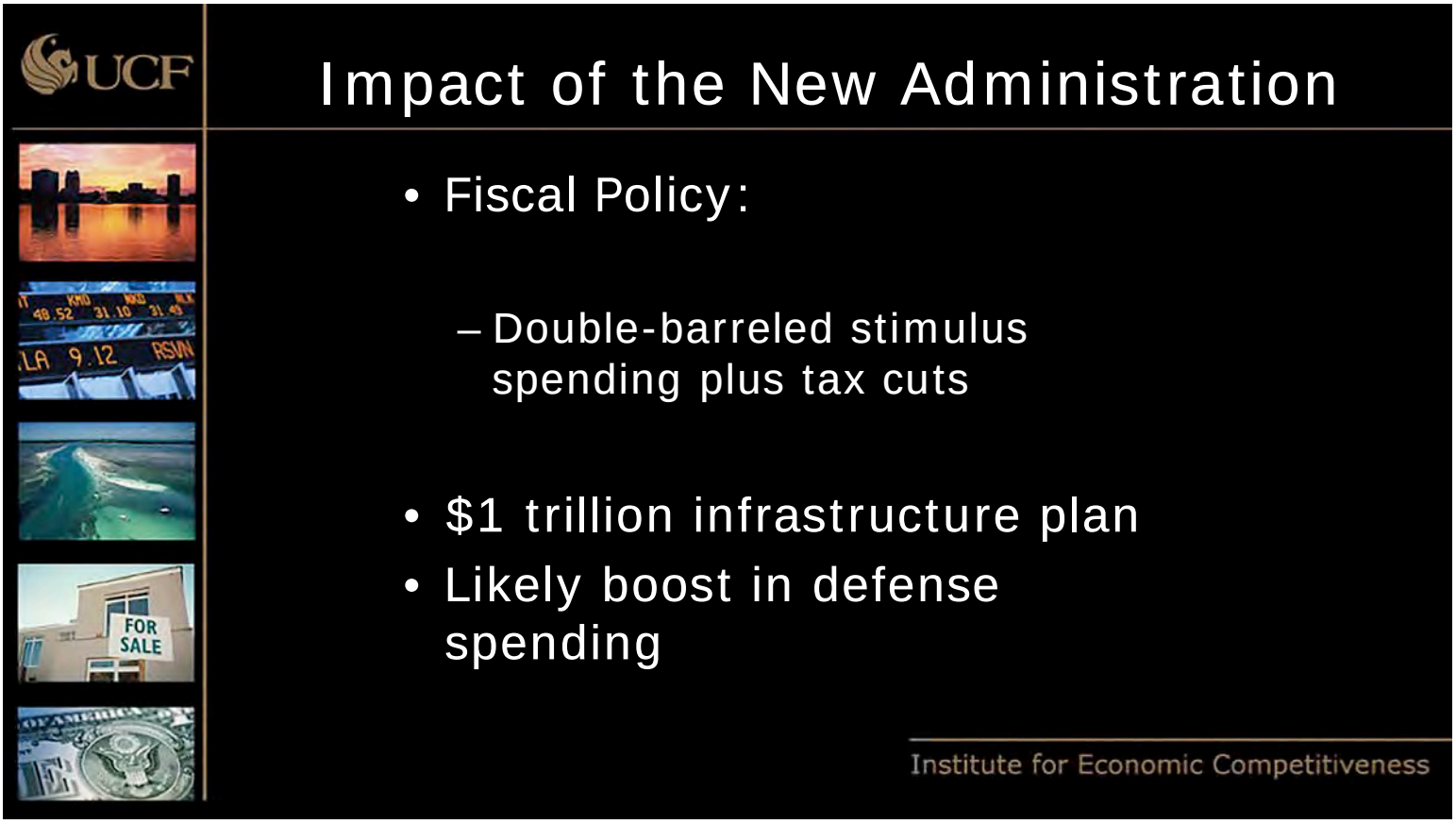
UCF
Impact of the New Administration
• Fiscal Policy:
– Double-barreled stimulus spending plus tax cuts
• $1 trillion infrastructure plan
• Likely boost in defense spending
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UCF
Impact of the New Administration
• Fiscal Policy:
• Tax reform
– Personal
– Corporate
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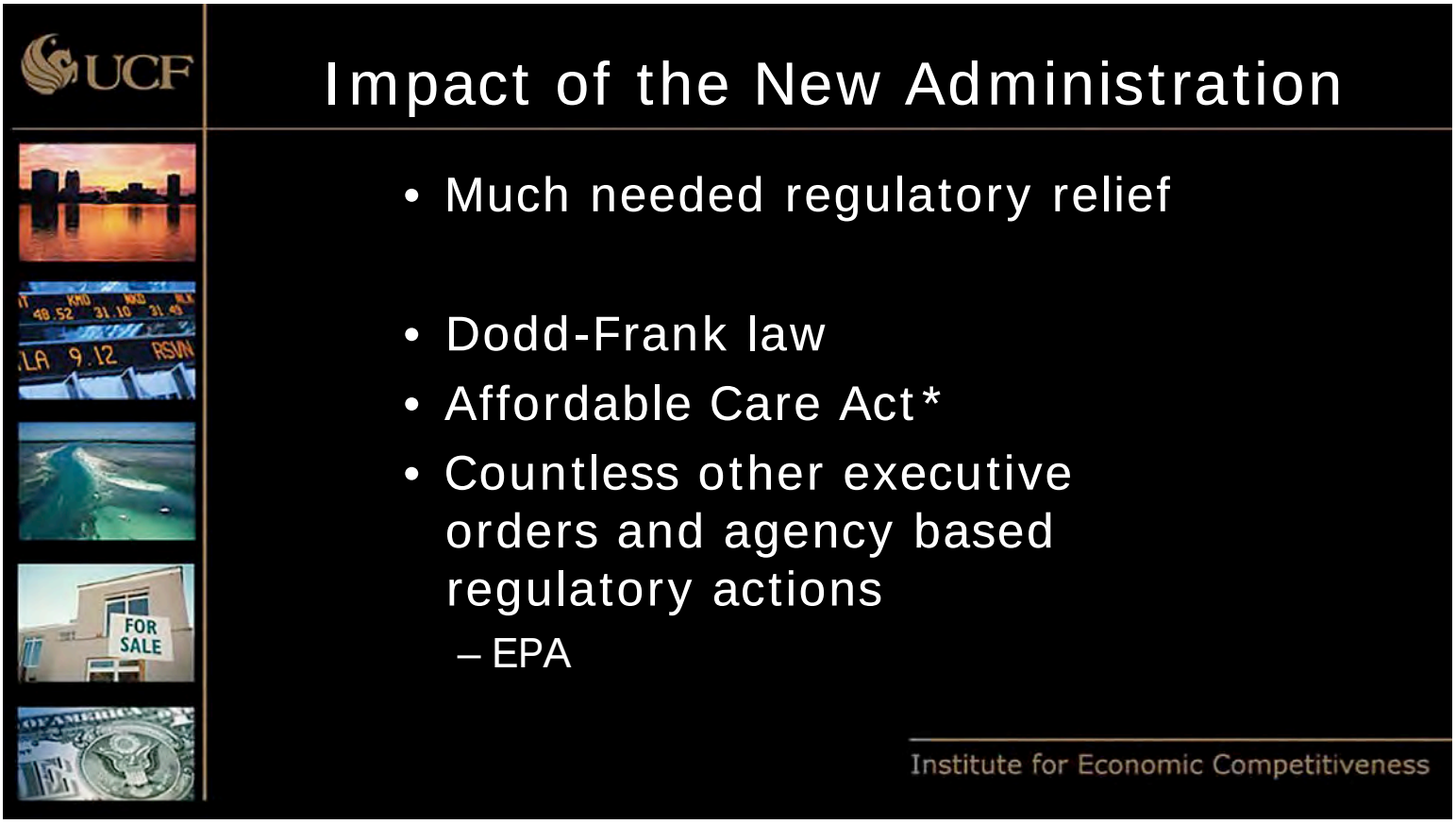
UCF
Impact of the New Administration
• Much needed regulatory relief
• Dodd-Frank law
• Affordable Care Act*
• Countless other executive orders and agency based regulatory actions
– EPA
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UCF
Impact of the New Administration
• Trade policy a potential pitfall
• Threats of tariffs and other trade barriers in response to unfair trade practices and currency manipulation
– Trade war possible?
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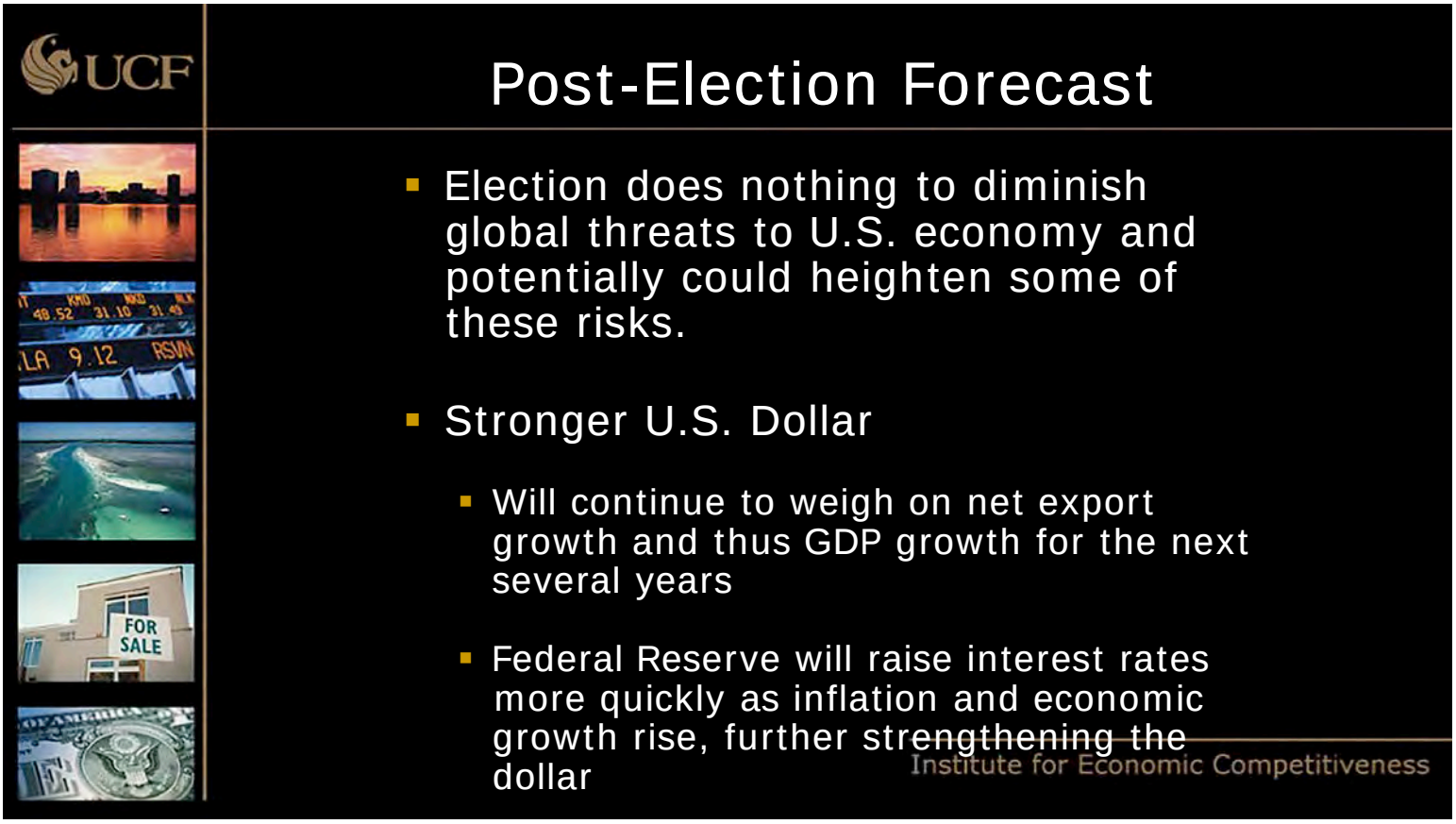
UCF
Post-Election Forecast
Election does nothing to diminish global threats to U.S. economy and potentially could heighten some of these risks.
Stronger U.S. Dollar
Will continue to weigh on net export growth and thus GDP growth for the next several years
Federal Reserve will raise interest rates more quickly as inflation and economic growth rise, further strengthening the dollar
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UCF
Impact of the New Administration
• New administration must avoid SkyMall™ Policies
▪ Sky Mall™ Policy:
▪ An Expensive Policy that Fails to Achieve its Desired Outcome
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U.S. Forecast
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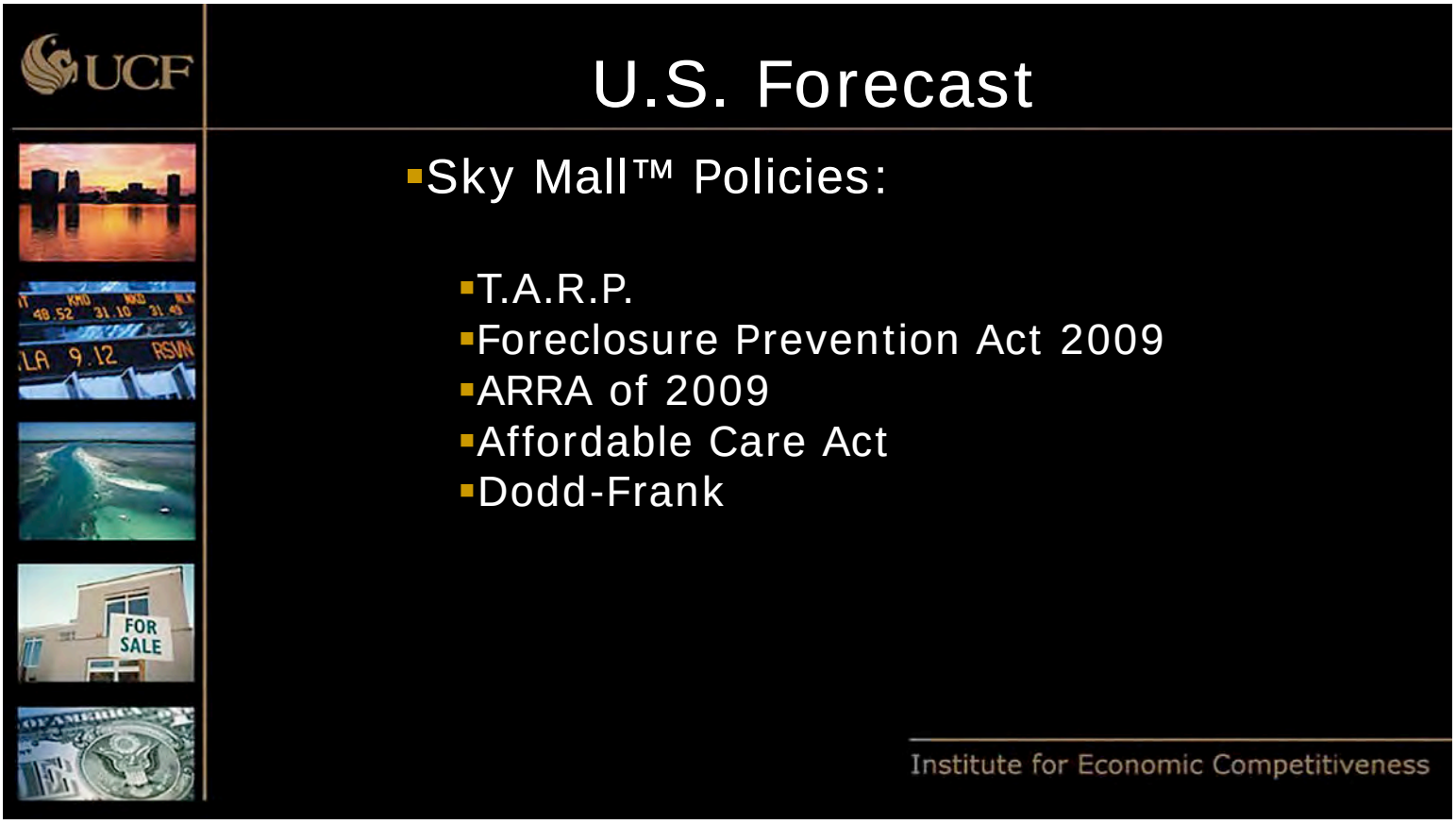
UCF
U.S. Forecast
Sky Mall™ Policies:
T.A.R.P.
Foreclosure Prevention Act 2009
ARRA of 2009
Affordable Care Act
Dodd-Frank
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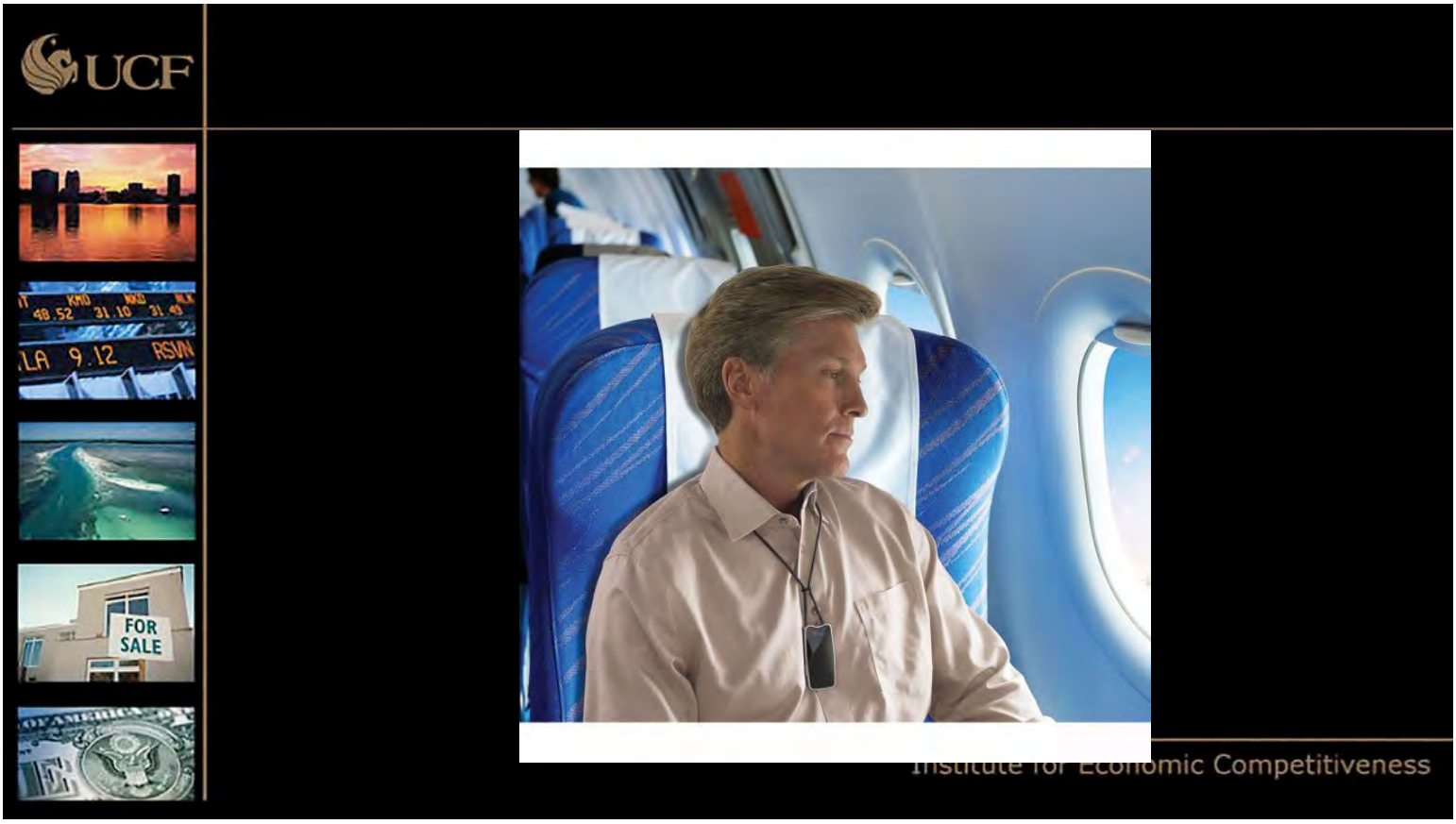
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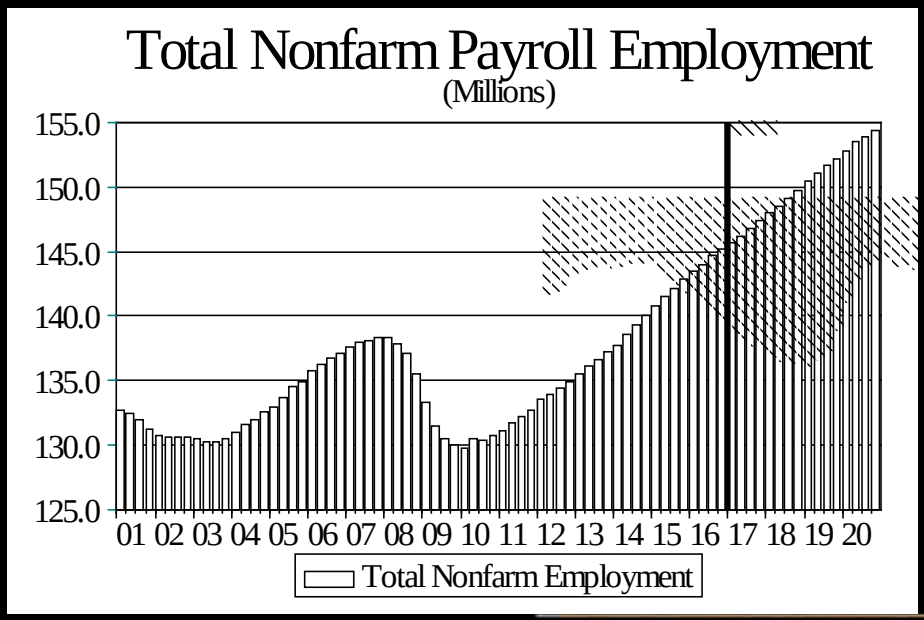
U.S. Forecast



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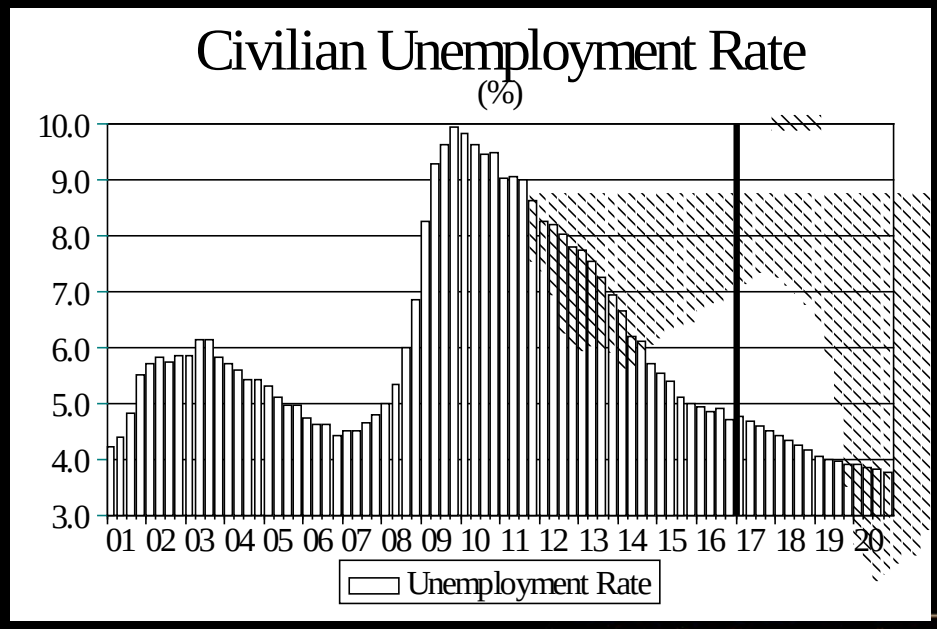
U.S. Forecast



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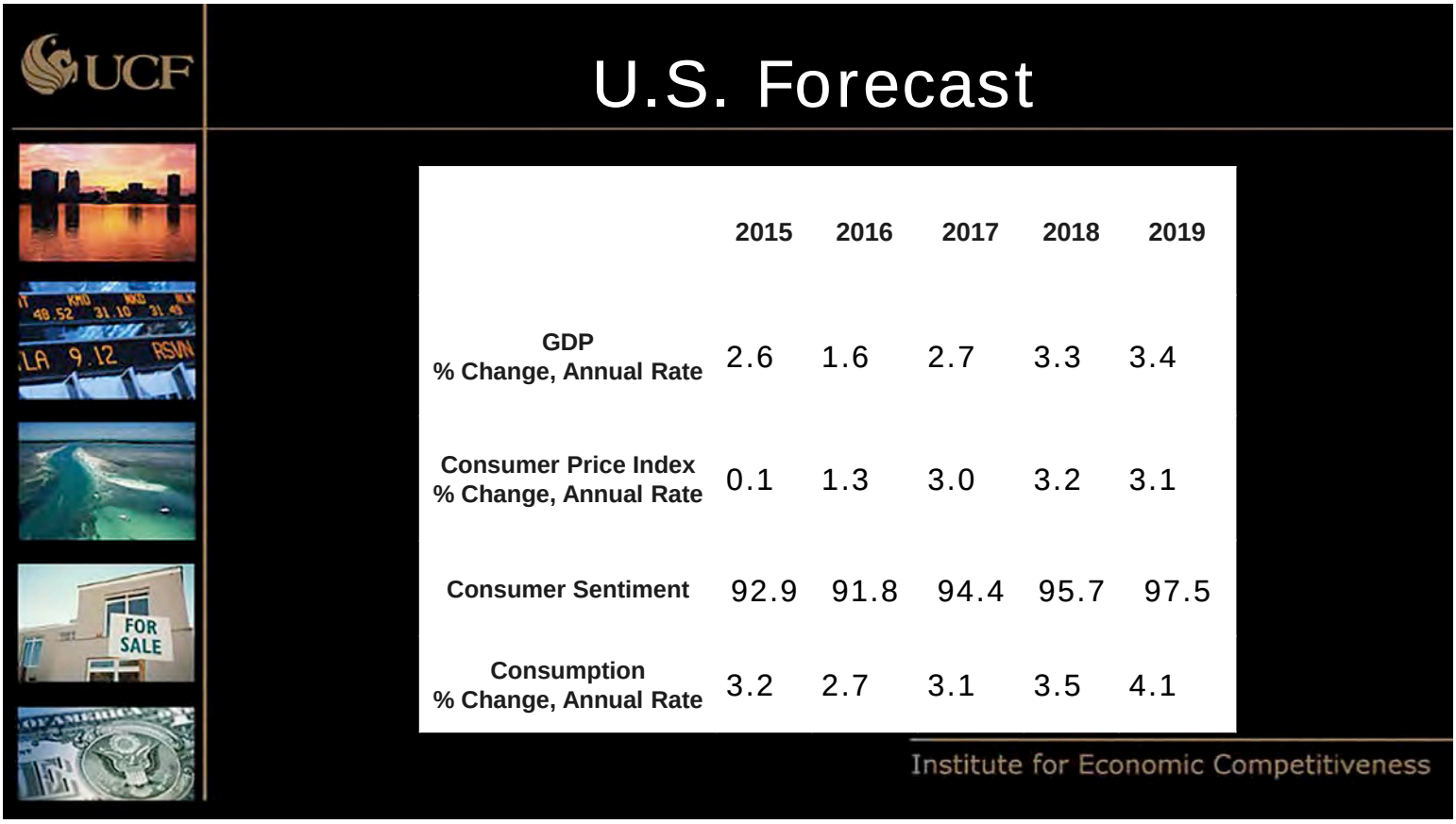
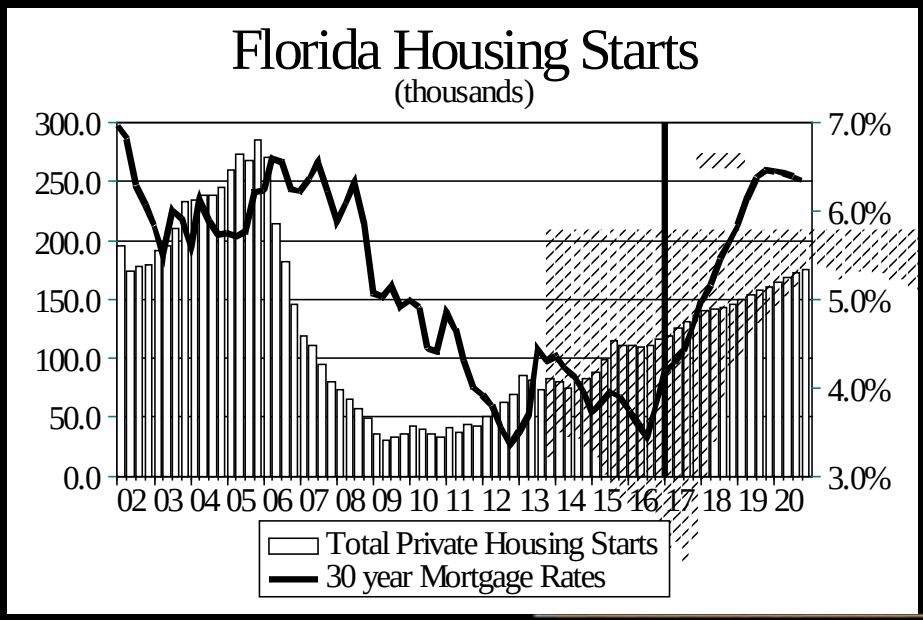


	2015	2016	2017	2018	2019
GDP % Change, Annual Rate	2.6	1.6	2.7	3.3	3.4
Consumer Price Index % Change, Annual Rate	0.1	1.3	3.0	3.2	3.1
Consumer Sentiment	92.9	91.8	94.4	95.7	97.5
Consumption % Change, Annual Rate	3.2	2.7	3.1	3.5	4.1

Florida Forecast



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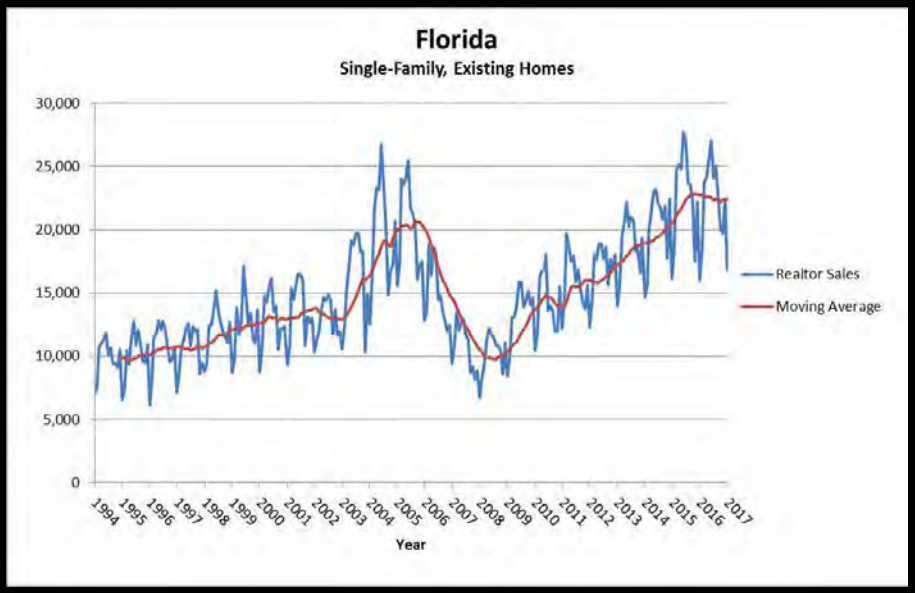
Florida Forecast



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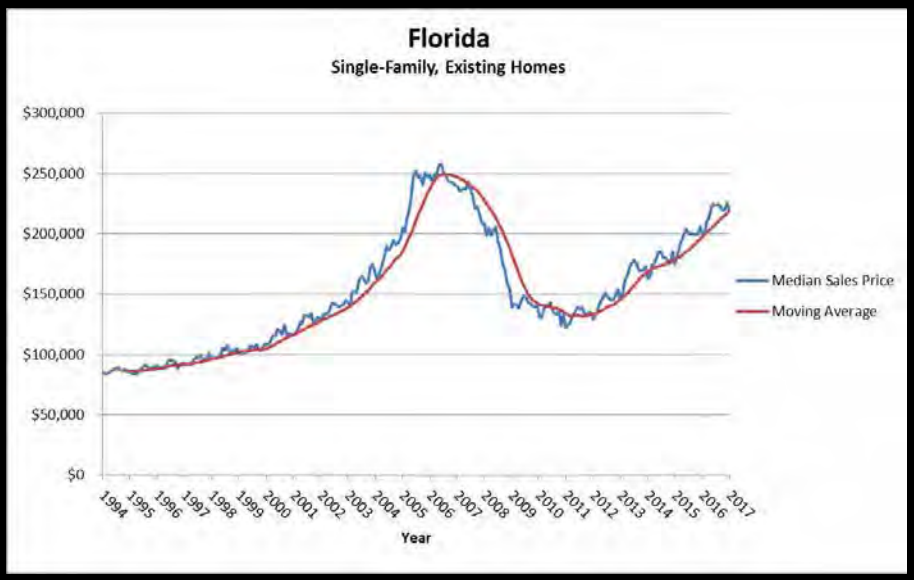
Florida Forecast



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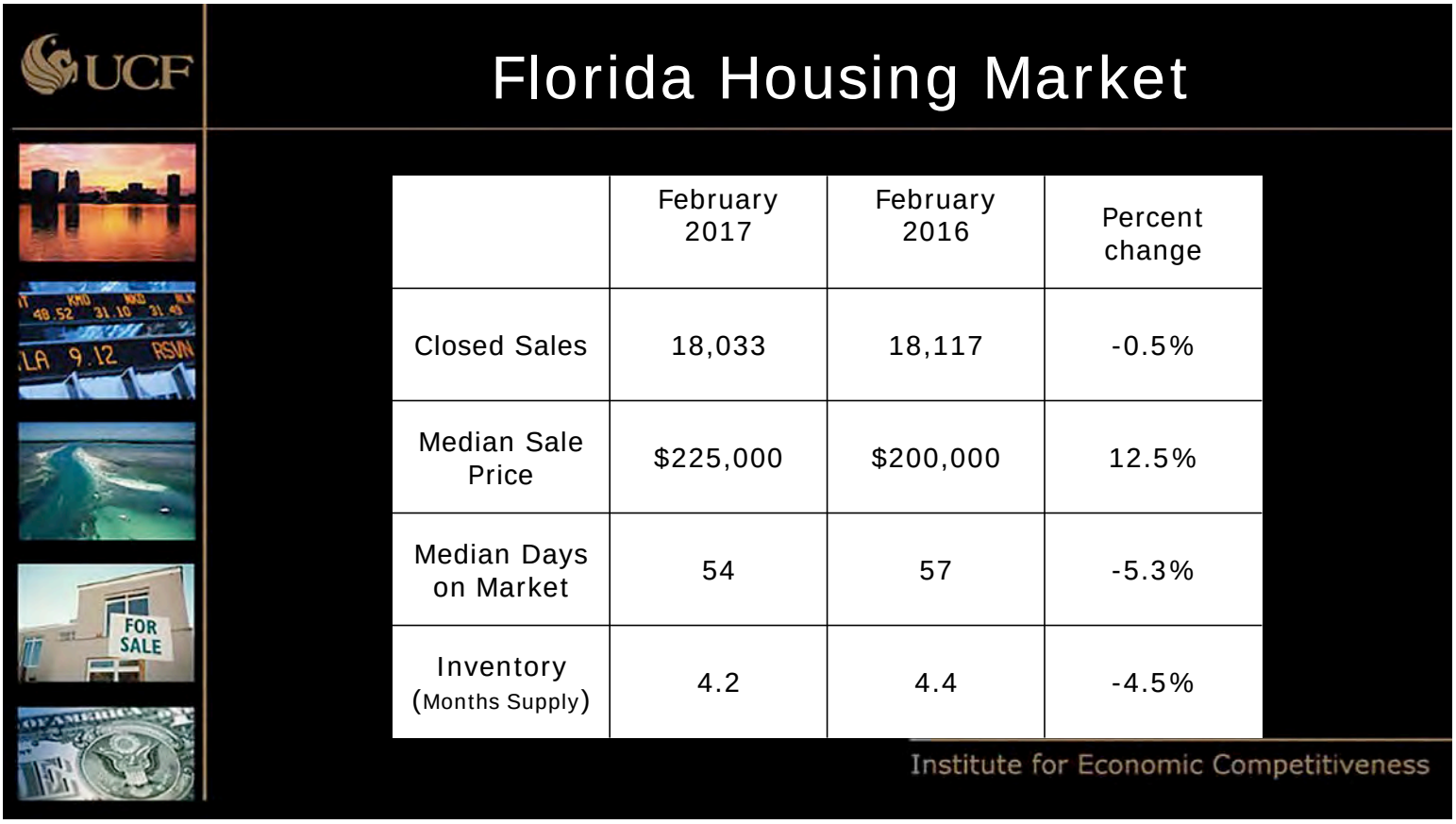
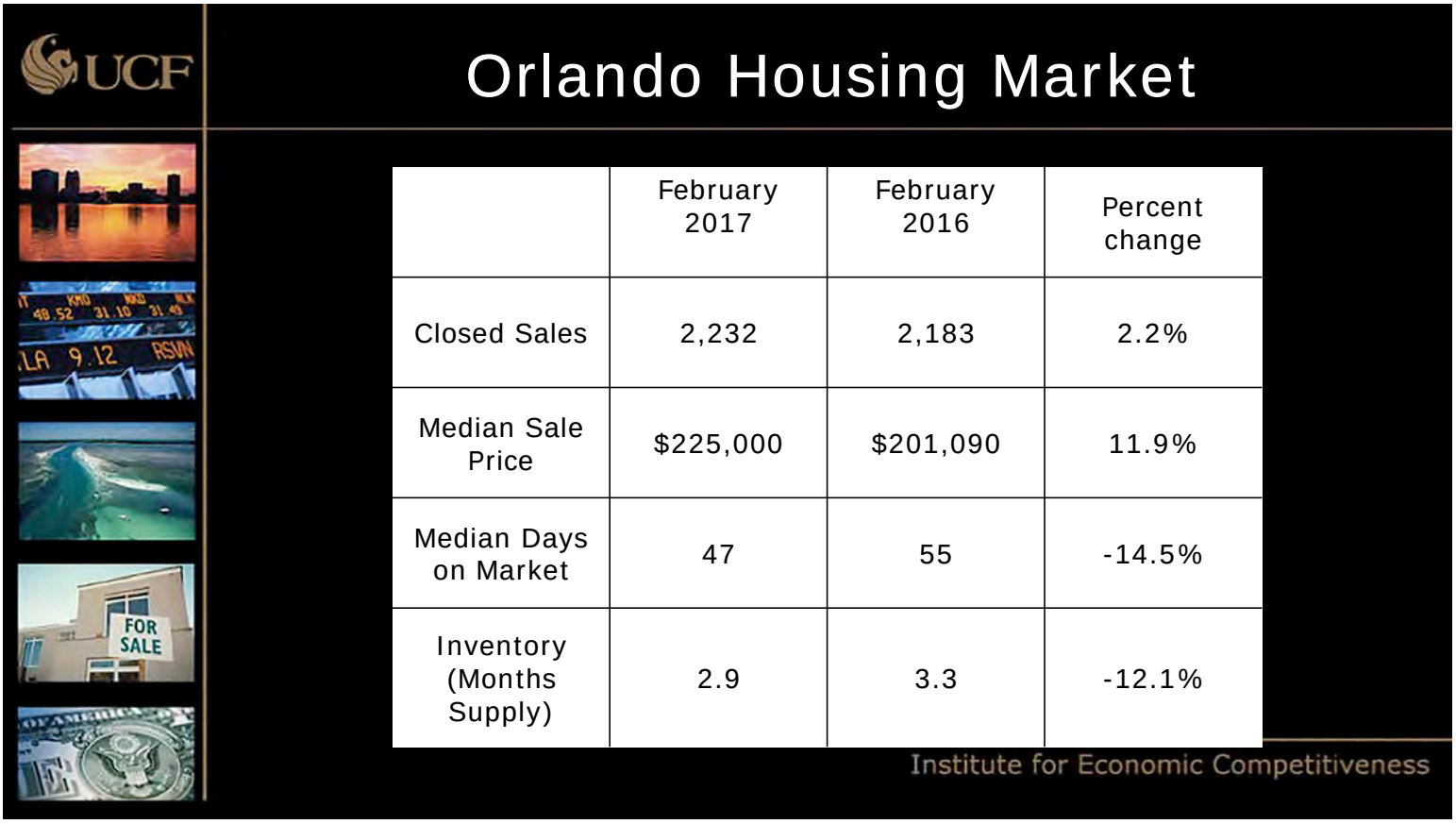


	February 2017	February 2016	Percent change
Closed Sales	18,033	18,117	-0.5%
Median Sale Price	$225,000	$200,000	12.5%
Median Days on Market	54	57	-5.3%
Inventory (Months Supply)	4.2	4.4	-4.5%



	February 2017	February 2016	Percent change
Closed Sales	2,232	2,183	2.2%
Median Sale Price	$225,000	$201,090	11.9%
Median Days on Market	47	55	-14.5%
Inventory (Months Supply)	2.9	3.3	-12.1%

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Jacksonville Housing Market

	February 2017	February 2016	Percent change
Closed Sales	1,470	1,463	0.5%
Median Sale Price	$218,000	$192,000	13.5%
Median Days on Market	62	71	-12.7%
Inventory (Months Supply)	3.6	4.2	-14.3%

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Miami Housing Market

	February 2017	February 2016	Percent change
Closed Sales	3,029	3,300	-8.2%
Median Sale Price	$314,872	$290,000	8.6%
Median Days on Market	58	61	-4.9%
Inventory (Months Supply)	5.0	4.9	2.0%

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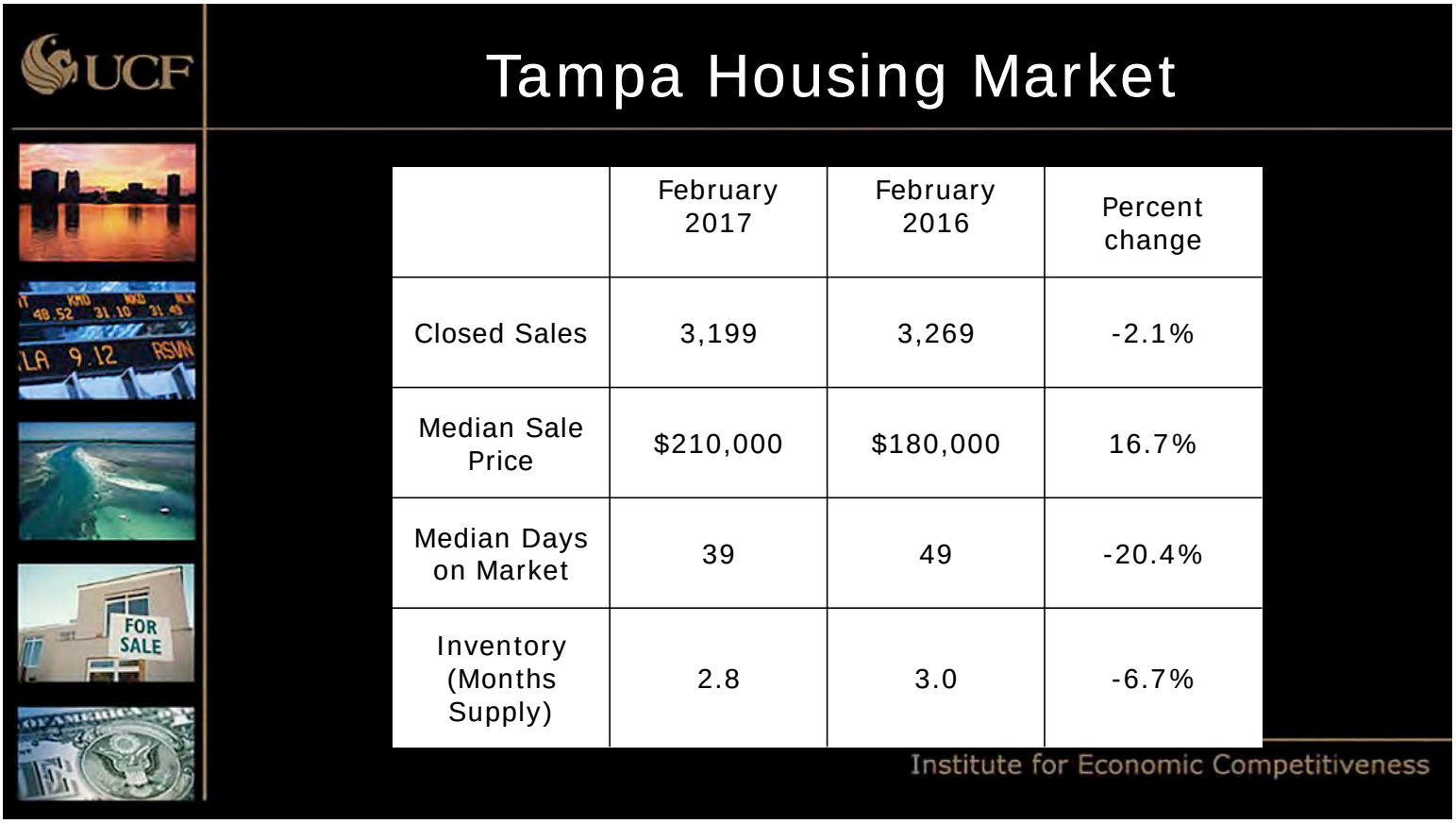

	February 2017	February 2016	Percent change
Closed Sales	3,199	3,269	-2.1%
Median Sale Price	$210,000	$180,000	16.7%
Median Days on Market	39	49	-20.4%
Inventory (Months Supply)	2.8	3.0	-6.7%

UCF
Florida Forecast
• Commercial Real Estate 2017
– Steady improvement to continue
• Improved job growth
• Strong demand from multifamily and industrial
• Retail and Office cooling
• Niche sectors offer higher yields
▪ Headwinds:
▪ Overseas instability
▪ Rising interest rates
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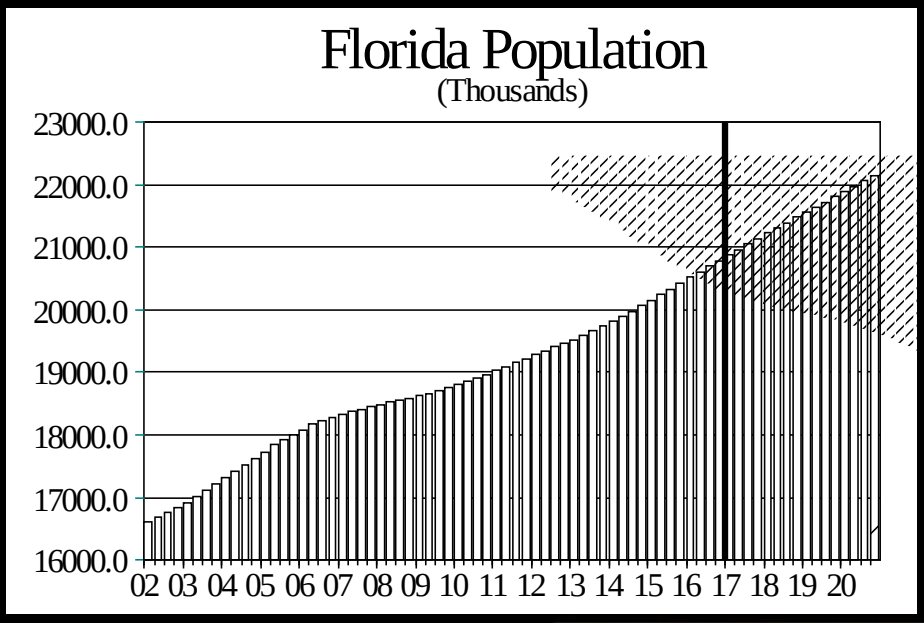
Florida Forecast



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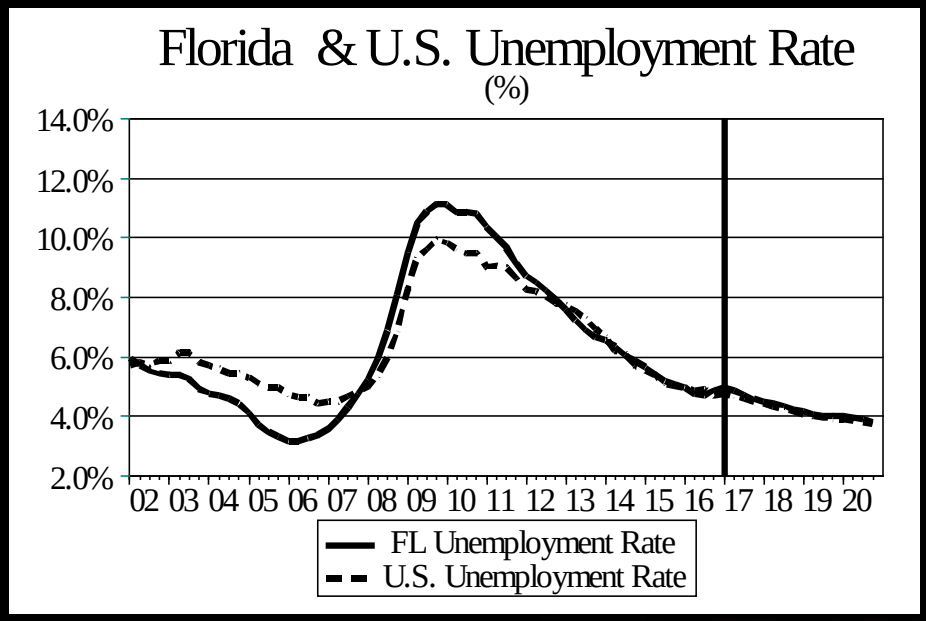
Florida Forecast



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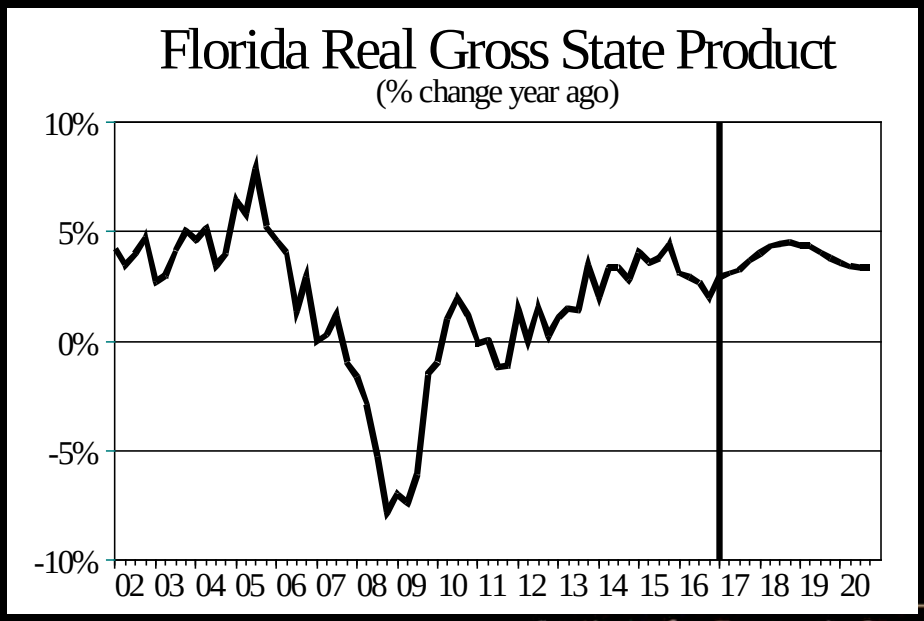

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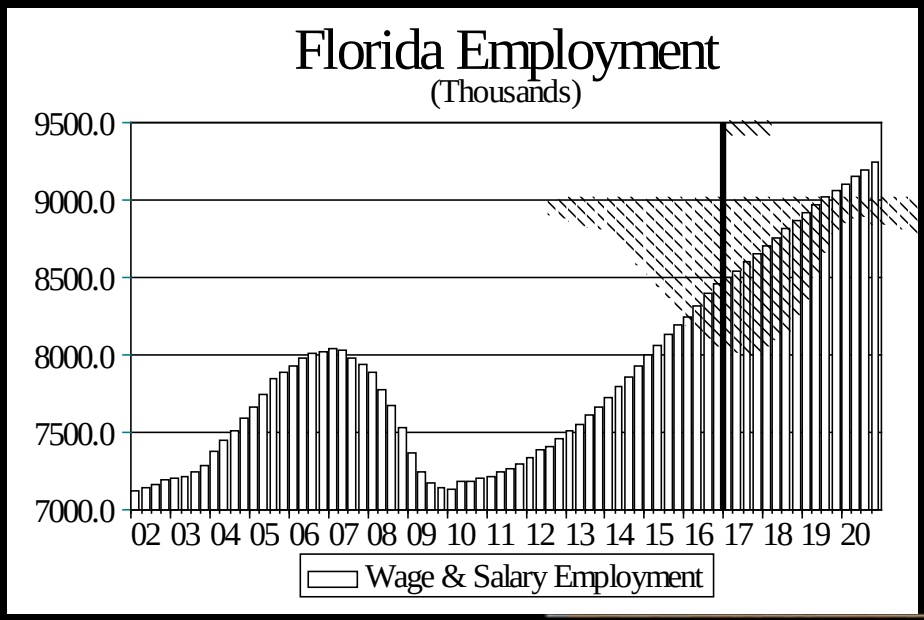

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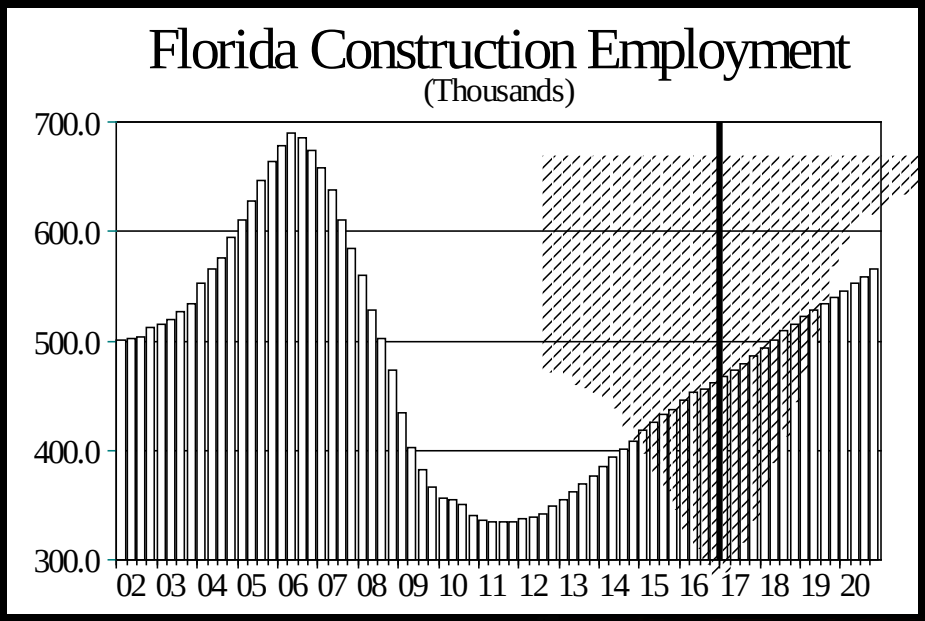

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Florida Forecast

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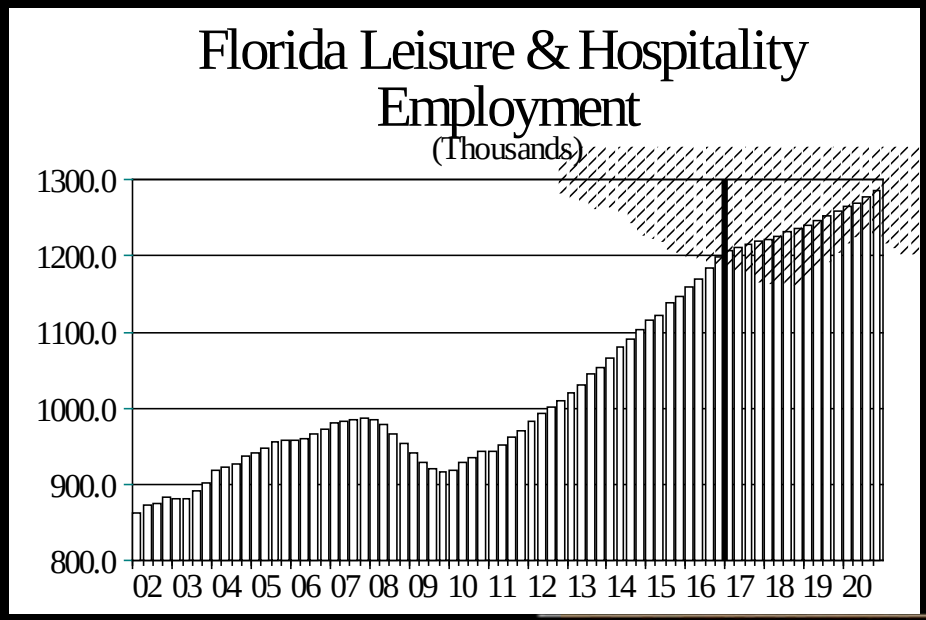
Florida Forecast



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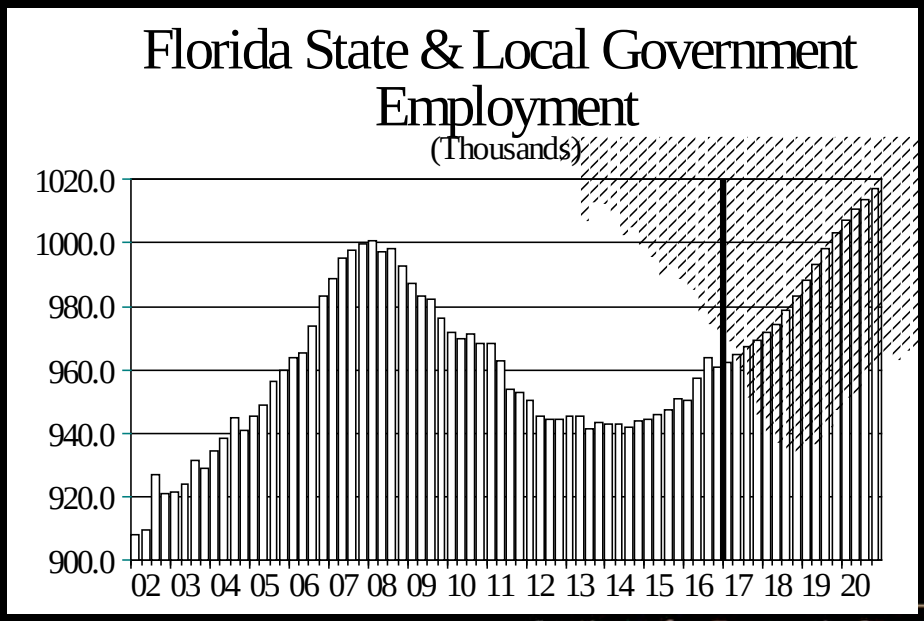

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2017-2020 Averages; Q1 2017 Forecast

Florida	
Sector	% Average Annual Growth
Professional & Business Services	5.6
Construction	5.1
Financial	2.3
Leisure & Hospitality	2.0
Trade, Transportation & Utilities	2.0
Education-Health Services	1.6
Manufacturing	1.4
State & Local Government	1.4
Information	0.3
Federal Government	-0.3

petitiveness

2017-2020 Averages; Q1 2017 Forecast

Region	Population Growth	
	Average % Chg	Rank
Florida	1.6	---
Deltona	1.7	4
Gainesville	1.0	11
Jacksonville	1.6	6
Lakeland	1.4	7
Miami	1.3	8
Naples	2.7	1
Ocala	1.8	3
Orlando	2.2	2
Palm Bay	1.3	9
Pensacola	0.9	12
Tallahassee	1.2	10
Tampa	1.6	5

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2017-2020 Averages; Q1 2017 Forecast

Region	Employment Growth	
	Average % Chg	Rank
Florida	2.4	---
Deltona	1.9	8
Gainesville	1.0	12
Jacksonville	2.3	4
Lakeland	1.7	9
Miami	2.1	6
Naples	2.9	2
Ocala	2.3	5
Orlando	3.0	1
Palm Bay	2.1	7
Pensacola	1.3	11
Tallahassee	1.5	10
Tampa	2.5	3

mpetitiveness

2017-2020 Averages; Q1 2017 Forecast

Orlando	
Sector	% Average Annual Growth
Construction	6.5
Professional & Business Services	6.1
Leisure & Hospitality	2.8
Education-Health Services	2.3
Financial	2.2
State & Local Government	1.8
Trade, Transportation & Utilities	1.6
Manufacturing	1.0
Federal Government	0.9
Information	0.8

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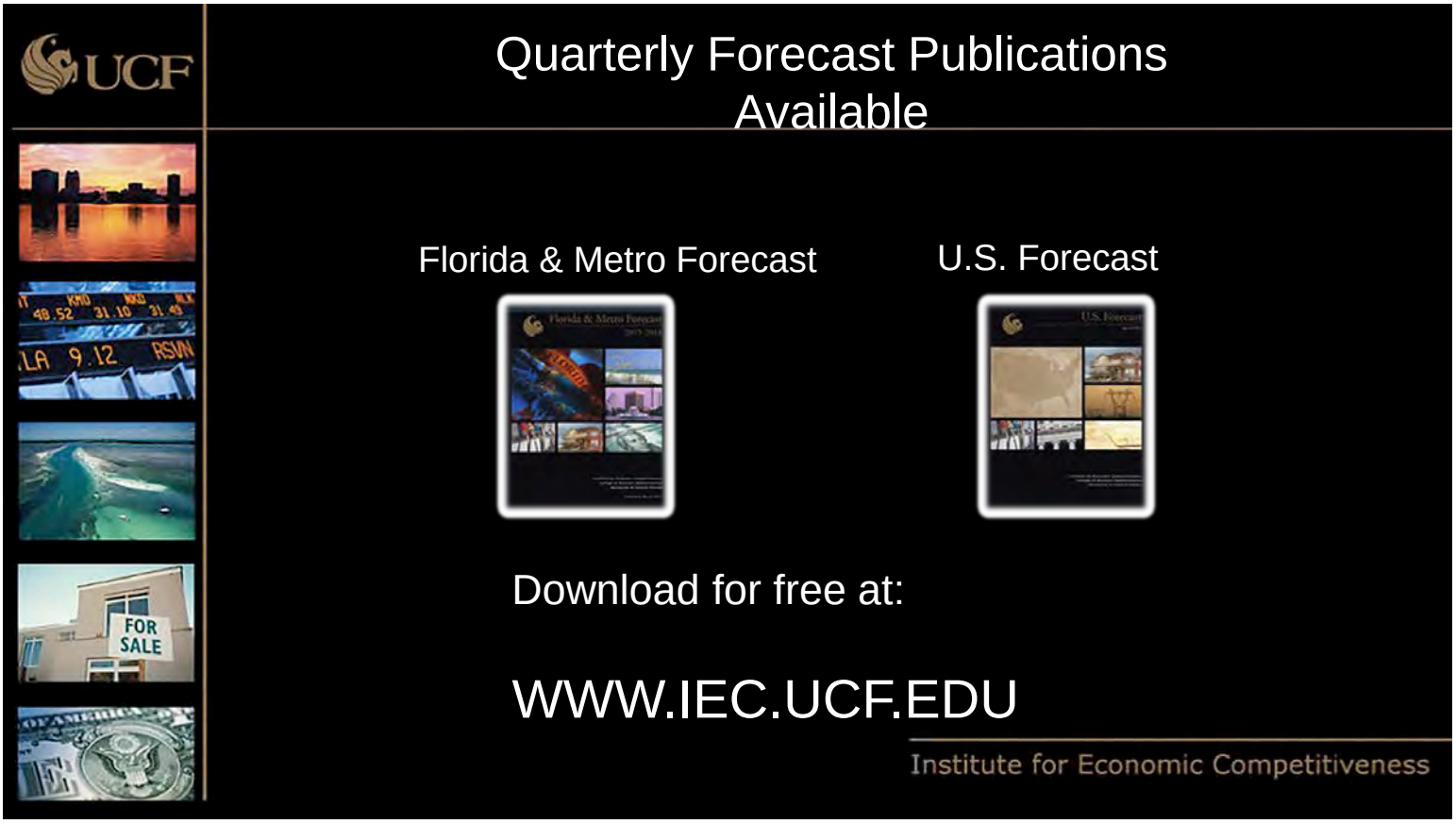
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Thank you
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Back to Speaker Topics

Fund Assembly

General Counsel's Perspective

Melissa Murphy, *Sr. Vice President and General Counsel, The Fund*

Back to Speaker Topics

Speaker Information

General Counsel's Perspective

Melissa Murphy,
Sr. Vice President and General Counsel, The Fund

I began working for The Fund in October of 2014. As General Counsel, I am using my 35 years of private practice experience to help The Fund continue to provide its lawyer members with everything they need to be successful in their real estate practices.

I really believe in the value an attorney brings to a real estate transaction. The Fund plays such a pivotal role in helping attorneys stay efficient in their practices and up-to-date on the laws and regulations; and the numbers at Assembly show we are doing it the right way. Watching the people here work so hard to support the membership is very energizing and motivating.

As The Fund looks to support attorneys in the future, I hope to help accomplish that goal in new and creative ways. I am excited about being part of this.

Back to Speaker Topics

Fund Assembly

The Fund and the 4th Floor: A Behind the Scenes Discussion on the 2017 Florida Legislative Session

George Moraitis, *Partner, Moraitis, Cofar, Karney, & Moraitis*
Greg Black, *Attorney, Metz, Husband & Daughton, P.A.*

Back to Speaker Topics

Speaker Information

The Fund and the 4th Floor: A Behind the Scenes Discussion on the 2017 FloridaLegislative Session

George Moraitis,
Partner, Moraitis, Cofar, Karney, & Moraitis

Representative George Moraitis is a partner with the Fort Lauderdale law firm of Moraitis, Cofar, Karney, & Moraitis, where he practices primarily in the areas of real estate, probate, and estate planning.

Rep. Moraitis was born and raised in Fort Lauderdale and is a graduate of Fort Lauderdale High School and the United States Naval Academy. After serving seven years on active duty as a submarine officer in the United States Navy during which he qualified as a Navy Nuclear Propulsion Engineer, George attended the University of Florida College of Law and then followed his father, George, Sr., into the practice of law.

In November 2010, Rep. Moraitis was elected as a State Representative. He currently represents District 93 that includes most of northeast Broward County. Rep. Moraitis serves on the Joint Administrative Procedures Committee (Alternating Chairman), Appropriations Committee (Vice Chair), Civil Justice & Claims Subcommittee, and Judiciary Committee.

Greg Black,
Attorney, Metz, Husband & Daughton, P.A.

Greg Black is an attorney with Metz, Husband & Daughton, P.A., and practices in the legislative affairs, administrative rulemaking, and state procurement areas of the firm. Mr. Black previously represented the Florida Bankers Association (FBA) and advocated on behalf of financial institutions of all sizes. In his role with FBA, he primarily focused on issues concerning financial services, insurance, and business entities.

Mr. Black serves as a Director for the Florida State University College of Law Alumni Board, and was recently appointed as Chair of the Development Committee, in addition to his participation in numerous civic and community activities. He is a member of the Seminole Torchbearer's and is an avid Seminole fan.

Mr. Black graduated from the Florida State University College of Law. While in law school, he co-founded the Volunteer Student Law Project which provides pro bono legal services through a partnership with the Legal Aid Foundation of the Tallahassee Bar Association.

Mr. Black earned his B.S. in Criminology, with a minor in Business, from the Florida State University. He was admitted as a member of the Florida Bar in 2010.

Back to Speaker Topics

Fund Assembly

Title Teasers

Moderator:
John Benson, *Associate Underwriting Manager, The Fund*

Panelists:
Connie Clark, *Associate Underwriting Manager, The Fund*
Benjamin Jepson, *Underwriting Counsel, The Fund*
Silvia Rojas, *Sr. Underwriting Counsel, The Fund*

Back to Speaker Topics

Speaker Information

Title Teasers

John Benson,
Associate Underwriting Manager, The Fund

John D. Benson is an Associate Underwriting Manager in the Palm Beach Branch with The Fund. He received his B.S. degree in business administration and economics from the University of Florida and his J.D. degree from Nova Southeastern University.

Prior to joining The Fund, Mr. Benson was in private practice with a concentration in real estate transactions and closings. He has been a guest lecturer at Nova Southeastern Law School and an adjunct professor at Palm Beach College. Mr. Benson is a member of The Florida Bar's Real Property, Probate & Trust Law Section and the Palm Beach County Bar Association.

Connie Clark,
Associate Underwriting Manager, The Fund

Connie Clark is an Associate Underwriting Manager with The Fund. She previously served The Fund as a Senior Claims Attorney, Vice President and Deputy Claims Manager, and Risk Manager.

Ms. Clark received her B.A. degree, with honors, from the University of Central Florida and her J.D. degree from the University of Florida College of Law. She is a past chair of the Title Insurance Litigation Committee of the American Bar Association's Tort, Trial and Insurance Practice Section.

Benjamin Jepson,
Underwriting Counsel, The Fund

Benjamin (Ben) Jepson is an underwriting attorney for The Fund, working in the Naples satellite office. Prior to becoming an underwriting attorney for The Fund, Ben was a Fund member for many years while running a private practice in Naples. His practice mainly focused on real estate, estate planning and probate.

Mr. Jepson is a volunteer for Meals of Hope, is a member of the Naples Area Board of Realtors and is a Past-President of the P.O.L.O. Club of Collier County.

Mr. Jepson obtained his B.S. degree in Psychology and his J.D. degree from the University of Florida and was admitted to the Florida Bar in 2000. He has been a presenter for seminars on trusts and is a member of the Real Property, Probate & Trust Law Section of the Florida Bar.

Back to Speaker Topics

Speaker Information

Title Teasers

Silvia Rojas,
Sr. Underwriting Counsel, The Fund

Silvia B. Rojas is a Senior Underwriting Counsel for The Fund, in Miami-Dade County. Before attending law school, she worked as a paralegal for various law firms during the times of carbon copies, shorthand and recording belts. She received her J.D. degree from University of Florida Law School and was admitted to The Florida Bar in 1980.

Before joining The Fund, Ms. Rojas' private practice was primarily centered on commercial and real estate transactions as well as probate. She is a Board Certified real estate lawyer and a licensed real estate broker in the State of Florida.

As a member of the Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar, she has served as chair, co-chair and vice-chair of a number of the Section committees (Mortgage Law, Real Estate Board Certification Seminar, Legislative Update, RPPTL Convention, and RPPTL Website), was program chair for the Florida Bar/Barcelona Bar Joint Seminar in Barcelona, Spain, and is a past Editor-in-Chief of ActionLine, The Florida Bar RPPTL Section magazine.

Ms. Rojas is the current editor of the Trusts Chapter of the Fund Title Notes and the author and current editor of the Standard Commitment Clauses Handbook and Affidavit Practice Manual used by Fund members and the Mortgage Modification Manual used by Fund examiners.

Title Teasers

Moderator:

John D. Benson, Associate Underwriting Manager

Expert Panelists:

Connie Clark, Associate Underwriting Manager

Ben Jepson, Underwriting Counsel

Silvia Rojas, Sr. Underwriting Counsel

Joint Tenancy and Judgments

Sam Reynolds, Ted Foil and Mike Wrap acquire non-homestead property as joint tenants with rights of survivorship. Some years later, Sam decides he would rather have his lineal descendants inherit his portion of the property, so he executes and records a deed to himself of any and all interest he may have in the property.

Mike passes away, testate, devising any and all property he may own to his only son, Cling Wrap. The will contains a power to sell by the personal representative. Mike has 3 properly recorded judgments liens against him totaling $9K but no execution has been issued as to any of the judgments.

For purposes of issuing a new policy to a proposed insured Buyer, what is required for each of the record title holders?

Joint Tenancy and Judgments

A. Deeds from Ted and Sam, and a personal representative's deed from Mike's estate, with notice to all creditors for the judgments which must be satisfied or released against the real property.

B. Deeds from Ted and Sam only. Nothing is required from Mike's estate and the judgments do not have to be satisfied or released as against the property.

C. Deeds from Ted and Sam only, but the judgments in Mike's estate must be satisfied or released as against this property.

Powers of Attorney

Yoda is selling Rogue One Estates and appoints R2-D2 as his attorney in fact under a power of attorney (POA).

The POA includes specific authority for R2-D2 to execute the deed of conveyance, is executed and contains two witnesses, but is not acknowledged.

For insuring purposes, may the POA be relied upon for execution of the deed in the sale of Rogue One Estates?

Powers of Attorney

A. Yes, the POA may be relied upon for insuring of the deed because it includes specific authority for the conveyance by the attorney in fact.

B. No, the POA may not be relied upon for insuring of the deed because it is not entitled to be recorded in the Public Records.

C. Yes, the POA may be relied upon for insuring of the deed because the force is always with you.

Deed in Lieu and Judgments

Loans R Us initiated a foreclosure on investment property against Danny Delinquent. There were several judgments against Danny and the judgment holders were included as defendants. The foreclosure proceeded to Final Judgment.

Prior to the scheduled judicial sale, Danny and Loans R Us negotiated a deed in lieu of foreclosure which Danny executed and delivered. The Final Judgment was satisfied, the LP terminated and the foreclosure dismissed. Loans R Us is now selling the property and believes the judgments have been eliminated by the Final Judgment and failure of the creditors to redeem them.

For insuring purposes, must the judgments be released of record as to the subject property?

Deed in Lieu and Judgments

A. No, the judgments do not need to be released of record as they were extinguished by the Final Judgment.

B. No, the judgments do not need to be released of record as the creditors failed to properly redeem them.

C. Yes, the judgments should be released of record.

Probate and Deeds

Tiny Dancer's will devised her non-homestead property, Yellow Brick Road Hotel, to Elton and John. Elton, as the Personal Representative, distributed Yellow Brick Road Hotel by PR's Deed to Elton and John. Simultaneously, Elton and John quit claimed Yellow Brick Road Hotel to Tommy Hilton.

The two deeds were recorded out of order with the quit claim deed recorded prior to the recordation of the PR deed. Tiny Dancer's estate has since been administered and closed. Tommy Hilton now desires to sell Yellow Brick Road Hotel.

May title to Yellow Brick Road Hotel be insured without any further deeds from Elton and John?

Probate and Deeds

A. Yes, under the after acquired title doctrine, title vests in Tommy Hilton.

B. Yes, subject to estate administration, title vested in Elton and John upon the passing of Tiny and the QCD to Tommy Hilton sufficiently passed title.

C. No, deeds must be obtained from Elton and John as the last deed of record vested title in their names.

UCC Financing Statements

Michael Member is examining title for the purchase of a manufacturing facility and discovers a Uniform Commercial Code (UCC) financing statement recorded within the last five years.

The statement contains the subject property legal description and describes different types of equipment, along with a statement that it is the intention that the equipment be characterized as personal property. The box indicating it is a fixture filing is also checked.

For insuring purposes, may an owner's policy be issued without exception for the UCC financing statements?

UCC Financing Statements

A. No, an owner's policy should not be issued without exception for the UCC financing statement because the description of the equipment could reasonably be deemed fixtures.

B. Yes, an owner's policy could be issued without exception for the UCC financing statement because it is unclear whether the equipment is personal property or a fixture.

C. Yes, an owner's policy could be issued without exception for the UCC financing statements because it is clear the equipment is personal property.

Limited Liability Company

Title to Blackacre, a parcel of vacant land, is vested in ONLY, LLC, a Florida limited liability company. Prior to his death two months ago, Oscar Only was the sole member of ONLY, LLC.

Angela, Oscar's only heir, is the personal representative of Oscar's testate estate. The letters of administration, the will which contains a power to sell and the order admitting the will are all recorded in the public records. Angela has recently received a contract to sell Blackacre.

For insuring purposes, does Angela have the ability to sell Blackacre before completion of the probate?

Limited Liability Company

A. Yes, Angela has the ability to sell Blackacre before completion of the probate because as the personal representative she can act on behalf of Oscar or any entity Oscar has an interest in.

B. Yes, Angela has the ability to sell Blackacre before completion of the probate provided an order distributing the assets of Oscar's is recorded prior to closing.

C. Yes, Angela has the ability to sell Blackacre before completion of the probate because as PR of Oscar's estate she has the authority to sell ONLY LLC's property.

Easements

Shortly before closing an apartment complex for your best developer client, David Dark Day, you receive a panicked call. It seems the adjoining property owner, Gilbert Go Green, had placed a solar energy trash compactor at the back of the complex under an agreement he had with the current owner. Gilbert claimed the owner thought it was a great idea and “shook hands” for the placement in order for the compactor to receive the optimum sun exposure. David wants the compactor removed because he plans to reconfigure the parking lot. Gilbert claims an easement for the compactor under Florida law which provides for the creation of solar easements. For insuring purposes, should an exception for an easement without a written agreement be shown?

Easements

A. Yes, an exception for the easement should be shown based on the claim that an easement was created.

B. Yes, an exception for the easement should be shown provided Gilbert and David enter into a formal written agreement

C. Yes, an exception for the easement should be shown because Gilbert has a valid solar easement under Florida law supporting renewable energy.

Lien Stripping

Wayne Dwade, after leaving Miami for the windy city falls into a great depression and finds himself in a Chapter 13 bankruptcy. Within the bankruptcy, his Miami home value is less than the mortgage balance and there is also a claim of lien for unpaid HOA assessments.

To avoid the association's claim of claim, Wayne's attorney files a motion to strip the secured association lien given the lack of equity in the property to justify its secured status. The court issues an order to strip the association's lien. Wayne completes his plan, obtains a discharge and is now selling his home to wipe away all memories of his Miami life.

For insuring purposes must the claim of lien be released of record?

Lien Stripping

A. Yes, the HOA claim must be released. Neither the lien nor the debt eliminated were stripped. The lien was not a mortgage, but a lien stemming from obligations under the deed restrictions.

B. No, the HOA claim does not need to be released. The lien is stripped. The association's claim shall not have any secured status upon issuance of the order.

C. No, the HOA claim does not need to be released. The lien is stripped, however the past due assessments may still be demanded upon subsequent purchasers of Wayne's property.

Easements and MRTA

The title examination for the sale of commercial property indicates covenants, conditions and restrictions (CCR) recorded in the back chain by a predecessor in title and an adjacent land owner. The root of title and all subsequent deeds do not refer to the recorded CCR.

The CCR granted a common access easement to a public road abutting each parcel and a restriction for commercial office use only. The easement areas of both parcels currently have buildings obstructing movement between the parcels which were built prior to the root of title.

The proposed Buyer intends on tearing down the buildings on the parcel being purchased. For purposes of insuring title can the CCR be removed as an exception?

Easements and MRTA

A. Yes, the CCR can be eliminated as an exception altogether.

B. Yes, the CCR can be eliminated as an exception except for the access easement which could again be in use after the building is torn down.

C. No, the CCR cannot be eliminated as an exception.

Attorney Charging Lien

Frank and Mary Nuptial were divorced in 2004. The divorce included rental property to be distributed under the property settlement agreement. During the course of the divorce, Frank and his attorney had a falling out which resulted in a court order imposing an attorney's charging lien against any real property interest of Frank.

Frank is now selling the rental property awarded to him in the divorce. The name search on Frank reveals the recorded order imposing the charging lien. To issue an owner's policy to the proposed Buyer, may the order imposing the charging lien be ignored?

Attorney Charging Lien

A. Yes, the charging lien may be ignored because no certified copy of the order was recorded and the lien was never perfected.

B. Yes, the charging lien may be ignored because the recording of the charging lien is more than 10 years ago, with no subsequent re- recording.

C. No, the charging lien may not be ignored and must be released.

Unsatisfied Mortgage

Jane is selling her vacation home on Lake Louise to Bob. Your title search reveals an unsatisfied mortgage dated January 3, 1990, executed by Jane in favor of HFS Loans, a Florida banking institution. The mortgage shows a maturity date of January 3, 2010.

When asked, Jane says the mortgage was paid off in 1999 when she refinanced. HFS Loans is no longer active on Sunbiz, the state website.

For purposes of issuing an owner's policy, must the HFS loan be satisfied of record?

Unsatisfied Mortgage

A. No, because under Sec. 95.281, F.S., more than 5 years has elapsed since the stated maturity date and no further inquiry is necessary.

B. Yes, the borrower is still the record title holder, therefore a satisfaction must be recorded.

C. No, provided an affidavit is obtained from the borrower addressing the circumstances of the payoff.

Foreign Asset Control Warning

Ana Agent was handling a $1,500,000 cash purchase for her buyer, Sally Anne Jones. As part of her examination of title, Ana ran a pre-closing name search on Sally Anne Jones and received the following message:

WARNING! NAME ALERT YOU MUST CALL FOREIGN ASSETS CONTROL 202 622-2490.

For purposes of issuing the owner's policy, what steps should Ana take prior to closing?

Foreign Asset Control Warning

A. Ana Agent should call the number listed in the warning, prior to closing, to determine if the Buyer is the same person as on the asset control list.

B. Ana Agent may ignore the warning as the buyer is paying cash and therefore any matters revealed by an ATIDS name search would not be covered by the owner's policy.

C. Ana Agent should determine whether the Buyer is a U.S. citizen and if so, Ana may ignore the warning.

Payment Bond

Mega Developer hires Crafty Construction to erect its new office tower. Crafty posts a payment bond and a copy of the bond is attached to the Notice of Commencement when recorded. The tower was completed but a disagreement arose between Mega and Crafty regarding some of the work. Mega withheld the final payment under the construction contract and Crafty filied a claim of lien against the project.

Due to the incomplete payment, Crafty failed to make final payments to several of its' sub-contractors, none of whom were in privity with Mega, resulting in liens being filed by the sub-contractors. Mega is now in the process of selling the tower.

For purposes of issuing an owner's policy, which of the liens should be released?

Payment Bond

A. All of the liens should be released, as the payment bond expired upon completion of construction.

B. All the liens, except that of Crafty Construction, should be released, as the payment bond acts to transfer liens only in favor of the contractor.

C. Only the lien of Crafty Construction needs to be released, as the other claims of lien filed subsequent to execution and delivery of the bond are transferred to the bond.

LLC and D-I-V-O-R-C-E

Key Lime, LLC, owned a marina property in Key West. Maria and Tony were the sole members. After Maria discovered that Tony was exporting things besides key limes, Maria and Tony divorced.

In the marital settlement agreement, Tony was required to convey the property owned by the LLC to Maria, individually, as well as transfer his ownership interest in the LLC. When Maria subsequently went to sell the property, it was discovered that the deed from the LLC was signed by Tony individually and not on behalf of the LLC.

The commitment called for a corrective deed from the LLC to the proposed insured Buyer. For insuring purposes, who signs the corrective deed to Maria?

LLC and D-I-V-O-R-C-E

A. Maria, as the only remaining member of Key Lime LLC.

B. Tony, as he signed the original deed that is now being corrected.

C. Maria and Tony, as they both were members of the LLC when the original deed was executed.

CEB Liens and Homestead

Jon and Fran own Greenacre, their homestead property. Due to an unfortunate skiing accident while on vacation, Jon was unable to maintain the property and it fell into disrepair.

Despite numerous attempts to remedy the situation, the City was forced to file a code enforcement (CEB) lien against the property. Jon and Fran are now trying to obtain a loan to make the much needed repairs.

For purposes of issuing a loan policy, must the CEB lien be satisfied after confirming the violation was brought into compliance?

CEB Liens and Homestead

A. No, the loan policy can be issued without satisfaction of the CEB lien with a homestead affidavit executed by Jon and Fran.

B. No, the loan policy can be issued without satisfaction of the CEB lien following a declaratory judgment action that the CEB lien does not attach to the homestead property.

C. No, the loan policy can be issued without satisfaction of the CEB lien because CEB liens are exempt from the homestead protection of forced sale.

Rating

Mary J. Dime is obtaining a $300,000 loan on her homestead property with Refi-Relief Bank. The new loan will be used to payoff her existing loan with Nickel and Dime Bank, N.A. and take out some equity to start-up a new medical dispensary. The outstanding balance of her existing mortgage is $240,000.

For the purposes of issuing a loan policy to Refi-Relief Bank, can substitution rates be applied?

Rating

A. No, substitution loan rates would not apply because the lenders are not the same.

B. Yes, substitution loan rates would apply because the outstanding principal balance of the existing mortgage is less than $250,000.

C. Yes, substitution loan rates would apply because the transaction is a refinance.

Military Power of Attorney

Freddy and Judy Mars, a married couple, are selling their homestead property. Judy is currently on active military duty and will be unavailable to attend closing.

While on base, Judy executes a specific power of attorney (POA) dated January 1, 2017, which authorizes the sale of homestead property, is notarized, but contains no witnesses. The power of attorney contains a preamble that identifies the instrument as a military power of attorney.

Can the POA be used for insuring purposes?

Military Power of Attorney

A. Yes, the power of attorney is acceptable for insuring purposes because it is a military form power of attorney.

B. Yes, the power of attorney is acceptable for insuring purposes because witnesses are not required for inter-spousal POAs.

C. No, the power of attorney is not acceptable for insuring purposes because it was not properly witnessed.

IRA Custodian

Record title to Blackacre is vested in Acme Bank, as custodian for the benefit of the Fred Smith Individual Retirement Account under agreement dated August 15, 2008.

Blackacre is now being sold to a bona fide purchaser for fair market value. Acme Bank is in good standing, duly qualified as an IRA custodian under federal law and still serving as custodian of the IRA.

For insurance purposes, who must be recited as grantor and execute the deed of conveyance?

IRA Custodian

A. Acme Bank, as custodian for the benefit of the Fred Smith Individual Retirement Account under agreement dated August 15, 2008, and Fred Smith, individually, with appropriate non-homestead language.

B. Fred Smith, individually with appropriate non-homestead language.

C. Acme Bank, as custodian for the benefit of the Fred Smith Individual Retirement Account under agreement dated August 15, 2008.

Probate and Homestead

Ted Guy was the sole owner of his homestead property. At the time he created his will, he was un-married and had three adult children, Liv, Harry and Happy. In the will, he specifically excluded Harry and Happy, leaving the his entire estate to Liv.

After looking for love in all the wrong places, Ted finally remarried, to his new wife, Anita. Unfortunately their marriage was short-lived, and Ted passed away within a year. His son, Harry was appointed personal representative (PR) and is now wishing to sell the property based upon a proper power of sale in the will. There has been no determination of homestead.

For the purposes of insuring the proposed Buyer, who must execute the deed?

Probate and Homestead

A. Only Harry, as the appointed personal representative with the authority to convey the property under the will.

B. Harry, as PR and individually, and Liv, because the property was devised to a specific heir and there has been no determination of homestead in the probate.

C. Harry, as PR and individually, and Liv, Happy and Anita.

Form 9 coverage

Cliff Rivers is refinancing his home. Your review of his existing survey reveals the following encroachments: 1) a corner of the house into the set back established by the local zoning code; 2) the air conditioner pad into a platted set back; 3) the swimming pool deck, pool shell and 10’ of the house into a the HOA Lake maintenance easement; and 4) the paver driveway and mailbox into the public ROW.

This is a very good customer of your lender client who wants to make this loan because there is some equity in the property and requests affirmative coverage.

For insuring purposes, what must be done to provide the lender the affirmative coverage they requested with the loan policy?

Form 9 coverage

A. Replace the standard survey exception with a specific survey exception and provide a Form 9-06 endorsement. After all, there is equity in the property.

B. Replace the standard survey exception with a specific survey exception and advise the lender that the Form 9-06 endorsement cannot be issued due to the several encroachments that exist.

C. Replace the standard survey exception with a specific survey exception containing language that no coverage is extended for the encroachment of the pool shell and the house, and provide a Form 9-06 endorsement.

CEB Lien and JTWROS

Paul Putin is the owner of Radioactive Estates, a solid waste storage site. In 2010, a code enforcement lien (CEB) pursuant to Ch. 162, F.S., was recorded against Radioactive Estates.

Paul and his daughter, Helga, as joint tenants with rights of survivorship, own Whiteacre, that lies just north of Radioactive Estates, and situated in the same county. Paul passes away in 2012. Helga is now selling Whiteacre.

For the purposes of insuring the sale, must the 2010 code enforcement lien be released?

CEB Lien and JTWROS

A. Yes, the CEB must be released pursuant to Sec. 162.09, F.S., which provides a CEB attaches to any and all real property owned by the violator.

B. Yes, the CEB must be released because the violation on Radioactive Estates has not been brought into compliance.

C. No, the CEB does not need to be released because Whiteacre passed free and clear of lien upon the death of Paul.

Guardian ad litem in Foreclosure

ABC Home Loans filed a foreclosure action against a homeowner who had defaulted. The homeowner was served through an adult daughter who was living with her father. The return of service comments states the daughter advised the processor her father was declared mentally incapacitated.

No guardian ad litem (GAL) was appointed in the foreclosure action nor did the court enter any orders that a GAL was not necessary. The foreclosure went through final judgment and a certificate of title (CT) was issued to the Plaintiff, who is now selling to a bona fide third party purchaser.

May a title policy be issued insuring the BFP?

Guardian ad litem in Foreclosure

A. Yes, there was no objection by the defendant for lack of an appointed GAL and the foreclosure was successfully completed through issuance of the CT.

B. Yes, because a bona fide third party purchaser who was not a part of the foreclosure action takes title free from the claims of the party defendants in these cases.

C. Yes, but with a requirement of re-foreclosure to address the lack of an appointed GAL.

Homestead and Probate

Zachary Jacobs acquired title to Greenacre in 1984. Zachary married Winnie in 1990 and she moved into Greenacre where the two lived together in wedded bliss until death did them part. Zachary died intestate in 2010, and had no lineal descendants.

No deed was ever given to establish a tenancy by the entireties with Winnie. Winnie continued to reside in the subject property and has now entered into contract to sell the property to a third party BFP for value.

For insuring purposes is a probate required in order for Winnie to sell the property?

Homestead and Probate

A. Yes. It must be established that Zachary died intestate and that his sole heir was his surviving spouse, Winnie.

B. No, Winnie as surviving spouse convey the homestead property.

C. Yes, the property must be judicially determined to be Zachary's homestead.

Notary Seal

In typical rush fashion, you receive a contract from your most loyal real estate agent to handle the sale of residential property valued at $300,000 which must close this week. In the examination of title, you discover that the deed vesting title into the seller has no notary stamp in the acknowledgment.

The seller produces an owner's policy issued within the last year, in the amount of $250,000, by an underwriter other than Old Republic. The policy contains no exception for the error in the insured deed.

May a policy insuring the sale be issued without any curative action?

Notary Seal

A. Yes, with a letter of indemnification from the other underwriter because this matter is not covered by the MIT (Mutual Indemnification Treaty).

B. Yes, with a letter of indemnification *with undertaking* because the new policy to be issued exceeds the amount of the current owner's policy.

C. Yes, with no further curative action as a matter covered the MIT (Mutual Indemnification Treaty).

Title Teasers

Thank you for attending

Back to Speaker Topics

Fund Assembly

Communicating the Benefits of Owner's Title Insurance

Wayne Stanley, *Director of Public Affairs, American Land Title Association*

Back to Speaker Topics

Speaker Information

Communicating the Benefits of Owner's Title Insurance

Wayne Stanley,

Director of Public Affairs, American Land Title Association

Wayne M. Stanley currently serves as Director of Public Affairs for the American Land Title Association (ALTA) in Washington, D.C. In this capacity, he directly oversees ALTA's Homebuyer Outreach Program, maximizes media outreach with national and local press, communicates and drives results for ALTA's Title Action Network and spearheads ALTA's digital strategy.

Mr. Stanley was recently acknowledged by Bisnow as one of Washington, D.C.'s Top Association Innovators.

Back to Speaker Topics

ALTA'S HOMEBUYER OUTREACH PROGRAM PRESENTS:

FREE VS. PAID TOOLS

10 Ideas to Increase Your Consumer Education for FREE

- Update your Facebook page with HOP graphics and language
- Send a HOP welcome email to buyers or sellers the moment you receive a title order
- Start an Instagram account with videos from your staff using phrases from the ALTA Manifesto
- Use HOP language on your Twitter account
- Swap out your email signature with new HOP graphics or tips each quarter
- Change your company voicemail or hold music to include "protect your property rights"
- Utilize HOP tutorials to learn how to edit our PDFs
- Present at local first-time homebuyer seminars using HOP PowerPoints
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- Provide new HOP REALTOR resources to your clients using ALTA.ORG/REALTOR

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Back to Speaker Topics

Fund Assembly

OMG! Oil, Mineral and Gas Rights in Florida: A Guide for Real Estate Attorneys

Garret Barnes, *Founding Partner, Barnes Walker Title, Inc., and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC*
Adron Walker, *Founding Partner, Barnes Walker Title, Inc., and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC*

Back to Speaker Topics

Speaker Information

OMG! Oil, Mineral and Gas Rights in Florida: A Guide for Real Estate Attorneys

Garret Barnes,

Founding Partner, Barnes Walker Title, Inc., and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC

Garret Barnes is a founding partner in 1995 of Barnes Walker Title, Inc. and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC, in Bradenton, Florida, where he practices in the areas of real property law, residential and commercial transactions, land development and planning, administrative law, and business law.

Mr. Barnes received his Bachelor of Science degree in Business from Wake Forest University at Winston-Salem, North Carolina, in May 1987, and earned his Juris Doctor from Stetson University College of Law in Gulfport, Florida, in May 1991. He was admitted to The Florida Bar in 1991.

Mr. Barnes' community and professional commitments include being a past Director of the Manatee County Chapter of the American Red Cross, a past Director of the United Way of Manatee County, a past President and current Trustee of the Board of Trustees of St. Stephen's Episcopal School, a past member of the Kiwanis Club of Bradenton, past Vice President of the Board of Trustees of the South Florida Museum, and past Secretary and past member of the Vestry for Christ Episcopal Church and current member of the attorney/realtor section with Realtor Association for Sarasota and Manatee Counties.

Mr. Barnes is a member of The Florida Bar, its Real Property, Probate and Trust Law Section, and the Manatee County Bar Association.

Back to Speaker Topics

Speaker Information

OMG! Oil, Mineral and Gas Rights in Florida: A Guide for Real Estate Attorneys

Adron Walker,

Founding Partner, Barnes Walker Title, Inc., and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC

Adron H. Walker is a founding partner in 1995 of Barnes Walker Title, Inc., and Barnes, Walker, Goethe, Hoonhout, Perron & Shea, PLLC, in Bradenton, Florida, where he practices in the areas of business law and real property law. He represents clients in the acquisition and sale of businesses (including manufacturing concerns, multi-store fast food franchises, and multiple small businesses of all types), and commercial properties (including marinas, bank office buildings, land developer sales, etc.).

Mr. Walker received a Bachelor of Science degree in Accounting magna cum laude in May 1977, from Stetson University in Deland, Florida, and earned his Juris Doctor degree from Stetson University College of Law in Gulfport, Florida, in May 1980. He was admitted to The Florida Bar in 1980.

Mr. Walker served as a Captain in the U.S. Army JAG (legal) Corps for more than 4 years prior to moving to Bradenton.

Mr. Walker is a member of The Florida Bar, its Real Property, Probate and Trust Law Section, and the Manatee County Bar Association.

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May, 2017

OMG!
OIL, MINERAL, AND GAS RIGHTS IN FLORIDA: A GUIDE FOR REAL ESTATE ATTORNEYS

We're sure you've heard before the Ballad of Jed Clampett:

Come and listen to my story about a man named Jed
A poor mountaineer, barely kept his family fed,
Then one day he was shootin' at some food,
And up through the ground come a bubblin' crude.

Oil that is, black gold, Texas tea.

For you more experienced attorneys and you younger attorneys who watch the METV or TV Land channels, you probably know by heart the lyrics to the theme song for the old *Beverly Hillbillies* situation comedy.

While ol' Jed Clampett became a multimillionaire and moved to Beverly Hills when his errant shot at a rabbit struck oil, rights associated with oil, gas, and minerals in Florida are more likely to cause problems for Realtors®, buyers, title companies, and real estate lawyers. The reason for this is, in the context of real estate sales and purchases, the oil, gas, and mineral rights, when found in the land records, are usually owned by someone other than the landowner who is selling the subject property. Does that create a title defect? Why? What are the ramifications? If it does create a title defect, can it be cured? Do certain title insurance companies quietly exclude insurance coverage for oil, gas, and mineral rights title defects? Do you have a liability if a buyer wishes to consummate the purchase despite oil, gas, and mineral rights creating a title defect?

INTRODUCTION

In Florida, oil, gas, and mineral rights (often collectively referred to herein as simply "mineral rights") can be as valuable to their owners as they are in Texas and the other significant oil-producing states. Mineral rights are an interest in real property, just like an easement. However, mineral rights may have little value in Florida if the property where these rights are located is not zoned for drilling or mining, e.g., the land is zoned for residences, retailers, service providers, industry, offices, parks, or governmental uses, or if acreage has been purchased by owners who wish to own a country estate, an equestrian estate, a secluded retreat, or who wish simply to preserve the land in its natural state. Additionally, there are substantial permitting, legal, and regulatory hurdles that must be overcome to obtain the permitting necessary to mine or drill for these mineral interests, not to mention overcoming the possible opposition of environmentalists, neighbors, and politicians. For purposes of this article, we will refer to lands used for these purposes, which we consider incompatible with drilling or mining for oil, gas, and minerals as "non-mining lands."

Not only may mineral rights have little value for non-mining lands, they may actually create title defects for those lands. These defects can be attributed to the natural conflict and friction that results when, if mineral rights are owned by a third party, the same piece of non-mining land will have different owners who own the land for totally different purposes and who are owners without the consent of each other. Normally, the ownership of land is vertically divided (think of a piece of land's surface boundaries with fences on each boundary – the fences literally exemplify a division by vertical boundaries). Even if there is more than one "vertical owner," usually they are partners, such as business partners or spouses. Now think of the land's subsurface. Mineral rights ownership is the ownership of oil, gas, and minerals beneath the surface, so you have a horizontal division of the land's ownership – you have an owner of the surface of the land (and the air to a certain height above it) who may be using the surface for a residence, a store, or an office; and an owner of the subsurface mineral rights with a financial interest in making money from mining or drilling for oil, gas, and minerals, which has a great potential for disturbing the surface owner's enjoyment of the land. Not only that, but, if a conflict arises, Florida courts have held that the rights of the mineral owner are dominant and superior to the rights of the surface owner.[1]

[1] *See, e.g.*, P & N Investment Corp. v. Florida Ranchettes, Inc., 220 So.2d 451 (Fla. 1st DCA 1969).

A. MINERAL RIGHTS AND NON-MINING LANDS.

Therefore, for the owner of non-mining lands, because of this conflict, mineral rights can create a serious title defect if the owner of the mineral rights has the legal right to enter upon the property and explore, drill, and mine for oil, gas, and minerals (the "right of entry"), even if the land's zoning does not allow for drilling and mining activities. The reason, as you know, is that The Fund and Old Republic National Title Insurance Company will not rely upon zoning that prohibits drilling and mining activities because that zoning can always be changed by the governmental zoning authorities.

Why are mineral rights that are accompanied by a right of entry considered a title defect for non-mining lands? As mentioned above, ownership of mineral rights is superior to the ownership of the land (the "surface rights"), especially if the oil, gas, and mineral rights owner (hereinafter collectively referred to as the "mineral rights owner") has the important right of entry.[2] Barring zoning and land development code restrictions (and any restrictions in the document that created the mineral rights), if the mineral rights owner has the right of entry, the mineral rights owner has the right to enter onto the surface rights owner's land; exploring and testing for oil, gas, and minerals; drilling wells throughout his or her property; digging mines everywhere on his or her property; and even "strip mining" (where the mining company comes in and removes all trees, plants, grass, and even the topsoil to lay bare the underground mineral layer being mined). However, if the mineral rights owner does not have the right of entry, the land-owning surface rights owner can prevent the mineral rights owner from entering onto the property, even if the mineral rights owner owns a portion or even all of the mineral rights. Otherwise, the surface rights owner (the landowner) has no legal right (and no title insurance) to stop the mineral rights owner from entering.

A buyer may decide that, even though the property the buyer is purchasing has mineral rights owned by a third party who has a right of entry, the buyer will consummate the purchase of the home in question, relying on the zoning not being changed and accepting a title insurance policy with an exception for the mineral rights owned, with the right of entry, by a third party. After all, the buyer may be purchasing a home on a lot in a large subdivision.

If the zoning does change to allow mining, obviously this decision will result in a poor outcome for the buyer. Would such a decision have any drawbacks if the zoning is not changed in the future, however? Should an attorney recommend that course of action in that fact situation? Maybe, but other problems may arise.

What if the buyer later tries to refinance? Our experience is that, if the mortgage lender notices the mineral rights and right of entry exception in the title policy, the lender will most likely not lend because the lender will deem the exception a title defect. Also, when the buyer goes to sell this property, the ownership of the mineral rights with right of entry by a third party must be disclosed to the new buyer, the new buyer may weigh the risks and decide not to go forward with the purchase. More importantly, the new buyer's mortgage lender, if it reads its title insurance commitment and discovers the issue, will probably not make a mortgage loan to the buyer. Even if the new buyer is paying cash and decides to go forward with the purchase, the new buyer may use this issue to negotiate a reduction of the price of the property below its otherwise fair market value.

[2] *See, e.g.*, Noblin v. Harbor Hills Development, L.P., 896 So.2d 781 (Fla. 5th DCA 2005).

Therefore, purchasing property where all or a part of the mineral rights are owned by a third party who has a right of entry can have a very negative effect on the marketability, value, and financing of that property.

For the preceding reasons, the Florida Realtors® have long had in their contracts, including the CRSP-13, Contract for Residential Sale and Purchase, in Paragraph 10(a), a requirement that the title insurance commitment state that the seller has marketable title, subject to a few standard exceptions, one of which is "oil, gas and mineral rights of record if there is *no* right of entry [for the mineral rights owner]." [Emphasis added.] Similarly, the Florida Realtors® and The Florida Bar have long had in their joint Residential Contract for Sale and Purchase, in both their regular and As Is versions, in Paragraph 18.A.(i)(c), a requirement that the title insurance commitment state that the seller has marketable title, also subject to a few standard exceptions, one of which is "outstanding oil, gas and mineral rights of record *without* [the mineral rights owner having a] right of entry." [Emphasis added.] Therefore, the Florida Realtors® and The Florida Bar created in both of their CRSP-13 and FAR/BAR contract forms a kind of compromise between seller and buyer of *residential properties* regarding mineral rights. The existence of mineral rights owned by a third party is not a contractual title defect and the property's title is marketable, unless the mineral rights owner has the right of entry, i.e., the right to enter, explore, drill, and mine for oil, gas, and minerals on the property. One result of this language is that the buyer cannot object to the ownership of mineral rights by a third party regarding the property the buyer is purchasing if there is no right of entry. In other words, in such a situation, the buyer must purchase the property subject to the mineral rights, or the buyer will be in breach of the contract. If the mineral rights owner has a right of entry, however, the property's title is not marketable, and this title defect must be corrected by the seller according to Paragraph 18A(ii) of the FAR/BAR contract forms and Paragraph 10(b) of the CRSP-13 contract form.

Practice Tip 1: *If you are the title agent issuing a title insurance commitment for property whose mineral rights are owned by a nongovernmental third party, Fund Title Note 27.01.01 and The Fund's Standard Commitment Clauses Handbook, E-37.2, provide you with the following format for the exception for the mineral rights:*

> *"Oil, gas and mineral or other reservations as set forth in deed by _____ recorded in O.R. ____, Page ____, and/or Instrument No. _____, Public Records of _____ County, Florida. No determination has been made as to the current record owner for the interest excepted herein. The rights of entry and/or exploration* ***[have/have not]*** *been released or eliminated of record."*

For automatic reservations of mineral rights in public lands by the Trustees of the Internal Improvement Trust Fund or any local government, water management district, or other agency of the State of Florida (see Section C.3. below), the exception provided from the Standard Commitment Clauses Handbook, E-37.5, is as follows:

> *"Deed from [public agency] to _____, dated _____ and recorded in O.R. _____, Page _____. Subject to automatic phosphate, metals, minerals and petroleum reservations by virtue of Section 270.11(1), Florida Statutes."*

Practice Tip 2: *As mentioned above, we characterized stores, offices, and industrial sites as non-mining lands. These properties are normally sold and purchased not with the above-referenced*

contract forms, but rather with an attorney's commercial contract or the Florida Realtors® Commercial Contract. There is a difference between residential and commercial properties and the contracts used for their sale and purchase regarding the lack of mineral rights. Please be aware that Paragraph 6 of the FAR Commercial Contract and Paragraph 7 of the FAR Vacant Land Contract (and perhaps the title insurance provision of the other attorney's contract), where they define marketable title to the property, make no exception for mineral rights when the mineral rights owner does not have the right of entry. Therefore, the buyer can object to the property's title if a third party owns oil, gas, or mineral rights without regard to whether the mineral rights owner also has the right of entry. Since third party ownership of mineral rights without the right of entry may be compatible with store, office, and industrial uses, not requiring a buyer to purchase property where the mineral rights owner has no right to enter upon the property gives a buyer an unfair right to terminate the contract if the buyer develops buyer's remorse after signing the contract and the termination of any Due Diligence or Inspection Period. Such an objection could jeopardize the closing, since purchasing mineral rights can be very expensive and may be impossible to accomplish. Finally, if the mineral rights cannot be repurchased, the buyer would be entitled to a return of the contract's deposit(s) pursuant to the terms of the contract dealing with un-remedied title defects. Therefore, we recommend inserting the words "oil, gas, and mineral rights, without the right of entry" in the second blank of the FAR Commercial Contract's Paragraph 6 or the title insurance provision of the other attorney's commercial contract when the property is used for store, office, or industrial purposes. Then, you, if representing a buyer, must review the title insurance commitment, or the title search if you are preparing the commitment, to determine the existence of any mineral rights and the status of the right of entry so that, if applicable, you can object thereto during the Due Diligence or Inspection Period.

B. OIL, GAS, AND MINERAL RIGHTS AND MINING LANDS.

A moment should be taken at this point, however, to consider the perspective of a buyer who wishes to purchase land for drilling and mining purposes or potentially compatible purposes, such as farming, ranching, and/or land-banking uses, and therefore desires to own all of the mineral rights. You may be unaware, but the latest production figures from December 2016 provided by the Florida Department of Environmental Protection show that oil wells in Florida produced 154,274 barrels of oil, and natural gas wells in Florida produced 1,853,813 cubic feet of natural gas, all in one month alone![3] Further, in 2015 (the latest figures available), Florida reportedly produced 17,262,000 metric tons of phosphate![4] Thus, if an attorney is representing a buyer who desires to own mineral rights, because they are in the business of mining or drilling or their business purposes are compatible with mining or drilling, the attorney ignores the ownership of mineral rights at potentially great financial peril to himself or herself! Therefore, make sure you ask your client buyer whether the ownership of a property's mineral rights is an essential aspect of his or her ownership of the property.

If an attorney is representing such a buyer, the attorney should ensure that any real estate contract to purchase such property does not have a clause that requires the buyer to purchase the property despite the lack of all or a part of the mineral rights as long as there is no right of entry. In such a case, the fact that the mineral rights owner has no right of entry is not the issue for the buyer,

[3] Florida Department of Environmental Protection, Florida Oil and Gas Monthly Production Report (December 2016), http://www.dep.state.fl.us/water/mines/oil_gas/reports/mpr/2016/dec_2016_fla_mon_prod.xlsx.

[4] U.S. Geological Survey, 2015 Minerals Yearbook: Phosphate Rock [Advance Release] (2015), https://minerals.usgs.gov/minerals/pubs/commodity/phosphate_rock/myb1-2015-phosp.pdf.

the issue for the buyer is that someone else owns all or part of the mineral rights. Further, when representing such a buyer, the attorney should ensure that the contract contains an inspection or due diligence period in which the buyer can determine how the property is zoned and, if the buyer wishes immediately to drill or mine, whether the current zoning allows such activity and, if not, the likelihood of obtaining a change or variance of the prohibitive zoning. Better still, the attorney and buyer may wish to negotiate a provision that provides the buyer with time to obtain the re-zoning or variance and makes the buyer's obligation to purchase the property contingent and conditioned upon obtaining such a re-zoning or variance.

Further, we recommend that an attorney who is representing a buyer who is a farmer, rancher, or land-banker advise that buyer that the contract should contain the clauses referenced above, even if initially such a buyer plans only to farm, ranch, or land-bank. Oil and gas production in particular can be compatible with ranching and farming, and the protection of these clauses can always be waived. Otherwise, if you are their attorney, you must be concerned about the following scenario: A farmer or rancher buys land pursuant to a contract that requires the farmer or rancher to take the land subject to mineral rights. Then, such mineral rights and the right of entry are found to be owned by a third party. Even worse, valuable oil, gas, and minerals are actually found to exist. That farmer, every time she walks out onto her field, or that rancher, every time he rides onto his pasture, will be extremely upset to see those wells pumping out all of that oil or gas, worth thousands of dollars every day, day after day, for which he or she is receiving no consideration. (In addition, oil, gas, and mining company employees, vehicles, and equipment will be present frequently, if not daily, disturbing the farmer, the rancher, livestock, and wildlife.) Our concern is that the rancher or farmer might start thinking about why his or her attorney did not protect their client and ensure that the rancher and farmer received some of those profits as royalties, especially considering the inevitable disturbances they will endure. Similarly, even though a land-banker needs only control of the right of entry, not all of the mineral rights, to develop a property or to sell it to a developer, if valuable oil, gas, and minerals are discovered under the property, hindsight being 20/20, the land-banker may claim that his or her attorney should have considered this possibility and ensured that the land-banker not only controlled the right of entry, but also owned all of the mineral rights. Thus, if the rancher, farmer, or land-banker elects to proceed with the purchase of a property without all or some of the mineral rights, be certain that you have a statement in writing documenting their decision.

Practice Tip 3: *Often, the FAR Vacant Land Contract is used to purchase mining, ranch, and farm lands. Like the FAR Commercial Contract, when this Contract in its Paragraph 7 defines marketable title to the property, it makes no exception for mineral rights where the mineral rights owner has no right of entry. When representing a mining company, or a rancher or farmer who feels that oil, gas, and mineral extraction would be compatible with their ranching or farming, make sure that oil, gas, and mineral rights are <u>not</u> listed as rights that can be excepted from the property's title. If this Contract is otherwise being used to purchase vacant lands, the intended uses of which do not include, or are not compatible with, drilling and mining activities, ensure that the language "oil, gas, and mineral rights without the right of entry" is inserted in the second blank of Paragraph 7 of said Contract for the reasons discussed in Practice Tip 2 above. Then, you, if representing a buyer, must review the title insurance commitment, or the title search if you are preparing the commitment, to determine the existence of any mineral rights and the status of the right of entry so that, if applicable, you can object thereto during the Due Diligence or Inspection Period.*

C. SOLVING A TITLE DEFECT CREATED BY OIL, GAS, AND MINERAL RIGHTS.

Now let's go back to the most common situation involving the sale and purchase of non-mining land – the purchase and sale of *residential property* using a CRSP-13 or FAR/BAR contract. What if the seller's title insurance policy reveals, or the title search finds, that mineral rights are owned by a third party and that the mineral rights owner has the right of entry, which creates a title defect that the seller has to remedy according to the contract?

Doesn't happen here, you say? By 2013, "fracking" (the fracturing of underground shale rock by the injection of high pressure fluid into it to release the oil or natural gas embedded in it) had become well known as a method for reaching oil and gas that was plentiful in many states, but had previously been unreachable. In October of that year, the Reuters news service revealed that, acting on this knowledge, four large, nationally known homebuilders – D.R. Horton, the Ryland Group, Inc., the Pulte Group, Inc., and Beazer Homes USA – were retaining the oil, gas, and mineral rights under all the homes they were building! D.R. Horton alone had retained the oil, gas, and mineral rights under more than 10,000 home lots in Florida! How were these builders able to do that?

Buyers were obviously not reading the "fine print" of those long builder contracts or the often equally long title insurance commitments being handed out late at the closing by the builder's title insurance agent. Even before the Reuters story broke, we had found such a mineral rights retention, *also with a retained right of entry*, in a title insurance policy issued to the buyer of a D.R. Horton home in Manatee County. The buyer was then trying to re-sell the home and had no idea that the mineral rights with the right of entry were owned by D.R. Horton. (Fortunately for the seller in that case, after demand was made, D.R. Horton conveyed back the mineral rights.) Later, Reuters reported that Florida's Attorney General became involved, met with representatives of D.R. Horton, and D.R. Horton then decided to offer to return all the oil, gas, and mineral rights to the affected homeowners.

Even worse, a condominium developer in Manatee County actually embedded its retention of the mineral rights to the condominium project, together with the right of entry, in its Declaration of Covenants, Conditions and Restrictions for the master association, and, while the developer was at it, the developer retained all rights to the groundwater. We have attached excerpts from the Declaration as the last attachment to this article. Not only did the reservation include oil, gas, and groundwater, but the retention of "minerals and resources" included every mineral known to man, along with such substances as helium, peat, and salt. This mineral rights reservation was so comprehensive and exhaustive that we were forced to see if the man behind the developer was J.R. Ewing.

Finally, the State of Florida has long been involved in retaining mineral rights. Florida law [currently Florida Statutes Section 270.11(1)] has long required that the State of Florida (including any state agency, water management district, and local government), reserve back to itself one-half of all oil rights and three-quarters of all other mineral rights, together with the right of entry, any time the State conveys governmental lands to private individuals or firms. These reservations have always been automatic and do not require any express reservation to be set forth in the deed. However, for conveyances after June 14, 2001, the Statute allows the state agency to choose not to reserve said mineral rights.

Practice Tip 4: *If you are representing the buyer of public land from a state agency, you should ensure that the deed expressly states that the agency is not reserving mineral rights.*

Now back to the original questions: What if the seller's title insurance policy for the seller's home reveals, or a title search finds, that mineral rights are owned by a third party and that the mineral rights owner has the right of entry? What tools are available to assist attorneys to close the sale and purchase?

The following eleven (11) tools are available: (**1**) using the Marketable Record Title Act, (**2**) applying of the "less than 10-acre exception" for mineral rights reserved by the State of Florida, (**3**) utilizing the "less than 20-acre exception" contained in Florida Statutes Section 270.11(2), (**4**) finding a termination clause in a mineral rights lease, (**5**) purchasing of either the mineral rights or a release of the right of entry, (**6**) relying on the effects of certain tax deeds, (**7**) purchasing and foreclosing a judgment against the mineral rights owner, (**8**) employing arguments justifying the removal of the standard generalized, nonspecific mineral rights exception, (**9**) preparing a disclosure of, acceptance of, and release of liability for the buyer relating to the mineral rights, (**10**) obtaining a letter of indemnity, and (**11**) commencing a partition lawsuit. There are other fact-specific remedies or title insurance company policies to eliminate at least the right of entry that are also available on a case-by-case basis, but which are outside the scope of this article.

1. The Marketable Record Title Act (discussed in Fund Title Note 27.01.02).

The Marketable Record Title Act ("MRTA"), which is Chapter 712 of the Florida Statutes, eliminates all ownership, interests, rights, and title defects in real property that were recorded in the land records before a title transaction (usually a deed that is not a quit claim deed), which was

recorded at least 30 years before the current date (the "root of title"), with certain exceptions. Those exceptions include mineral rights, but not the private right of entry to explore, drill, and mine for oil, gas, and minerals.

MRTA will eliminate and bar the right of entry of a private mineral rights owner if: (i) there has been no recording of any documents or instruments associated with the mineral rights since the recording of the deed, reservation, or lease that is the root of title for the mineral rights to the current time as determined by a Fund MRTA title search; (ii) a review of the county property appraiser's tax roll finds that the mineral rights are not being taxed (which they should be, if they are in existence); and (iii) the surface owner signs an affidavit that no one is currently or has been exploring, mining, or drilling for oil, gas, and minerals on the property in question.[5] In Florida, only one oil well (if drilled 7,000 feet or deeper) can be drilled for each quarter section (¼ square mile), and only one natural gas well can be drilled in each section, or square mile.[6] Therefore, unfortunately, the surface rights owner must be able to swear in the affidavit that no oil wells are closer than a half mile from the property and no gas well is within a mile of the property. Otherwise, a well within one of those distances could be exercising the surface owner's mineral rights, even though that well is not located on the surface owner's property. In such a case, the right of entry cannot be barred.

As you recall, both the FAR/BAR real estate contracts and the CRSP-13 real estate contract for residential sales and purchases state that mineral rights ownership by a third party *without* the right of entry is not a title defect, and, therefore, the buyer may not object to the rights. Thus, when faced with the problem of mineral rights *with* a right of entry in favor of the mineral owner, the mineral rights search referenced above can be ordered back to the root of title of the mineral rights to try to eliminate the right of entry, if the oil, gas, and minerals are not being taxed, explored for, or extracted. If they are not, the right of entry can be documented as barred at the end of the title insurance commitment's mineral rights exception in Schedule B-II.

2. The "less-than-10-acre exception" for mineral rights reserved by the State of Florida (as discussed in Fund Title Note 27.04.01 B.).

Older deeds from the State of Florida which reserved back mineral rights prefaced their reservations with the qualifying words, "As to lands in tracts or composite tracts aggregating ten (10) acres or more." This language means that if the area of all tracts described in the original Trustees of the Internal Improvement Fund ("TIIF") deed is less than ten (10) acres in the aggregate, neither mineral rights nor the right of entry were kept by the State of Florida.

Therefore, when faced with such a mineral rights reservation by the State of Florida for a parcel of land that is less than ten (10) acres (and obviously most subdivision lots are less than ten acres), the original TIIF deed containing the original mineral rights reservation should be found and examined to determine if the above-referenced qualifying language is contained in the deed. If so, any reference in the title insurance commitment to either the mineral rights or the right of entry can be deleted.

3. The statutory "less-than-20-acre exception" for mineral rights reserved by TIIF or the State Board of Education (as discussed in Fund Title Note 27.04.01 C.).

[5] *See* TN 27.01.02.
[6] FLA. ADMIN. CODE R. 62C-26.004(2).

Regarding mineral rights reserved from the ownership of a property by TIIF or the State Board of Education, there is yet another tool, which is Florida Statutes Section 270.11(2)(b), which releases the right of entry for mineral rights owned by either TIIF or the State Board of Education "as to any parcel or property that is, or has ever been, a contiguous tract of less than 20 acres in the aggregate under the same ownership." Unlike the less-than-10-acre exception discussed above which eliminates both the mineral rights and the right of entry, this less-than-20-acre exception eliminates only the right of entry, not the mineral rights ownership, and applies only to reservations in favor of TIIF or the State Board of Education. However, as you have read above, release of the right of entry alone makes title to the property good and marketable, despite the exception for the mineral rights remaining in the title insurance commitment.

4. Finding a termination clause in a mineral rights lease.

In addition to mineral rights being reserved or held back by a prior owner of the surface and/or mineral rights when property is sold to a buyer, mineral rights can be sold and conveyed by a separate deed. However, mineral rights can also be leased to a drilling or mining company and a portion of the profits paid back to the mineral rights owner/lessor as royalties, using a mineral lease. As with most leases, a mineral lease has a period of time during which it is effective, called the "term." Unlike other leases, in a mineral lease, this period of time is called the "primary term," and the term of the mineral lease will be extended indefinitely if oil, gas, or minerals are being actively extracted from the land at the end of the primary term. In such a case, the term of the lease will continue until oil, gas, or minerals are no longer being extracted.

If the mineral rights owned by a third party consist of a mineral lease, the lease should be examined to determine when the primary term ended, and then to determine if oil, gas, and minerals are actively being extracted from the subject property. If the primary term has ended and no oil, gas, or minerals are being extracted, the mineral lease and its rights no longer exist, its exception can be removed from the title insurance commitment, and title to the property will be marketable.

5. Purchase of mineral rights or purchase of a release of the right of entry.

When non-mining lands are being sold and purchased, and they are subject to mineral rights with the mineral rights owner having the right of entry, if the seller is willing to purchase the outstanding mineral rights themselves, this is the best solution for the buyer, since it removes these rights totally as an issue. However, the FAR/BAR and CRSP-13 real estate contracts require only that the right of entry of the mineral rights owner be terminated, not their mineral rights, and purchasing a release of the right of entry from the mineral rights owner is usually easier. First, valuing mineral rights themselves is typically beyond the capability of those not involved in the oil, gas, mineral industry. Second, mineral rights are more expensive to purchase than a release of the right of entry. Third, purchasing a release of the right of entry does not require the mineral rights owner to sell any portion of the mineral rights, which the owner often believes are valuable. Thus, persuading a mineral rights owner to sell a release of the right of entry is usually easier, cheaper, and faster to accomplish. At the same time, it also protects the surface rights owner because, if the surface rights owner (the landowner) obtains the right of entry back from the mineral rights owner, that will prevent anyone from exploring, drilling, or mining on the property without the landowner's consent.

Further, the lack of mineral rights does not necessarily preclude the landowner who has the right of entry from benefiting from the extraction of the oil, gas, and minerals. Even if gold is discovered under the surface of a property, the landowner without mineral rights can still benefit from the mining of the gold. Why? Even if the zoning is changed to allow the mining, the mineral rights owner still cannot mine without the landowner's consent because the landowner controls the right of entry. Thus, the landowner can allow the mining in exchange for a portion of the mineral rights or a part of the profits therefrom, payments for the latter being royalties.

6. Tax Deeds.

Under Florida Statutes Section 193.481(1), the ownership of mineral rights is taxable by each county as an ad valorem or property tax, and under subsection (5) of that Statute, tax certificates and tax deeds can be issued if the taxes are not paid on the mineral rights. Under Florida Statutes Section 197.343(2), the surface rights owner (landowner) has the first right to purchase a tax certificate for any delinquent taxes on the mineral rights relating to the landowner's property. Given the title problems that mineral rights cause for non-mining land and the value they may have for mining lands, a surface owner should jump at the opportunity to purchase such a tax certificate and, if the taxes are not paid within two years thereafter, to apply for and purchase a tax deed for the mineral rights.

If, by chance, the mineral rights are very old, and, before 1957, the property under which the oil, gas, and minerals were located was sold at a tax sale, that tax deed would have transferred not only the land but the mineral rights, too. This is because before 1957, landowners had to pay the taxes for both the land and the mineral rights, according to the old Florida Statutes Section 211.14, which is no longer in effect. Such a deed, however, would allow one to disregard any mineral rights that had existed prior to the deed and remove their exception from the title insurance commitment.

7. Foreclosure of judgments against mineral rights owners.

If, fortuitously, a surface rights owner finds that an owner of their property's mineral rights has a judgment against him or her, the surface rights owner may be able to purchase the judgment, perhaps even with a discount, and then foreclose the judgment lien against the mineral rights. If the amount of the judgment is substantial enough, hopefully the judgment holder will be the high bidder at the foreclosure sale, thereby obtaining the mineral rights.

8. Reasons justifying the removal of the standard generalized, nonspecific mineral rights exception of certain title insurers.

A number of title insurers are now inserting a standard generalized, nonspecific mineral rights exception at the end of their commitments' standard exceptions in Schedule B-II, formatting it to even look like a standard exception. It reads basically as follows: "Any oil, gas, or mineral rights." No specific recorded documents are referenced. There is no reference to whether the right of entry of the mineral rights owner is barred or not. As we know from our discussion above of the mineral rights provisions in the real estate contract forms developed by the Florida Realtors® and The Florida Bar, the preceding exception is a title defect to which the buyer can object, and to which you should object if you represent the buyer.

If you are preparing the title insurance commitment for a transaction and this type of mineral rights exception is found in the seller's prior title insurance policy, look to see if the property to be insured is in a subdivision or is a unit in a condominium development. If so, you can check to see if other title insurance policies (not prepared by you) for other homes in that subdivision or other units in that condominium have any mineral rights exceptions. If you can find two such policies (informally called "go-bys") without mineral rights exceptions, The Fund will allow you to exclude the mineral rights exception from the seller's prior policy from your current title insurance commitment. If the property has a metes and bounds legal description, a 30-year mineral rights search must be ordered for an additional fee to determine if the mineral rights actually exist, and if they do, whether MRTA has barred the right of entry to the mineral rights owner for purposes of your title insurance commitment.

If the title insurance commitment for a transaction was prepared by another title insurance agent and you have received the commitment to review as the buyer's attorney, following are arguments that you can send to the agent to eliminate the mineral rights exception:

> Please line through and initial the deletion of Schedule B-II Exception __ regarding oil, gas, and/or mineral rights for the following three reasons: (a) You have provided no O.R. Book and Page where documents creating these rights have been recorded. (I am certain that the reason no recording references were given was because your search did not reveal any oil, gas, or mineral rights documents.) (b) Further, Paragraph 18.A.(i) of the FAR/BAR Residential Contract for Sale and Purchase for this transaction requires that the title commitment be issued to the Buyer "with legible copies of instruments listed as exceptions attached thereto …." You have provided no such documents as required by the Contract, which constitutes a breach of the Contract by your Seller if oil, gas, and/or mineral rights do exist, since the Seller and your company have the obligation to provide the title insurance commitment and the accompanying documents. (c) Finally, farther down in that Paragraph, it requires the Buyer to take title "subject *only* to the following matters: … (c) outstanding oil, gas, and mineral rights of record *without right of entry* …." [Emphasis added.] Thus, mineral rights for which the right of entry has not been barred are a title defect under this Contract. We cannot determine whether these oil, gas and mineral rights are without the right of entry unless we have the documents that created them. Therefore, without these documents and a barring of the right of entry, this Exception is a title defect according to that Contract provision, and therefore must be deleted or the defect remedied.
>
> Further, a title insurer cannot insert exceptions in their policy other than the "gap" and standard exceptions without some recorded or statutory basis for inserting the exception, particularly an exception that is a title defect, and mineral rights cannot be conveyed, transferred, reserved, or leased without recorded documentation to protect their priority against subsequently recorded instruments. What is next as a generalized exception – "any mortgages given and recorded by prior owners," "any recorded judgment or tax lien that may have attached to the insured property previously," "any easements encumbering the insured property," etc.?
>
> Moreover, issuing policies with broad mineral rights or similar exceptions means substantially less risk and liability is being assumed by a title insurer, yet it and

its agents are collecting the same promulgated premium as other insurers who are not inserting this exception. This gives such a title insurer a competitive advantage and is a violation of Florida Statutes Section 627.777, subsection (5), below.

> ***627.777. Approval of forms. –***
>
> *(1) A title insurer may not issue or agree to issue any form of title insurance commitment, title insurance policy, other contract of title insurance, or related form until it is filed with and approved by the office. The office may not disapprove a title guarantee or policy form on the ground that it has on it a blank form for an attorney's opinion on the title.*
>
> *(2) The office shall approve or disapprove a form filed for approval within 180 days after receipt.*
>
> *(3) When the office approves any form, it shall determine if the current rate in effect applies or if the coverages require the adoption of a rule pursuant to s. 627.782.*
>
> *(4) The office may revoke approval of any form after providing 180 days' notice to the title insurer.*
>
> *(5) An insurer may not achieve a competitive advantage over any other insurer, agency, or agent as to rates or forms. If a form or rate is approved for an insurer, the office shall expeditiously approve the forms of other insurers who apply for approval if those forms contain identical coverages, rates, and deviations which have been approved under s. 627.783.*

Finally, according to Florida Statutes Section 627.7845, subsection (1) below, a title insurer is not allowed to issue a title insurance policy until it "has caused to be made a determination of insurability based upon the evaluation of a reasonable title search …." Since the title insurer has determined that mineral rights for the subject property were not insurable, that decision had to be based on the said public records. Please provide me with the information from the said public records upon which that decision was based, since subsection (2) below of the Statute requires a title insurer to preserve evidence of the title insurer's title search and examination.

> ***627.7845. Determination of insurability required; preservation of evidence of title search and examination. –***
>
> *(1) A title insurer may not issue a title insurance commitment, endorsement, or title insurance policy until the title insurer has caused to be made a determination of insurability based upon the evaluation of a reasonable title search or a search of the records of a Uniform Commercial Code filing office, as applicable, has examined such other information as may be necessary, and has caused to be made a determination of insurability of title or the existence, attachments, perfection, and priority of a Uniform Commercial Code security interest, including endorsement coverages, in accordance with sound underwriting practices.*
>
> *(2) The title insurer shall cause the evidence of the determination of insurability and the reasonable title search or search of the records of a Uniform Commercial Code filing office to be preserved and retained in its files or in the files of its title insurance agent or agency for at least 7 years after the title insurance commitment or title insurance policy was issued. The title insurer*

or its agent or agency must produce the evidence required to be maintained under this subsection at its offices upon the demand of the office. Instead of retaining the original evidence, the title insurer or its agent or agency may, in the regular course of business, establish a system under which all or part of the evidence is recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process that accurately reproduces or forms a durable medium for reproducing the original.

(3) The title insurer or its agent or agency must maintain a record of the actual premium charged for issuance of the policy and any endorsements in its files for a period of not less than 7 years. The title insurer, agent, or agency must produce the record at its office upon demand of the office.

(4) This section does not apply to an insurer assuming no primary liability in a contract of reinsurance or to an insurer acting as a coinsurer if any other coinsuring insurer has complied with this section.

Absent recorded documentation upon which the title insurer relied to determine that mineral rights were uninsurable for the subject property, the title insurer has no grounds to continue to refuse insurability of the mineral rights. Therefore, if documentation cannot be provided, we hereby demand the deletion of the mineral rights exception, or, if your title search requires the exception be retained, bar the right of entry.

9. A letter of indemnity.

If the seller did not provide you with the seller's existing title insurance policy and you discover a mineral rights title defect that occurred prior to the seller's purchase of the property, you should press the seller to try to find their prior title insurance policy. (If the seller cannot find the policy, a check of their deed or other closing documents should reveal the title agent who handled the seller's closing when the seller purchased the property and who the seller can call for a copy of their policy.) Once you have a copy of the prior policy, check to see if it has an exception to coverage for the mineral rights title defect. If it does not, contact your Fund underwriting attorney to determine if you can accept a letter of indemnity from the seller's title insurance company. If the current sales price greatly exceeds the amount of coverage provided by the prior policy, Old Republic National Title Insurance Company may not be willing to accept the letter of indemnity since Old Republic would still be liable for the excess coverage above the prior policy's limit. If, on the other hand, Old Republic will accept a letter of indemnity, you can request a letter of indemnity from the prior title insurer. Usually you will receive such a letter because, by issuing the letter of indemnity, the prior title insurer will delay, and maybe completely avoid, an insurance claim that will surely be filed by the seller if the prior title insurer does not agree to indemnify. Once you receive the letter of indemnity, send it to your Fund underwriting attorney to ensure that the letter's language is sufficient.

10. Disclosure of, acceptance of, and release of liability by the buyer relating to the mineral rights.

If a third party owns mineral rights and has the right of entry for the property being sold and purchased, that situation creates a title defect, according to the mineral rights provisions of the real estate contract forms developed by the Florida Realtors® and The Florida Bar. Certainly, if you are the buyer's attorney, you have a duty to disclose the title defect to your client. If you are simply a

closing/title agent, you may have a duty to disclose to the buyer that the mineral rights exception that does not bar the right of entry in your title insurance commitment is a title defect pursuant to the real estate contract. After all, as the closing/title agent, your obligation is to follow the contract in conducting the closing, preparing the closing documents, etc. Further, even if you did not consider yourself to be the buyer's attorney, what if you "helped" the buyer with some issues related to the closing or, after soliciting the buyer at the first closing, he or she retained you to conduct a second closing? Isn't the buyer's expectation going to be that you acted as his or her attorney and should have disclosed the mineral rights title defect? Even if you disagree, if a buyer is given a title insurance commitment with such a mineral rights exception without a disclosure that the exception is a title defect pursuant to the contract, what do you think the buyer's new attorneys will claim when they are subsequently hired by the buyer after an oil or mining company starts exploring, drilling wells, or mining on the buyer's property? It will be time to call your malpractice insurance company.

Once you disclose the mineral rights title defect, what if the seller cannot remedy the defect with any of the methods referenced in this article, and the buyer decides to purchase the property subject to the mineral rights and the mineral rights owner's right of entry? We recommend, because of the risk involved, that you have the buyer sign a disclosure and release.

We have attached to the end of this article two disclosures and releases – one which is detailed and the other which is shorter. Each of the disclosures follows our firm's policy of disclosing the risk, describing why the risk is a risk, detailing the adverse effects and problems the risk can cause if it comes to fruition, and has the seller agree to an additional due diligence period in which the buyer can determine whether to proceed with the purchase of the property or cancel the contract and receive a refund of the buyer's deposit(s). The longer disclosure and release form contains the buyer's acknowledgement that our law firm does not represent the buyer, recommends the buyer retain an attorney, and actually warns against purchasing the property.

11. A partition lawsuit.

If a mineral rights owner also has the right of entry and will not cooperate with the surface rights owner, and none of the preceding tools will work, the surface rights owner, as long as that owner owns a share of the mineral rights, can file a partition lawsuit to force the sale of the mineral rights, which has to include, however, any share of the mineral rights owned by the surface rights owner. As pointed out by G. Thomas Smith, Esq., a respected Florida oil, gas, and mineral rights attorney (and Fund member) in Pensacola, Florida, there are risks to this procedure. First, if the surface owner has a minority share of the mineral rights, say 1/3, and the other mineral rights owner has a 2/3's share, at the sale of the mineral rights, the majority mineral rights owner can bid up the price of all the mineral rights, knowing that if he or she wins, he or she will only have to pay 1/3 of the price to buy all of the mineral rights, since he or she already owns the other 2/3's of the mineral rights. On the other hand, the surface rights owner will have to pay two times the price that the mineral rights owner has to pay because the surface rights owner only has 1/3 of the mineral rights and has to pay for the other 2/3's. Even if the 2/3's mineral rights owner loses the bidding war, he or she will be paid a handsome price for his or her 2/3's of the mineral rights. The second risk to the surface rights owner is, if he or she loses the bidding contest, he or she will not only lose his or her mineral rights, but will further antagonize the mineral rights owner and still not control the all-important right of entry. Thus, since losing would worsen the surface rights owner's position, he or she has to keep bidding, thereby worsening the first risk. The third risk is that a third party, other than the surface rights owner and the mineral rights owner, will out bid both of those parties, thereby

requiring the surface rights owner, now with no mineral rights ownership, to deal with a new mineral rights owner who has paid even more for the mineral rights and is therefore probably going to charge an even higher price to release the right of entry, if he or she is even willing to discuss its release.

D. CONCLUSION.

We trust that you have learned a little more about oil, gas, and mineral rights from the perspective of a real estate attorney, when mineral rights create a title defect, and its ramifications. We hope that you will find helpful some of the eleven tools to overcome a mineral rights defect that we have discussed. If you have any questions regarding mineral rights, please do not hesitate to call us at 941-741-8224 or e-mail us. If you would like a copy of this article emailed to you, please request one from our Firm Administrator, Connie Hoff, at CHoff@BarnesWalker.com.

Garret T. Barnes *Adron H. Walker*

Important Note: *The information contained in the preceding is summary in nature and is provided for educational purposes only to you as a member of The Fund, of which we are a proud member. This article should not be considered as legal advice for your or your client's situation, if any, nor is it intended as specific or detailed advice, as we do not have any information specific to your or your client's situation. Further, the preceding article is not intended to be an all-inclusive discussion of oil, gas, and mineral rights, but a guide to the same, and there may be other matters not described in the article that may impact your particular situation.*

OIL, GAS, AND/OR MINERAL RIGHTS
DISCLOSURE AND RELEASE
ADDENDUM TO REAL ESTATE CONTRACT

Seller: _____

Buyer: _____

Property: _____

Date: _____

The above-referenced Real Estate Contract for the purchase and sale of the above-referenced Property is hereby amended to add the following:

1. Disclosure. Seller and ***[your law firm's or title company's name]*** do hereby disclose to you as buyer that the Property has a title defect by virtue of being subject to certain oil, gas, and/or mineral rights, reservations, restrictions, limitations, and/or notices recorded at:

_____
_____, of the Public Records of Manatee County, Florida, all attached hereto and hereinafter collectively referred to as the **"Mineral Rights."**

2. Risks and Effects. The risks, ramifications, and effects of the Mineral Rights are:

a. There are separate owners of any oil, gas, or minerals (hereinafter collectively referred to as the "Mineral Owners") lying beneath the Property who have the right to conduct mineral and oil exploration, mining, and drilling operations on the Property and to remove and sell those minerals and oil, without your permission, with lessened or no payment to you as owner of the Property. Typically, the rights of Mineral Owners are superior to the rights of the owners of the surface of the land.

b. ***As a result of the Mineral Owners' rights, the Property, and any houses, buildings, crops, pasture lands, citrus groves, trees, timber and other items on the Property, may be damaged, destroyed, or dismantled by the Mineral Owners, their successors or assigns. The Mineral Owners typically will have no liability to any owner of the Property as the result of any such action.***

c. Further, any funds loaned by any lender or expended by a buyer or owner in connection with any home, building, or other improvement on the Property are at risk of being lost.

d. In addition to the Property being torn up by exploration, mining, or drilling and any homes on the Property being removed possibly at your, the Property owners', expense, by the Mineral Owners, in the future, the existence of these Mineral Rights constitutes a defect in title to this Property, and ***you as owner must disclose, under Florida law, the Mineral Rights to any future buyer of the Property and to any future mortgage lender should you as owner wish to sell or refinance the Property.*** This disclosure obligation may prevent you from refinancing the Property or may prevent you from re-selling the Property for its full fair market value or even re-selling the Property at all.

e. You will have no title insurance to compensate you for any costs or expenses caused by the exploration, extraction, or use of the Mineral Rights by the Mineral Owners.

f. Finally, you ***may or may not*** have the right to be paid rentals, royalties, or other forms

of compensation for the minerals pumped or mined from your Property.

3. Acknowledgment, Recommendation, & Warning. *You as buyer acknowledge that neither **[your law firm's name]** nor its affiliated title company, **[your title company's name]** represents you or the seller regarding this issue of Mineral Rights or the purchase of the Property. We hereby strongly recommend that you take this Disclosure Addendum and its attachments to an attorney of your selection for review. If you do not do so, **[your law firm's name]**, and its affiliated title company, **[your title company's name]**, warn you not to purchase the Property.*

4. Additional Due Diligence Period. You as buyer are being given an additional Due Diligence Period by the seller of _____ (__) business days from the date of _____in which to determine whether to cancel the Contract or proceed with the purchase of the Property, despite the Mineral Rights. If you decide within the additional Due Diligence Period not to proceed with the purchase, you must give seller written notification of cancellation of the Contract on or before _____, at 5:00 p. m., by signing the **Cancellation** section below and returning it to ***[your law firm's or title company's name]***, and you will be promptly refunded your deposit(s). You are cautioned not to expend any monies regarding the Property or its purchase until such time as you have made a decision as to whether to proceed with the purchase of the Property or not. If you decide within the additional Due Diligence Period to proceed with the purchase, you must give the seller written notification of your decision to proceed with the purchase also on or before _____, at 5:00 p. m., by signing the **Non-Cancellation, Release, And Assumption Of Risk** section below and returning it to ***[your law firm's or title company's name]***.

ACKNOWLEDGMENT & AGREEMENT

I, the undersigned buyer, do hereby acknowledge that I have received this Disclosure Addendum and its attachments on _____, and accept the additional Due Diligence Period referenced above. I also agree to carefully read this Disclosure Addendum and its attachments and have been advised to take this Disclosure Addendum and its attachments to an attorney of my own selection for his or her review.

I, the undersigned seller, do hereby make the above Disclosure and agree to the terms of Paragraph 4 above.

SELLER: BUYER:

_____ _____
[Name] [Name]

_____ _____
[Name] [Name]

CANCELLATION

I, as buyer, have decided to **cancel** the Contract. I understand that my deposit(s) will be promptly returned.

BUYER:

_____ _____
[Name] [Name]

Date: _____

NON-CANCELLATION,
RELEASE, AND ASSUMPTION OF RISK

I, as buyer, have voluntarily decided **not to cancel** the Contract during the Due Diligence Period. I intend to purchase the Property for _____ purposes, and I have acknowledged to the Releasees identified below that the current purchase price that I am paying for the Property is appropriately decreased to reflect all of the risks, restrictions, limitations, and reduction in value caused by the Mineral Rights. In consideration of the seller entering into the Contract and agreeing to give me as buyer the additional Due Diligence Period, I do hereby release and discharge the seller; seller's and buyer's Realtors®, _____ and _____; and their real estate brokerages, _____ and _____; ***[your law firm's name and/or your title company's name]*** (collectively, the "Releasees"), of and from all causes of action, suits, liabilities, expenses, costs, agreements, promises, damages, claims, and demands whatsoever, in law or in equity, which I ever had, now have, can, shall, or may have, or which any personal representative, successor, heir, or assign of me, hereafter can, shall or may have, against the Releasees, for, upon, or by reason of any matter, cause or thing whatsoever, arising out of, related to, or connected with the above-referenced Mineral Rights, and I assume all risks, liabilities, and responsibilities arising out of, related to, or connected with the above-referenced Mineral Rights. This Addendum shall survive closing.

BUYER:

_____
[Name]

_____
[Name]

Date: _____
(May <u>not</u> be dated prior to _____)

OIL, GAS, AND/OR MINERAL RIGHTS DISCLOSURE AND RELEASE

I/We, the undersigned buyer(s) of property located at _____ (the "Property") do hereby acknowledge that I/we have been advised that there are oil, gas, and/or mineral rights and restrictions against the Property as described in the following documents, copies of which I/we have received, had the opportunity to examine, and about which I/we have had the opportunity to consult with an attorney: _____.

These oil, gas, and/or mineral rights and restrictions typically include, but are not necessarily limited to, the rights of mining and drilling companies to enter, explore, drill, and mine on the Property without my/our permission; to sell the oil, gas, and/or minerals with lessened or no payment to me/us, and to remove homes and other structures from, and damage or destroy any pasture land, agricultural crops, or citrus groves on, the Property. I/we understand that these rights and restrictions are superior to my rights as the surface landowner. These rights and restrictions are defined as title defects in most Florida real estate contracts. Thus, these rights and restrictions may therefore substantially impair the future price and marketability of the Property and hinder or completely prevent future financing of the Property by me/us or any buyer from me/us. Therefore, I/we understand that monies paid by me or loaned to me to purchase the Property are at a certain amount of risk, and I/we will not have title insurance protection against that risk and, instead, I/we will be assuming that risk.

Choose one of the following paragraphs:

[I/we further acknowledge that, after receiving this disclosure orally, I/we had the opportunity to cancel my/our real estate contract for the purchase of the Property and have any deposits that I/we had previously made returned to me/us.

OR

The Seller agrees that I/we will have a 10-day investigative period from the date hereof to determine the acceptability of these oil, gas, and/or mineral rights and restrictions. Should I/we find the results of my/our investigation to be unsatisfactory in my/our sole opinion, and I/we cancel the real estate contract for the Property in writing during my/our investigation period, the Seller agrees to accept said cancelation and the escrow agent shall promptly refund my/our deposit.]

If I/we do not or did not cancel the real estate contract for the purchase of the Property as described above, I/we do hereby release and discharge my/our Seller, _____; my/our Realtor®, _____; and his/her real estate brokerage, _____; and ***Choose one of the following:*** *[the attorney and/or title company that handles my/our closing]* ***OR [your law firm's and/or title company's name]***, and their employees, owners, heirs, successors, and assigns, as applicable (collectively, the "Releasees"), of and from all causes of action, suits, liabilities, expenses, costs, agreements, promises, damages, claims, and demands whatsoever, in law or in equity, which I/we ever had, now have, can, shall, or may have, or which any personal representative, successor, heir or assign of me/us, hereafter can, shall or may have, against the Releasees, for, upon or by reason of any matter, cause or thing whatsoever, arising out of, related to, or connected with the above-referenced oil, gas, and/or mineral rights and restrictions. This Disclosure and Release shall survive closing.

Dated this _____ day of _____, 20___.

_____
Buyer Signature

_____
Printed Name

_____
Buyer Signature

_____
Printed Name

If the second option above is selected, the following Joinder should be added:

JOINDER

FOR VALUE RECEIVED, the undersigned Seller does hereby agree to the third paragraph above.

Dated this _____ day of _____, 20___.

_____
Seller Signature

_____
Printed Name

_____
Seller Signature

_____
Printed Name

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR

HARBOUR ISLE ON ANNA MARIA SOUND MASTER ASSOCIATION

Section 19. **"FHA"** shall mean and refer to the Federal Housing Administration, an agency of the government of the United States of America.

Section 20. **"Groundwater"** shall mean and refer to all groundwater and other subsurface water of any and every type, kind, category or nature whatsoever, separately, mixed or combined with any other substance, found beneath the surface of the earth (whether referred to or categorized as ground water, underground water, reclaimed water, percolating ground water, moisture in soils or other substances, underflow of streams or underground streams), together with all rights, privileges and interest pertaining thereto, including without limitation all rights and benefits accruing from historical production, use and usage, and any and all permits, licenses or other governmental approvals that now or hereafter pertain or accrue to such Groundwater ownership, production and use.

Section 21. **"Master Association"** shall mean and refer to HARBOUR ISLE ON ANNA MARIA SOUND MASTER ASSOCIATION, INC., a Florida corporation not-for-profit, its successors and assigns, which shall be responsible for administering the lands and improvements covered by this Master Declaration, which duties and obligations shall include, but are not limited to, the imposition and levy of assessments and/or fines that are separate, apart and in addition to any and all assessments and or fines imposed or levied by the Association. The Master Association shall be superior in all respects to the Association, and shall have a separate board of directors. Every Owner in the Project shall be a member of the Master Association as provided by the terms of this Master Declaration.

Section 22. **"Master Association Documents"** shall mean this Declaration, the Articles, the Bylaws and the Rules and Regulations of the Master Association.

Section 23. **"Member"** shall mean and refer to a member of the Master Association, that is, each Owner of a Unit which is subject to assessment by the Association and the Declarant.

Section 24. **"Minerals and Resources"** shall mean and refer to all subsurface rights and interests underlying the Project, or any portion thereof, including but not limited to, any hydrocarbons of whatever name or type, all metals and any and all other minerals, gases and substances of whatever name or type, geothermal energy and geothermal substances and rights, all aluminum, asphalt, barite, basalt, beryllium, bismuth, bentonite, clays, brines, bromine, caliche, celestite, cement, clay, coal, copper, diatomite, dolomite, evaporates, feldspar, fluorspar, gas, gemstones, gold, gravel, greensand, gypsum, helium, hydrogen, iron, lead, lime, limestone, lignite, magnesite, magnesium, manganese, mercury, mica, mineral water, molybdenum, natural gas, nitrates, novaculite, oil, oyster, peat, perlite, petroleum, phosphate, potash, polyhalite, pumicite, salt, shell, silver, sulfur, talc, tin, titanium, topaz, tripoli, turquoise, uranium, vermiculite, zeolites and zinc that now or in the future that are located in whole or in part, in, on, and under, and/or that may be produced from, the Project, together with all ores thereof and other products or materials produced therefrom or in association therewith.

Section 25. **"Minerals, Resources and Groundwater"** shall mean and refer to Minerals and Resources and Groundwater collectively.

Section 2. **Duration.** The covenants and restrictions of this Declaration shall run with and bind the land for a term of twenty-five (25) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years.

Section 3. **Notices.** Any notice required to be sent to any Owner under the provisions of this Declaration shall be deemed to have been sent when mailed, postage prepaid, to the last known address of the person or persons who appear as the Owner of the Unit on the records of the Association at the time of such mailing.

Section 4. **FHA/VA Approval.** As long as there is a Class B membership, the following actions will require the prior approval of the FHA and/or the VA if required by the VA and/or the FHA regulations.

a. Annexation of additional properties,

b. Dedication of Common Areas, and

c. Amendment of this Declaration of Covenants and Restrictions,

Section 5. **Rules and Regulations.** The Master Association may publish unrecorded Rules and Regulations from time to time that shall be applicable to the Project but which shall not be applicable to the Declarant or its affiliates, agents or employees and contractors (except in such contractor's capacity as Owners), nor to institutional first mortgagees, nor to property while owned by either the Declarant or its affiliates or such mortgagees. Such Rules and Regulations shall apply to all other Owners and occupants. The Board of Directors shall be permitted to grant relief to one or more Owners from specific Rules and Regulations upon written request therefor and good cause shown in the sole opinion of the Board.

Section 6. **Easements.** Formal language of grant or reservation with respect to such easements, as appropriate, is hereby incorporated in the easement provisions hereof to the extent not so recited in some or all of such provisions.

Section 7. **Covenants Running With the Land.** Anything to the contrary herein notwithstanding, it is the intention of the Declarant as fee simple owner of the Project, that this Declaration shall constitute covenants running with the land and with title to the Project or any part thereof, or as equitable servitudes upon the land, as the case may be.

Section 8. **Dissolution of Association.** In the event of a permanent dissolution of the Master Association, the fee simple owners of the Units in the Project shall immediately thereupon hold title to the Common Areas, as tenants in common and shall collectively provide for the continued maintenance and upkeep thereof by conveying same to an appropriate governmental entity or another organization similar to the Master Association.

Section 9. **Minerals, Resources and Groundwater.** Declarant expressly reserves the right to all Minerals, Resources and Groundwater lying beneath the surface of the Project, together with (a) the right of ingress, egress and possession of the surface of the Property at all times for the purposes of exploring, studying, mining, drilling and operating for such Minerals, Resources and Groundwater and the construction, installation and maintenance of well sites,

24

facilities and means necessary or convenient for producing, developing, withdrawing, capturing, pumping, treating, storing and transporting the Minerals, Resources and Groundwater, including, without limitation, the right to develop or produce the Minerals, Resources and Groundwater by pooling, unitization or by directional drilling under the Property from well sites located on the Project or other land, and (b) all bonuses, rents, royalties, production payments or monies of any nature accrued in the past or future with respect to the Minerals, Resources and Groundwater, and (c) the right from time to time to convey all or any part of such Minerals, Resources and Groundwater to a third party or third parties, either prior to or after the date of recording of this Declaration. Neither the conclusion of the Class 'B' Control Period, nor any assignment of Declarant rights to the Association, shall be deemed to transfer the rights of Declarant to the Minerals, Resources and Groundwater, either expressly or by implication, but such rights may be conveyed to the Master Association or other third party or third parties, solely by an instrument in writing, executed with the formalities of a deed and recorded in the Official Records of the County. The Master Association and each Owner for themselves, their respective heirs, personal representatives, successors and assigns, as applicable, by acceptance of the rights and obligations under this Declaration, hereby waive and release any rights, claims, actions or causes of action now existing or hereafter arising against Declarant, its successors, assigns, contractors, employees or agents, arising out of or in connection with exercise by Declarant or any such parties of the rights in Minerals, Resources and Groundwater reserved by this Section.

ARTICLE XI
ESTOPPEL CERTIFICATE

The Master Association shall deliver an estoppel certificate within ten (10) days of a written request therefor. The Owner requesting the certificate shall pay to the Association a reasonable sum to cover the costs of examining records and preparing the certificate.

ARTICLE XII
ENFORCEMENT

Section 1. **Compliance by Owners.** Every Owner shall comply with the restrictions and covenants set forth herein and in the Master Association Documents, including without limitation any and all Rules and Regulations which from time to time may be adopted by the Board of Directors of the Master Association without the necessity of the same being recorded in the public records.

Section 2. **Enforcement.** The Master Association, acting by and through its Board, and any Owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration and the Master Association By-Laws and Rules and Regulations. Failure by the Master Association or by any Owner to enforce any covenant or restriction herein contained shall in no way be deemed a waiver of the right to do so thereafter. The Master Association may also impose sanctions against an Owner for violation of the Association Rules and Regulations. Such sanctions shall be in addition to all other enforcement powers and remedies of the Association provided herein and in the By-Laws. The offending Owner shall be responsible for all sanctions and costs of enforcement, including attorneys' fees actually incurred and court costs. Such sanctions may include, without limitation:

Back to Speaker Topics

Fund Assembly

Title Policy Endorsements: An Examination of Florida Approved Forms

Lee Offir, *Sr. Underwriting Counsel, The Fund*

Back to Speaker Topics

Speaker Information

Title Policy Endorsements: An Examination of Florida Approved Forms

Lee Offir,

Sr. Underwriting Counsel, The Fund

Liron "Lee" Offir has been practicing law since 2006 and is Board Certified in Real Estate. Prior to joining The Fund as Underwriting Counsel, he was in private practice handling transactional matters, litigation, and trial work. He earned his J.D. from Stetson University College of Law in St. Petersburg, and his B.S.B.A. from the University of Central Florida.

Mr. Offir has given presentations and lectures with regard to business, law, real estate, networking, trend forecasting, as well as other areas for various groups and organizations throughout South Florida. Mr. Offir serves on the Board of Directors for several charitable organizations, and is the Chairman of the Small Business Advisory Board for the City of Sunrise.

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Title Policy Endorsements:
A Practical Look At Florida Approved Forms
Liron “Lee” Offir, Esq, BCS

- Title Policy Endorsement – What Is It?
- What are the Florida Approved Forms
- Common Endorsement Requests
  Basic and Advanced

What is a Title Policy Endorsement?

The Modification of Policy Provisions

- Policy Coverage under the Jacket
  Limited in Certain Respects
- Managing the Risk of Issuing Endorsements
  Expanded Coverage = Expanded Liability

The Title Insurance Policy

Coverage v. Liability

- Insuring Clauses
- Exclusions
- Conditions & Stipulations
- Schedule A
- Schedule B
- Endorsements

3/66

Managing the Risk

- Consider the Facts and Risks
  - Expanding the Terms of Coverage.
  - Is the additional coverage appropriate?

Guideline Compliance
  - Each endorsement has specific underwriting guidelines

- Undertaking the Proper Procedure for Issuance
  - Properly identifying, issuing, and submitting

- Questions, “Gray Areas”, & Assumptions

Florida Approved Forms

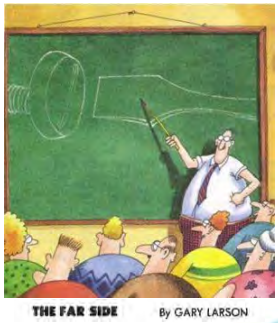
OIR Approved ALTA Forms

- 4.1 – Condominium
- 5.1 – PUD
- 6 Series – Variable Rate Mortgage
- 7 – Manufactured Housing
- 8 – Environmental
- 9 Series – R.E.M. (with FL Modifications)
- 10 – Assignment
- 11 – Mortgage Modification
- 13 Series – Leasehold
- 14 Series – Future Advance (Priority)

OIR Approved Florida Forms

- AIE – Additional Interest
- BME– Balloon Mortgage
- CPE – Change of Partners
- CLU – Construction Loan
- CE – Contiguity
- FCE – Foreign Currency
- NSE – Navigational Servitude
- OE – Option
- RME – Reverse Mortgage
- RCE – Revolving Line of Credit
- SAE – Shared Appreciation
- SE – Survey Endorsement
- Form E

Policy Endorsements 1101



Primer

- These endorsements may not be issued on an automatic basis.
- Sham coverage v. Deleting an element of coverage

"This endorsement is amended in that element(s) of coverage _____ is (are) deleted."

Common Endorsement Requests

- 4.1 – Condominium
- 5.1 – Planned Unit Dev.
- 8.1 – Environmental
- 9 Series – R.E.M.
- 11 – Mortgage Modification
- 14 Series – Future Advance
- Form E

4.1 – 06

Condominium Endorsement

- To provide expanded coverage peculiar to condominiums
- Premium – Minimum of $25

4.1 – 06 Condominium Endorsement

Coverage Guidelines

1. Is the proposed insured unit (and its common elements) identified as part of the condominium?
2. Are the condominium documents statutorily compliant?
3. Are there any existing and present violations of the restrictive covenants which restrict the use of the unit (and its common elements)?
4. Are there any due and unpaid charges or assessments?

4.1 – 06 Condominium Endorsement

Coverage Guidelines

5. Is the proposed insured unit (and its common elements) entitled to be assessed as a separate parcel?
6. Is there any obligation, in existence, to remove any of the improvements as they encroach?
7. Can title to the proposed insured unit (and its common elements) fail due to the exercise or potential for exercising a right of first refusal?

4.1 – 06
Condominium Endorsement

Coverage	Guidelines
1. The failure of the unit identified in Schedule 1. A and its common elements to be part of a condominium within the meaning of the condominium statutes of the jurisdiction in which the unit and its common elements are located.	1. Is the proposed insured unit (and its common elements) identified as part of the condominium?
2. The failure of the documents required by the condominium statutes to comply with the requirements of the statutes to the extent that such failure affects the Title to the unit and its common elements.	2. Are the condominium documents statutorily compliant?
3. Present violations of any restrictive covenants that restrict the use of the unit and its common elements and that are contained in the condominium documents or the forfeiture or reversion of Title by reason of any provision contained in the restrictive covenants. As used in this paragraph 3, the words "restrictive covenants" do not refer to or include any covenant, condition, or restriction (a) relating to obligations of any type to perform maintenance, repair, or remediation on the Land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the Land has been recorded in the Public Records at Date of Policy and is not excepted in Schedule B.	3. Are there any existing and present violations of the restrictive covenants which restrict the use of the unit (and its common elements)?

4.1 – 06
Condominium Endorsement

Coverage	Guidelines
4. Any charges or assessments provided for in the condominium statutes and condominium documents due and unpaid at Date of Policy.	4. Are there any due and unpaid charges or assessments?
5. The failure of the unit and its common elements to be entitled by law to be assessed for real property taxes as a separate parcel.	5. Is the proposed insured unit (and its common elements) entitled to be assessed as a separate parcel?
6. Any obligation to remove any improvements that exist at Date of Policy because of any present encroachments.	6. Is there any obligation, in existence, to remove any of the improvements as they encroach?
7. The failure of the Title by reason of a right of first refusal to purchase the unit and its common elements which was exercised or could have been exercised at Date of Policy.	7. Can title to the proposed insured unit (and its common elements) fail due to the exercise or potential for exercising a right of first refusal?

Example of Condominium Endorsement (ALTA 4.1-06)

ALTA ENDORSEMENT 4.1-06 CONDOMINIUM

Old Republic National Title Insurance Company

Endorsement No. to Policy No.:

The Company insures against loss or damage sustained by the Insured by reason of:

1. The failure of the unit identified in Schedule A and its common elements to be part of a condominium within the meaning of the condominium statutes of the jurisdiction in which the unit and its common elements are located.

2. The failure of the documents required by the condominium statutes to comply with the requirements of the statutes to the extent that such failure affects the Title to the unit and its common elements.

3. Present violations of any restrictive covenants that restrict the use of the unit and its common elements and that are contained in the condominium documents or the forfeiture or reversion of Title by reason of any provision contained in the restrictive covenants. As used in this paragraph 3, the words "restrictive covenants" do not refer to or include any covenant, condition, or restriction (a) relating to obligations of any type to perform maintenance, repair, or remediation on the Land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the Land has been recorded in the Public Records at Date of Policy and is not excepted in Schedule B.

4. Any charges or assessments provided for in the condominium statutes and condominium documents due and unpaid at Date of Policy.

5. The failure of the unit and its common elements to be entitled by law to be assessed for real property taxes as a separate parcel.

6. Any obligation to remove any improvements that exist at Date of Policy because of any present encroachments.

7. The failure of the Title by reason of a right of first refusal to purchase the unit and its common elements which was exercised or could have been exercised at Date of Policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Name of Agent

Agent No.

_____
Agent's Signature

Old Republic National Title Insurance Company
By **Mark A. Bilbrey**
President

ALTA Endorsement 4.1-06 Condominium (rev. 12/10) (With Florida Modifications)
File Number:

5.1 – 06

Planned Unit Development (PUD) Endorsement

- To provide expanded coverage when the Land is located in a residential development that is subject to recorded covenants, conditions, or restrictions (CCR's)
- Premium – Minimum of $25

5.1 – 06 PUD Endorsement

Coverage Guidelines

1. Do the restrictive covenants contain any forfeiture or reversionary clauses within? If so, are there any existing and present violations of those restrictive covenants?
2. Are all Association related charges or assessments, as against the proposed insured land, current?

5.1 – 06 PUD Endorsement

Coverage Guidelines

3. Does a current survey reveal any existing structure on the proposed insured land encroaching on
   - adjoining land;
   - an easement; or
   - setback lines?
4. Can title to the proposed insured lot fail due to the exercise or potential for exercising a right of first refusal?

5.1 – 06 PUD Endorsement

But What if…

The lender requests a PUD Endorsement, but the subject property is not located within a PUD?

- What is a PUD?
- When can it be issued?
- Is there similar coverage available?

5.1 – 06
PUD Endorsement

Coverage	Guidelines
1. Present violations of any restrictive covenants referred to in Schedule B which restrict the use of the land, except violations relating to environmental protection unless a notice of a violation thereof has been recorded or filed in the public records and is not excepted in Schedule B. Said restrictive covenants do not contain any provisions which will cause a forfeiture or reversion of title.	1. Do the restrictive covenants contain any forfeiture or reversionary clauses within? If so, are there any existing and present violations of those restrictive covenants?
2. Any charges or assessments in favor of any association of homeowners which are provided for in any document referred to in Schedule B due and unpaid at Date of Policy.	2. Are all Association related charges or assessments, as against the proposed insured land, current?
3. The enforced removal of any existing structure on the land (other than a boundary wall or fence) because it encroaches onto adjoining land or onto any easements.	3. Does a current survey reveal any existing structure on the proposed insured land encroaching and adjoining land or easement?
4. The failure of title by reason of a right of first refusal to purchase the land which was exercised or could have been exercised at Date of Policy.	4. Can title to the proposed insured unit fail due to the exercise or potential for exercising a right of first refusal?

Example of Planned Unit Development Endorsement (PUD) (ALTA 5.1-06)

PUD ENDORSEMENT

Old Republic National Title Insurance Company

Endorsement No. to Policy No.:

The Company hereby insures against loss or damage by reason of:

(1) Present violations of any restrictive covenants referred to in Schedule B which restrict the use of the land, except violations relating to environmental protection unless a notice of a violation thereof has been recorded or filed in the public records and is not excepted in Schedule B. Said restrictive covenants do not contain any provisions which will cause a forfeiture or reversion of title.

(2) Any charges or assessments in favor of any association of homeowners which are provided for in any document referred to in Schedule B due and unpaid at Date of Policy.

(3) The enforced removal of any existing structure on the land (other than a boundary wall or fence) because it encroaches onto adjoining land or onto any easements.

(4) The failure of title by reason of a right of first refusal to purchase the land which was exercised or could have been exercised at Date of Policy.

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

Name of Agent

Agent No.

_____
Agent's Signature

Old Republic National Title Insurance Company
By **Mark A. Bilbrey**
President

Form PUD-E (ALTA Endorsement Form 5.1) (rev. 12/10)
File Number:

8.1 – 06

Environmental Protection Endorsement

- To provide expanded coverage against loss or damage by reason of a lack of priority of the Insured Mortgage over any environmental protection lien that is recorded at the Date of Policy
- Premium – Minimum of $25

8.1 – 06 Environmental Protection Endorsement

Guidelines

Is there a recorded notice of an environmental protection lien or a recorded environmental protection lien for cleanup and removal?

*What is that “None”?

8.1 – 06 Environmental Protection Endorsement

What is an Environmental Protection Lien?

- CERCLA - cleanup provisions cover all substances designated as hazardous under these acts of Congress:
  - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (a/k/a “Superfund”)
  - Clean Water Act (CWA)
  - Resource Conservation and Recovery Act (RCRA)
  - Clean Air Act (CAA)
  - Toxic Substances Control Act (TSCA)

8.1 – 06
Environmental Protection Lien Endorsement

Coverage

The Company insures against loss or damage sustained by the Insured by reason of lack of priority of the lien of the Insured Mortgage over:

(a) any environmental protection lien that, at Date of Policy, is recorded in those records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge, or is filed in the records of the clerk of the United States district court for the district in which the Land is located, except as set forth in Schedule B; or

(b) any environmental protection lien provided by any state statute in effect at Date of Policy, except environmental protection liens provided by the following state statutes: NONE

Guidelines

Is there a recorded notice of an environmental protection lien or a recorded environmental protection lien for cleanup and removal?

Example of Environmental Protection Lien Endorsement (ALTA 8.1-06)

ALTA ENDORSEMENT 8.1-06 ENVIRONMENTAL PROTECTION LIEN

Old Republic National Title Insurance Company

Endorsement No. to Policy No.:

The Company insures against loss or damage sustained by the Insured by reason of lack of priority of the lien of the Insured Mortgage over:

(a) any environmental protection lien that, at Date of Policy, is recorded in those records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge, or is filed in the records of the clerk of the United States district court for the district in which the Land is located, except as set forth in Schedule B; or

(b) any environmental protection lien provided by any state statute in effect at Date of Policy, except environmental protection liens provided by the following state statutes:

NONE

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Name of Agent

Agent No.

Old Republic National Title Insurance Company

_____
Agent's Signature

By **Mark A. Bilbrey**
President

ALTA Endorsement 8.1-06 Environmental Protection Lien (rev.12/10) (With Florida Modifications)
File Number:

9 – 06

Restrictions, Encroachments, Minerals Endorsement

- To provide expanded coverage relating to violations of restrictions, encroachments, and mineral rights
- Premium – 10% of the sum of the premium of the underlying policy(ies)

9 – 06 Restrictions, Encroachments, Minerals Endorsement

Guidelines

1.(a) Are there any covenants, conditions, or restrictions under which Mortgage could be divested, subordinated, or extinguished, or its validity, priority, or enforcement impaired?

1.(b) Disclosing matters in Schedule B

9 – 06
Restrictions, Encroachments, Minerals Endorsement

Coverage	Guidelines
The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:	
1. Any incorrectness in the assurance that, at Date of Policy:	
(a) There are no covenants, conditions or restrictions under which the lien of the Mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.	1.(a) Are there any covenants, conditions, or restrictions under which Mortgage could be divested, subordinated, or extinguished, or its validity, priority, or enforcement impaired?

9 – 06 Restrictions, Encroachments, Minerals Endorsement

Guidelines

1.(b)(1) Are there any existing violations of the CCR's, and do any of the existing improvements on the Land violate any platted setback lines?

1.(b)(2) Do any of the CCR's contain easements, liens for liquidated damages, private charges or assessments, or provide for options to purchase, rights of first refusal, or prior approval of a future purchaser or occupant?

9 – 06 Restrictions, Encroachments, Minerals Endorsement

1.(b)(2) Nationwide Language

Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 687 F.3d 620 (3d Cir. 2012)

- Scrutiny and Itemization – Do they
  - Establish an easement;
  - Provide for a lien for liquidated damages;
  - Provide for a private charge or assessment; or
  - Provide for an Option, ROFR, or Prior Approval?
- How should they be shown?

9 – 06 Restrictions, Encroachments, Minerals Endorsement

Guidelines

1.(b)(3) Is there any encroachment of existing improvements located on the Land onto adjoining land, or any encroachment onto the Land of existing improvements located on adjoining land?

1.(b)(4) Is there any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B?

1.(b)(5) Are there any notices of violations of CCR's related to environmental protection recorded in the Public Records?

9 – 06
Restrictions, Encroachments, Minerals Endorsement

Coverage	Guidelines
1.(b) Unless expressly excepted in Schedule B:	
(1) There are no present violations on the Land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the Land violate building setback lines shown on a plat of subdivision recorded or filed in the Public Records.	1.(b)(1) Are there any existing violations of the CCR's, and do any of the existing improvements on the Land violate any platted setback lines?
(2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the Land does not, in addition, (i) establish an easement on the Land; (ii) provide a lien for liquidated damages; (iii) provide for a private charge or assessment; (iv) provide for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.	1.(b)(2) Do any of the CCR's contain easements, liens for liquidated damages, private charges or assessments, or provide for options to purchase, rights of first refusal, or prior approval of a future purchaser or occupant?
(3) There is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.	1.(b)(3) Is there any encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.
(4) There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.	1.(b)(4) Is there any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B?
(5) There are no notices of violation of covenants, conditions and restrictions relating to environmental protection recorded in the Public Records.	1.(b)(5) Are there any notices of violations of CCR's related to environmental protection recorded in the Public Records?

9 – 06 Restrictions, Encroachments, Minerals Endorsement

Guidelines

2. Will the violation, which occurred prior to acquisition of interest in the Land, of the existing CCR's result in either:

2.(a) The impairment or loss of the lien of the Insured Mortgage; or

2.(b) The loss of Title to the Land if the Insured acquires Title in satisfaction of the secured debt?

NOTE: CCR's may include subordination language

9 – 06 Restrictions, Encroachments, Minerals Endorsement

Guidelines

3.(a) Are there any existing improvements on the Land encroaching on an easement? If so, will the exercise of the right to maintain the easement potentially damage the improvement?

3.(b) Are there any existing improvements on the Land located in an area that is subject to mineral rights? If so, will the exercise of the right to use the surface for extraction or development of minerals potentially damage the improvement?

Which improvements are not covered?

9 – 06
Restrictions, Encroachments, Minerals Endorsement

Coverage	Guidelines
2. Any future violation on the Land of an existing covenant, condition or restriction occurring prior to the acquisition of title to the estate or interest in the Land, provided the violation results in:	2. Will the violation, which occurred prior to acquisition of interest in the Land, of the existing CCR's result in either:
(a) invalidity, loss of priority or unenforceability of the lien of the Insured Mortgage; or	2.(a) The impairment or loss of the lien of the Insured Mortgage; or
(b) loss of Title to the estate or interest in the Land if the Insured shall acquire Title in satisfaction of the Indebtedness secured by the Insured Mortgage.	2.(b) The loss of Title to the Land if the Insured acquires Title in satisfaction of the secured debt?
3. Damage to existing improvements (excluding lawns, shrubbery or trees):	Are there any existing improvements on the Land:
(a) which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or	3.(a) encroaching on an easement? If so, will the exercise of the right to maintain the easement potentially damage the improvement?
(b) which results from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.	3.(b) located in an area that is subject to mineral rights? If so, will the exercise of the right to use the surface for extraction or development of minerals potentially damage the improvement?

9 – 06 Restrictions, Encroachments, Minerals Endorsement Guidelines

4. Are there any encroachments, from the Land, onto any neighboring land?

5. Do any of the improvements, located on the Land, violate any CCR's or platted setback lines?

9 – 06
Restrictions, Encroachments, Minerals Endorsement

Coverage	Guidelines
4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.	4. Are there any encroachments from the Land onto any neighboring land?
5. Any final court order or judgment denying the right to maintain any existing improvement on the Land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.	5. Do any of the improvements, located on the Land, violate any CCR's or platted setback lines?

9 – 06 Restrictions, Encroachments, Minerals Endorsement

Surveys

DON'T MISS "Residential Survey Problems and Form 9 Endorsements" Presented by Cliff Rainey Saturday @ 11:00am

A current survey is required to give good coverage under the following elements of coverage:

1.(b)(1) 1.(b)(3) 1.(b)(4) 3 4 5

"Can I still issue an ALTA 9?"

BUT - "Lender says they don't require it, yet they want a Clean ALTA 9"

9 – 06
Restrictions, Encroachments, Minerals Endorsement

Coverage	Guidelines
Nationwide language:	In addition, this instrument: Establishes easements upon the Land. Provides for a lien for liquidated damages. Provides for a private charge or assessment. Provides for an option to purchase. Provides for a right of first refusal. Provides for prior approval.
Specifying matters revealed on a survey: SCC Reference E-3.2	Encroachments, encumbrances, violations, variations, or adverse circumstances, if any, actually shown on the survey prepared by dated ___, bearing Job # ___ including [itemize specific survey matter].
Modifying the Alta 9-06 Coverage to delete affirmative coverage provided over listed exception” SCC Reference E-3.3	Element of coverage No. ___ of the ALTA 9.06 endorsement (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.
Modifying the Alta 9-06 Coverage when no current survey is presented” SCC Reference E-3.5	The ALTA 9-06 endorsement (Restrictions, Encroachments, Minerals) is attached to this policy as Endorsement No._____ Element of coverage 1(b)(1) thereof is hereby modified to read as follows: “There are no present violations on the Land of any enforceable covenants, conditions, or restrictions.” Elements of coverage 1(b)(3), 1(b)(4), 3, 4, and 5 are hereby deleted from the endorsement in their entirety.

Example of Restrictions, Encroachments, Minerals Endorsement (ALTA 9-06)

ALTA ENDORSEMENT 9-06 RESTRICTIONS, ENCROACHMENTS, MINERALS - LOAN POLICY
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. Any incorrectness in the assurance that, at Date of Policy:
   (a) There are no covenants, conditions or restrictions under which the lien of the Mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.
   (b) Unless expressly excepted in Schedule B:

   (1) There are no present violations on the Land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the Land violate building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

   (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the Land does not, in addition, (i) establish an easement on the Land; (ii) provide a lien for liquidated damages; (iii) provide for a private charge or assessment; (iv) provide for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.

   (3) There is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.

   (4) There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.

   (5) There are no notices of violation of covenants, conditions and restrictions relating to environmental protection recorded in the Public Records.

2. Any future violation on the Land of an existing covenant, condition or restriction occurring prior to the acquisition of title to the estate or interest in the Land, provided the violation results in:
   (a) invalidity, loss of priority or unenforceability of the lien of the Insured Mortgage; or
   (b) loss of Title to the estate or interest in the Land if the Insured shall acquire Title in satisfaction of the Indebtedness secured by the Insured Mortgage.

3. Damage to existing improvements (excluding lawns, shrubbery or trees):
   (a) which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
   (b) which results from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.

4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.

5. Any final court order or judgment denying the right to maintain any existing improvement on the Land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

As used in paragraph 1(b)(1) and 5, the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection.

The failure to expressly except any matter delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) of this endorsement constitutes the Company's agreement to indemnify against loss or damage resulting from any matters delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.

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

_____ _____
Name of Agent Agent No.

_____ **Old Republic National Title Insurance Company**
Agent's Signature **By** **Mark A. Bilbrey**
President

ALTA 9-06 Endorsement - Restrictions, Encroachments, Minerals (Florida Modified) (rev. 05/14)

Back to Speaker Topics

THE ALTA 9-06: SELECTED ISSUES - COVENANTS, CONDITIONS, RESTRICTIONS AND SURVEYS

BY JALINDA B. ("JAY") DAVIS, FUND SR. UNDERWRITING COUNSEL

The ALTA 9-06 (9-06) is applicable to loan policies and is perhaps the most frequently issued endorsement. It provides an insured lender with several commonly requested affirmative coverages, most of which concern violations of covenants, conditions, restrictions and encroachments. Contrary to misconceptions, this endorsement may not be issued on an automatic basis due to the breadth of the affirmative coverage provided by the endorsement. Many determinations must be made prior to the issuance of the 9-06. This article focuses on issues which arise in conjunction with the issuance of the 9-06 when the proposed insured lands are encumbered by covenants, conditions, restrictions and encroachments or other matters revealed by a survey. The insuring guidelines reviewed in this article apply similarly to the ALTA 9.1-06 and ALTA 9.2-06 endorsements which are sometimes issued with owner's policies.

Covenants, Conditions, Restrictions. A common oversight made in connection with the issuance of the 9-06 is the failure to review recorded covenants, conditions and restrictions (CCRs) prior to closing only to later discover, post-closing, that certain terms and conditions of the CCRs have been violated resulting in the possibility of a claim under the 9-06. While recorded CCRs are most commonly associated with condominium properties and properties located in residential subdivisions, both commercial and residential properties conveyed independent of a subdivision or condominium project may also be encumbered by CCRs. Additionally, a deed conveying a single parcel of land may include CCRs. As a result, it is important to identify any instrument in the chain of title which includes covenants, conditions or restrictions and conduct a thorough review for issues which may pose an insuring risk under the 9-06.

By its very language, element of coverage 1(a) of the 9-06 provides a reminder of the necessity to review any instrument containing CCRs. This element of coverage assures that there are no covenants, conditions or restrictions under which the lien of the insured mortgage could be divested, subordinated or extinguished or its validity, priority or enforcement impaired. The only way this element of coverage can be provided is through review of all CCRs which encumber the property to be insured for confirmation that such assurance is correct.

A common misconception is that mere insertion of a blanket exception for CCRs under Schedule B of the loan policy may eliminate 9-06 coverage for all matters set forth in CCRs encumbering the property to be insured. Fund Members should examine any instrument listed in Schedule B that contains covenants, conditions or restrictions in order to determine whether or not any such instrument includes any of the items enumerated in subparagraphs (i) through (iv) of item number 1(b)(2) of the 9-06, specifically: easements on the land, a lien for liquidated damages, a private charge or assessment, an option to purchase, a right of first refusal and prior approval of a future purchaser or occupant.

Any of the above enumerated 1(b)(2) items included in CCRs encumbering the property to be insured must be expressly excepted in Schedule B. For example, if a declaration of condominium imposes charges, assessments or liens and requires prior approval of a future purchaser or occupant, the following language should be added to the end of the paragraph in Schedule B which makes exception for the declaration of condominium: "*...which declaration establishes and provides for liens, charges, assessments and prior approval of a future purchaser or occupant.*" It is important to note that by virtue of element of coverage 1(a) of the 9-06, the endorsement affirmatively insures that those provisions will not have the effect of divesting, subordinating or extinguishing the insured mortgage or impairing its validity, priority or enforceability. Additional provisions of CCRs which permit change in use or other private rights may merit specific exception. Any questions, issues or concerns in connection with any of the enumerated 1(b)(2) items should be directed to Fund Underwriting Counsel. For further discussion on

element of coverage 1(b)(2) of the 9-06, see also "Loan Policy ALTA 9 Endorsement Interpreted," 38 *Fund Concept* 44 (Apr. 2006); "ALTA 9 Coverage," 44 *Fund Concept* 100 (Nov. 2012); "Revised ALTA Endorsements and Forms," 46 Fund Concept 98 (Sep. 2014); and *The Fund Procedures Handbook*, Ch. 7.

Surveys. There are a few common misconceptions about coverage under the 9-06 as it relates to survey matters. The first, and perhaps the most common misconception, is whether or not a survey is necessary in order to issue a 9-06. Generally speaking, the 9-06 may not be issued unless a current survey has been obtained. However, some lenders do not require surveys in connection with certain types of loans. The 9-06 may still be issued in such a situation, but must be modified by way of the following special language which must be inserted in Schedule B of the loan policy:

"*The ALTA 9-06 endorsement (Restrictions, Encroachments, Minerals) is attached to this policy as Endorsement No. ___. Element of coverage 1(b)(1) thereof is hereby modified to read as follows: 'There are no present violations on the Land of any enforceable covenants, conditions, or restrictions.' Elements of coverage 1(b)(3), 1(b)(4), 3, 4 and 5 are hereby deleted from the endorsement in their entirety.*" See *The Fund Procedures Handbook*, Ch. 7. Exceptions permitting deletion of the standard survey exception and providing full 9-06 coverage are detailed within TN 25.03.06(B).

Another misconception concerning survey matters and coverage under the 9-06 involves encroachments. For example, consider elements of coverage 1(b)(3) and 1(b)(4) of the 9-06. Element of coverage 1(b)(3) assures that, *unless expressly excepted in Schedule B*, there are no encroachments of existing improvements located on the insured property which encroach onto adjoining land and there are no encroachments of existing improvements located on adjoining land which encroach onto the insured property. Element of coverage 1(b)(4) assures that, *unless expressly excepted in Schedule B*, there are no encroachments of existing improvements located on any portion of the insured property subject to an easement excepted in Schedule B. Therefore, any existing encroachment falling under item 1(b)(3) or 1(b)(4), must be specifically set out as an exception in Schedule B of the loan policy for disclosure purposes. Listing of 1(b)(3) and 1(b)(4) type encroachments in Schedule B of the loan policy removes the affirmative coverage under item number 1 of the 9-06. However, special consideration must be given to whether affirmative coverage will be provided under item numbers 3, 4 or 5 of the 9-06 for specific encroachments and matters as scheduled in Schedule B. This affirmative coverage is automatically provided unless specifically excluded by an additional Schedule B exception. A determination of such coverage depends on the nature of the encroachment and whether or not it falls under item number 3, 4 or 5 of the 9-06. More importantly, unless such an encroachment is minor and poses little risk pursuant to underwriting guidelines as set forth in TN 25.03.07 and *The Fund Procedures Handbook*, Ch. 7, such encroachment requires Fund Underwriting Counsel authorization before affirmative coverage under the 9-06 may be provided.

For example, in connection with element of coverage 1(b)(4), subparagraph 3(a) of the 9-06 provides coverage for damage to existing improvements (excluding lawns, shrubbery or trees) located within an easement resulting from exercising the right to maintain the easement for the purpose for which the easement was granted or reserved. If there are no improvements located upon the portion of the insured property subject to an easement, subparagraph 3(a) poses no problem. In general, however, this coverage may still be provided where encroachments of improvements onto typical utility or drainage easements exist, as long as the improvement is removable and relatively minor (e.g., a fence or driveway) and there should be at least a 10% equity cushion in the subject property. Any facts falling outside these general guidelines must be discussed with and approved by Fund Underwriting Counsel. See *The Fund Procedures Handbook*, Ch. 7.

In connection with item number 1(b)(3), item number 4 of the 9-06 provides coverage for loss or damage arising from a final judgment requiring the removal of any encroachment from the insured property onto neighboring land. Any transaction involving such an encroachment must be reviewed with Fund Underwriting Counsel.

Encroachments that are insignificant, minor and easily removable present less risk but still require evaluation pursuant to underwriting guidelines. If there is any indication of a boundary dispute, element of coverage number 4 may not be provided. It is important to note that item number 4 of the 9-06 does not provide coverage for encroachments of improvements from adjoining lands onto the insured property or other encroachment matters. See *The Fund Procedures Handbook*, Ch. 7.

In connection with item number 1(b)(1), element of coverage number 5 of the 9-06 provides coverage for loss or damage arising from a final judgment denying the right to maintain any existing improvement because of a violation of covenants, conditions or restrictions or platted setback lines. This element of coverage may be provided for insignificant or minor encroachments that comply with underwriting guidelines, otherwise this element of coverage should not be provided without prior approval by Fund Underwriting Counsel. For more information on insuring requirements and guidelines as to this element of coverage, see *The Fund Procedures Handbook*, Ch. 7.

Notwithstanding the foregoing, it is important to note that in the event an element of coverage provided under the 9-06 is not provided in a particular transaction, there must be an appropriate notation in the paragraph of Schedule B containing the exception. For example, if a building encroaches 30 feet onto adjoining land, this must be listed as a Schedule B exception (per element of coverage 1(b)(3)), and the following language must be added:

"*Element of coverage No. 4 of the ALTA 9-06 endorsement (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.*" See *The Fund Procedures Handbook*, Ch 7.

Finally, pursuant to TN 25.03.07(3)(b), Fund Members may use either a general survey exception or a specific survey exception which lists all survey matters. However, the 9-06 may not be provided where a general survey exception is used in a loan policy. When a 9-06 endorsement is issued with a loan policy, and when either an ALTA 9.1-06 or 9.2-06 endorsement is issued with an owner's policy, the specific survey exception must be used. The following is an example of the specific survey exception:

This policy does not insure against loss or damage by reason of the following exceptions:

Any rights, easements, interests or claims which may exist by reason of, or reflected by, the following facts shown on the survey prepared by Ronald Thompson Surveyors, LLC dated September 27th, 2015, bearing Job #3255-2015:

A. Encroachment of concrete drive upon utility easement in favor of Florida Power on the Northeasterly boundary of the Property.

B. Encroachment of portable wood frame shed upon platted building setback line on the Southwesterly boundary of the Property.

C. Encroachment of brick paver and fence upon the 60 foot draining easement along the Southerly boundary of the Property.

The following general survey exception may be used when the 9-06 is not provided to the insured lender and neither the ALTA 9.1-06, nor the ALTA 9.2-06 is issued to the insured owner:

This policy does not insure against loss or damage by reason of the following exceptions:

Encroachments, overlaps, boundary line disputes and any other matters which would be disclosed by an accurate survey and inspection of the premises; alternatively, if a survey meeting the requirements of Sec. 627.7842(1)(a), F.S., is presented, then only those encroachments, overlaps, boundary line disputes, and other matters which are actually shown on the survey presented to and relied upon by the underwriter in the issuance of this policy.

Conclusion: Before closing and issuing the 9-06, ALTA 9.1-06 or ALTA 9.2-06, it is imperative to review all instruments in the chain of title containing covenants, conditions or restrictions. Provisions which provide for easements on the land, a lien for liquidated damages, private charges or assessments, op-

tions to purchase, rights of first refusal and prior approval of a future purchaser or occupant must be specifically shown as exceptions in Schedule B of the loan policy as discussed above. In addition, specific exception must be made under Schedule B of the loan policy for any encroachments revealed by a survey. However, it is important to recognize that the affirmative coverages provided in the 9-06 are limited and some encroachments revealed by a survey may not fall under any of the affirmative coverages provided. Finally, covenants, conditions or restrictions and encroachments that pose an insuring risk should be discussed with, and approved by, Fund Underwriting Counsel before closing and issuing a 9-06. See *The Fund Procedures Handbook*, Ch. 7.

DO YOU HAVE CFPB QUESTIONS?

You can speak with a live representative, or you can send in your questions/concerns to the email address provided.

CFPB Hotline:
(844) CFPB-FAQ or (844) 237-2327

CFPB Email:
cfpbfaq@thefund.com

You can also visit:
www.thefund.com/infocenter.

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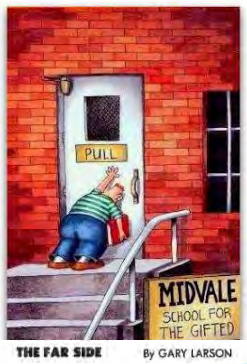
TITLE Q&A

5. Power of Attorney

Q. *Frankie and Mary Newlywed are refinancing their non-homestead property. Mary is traveling abroad and will not be back in time for the closing. Mary executed a power of attorney (POA) at the U.S. Consulate, and had it delivered to the Fund Member's office in advance of the closing. The POA is properly executed and notarized by the Vice Consul and witnessed by two witnesses. The POA grants adequate specific powers to the attorney-in-fact for the refinance transaction. For the purpose of issuing a loan policy insuring the new mortgage, may the Fund Member rely on the execution formalities observed in this POA?*

A. Yes. The POA was notarized by a Consulate official authorized by Sec. 695.03(3), F.S., to take acknowledgements. Secs. 709.2105(2) and 709.2106(1), F.S., provide that all POAs executed in Florida or in a foreign country, on or after Oct. 1, 2011, must have two witnesses, regardless of whether the property is homestead or not. However, if the POA had been executed in another state as opposed to a foreign country, the POA could be used to mortgage non-homestead property as long as the POA complied with the laws of the state in which it was executed. Sec. 709.2106(3), F.S. In order to convey or mortgage homestead property using a POA, Sec. 689.111, F.S. requires that the POA be executed in the same manner as a deed, including two witnesses, no matter where the POA was executed. TN 4.02.01(B)(3).

Policy Endorsements 1102



Form E Endorsement

- To correct or amend either a commitment or policy that has been issued
- There is no premium charged for a Form E Endorsement, UNLESS...

Credit: The Simpsons TM & Twentieth Century Fox Film Corporation

Form E Endorsement

Our Happy Little Helper

- Correcting Scriveners' and other Errors on issued policies
- Deleting Exceptions which may no longer be an issue
- Amending issued policies:
  - Date downs;
- Assisting other Endorsements:
  - Modifications; or
  - Future Advances
- Standard Exceptions: "Again?!? But, I don't wanna!"

Example of Form E Endorsement

ENDORSEMENT

Old Republic National Title Insurance Company

Endorsement No. to Policy No.:

Name of Original Insured:

Original Effective Date:

Original Amount of Insurance: $ Agent's File Reference:

Current Amount of Insurance: **$**

The policy is hereby amended as follows:

(Continue text of endorsement on separate continuation sheet if necessary.)

but in all other respects remains unchanged.

Name of Agent Date Agent No.

Old Republic National Title Insurance Company

By **Mark A. Bilbrey**
President

_____
Agent's Signature

Form E Endorsement (rev. 12/10)
File Number:

Page 1 of 1

11 – 06

Mortgage Modification Endorsement

- Insures that a modification of a mortgage does not result in a loss of priority, invalidity, or unenforceability of the Insured Mortgage
- Premium – There is no premium charged for an ALTA 11-06 Mortgage Modification endorsement itself, however…

11 – 06 Mortgage Modification Endorsement

Novation

Does the modification create a novation or a premium-triggering event?

What is a novation?

What is NOT a premium-triggering event?

11 – 06 Mortgage Modification Endorsement

Novation

Novation = Loss of Priority

Material change in terms so as to create a new mortgage

(Don't Believe the Hype!)

11 – 06 Mortgage Modification Endorsement

Non-Premium Triggering Event

- Extend the time for repayment;
- Decrease the interest rate;

  (Watch for variable rate caps)
- Extending the term;
- Release a portion of secured property;
- Make a correction to either
  - perfect the lien or
  - comply with the terms of the lender's original commitment; or
- <u>Increase the interest rate</u>

*Substitution Loan Rate Premium Calculation
Fund Procedures Handbook, Chapter 9

11 – 06 Mortgage Modification Endorsement
Is It Available?

Your review of the modification instrument(s) concludes no novation or premium-triggering event

Credit: Archer TM & Twenty-First Century Fox Inc.

11 – 06 Mortgage Modification Endorsement
Is It Available?

Your title search revealed no intervening matters of record

Credit: Futurama TM & Twentieth Century Fox Film Corporation

11 – 06 Mortgage Modification Endorsement

Is It Available?

Either your review of the modification instrument(s) revealed a novation or intervening matters exist

Credit: The Simpsons TM & Twentieth Century Fox Film Corporation

11 – 06 Mortgage Modification Endorsement

Back to the Future?

How do I extend the Date of Policy?

What if the Modification requires a premium?

Rating…

Credit: Back to the Future TM & Universal City Studios, Inc.

11 – 06
Mortgage Modification Endorsement

Coverage	Guidelines
1. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title at Date of Endorsement as a result of the agreement dated _____, recorded _____ ("Modification"); and	In examining the modification instrument(s), does the change in terms create a novation or premium-triggering event?
2. The lack of priority of the lien of the Insured Mortgage, at Date of Endorsement, over defects in or liens or encumbrances on the Title, except for those shown in the policy or any prior endorsement and except:	In examining title, from the date of the prior policy through the date of the recorded modification, are there any intervening matters appearing on the record that could affect the: 1. Validity of the mortgage? 2. Priority of the mortgage? If ANY were answered 'YES', the 11-06 is not available for issuance.

,

Example of Mortgage Modification Endorsement (ALTA 11-06)

ALTA ENDORSEMENT 11-06 MORTGAGE MODIFICATION

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The Company insures against loss or damage sustained by the Insured by reason of:

1. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title at Date of Endorsement as a result of the agreement dated _____, recorded _____ ("Modification"); and

2. The lack of priority of the lien of the Insured Mortgage, at Date of Endorsement, over defects in or liens or encumbrances on the Title, except for those shown in the policy or any prior endorsement and except:

This endorsement does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses, by reason of any claim that arises out of the transaction creating the Modification by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws that is based on:

1. the Modification being deemed a fraudulent conveyance or fraudulent transfer; or

2. the Modification being deemed a preferential transfer except where the preferential transfer results from the failure

   a. to timely record the instrument of transfer; or

   b. of such recordation to impart notice to a purchaser for value or to a judgment or lien creditor.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Date of Endorsement:_____

_____ _____
Name of Agent Agent No.

_____ **Old Republic National Title Insurance Company**
Agent's Signature **By Mark A. Bilbrey**
President

ALTA Endorsement 11-06 Mortgage Modification (rev. 12/10)

14 – 06

Future Advance (Priority) Endorsement

- To provide coverage insuring the validity, priority, and enforceability of future advances, other than those advances related to construction
- Premium – There is no premium charged for an ALTA 14-06 Mortgage Modification endorsement itself, however…

14 – 06 Future Advance (Priority) Endorsement

Guidelines

2. FL Stat. §697.04 Compliance Coverage

- Does the insured mortgage state that it secures the existing indebtedness, AND the future advances?
- Does the insured mortgage provide that advances be made within twenty years of the date of the mortgage?
- Does the insured mortgage specify the maximum principal amount to be secured?
- Has the maximum principal amount stated in the Mortgage or a notice limiting the maximum principal amount been exceeded?

14 – 06
Future Advance – Priority Endorsement

Coverage	Guidelines
2. The Company insures against loss or damage sustained by the Insured by reason of:	
a. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Advance.	2. FL Stat. §697.04 compliance coverage.
b. The lack of priority of the lien of the Insured Mortgage as security for each Advance over any lien or encumbrance on the Title.	Does the insured mortgage state that it secures not only the existing indebtedness, but also future advances?
c. The invalidity or unenforceability or lack of priority of the lien of the Insured Mortgage as security for the Indebtedness, Advances and unpaid interest resulting from (i) re-Advances and repayments of Indebtedness, (ii) earlier periods of no indebtedness owing during the term of the Insured Mortgage, or (iii) the Insured Mortgage not complying with the requirements of state law of the state in which the Land is located to secure Advances.	Does the insured mortgage provide that advances be made within twenty years of the date of the mortgage? Does the insured mortgage specify the maximum principal amount to be secured? Has the maximum principal amount stated in the Mortgage or a notice limiting the maximum principal amount been exceeded?

14 – 06 Future Advance (Priority) Endorsement Guidelines

3. Changes in Interest Rate Coverage

- Does the insured mortgage, at a minimum, specifically identify the secured note and contain all of the provisions controlling the changes in the rate of interest?

14 – 06
Future Advance – Priority Endorsement

Coverage	Guidelines
3. The Company also insures against loss or damage sustained by the Insured by reason of: a. The invalidity or unenforceability of the lien of the Insured Mortgage resulting from any provisions of the Agreement that provide for (i) interest on interest, (ii) changes in the rate of interest, or (iii) the addition of unpaid interest to the Indebtedness. b. Lack of priority of the lien of the Insured Mortgage as security for the Indebtedness, including any unpaid interest that was added to principal in accordance with any provisions of the Agreement, interest on interest, or interest as changed in accordance with the provisions of the Insured Mortgage, which lack of priority is caused by (i) changes in the rate of interest, (ii) interest on interest, or (iii) increases in the Indebtedness resulting from the addition of unpaid interest.	3. Changes in interest rate coverage. Does the insured mortgage, at a minimum, specifically identify the secured note and contain all of the provisions controlling the changes in the rate of interest?

14 – 06 Future Advance (Priority) Endorsement

Additional Exclusions

4. Additional Specific Exclusions

- 4a. (i) Advances made after bankruptcy;
- 4a. (ii)Advances made subsequent to 20 years after the date of the Insured mortgage;
- 4a. (ii)Advances made after a notice has been recorded in the Public Records, limiting the maximum principal amount that may be secured to the extent the advance causes the outstanding principal balance to exceed the amount stated in the notice;

14 – 06 Future Advance (Priority) Endorsement

Additional Exclusions

4. Additional Specific Exclusions

- 4b. Real property taxes and assessments;
- 4c. Federal tax lien filed more than 45 days before the advance;
- 4d. Federal or state environmental protection lien; and
- 4e. Usury or consumer protection law

14 – 06 Future Advance (Priority) Endorsement

Two Ways to Skin a Cat

The Amount of Insurance in Schedule A of the loan policy would reflect:

1. The maximum amount that is secured by the Mortgage, inclusive of all potential advances; or
2. The amount of the initial obligation, which is less than the maximum amount secured by the Mortgage

14 – 06 Future Advance (Priority) Endorsement

Additional Exception Required

The following exception must be added to Schedule B of the loan policy whenever this endorsement is issued:

"Advances in excess of the amount of insurance stated in Schedule A are not insured by the ALTA 14-06 endorsement attached to this policy."

Example of Future Advance — Priority Endorsement (ALTA 14-06)

ALTA ENDORSEMENT 14-06 FUTURE ADVANCE - PRIORITY

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

1. The insurance for Advances added by Sections 2 and 3 of this endorsement is subject to the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, except Exclusion 3(d), the provisions of the Conditions, and the exceptions contained in Schedule B.

   a. "Agreement," as used in this endorsement, shall mean the note or loan agreement, the repayment of Advances under which is secured by the Insured Mortgage.

   b. "Advance," as used in this endorsement, shall mean only an advance of principal made after the Date of Policy as provided in the Agreement, including expenses of foreclosure, amounts advanced pursuant to the Insured Mortgage to pay taxes and insurance, assure compliance with laws, or to protect the lien of the Insured Mortgage before the time of acquisition of the Title, and reasonable amounts expended to prevent deterioration of improvements, together with interest on those advances.

   c. "Changes in the rate of interest," as used in this endorsement, shall mean only those changes in the rate of interest calculated pursuant to a formula provided in the Insured Mortgage or the Agreement at Date of Policy.

2. The Company insures against loss or damage sustained by the Insured by reason of:

   a. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Advance.

   b. The lack of priority of the lien of the Insured Mortgage as security for each Advance over any lien or encumbrance on the Title.

   c. The invalidity or unenforceability or lack of priority of the lien of the Insured Mortgage as security for the Indebtedness, Advances and unpaid interest resulting from (i) re-Advances and repayments of Indebtedness, (ii) earlier periods of no indebtedness owing during the term of the Insured Mortgage, or (iii) the Insured Mortgage not complying with the requirements of state law of the state in which the Land is located to secure Advances.

3. The Company also insures against loss or damage sustained by the Insured by reason of:

   a. The invalidity or unenforceability of the lien of the Insured Mortgage resulting from any provisions of the Agreement that provide for (i) interest on interest, (ii) changes in the rate of interest, or (iii) the addition of unpaid interest to the Indebtedness.

   b. Lack of priority of the lien of the Insured Mortgage as security for the Indebtedness, including any unpaid interest that was added to principal in accordance with any provisions of the Agreement, interest on interest, or interest as changed in accordance with the provisions of the Insured Mortgage, which lack of priority is caused by (i) changes in the rate of interest, (ii) interest on interest, or (iii) increases in the Indebtedness resulting from the addition of unpaid interest.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. The invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage as security for any:

      (i) Advance made after a Petition for Relief under the Bankruptcy Code (11 U.S.C.) has been filed by or on behalf of the mortgagor; or

      (ii) Advance made subsequent to 20 years after the date of the Insured Mortgage or after a notice has been recorded in the Public Records limiting the maximum principal amount that may be secured to the extent the advance causes the outstanding principal balance to exceed the amount stated in the notice.

   b. The lien of real estate taxes or assessments on the Title imposed by governmental authority arising after Date of Policy;

   c. The lack of priority of the lien of the Insured Mortgage as security for any Advance to a federal tax lien, which Advance is made after the earlier of (i) actual knowledge of the Insured that a federal tax lien was filed against the mortgagor, or (ii) the expiration, after notice of a federal tax lien filed against the mortgagor, of any grace period for making disbursements with priority over the federal tax lien provided in the Internal Revenue Code (26 U.S.C.);

   d. Any federal or state environmental protection lien; or

   e. Usury, or any consumer credit protection or truth-in-lending law.

5. The Indebtedness includes Advances.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

_____ _____
Name of Agent Agent No.

_____ **Old Republic National Title Insurance Company**
Agent's Signature **By** **Mark A. Bilbrey**
President

ALTA Endorsement 14-06 Future Advance - Priority (02/11) (Florida Modified) (rev. 05/14)

APPENDIX

- List of Endorsements
- Rating Information
- Endorsement Premium Chart
- Mortgage Modification Endorsement Worksheet
- Substitution Loan Worksheet

53/66

List of Endorsements

Condominium Endorsement (ALTA 4.1-06)
The Condominium Endorsement (ALTA 4.1-06) is often given with owner's and loan policies when the insured property consists of a condominium unit. It provides the Insured with various affirmative coverages peculiar to condominiums, such as the valid creation of the condominium.

PUD Endorsement (ALTA 5.1-06)
The PUD Endorsement (ALTA 5.1-06) is given most often with loan policies, and is used when the property is located in a residential development that is subject to recorded covenants, conditions, or restrictions.

Variable Rate Mortgage Endorsement (ALTA 6-06)
The Variable Rate Mortgage Endorsement (ALTA 6-06) assures the lender that their priority will be maintained even when certain changes are made in the interest rate.

Variable Rate Mortgage Endorsement — Negative Amortization (ALTA 6.2-06)
The Variable Rate Mortgage Endorsement (ALTA 6.2-06) assures the lender that the occurrence of negative amortization/deferral of interest will not impair their lien priority.

Manufactured Housing Unit Endorsement (ALTA 7-06)
The Manufactured Housing Unit Endorsement (ALTA 7-06) insures that a specifically described mobile home constitutes part of the Insured property.

Environmental Protection Lien Endorsement (ALTA 8.1-06)
The Environmental Protection Lien Endorsement (ALTA 8.1-06) provides for affirmative coverage against loss or damage by reason of a lack of priority of the Insured Mortgage over any environmental protection lien recorded at the Date of Policy.

ALTA Endorsement 9-06 (ALTA 9-06)
This endorsement (ALTA 9-06) is used only with loan policies. It provides the Insured with several commonly requested affirmative coverages, most of which concern violations of restrictions and encroachments.

ALTA Endorsement 9.1-06 (ALTA 9.1-06)
The ALTA 9.1-06 endorsement is used with owner’s policies when the Land is unimproved land. It provides the Insured with several commonly requested affirmative coverages, such as those dealing with encroachments, easements and mineral rights.

ALTA Endorsement 9.2-06 (ALTA 9.2-06)
This endorsement (ALTA 9.2-06) is used with owner’s policies when improvements are located on the Land. It provides the Insured with several commonly requested affirmative coverages, in particular those dealing with encroachments and restrictions.

List of Endorsements

Assignment Endorsement (ALTA 10-06)
The Assignment of Mortgage Endorsement (ALTA 10-06) is used when the note and the mortgage are assigned by the holder to someone else. It is most used when an institutional mortgagee assigns a mortgage in the secondary market.

Mortgage Modification Endorsement (ALTA 11-06)
The Mortgage Modification Endorsement (ALTA 11-06) is issued only to insure modifications to mortgages previously insured by Old Republic with a 2006 ALTA loan policy in circumstances in which the modification does not cause loss of priority or require the payment of a substitution loan rate premium. This endorsement does not advance the Date of Policy.

Leasehold — Owner's Endorsement (ALTA 13-06)
The Leasehold – Owner's Endorsement (ALTA 13-06) defines the coverages provided to a tenant under a policy insuring a leasehold interest. The form describes the coverages more completely than the Owner's – Leasehold policy form it replaces. The endorsement must be issued in conjunction with an owner's policy (OF6).

Leasehold — Loan Endorsement (ALTA 13.1-06)
The Leasehold – Loan Endorsement (ALTA 13.1-06) defines the coverages provided to a lender under a policy insuring a leasehold interest. The form describes the coverages more completely than the Mortgagee – Leasehold policy it replaces. The endorsement must be issued in conjunction with a loan policy (MF6).

Future Advance — Priority Endorsement (ALTA 14-06)
The Future Advance – Priority Endorsement (ALTA 14-06) insures the validity, priority, and/or enforceability of future advances other than advances pursuant to construction loans. The endorsement must be issued in conjunction with a loan policy (MF6).

Future Advance — Letter of Credit Endorsement (ALTA 14.2-06)
The Future Advance – Letter of Credit Endorsement (ALTA 14.2-06) insures the validity, priority and enforceability of future advances other than advances pursuant to construction loans in mortgages securing letters of credit, surety agreements, and reimbursement agreements. The endorsement must be issued in conjunction with a loan policy (MF6).

Future Advance — Reverse Mortgage Endorsement (ALTA 14.3-06)
The Future Advance Reverse Mortgage Endorsement (ALTA 14.3-06) assures the lender that changes in the rate of interest or the occurrence of negative amortization will not impair the lender's lien position. The endorsement also provides that future advances are also included within the coverage of the policy. The ALTA 14.3-06 and the Reverse Mortgage Endorsement (RME) may be used interchangeably with loan policies.

List of Endorsements

Additional Interest Endorsement (AIE)
The Additional Interest Endorsement, is used with loan policies only, provides the Insured under a loan policy with affirmative coverage related to additional interest provisions in the mortgage.

Balloon Mortgage Endorsement (BME)
The Balloon Mortgage Endorsement, is used with loan policies only, assures the lender that its mortgage will not be invalid or unenforceable because it contains a conditional right for the borrower to refinance. It also assures that the mortgage will not lose its priority if the borrower exercises the conditional right to refinance.

Change of Partners, Members or Shareholders Endorsement (CPE)
The Change of Partners (Fairways) Endorsement is used in connection with owner's policies under which the Insured is a corporation, partnership, limited partnership, limited liability company or business trust. It provides that insurance coverage will continue even if new partners, members, shareholders, beneficiaries, or certificate holders are added or old partners, members, shareholders, or certificate holders withdraw.

Construction Loan Update Endorsement (CLU)
The Construction Loan Endorsement is used to update a loan policy as construction loan disbursements are made.

Contiguity Endorsement (CE)
The Contiguity Endorsement provides affirmative coverage that a parcel of land consisting of more than one legal description constitutes one contiguous parcel of land.

Foreign Currency Endorsement (FCE)
The Foreign Currency Endorsement is used in connection with loan policies that contain provisions for the re-evaluation of the Indebtedness based upon changes in the conversion rate between U.S. dollars and a stated foreign currency.

Form E Endorsement (Form E)
Endorsement Form E is used to correct or amend either a commitment or policy that has been issued (for example, to correct an error in the spelling of a name or in conjunction with a mortgage modification agreement).The exclusive method for changing the Date of Policy or effective date on a loan policy is through the use of the Form E endorsement.

List of Endorsements

Navigational Servitude Endorsement (NSE)
The Navigational Servitude Endorsement provides affirmative coverage as to losses arising by reason of forced removal of improvements based upon the exercise of governmental rights with respect to control over navigable waters or lands that formerly constituted navigable waters.

Option Endorsement (OE)
The Option Endorsement insures a person or entity who has the right to purchase the subject property under a recorded option.

Reverse Mortgage Endorsement (RME)
The Reverse Mortgage Endorsement assures the lender that changes in the rate of interest or the occurrence of negative amortization will not impair the lender's lien position. The endorsement also provides that future advances are also included within the coverage of the policy. The Reverse Mortgage Endorsement (RME) and the ALTA 14.3-06 may be used interchangeably with loan policies.

Revolving Credit Endorsement (RCE)
The Revolving Credit Endorsement is used with loan policies in instances under which the principal fluctuates from time to time as the borrower draws against a line of credit.

Shared Appreciation Endorsement (SAE)
The Shared Appreciation Endorsement insures the lender against loss or damage by reason of the invalidity or unenforceability of the mortgage resulting from shared appreciation interest provisions contained therein. It also provides coverage as to loss or damage by reason of loss of priority of the lien of the Insured Mortgage as security for the unpaid principal balance, the stated interest, and the shared appreciation interest, which loss of priority results from provisions in the mortgage for payment of shared appreciation interest.

Survey Endorsement (SE)
The Survey Endorsement, given with either an owner's or a loan policy, assures that the lands described in Schedule A of the policy are the same lands described in a specific survey.

Endorsements — General

Under Rule 69O-186.005(7), endorsements and affirmative coverages are placed into three categories:

- permitted endorsements and/or affirmative coverages;
- prohibited endorsements and/or affirmative coverages;
- endorsements and/or affirmative type coverages that are allowed without specific department approval, where no increased risk results to the insurer by the issuance of such endorsement or affirmative type coverages.

According to Rule 69O-186.005(7)(b), no other endorsements or affirmative coverages may be issued other than the endorsements listed in Rule 69O-186.005(6) and Rule 69O-186.005(8).

The permitted endorsements and the associated premiums are provided in the table at the end of this chapter.

Rule Interpretations — Endorsements — General

1. **Do copies of each type of endorsement issued need to be submitted to Attorneys' Title Fund Services, LLC with the policy?**

   No. Endorsements other than endorsement Form E, Contiguity, Survey, Assignment of Mortgage, and Construction Loan Updates can be marked either on the Loan Policy Schedule A, the Policy Calculation Worksheet, or worksheets printed from ATIDS and DoubleTime, submitted to The Fund.

2. **If the lender requires that copies of the preprinted endorsements be submitted with the commitment, does The Fund also need copies of the endorsements?**

   All preprinted endorsements to be issued with the policy should be listed on Schedule B of the commitment. Copies of the forms can be attached to the lender's copy of the commitment, but should be marked "pro forma" or "sample." *Do not send copies of the commitments or the proposed endorsements to The Fund.*

Premium Calculations — Endorsements — General

1. **What is the premium for an ALTA 9-06 when more than one loan policy is being issued?**

   Refer to the *Premium Calculations — Simultaneous Issue Rate* section.

2. **How is the premium calculated for a ALTA 9-06 in the case of loan modifications?**

Fund members are advised to charge the minimum rate for all endorsements based upon a stated minimum. All other costs should be allocated as "closing services."

Refer to the chart below.

Mortgage Modification Type	ALTA 9-06 issued with original loan policy = 10% of premium on:	ALTA 9-06 not issued with original loan policy = 10% of premium on:
Modification resulting in change to terms, conditions, priority, or security, including spreading the lien to mortgages other than construction loans secured by revolving notes and mortgages.	Mortgage Modification Endorsement Worksheet	Original rate or reissue rate applied to current unpaid principal balance
Modifications insuring a future advance	Mortgage Modification Endorsement Worksheet	Original rate or reissue rate applied to total amount of insurance
Modifications to spread the lien of a construction loan secured by revolving note and mortgage.	Mortgage Modification Endorsement Worksheet	Original rate or reissue rate applied to total amount of insurance
Modification not resulting in a change	No charge	Original rate or reissue rate applied to current unpaid principal balance

If an ALTA 9-06 was issued with the original policy and the premium for the extended coverage for the modification (and/or future advance and/or spreader agreement for a construction loan secured by a revolving note and mortgage) is paid, then it is not necessary to attach an additional ALTA 9-06 to the policy.

If an ALTA 9-06 was issued with the original policy and the premium for the extended coverage for the modification (and/or future advance and/or spreader agreement for a construction loan secured by a revolving note and mortgage) is **not paid**, then the endorsement should contain the following statement:

> *The coverage provided by the ALTA 9-06 endorsement attached to this policy is not extended to the mortgage modification (and/or future advance and/or spreader agreement) recorded in Official Records Book _____, Page _____, and insured by this endorsement.*

3. How is the premium calculated for a Navigational Servitude Endorsement (NSE) in the case of mortgage modifications?

Refer to the chart below.

Mortgage Modification Type	NSE issued with original loan policy= 10% of premium on:	NSE not issued with original loan policy=10% of premium on:
Modification resulting in change to terms, conditions, priority, or security, including spreading the lien to mortgages other than construction loans secured by revolving notes and mortgages.	Mortgage Modification Endorsement Worksheet	Original rate or reissue rate applied to current unpaid principal balance
Modifications insuring a future advance	Mortgage Modification Endorsement Worksheet	Original rate or reissue rate applied to total amount of insurance
Modifications to spread the lien of a construction loan secured by revolving note and mortgage.	Mortgage Modification Endorsement Worksheet	Original rate or reissue rate applied to total amount of insurance
Modification not resulting in a change	No charge	Original rate or reissue rate applied to current unpaid principal balance

If a Navigational Servitude Endorsement (NSE) was issued with the original policy and the premium for the extended NSE coverage for the modification (and/or future advance and/or spreader agreement for a construction loan secured by a revolving note and mortgage) is paid, then it is not necessary to attach an additional NSE to the policy.

If an NSE was issued with the original policy and the premium for the extended NSE coverage for the modification (and/or future advance and/or spreader agreement for a construction loan secured by a revolving note and mortgage) is **not paid**, then the endorsement should contain the following statement:

> *Navigational Servitude Endorsement coverage is not extended to the mortgage modification (and/or future advance and/or spreader agreement) recorded in Official Records Book _____, Page _____, and insured by this endorsement.*

4. Navigational Servitude Endorsement (NSE) forms are issued in a simultaneous transaction to an owner's policy and to the loan policy. What is the premium?

Example: OF6 $75,000.00; MF6 $75,000.00; NSE Owner's, NSE Loan.

The premium for the Navigational Servitude Endorsement to the owner's policy is a minimum of ten percent (10%) of the premium for the owner's policy. The premium for the Navigational Servitude Endorsement to the loan policy is a minimum of ten percent (10%) of the premium of the combined owner's and loan policies.

Policy	Amount of Insurance	Rate per Thousand	Premium
OF6	$ 75,000.00	$ 5.75 x 75 =	$ 431.25
MF6	$ 75,000.00		$ 25.00
		Premium (OF6 + MF6)	$ 456.25
	Calculate NSE (Owner's)	$ 431.25 x 10% =	$ 43.13
	Calculate NSE (Loan)	$ 456.25 x 10% =	$ 45.63
	Total NSE Premium	$ 43.13 + $45.63 =	$ 88.76
	Total Premium	$ 456.25 + $88.76 =	$ 545.01

Note: Other than the situation in this example, the Navigational Servitude Endorsement is rated the same as the ALTA 9-06.

Endorsement Premium Chart

		Applicable To		
Endorsement Type	**Form Code**	**Owner's Policy**	**Loan Policy**	**Premium Calculation**
ALTA Endorsement 9-06 (Restrictions, Easements, Minerals)	ALTA 9-06		X	**1**
ALTA Endorsement Form 9.1-06	ALTA 9.1-06	X		
ALTA Endorsement 9.2-06 (Restrictions, Encroachments and Minerals — Improved Land)	ALTA 9.2-06	X		
Navigational Servitude Endorsement	NSE	X	X	
Construction Loan Update	CLU		X	**2**
Contiguity Endorsement	CE	X	X	
Shared Appreciation	SAE		X	
Foreign Currency	FCE		X	
ALTA 10.0-06 Assignment of Mortgage	AM6/10.06		X	
Additional Interest	AIE		X	
Change of Partners	CPE	X	X	
Balloon Mortgage	BME		X	
Option Endorsement	OE	X		
Survey	SE	X	X	
ALTA 4.1-06 (Condo Endorsement)	ALTA 4.1-06	X	X	**3**
ALTA 5.1-06 (Planned Unit Development)	ALTA 5.1-06	X	X	
ALTA 6.0-06 (Variable Rate Mortgage Endorsement)	ALTA 6.0-06		X	
ALTA 6.2-06 (Variable Rate Mortgage — Negative Amortization)	ALTA 6.2-06		X	
ALTA 7.0-06 (Manufactured Housing Unit)	ALTA 7.0-06	X	X	
ALTA 8.1-06 (Environmental Protection)	ALTA 8.1-06		X	
Reverse Mortgage	RME		X	
Revolving Credit	RCE		X	

		Applicable To		
Endorsement Type	**Form Code**	**Owner's Policy**	**Loan Policy**	**Premium Calculation**
Form E — General Endorsement	E	X	X	**4**
ALTA 11.0-06 (Mortgage Modification)	ALTA 11.0-06		X	
ALTA 12.0-06 (Aggregation)	ALTA 12.0-06		X	
ALTA 14.0-06 (Future Advance Priority)	ALTA 14.0-06		X	
ALTA 14.2-06 (Future Advance Letter of Credit)	ALTA 14.2-06		X	
ALTA 14.3-06 (Future Advance Reverse Mortgage)	ALTA 14.3-06		X	
ALTA 13.0-06 Leasehold Owner's	ALTA 13.0-06	X		
ALTA 13.1-06 Leasehold Loan	ALTA 13.1-06		X	

If an endorsement is issued with either an owner's policy or a loan policy, the premium is:

1 – Minimum of ten percent (10%) of the premium of underlying policy. If the endorsement is issued to a simultaneous loan policy, the premium is a minimum of ten percent (10%) of the sum of the premiums for the owner's and loan policy to which the endorsement applies.

2 – One to four family residential premium: minimum of $25.00 and a maximum of $100.00. Other risks (commercial or greater than one to four family): minimum of $100.00

3 – Premium: minimum of $25.00

4 – No additional charge.

Fund members are advised to charge the minimum rate for all endorsements based upon a stated minimum. All other costs should be allocated as "closing services."

MODIFICATIONS THAT DO NOT REQUIRE A PREMIUM:

* Extend the time for repayment

* Decrease the interest rate, provided the cap on a variable rate mortgage is not more than the original cap and/or the cap is not more than the original fixed rate

* Increase the interest rate, provided the endorsement contains an exception for the loss of priority resulting from the increase

* Change the amortization schedule to extend the term

* Release a portion of secured property

* Make a correction to either perfect the lien of the insured mortgage or comply with the terms of the lender's original commitment.

PREMIUM for Florida Form 9 Endorsement 9-06 and Navigational Servitude Endorsement (NSE):

10% of premium on:

Mortgage Modification Type	**Update Existing 9.06 or NSE issued with original MP: Charge 10% based upon**	**New 9.06 or NSE not issued with original MP: Charge 10% based upon**
Modification resulting in change to terms, conditions, priority, or security	9-06 and NSE: Mortgage Modification Endorsement Worksheet	9-06 and NSE: Original rate or reissue rate as applicable applied to current unpaid principal balance
Modifications insuring a future advance	and Mortgage Modification Endorsement Worksheet	9-06 and NSE: Original rate or reissue rate as applicable applied to total amount of insurance
Modifications for spreader agreement	and Mortgage Modification Endorsement Worksheet	9-06 and NSE: Original rate or reissue rate as applicable applied to total amount of insurance
Modification not resulting in a change	9-06: no charge NSE: no charge	9-06 and NSE: Original rate or reissue rate as applicable applied to current unpaid principal balance
Modifications to Revolving Line of Credit, Construction Mortgage, or Reverse Mortgage	9-06: Mortgage Modification Endorsement Worksheet, which requires substitution loan rate on entire amount policy NSE: no charge	9-06 and NSE: Original rate or reissue rate as applicable applied to entire policy amount

FF9 and NSE:

If a9-06 and/or NSE was issued with the original policy and the premium for the extended FF9 and/or NSE coverage for the modification (and/or future advance and/or spreader agreement) is paid, then it is not necessary to attach an additional 9-06 and/or NSE to the policy.

If a 9-06 and/or NSE was not issued with the original policy, and the premium for the extended 9-06 and/or NSE coverage for the modification (and/or future advance and/or spreader agreement) is not paid, then the endorsement should contain the following statement:

"Florida Form 9 Endorsement and/or Navigational Servitude Endorsement coverage is not extended to the mortgage modification (and/or future advance and/or spreader agreement) recorded in Official Book _____ Page _____ and insured by this endorsement."

Mortgage Modification Endorsement Worksheet

Issued Through Attorneys' Title Fund Services, LLC

Agent Number _____ Agent' _____ Paid with Check No. _____
Endorsing Policy # _____ Original Amount of Insu _____
CS _____

I. MODIFICATION WHICH CHANGES THE TERMS, CONDITIONS, PRIORITY, OR SECURITY, OTHER THAN THOSE PERMITTED UNDER RULE 690-186.005(13). THIS SECTION INCLUDES THOSE MODIFICATIONS SPREADING LIENS WHICH ARE NOT CONSTRUCTION LOANS SECURED BY REVOLVING NOTES AND MORTGAGES TO ADD PROPERTY.

Unpaid Principal of Loan _____ *Original/Last Effective Date _____
Premium on Unpaid Principal of the Loan $ - *New Effective Date _____
*Required for rating percentage

Times: Percentage, based on the age of the loan X 0%

___ 3 years or under, 30% _____ 4 to 5 years, 50%

___ 3 to 4 years, 40% _____ 5 to 10 years, 60% **Equals premium** $ - **(1)**

___ Over 10 years original rates and premiums splits apply **X30% = Old Republic Share** $ - **(1a)**

II. MODIFICATION TO INSURE A FUTURE ADVANCE

Unpaid Principal Balance _____ + Future Advance _____ = $ -
New Amt of Insurance

Rate Future Advance at appropriate tiers. The starting tier will depend on where the Unpaid Balance falls.
(If Revolving Line of Credit with Revolving Credit Endorsement, the starting tier will depend on where the original loan amount falls.)

Rating Tiers	Future Advance amt.	Rate per Thousand	Premium	%	Old Republic Share
Up to $100,000	$ -	$ 5.75	$ -	30%	$ -
Over $100,000 up to $1 million	$ -	$ 5.00	$ -	30%	$ -
Over $1 million up to $5 million	$ -	$ 2.50	$ -	35%	$ -
Over $5 million up to $10 million	$ -	$ 2.25	$ -	40%	$ -
Over $10 million	$ -	$ 2.00	$ -	40%	$ -
		Totals:	$ - **(2)**		$ - **(2a)**

III. MODIFICATION TO SPREAD THE LIEN OF A CONSTRUCTION LOAN SECURED BY REVOLVING NOTE AND MORTGAGE. PURSUANT TO RULE 690-186.003 (8)

Amt. Allocated to additional property _____ +Amt. Allocated to original property _____ = $ -
Unpaid Prin. Bal

Calculate rate for amount allocated to additional property at the appropriate tiers. The starting tier will depend on where the "Amount Allocated to Original Property" falls.

Rating Tiers	Amt. Allocated To Add'l Prop	Rate per Thousand	Premium	%	Old Republic Share
Up to $100,000	$ -	$ 5.75	$ -	30%	$ -
Over $100,000 up to $1 million	$ -	$ 5.00	$ -	30%	$ -
Over $1 million up to $5 million	$ -	$ 2.50	$ -	35%	$ -
Over $5 million up to $10 million	$ -	$ 2.25	$ -	40%	$ -
Over $10 million	$ -	$ 2.00	$ -	40%	$ -
		Totals:	$ - **(3)**		$ - **(3a)**

IV. MODIFICATION THAT DOES NOT REQUIRE A PREMIUM (See reverse side for a list of these modifications) **$0.00** _____
Please check here for modification that does not require premium.

TOTAL PREMIUM ON ENDORSEMENT [1+(> of 2 or 3)] $ - TOTAL OLD REPUBLIC SHARE [1a+(> of 2a or 3a)] $ -
Calculate the premium for FF9 and/or NSE using the table on the reverse side:

___ 9-06 not issued with origina or _____ 9-06 is: $ - $ - X 30% = $ - $ -

___ NSE not issued with origina or _____ NSE is $ - $ - X 30% = $ - $ -

TOTAL PREMIUM* **(min $100)** $ - **TOTAL OLD REPUBLIC SHARE** $ -

NAME OF AGENT: _____ **AGENT NUMBER:**

Fund Net

SUBSTITUTION LOAN WORKSHEET
Old Republic National Title Insurance Company
Issued Through Attorneys' Title Fund Services, LLC
Please sumit this form along with the policy to ensure proper processing

AGENT NO: _____ **AGENT FILE REF:** _____ **PAID WITH CHECK NO:** _____
RESEARCHER _____

LOAN INFORMATION

New Loan Policy Number: _____ Effective Date of Original Policy: _____

Original Mortgagee Policy Number: _____ Unpaid Principal Balance of Loan: _____
(Copy of original policy should be attached)

New Amount of Insurance: _____

☐ **Residential** ☐ **Non-Residential** ☐ **Surcharge**

I. PREMIUM CALCULATION FOR SUBSTITUTION LOAN RATE

Premium on the Unpaid Balance of Loan $ - (1)
Time percentage, based on age of the loan or age of the policy as last endorsed

0%

	3 years or under	30%		5 to 10 years	60%	Equals Premium	$ - (2)
	3 to 4 years	40%		over 10 years	*	30%=Old Republic Share	$ - (2a)
	4 to 5 years	50%					

*Original Rates and premium splits apply

II. PREMIUM CALCULATION FOR AMOUNT IN EXCESS OF THE UNPAID PRINCIPAL BALANCE AT ORIGINAL RATE
Note: The starting tier will depend on where the Unpaid Principal Balance falls.

Rating Tier(s)	Amt. Of Insurance	Rate Per Thousand	Premium	%	Old Republic Share
Up to $100,000	$ -	$5.75	$ -	30%	$ -
Over $100,000 up to $1 million	$ -	$5.00	$ -	30%	$ -
Over $1 million up to $5 million	$ -	$2.50	$ -	35%	$ -
Over $5 million up to $10 million	$ -	$2.25	$ -	40%	$ -
Over $10 million	$ -	$2.00	$ -	40%	$ -
		Totals	$ - (3)		$ - (3a)
		Totals: Premium (line 2 +3)	$ -	(4) **(2a+3a)**	$ - (4a)

III. ENDORSEMENTS PER RULE 69O-186.005 (8)(a) & (b): Place an "X" for the applicable endorsement and complete premium calculation

906 issued with original MF6 -	x	Premium from line 4	$ -	X 10% min.	$ -	(5) x 30% =	$ - (5a)
906 NOT issued with original MF6 -		Premium from lines 1 + 3	$ -	X 10% min.	$ -	(6) x 30% =	$ - (6a)
NSE issued with original MF6 -		Premium from line 4	$ -	X 10% min.	$ -	(7) x 30% =	$ - (7a)
NSE NOT issued with original MF6 -		Premium from lines 1 + 3	$ -	X 10% min.	$ -	(8) x 30% =	$ - (8a)

IV. ENDORSEMENTS PER RULE 69O-186.005 (8) (c) thru (l): Place an "X" for the applicable endorsement, indicate property type, and complete premium calculation. **A COPY MUST BE ATTACHED TO POLICY

	SAE		BME		AIE		10-06/AM6**		OE
	CLU**		CPE		CE**		FCE		SE**
1-4 Family Residential: -									
	No. of Endorsements issued	0	X (min. $25.00/max. $100.00) =		$ -	(9) X 30% =		$ -	(9a)
Non-Residential: -									
Verify Residential or Non-Residential has been selected at top of form.	No. of Endorsements issued	0	X (min.) $100.00 =		$ -	(10) X 30% =		$ -	(10a)

V. ALTA ENDORSEMENTS PER RULE 69O-186.005 (6): Place an "X" for the applicable endorsements below and complete the calculation.

	4.1 - 06		6.0 - 06		7.0-06		RCE		
	5.1 - 06		6.2 - 06		8.1 - 06		RME		
No. of Endorsements Issued	0	x (minimum) $25.00 =	$ -	(11) X 30'	$ -	(11a)			

VI. ALTA ENDORSEMENTS PER RULE 69O-186.005 (6): Place an "X" for the applicable endorsements below.

	13.1-06								
			14.2-06		14.3-06				
No. of Endorsements Issued	0	Rate at $0							

TOTAL CALCULATIONS ON SUBSTITUTION LOAN:

Per Rule **631.401** **Surcharge**	$ -
Total of Premium (add lines 4 through 11 and Surcharge)	$ -
Total of Old Republic Share (add lines 4a through 11a and Surcharge)	$ -
*Minimum Premium of $100	

* Note: Applicable premium is to be remitted. Minimums are indicated where applicable. Overpayment of premium will be treated as excess insurer retention.

66/66

Back to Speaker Topics

Fund Assembly

Using Fund Resources to Maximize Your Closing Practice

John St. Lawrence, *Legal Education Attorney, The Fund*

Back to Speaker Topics

Speaker Information

Using Fund Resources to Maximize Your Closing Practice

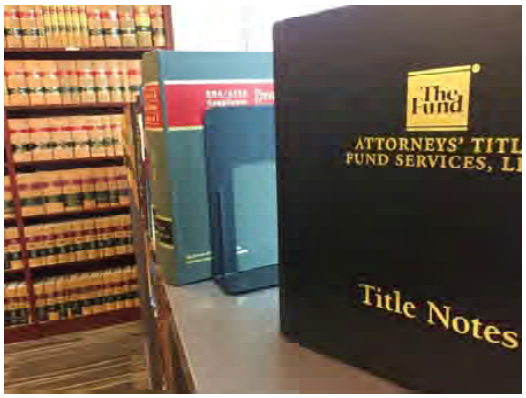
John St. Lawrence,
Legal Education Attorney, The Fund

John B. St. Lawrence was admitted to practice in the State of Florida in 1995 following award of a Juris Doctor degree from the University of Florida. He earned a B.S. in Journalism from the University of Florida in 1992. His practice has focused on bankruptcy, real estate, and title insurance.

Mr. St. Lawrence is currently a Legal Education Attorney with The Fund. Prior to that, he served as Fund claims counsel. He is a member of the Florida Bar's Real Property, Probate & Trust Law Section and has been admitted to all Florida Federal District Courts. He currently co-teaches The Fund's New Member Training course for beginning title agents.

Using Fund Resources to Maximize Your Closing Practice

John B. "Jay" St. Lawrence
Fund Legal Education Attorney



Overview of Resources–Fund Website

Resources Tab

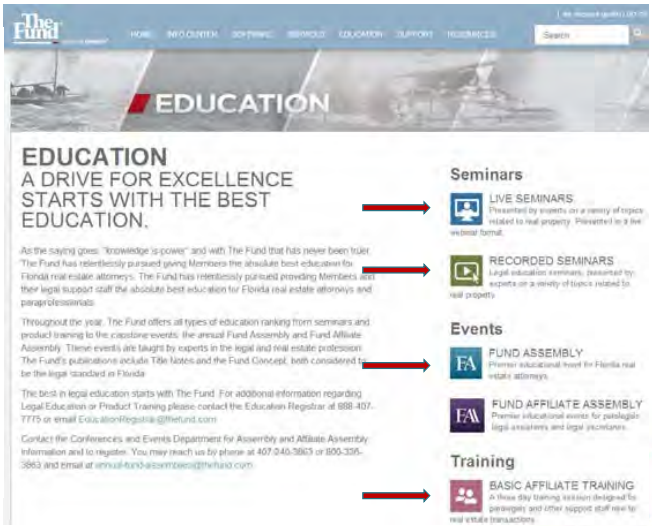
- Title Notes
- Affidavit Practice Manual
- Standard Commitment Clauses
- Best Practices
- Fund Concept Articles
- Fund Procedures Handbook

2

Overview of Resources–Fund Website

Education Tab

- Live Seminars
- Recorded Seminars
- Events
- Live Training Schedule



3

Fund Procedures Handbook

- Who to call
  - Fund Reps
  - Branch Managers
  - Member Account Executives
- Obtaining title information
  - Branch phone list by area
  - Branch products
  - ATIDS information

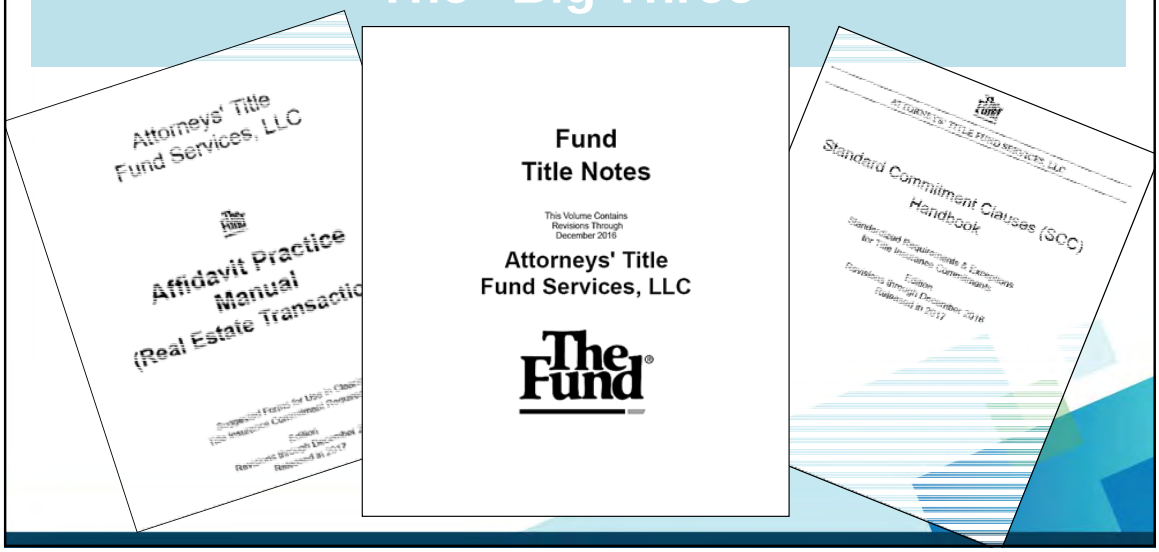
4

Fund Procedures Handbook

- Terminology
- Finding base title
- Preparing the forms
  - Commitment
  - Loan policy
  - Owner's policy
  - Endorsements
- Rating
- Submitting payment
- Claims procedures
- Agency agreement

5

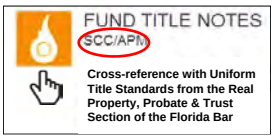
The "Big Three"

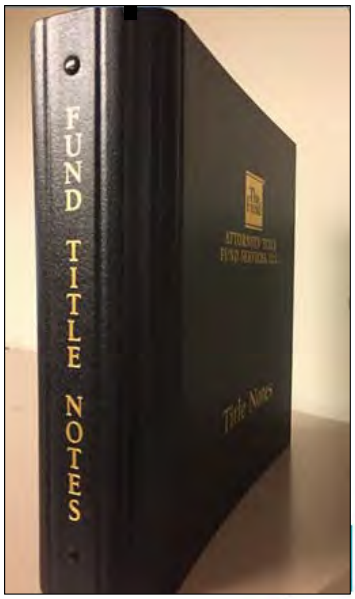


3

Fund Title Notes

- Fund underwriting guidance in chapter format
- Download Interlinked PDF from Resources tab
- Download includes SCC Handbook and Affidavit Practice Manual
- Updated annually by Fund staff and attorneys
- Cross-references Florida Uniform Title Standards
- Online version free for Fund members

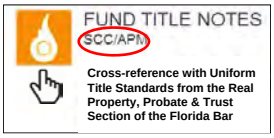




7

Standard Commitment Clauses Handbook

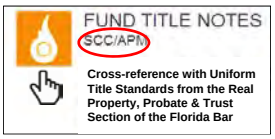
- The Fund's standardized Requirements and Exceptions clauses
- Assists in preparation of Schedule B of title insurance commitments
- Discusses and helps explain requirements found in Branch commitments
- Included with Title Notes download



8

Standard Commitment Clauses Handbook

- Divided into four chapters
- Chapters 1 and 2 contain discussions and sample clauses for Schedule B Part I of the commitment (requirements)
- Chapters 3 and 4 contain discussions and clauses for Part II (exceptions)
- Chapters reference applicable Title Notes for further explanation



9

Standard Commitment Clauses Handbook

Note on Identifying Sample Clauses by Type

- A sample clause is identified first by a prefix that indicates the chapter in which it appears and the type of clause it is,
- Then by section, subsection, and subparts as applicable

Table 1: Sample Clauses

Prefix	Chapter	Section of Commitment Schedule B
I	1 – Instruments Creating Insured Interests	Part I, Item 2
GR	2 – General Requirements	Part I
E	3 – Exceptions	Part II
ML	4 – Exceptions Modifying Liability	Part II

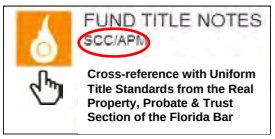
Table 2: Examples of Clauses

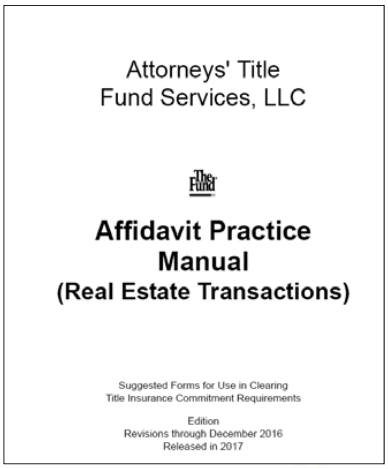
Clause	Chapter	Section	Subsection	Other
GR-19.9.1	2	Corporations	Domestications	1st requirement
GR-19.9.2	2	Corporations	Domestications	2nd requirement
E-9.1.2	3	Lease with Option to Purchase	None	2nd exception

10

Affidavit Practice Manual

- Available only online as part of Interlinked PDF from Resources tab
- Used with Title Notes and the Standard Commitment Clauses Handbook
- Sample affidavits to help meet requirements
- May be modified for individual needs
- **Contact Underwriting when in doubt about specific situations**





11

Using Fund Resources: The Process

- Use **SCC Handbook** to examine requirements
- Review, modify, and utilize affidavits from **Affidavit Practice Manual** as needed
- Cross-reference **Title Notes** for in-depth information

12

For example, say the following trust requirement appears in a Branch Commitment:

13

GR-5.2

Review of the complete trust agreement of the trust _____ [state whether *described in Schedule A Number 2* or whether *known as* _____ or whether *referred to in the instrument recorded in O.R. ____, Page _____, and/or Instrument No. _____*] *and all amendments thereto to determine that the proposed transaction is authorized under the terms of the trust. Said trust agreement, and amendments, shall be attached to an affidavit confirming that it is a full and complete copy of the trust and amendments, and recorded or kept in the title agent's file. Further requirements may be necessary upon review of the trust. If the full trust agreement and amendments, if any, are recorded as an exhibit to an affidavit from the trustee or attorney for the trust, the affidavit shall confirm that such trust agreement* [current transaction, insert: *is currently in full force and effect*] [prior transaction in chain, insert: *was in full force and effect during the period of ownership*]. *If the full trust agreement and amendments, if any, are not recorded, then record affidavit from trustee or attorney for the trust stating at least the following: (1) name of the trustee(s) or successor trustee(s) (2) legal description of the trust property (3) an affirmative statement that the trustee(s) or successor trustee(s) has the full power and authority to do the required act (4) that nothing in the trust documents prohibits or restricts the trustee(s) or successor trustee(s) from doing the required act, and (5) that the trust has been in full force and effect during the period of ownership of the real property to be insured. As to (1) above, attach excerpts of the pertinent pages from the trust documents showing the appointment and identity of the trustee(s) or successor trustee(s) as exhibits; and if the successor trustee(s) acts, that the successor trustee(s) is appointed due to circumstances described in attached excerpts of the trust and further evidenced by the supporting documents attached as exhibits. As to (3) above, attach the pertinent pages of the trust describing such authority as exhibits.*

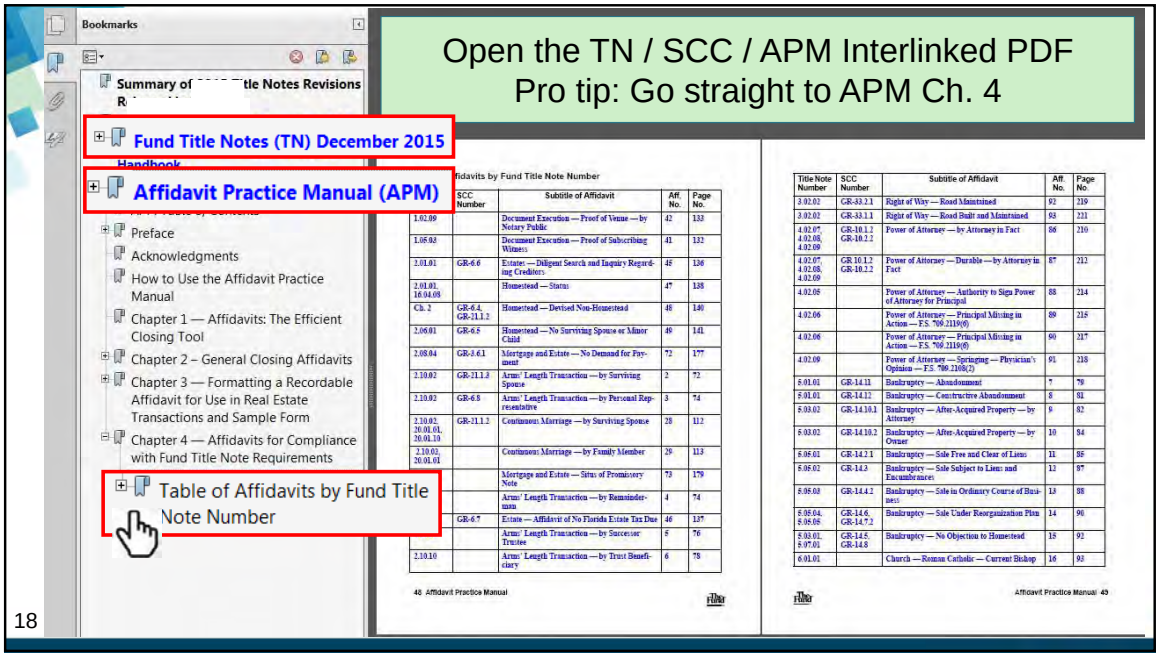
Let's break down the requirement

16

SCC Handbook details requirements

17

Open the TN / SCC / APM Interlinked PDF
Pro tip: Go straight to APM Ch. 4



18

Chapter 4 — Affidavits for Compliance with Fund Title Note Requirements

APM Ch. 4 table hyperlinks directly to SCC *and* related Title Notes and affidavits

Title Note Number	SCC Number	Subtitle of Affidavit	Aff. No.	Page No.
31.02.05	GR-5.7	Trust — Majority of Trustees — Land Trust	97	228
31.05.01, 31.06.05	GR-5.2, 5.5, 5.8	Trust — Unrecorded Trust —Excerpts — Majority/Successor	101.1	237
		Trust — Trustee Not Same As Debtor	98	230
	R-5.2, 5, 5.8	Trust — Unrecorded Trust — Full Copy — Majority/Successor	100	233
	R-5.2	Trust — Unrecorded Trust — Excerpts	101	235
31.06.05		Trust — of Record — Homestead — by Successor Trustee	102	239
31.06.05		Trust — Unrecorded Trust — Homestead — by Successor Trustee	103	240
31.06.10.B	GR-5.10	Confirming Identities of Heirs When Protected Homestead Titled in Trustee of a Revocable Trust	107	245
31.06.07	GR-5.3	Trust — of Record — Linking Affidavit	99	231

GR-5.2, 5.5, 5.8

GR-5.2

19

Practical Examples - Trusts

SCC Ch. 2

The Requirement:

Recording Trust Agreement or Excerpts thereof

Introductory language in SCC Handbook explains use of the requirement

E. Trust Agreements — **TNs 31.01.01** to **31.06.09**
When title is held by the trustee of an unrecorded trust, and the deed under which title was taken does not contain land trust powers (see Sec. 689.071, F.S., or Sec. 689.073, F.S.,effective June 28, 2013) and does not fall within Sec. 689.07, F.S., i.e., title taken as Trustee without mention of a trust agreement, either GR-5.1 or GR-5.2 may be used. If it is a qualified personal residence trust (QPRT), regardless of it being a land trust, the trust must be reviewed

20

Practical Examples - Trusts

SCC Ch. 2

The Requirement:

Recording Trust Agreement or Excerpts thereof

Introductory language in SCC Handbook explains use of the requirement (cont'd)

If the trust agreement or excerpts thereof will be placed in the public records as an exhibit to an affidavit or if the trust must be reviewed because it is a qualified personal residence trust (QPRT) regardless of the deed into the trustee providing for trust powers under Sec. 689.071, F.S, or Sec. 689.073, F.S., effective June 28, 2013, then make the following requirement:

real property to be insured. As to (1) above, attach excerpts of the pertinent pages from the trust documents showing the appointment and identity of the trustee(s) or successor trustee(s) as exhibits; and if the successor trustee(s) acts, that the successor trustee(s) is appointed due to circumstances described in attached excerpts of the trust and further evidenced by the supporting documents attached as exhibits. As to (3) above, attach the pertinent pages of the trust describing such authority as exhibits.

21

Practical Examples - Trusts

SCC Ch. 2

1

Review trust agreement to confirm authorization for insured transaction

Review of the complete trust agreement of the trust _____ [state whether *described in Schedule A Number 2* or whether *known as* _____ or whether *referred to in the instrument recorded in O.R. ____, Page _____, and/or Instrument No. _____*] *and all amendments thereto to determine that the proposed transaction is authorized under the terms of the trust.*

the trust stating at least the following: (1) name of the trustee(s) or successor trustee(s) (2) legal description of the trust property (3) an affirmative statement that the trustee(s) or successor trustee(s) has the full power and authority to do the required act (4) that nothing in the trust documents prohibits or restricts the trustee(s) or successor trustee(s) from doing the required act, and (5) that the trust has been in full force and effect during the period of ownership of the real property to be insured. As to (1) above, attach excerpts of the pertinent pages from the trust documents showing the appointment and identity of the trustee(s) or successor trustee(s) as exhibits; and if the successor trustee(s) acts, that the successor trustee(s) is appointed due to circumstances described in attached excerpts of the trust and further evidenced by the supporting documents attached as exhibits. As to (3) above, attach the pertinent pages of the trust describing such authority as exhibits.

22

Practical Examples - Trusts

SCC Ch. 2

2

The Requirement:

Recording Trust Agreement or Excerpts thereof

Requirement calls for affidavit

Said trust agreement, and amendments, shall be attached to an affidavit confirming that it is a full and complete copy of the trust and amendments, and recorded or kept in the title agent's file. Further requirements may be necessary upon review of the trust.

is a full and complete copy of the trust and amendments, and recorded or kept in the title agent's file. Further requirements may be necessary upon review of the trust. If the full trust agreement and amendments, if any, are recorded as an exhibit to an affidavit from the trustee or attorney for the trust, the affidavit shall confirm that such trust agreement [current transaction, insert: *is currently in full force and effect*] [prior transaction in chain, insert: *was in full force and effect during the period of ownership*]. *If the full trust agreement and amendments, if any, are not recorded, then record affidavit from trustee or attorney for the trust stating at least the following: (1) name of the trustee(s) or successor trustee(s) (2) legal description of the trust property (3) an affirmative statement that the trustee(s) or successor trustee(s) has the full power and authority to do the required act (4) that nothing in the trust documents prohibits or restricts the trustee(s) or successor trustee(s) from doing the required act, and (5) that the trust has been in full force and effect during the period of ownership of the real property to be insured. As to (1) above, attach excerpts of the pertinent pages from the trust documents showing the appointment and identity of the trustee(s) or successor trustee(s) as exhibits; and if the successor trustee(s) acts, that the successor trustee(s) is appointed due to circumstances described in attached excerpts of the trust and further evidenced by the supporting documents attached as exhibits. As to (3) above, attach the pertinent pages of the trust describing such authority as exhibits.*

23

Practical Examples - Trusts

SCC Ch. 2

3

The Requirement:

Recording Trust Agreement or Excerpts thereof

Affidavit requirements further specified

If the full trust agreement and amendments, if any, are recorded as an exhibit to an affidavit from the trustee or attorney for the trust, the affidavit shall confirm that such trust agreement [current transaction, insert: *is currently in full force and effect*] [prior transaction in chain, insert: *was in full force and effect during the period of ownership*].

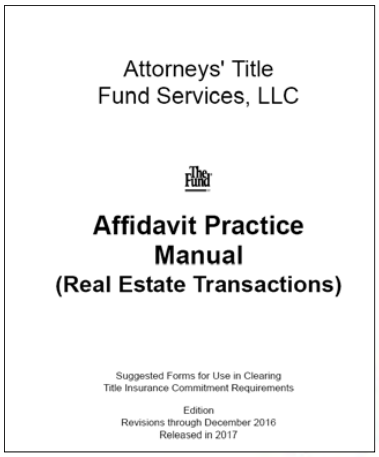
effect during the period of ownership]. If the full trust agreement and amendments, if any, are not recorded, then record affidavit from trustee or attorney for the trust stating at least the following: (1) name of the trustee(s) or successor trustee(s) (2) legal description of the trust property (3) an affirmative statement that the trustee(s) or successor trustee(s) has the full power and authority to do the required act (4) that nothing in the trust documents prohibits or restricts the trustee(s) or successor trustee(s) from doing the required act, and (5) that the trust has been in full force and effect during the period of ownership of the real property to be insured. As to (1) above, attach excerpts of the pertinent pages from the trust documents showing the appointment and identity of the trustee(s) or successor trustee(s) as exhibits; and if the successor trustee(s) acts, that the successor trustee(s) is appointed due to circumstances described in attached excerpts of the trust and further evidenced by the supporting documents attached as exhibits. As to (3) above, attach the pertinent pages of the trust describing such authority as exhibits.

24

So it looks like you need an affidavit …

Ch. 4 of the Affidavit Practice Manual provides:

- Basic forms of averments to comply with commitment requirements as set forth in Title Notes and the SCC Handbook
- Table with list of affidavit forms with related Title Note numbers and applicable SCC references
- Note: forms should be modified to fit specific situations



25

Chapter 4 — Affidavits for Compliance with Fund Title Note Requirements

Locate affidavit(s) with page number / hyperlink

Locate requirement

GR-5.2, 5.5, 5.8	Trust — Unrecorded Trust — Full Copy — Majority/Successor	100	233
GR-5.2	Trust — Unrecorded Trust — Excerpts	101	235

26

Aff-100 Trust — Unrecorded Trust — Full Copy — Majority Successor
(TN 31.06.05, SCC GR-5.2, 5.5, 5.8)

Affidavit

[Trust — Unrecorded Trust — Full Copy — Majority Successor]

BEFORE ME, the undersigned authority, duly authorized to take acknowledgments and administer oaths, personally appeared _____ ("Affiant"), who deposes and says under penalties of perjury that:

[*initial where requested, if applicable*]

1. This affidavit is made with regard to the following described property:

   [*insert legal description*]

2. By deed recorded _____ in O.R. _____, Page_____, and/or Instrument No. _____, Public Records of _____ County, Florida, ("Deed") title to the real property described in item 1 above ("Property") was taken in the name of [state names of grantee trust as it appears on deed]. Attached hereto as Exhibit A is a complete true and correct copy of the trust agreement, and amendments, if any, ("Trust") described in Deed.

3. A. _____ [*initial, if applicable*] Affiant (s) is/are the trustee(s) of the Trust.

   B. _____ [*initial, if applicable*] Affiant (s) is/are the successor trustee(s) of the Trust. Attached as Exhibit A-2 are the documents supporting the appointment of the successor trustee.

4. _____ [*initial, if applicable*] Affiants are a majority of the co-trustees of Trust and the Trust is silent as to their authority to act on behalf of the Trust. Choose A or B:

   A. _____ [*initial, if applicable*] The co-trustees were unable to reach a unanimous decision; or,

   B. _____ [*initial, if applicable*] All of the co-trustees could not participate because of [state whether due to absence, illness, disqualification under a particular law, or temporary incapacity] as provided by F.S. 736.0703.

5. The Trust has been in full force and effect during the period of ownership of the Property.

6. This affidavit is made to induce **Old Republic National Title Insurance Company** ("Title Insurer") to insure title to the real property described in item 1 above. Affiant agrees to indemnify **Title Insurer** and hold it harmless from any loss or damage resulting from its reliance on the matters set forth in this affidavit.

7. Item 3.A. or 3.B. must be initialed to be deemed averred by this affidavit.

_____ (Affiant)
Print Name: _____

STATE OF _____
COUNTY OF _____

Sworn to, affirmed, and subscribed before me this ___ day of _____, 201__, by _____, who is/are personally known to me or who has/have produced _____ as identification.

Notary Signature: _____
Print Name: _____
Notary Public, State of _____
My Commission Expires: _____
[PLACE NOTARIAL SEAL]

Note:
- Affidavits may require modification to fit specific facts
- Call Underwriting with specific questions

27

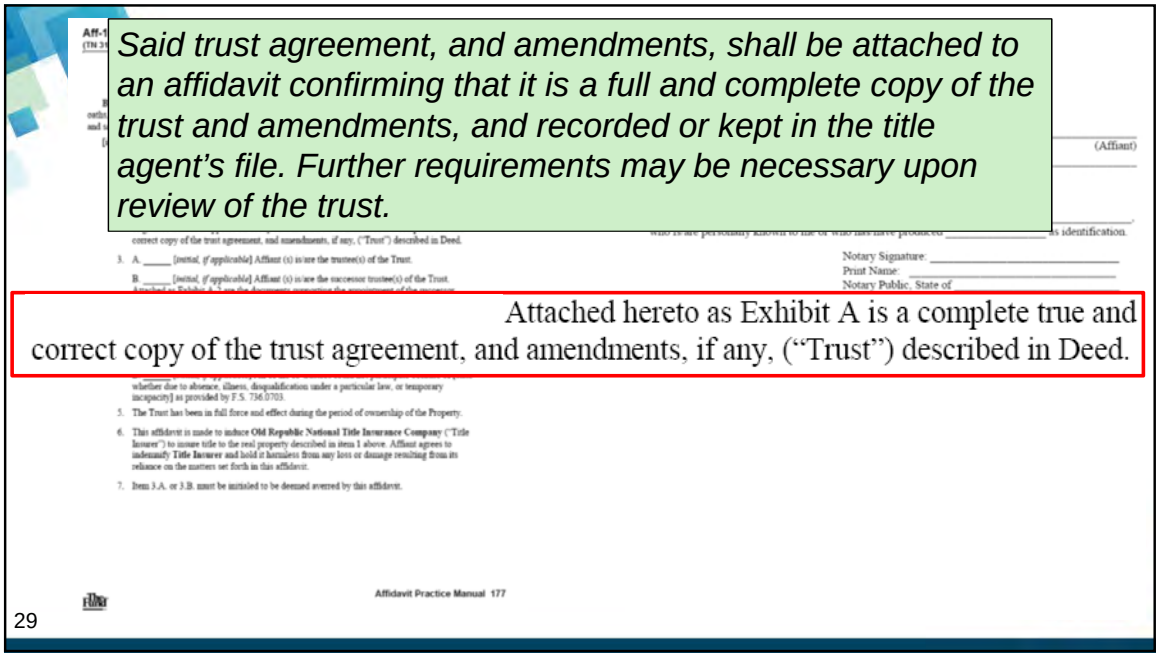
Said trust agreement, and amendments, shall be attached to an affidavit confirming that it is a full and complete copy of the trust and amendments, and recorded or kept in the title agent's file. Further requirements may be necessary upon review of the trust.

2. By deed recorded _____ in O.R. _____, Page_____, and/or Instrument No. _____, Public Records of _____ County, Florida, ("Deed") title to the real property described in item 1 above ("Property") was taken in the name of [state names of grantee trust as it appears on deed]. Attached hereto as Exhibit A is a complete true and correct copy of the trust agreement, and amendments, if any, ("Trust") described in Deed.

Affidavit Practice Manual 177

28

Said trust agreement, and amendments, shall be attached to an affidavit confirming that it is a full and complete copy of the trust and amendments, and recorded or kept in the title agent's file. Further requirements may be necessary upon review of the trust.

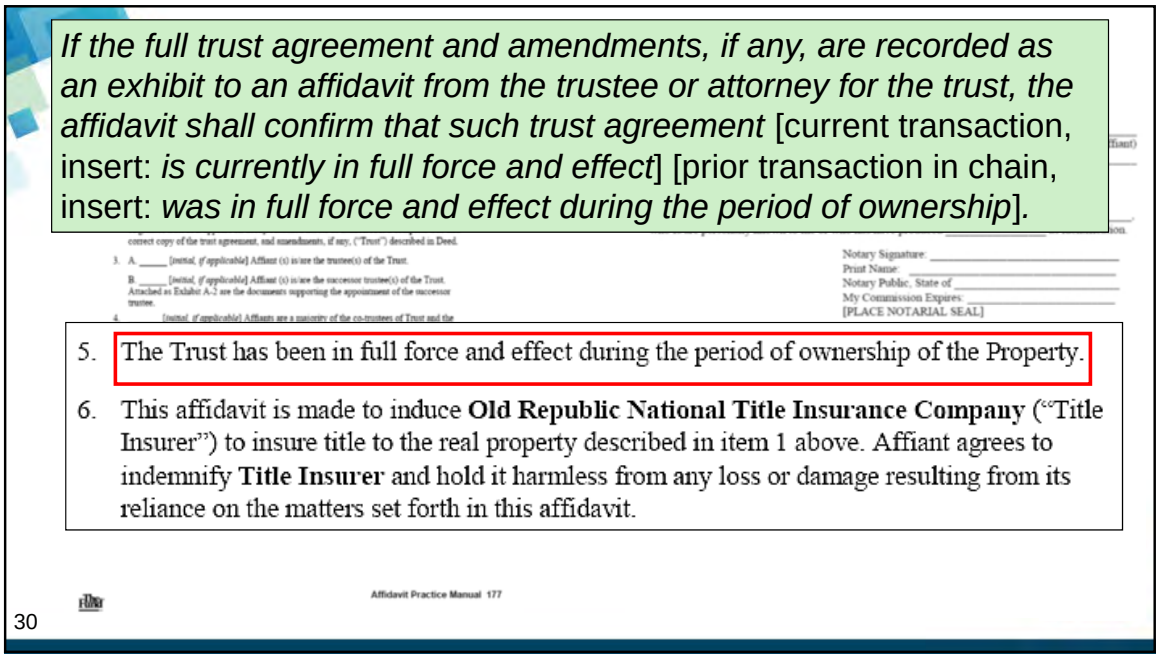


Attached hereto as Exhibit A is a complete true and correct copy of the trust agreement, and amendments, if any, ("Trust") described in Deed.

Affidavit Practice Manual 177

29

If the full trust agreement and amendments, if any, are recorded as an exhibit to an affidavit from the trustee or attorney for the trust, the affidavit shall confirm that such trust agreement [current transaction, insert: *is currently in full force and effect*] [prior transaction in chain, insert: *was in full force and effect during the period of ownership*].



5. The Trust has been in full force and effect during the period of ownership of the Property.

6. This affidavit is made to induce **Old Republic National Title Insurance Company** ("Title Insurer") to insure title to the real property described in item 1 above. Affiant agrees to indemnify **Title Insurer** and hold it harmless from any loss or damage resulting from its reliance on the matters set forth in this affidavit.

Affidavit Practice Manual 177

30

Practical Examples - Trusts

SCC Ch. 2

4

The Requirement:

Different affidavit required where the full trust agreement not recorded

If the full trust agreement and amendments, if any, are not recorded, then record affidavit from trustee or attorney for the trust stating at least the following: (1) name of the trustee(s) or successor trustee(s) (2) legal description of the trust property (3) an affirmative statement that the trustee(s) or successor trustee(s) has the full power and authority to do the required act (4) that nothing in the trust documents prohibits or restricts the trustee(s) or successor trustee(s) from doing the required act, and (5) that the trust has been in full force and effect during the period of ownership of the real property to be insured.

31

Back to the hyperlinked chart to locate a different affidavit if needed
Ex) Trust is unrecorded

Chapter 4 — Affidavits for Compliance with Fund Title Note Requirements

Title Note Number	SCC Number	Subtitle of Affidavit	Aff. No.	Page No.
31.02.05	GR 5.7	Trust — Majority of Trustees — Land Trust	97	228
31.05.01, 31.06.05	GR 5.2, 5.5, 5.8	Trust — Unrecorded Trust — Excerpts — Majority Successor	101.1	237
31.06.02		Trust — Unrecorded Trust — Excerpts	101	235
31.06.05		Trust — of R… sor Trustee		239
31.06.05	GR 5.2	Trust — Unrecorded Trust — Excerpts	101	235
31.06.05		Trust — of Record — Homestead — by Succes- sor Trustee	102	239
31.06.05		Trust — Unrecorded Trust — Homestead — by Successor Trustee	103	240
31.06.10.B	GR 5.10	Confirming Identities of Heirs When Protected Homestead Titled in Trustee of a Revocable Trust	107	245
31.06.07	GR 5.3	Trust — of Record — Linking Affidavit	99	231

Select hyperlink

32

Aff-101 Trust — Unrecorded Trust — Excerpts (TN 31.06.05, SCC GR-5.2)

Affidavit

[Trust — Unrecorded Trust — Excerpts]

BEFORE ME, the undersigned authority, duly authorized to take acknowledgments and administer oaths, personally appeared _____ ("Affiant"), who deposes and says under penalties of perjury that:

[*Initial where requested, if applicable*]

1. This affidavit is made with regard to the following described property:

[*insert legal description*]

2. By deed recorded _____ in O.R. _____, Page_____, and/or Instrument No. _____, Public Records of _____ County, Florida, ("Deed") title to the real property described in item 1 above ("Property") was taken in the name of [*state names of grantee trust as it appears on deed*].

3. Affiants are a majority of the co-trustees of that certain trust and amendments, if any, ("Trust") as described in Deed. Attached hereto as Exhibit A are the pertinent pages of the Trust showing the appointment of the co-trustees. If any Affiant is a successor co-Trustee, attached hereto as Exhibit A-1 are the pertinent pages showing the appointment and identity of the successor co-trustee and attached as Exhibit A-2 are the documents supporting the appointment of the successor co-trustee.

4. A. _____ [Initial, if applicable] The co-trustees were unable to reach a unanimous decision, or B. _____ [Initial, if applicable] all of the co-trustees could not participate because of [state whether due to absence, illness, disqualification under a particular law, or temporary incapacity] as provided by F. S. 736.0703.

5. Affiants have full power and authority to [*state whether convey or mortgage*] the Property. See excerpt of trust as Exhibit B describing such authority.

6. Nothing in the Trust prohibits or restricts the Affiants from [*state whether conveying or mortgaging*] the Property.

7. The Trust has been in full force and effect during the period of ownership of the Property.

8. This affidavit is made to induce **Old Republic National Title Insurance Company** ("Title Insurer") to insure title to the real property described in item 1 above. Affiant agrees to indemnify **Title Insurer** and hold it harmless from any loss or damage resulting from its reliance on the matters set forth in this affidavit.

9. Item 4A. or 4B. must be initialed to be deemed averred by this affidavit.

_____
(Affiant)

Print Name: _____

STATE OF _____
COUNTY OF _____

Sworn to, affirmed, and subscribed before me this ___ day of _____, 201__, by_____, who is/are personally known to me or who has/have produced _____ as identification.

Notary Signature: _____
Print Name: _____
Notary Public, State of _____
My Commission Expires: _____
[PLACE NOTARIAL SEAL]

33

Aff-101 Trust — Unrecorded Trust — Excerpts (TN 31.06.05, SCC GR-5.2)

If the full trust agreement and amendments, if any, are not recorded, then record affidavit from trustee or attorney for the trust stating at least the following:
(1) name of the trustee(s) or successor trustee(s)
(2) legal description of the trust property
(3) an affirmative statement that the trustee(s) or successor trustee(s) has the full power and authority to do the required act
(4) that nothing in the trust documents prohibits or restricts the trustee(s) or successor trustee(s) from doing the required act, and
(5) that the trust has been in full force and effect during the period of ownership of the real property to be insured.

indemnify **Title Insurer** and hold it harmless from any loss or damage resulting from its reliance on the matters set forth in this affidavit.

9. Item 4A. or 4B. must be initialed to be deemed averred by this affidavit.

34

If the full trust agreement and amendments, if any, are not recorded, then record affidavit from trustee or attorney for the trust stating at least the following:
(1) name of the trustee(s) or successor trustee(s)
(2) legal description of the trust property

property described in item 1 above ("Property") was taken in the name of [*state names of grantee trust as it appears on deed*].

Notary Signature: _____
Print Name: _____
Notary Public, State of _____
Expires: _____
[NOTARIAL SEAL]

1. This affidavit is made with regard to the following described property:

[*insert legal description*]

B. _____ [Initial, if applicable] all of the co-trustees could not participate because of [state whether due to absence, illness, disqualification under a particular law, or temporary incapacity]

3. Affiants are a majority of the co-trustees of that certain trust and amendments, if any, ("Trust") as described in Deed. Attached hereto as Exhibit A are the pertinent pages of the Trust showing the appointment of the co-trustees. If any Affiant is a successor co-Trustee, attached hereto as Exhibit A-1 are the pertinent pages showing the appointment and identity of the successor co-trustee and attached as Exhibit A-2 are the documents supporting the appointment of the successor co-trustee.

9. Item 4A. or 4B. must be initialed to be deemed averred by this affidavit.

35

(3) an affirmative statement that the trustee(s) or successor trustee(s) has the full power and authority to do the required act
(4) that nothing in the trust documents prohibits or restricts the trustee(s) or successor trustee(s) from doing the required act, and
(5) that the trust has been in full force and effect during the period of ownership of the real property to be insured.

5. Affiants have full power and authority to [*state whether convey or mortgage*] the Property. See excerpt of trust as Exhibit B describing such authority.

6. Nothing in the Trust prohibits or restricts the Affiants from [*state whether conveying or mortgaging*] the Property.

7. The Trust has been in full force and effect during the period of ownership of the Property.

36

Chapter 4 — Affidavits for Compliance with Fund Title Note Requirements

You can also use hyperlinks in the APM to examine related Title Notes

Title Note Number	SCC Number	Subtitle of Affidavit	Aff. No.	Page No.
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31.06.05		Trust — of Record — Homestead — by Successor Trustee	102	239
31.06.05		Trust — Unrecorded Trust — Homestead — by Successor Trustee	103	240
31		irs When Protected e of a Revocable Trust	107	245
31.06.07	GR 5.3	Trust — of Record — Linking Affidavit	99	231

31.06.05

Select hyperlink

37

B. Unrecorded trust

A conveyance was made to a bank, as trustee. The deed recited no trust provisions and named no beneficiaries but did refer to a specific trust by number under which the conveyance was made. The question is whether a deed from the trustee will be sufficient to convey the title.

Sec. 689.071, F.S., now Sec. 689.073, F.S., effective June 28, 2013, is not applicable

When recording the trust agreement, an affidavit should be placed on record from the trustee describing the real property that the trust holds, affirming that the trust is/was in full force and effect during the period of time the trustee held title, and affirming that the recorded trust is the full and complete original or copy of the trust document, including amendments, if any.

place the purchaser on inquiry and if the unrecorded trust agreement creates only a passive trust or leaves room for doubt, the joinder of the beneficiaries in any conveyance by the bank, as trustee, should be required. Also, before a title policy is issued the trust agreement or excerpts thereof should be recorded. When recording the trust agreement, an affidavit should be placed on record from the trustee describing the real property that the trust holds, affirming that the trust is/was in full force and effect during the period of time the trustee held title, and affirming that the recorded trust is the full and complete original or copy of the trust document, including amendments, if any.

38

Chapter 4 — Affidavits for Compliance with Fund Title Note Requirements

And you can even hyperlink back to the requirement

Title Note Number	SCC Number	Subtitle of Affidavit	Aff. No.	Page No.
31.02.05	GR-5.7	Trust — Majority of Trustees — Land Trust	97	228
31.05.01, 31.06.05	GR-5.2, 5.5, 5.8	Trust — Unrecorded Trust — Excerpts — Majority Successor	101.1	237
31.06.02		Trust — Trustee Not Same As Debtor	98	230
31.06.05	GR-5.2, 5.8	Trust — Unrecorded Trust — Full Copy — Majority Successor	100	233
	GR-5.2, 5.5, 5.8	Trust — Unrecorded Trust — Excerpts	101	235
		Trust — of Record — Homestead — by Successor Trustee	102	239
	GR-5.2	Trust — Unrecorded Trust — Homestead — by Successor Trustee	103	240
31		irs When Protected e of a Revocable Trust	107	245
31.06.07	GR-5.3	Trust — of Record — Linking Affidavit	99	231

Select hyperlink

39

GR-5.2 Recording Trust Agreement or Excerpts thereof

If the trust agreement or excerpts thereof will be placed in the public records as an exhibit to an affidavit or if the trust must be reviewed because it is a qualified personal residence trust (QPRT) regardless of the deed into the trustee providing for trust powers under Sec. 689.071, F.S. or Sec. 689.073, F.S., effective June 28, 2013, then make the following requirement:

Review of the complete trust agreement of the trust _____ [state whether described in Schedule A Number 2 or whether known as _____ or whether referred to in the instrument recorded in O.R. ____, Page _____, and/or Instrument No. _____] and all amendments thereto to determine that the proposed transaction is authorized under the terms of the trust. Said trust agreement, and amendments, shall be attached to an affidavit confirming that it is a full and complete copy of the trust and amendments, and recorded or kept in the title agent's file. Further requirements may be necessary upon review of the trust. If the full trust agreement and amendments, if any, are recorded as an exhibit to an affidavit from the trustee or attorney for the trust, the affidavit shall confirm that such trust agreement [current transaction, insert: is currently in full force and effect] [prior transaction in chain, insert: was in full force and effect during the period of ownership]. If the full trust agreement and amendments, if any, are not recorded, then record affidavit from trustee or attorney for the trust stating at least the following: (1) name of the trustee(s) or successor trustee(s); (2) legal description of the trust property; (3) an affirmative statement that the trustee(s) or successor trustee(s) has the full power and authority to do the required act; (4) that nothing in the trust documents prohibits or restricts the trustee(s) or successor trustee(s) from doing the required act; and (5) that the trust has been in full force and effect during the period of ownership of the real property to be insured. As to (1) above, attach excerpts of the pertinent pages from the trust documents showing the appointment and identity of the trustee(s) or successor trustee(s) as exhibits; and if the successor trustee(s) acts, that the successor trustee(s) is appointed due to circumstances described in attached excerpts of the trust and further evidenced by the supporting documents attached as exhibits. As to (3) above, attach the pertinent pages of the trust describing such authority as exhibits.

See Ch. 1 — C. Trustees.

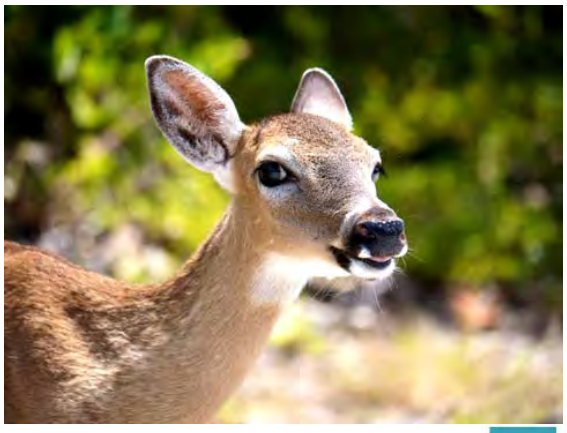
40

Now we're up and running!

41

What if instead of analyzing a known requirement, we need to know what the requirements will be for a specific situation?

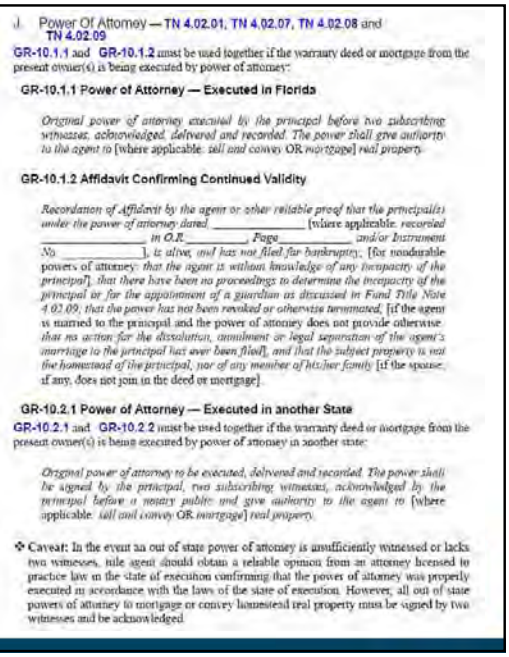
Example:
Determining the requirements for a Power of Attorney to be used in a transaction



42

You could again start with the SCC from the Interlinked PDF to review typical requirements …

FUND TITLE NOTES
SCC/APM
Cross-reference with Uniform Title Standards from the Real Property, Probate & Trust Section of the Florida Bar



J. Power Of Attorney — TN 4.02.01, TN 4.02.07, TN 4.02.08 and TN 4.02.09

GR-10.1.1 and GR-10.1.2 must be used together if the warranty deed or mortgage from the present owner(s) is being executed by power of attorney:

GR-10.1.1 Power of Attorney — Executed in Florida

Original power of attorney executed by the principal before two subscribing witnesses, acknowledged, delivered and recorded. The power shall give authority to the agent to [where applicable: *sell and convey* OR *mortgage*] *real property.*

GR-10.1.2 Affidavit Confirming Continued Validity

Recordation of Affidavit by the agent or other reliable proof that the principal(s) under the power of attorney dated _____ [where applicable: *recorded* _____ *in O.R.* _____, *Page* _____ *and/or Instrument No.* _____], *is alive, and has not filed for bankruptcy;* [for nondurable powers of attorney: *that the agent is without knowledge of any incapacity of the principal*], *that there have been no proceedings to determine the incapacity of the principal or for the appointment of a guardian as discussed in Fund Title Note 4.02.09; that the power has not been revoked or otherwise terminated;* [if the agent is married to the principal and the power of attorney does not provide otherwise: *that no action for the dissolution, annulment or legal separation of the agent's marriage to the principal has ever been filed*], *and that the subject property is not the homestead of the principal, nor of any member of his/her family* [if the spouse, if any, does not join in the deed or mortgage].

GR-10.2.1 Power of Attorney — Executed in another State

GR-10.2.1 and GR-10.2.2 must be used together if the warranty deed or mortgage from the present owner(s) is being executed by power of attorney in another state:

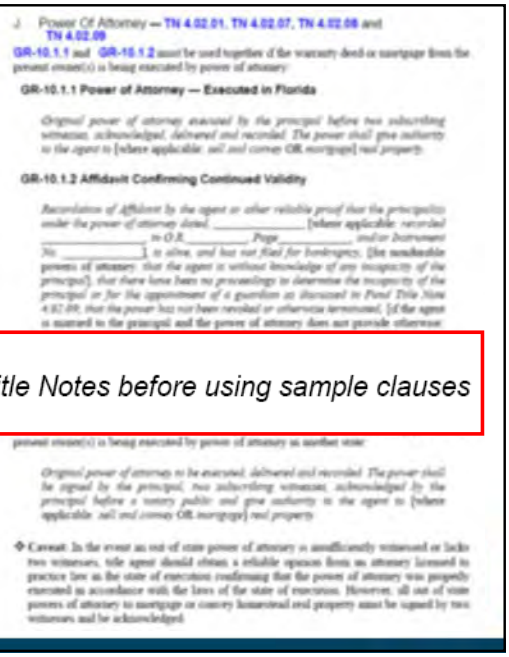
Original power of attorney to be executed, delivered and recorded. The power shall be signed by the principal, two subscribing witnesses, acknowledged by the principal before a notary public and give authority to the agent to [where applicable: *sell and convey* OR *mortgage*] *real property.*

❖ **Caveat:** In the event an out of state power of attorney is insufficiently witnessed or lacks two witnesses, title agent should obtain a reliable opinion from an attorney licensed to practice law in the state of execution confirming that the power of attorney was properly executed in accordance with the laws of the state of execution. However, all out of state powers of attorney to mortgage or convey homestead real property must be signed by two witnesses and be acknowledged.

43

… but note this reminder in the SCC Handbook:

The Fund — *Important: Review applicable Title Notes before using sample clauses*



J. Power Of Attorney — TN 4.02.01, TN 4.02.07, TN 4.02.08 and TN 4.02.09

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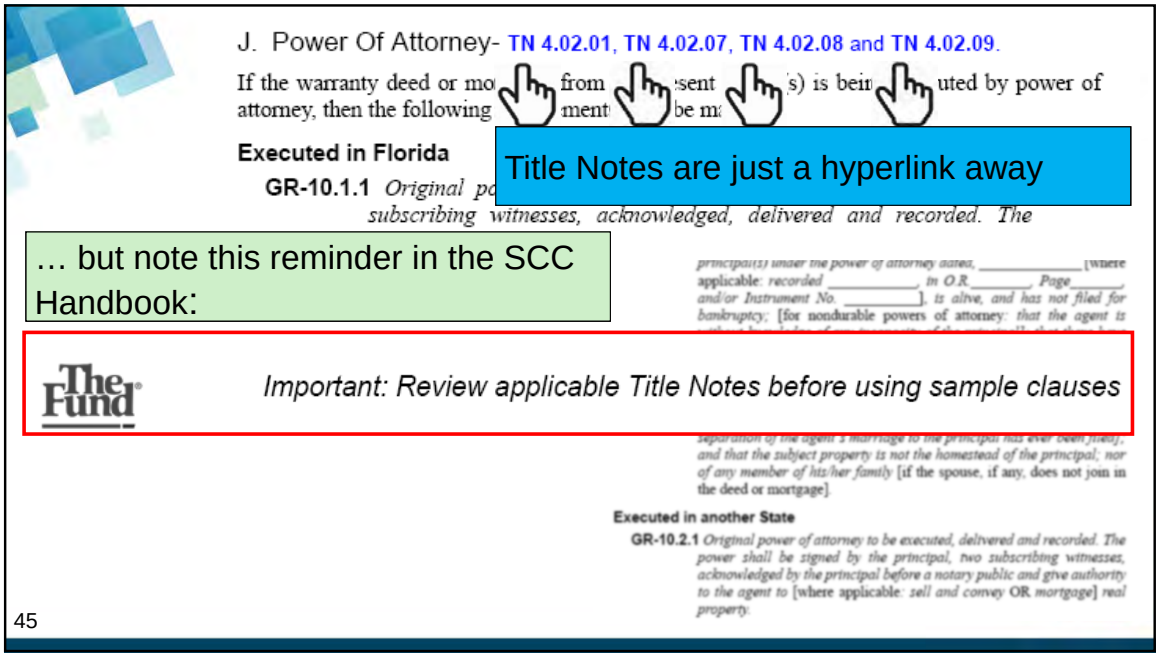
GR-10.2.1 Power of Attorney — Executed in another State

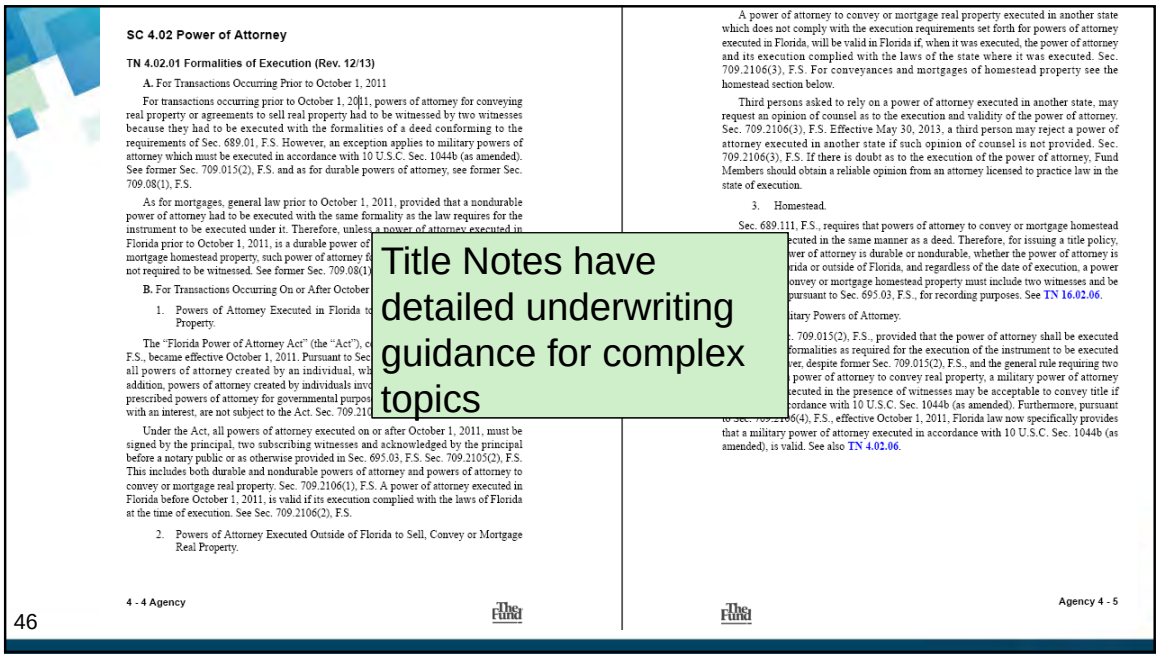
GR-10.2.1 and GR-10.2.2 must be used together if the warranty deed or mortgage from the present owner(s) is being executed by power of attorney in another state:

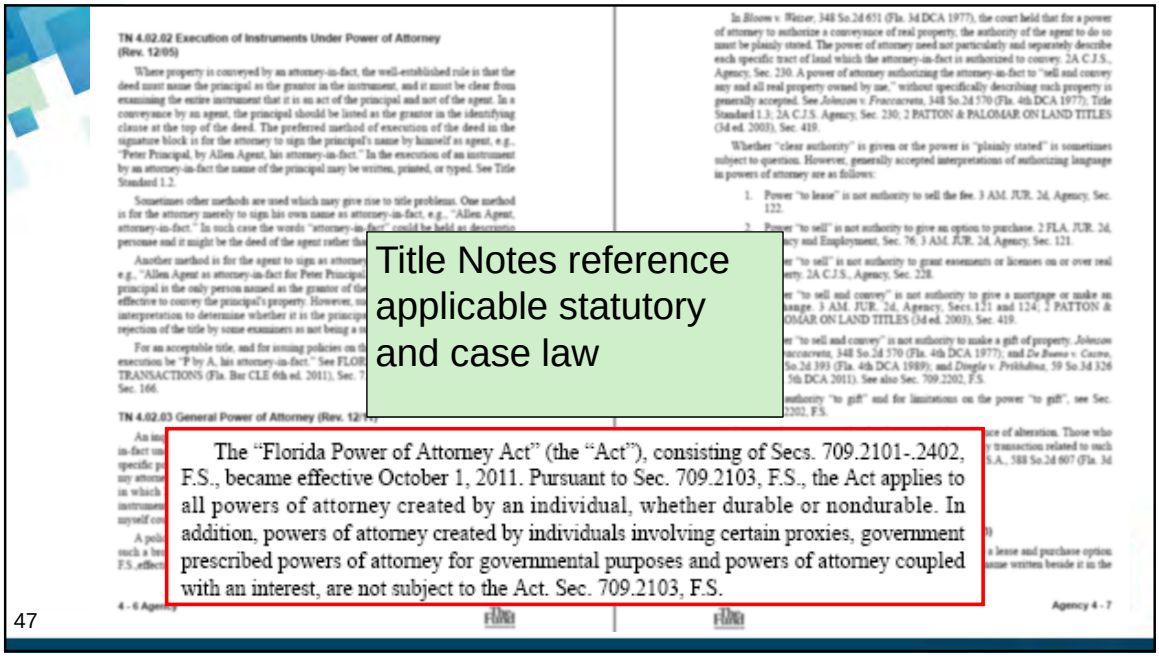
Original power of attorney to be executed, delivered and recorded. The power shall be signed by the principal, two subscribing witnesses, acknowledged by the principal before a notary public and give authority to the agent to [where applicable: *sell and convey* OR *mortgage*] *real property.*

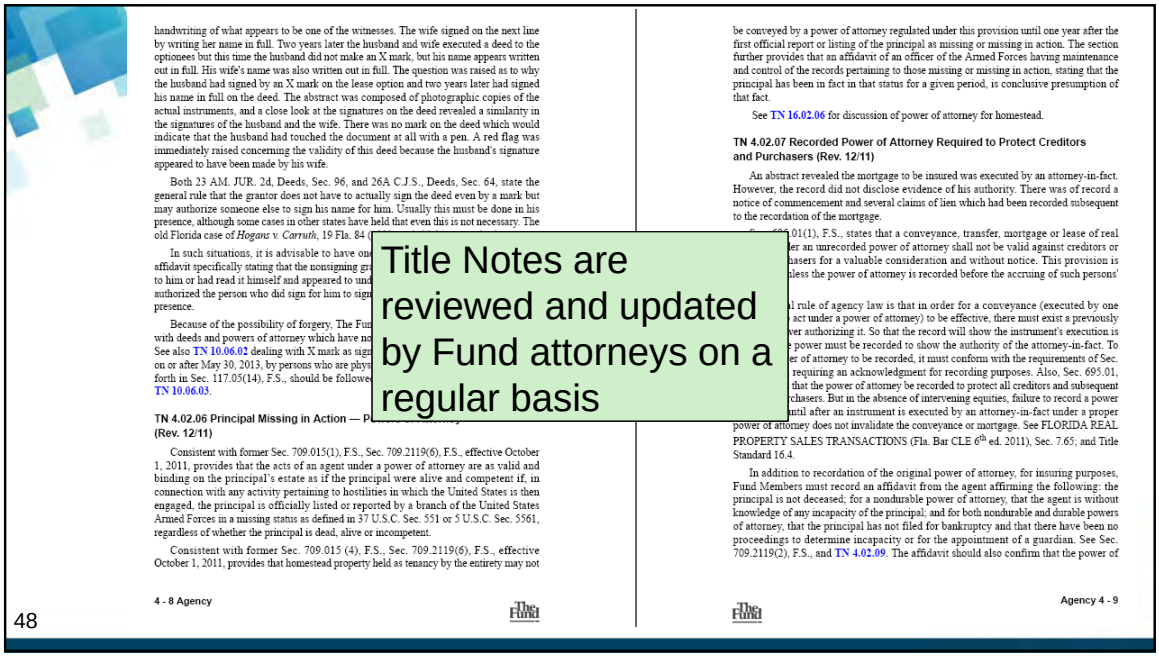
❖ **Caveat:** In the event an out of state power of attorney is insufficiently witnessed or lacks two witnesses, title agent should obtain a reliable opinion from an attorney licensed to practice law in the state of execution confirming that the power of attorney was properly executed in accordance with the laws of the state of execution. However, all out of state powers of attorney to mortgage or convey homestead real property must be signed by two witnesses and be acknowledged.

44


J. Power Of Attorney- TN 4.02.01, TN 4.02.07, TN 4.02.08 and TN 4.02.09.
Executed in Florida
Title Notes are just a hyperlink away
… but note this reminder in the SCC Handbook:
The Fund
Important: Review applicable Title Notes before using sample clauses
Executed in another State
GR-10.2.1 Original power of attorney to be executed, delivered and recorded. The power shall be signed by the principal, two subscribing witnesses, acknowledged by the principal before a notary public and give authority to the agent to [where applicable: sell and convey OR mortgage] real property.
45


SC 4.02 Power of Attorney
TN 4.02.01 Formalities of Execution (Rev. 12/13)
Title Notes have detailed underwriting guidance for complex topics
4 - 4 Agency
Agency 4 - 5
46


TN 4.02.02 Execution of Instruments Under Power of Attorney (Rev. 12/05)
Title Notes reference applicable statutory and case law
The "Florida Power of Attorney Act" (the "Act"), consisting of Secs. 709.2101-.2402, F.S., became effective October 1, 2011. Pursuant to Sec. 709.2103, F.S., the Act applies to all powers of attorney created by an individual, whether durable or nondurable. In addition, powers of attorney created by individuals involving certain proxies, government prescribed powers of attorney for governmental purposes and powers of attorney coupled with an interest, are not subject to the Act. Sec. 709.2103, F.S.
47


Title Notes are reviewed and updated by Fund attorneys on a regular basis
TN 4.02.06 Principal Missing in Action — P... (Rev. 12/11)
TN 4.02.07 Recorded Power of Attorney Required to Protect Creditors and Purchasers (Rev. 12/11)
48

attorney has not been revoked or otherwise terminated. See Sec. 709.2109, F.S., for events that terminate or suspend a power of attorney.

TN 4.02.08 Revoked by Death of Principal — Proof Required (Rev. 12/11)

In 1973, title was vested in A, an unmarried woman. During that year she gave a power of attorney, which recited her to be unmarried, to B, attorney-in-fact. By warranty deed dated and recorded July 7, 1974, A (again recited to be unmarried) by B, her attorney-in-fact, conveyed the property and the present title is deraigned through the grantee named in that conveyance.

The Fund's opinion was requested as to the sufficiency of that transfer of title by the attorney-in-fact, particularly whether 1) proof that the principal was still living, and whether 2) the power of attorney was unrevoked at the time of the conveyance should be required. The Fund Member was advised that the proof mentioned would be required since the power of attorney would have been revoked automatically if the principal had died. *Dallam v. Sanchez*, 47 So. 871 (Fla. 1908).

This requirement may be modified in some ce
where the facts come within the scope of former S
provisions for the benefit of a party who, dealt
principal "dealt bona fide, not knowing at the t
principal was dead." The problem in relying on th
of determining that a prior party in the title dealt b
an affidavit of the agent, concerning lack of notice
obtained.

For purposes of issuing a title policy in all suc
2011, an affidavit of the agent affirming that the pr
conveyance would be required. See Sec. 709.2119
4.02.07.

The Marketable Record Title Act may be applied to a warranty deed given subsequent to the deed from the attorney-in-fact which has been of record for more than 30 years.

Sec. 95.231, F.S., may be applied to a deed given subsequent to the deed from the attorney-in-fact which has been of record for more than 20 years where the proof mentioned is not available and nothing in the record suggests the death of the principal prior to the deed by the attorney-in-fact. See TN 4.02.09.

Title Notes are typically the *first thing* Underwriting counsel will reference when you call

TN 4.02.09 Revoked by Incapacity; Durable and Nondurable and "Springing" Powers of Attorney (Rev. 12/15)

Incapacity — Durable and Nondurable Powers of Attorney

TN 4.02.08 addressed reliance on an affidavit as to lack of knowledge of the death of the principal. Should such an affidavit also include lack of knowledge of the incapacity of the principal?

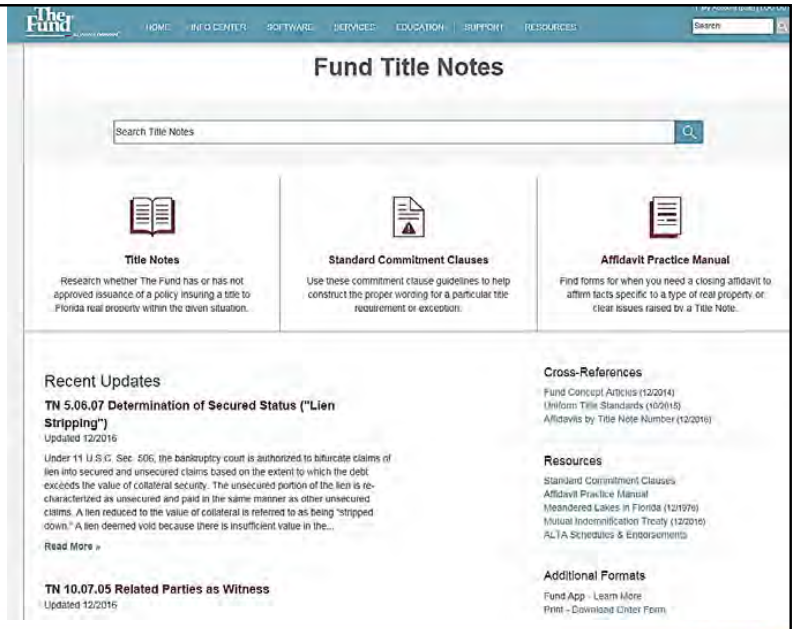
This question has now been answered under Sec. 709.2119(3), F.S., which allows for good faith reliance on an affidavit by the agent that the power of attorney has not been terminated or suspended. See also Secs. 709.2119(1) and .2109(4), F.S., and former Sec. 709.08(4), F.S. Events resulting in the termination of a power of attorney have also been expanded by statute to include the subsequent incapacity of the principal under a nondurable power of attorney and adjudication of incapacity of the principal under both durable and nondurable powers of attorney, unless the court determines that certain
y be exercised by the agent. See Sec. 709.2109(1) and (3)(a), F.S., effective
2011. A court order authorizing the continued use of a power of attorney
corded in the public records of the county where the property is located prior
itle policy. Consistent with former Sec. 709.08(3), F.S., a power of attorney is
pon the initiation of judicial proceedings to determine the principal's
r for the appointment of a guardian. However, effective July 1, 2015, if the
in the power of attorney is the principal's parent, spouse, child or grandchild
y "relative agent"), the authority under the power of attorney is not
y suspended. The agent's authority continues unless a motion for suspension
e agent's authority is filed in accordance with Sec. 744.3203, F.S. See Sec.
, F.S. Suspension of the power under Sec 709.2109(3) or 744.3203, F.S.,
il the petition is dismissed or withdrawn, or a court order provides otherwise.
9.2109(3), F.S., effective October 1, 2011, and 744.3203, F.S., effective July
where a court proceeding has been filed, either to determine the incapacity of a principal, or for the appointment of a guardian, Fund Members must use diligence in reviewing such court file to ascertain whether a motion for suspension of a relative agent's authority has been filed. Fund Underwriting Counsel must be consulted if there is any indication of a potential adversarial situation, or if there is any perceived risk that a motion to suspend the relative agent's authority may be filed during the gap.

In a current transaction, when relying on a power of attorney, an affidavit by the attorney-in-fact is required. Whether the power is durable or non-durable, the affidavit must include the following statement: there have been no proceedings for appointment of a guardian or to determine incapacity. In addition, if the agent is a relative agent, the affidavit must include the following statement: no motion to suspend such relative agent's

49

Breaking News:

TN / SCC / APM is getting its own page



50

Breaking News:

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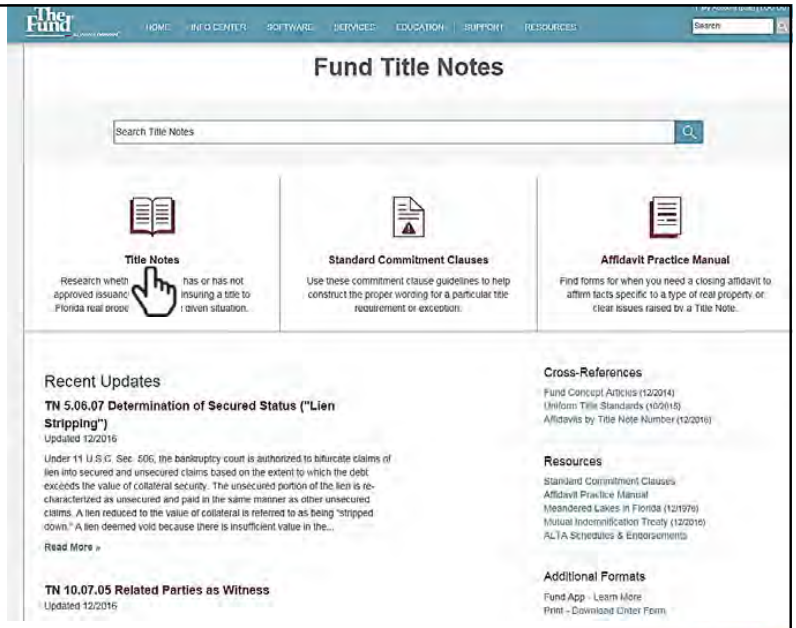

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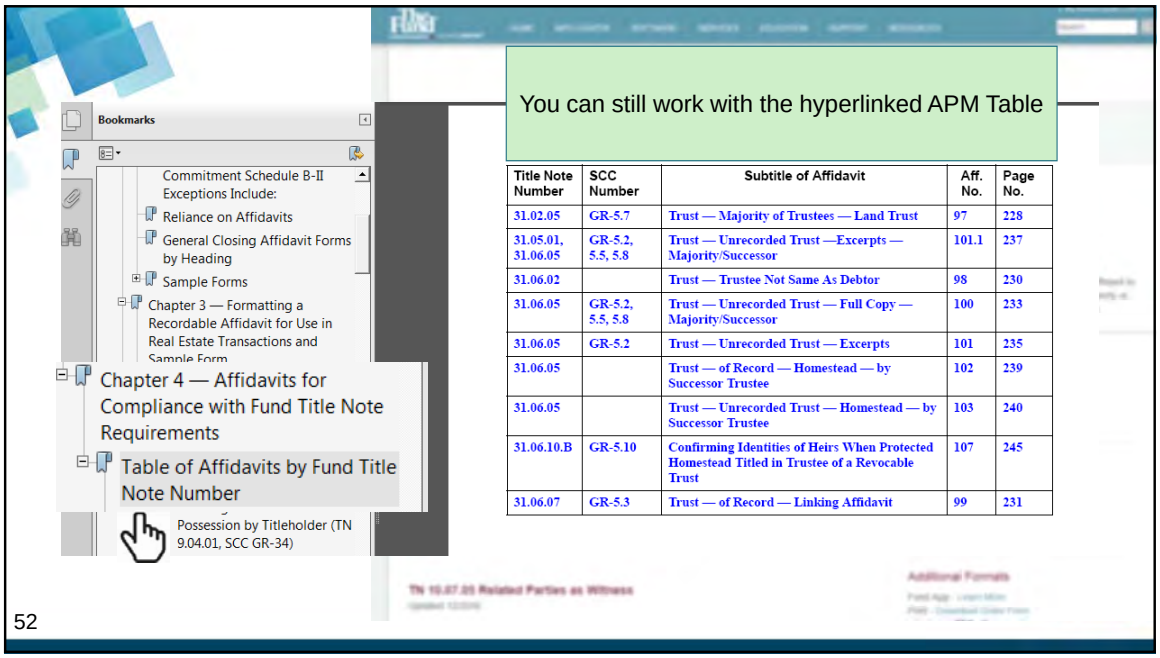

You can still work with the hyperlinked APM Table

Title Note Number	SCC Number	Subtitle of Affidavit	Aff. No.	Page No.
31.02.05	GR-5.7	Trust — Majority of Trustees — Land Trust	97	228
31.05.01, 31.06.05	GR-5.2, 5.5, 5.8	Trust — Unrecorded Trust —Excerpts — Majority/Successor	101.1	237
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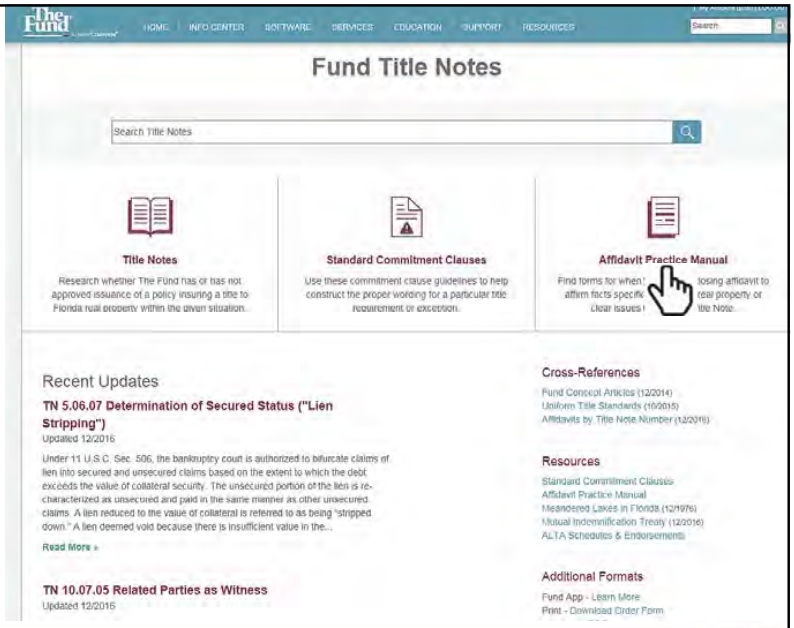
31.06.05		Trust — of Record — Homestead — by Successor Trustee	102	239
31.06.05		Trust — Unrecorded Trust — Homestead — by Successor Trustee	103	240
31.06.10.B	GR-5.10	Confirming Identities of Heirs When Protected Homestead Titled in Trustee of a Revocable Trust	107	245
31.06.07	GR-5.3	Trust — of Record — Linking Affidavit	99	231

52

Or you can use the webpage to go directly to wherever you need



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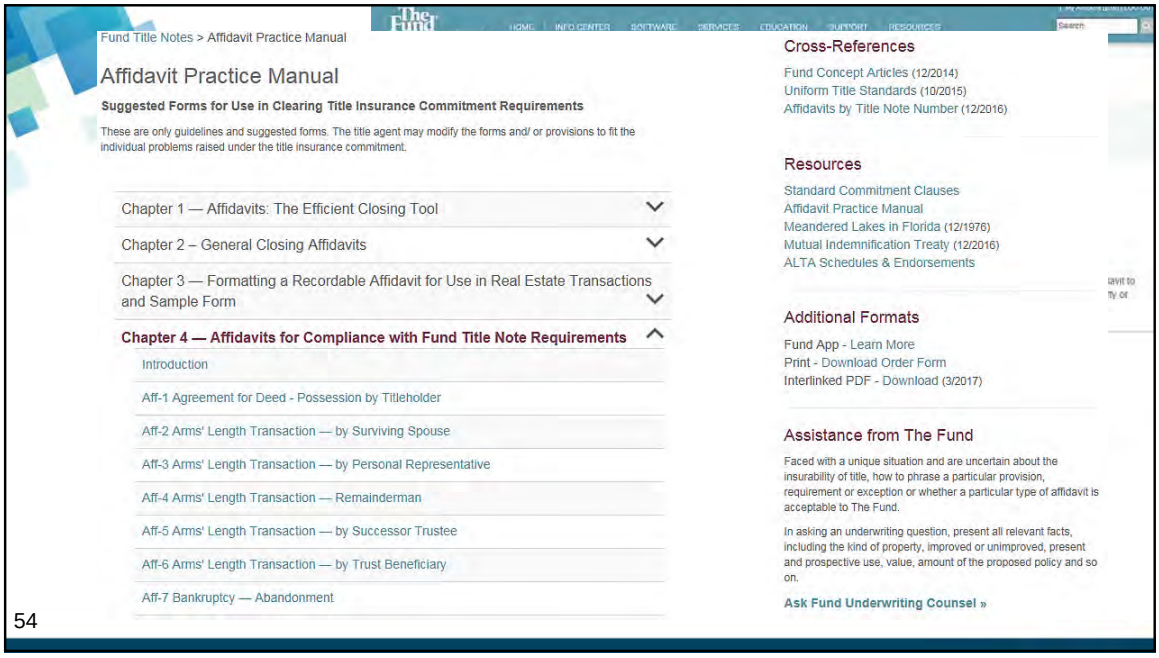

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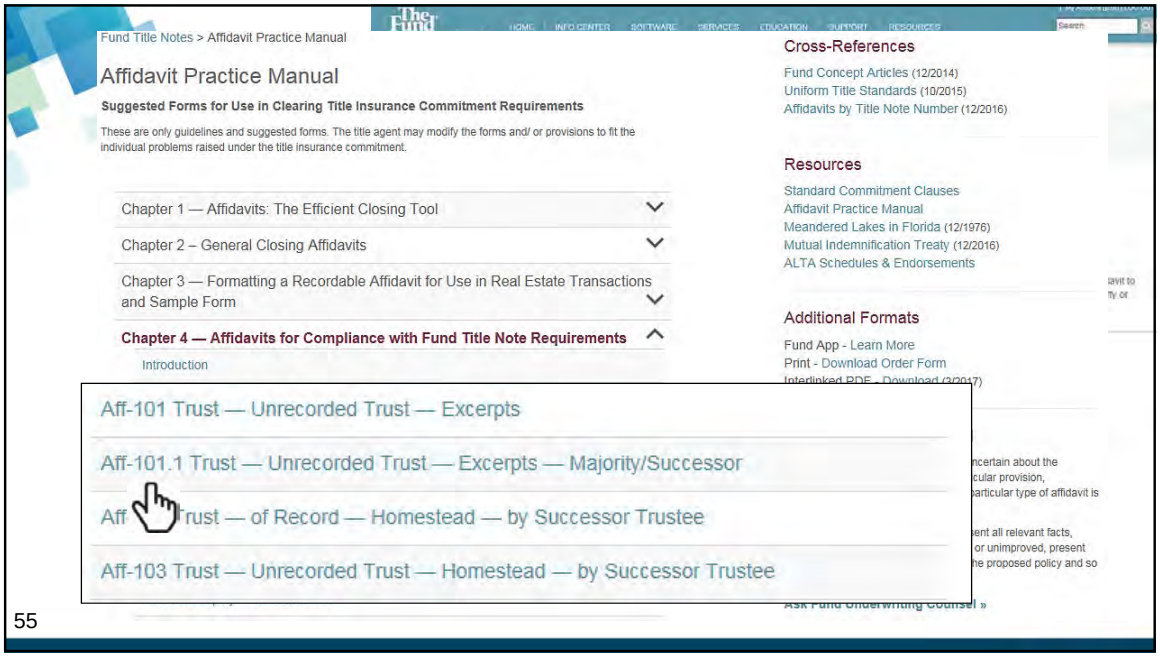
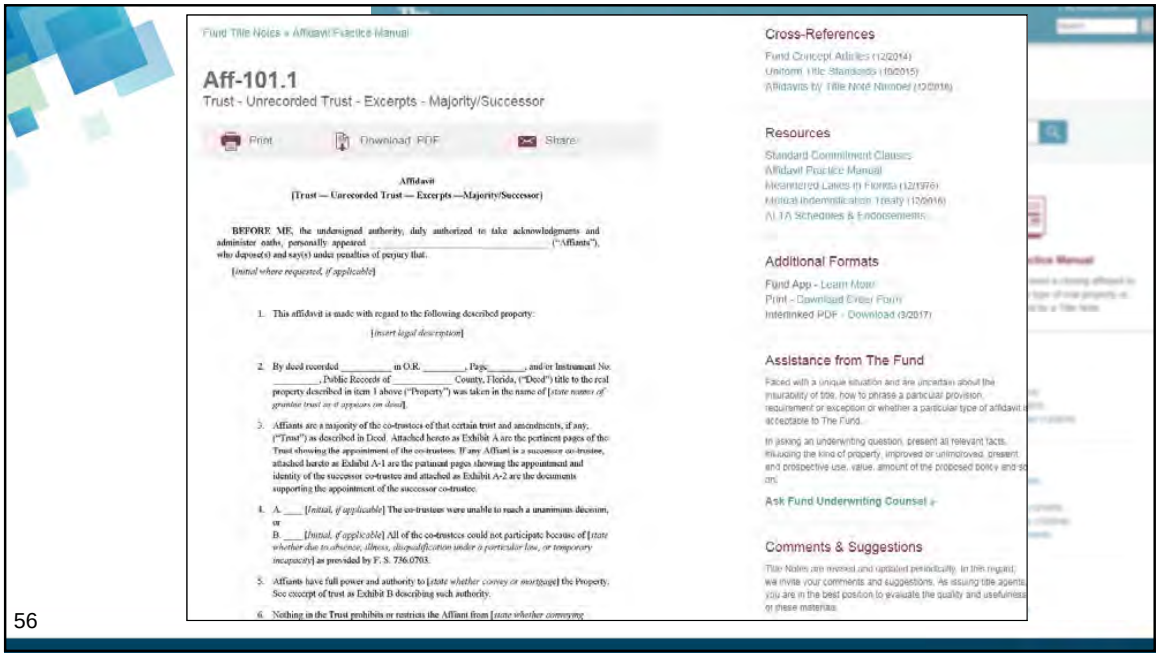

Fund Title Notes > Affidavit Practice Manual
Affidavit Practice Manual
Suggested Forms for Use in Clearing Title Insurance Commitment Requirements
These are only guidelines and suggested forms. The title agent may modify the forms and/ or provisions to fit the individual problems raised under the title insurance commitment.
Chapter 1 — Affidavits: The Efficient Closing Tool
Chapter 2 – General Closing Affidavits
Chapter 3 — Formatting a Recordable Affidavit for Use in Real Estate Transactions and Sample Form
Chapter 4 — Affidavits for Compliance with Fund Title Note Requirements
Introduction
Aff-101 Trust — Unrecorded Trust — Excerpts
Aff-101.1 Trust — Unrecorded Trust — Excerpts — Majority/Successor
Aff Trust — of Record — Homestead — by Successor Trustee
Aff-103 Trust — Unrecorded Trust — Homestead — by Successor Trustee
Cross-References
Fund Concept Articles (12/2014)
Uniform Title Standards (10/2015)
Affidavits by Title Note Number (12/2016)
Resources
Standard Commitment Clauses
Affidavit Practice Manual
Meandered Lakes in Florida (12/1976)
Mutual Indemnification Treaty (12/2016)
ALTA Schedules & Endorsements
Additional Formats
Fund App - Learn More
Print - Download Order Form
55


Aff-101.1
Trust - Unrecorded Trust - Excerpts - Majority/Successor
Print
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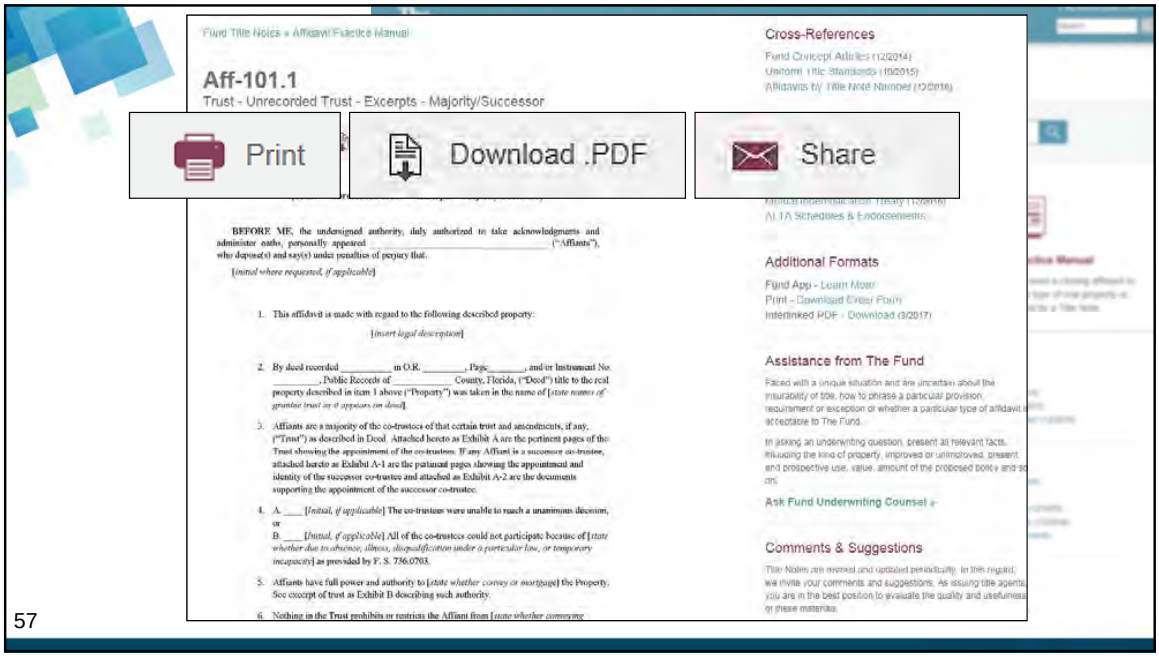
Affidavit
(Trust — Unrecorded Trust — Excerpts —Majority/Successor)
BEFORE ME, the undersigned authority, duly authorized to take acknowledgments and administer oaths, personally appeared _____ ("Affiants"), who deposed(s) and say(s) under penalties of perjury that:
[initial where requested, if applicable]
1. This affidavit is made with regard to the following described property:
[insert legal description]
2. By deed recorded _____ in O.R. _____, Page _____, and/or Instrument No. _____, Public Records of _____ County, Florida, ("Deed") title to the real property described in item 1 above ("Property") was taken in the name of [state names of grantee/trust as it appears on deed].
3. Affiants are a majority of the co-trustees of that certain trust and amendments, if any, ("Trust") as described in Deed. Attached hereto as Exhibit A are the pertinent pages of the Trust showing the appointment of the co-trustees. If any Affiant is a successor co-trustee, attached hereto as Exhibit A-1 are the pertinent pages showing the appointment and identity of the successor co-trustee and attached as Exhibit A-2 are the documents supporting the appointment of the successor co-trustee.
4. A. ____ [Initial, if applicable] The co-trustees were unable to reach a unanimous decision, or
B. ____ [Initial, if applicable] All of the co-trustees could not participate because of [state whether due to absence, illness, disqualification under a particular law, or temporary incapacity] as provided by F. S. 736.0703.
5. Affiants have full power and authority to [state whether convey or mortgage] the Property. See excerpt of trust as Exhibit B describing such authority.
6. Nothing in the Trust prohibits or restricts the Affiant from [state whether conveying
Cross-References
Resources
Additional Formats
Assistance from The Fund
Ask Fund Underwriting Counsel »
Comments & Suggestions
56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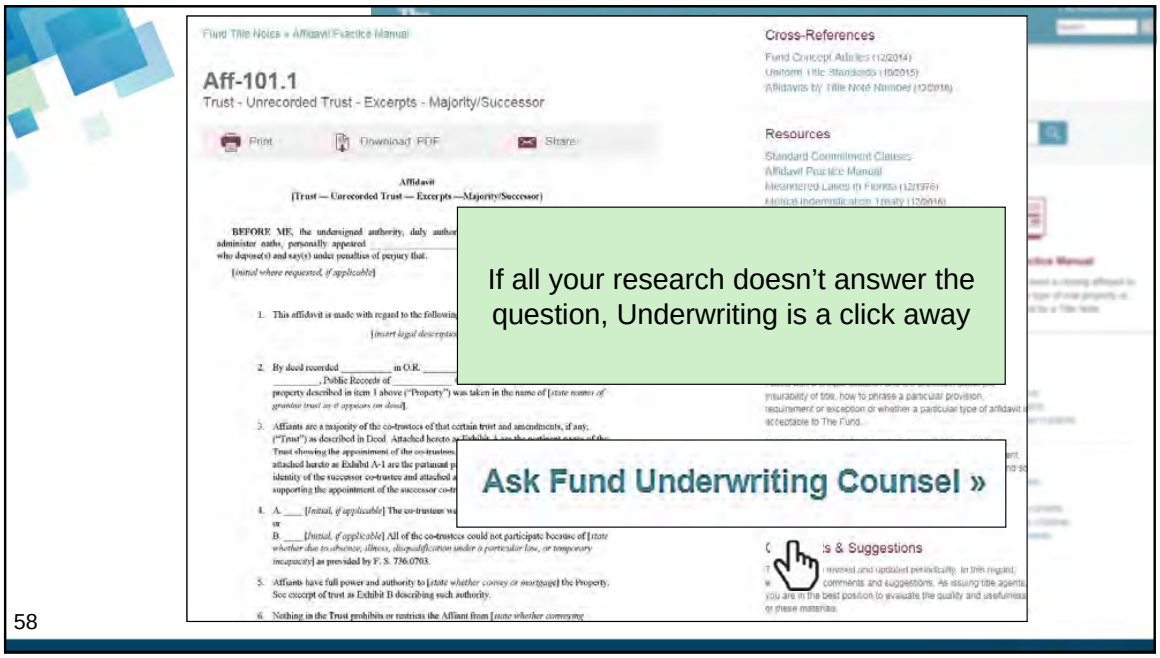
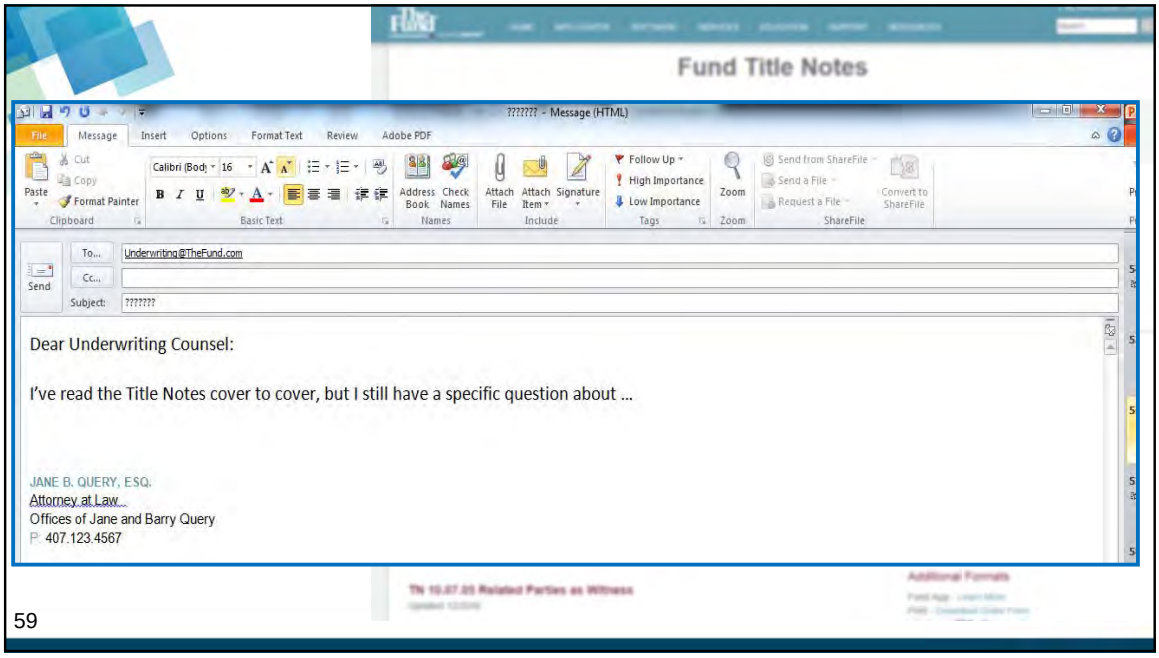
Aff-101.1
Trust - Unrecorded Trust - Excerpts - Majority/Successor
Cross-References
Additional Formats
Assistance from The Fund
Comments & Suggestions

57


Aff-101.1
Trust - Unrecorded Trust - Excerpts - Majority/Successor
Resources
If all your research doesn't answer the question, Underwriting is a click away
Ask Fund Underwriting Counsel »

58


Fund Title Notes
Message (HTML)
Underwriting@TheFund.com
Dear Underwriting Counsel:
I've read the Title Notes cover to cover, but I still have a specific question about ...
JANE B. QUERY, ESQ.
Attorney at Law
Offices of Jane and Barry Query
P: 407.123.4567
59

Bonus skill unlocked!
Search the website for *Fund Concept* articles on complex topics
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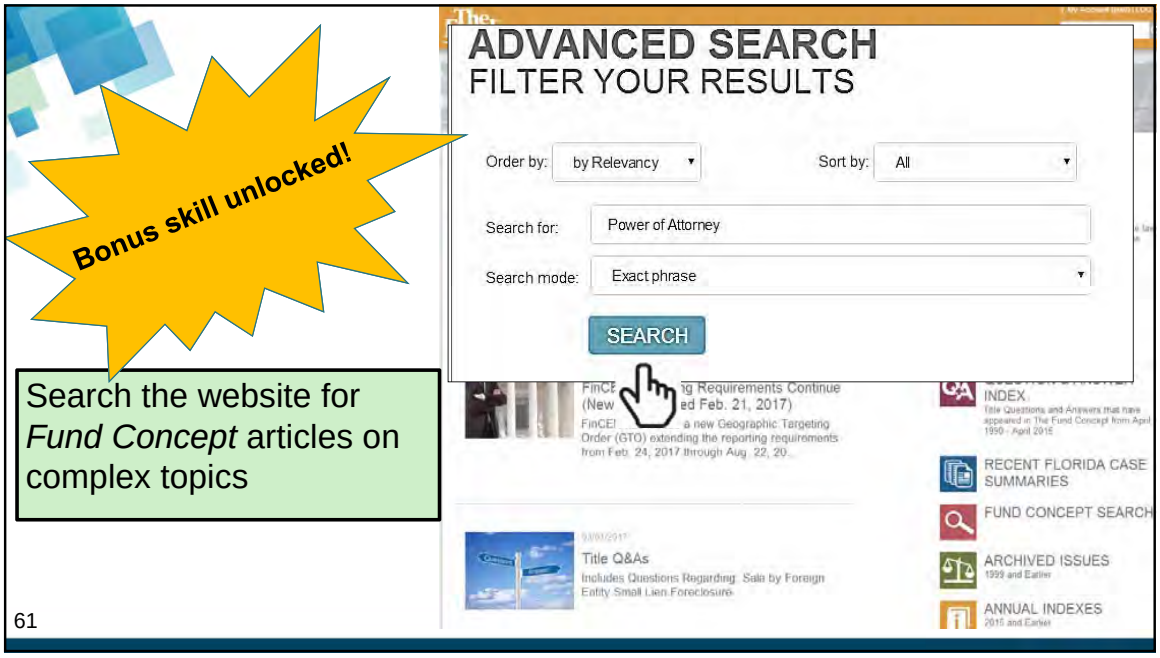
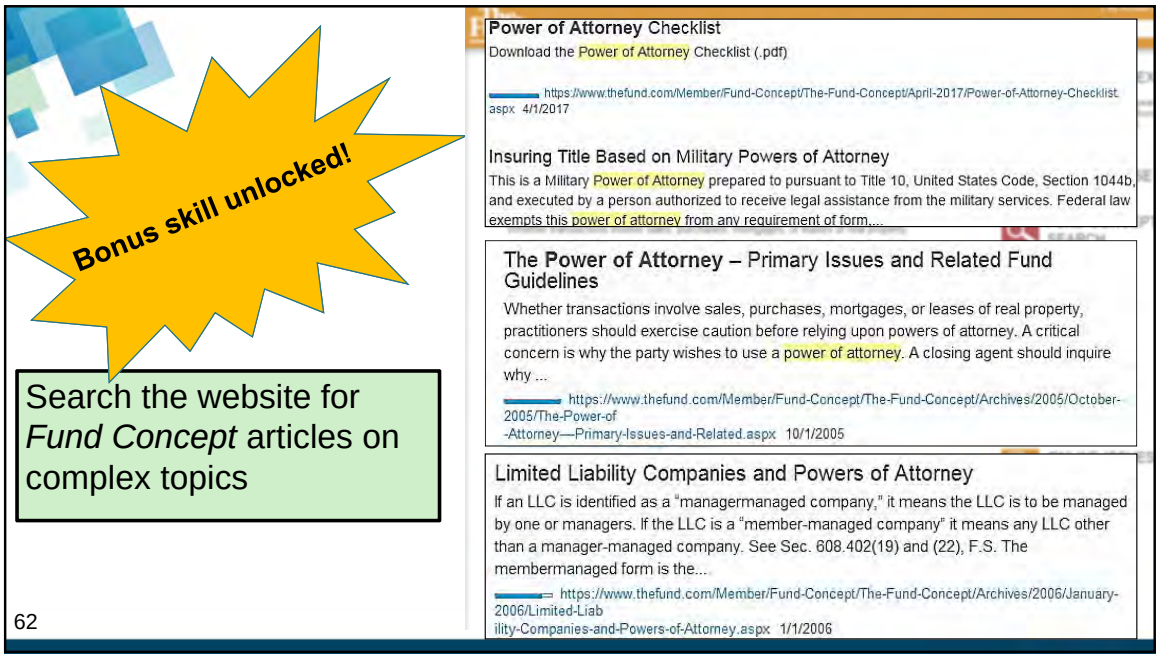
FUND CONCEPT SEARCH
ARCHIVED ISSUES
ANNUAL INDEXES
New Members
FinCEN Reporting Requirements Continue (New GTO Issued Feb. 21, 2017)
Title Q&As
60


Bonus skill unlocked!
Search the website for *Fund Concept* articles on complex topics
61
ADVANCED SEARCH
FILTER YOUR RESULTS
Order by: by Relevancy
Sort by: All
Search for: Power of Attorney
Search mode: Exact phrase
SEARCH
INDEX
RECENT FLORIDA CASE SUMMARIES
FUND CONCEPT SEARCH
ARCHIVED ISSUES
ANNUAL INDEXES
Title Q&As
Includes Questions Regarding: Sale by Foreign Entity Small Lien Foreclosure


Bonus skill unlocked!
Search the website for *Fund Concept* articles on complex topics
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Power of Attorney Checklist
Download the Power of Attorney Checklist (.pdf)
https://www.thefund.com/Member/Fund-Concept/The-Fund-Concept/April-2017/Power-of-Attorney-Checklist.aspx 4/1/2017
Insuring Title Based on Military Powers of Attorney
This is a Military Power of Attorney prepared to pursuant to Title 10, United States Code, Section 1044b, and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this power of attorney from any requirement of form,...
The Power of Attorney – Primary Issues and Related Fund Guidelines
Whether transactions involve sales, purchases, mortgages, or leases of real property, practitioners should exercise caution before relying upon powers of attorney. A critical concern is why the party wishes to use a power of attorney. A closing agent should inquire why ...
https://www.thefund.com/Member/Fund-Concept/The-Fund-Concept/Archives/2005/October-2005/The-Power-of-Attorney—Primary-Issues-and-Related.aspx 10/1/2005
Limited Liability Companies and Powers of Attorney
If an LLC is identified as a "managermanaged company," it means the LLC is to be managed by one or managers. If the LLC is a "member-managed company" it means any LLC other than a manager-managed company. See Sec. 608.402(19) and (22), F.S. The membermanaged form is the...
https://www.thefund.com/Member/Fund-Concept/The-Fund-Concept/Archives/2006/January-2006/Limited-Liability-Companies-and-Powers-of-Attorney.aspx 1/1/2006

Let's try something else.

Say you're out of the office, but need to know what type of authority is needed for an LLC to convey …

63

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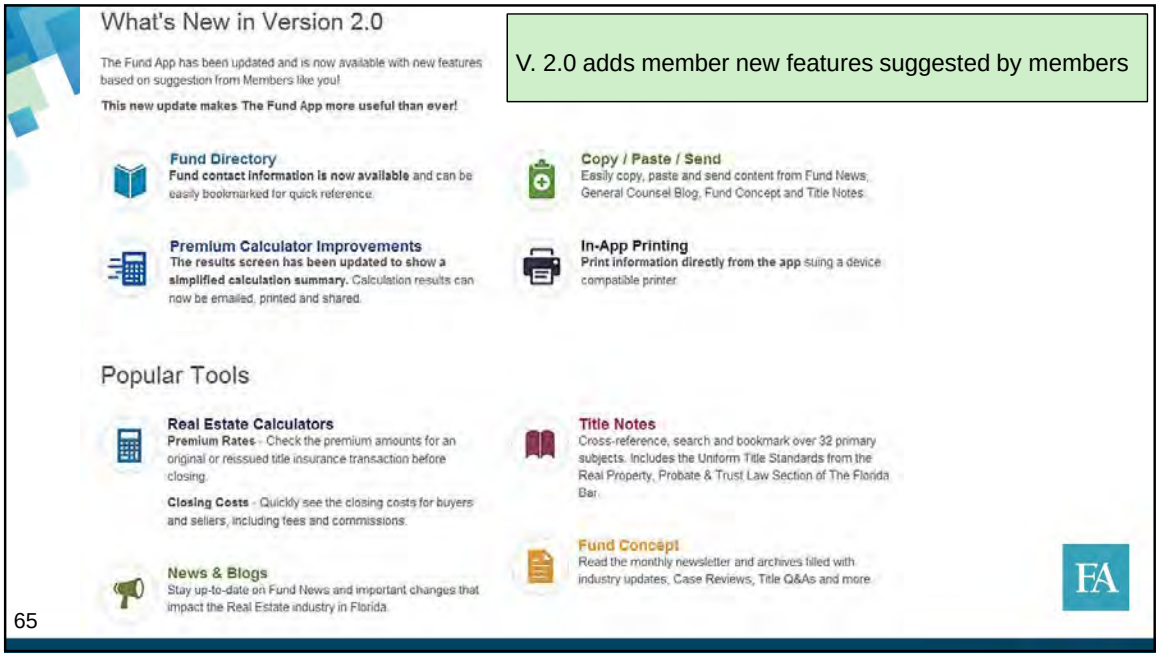
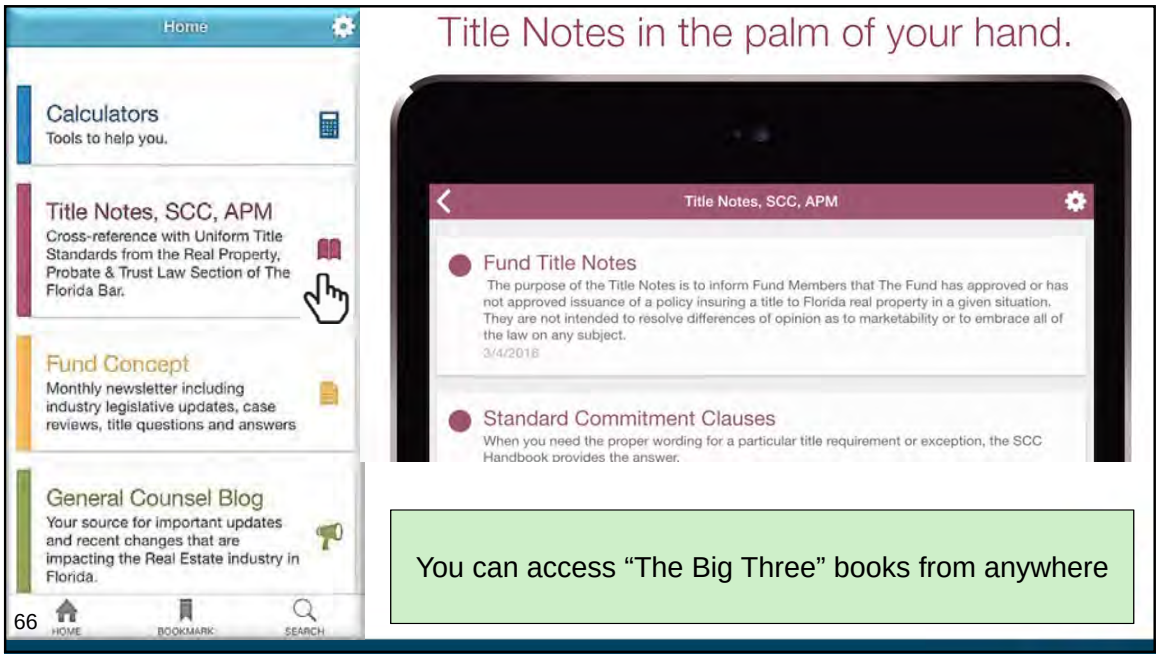
- Fund mobile APP puts key resources in your pocket
- Free to download
- Requires FundNet logon information

64



V. 2.0 adds member new features suggested by members

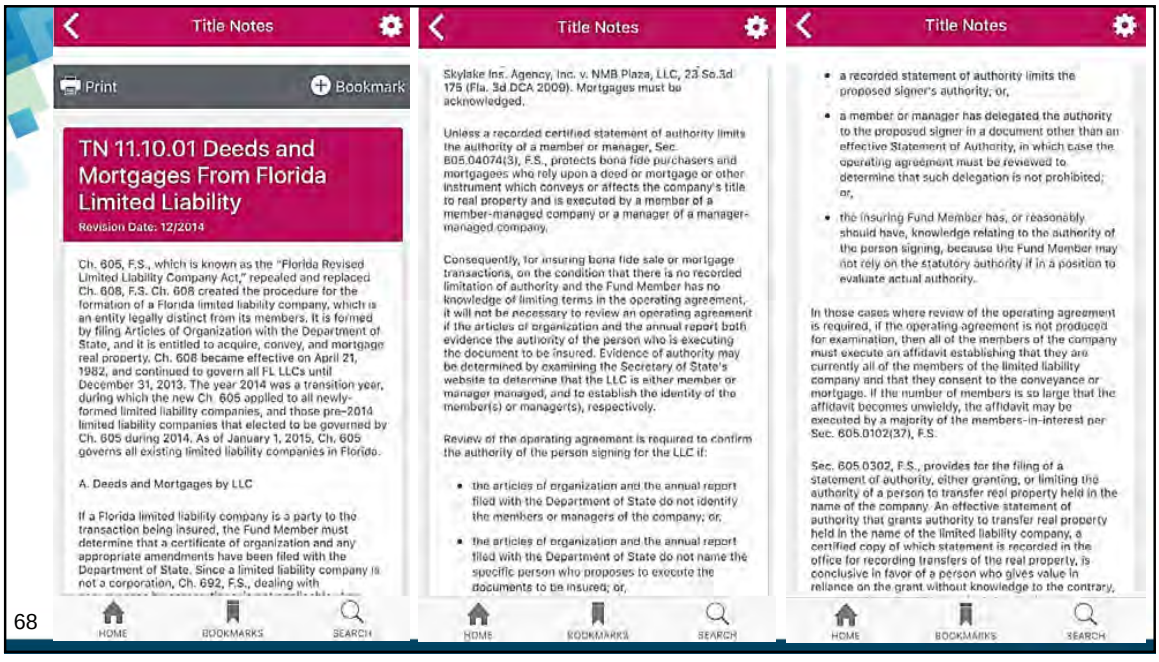


You can access “The Big Three” books from anywhere

Fund Mobile App

- Choose a resource
- Enter search terms

67



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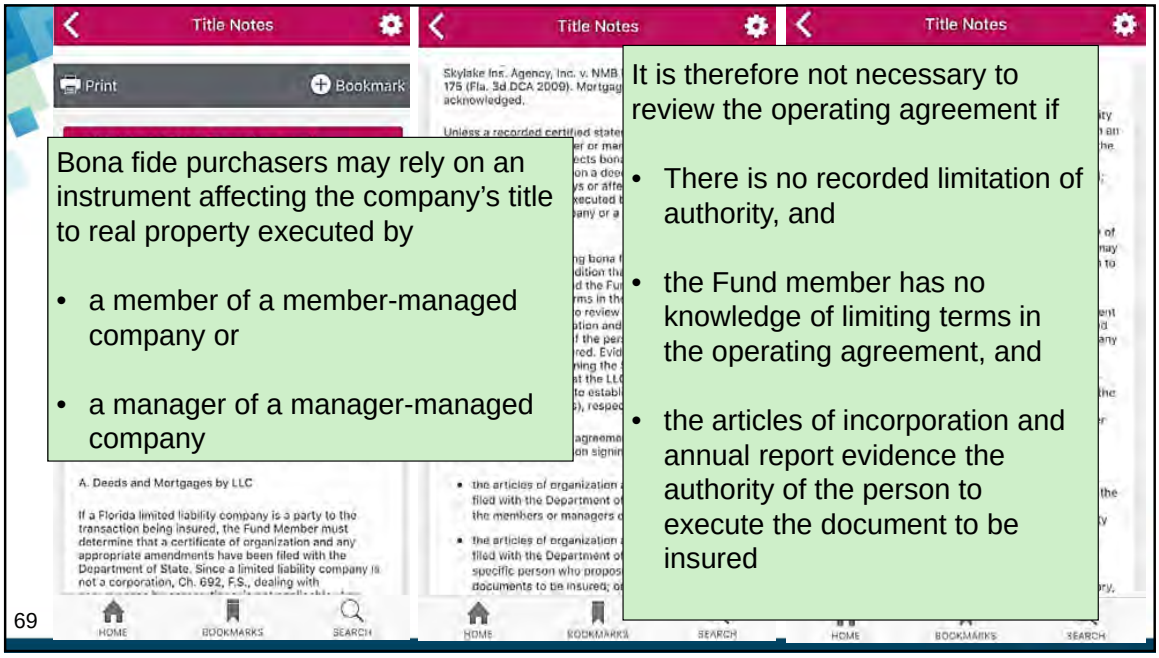
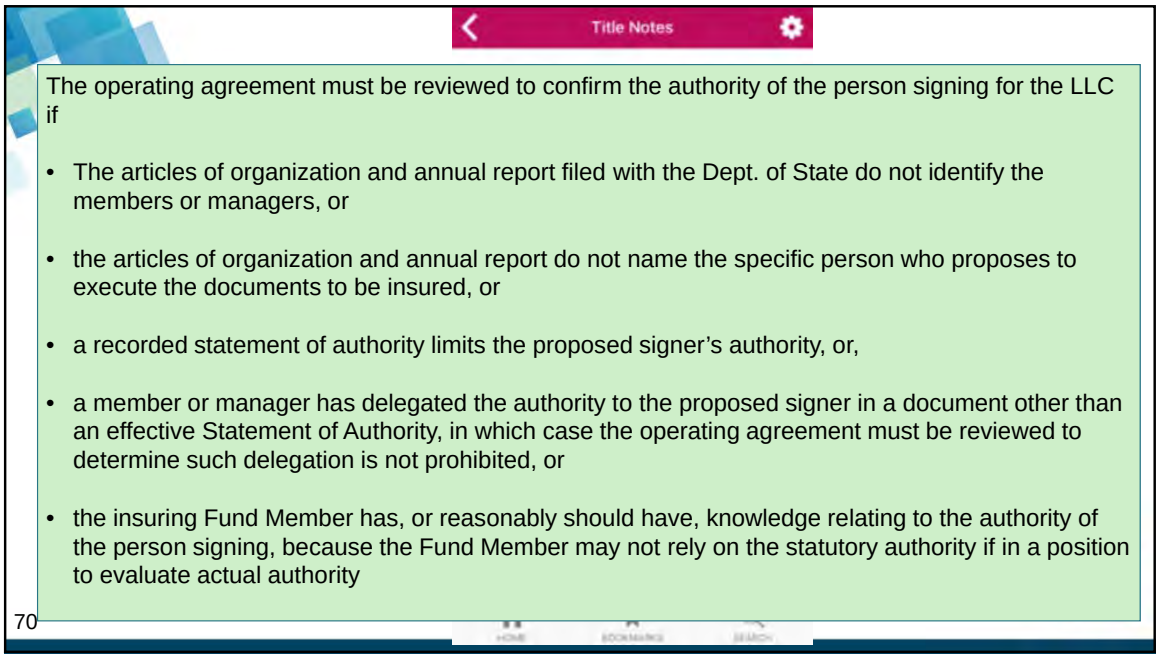
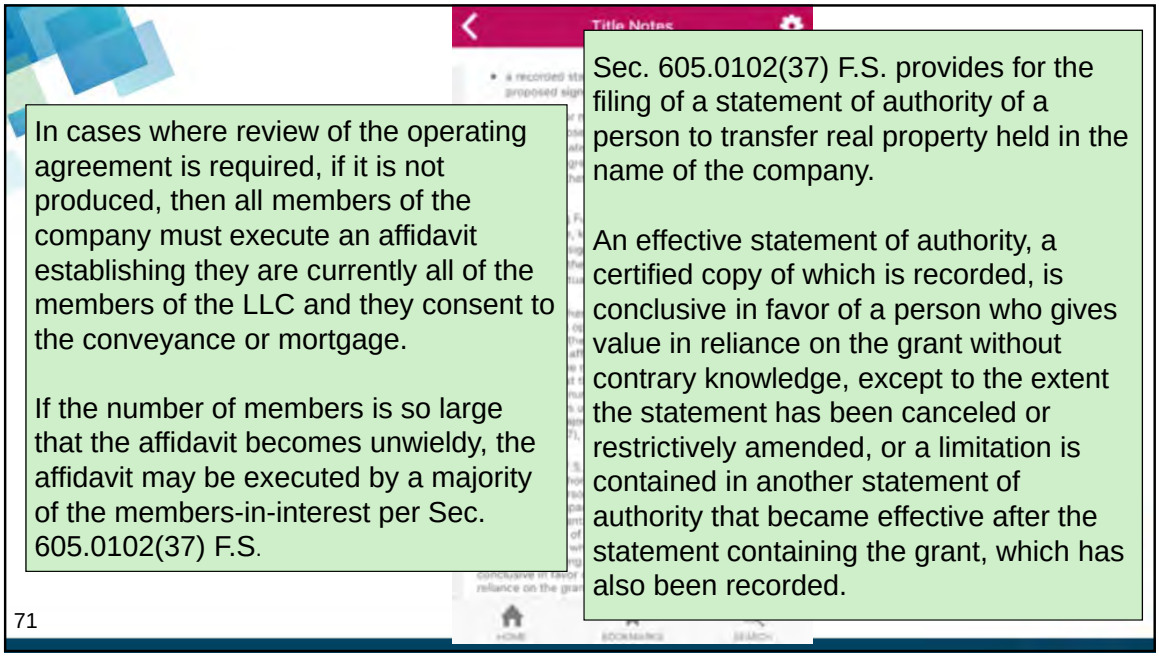
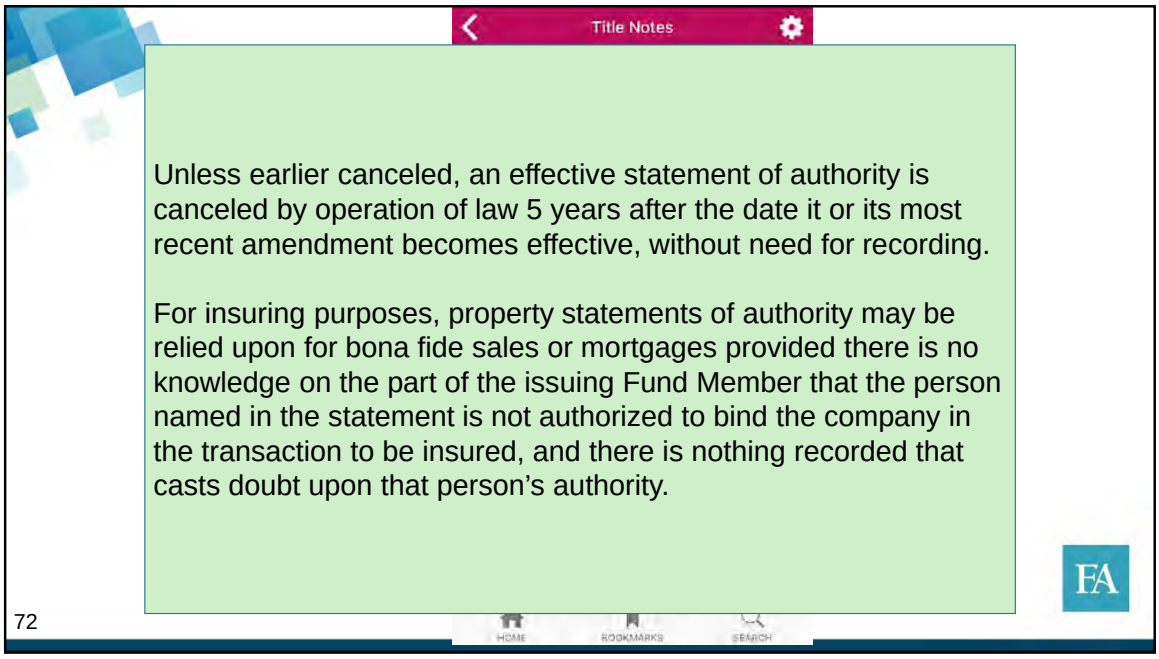
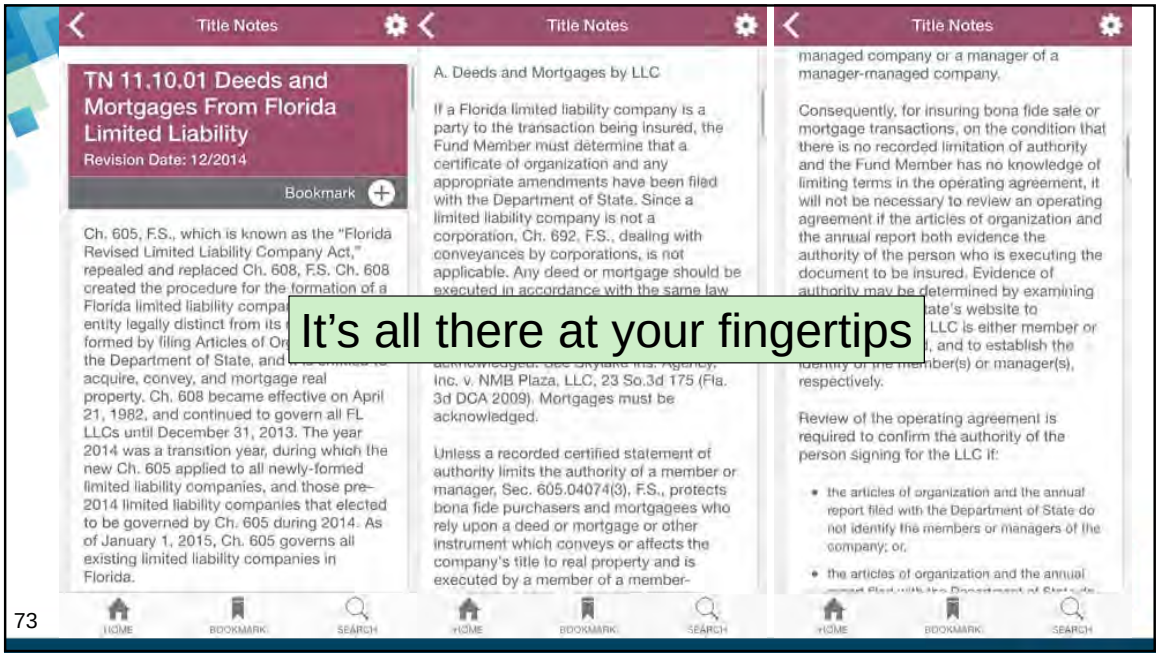
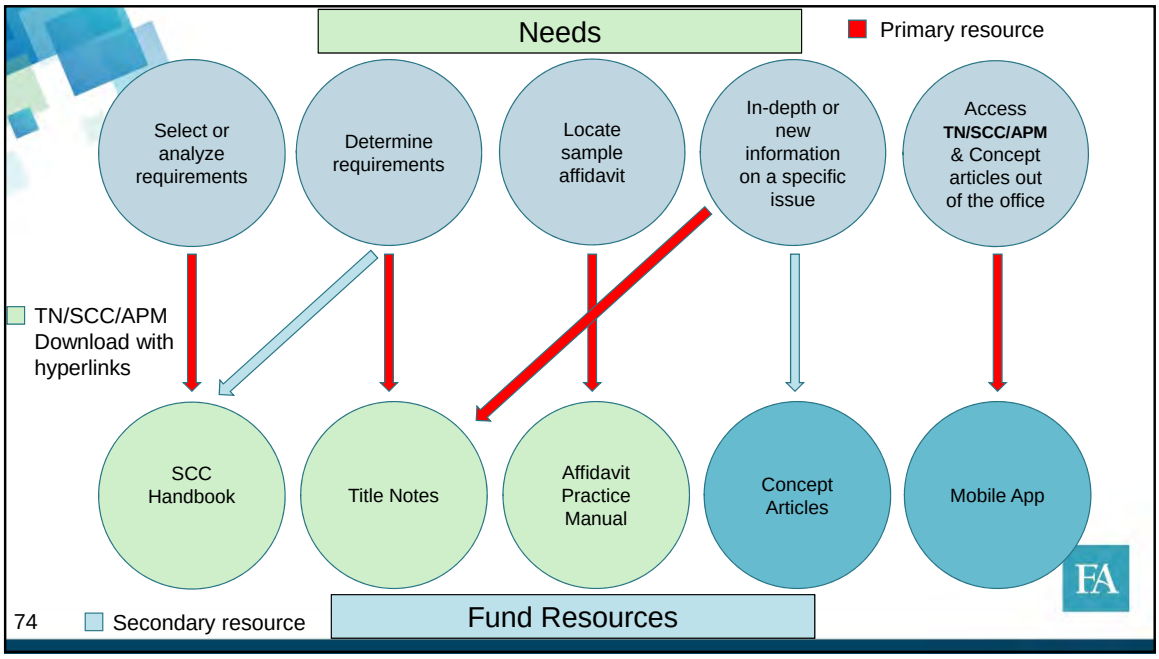

Title Notes
Print
Bookmark
A. Deeds and Mortgages by LLC
If a Florida limited liability company is a party to the transaction being insured, the Fund Member must determine that a certificate of organization and any appropriate amendments have been filed with the Department of State. Since a limited liability company is not a corporation, Ch. 692, F.S., dealing with
HOME
BOOKMARKS
SEARCH
Bona fide purchasers may rely on an instrument affecting the company's title to real property executed by
• a member of a member-managed company or
• a manager of a manager-managed company
It is therefore not necessary to review the operating agreement if
• There is no recorded limitation of authority, and
• the Fund member has no knowledge of limiting terms in the operating agreement, and
• the articles of incorporation and annual report evidence the authority of the person to execute the document to be insured
69


Title Notes
The operating agreement must be reviewed to confirm the authority of the person signing for the LLC if
• The articles of organization and annual report filed with the Dept. of State do not identify the members or managers, or
• the articles of organization and annual report do not name the specific person who proposes to execute the documents to be insured, or
• a recorded statement of authority limits the proposed signer's authority, or,
• a member or manager has delegated the authority to the proposed signer in a document other than an effective Statement of Authority, in which case the operating agreement must be reviewed to determine such delegation is not prohibited, or
• the insuring Fund Member has, or reasonably should have, knowledge relating to the authority of the person signing, because the Fund Member may not rely on the statutory authority if in a position to evaluate actual authority
70


Title Notes
In cases where review of the operating agreement is required, if it is not produced, then all members of the company must execute an affidavit establishing they are currently all of the members of the LLC and they consent to the conveyance or mortgage.
If the number of members is so large that the affidavit becomes unwieldy, the affidavit may be executed by a majority of the members-in-interest per Sec. 605.0102(37) F.S.
Sec. 605.0102(37) F.S. provides for the filing of a statement of authority of a person to transfer real property held in the name of the company.
An effective statement of authority, a certified copy of which is recorded, is conclusive in favor of a person who gives value in reliance on the grant without contrary knowledge, except to the extent the statement has been canceled or restrictively amended, or a limitation is contained in another statement of authority that became effective after the statement containing the grant, which has also been recorded.
71

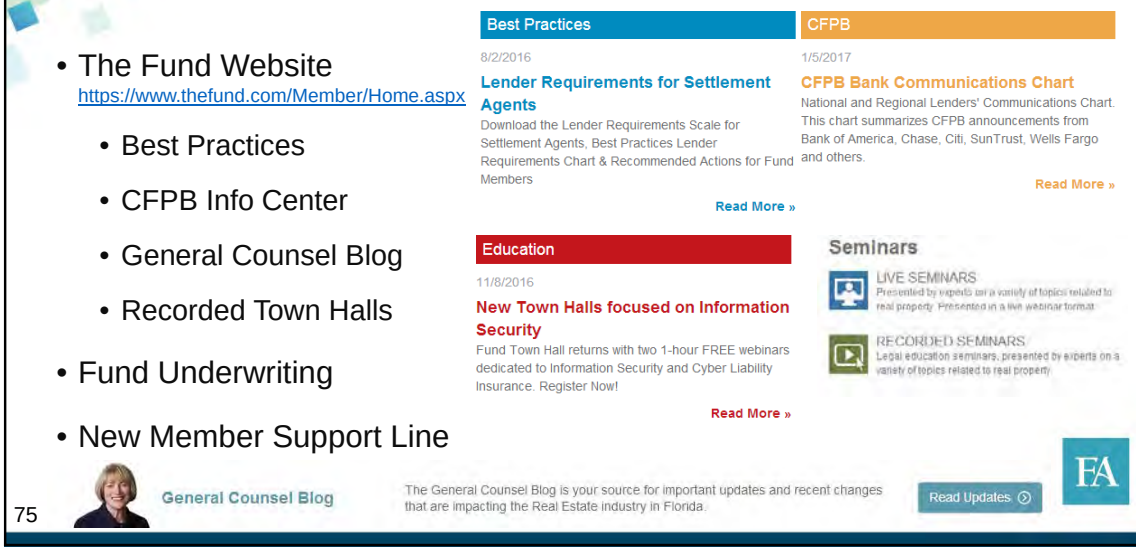

Title Notes
Unless earlier canceled, an effective statement of authority is canceled by operation of law 5 years after the date it or its most recent amendment becomes effective, without need for recording.
For insuring purposes, property statements of authority may be relied upon for bona fide sales or mortgages provided there is no knowledge on the part of the issuing Fund Member that the person named in the statement is not authorized to bind the company in the transaction to be insured, and there is nothing recorded that casts doubt upon that person's authority.
72


Title Notes
TN 11.10.01 Deeds and Mortgages From Florida Limited Liability
Revision Date: 12/2014
Bookmark
Ch. 605, F.S., which is known as the "Florida Revised Limited Liability Company Act," repealed and replaced Ch. 608, F.S. Ch. 608 created the procedure for the formation of a Florida limited liability compa
entity legally distinct from its
formed by filing Articles of Or
the Department of State, and
acquire, convey, and mortgage real property. Ch. 608 became effective on April 21, 1982, and continued to govern all FL LLCs until December 31, 2013. The year 2014 was a transition year, during which the new Ch. 605 applied to all newly-formed limited liability companies, and those pre-2014 limited liability companies that elected to be governed by Ch. 605 during 2014. As of January 1, 2015, Ch. 605 governs all existing limited liability companies in Florida.
HOME
BOOKMARK
SEARCH
Title Notes
A. Deeds and Mortgages by LLC
If a Florida limited liability company is a party to the transaction being insured, the Fund Member must determine that a certificate of organization and any appropriate amendments have been filed with the Department of State. Since a limited liability company is not a corporation, Ch. 692, F.S., dealing with conveyances by corporations, is not applicable. Any deed or mortgage should be executed in accordance with the same law
Inc. v. NMB Plaza, LLC, 23 So.3d 175 (Fla. 3d DCA 2009). Mortgages must be acknowledged.
Unless a recorded certified statement of authority limits the authority of a member or manager, Sec. 605.04074(3), F.S., protects bona fide purchasers and mortgagees who rely upon a deed or mortgage or other instrument which conveys or affects the company's title to real property and is executed by a member of a member-
HOME
BOOKMARK
SEARCH
Title Notes
managed company or a manager of a manager-managed company.
Consequently, for insuring bona fide sale or mortgage transactions, on the condition that there is no recorded limitation of authority and the Fund Member has no knowledge of limiting terms in the operating agreement, it will not be necessary to review an operating agreement if the articles of organization and the annual report both evidence the authority of the person who is executing the document to be insured. Evidence of
LLC is either member or
, and to establish the
member(s) or manager(s), respectively.
Review of the operating agreement is required to confirm the authority of the person signing for the LLC if:
the articles of organization and the annual report filed with the Department of State do not identify the members or managers of the company; or,
the articles of organization and the annual
HOME
BOOKMARK
SEARCH
It's all there at your fingertips
73


Needs
Primary resource
Select or analyze requirements
Determine requirements
Locate sample affidavit
In-depth or new information on a specific issue
Access TN/SCC/APM & Concept articles out of the office
TN/SCC/APM Download with hyperlinks
SCC Handbook
Title Notes
Affidavit Practice Manual
Concept Articles
Mobile App
FA
74
Secondary resource
Fund Resources

Additional Resources

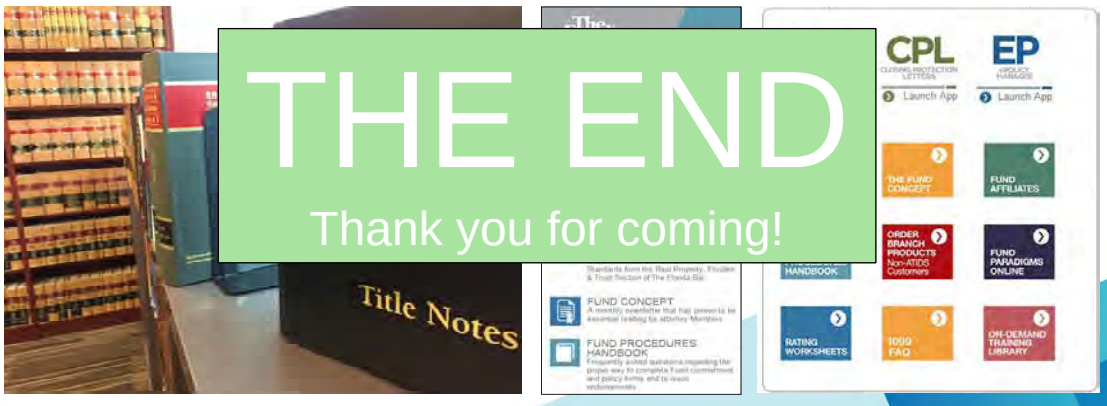
- The Fund Website
  https://www.thefund.com/Member/Home.aspx
  - Best Practices
  - CFPB Info Center
  - General Counsel Blog
  - Recorded Town Halls
- Fund Underwriting
- New Member Support Line



75

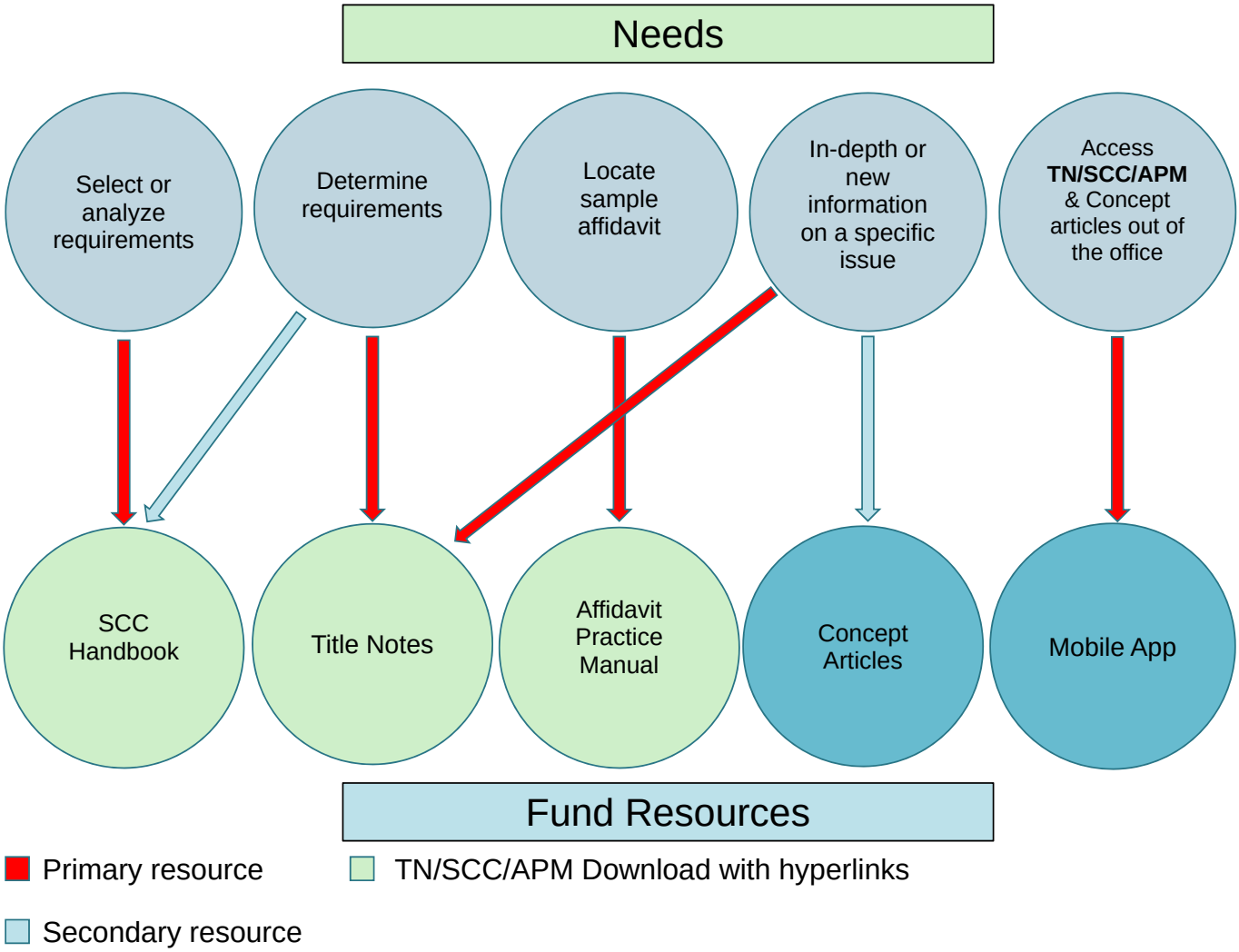
Using Fund Resources to Maximize Your Closing Practice

John B. "Jay" St. Lawrence
Fund Legal Education Attorney



THE END

Thank you for coming!


Needs
Select or analyze requirements
Determine requirements
Locate sample affidavit
In-depth or new information on a specific issue
Access **TN/SCC/APM** & Concept articles out of the office
SCC Handbook
Title Notes
Affidavit Practice Manual
Concept Articles
Mobile App
Fund Resources
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Secondary resource

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Fund Assembly

Protecting Your and Your Clients' Most Precious Asset, Their Private Information

Ilan Sredni, *President and CEO, Palindrome Consulting, Inc.*

Back to Speaker Topics

Speaker Information

Protecting Your and Your Clients' Most Precious Asset, Their Private Information

Ilan Sredni,

President and CEO, Palindrome Consulting, Inc.

Ilan Sredni, President and CEO of Palindrome Consulting, is a well-respected business leader who has authored 3 books on Information technology. His latest book, Easy Prey, is an Amazon best-seller. Mr. Sredni and Palindrome specialize in servicing law firms with their ever changing technology needs. Ilan is a founder of the Institute of Business Communications and Technology Excellence (IBCTE) and prides himself in educating business leaders on the perils of badly managed IT.

Mr. Sredni is a member of the FBI's InfraGard and the US Secret Service Electronic Crimes Task Force, both partnerships between the private sector and the federal government. He is also a proud member of the Microsoft Partner Research Panel and was invited by RONIN Corporation to serve on an IT Advisory Panel, featuring an exclusive international community of IT decision-makers that consults on important issues. Mr. Sredni has been featured in many leading professional publications and often donates his time for speaking engagements to non-profits as a way to give back.

Back to Speaker Topics

Critical IT Security Protections

EVERY Law Firm Must Have In Place NOW

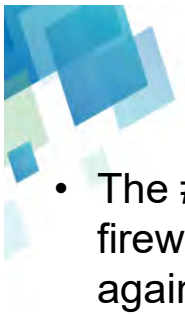
To Avoid Cyber Attacks, Data Breaches, Bank Fraud and Compliance Penalties

Ilan Sredni

CEO, Palindrome Consulting, Inc.

Authored 3 Books

CYBERSECURITY FOR LAW FIRMS
CREATING A SOUND CORPORATE SECURITY POLICY



Today We're Going To Cover

- The #1 security threat to your business that antivirus, firewalls and other security protocols can't protect against.
- A SHOCKING truth about bank fraud that most people don't know about that could (literally) wipe out your bank account.
- Why firewalls and antivirus software aren't enough anymore.
- How mobile phones and cloud applications are seriously jeopardizing your organization's security and data protection – and what you need to do to protect yourself.

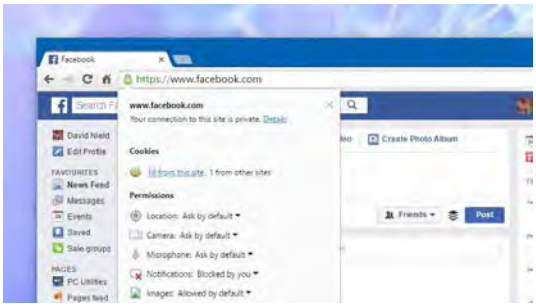
Ultimately We're Going To Cover…

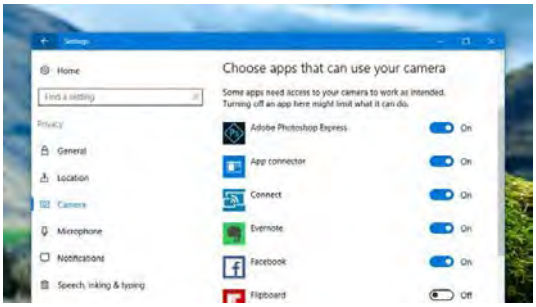
How To Avoid Being A **Sitting Duck** To Cybercriminals And Protect Everything You've *Worked So Hard To Achieve*

Other Simple Threats

1. USB Devices
2. WIFI Leaks
3. Social Engineering
4. Webcam Monitoring
5. Website Breaches
6. Remote Desktop

Protect your PC



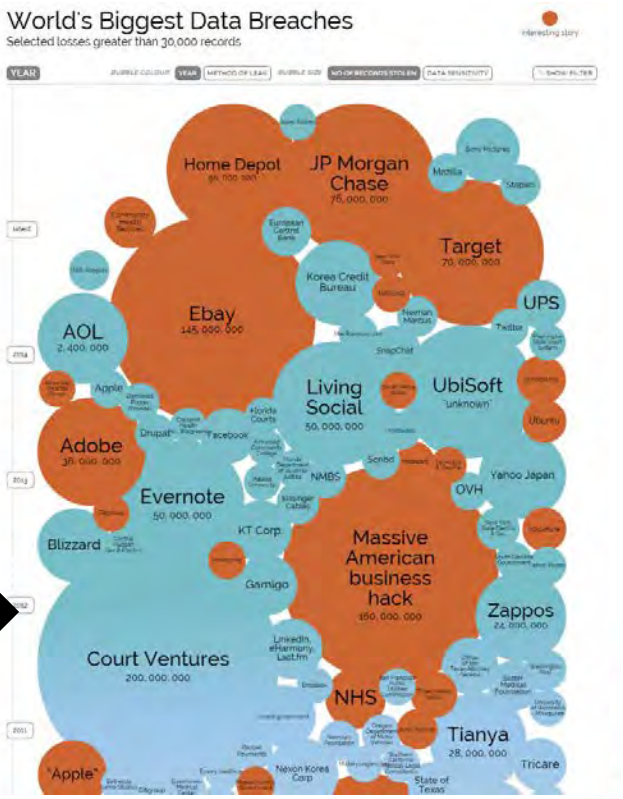


The Biggest Danger Is Your Complacency

"Success breeds complacency.
Complacency breeds failure.
Only the paranoid survive."
- Andrew Grove, former CEO of Intel

Cybercrime Business

The Evolution Of Crime



A Quick Overview Of The Internet And The Proliferation Of The

Cybercrime Business

The Digital Underground's Thriving Black Market

- Credit card details: $2 to $90
- iTunes accounts: $8
- Physical credit cards: $190
- Card cloners: $200-$300
- Fake ATMs: $35,000
- Anyone can easily buy training, tools and services for committing fraud, hacking systems, buying stolen credit cards, setting up fake web sites, etc.

"But We're Small... Nobody Would Bother To Hack Us, Right?"

Wrong!

- **One in five** small businesses falls victim to cybercrime each year and that number is GROWING.
  (Source: National Cyber Security Alliance)
- Small businesses **are low-hanging fruit** because they don't believe they are a target, and therefore have very loose or no security systems and protocols in place.
- **Half of all cyber attacks** are aimed at SMBs.
  (Source: Forbes Article, "5 Ways Small Businesses Can Protect Against Cybercrime")

82,000

NEW Malware Threats Are Being Released *Per Day*

Source: PC World

Bank Fraud:

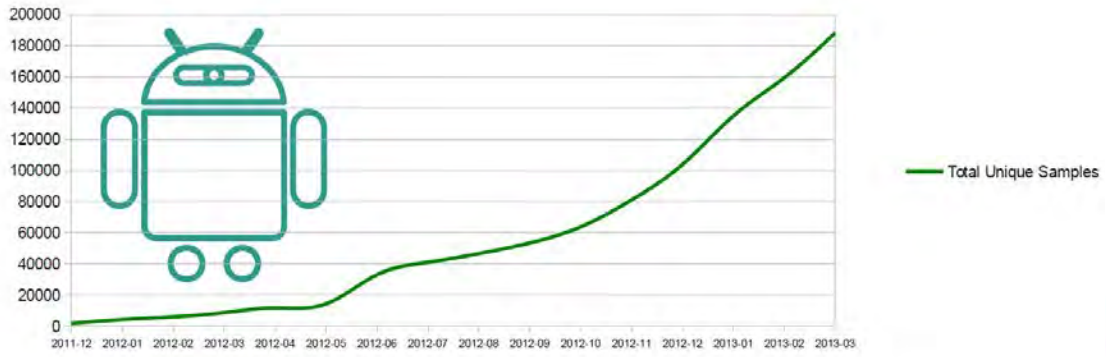
FDIC Does NOT Protect You From Bank Fraud; And The Bank Is NOT Responsible For Getting Your Money Back!!!

Tips For Protecting Yourself:

- Cancel your debit cards; they are the #1 way bank accounts get compromised.
- Have a dedicated PC for online banking and DON'T use that PC for accessing any other web sites, e-mail access, social media sites or for downloading files and applications.
- Sign up for e-mail alerts from your bank whenever a withdrawal over $100 happens.
- Require YOUR signature for any wire transfers.
- Have your money spread out in multiple accounts to minimize the risk.

The Next Frontier: MOBILE

Mobile malware growth accelerating



Mobile Computing Dangers On The Rise…

If A Device Is **Lost Or Stolen**, And The Data Was NOT Encrypted, You May Have Violated A Data Breach Law

- In some states, "personal information" is considered a person's first name or first initial, last name in combination with a driver's license number, social security number, or any information (including logins and passwords) related to financial records (credit cards, access codes, passwords, etc.).

For the first time, a small data breach draws a big fine ($50K)

Idaho hospice to pay $50,000 for HIPAA violation

By Paul McNamara on Mon, 01/07/13 - 10:22am.

17 Comments Print Share 75 +1 Like 95 More

Losing a single laptop containing sensitive personal information about 441 patients will cost a non-profit Idaho hospice center $50,000, marking the first such penalty involving fewer than 500 data-breach victims.

The data was unencrypted.

The Department of Health and Human Services (HHS) announced last week that it has reached an agreement with the Hospice of North Idaho that will see the hospice pay $50,000 for violating the Health Insurance Portability and Accountability Act (HIPAA).

HOSPICE OF NORTH IDAHO

"This action sends a strong message to the health care industry that, regardless of size, covered entities must take action and will be held accountable for safeguarding their patients' health information." said HHS Office of Civil Rights Director Leon Rodriguez in a press release. "Encryption is an easy method for making lost information unusable, unreadable and undecipherable."

While the hospice's failure to encrypt patient data is egregious by any measure, you can count me among those wondering if perhaps HHS could have found a less sympathetic violator to hold up as an example. From the organization's website: "Hospice of North Idaho cares for thousands of our neighbors and loved ones each year with a staff of over 100 and a volunteer force nearly double that. … Hospice of North Idaho provides services for over 50% of our dying in Kootenai County; it is the community leader for hospice and palliative care."

According to an article in *The Spokesman-Review*, the laptop was stolen from a hospice worker's car, and although the thief was apparently apprehended, the computer was not recovered. Amanda Miller, a spokeswoman for the hospice, told the newspaper that there was no evidence that any patient information had been abused.

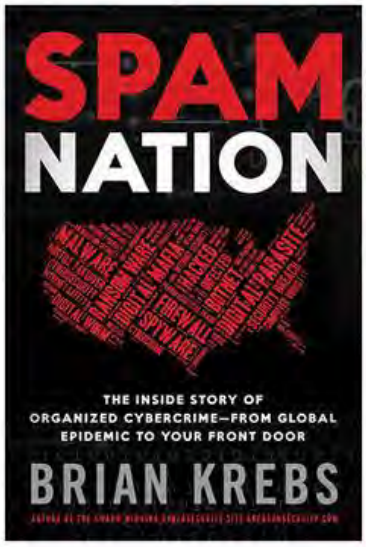
Ransomware Dangers On The Rise…

A writer once asked a literary agent, **"What kind of writing pays the most?"** Her answer was simple: **"Ransom notes."**

That's sort of what's happening in the cybercrime world — sensitive data in the wrong hands is used to extort money.

Ransomware: From $24M to $1B industry in just 1 year

Spam!



"Spam remains the single biggest driver of big breaches today. If we look at some of the biggest data breaches in recent memory - JPMorgan, Target, RSA Security come to mind - they all began with poisoned e-mail."

– Brian Krebs, Spam Nation

Email Spoofing!

Bait

From: jane@flarealty.com
Sent: Thursday, January 12, 2017 10:07:06 AM
To: Closing Agent
Subject: Re: Status of 29640 NW 160th Court

What time is this file closing ?

Thanks

Hook

From: jane@flarealty.com [mailto:jane.doe@flarealtyagent.com]
Sent: Thursday, January 12, 2017 2:16 PM
To: Closing Agent <Closing attorney@lawfirm.com>
Subject: Re: Status of 29640 SW 165th Ct.

Just a quick update, Seller's just requested to have the proceed from the sale of (29640 NW 160th Court) wired to their trust account ? They just discovered their bank now maintains a mandatory 14 days hold policy before clearing wire and check deposits. They would rather pay the wire fee to have their proceed wired to their trust account to ensure immediate access to the funds.

Please let me know how you can help with this.
Thanks !

Email Spoofing!

Hop	Delay	From	By	With	Time (UTC)	Blacklist
1	*	105.112.34.11	3capp-mailcom-lxa01.server.lan		1/12/2017 7:16:06 PM	
2	1 Second	unknown 74.208.4.201	rfx-qmail	(AES256-SHA encrypted) SMTP	1/12/2017 7:16:07 PM	
3	0 seconds	network			1/12/2017 7:16:07 PM	
4	0 seconds		rtc-smb-04.app.dca.reflexion.local	SMTP	1/12/2017 7:16:07 PM	
5	0 seconds	unknown 10.81.150.14	rfx-qmail	SMTP	1/12/2017 7:16:07 PM	
6	0 seconds	network			1/12/2017 7:16:07 PM	
7	1 Second	asp.reflexion.net 208.70.210.17	DM3NAM03FT053.mail.protection.outlook.com 10.152.83.181	Microsoft SMTP Server (version=TLS1_2, cipher=TLS_ECDHE_RSA_WITH_AES_256_CBC_SHA384_P384)	1/12/2017 7:16:08 PM	

So How Do You Protect Yourself?

Basic “Must Haves” of Security

- *Employee education*
- *Solid UTM (unified threat management), not just random haphazard security software*
- *Good spam filtering*
- *Vendor selection*
- *Control what web sites employees are accessing*
- *Lock down the use of 3rd-party cloud apps (i.e. Dropbox)*
- *Implement a mobile device policy and security protocols*
- *Force passwords that are difficult to hack*
- *Back up your systems properly (protects against a number of threats)*
- *Lock down the ability for employees to use home PCs and devices to access your network and cloud applications.*

3 Steps To Protecting Your Organization:

- **Step 1: Threat Assessment**
  What's lacking in your security right now? How are employees using your company-owned devices? What 3rd-party cloud apps are you using? Are your systems truly backed up? Where are you exposed to risk? Whose job is it to make sure your network is protected, and how do you know if they're doing their job?
- **Step 2: Action Plan**
  Based on what's discovered, what do we need to do to ensure our systems, data and operations are secure from theft, compromise, corruption, etc.?
- **Step 3: Ongoing Maintenance**
  You definitely don't want to take a "set-it-and-forget-it" approach to security – your attackers aren't!

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How Secure is Your Data Network?

Review this checklist with your management team. If you feel that there are potential vulnerabilities in your system that put the lifeblood of your company at risk, please contact a trusted security expert for a detailed security risk assessment and audit.

Some firms charge a fee to do a risk assessment (which depends on the size of your network). At the conclusion of our assessment, you should receive a list of risks and the associated price to make your network secure.

Here are the ten questions you need to satisfactorily answer to have peace of mind regarding your network security:

1. Intrusion Detection: Do you have any intrusion detection systems (IDS) deployed? If someone were to get into your network, or even more commonly, if someone already on your network were to show malicious behavior, how would you know? If someone robs our home, we notice the television missing. How would you notice that data had been accessed? Who monitors your systems for intrusions, and reports back to you?

2. Basic Network Security Policies: How complex are your passwords, and how often are they changed? Do you have account lockout policies in place to prevent brute force attacks (simple programs that automatically insert hundreds of passwords per minute)? Are you monitoring and policing who has administrative rights to your network? What are your policies to protect yourself when an employee is discharged?

3. Spyware: Spyware is software that installs itself on a computer without the knowledge or permission of the owner, be it your company or the main person using the system. Nine out of 10 PCs connected to the Internet are infected with spyware, and some form of spyware can be found on 87 percent of corporate PCs. Spyware can get into your computer from executable attachments in e-mail, “hostile applets” on Web sites, hidden on installation CDs or downloaded files and through security holes in other applications. Spyware also “piggybacks” on top of quasi-legitimate downloads, often pretending to be a browser accessory or important security update. Increasingly, spyware is malicious in intent, monitoring a user’s keystrokes or examining their files for passwords, financial account numbers and other sensitive data, and then sending that information back to the spyware’s creator, who may use it for identify theft. Spyware can be difficult to detect and difficult to remove.

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4. Anti-Virus: Is your anti-virus deployment current and up to date on all machines? Is it centrally managed so that you can monitor it? Are you scanning your email in addition to your files? Viruses, which infect existing computer programs, and worms, which are executable programs, are some of the oldest and most well-known types of computer threats. Viruses tend to be in document, spreadsheet and other files and spread via e-mail, while worms typically spread themselves directly over networks. Once a worm or virus has infected a computer, it may begin wreaking havoc in addition to attempting to replicate itself to other systems.

5. Instant Messaging: Does your organization utilize instant messaging? Are your employees using it for personal use without your knowledge? Like e-mail, instant messaging is a common vector by which viruses and spyware spread, typically through sent files that users open. When employees use IM and peer-to-peer applications, they can easily download spyware without being aware of it. Often, once opened, an IM virus will resend itself to everyone on the user's contact list, as well as installing spyware.

6. Perimeter Security: Do you know what ports or holes are open on your network to the outside and why? Open ports are gateways into your network. Do you regularly have scans and penetration tests performed to insure your security? Is this actively monitored?

7. Content Filtering: Do you have content filtering in place to control users' access to web sites? Content filtering protects your organization from inappropriate and illegal use of your network resources in addition to protecting your systems from spyware, viruses and phishing threats.

8. Data Encryption: Do you have employees utilizing laptops that travel and carry sensitive company data with them? Do you encrypt this data to prevent unauthorized access in the case of loss or theft of the laptop? Is Data encrypted when working remotely?

9. Remote and Wireless Access: Are employees accessing your corporate network from home or from the road? How secure is the access? Are you confident that the users' home computer is spyware, virus, and work free before allowing them access inside your network? Do you have wireless access to your network? Are you confident that it is secure? Are you sure there are no rogue access points?

10. Patch Management: Do you have a system in place to insure that all workstations and servers are kept up to date with all service packs and security patches? Do you have reporting capabilities to insure that this is successful? Are you updating firmware on all network devices such as routers, firewalls, and printers? What about operating systems on your firewalls and routers?

If you cannot answer these questions, or have unsatisfactory answers to any, your system could be at risk. If you are not happy with the answers to three or more of these questions, your risk level is SEVERE.

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We may recommend some or all of the following actions, plus others that the security audit identifies a need for. Our goal is to prevent penetrations ranging from privilege escalation, to remote control of servers or clients, to complete network shutdown. Security integration steps to resolve holes include but are not limited to:

- Implementing Intrusion Detection Systems
- Reviewing basic network security policies and insure they meet best practice.
- Deploy best of breed gateway and host based spyware prevention.
- Deploy best of breed centrally managed anti-virus solution including SMTP (email) solutions at the gateway and the messaging server.
- Access current instant messaging usage and address as appropriate.
- Perform perimeter scanning and penetration testing to identify vulnerabilities.
- Deploy content filtering solution to prohibit inappropriate network usage and control spyware, worms, and viruses.
- Deploy laptop encryption as appropriate.
- Assess remote and wireless network access.
- Deploy patch management solutions.

Ilan Sredni, CEO
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Palindrome Consulting, Inc.

Mobile Device Policy	Created: 9/22/2015
Section of: Corporate Security Policies	Target Audience: Users, Technical
CONFIDENTIAL	Page 1 of 4

Palindrome Consulting, Inc. is hereinafter referred to as "the company."

1.0 Overview

Generally speaking, a more mobile workforce is a more flexible and productive workforce. For this reason, business use of mobile devices is growing. However, as these devices become vital tools to the workforce, more and more sensitive data is stored on them, and thus the risk associated with their use is growing. Special consideration must be given to the security of mobile devices.

2.0 Purpose

The purpose of this policy is to specify company standards for the use and security of mobile devices.

3.0 Scope

This policy applies to company data as it relates to mobile devices that are capable of storing such data, including, but not limited to, laptops, notebooks, PDAs, smart phones, and USB drives. Since the policy covers the data itself, ownership of the mobile device is irrelevant. This policy covers any mobile device capable of coming into contact with company data.

4.0 Policy

4.1 Physical Security

By nature, a mobile device is more susceptible to loss or theft than a non-mobile system. The company should carefully consider the physical security of its mobile devices and take appropriate protective measures, including the following:

- Laptop locks and cables can be used to secure laptops when in the office or other fixed locations.
- Mobile devices should be kept out of sight when not in use.
- Care should be given when using or transporting mobile devices in busy areas.

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- As a general rule, mobile devices must not be stored in cars. If the situation leaves no other viable alternatives, the device must be stored in the trunk, with the interior trunk release locked; or in a lockable compartment such as a glove box.

- The company should evaluate the data that will be stored on mobile devices and consider remote wipe/remote delete technology. This technology allows a user or administrator to make the data on the mobile device unrecoverable.

- The company should continue to monitor the market for physical security products for mobile devices, as it is constantly evolving.

4.2 Data Security

If a mobile device is lost or stolen, the data security controls that were implemented on the device are the last line of defense for protecting company data. The following sections specify the company's requirements for data security as it relates to mobile devices.

4.2.1 Laptops

Whole disk encryption is required. Laptops must require a username and password or biometrics for login.

4.2.2 PDAs/Smart Phones

Encryption and login passwords are required on PDAs/smart phones.

4.2.3 Mobile Storage Media

This section covers any USB drive, flash drive, memory stick or other personal data storage media. Storing company data on such devices is not permitted under any circumstance.

4.2.4 Portable Media Players

No company data can be stored on personal media players.

4.2.5 Other Mobile Devices

Unless specifically addressed by this policy, storing company data on other mobile devices, or connecting such devices to company systems, is expressly prohibited. Questions or requests for clarification on what is and is not covered should be directed to the IT Manager.

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Mobile Device Policy	Created: 9/22/2015
Section of: Corporate Security Policies	Target Audience: Users, Technical
CONFIDENTIAL	Page 3 of 4

4.3 Connecting to Unsecured Networks

Users must not connect to any outside network without a secure, up-to-date software firewall configured on the mobile computer. Examples of unsecured networks would typically, but not always, relate to Internet access, such as access provided from a home network, access provided by a hotel, an open or for-pay wireless hotspot, a convention network, or any other network not under direct control of the company.

4.4 General Guidelines

The following guidelines apply to the use of mobile devices:

- Loss, Theft, or other security incident related to a company-provided mobile device must be reported promptly.

- Confidential data should not be stored on mobile devices unless it is absolutely necessary. If confidential data is stored on a mobile device it must be appropriately secured and comply with the Confidential Data policy.

- Data stored on mobile devices must be securely disposed of in accordance with the Data Classification Policy.

- Users are not to store company data on non-company-provided mobile equipment. This does not include simple contact information, such as phone numbers and email addresses, stored in an address book on a personal phone or PDA.

4.5 Audits

The company must conduct periodic reviews to ensure policy compliance. A sampling of mobile devices must be taken and audited against this policy on a yearly basis.

4.6 Applicability of Other Policies

This document is part of the company's cohesive set of security policies. Other policies may apply to the topics covered in this document and as such the applicable policies should be reviewed as needed.

5.0 Enforcement

This policy will be enforced by the IT Manager and/or Executive Team. Violations may result in disciplinary action, which may include suspension, restriction of access, or more severe penalties

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up to and including termination of employment. Where illegal activities or theft of company property (physical or intellectual) are suspected, the company may report such activities to the applicable authorities.

6.0 Definitions

Encryption The process of encoding data with an algorithm so that it is unintelligible without the key. Used to protect data during transmission or while stored.

Mobile Devices A portable device that can be used for certain applications and data storage. Examples are PDAs or Smartphones.

Mobile Storage Media A data storage device that utilizes flash memory to store data. Often called a USB drive, flash drive, or thumb drive.

Password A sequence of characters that is used to authenticate a user to a file, computer, or network. Also known as a passphrase or passcode.

PDA Stands for Personal Digital Assistant. A portable device that stores and organizes personal information, such as contact information, calendar, and notes.

Portable Media Player A mobile entertainment device used to play audio and video files. Examples are mp3 players and video players.

Smartphone A mobile telephone that offers additional applications, such as PDA functions and email.

7.0 Revision History

Revision 1.0, MM/DD/XXXX

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Back to Speaker Topics

Fund Assembly

Condominium Terminator: Land Vulture or Urban Rehabilitator? Arnold Schwarzenegger or Dr. Albert Schweitzer?

Michael Gelfand, *Managing Partner, Gelfand & Arpe, P.A.*

Back to Speaker Topics

Speaker Information

Condominium Terminator: Land Vulture or Urban Rehabilitator? Arnold Schwarzenegger or Dr. Albert Schweitzer?

Michael Gelfand,
Managing Partner, Gelfand & Arpe, P.A.

Michael Gelfand, a Florida Bar Board Certified Real Estate Lawyer, is managing partner of Gelfand & Arpe in West Palm Beach, which emphasizes a community association law practice. He is co-owner of ARC Mediation, Palm Beach County's largest mediation and arbitration firm.

Mr. Gelfand serves as the Immediate Past Chair of The Florida Bar's Real Property, Probate and Trust Law Section; a member of the National Association of Parliamentarians; a fellow of the American College of Real Estate Lawyers, and is the immediate past chair of its Common Interest Ownership Committee; and a fellow of the College of Community Association Lawyers.

Mr. Gelfand's publications include "The Plaza East Trilogy: Not a Nursery Rhyme, but Scary Warfare," analyzing condominium casualty insurance. The Florida Bar has published his "Alternate Dispute Resolution, Arbitration and Mediation" and "Condominium and Homeowner Association Liens" and many statutory updates.

Mr. Gelfand received Palm Beach County's Pro Bono Child Advocate of the Year award, serves as the real estate/construction attorney appointee on the Palm Beach County School District's Construction Oversight and Review Committee, and as magistrate for the District's Law Magnet Program. Mr. Gelfand received his B.S.S. from Northwestern University, and his J.D. from the University of Florida College of Law.

CONDOMINIUM TERMINATOR:
LAND VULTURE OR URBAN REHABILITATOR?
ARNOLD SCHWARZENEGGER OR DR. ALBERT SCHWEITZER?

Michael J. Gelfand, Esq.
Gelfand & Arpe, P.A.
(West Palm Beach, Florida)

1. **DEFINITIONS.**

What is a "termination"?[1] The Florida Condominium Act does not provide an express definition.

"Termination" as a noun, is the label for a process to terminate a condominium. To "terminate," the verb, is to end the legal status of a condominium in which each owner of what was a condominium unit with joint and several, but not severable, ownership of the condominium's common elements.

From the very start, mandating a process to create a condominium, the Florida Legislature also included a process to terminate a condominium. Originally in Chapter 711, the termination provisions are found in §718.117 Fla. Stat. (2016). (The "Termination Statute"). [2]

In current terms, the vehicle for a termination is the "plan of termination" which outlines the details for how the termination is to proceed, the sequence of events including contingencies, and how funds are to be distributed. §718.117(3). The termination of a condominium does not bar the former condominium being the basis for a new condominium §718.117(19).

Who undertakes the process? The Act does not provide a label, but this outline shall use the term, "terminator."

2. **THE ORIGINAL CONCEPT**.

In the condominium context, the termination process was originally designed to address significantly changed circumstances that motived the condominium unit owners to remove the legal obligations and duties concerning the real property submitted to condominium ownership, by and between the condominium's unit owners, and with the condominium association. The former condominium property would be held after termination by the unit owners as tenants in

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[1] This outline does not address timeshare terminations, nor to merger of condominiums, the latter of which the Termination Statute expressly does not apply. §718.117(20)

[2] Statutory references herein are to Florida Statutes (2016), unless expressly stated otherwise.

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common until either a new condominium was declared or the real property is transferred to another person.

There is a common misperception as to what is terminated. Termination only removes the legal status of real property being a condominium with its unique undivided and unseverable interests in real property.

Termination does not affect the physical characteristics of real property. Termination does not affect the any corporate status. The condominium association still functions, as addressed below, including the authority to assess, the duty to insure, and otherwise.

The original Condominium Act, dating from 1963, and incorporated in many early declarations of condominium, required that the termination process be triggered by all owners providing unanimous consent. What would motivate unanimous action? Generally, it was assumed that a condition precedent would be either the rare casualty destroying the entire, or a good portion of, a condominium, or the equally rare consolidation of ownership of all of a condominium's units in one person who desired to repurpose the property.

The lack of significant statutory guidance likely reflects the belief that the need for termination would be rare. The changed circumstances were originally conceived of being casualty based. This would primarily be a catastrophic fire. Less of a consideration, given Florida's relative avoidance of major storms in the 1960 -1980's, was hurricane destruction.

The original process can be found in "Termination," §711.16, Fla. Stat. (1963), which stated as follows:

> (l) All of the unit owners may remove the condominium property from the provisions of this law by an instrument to that effect, duly recorded, provided that the holders of all liens affecting any of the condominium parcels consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred to the percentage of the undivided interest of the unit owner in the property as hereinafter provided.
>
> (2) Upon removal of the condominium property from the provisions of this law, the condominium property shall be deemed to be owned in common by the unit owners. Unless otherwise provided in the declaration, the undivided interest in the property owned in common by each unit owner shall be the percentage of undivided interest previously owned by such owner in the common elements.
>
> (3) The condominium may be terminated in such other manner as may be prescribed in the declaration.
>
> (4) The termination of a condominium shall not bar the creation of another condominium affecting the same property.

Though not exercised early, concerning how the proceeds would be distributed, from the beginning the Act allowed a developer to include in a declaration of condominium an alternative formula as to how the resulting undivided shares in the property would be divided.

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3. **INCRIMENTAL ADAPTATIONS PRE-2007**.

Perhaps reflecting the balance of power, the original Act was swiftly amended in the next legislative session to address lender security.

> After termination of a condominium in any manner, the liens upon condominium parcels shall be upon the respective undivided shares of the owners as tenants in common.

§711.16 Fla. Stat. (1965), *Fla. Laws* Chp. 1965-387, §7. The 1965 change also sought to provide uniform terms, focusing upon the undivided "share" verses the original undivided "interest."

Nearly half of a century passed without many significant changes to the Termination Statute. Florida session laws that impacted the Termination Statute were:

> 1976-222: Condominium Act was re-numbered, provisions including the Termination Statute placed in Chapter 718.
>
> 1988-148: Reports of a termination had to be filed with the State of Florida.
>
> 1995-274: Wrap-up authority was described, including the potential for a receiver, and the continuing operation of the condominium association
>
> 1998-175: Pre- and post-termination notice to be filed with the Division.
>
> 2000-302: Excepts from the termination process a merger related to terminations.

Then, dormancy as the Termination Statute remained unchanged for seven years, until 2007.

4. **CHANGED CIRCUMSTANCES: 2007**.

From the start, the Termination Statute did not consider changed economic circumstances. In part this was a result of Florida's expanding residential real estate market. There were ups and downs, but the downs slowed the market, the market spreading out from city centers creating suburban and transition rural communities. Condominiums that lost their luster were just passed by with little thought.

The impetus to substantial changes was the twin physical and financial hits of the 1990's, Hurricane Andrew and the "S&L Financial Crisis." These two milestones sparked an interest in parcels that were destroyed by weather, or decimated by the ravages of time and neglect. Added to this mix, local governmental leaders started to see blighted areas around declining condominiums and feared that these parcels would drag down their areas, or slow economic recovery.

New perspectives on termination reflected the altering perspective of condominium development. The original concept that 100% of the unit owners were required to approve of termination created two distinct practical issues. First, acquiring the approval was a practical

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impossibility, especially as condominiums grew larger with more unit owners, particularly if the owners were scattered elsewhere. Second, once terminated, how to administer what was left? A tenancy in common with all owners of the former units was fractured and geographically disbursed.

Over a four year process legislators reviewed the Termination Statute. The original impetus, casualty impacts, gave way to broader community considerations. Eventually, the Legislature amended the Termination Statute, providing expanded justifications for termination, and creating a detailed process for termination.

a. TRADITIONAL TERMINATION: CASUALTY.

The traditional casualty based termination now had two distinct thresholds for application, a financial test and a legal test, either of which would justify termination.

> 1. The total estimated cost of construction or repairs necessary to construct the intended improvements or restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of the units in the condominium after completion of the construction or repairs; or,
>
> 2. It becomes impossible to operate or reconstruct a condominium to its prior physical configuration because of land use laws or regulations.

These relatively narrow, and anticipated rare, thresholds were important because the consents required for this termination were relatively small. Termination could proceed either pursuant to a declaration of condominium's own termination requirements, or if the declaration was silent, then the declaration's requirements for amending the declaration.

b. THE NEW FANGLED: OPTIONAL TERMINATION.

The revision effort began with significant fact finding to justify the process to force the transfer of real property ownership:

> LEGISLATIVE FINDINGS. — The Legislature finds that condominiums are created as authorized by statute. In circumstances that may create economic waste, areas of disrepair, or obsolescence of a condominium property for its intended use and thereby lower property tax values, the Legislature further finds that it is the public policy of this state to provide by statute a method to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property before and after termination. The Legislature further finds that it is contrary to the public policy of this state to require the continued operation of a condominium when to do so constitutes economic waste or when the ability to do so is made impossible by law or regulation. **This section applies to all condominiums in this state in existence on or after July 1, 2007.**

Fla. Laws 2007-226. (Emphasis added.) Following from these findings, the Termination Statute outlined two distinct, independent processes. Joining the casualty based justification for

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termination, "Termination Because of Economic Waste or Impossibility," was a new concept, "Optional Termination."

The 2007 amendment provided an alternative to the very limited circumstances for economic waste and impossibility termination, premised on supra-majority unit owner consent:

> … unless the declaration provides for a lower percentage, the condominium form of ownership of the property may be terminated pursuant to a plan of termination approved by at least 80 percent of the total voting interests of the condominium if not more than 10 percent of the total voting interests of the condominium have rejected the plan of termination by negative vote or by providing written objections thereto.

These two criteria, requiring eighty percent of the voting interests in conjunction, and simultaneously limiting the number of objecting voting interests to ten percent, were to ensure that termination received overwhelming support, and that not just one or a very small cadre of owners could not veto what nearly all other owners sought.

The "optional" termination process threshold was anticipated to be rigorous, but not a practical impossibility. The eighty percent threshold is an unusual number and a high number for consent. Supra-majority consents in corporate contexts are not unheard. Frequently, if greater than a simple majority, fifty percent plus one, the consents usually have been in the realm of two-thirds or three-quarters.

Higher consent totals are frequently eschewed because of the belief that they are close to a practical impossibility to obtain. Thus, the eighty percent owner consent requirement was legislated to help ensure not only that there was significant support, but that overwhelming support was present. As a counter point, to help ensure that the majority did not ride roughshod over the minority, ten percent of the owners could stop a termination.

5. **EFFECTIVE DATE: RETROACTIVE APPLICATION**.

Immediate application of the new termination thresholds to existing condominiums was sought by the Legislature. There are valid reasons for immediate application of statutes; generally, including not waiting for "grandfathering" which by delaying implementation undermines a new law's purpose, and a desire for uniformity. In the termination context, it was recognized, likely correctly, that not applying the Termination Statute to existing condominiums would undermine the effort to revitalize communities with deteriorating condominiums.

However, as has observed with other condominium related laws, the Legislature's desire for immediate change frequently runs afoul of constitutional imperatives. *See Cohn v. The Grand Cd'm. Ass'n., Inc.*, 62 So.3d 1120 (Fla. 2011). The Florida Constitution and the United States Constitution restrain legislative action impacting a pre-existing contract right, or a vested property right. There are some general exceptions to the constitutional bar, notably: remedial changes to further a remedy or to confirm existing rights; and, procedural changes to provide the means and methods for the application and enforcement of existing duties and rights.

a. IMPAIRMENT OF CONTRACT.

Two separate provisions in each Constitution, Federal and Florida, prohibit the Legislature from retroactively impairing contract rights.

> Art I, §10, U.S. Const.:
>
> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal … pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
>
> Art. I, §10, Fla. Const.:
>
> Prohibited laws. No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

These were applied to invalidate legislation affecting substantive real property rights, specifically retroactive application of a law limiting rental escalations. *Fleeman v. Case*, 342 So. 2d 815 (Fla. 1976).

Generally, exceptions to these constitutional prohibitions have been recognized when legislation is:

> (a) enacted to deal with a broad, generalized economic or social problem;
>
> (b) in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state; or,
>
> (c) a temporary alteration of the contractual relationships of those within its coverage, as opposed to a severe, permanent, and immediate change in those relationships.

Pomponio v. Claridge, 378 So.2d 774, 779 (Fla., 1979).

Common sense dictates that the constitutional impairment prohibition does not apply if the contract in question incorporated future legislation. A declaration of condominium's text stating that it was subject to not only the Condominium Act, but also the Act "as it may be amended from time to time," had the effect of incorporating changes in the law. *Kaufman v. Shere*, 347 So.2d 627 (Fla. 3rd DCA, 1977). The incorporation text has been referred to as "Kaufman Language." *Tropicana Cdm. Ass'n, Inc. v. Tropical Cd'm., LLC* _____ So. 3d _____, Case No. 3D15-2583 (Fla. 3rd DCA, Nov. 16, 2016) *motion for rehearing denied* January 23, 2017, *notice of discretionary Florida Supreme Court jurisdiction filed* February 17, 2017.

Legislation may also retroactively correct a judicial decision that, while perhaps correctly interpreting the words of a statute, did not follow the legislature's actual intent; however, the time for a clarifying act is not unlimited. *CRC 603, LLC V. North Carillon, LLC*, 77 So.3d 655 (Fla. 3rd DCA, 2011), *reversed on other grounds*, 135 So.3d 274 (Fla. 2014).

b. DUE PROCESS.

Constitutional protections prohibit the taking of property rights without due process of law.

> Art I, §2, Fla Const.
>
> All Natural Persons … Have Inalienable Rights, Among Which Are The Right … To Acquire, Possess And Protect Property.
>
> Art I, §9, Fla Const.
>
> No Person Shall Be Deprived Of Life, Liberty Or Property Without Due Process Of Law.
>
> Amend V, U.S. Const.
>
> No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Thus, though frequently not required to be relied upon by the courts when a holding can rest upon impairment of contract principals, the "Due Process clauses" are alternatives that have been utilized to concepts that may apply. *See Sowell v. Panama Commons LP*, 192 So. 3d 27, 30 (Fla. 2016); *Maronda Homes, Inc. v. Lakeview Reserve H.O.A.*, 127 So.3d 1258, 1272 (Fla. 2013).

c. APPLICATION TO TERMINATION STATUTE.

The application of constitutional impairment protections to an existing condominium and its association was recently addressed in a suit brought by the owner of a unit in the forty-eight unit Tropicana Condominium Association. *Tropicana Cdm. Ass'n, Inc. v. Tropical Cd'm., LLC* _____ So. 3d _____, Case No. 3D15-2583 (Fla. 3rd DCA, Nov. 16, 2016). The Association, administering a declaration of condominium created in 1983, sought to utilize the "optional termination" process. A majority, but less than all unit owners, approved an amendment to the declaration reducing the threshold consent for termination from 100% to 80% of the unit owners which removed the ability of any one owner to veto a termination proposal.

The *Tropicana* court recognized the general rule that:

> Absent Kaufman language, an amendment to the Condominium Act will not have retroactive application to a condominium's Declaration if it impairs contractual obligations. Cohn v. Grand Condo. Ass'n, Inc., 62 So. 3d 1120, 1121-22 (Fla. 2011) (holding that an amendment to section 718.404(2) of the Florida Statutes, which altered voting rights for mixed-use condominium boards, constituted an impairment of contract under Article 1, section 10 of the Florida Constitution).

As the *Tropicana* declaration did not include "Kaufman language" the application of the 2007 Termination Statute to the 1983 declaration was subject to challenge. The Court decisively rejected the Association's practical assertions as the amendment "would eviscerate the Tropical owners' contractually bestowed veto rights, and invalidated the declaration amendment."

6. **INCREMENTAL STEPS POST-2017**.

After the 2007 overhaul, the Termination Statute received a number of amendments. There were relatively minor tweaks in 2008, *Fla. Laws* Chp. 2008-28, §11; Chp. 2008-202, §2; Chp. 2008-240, §6, and 2010, *Fla. Laws* Chp. 2010-174, §13. In 2011, partial termination was permitted, and substantial changes were made to the plan of termination. *Fla. Laws* Chp 2011-196, §7. In 2014, after a failed consent process there would be a six month cooling off period. *Fla. Laws* Chp. 2014-133, §11. In 2015, there was a substantial change in the optional termination process. *Fla. Laws* Chp. 2015-175.

7. **CURRENT REQUIREMENTS: THRESHOLDS**.

The current Termination Statute still can be triggered by two circumstances: economic waste or impossibility; and, optional after approval by owners. The Statute outlines a detailed "plan of termination."

Regardless of a belief that the statutory pre-requisites have been fulfilled, the real property concepts underlying a termination must be recognized, that is the ability to transfer good marketable title to a bona fide third party purchaser. Thus, particularly as there has not been a Florida appellate court decision confirming implementation requirements, it is frequently recommended that one or more of the participants in a termination process consult with a title insurance underwriter. The unit owners and association will likely focus on the gathering and distribution of money which does not address title issues.

a. APPLICABILTY.

Is there a condominium to terminate? This may sound tautological, but the question should be asked, especially of recently declared condominiums, and in particular non-traditional condominiums such as hotel and multi-use condominiums. Elementary, but a critical question, is whether there are units and common elements, in reality, not just name.

A valid condominium requires "units," the plural in the definition presumably requiring more than one unit, and "common elements." §718.103(11). The requirement is not in the abstract, and apparently may not be stretched to absurdity. When the common elements are such that they provide no perceived value to the units negates the assertion that a condominium was created.

> [T]he portion of the Condominium Property below elevation minus fifty feet (-50.0') N.G,V.D. Said portion of the Condominium Property lying below elevation minus fifty feet (-50.0') N.G.V.D. shall be deemed Common Elements hereunder.

The attempt to create a condominium with no common elements does not create a condominium subject to termination pursuant to the Termination Statute. *Bozo I, LLC v. The Bonaventure Hotel Cd'm. Ass'n., Inc.*, Case No. 2015-03-6352 (Jan. 22, 2016, Earl); *Gallery One 311 Corp.v . The Bonaventure Hotel Cd'm. Ass'n., Inc.*, Case No. 2015-03-6243 (Jan. 22, 2016, Earl);. Of course the Arbitrator's decision may have been welcomed by the Association in the short run, but there likely are questions of what do the owners own, and how is it regulated. It is also

unclear as to whether the savings provisions of §718.110(3), and the three year limitations period for a challenge to the effectiveness of a declaration were considered.

b. TYPES.

The Termination Statute now recognized two distinct types of termination. Each have different thresholds.

i. ECONOMIC WASTE OR IMPOSSIBILITY.

The "traditional" threshold for termination has its roots in the original Florida Statutes Chapter 711, Termination Statute. This type is driven by practicality, the trigger likely being a casualty, such as storm or fire damage. Two threshold tests are mandated, either of which are sufficient to move forward with termination.

> 1. The total estimated cost of construction or repairs necessary to construct the intended improvements or restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of the units in the condominium after completion of the construction or repairs; or
>
> 2. It becomes impossible to operate or reconstruct a condominium to its prior physical configuration because of land use laws or regulations.

§718.117(2)(a). The former threshold option, an expense test, is relatively straight forward, grossly summarized as whether it will cost more to re-construct or repair than the condominium, or portion of the condominium's, fair market value determined after the plan as if the work was completed.

The later threshold option, impossibility of operations may be more problematic, if not obvious. In many areas land use restrictions will not allow the reconstruction of a destroyed structure. Frequently zoning restrictions will limit the size or placement of replacement structures. Condominiums along the Atlantic Ocean, the Straits of Florida and the Gulf of Mexico must also contend with the Coastal Construction Setback/Control Line which may also prohibit replacement structures close to the water. See §161.052 Fla. Stat.

ii. OPTIONAL TERMINATION.

The "upstart" type of termination, causing most of the debate around the topic is Optional Termination which in theory, is not dependent upon any external process or event. Optional Termination is based upon the conjunction of two factors: 1) the will of an overwhelming majority of unit owners to proverbially say "enough is enough;" and, 2) the number of objectors to termination being minimal. In practice, when created the Optional Termination process was intended to allow owners to extract the value of their units, plus perhaps an additional bonus because all units are usually submitted in conjunction.

c. AMENDING SHARES OF COMMON ELEMENTS.

Though the adoption of a plan of termination changes a declaration of condominium, and in practice what is owned by a unit owner ultimately will change, the plan is not considered a declaration amendment changing unit boundaries, configuration, appurtenances, or proportionate ownership of common elements which otherwise would be prohibited by §718.110(4). §718.117(4).

In a partial termination the gross total common elements usually decreases. As the number of units decreases, each remaining unit's percentage of ownership of common elements increases, and correspondingly each remaining unit's the share of assessments must also increase. Though an amendment changing the percentages normally requires unanimous owner approval, a plan of partial termination is not §718.110(4) if each surviving unit's share of common elements remains in the same proportion to the surviving units as the share was before the partial termination.

d. MORTGAGE LIENS.

The Termination Statute protects mortgage lenders, not distinguishing between the priority of mortgages. Generally, if the plan of termination satisfies a unit's mortgages, then the mortgage holder's consent is not required, and the mortgage lien is deemed transferred to the unit's share of proceeds.

If lender approval is required, and not initially obtained, then the holder of a recorded mortgage may contest the plan as provided in §718.117(26). Note that the right to contest is held only to mortgage holder if the mortgage was recorded. The right to contest is only for the plan, not the termination, itself.

Mortgage holder approval in non-timeshare condominiums, with 75% of more of the units being submitted to timeshare ownership, is stated as not required.§718.117(5).

e. ASSOCIATION AUTHORITY.

Termination does not affect the Association's status as a corporation. The Association remains operative. In addition to pre-termination powers, post termination the Association shall have the power to:

(a) Employ directors, agents, attorneys, and other professionals to liquidate or conclude its affairs.

(b) Conduct the affairs of the association as necessary for the liquidation or termination.

(c) Carry out contracts and collect, pay, and settle debts and claims for and against the association.

(d) Defend suits brought against the association.

(e) Sue in the name of the association for all sums due or owed to the association or to recover any of its property.

(f) Perform any act necessary to maintain, repair, or demolish unsafe or uninhabitable improvements or other condominium property in compliance with applicable codes.

(g) Sell at public or private sale or exchange, convey, or otherwise dispose of assets of the association for an amount deemed to be in the best interests of the association, and execute bills of sale and deeds of conveyance in the name of the association.

(h) Collect and receive rents, profits, accounts receivable, income, maintenance fees, special assessments, or insurance proceeds for the association.

(i) Contract and do anything in the name of the association which is proper or convenient to terminate the affairs of the association.

§718.117(6) and (18). In fact, after the plan of termination is recorded the Association frequently will still have significant duties, directly, or indirectly through the termination trustee, and among other efforts, should ensure that there is sufficient cash flow to fund plan efforts.

8. **PLAN OF TERMINATION**.

The operative document for the termination of a condominium is the "plan of termination." §718.117(11). The Termination Statute outlines mandatory and discretionary requirements for the plan of termination. The Termination Statute also provides for a conditional termination, triggered by a future event, as opposed to immediate termination.

a. TERMINATION TRUSTEE.

One of the primary actors in the termination process is the termination trustee. This is the person, a natural person or a legal entity, that administers the process. If the association is unable, unwilling, or fails to act as trustee, any unit owner may petition the court to appoint a trustee. §718.117(13).

If the association is not the termination trustee, the trustee's powers shall be coextensive with those of the association to the extent not prohibited in the plan of termination or the order of appointment. If the association is not the termination trustee, the association shall transfer any association property to the trustee. If the association is dissolved, the trustee shall also have such other powers necessary to conclude the affairs of the association.

Upon recording of the plan of termination, or as stated in the plan, the termination trustee normally takes possession of what was all condominium and all association property, responsible for administering, including insuring and maintaining, and for which the termination trustee must also be able to raise funds. Unless prohibited by the plan, the termination trustee shall be vested with the powers given to the board of directors pursuant to the declaration, bylaws, and subsection §718.117(6).

Of no small importance, instead of the former unit owners holding the former condominium property as tenants in common with the headaches and other problems of coordinating closing documents, upon recording the plan of termination, title to the condominium property vests in the termination trustee, subject to the plan's provisions. §718.117(14). A plan that includes power of attorney authority from unit owners to the termination trustee may facilitate creation and execution of documents, from obtaining estoppel letters, to execution of receipts.

The unit owners are the beneficiaries of the proceeds realized from the plan of termination as set forth in the plan. The termination trustee may deal with the condominium property being terminated or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee, on behalf of the unit owners, may contract for the sale of real property being terminated, but the contract is not binding on the unit owners until the plan is approved.

b. NOTICE OF PLAN ADOPTION.

The termination trustee shall deliver within thirty days after recording the plan of termination, the termination trustee shall deliver to their last known addresses by certified mail, return receipt requested, notice of recording of the plan to: all unit owners; lienors of the condominium property; and, lienors of all units. The notice shall be sent to their last known addresses. §718.117(13). The notice must include the book and page number of the public records in which the plan was recorded, notice that a copy of the plan shall be furnished upon written request, and notice that the unit owner or lienor has the right to contest the fairness of the plan.

In addition the trustee shall provide notice to the Division of Condominiums within ninety days after the effective date of the plan: a certified copy of the recorded plan; the date the plan was recorded; and, the county, book, and page number of the public records in which the plan is recorded.

c. UNIT POSSESSORY RIGHTS.

A unit owner's right to possession, and all leases and agreements concerning occupancy and use of the now former unit ceases upon termination, unless the plan of termination expressly authorizes otherwise, specifying terms and conditions of possession. To avoid misperceptions, the plan of a partial termination must identify the units that survive, and include an amendment to the declaration of condominium or an amended and restated declaration that states the

remaining units, the effect of which is to exclude ownership of property that is to remain as a unit and common elements from as being vested in the termination trustee. §718.117(11)(a).

d. CONTINGENT TERMINATION.

If termination is not to immediately occur, the plan of termination must specify the conditions for termination. Why conditional? Otherwise, if there is a reason to stop to the process, a unit owner vote to terminate the termination, *supra*, is required.

What reasons? One reason is not to trigger termination until the buyer of the property is actually able or willing, to close, and closes. Conditions for closing, such as zoning and financing, if any, can be fulfilled. If the plan is conditional, then title of the former condominium property does not vest in the termination trustee until recording of a certificate executed by the association with the formalities of a deed confirming that the conditions have been satisfied or waived by the requisite percentage of the voting interests. §718.117(11)(b).

e. TERMINATING TERMINATION.

A plan of termination may be withdrawn or modified by the affirmative vote or written agreement of at least the same percentage of voting interests in the condominium as that which was required for the initial approval of the plan, unless otherwise provided in the plan. §718.117(11)(c).

f. ERROR.

The termination trustee may record an amended plan of termination, or an amendment to the plan, to correcting a scrivener's error. Such an amended plan or amendment to the plan must be executed by the termination trustee in the same manner as required for the execution of a deed. §718.117(11)(d).

g. PROCEEDS OF SALE.

It is presumed that the former common elements have no independent value for purpose of allocation of sale proceeds. Instead, the value each unit includes the value of the appurtenant share of common elements. However, a declaration provisions may require otherwise, and there are special provisions for a partial termination. §718.117(12).

The allocation of sale proceeds to individual units, and thus to the unit owners is usually the ultimate focus, or goal, of the unit owners, and thus the association. The traditional concept would lead an observer to conclude that the only method of allocation would be to follow the declaration of condominium's allocation of shares in the common elements. This traditional approach was turned upside down by the Florida Supreme Court which found that in the context of a casualty loss equitable principles may override the declaration's allocation. *Providence Square Ass'n., Inc. v. Biancardi*, 597 So. 2d 1366 (Fla. 1987).

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i. Complete Termination Allocation.

A plan of termination's apportionment of unit valuation, and thus sale proceeds is deemed fair and reasonable if the apportionment is determined by any of the following methods:

1. Independent Appraiser. The respective values of the units based on the fair market values of the units immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee;

2. Property Appraiser. The respective values of the units based on the most recent market value of the units before the termination, as provided in the county property appraiser's records; or

3. Declaration. The respective interests of the units in the common elements specified in the declaration immediately before the termination.

These methods are not exclusive. Other apportionment methods may be agreed upon in the plan of termination. §718.117(12). At least one Division of Condominiums Arbitration decision has held that the independent appraiser is consider comparable values existing before recording the plan of termination, not afterwards; thus, the premium realized by the value of the entire condominium being sold as one parcel is not to be considered, *Quinones v. Omni Bay House Cd'm. Ass'n., Inc.*, Case No. 2016-00-9685 (Nov. 14, 2016, Earl), which may be considered a loss for the individual unit owner verses the terminator.

Common element apportionment shall be based upon each unit's respective interest in the common elements as provided in the declaration. This process appears intended to take into account not only the allocation of shares of "general" common elements, but also the value of limited common elements that are not uniformly assigned to each unit. For example, the number of parking spaces or boat docks may not be equally distributed to all units in a condominium, and a unit with two spaces or docks should receive a larger apportionment than a unit that has one of each.

ii. Partial Termination Valuation and Allocation.

In a partial termination, the plan of partial termination must contain separate valuations of the aggregate value of the terminated units, and contain the aggregate value of the terminated common elements. The plan of partial termination must also specify how the proceeds of the sale, for the units and common elements being terminated. Though the valuation and the proceeds are anticipated to be equal, the Termination Statute uses different terminology, "valuation" and "proceeds of the sale" §718.117(12)(a).

iii. Liens.

Unless the plan of termination provides otherwise liens upon condominium property upon termination shall be transferred to the proceeds of sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority. In terms of categorization, the

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proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed to be common surplus or association property. §718.117(12)(d).

In a partial termination, liens that encumber a unit being terminated must be transferred to the proceeds of sale of that portion of the condominium property being terminated which are attributable to such unit.

The Termination Statute creates a notice requirement for enforcement of a lien existing at the time the plan of termination is recorded. A termination trustee's written estoppel letter request triggers a thirty day deadline for a lien holder to deliver to the termination trustee a statement confirming the outstanding amount of any obligations of the unit owner secured by the lien.

iv. Set-Offs.

As in many title transactions there are expenses, direct sale expenses and indirect expenses to satisfy claims, that are to be deducted from a seller's sale proceeds. Similarly, in the termination context there will be expenses to be deducted from a unit owner's allocation of proceeds. The termination trustee may setoff against, and reduce the share of, the termination proceeds allocated to a unit by the following amounts, which may include attorney fees and costs:

1. All unpaid assessments, taxes, late fees, interest, fines, charges, and other amounts due and owing to the association associated with the unit, its owner, or the owner's family members, guests, tenants, occupants, licensees, invitees, or other persons.

2. All costs of clearing title to the owner's unit, including, but not limited to, locating lienors, obtaining statements from such lienors confirming the outstanding amount of any obligations of the unit owner, and paying all mortgages and other liens, judgments, and encumbrances and filing suit to quiet title or remove title defects.

3. All costs of removing the owner or the owner's family members, guests, tenants, occupants, licensees, invitees, or other persons from the unit in the event such persons fail to vacate a unit as required by the plan.

4. All costs arising from, or related to, any breach of the plan by the owner or the owner's family members, guests, tenants, occupants, licensees, invitees, or other persons.

5. All costs arising out of, or related to, the removal and storage of all personal property remaining in a unit, other than personal property owned by the association, so that the unit may be delivered vacant and clear of the owner or the owner's family members, guests, tenants, occupants, licensees, invitees, or other persons as required by the plan.

6. All costs arising out of, or related to, the appointment and activities of a receiver or attorney ad litem acting for the owner in the event that the owner is unable to be located.

§718.117(12)(e).

h. DISTRIBITION OF PROCEEDS.

The termination trustee after termination shall hold pursuant to the plan of termination all condominium property, association property, common surplus, and other assets of the association pursuant to the plan of termination.

i. Notice of Estimated Distribution.

The termination trustee shall deliver by Certified Mail Return Receipt Requested the first notice of estimated distribution not less than thirty days before the meeting a notice of the estimated distribution to all unit owners, lienors of the condominium property, and lienors of each unit at their last known addresses. The notice shall state a good faith estimate of the amount of the distributions to each class and the procedures and deadline for notifying the termination trustee of any objections to the amount. The deadline must be at least 15 days after the date the notice was mailed. The notice may be sent with or after the notice of plan recording.

ii. Stay for Objection.

If a unit owner or lienor files a timely objection with the termination trustee, the trustee need not distribute the funds and property allocated to the respective unit owner or lienor until the trustee has had a reasonable time to determine the validity of the adverse claim. In the alternative, the trustee may interplead the unit owner, lienor, and any other person claiming an interest in the unit and deposit the funds allocated to the unit in the court registry, at which time the condominium property, association property, common surplus, and other assets of the association are free of all claims and liens of the parties to the suit. In an interpleader action, the trustee and prevailing party may recover reasonable attorney's fees and costs.

iii. Distribution Priority.

The proceeds from any sale of condominium property or association property and any remaining condominium property or association property, common surplus, and other assets shall be distributed in the following priority:

1. To pay the reasonable termination trustee's fees and costs and accounting fees and costs.

2. To lienholders of liens recorded prior to the recording of the declaration.

3. To purchase-money lienholders on units to the extent necessary to satisfy their liens; however, the distribution may not exceed a unit owner's share of the proceeds.

4. To lienholders of liens of the association which have been consented to under s. 718.121(1).

5. To creditors of the association, as their interests appear.

6. To unit owners, the proceeds of any sale of condominium property subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or lienor as provided in paragraph (b).

7. To unit owners, the remaining condominium property, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor as provided in paragraph (b).

8. To unit owners, the proceeds of any sale of association property, the remaining association property, common surplus, and other assets of the association, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor as provided in paragraph (b).

After determining that all known debts and liabilities of an association in the process of termination have been paid or adequately provided for, the termination trustee shall distribute the remaining assets pursuant to the plan of termination. If the termination is by court proceeding or subject to court supervision, the distribution may not be made until any period for the presentation of claims ordered by the court has elapsed. To facilitate distributions, it may be appropriate to include in the plan of termination, a prohibition on unit owners interfering with the termination trustee's actions to release liens, and that during the plan process, that unit owners pay and keep liens indebtedness current.

Distribution may be made in money, property, or securities and in installments or as a lump sum, if it can be done fairly and ratably and in conformity with the plan of termination. Distribution shall be made as soon as is reasonably consistent with the beneficial liquidation of the assets. Assets held by an association upon a valid condition requiring return, transfer, or conveyance, which condition has occurred or will occur, shall be returned, transferred, or conveyed in accordance with the condition.

9. **CHALLENGE TO THE PLAN**.

Once a plan of termination is adopted, the method of challenge for a residential condominium is through the mandatory pre-suit arbitration program found in §718.1255. §718.117(16). A challenge may be initiated by either a unit owner or lienor within ninety days after the plan's recording, or is barred from challenging. The rationales for challenge are limited to:

The fairness and reasonableness of the apportionment of the proceeds from the sale among the unit owners,

> That the liens of the first mortgages of unit owners other than the bulk owner have not or will not be satisfied to the extent required by the Termination Statute, or,
>
> That the required vote to approve the plan was not obtained.

The owner or lienor contesting the plan has the burden of pleading and proving their claim.

As a threshold, jurisdiction for a challenge must meet the statutory prerequisites, which expressly includes a dispute regarding plan of termination. §718.1255(1)(c). Caution must be made regarding pre-plan disputes. For example, the failure to proceed with a plan of partial termination following a fire destroying units in one of a multi-building condominium may be characterized as a title issue outside aN arbitrator's jurisdiction, *Lemon Tree-1 Cd'm., Ass'n., Inc. v.Abroscat Family Trust*, Case No. 2012-00-1251 (Mar. 22, 2012, Simms); however, this writer questions whether the arbitrators conclusion that a decision to terminate affects title to divest jurisdiction because that rational would eviscerate the statutory extension of jurisdiction in §718.1255(1)(c).

A potential disqualifier for Division of Condominiums Arbitration is whether the condominium is non-residential because disputes in a nonresidential condominium are excepted from Division arbitration unless the declaration of condominium provides otherwise. §718.1255(6). While the Condominium Act does not define "nonresidential", the converse, a residential condominium is defined as:

> … a condominium consisting of two or more units, any of which are intended for use as a private temporary or permanent residence, except that a condominium is not a residential condominium if the use for which the units are intended is primarily commercial or industrial and not more than three units are intended to be used for private residence, and are intended to be used as housing for maintenance, managerial, janitorial, or other operational staff of the condominium.

§718.103(23). Thus, as a start, if any units are residential, then the premise is that the condominium is residential, unless one of the definition's exceptions apply. A dispute regarding the termination of a boat dock condominium, or a dockominium, being nonresidential, similarly has been held by an arbitrator to outside Arbitration jurisdiction when the declaration of condominium did not include arbitration as a dispute alternative. *Forcier v. The Dania Beach Boart Club Ass'n., Inc.*, Case No. 2016-03-6722 (Jan. 9, 2017, Earl).

If the arbitrator determines that the apportionment of sales proceeds is not fair and reasonable, the arbitrator may void the plan or may modify the plan to apportion the proceeds in a fair and reasonable manner pursuant to this section based upon the proceedings and order the modified plan of termination to be implemented. If the arbitrator determines that the plan was not properly approved, or that the procedures to adopt the plan were not properly followed, the arbitrator may void the plan or grant other relief it deems just and proper. The arbitrator shall automatically void the plan upon a finding that any of the required disclosures are omitted,

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misleading, incomplete, or inaccurate. Any challenge to a plan, other than a challenge that the required vote was not obtained, does not affect title to the condominium property or the vesting of the condominium property in the trustee, but shall only be a claim against the proceeds of the plan. In any such action, the prevailing party shall recover reasonable attorney fees and costs.

10. **OPTIONAL TERMINATION THRESHOLDS**.

Before commencing a termination, has there been asked "what is the goal?" Usually, the goal is not simply just to terminate the condominium. Termination does not change the physical structure of improvements. Termination changes the legal relationship, the owners becoming tenants in common.

The goal beyond termination depends upon one's perspective. Altering the legal relationships between the unit owners is not usually a satisfactory goal in itself. Frequently, the goal is the transferring the real property interests of the individual unit owners, what was the now terminated condominium, to a third party. Because of the time dependent cost of money, timing can be important.

In theory, the crafting of a plan of termination is the first step, in reality counting votes is critical which leads the terminator to evaluate the proverbial "lay of the land" and determine what is necessary in the plan to ensure that the votes are present to approve the plan of termination.

i. CONSENTS: NUMERIC THRESHOLD.

Timing and numbers are two key considerations for a terminator.

i. Numbers.

In terms of numbers the terminator must obtain two statutory thresholds, unless a condominium's declaration of condominium provides for lower thresholds.. First, eighty percent of all voting interests must consent to a plan of termination. Second, no more than ten percent of the voting interests may reject the plan of termination. §718.117(3).

Who can vote? All units' votes are eligible to be cast. The ability to suspend voting, either for failure to pay assessments §718.303(4), or for the violation of a use restriction §718.303(3)(a) do not apply to terminations. No voting interest can be terminated when voting for a termination plan. §718.117(3)(a)(1). In this regard, it may behoove to have the plan of termination include a requirement that unit owners continue to fulfill their monetary obligations to the Association, not just assessments.

ii. Timing.

Two timing requirements may push terminators to offer realistic plans, especially proposed payouts. These requirements are an overall time limit, and a limitation on what types of condominiums can be terminated.

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An eighteen month "time out" confronts a terminator when a condominium association's voting interests do not approve a proposed plan of termination. A plan cannot be re-submitted for eighteen months after the defeat. This forces terminators, at least terminators who are far thinking, to consider what is the best offer that can be made at the start.

A five year waiting period before an optional plan of termination can be approved after the creation of certain types of condominiums listed in Part IV of the Act. §718.117(3)(b). Part IV of the Act lists: leaseholds; Conversions; Phased; Mixed Use; Multi-Condominiums; and Condominiums within Condominiums. While there has been a considerable hue and cry over recent efforts conversion condominium terminations, there has been little concern over other the other specialty types of condominiums and three is a question of whether the other types should be limited.

j. BULK OWNER LIMITATION.

The proliferation of terminations in residential condominiums converted from other uses, such from an apartment with a landlord, resulted in legislative restraints on "bulk owners" which own eighty percent of a condominium association's voting interests. While the term "bulk owner" may be one person or entity, the term is not limited to a single person or entity. The term "bulk owner" is expanded to include related entities that would be considered an "insider" under the Fraudulent Transfer Act's definition, §726.102. A "bulk owner" is not necessarily a "bulk buyer" or a "bulk assignee" defined in §718.703(1) and (2).

i. Board of Director Control.

If the association's directors are elected by the bulk owner, then unit owners other than the bulk owner may elect at least one-third of the directors before the approval of any plan of termination. §718.117(3)(d).

ii. Possession/Tenancy.

In a bulk owner termination, if the former condominium units are offered for lease, then a resident is entitled to remain in residence and possession of their unit for twelve months after the effective date of the recording of a plan of termination. The terms of the continuing residency, such a lease terms, including presumably rent, are to be the same as that offered to the public for similar unit types. §718.117(3)(c)(1). The term "unit types" is not defined which may lead to issues as to whether the term refers only to layouts, or also floor level types.

How would a unit owner, or former unit owner claim this right? There are two deadlines. First, within ninety days of the recording of plan of termination the former unit owner must make a written request to the termination trustee to rent the former unit. While the start date for the ninety days is definite, recording, there is no guidance as to what constitutes "to make" the request. The safest method likely would be actual delivery.

Upon receipt of the bulk owner's offer of a lease, then the former unit owner has a relatively short deadline, fifteen days, after being "presented" with a lease. "Presented" is not defined, but actual delivery is anticipated to be sufficient. Failure of the unit owner to act is deemed to be a waiver of any right to possess the former unit, and also triggers a requirement to

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vacate upon the effective date of the termination, unless otherwise provided in the plan of termination.

iii. Homestead Relocation Payment.

In a bulk owner termination, if a former unit was the owner's homestead for real estate tax purposes, granted by the county property appraiser as of the date of the recording of the plan of termination, then, the bulk owner shall pay the unit owner a relocation payment equal to 1 percent of the termination proceeds allocated to the owner's former unit which is in addition to the termination proceeds for such owner's former unit. The payment shall be made no later than 10 days after the former unit owner vacates his or her former unit. §718.117(3)(c)2.

iv. Unit Valuation.

In a bulk owner termination, each unit owner which is not a bulk owner shall receive at least 100 percent of the fair market value of their units as of a date that is no earlier than 90 days before the date that the plan of termination is recorded. The amount shall be determined by an independent appraiser selected by the termination trustee. "Fair market value" is defined as

> the price of a unit that a seller is willing to accept and a buyer is willing to pay on the open market in an arms-length transaction based on similar units sold in other condominiums, including units sold in bulk purchases but excluding units sold at wholesale or distressed prices. The purchase price of units acquired in bulk following a bankruptcy or foreclosure shall not be considered for purposes of determining fair market value.

§718.117(3)(c)3. The fair market value shall be not less than the unit's original purchase price if the unit is owned by an original purchaser from the developer, that owner rejected the plan of termination, and, as of the date that the plan of termination is recorded:

> the unit was granted homestead tax exemption status or was an owner-occupied operating business;
>
> the unit's monetary obligations to the association, including assessments are current; and,
>
> any mortgage encumbering the unit is current.

k. MORTGAGE PAYMENTS.

In a bulk owner termination, a first mortgage encumbering a unit must be paid "to the extent necessary to satisfy the lien." However, the payment under the plan may not exceed the unit's share of termination proceeds. If the unit owner's monetary obligations to the association, including assessments, and any mortgage encumbering the unit are current as of the date the plan of termination is recorded, receipt by the mortgage holder of the unit's share of the proceeds of termination or the outstanding balance of the mortgage, whichever is less, shall be deemed to have satisfied the first mortgage in full. §718.117(3)(c)4.

Initially, this requires a determination of who actually holds the first mortgage, and the amount of the mortgage. Whether the cram down of the mortgage holder to the amount of plan

proceeds is constitutional is subject to court action. In support of the statute's constitutionality, if there was no termination and instead there was a foreclosure judgment, a foreclosure sale should not rationally be expected to result in proceeds greater than the fair market value.

l. DISCLOSURES.

In a bulk owner termination, a plan of termination must include in form of a sworn statement:

> The identity of any person or entity that owns or controls 50 percent or more of the units in the condominium and, if the units are owned by an artificial entity or entities, a disclosure of the natural person or persons who, directly or indirectly, manage or control the entity or entities and the natural person or persons who, directly or indirectly, own or control 20 percent or more of the artificial entity or entities that constitute the bulk owner.
>
> For each unit acquired by a bulk owner, the date each unit was acquired, and the total amount of compensation paid to each prior unit owner by the bulk owner, regardless of whether attributed to the purchase price of the unit.
>
> The relationship of any association director to a bulk owner or any person or entity affiliated with the bulk owner subject to disclosure.

§718.117(3)(c)5.

11. **RECEIVERS**.

a) If, after a natural disaster, the identity of the directors or their right to hold office is in doubt, if they are deceased or unable to act, if they fail or refuse to act, or if they cannot be located, any interested person may petition the circuit court to determine the identity of the directors or, if found to be in the best interests of the unit owners, to appoint a receiver to conclude the affairs of the association after a hearing following notice to such persons as the court directs. Lienholders shall be given notice of the petition and have the right to propose persons for the consideration by the court as receiver. If a receiver is appointed, the court shall direct the receiver to provide to all unit owners written notice of his or her appointment as receiver. Such notice shall be mailed or delivered within 10 days after the appointment. Notice by mail to a unit owner shall be sent to the address used by the county property appraiser for notice to the unit owner.

(b) The receiver shall have all powers given to the board pursuant to the declaration, bylaws, and subsection (6) [Plan of termination], and any other powers that are necessary to conclude the affairs of the association and are set forth in the order of appointment. The appointment of the receiver is subject to the bonding requirements of such order. The order shall also provide for the payment

> of a reasonable fee to the receiver from the sources identified in the order, which may include rents, profits, incomes, maintenance fees, or special assessments collected from the condominium property.

§718.117(7).

12. **THE FUTURE**.

The short term future of condominium termination has been written. In practice, the short term is dependent upon the provisions of the Condominium Act at the time of the recording of a particular condominium's declaration of condominium, and the provisions of the declaration of condominium itself. Amending the Condominium Act to address current issues when many if not most declarations do not have *Kaufman* language appears futile, and perhaps worse, creating traps for the unwary.

Like many issues that grab headlines, the greater policy issue underlying termination is rarely discussed. That is to what extent should joint owners be required to "cooperate" in the disposition of their property when there is a dissenting minority. Is real property so special that each owner's consent be required? Should there be a re-examination of the "uniqueness" rule developed centuries ago when there were a handful of potential joint owners and then the parcel was a horizontal farm relatively easily partitioned, before hundreds or thousands of joint owners shared title to vertical residences not capable of partition? If forced sale is an option, is that contrary to Florida's strong homestead considerations? What should be the thresholds?

F:\LL\SPEECHES\Termination Fund 170323.docx

Gelfand & Arpe, P.A.
1555 Palm Beach Lakes Blvd., Suite 1220, West Palm Beach, FL 33401-2329
(561) 655-6224

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Fund Assembly

Practice of Law: Run it like a Business

Jerry Levin, *Founder and Manager, Levin Law and Mediation*

Back to Speaker Topics

Speaker Information

Practice of Law: Run it like a Business

Jerry Levin,
Founder and Manager, Levin Law and Mediation

Jerry Levin manages a solo law and mediation practice in Sarasota. He is the former managing partner of Levin Tannenbaum of Sarasota. Mr. Levin obtained his B.A. degree from George Washington University and his J.D. degree from University of Miami.

He has been a Board Certified Real Estate Attorney since 1990, and is a member of the Fund and the RPPTL section of the Florida Bar. Mr. Levin has started and managed two law firms, a real estate business and a diamond wholesale business.

PRACTICING LAW:

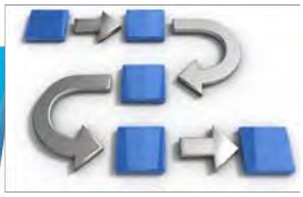
RUN IT LIKE A BUSINESS

Jerome Levin, Esq.
Levin Law and Mediation
jlevin@levinmediation.com
941-308-3151

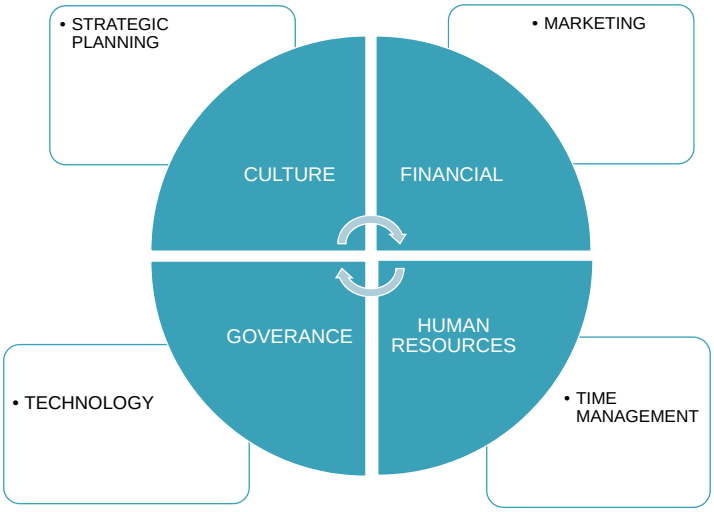
BEGIN WITH THE END IN MIND

KEY OBJECTIVES

- Create your Culture
- Understand your Financial Picture
- Management and Procedures



ELEMENTS OF A BUSINESS ORGANIZATION



CULTURE

- PASSION
- VISION
- VALUES

VISION STATEMENT

A successful and respected firm providing effective legal representation and services with integrity and dignity.

PERSONAL VISION STATEMENT

In my personal life I will provide financial security for my family, set aside travel and vacation time, exercise frequently and eat healthy.

I intend to invest in real estate ventures.

I will have multiple homes for our family.

I will assure my child gets a great education.

VALUE WHEEL

Innovation
Respect
Community Service
Quality of Life
Service
Financial Stability
Teamwork

BUSINESS PLAN

Keep your eye on the Vision - Do not ignore the Warning Signs!

EVERY ACTION PLAN NEEDS AN OWNER

The systems in your office run your business.

People in your office run the systems.

You need BOTH to SUCCEED!

LARGE REVENUES

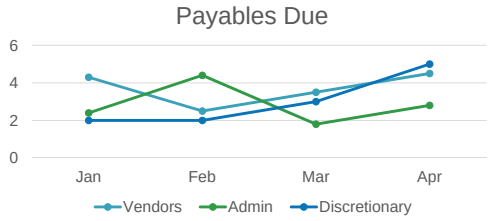
PROFITABILITY

FINANCIAL DASHBOARD

CASH DEPOSITED

Payroll Upcoming

WIP & RECEIVABLES



CASH IN BANK

LINE OF CREDIT

BUDGET

2017	Budget	Actual	VARIANCE	2016
INCOME				
CATEGORIZE AREAS				
TOTAL INCOME				
CAPTIAL NEEDS				
DEBT SERVICE-LIABILITIES				
Expense				
Salary				
Fixed				
Variable				
Discretionary				
TOTAL EXPENSES				
Net Profit (loss)				

INCOME AND EXPENSE STATEMENT

Include Year to Date and Percentages

Compare to Past Year Figures

KEY INDICATORS:

A. Fixed Expenses

B. Variable Expenses

C. Revenue Against Budget

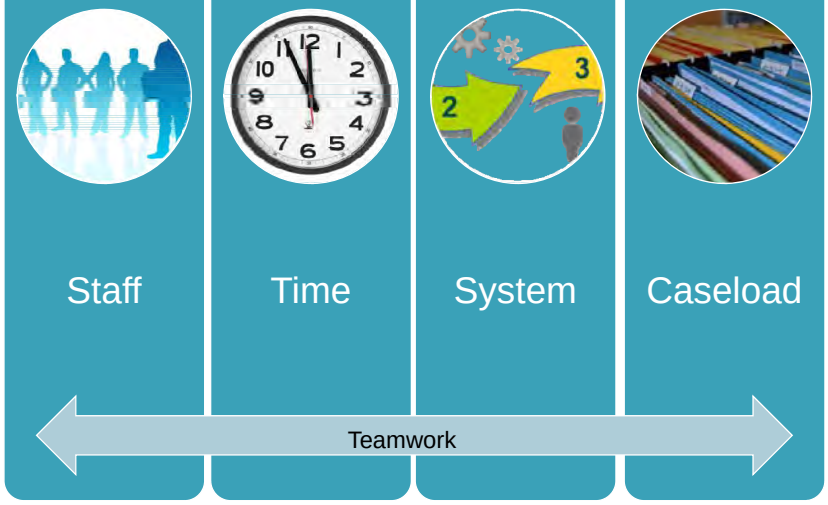
Detail Income Statement

	1ST QUARTER						YEAR TO DATE					
	Actual	%	Budget	%	Last Year	%	Actual	%	Budget	%	Last Year	%
INCOME												
PROFESSIONAL FEES EARNED												
Income - Referral Fees												
Income - Other Fees												
Income - Real Estate												
Income - Probate												
Income - Mediation												
SUBTOTAL PROFESSIONAL FEES												
MISC. INCOME												
TOTAL INCOME	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**
EXPENSES												
SALARIES												
Salaries - Staff												
TOTAL SALARIES												
MISC. EXPENSES												

KEY FINANCIAL POINTS

- P & L Income and Expense
- Bill-Invoice and Collect
- Bank Account Reconciliations
- Working Line of Credit

ADMINISTRATION



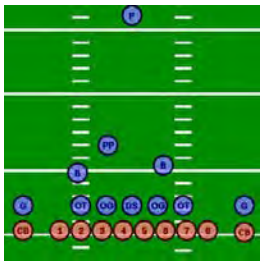
HIRING PRACTICES

- Hire Slow – Fire Fast
- Hire Winners (Retention)
- Interview Process
  - ✓Testing
  - ✓Other Staff member evaluation

DEVELOPMENT

- Job Description in Training Manual
- Policy and Procedure Manual
- Software Training
- Cross Training-Mentors
- Know where to go for answers

TIME MANAGEMENT



Email Phone

COMMUNICATION ENCOURAGES FEEDBACK

- Meeting Staff Frequently - set time
- Scheduling closings and clients
- Delegation of Work
- Praise Publicly - Correct Privately
- Encourage Creativity
- Independent Decision Making

OUTCOMES

- Positive Working Environment
- Profitable
- Trains Run on Time
- Measure Success
- Time for You

"Embrace the fact that in your first years of practice that you are still learning. Law school does not teach you everything that you need to know to practice law – far from it."

If you would like clients to have an exceptional experience, you must work to create that exceptional experience

RESOURCES

Resources for Starting a Law Practice and Operating a Law Practice:

1. **GO TO FLORIDA BAR WEBSITE**: **http://pri.floridabar.org/**

The Florida Bar/Member Services/Practice Resource Institute

http://pri.floridabar.org/starting-your-own-practice-out-of-law-school/

PLEASE NOTE THAT ALL RESOURCES AT PRI.FLORIDABAR.ORG ARE FREE TO ATTORNEYS

2. Employment Federal and State:

https://www.zenefits.com/blog/compliance-checklist-each-company-size-threshold/

3. Software:

http://pri.floridabar.org/solution-article/can-pri-recommend-any-practice-management-software/

4. Time Management Tune-Up

http://www.atticusonline.com/library/top-10-calls/

http://www.atticusonline.com/

5. Websites with Articles and Forms:

http://www.americanbar.org/portals/solo_home/practice-management2.html

http://www.americanbar.org/publications/law_practice_magazine/lp-app.html

http://www.lawpracticemagazine.com/

http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/**casemanagementcomparison**.html

http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/docassembly.html

http://www.americanbar.org/portals/solo_home/solo_home.html

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http://www.americanbar.org/publications/law_practice_magazine/2012/july-august/the-new-normal-restoring-profitability.html

http://www.lawbiz.com/coaching_lawyers.html

http://www.corcoranlawbizblog.com/2013/03/10-things/

http://www.altmanweil.com/

http://www.pwc.com/us/en/law-firms/surveys/update.html

https://www.olmsteadassoc.com/resource-center/published-articles/

http://smocksterling.com/who_we_are.html

www.positiveimpactforce.com

www.almlegalintelligence.com

BOOKS:

The Business of Law: Edward Poll

The Practice: Brian Tannenbaum

The E Myth: Michael E. Gerber

Client Management for Lawyers: Alexander Y. Benikov

Start Your Own Law Practice: Judge Huss

How to Start and Build a Law Practice: Jay Foonberg

Going Solo: D. L. Carr

Visionary Business, Entrepreneur's Guide to Success: Marc Allen

CEO Tools, the Nuts-n-Bolts of Business for Every Manager's Success: Kraig Kramers

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Manuals

Policies and Procedures	Organizational Chart
Training-(Software, Closings…)	Disaster Manual
Personnel-(Rules, Hours, Legal, Benefits)	Marketing Plan
Administration- (Agenda, meeting minutes)	Governance Documents
Best Practices	

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BUDGET							
2017	Dept	Type	2017 Budget	2017 Actual	Variance	2016 Actual	2015 Actual
INCOME							
Professional Fee - RE							
Title Insurance - RE							
Closing/Search/Exam - RE							
Doc Prep-RE							
attorney fees							
Other							
Total Real Estate			**0**	**0**	**0**	**0**	**0**
Capital			**0**	**0**	**0**	**0**	**0**
Liabilities			**0**	**0**	**0**	**0**	**0**
EXPENSE							
Office Salaries - Admin	1	**99**					
Tenure	1	**97**					
Admin Bonus - Staff Only	1	**97**					
Partner Salaries - Re	**2**	**99**					
Staff Salaries - R/E	**2**	**99**					
Associates Salaries - RE	**2**	**99**					
Tenure	**2**	**97**					
Bonus - Associates	**2**	**97**					
Bonus - RE - Staff/Only	**2**	**97**					
Advertising	**1**	**97**					
Auto	**2**	**98**					
Legal and Accounting	**1**	**98**					
Computer Software - Maintenance	**1**	**98**					
Continuing Education -	**1**	**97**					
Due & Memberships - Real Estate	**2**	**99**					
Misc.	**1**	**99**					
Equipment	**1**	**97**					
Insurance -Other	**1**	**98**					
Heath Insurance	**2**	**98**					
Malpractice	**1**	**98**					
Licenses and Software	**1**	**98**					
Library	**1**	**97**					
Pension Expense	**1**	**98**					
Expense Accounts	**2**	**97**					
Marketing	**2**	**99**					
Outside Services	**1**	**99**					
Firm Consultant	**1**	**99**					
Office Supplies	**1**	**97**					
Rent	**1**	**98**					
Utilities	**1**	**99**					
Taxes-payroll	**2**	**99**					

Telephone	**1**	**98**					
Travel	**2**	**97**					
Utilities	**1**	**99**					
TOTAL EXPENSE			0	0	0	0	0
NET (INCOME - EXPENSES)			0	0	0	0	0
ALLOCATION							
Total Expenditures							
Dept 1 - Admin			**0**	**0**	**0**	**0**	**0**
Dept 2 - RE			**0**	**0**	**0**	**0**	**0**
Dept 3 - Lit			**0**	**0**	**0**	**0**	**0**
Dept 4 - Family			**0**	**0**	**0**	**0**	**0**
Dept 7 - Trust			**0**	**0**	**0**	**0**	**0**
Total Expenditures							
Fixed Expenses = 98			**0**	**0**	**0**	**0**	**0**
Discretionary = 97			**0**	**0**	**0**	**0**	**0**
Variable = 99			**0**	**0**	**0**	**0**	**0**

Reporting Period:	Detail Income Statement											
Jan 17 thru Mar 17												
	1ST QUARTER						YEAR TO DATE					
					Last						Last	
	Actual	%	Budget	%	Year	%	Actual	%	Budget	%	Year	%
INCOME												
PROFESSIONAL FEES EARNED												
Income - Referral Fees												
Income - Other Fees												
Income - Real Estate												
Income - Probate												
Income - Mediation												
Income - Rent												
Income - Business/Corp												
SUBTOTAL PROFESSIONAL FEES												
CLIENT COSTS REIMBURSED												
Advanced Reimbursed												
Expense Reimbursed												
SUBTOTAL COSTS REIMBURSED												
MISC. INCOME												
TOTAL INCOME	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**

Reporting Period:	Detail Income Statement											
Jan 17 thru Mar 17												
	1ST QUARTER						YEAR TO DATE					
					Last						Last	
	Actual	%	Budget	%	Year	%	Actual	%	Budget	%	Year	%
EXPENSES												
SALARIES												
Salaries - Staff												
TOTAL SALARIES												
MISC. EXPENSES												
Miscellanous												
Bank Charges												
Legal and Accounting												
Licenses and Permits												
Continuing Education												
Dues & Memberships												
Postage												
Meal & Entertainment												
Referral Fees												
Travel & Lodging												
Computer - Software Maintenanc												
Computer - Consulting												
TOTAL MISC EXPENSES												
Insurance - Health												
OFFICE EXPENSE												
Office Expense - Paper												
Office Expense - Kitchen												
Office Expense - Printing												
Office Expense - Misc												
TOTAL OFFICE EXPENSES												
OUTSIDE SERVICES												
Outside Services - Office												

Reporting Period:	Detail Income Statement											
Jan 17 thru Mar 17												
	1ST QUARTER						YEAR TO DATE					
					Last						Last	
	Actual	%	Budget	%	Year	%	Actual	%	Budget	%	Year	%
Outside Services - Plan Sea												
TOTAL OUTSIDE SERVICES												
RENT												
EQUIPMENT & MAINTENANCE												
Equipment Maintenance												
Equipment Rental												
TOTAL EQUIP / MAINTENANCE												
UTILITIES												
Utilities - Electric												
Utilities - Telephone												
Utilities - Mobile												
TOTAL UTILITIES												
TAXES												
FUTA												
SS & MEDICARE												
TAXES - OTHER												
TOTAL TAXES												
AUTO EXPENSES												
CLIENT EXPENSES												
TOTAL EXPENSES	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**
TOTAL PROFIT & LOSS	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**	**0**	**0%**

Florida

The Link
The Florida Bar's General Practice, Solo & Small Firm Section publishes a newsletter titled The Link. Past issues of The Link contain articles on topics ranging from substantive legal topics to practice management to marketing, as well as including updates on the Section's activities.

Resources
Here is a list of resources on The Florida Bar's website.

Law Office Management Assistance Service (LOMAS) of The Florida Bar
Forms published by the LOMAS may be used "as is" or modified as needed with the permission of the publisher. No form on the LOMAS site has been adopted as an official form of The Florida Bar.

Advertising Rules
A list of resources regarding advertising rules on The Florida Bar's website.

Virtual Law Libraries
Here is a list of virtual law libraries on The Florida Bar's website.

Acknowledgement of Receipt of File
Get a sample document to acknowledge receipt of a client file.

Handbook on Lawyer Advertising and Solicitation
This handbook was produced by the Ethics and Advertising Department in an effort to assist advertising lawyers in developing advertisements that comply with the rules of governing lawyer advertising.

Ethics Informational Packet: Ancillary and Other Business Arrangements
A compilation of Florida State Bar ethic options

Authorization for Transfer of a Client File
Here is a sample document to use when transferring a client file.

Chart of Accounts for Law Firms
Here is a sample document for a chart of accounts.

Standard Chart of Accounts for Solos and Small Law Offices
Here is a sample document for a chart of accounts within a solo or small firm law office.

Quick Reference Checklist – Websites
This quick reference checklist is intended to assist advertising lawyers in developing advertisements that comply with the lawyer

State Bar of Florida

Address

651 E. Jefferson Street
Tallahassee, FL
32399-2300

Phone

850-561-5600

Click here to view the State Bar of Florida website.

The Florida Bar PRI - Annual Law Office Check-Up

(Your Firm's Annual Physical)

The Practice Management Advisors at The Florida Bar Practice Resource Institute believe the maxim "an ounce of prevention is worth a pound of cure" applies to most areas of life. It is usually easier and less expensive to avoid mistakes than to correct them after they have occurred.

In a law office, as in life, often the time needed to review systems and procedures, that insure quality legal services are being delivered to clients, just never seems to be available. There is always one more telephone call to make, one more client to talk to, one more motion to review, one more question to research, and one more bill to pay. Just like the appointment for a dental check-up, it is easy to put off non-critical activity until next month.

This Check-Up has been organized for just these reasons. You will spend about an hour going through this checklist, and the time spent will be worth it! This checklist is designed to take the pulse of your law firm and help you identify areas that need a little, or a lot of, preventive medicine.

Whether you view the practice of as a "profession" or a "business," it is at the core a professional service business. Competitive pressure has everyone looking for efficient business processes that can be successfully applied to law firms to produce profitable, growing practices. Business terminology, such as marketing, return on investment, and strategic planning, has crept into law office management literature. Technology is speeding up processes, and with it, clients' demands for faster response time. What once used to take days now must be done in hours.

Although many lawyers wholeheartedly embrace the "law firms as a service industry" culture, there are still bar rules and ethical guidelines to consider. The most important reason to manage your law practice in accordance with bar rules and ethical standards is the true "cost" of a grievance or a malpractice claim. These costs are enumerated as:

1. Emotional cost of an attack on one's intelligence, integrity, and/or character. Even frivolous claims cause anger, stress, and take valuable time to defend.

2. Financial cost of defending against a grievance. The financial costs include both money and time. The time involved in even responding to grievances that are ultimately dismissed can be costly. The financial cost of resolving a well-founded grievance that can result in suspension, or worse, disbarment can be devastating.

3. Office morale suffers when malpractice or grievance "clouds" hang over everyone's head. Low morale is generally linked to low productivity.

Annual Law Office Check Up

12 Ways to Improve Your Firm in 2016

Altman Weil consultants offer their insights for law firms

Ward Bower ▪ Thomas S. Clay

James D. Cotterman ▪ Rees W. Morrison

Alan R. Olson ▪ Eric A. Seeger ▪ James S. Wilber

PLANNING

1. **Develop a five-year outlook** for the firm and set goals to achieve that vision. Planning year to year is not sufficient. *(Ward Bower)*

2. At a partner meeting in the first quarter, **have your practice group leaders publicly commit to two things - and only two things – that their groups will accomplish in the next nine months.** At a year-end meeting, ask the leaders to deliver brief progress reports and take questions. This simple process requires prioritization, execution, accountability and interaction – all essential elements for effective planning and implementation firmwide. *(Eric Seeger)*

3. Identify a short list of key clients and **create or update customized client service plans** for each. *(Alan Olson)*

4. **Develop formal succession plans** for the firm, each Practice Group, and each office, as well as for key clients. *(Ward Bower)*

ECONOMICS

5. **Focus on profitability (rather than revenue)** at the firm and practice levels, and develop an understanding of your major profit drivers. *(Alan Olson)*

6. Take advantage of the data stored in your time and billing system and the many data analytics tools available to **understand the cost drivers** of one of your strong practices. Use that data to make well-informed and competitively priced pitches for new work. *(Rees Morrison)*

Altman Weil, Inc.

LAWYERS

7. Pricing pressure and variable demand make it critical that law firms **carefully manage headcount** in 2016, as overcapacity remains a serious threat. Law firms must show a greater willingness to accept flexible staffing arrangements and invest in productivity increases through more competent use of technology tools. *(Jim Cotterman)*

8. Review work volume and demand trends in core practice areas and make a 2016 plan to address lawyer staffing gaps, growth opportunities or over-staffing to **better match capacity with demand.** *(Alon Olson)*

9. **Establish partnership criteria for economic performance** that recognize 2016 market competitiveness. Review current partner performance in light of the standards and consider cutting those who are not pulling their weight economically, relying on other partners to generate work for them, or blocking opportunities for younger lawyers. *(Ward Bower)*

LEADERSHIP

10. **Focus on the basic blocking and tackling of managing your law firm as a business.** In too many firms the demands of big rainmakers and big personalities take precedence over sound business principles and even above client needs. In firms truly governed by business principles, clients and client satisfaction will be paramount. *(Jim Wilber)*

11. One of the major causes of business failure is an inattention to market-driven signals. For law firms in 2016, the most important signals deal with what clients want, what traditional competitors are doing, and what new types of competitors are vying for market share. Law firms must find ways to systematically **increase rank-and-file partners' awareness of issues that are changing the marketplace.** Managing partners and practice group leaders can't be the only ones with their ears to the ground. *(Tom Clay)*

12. **Empower your firm's lawyer leaders and senior administrators** to run their areas without interference and give them the authority needed to do so. Look to the corporate world where senior executives work closely together as true teams, all pulling in the same direction. *(Jim Wilber)*

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SMOCK
LAW FIRM CONSULTANTS

"WE'VE GOTTA RUN THIS PLACE LIKE A BUSINESS" – A PRIMER ON WHAT MANY LAW FIRM MANAGERS SAY THEY MUST DO, BUT VERY OFTEN DO NOT

John S. Smock, Partner
Peter A. Giuliani, Partner
Gary B. Fiebert, Partner
Joseph V. Walker, Partner

In our consulting assignments for law firms, regardless of the management issue Smock Law Firm Consultants (SLFC) is asked to address, we continually hear the refrain that *"we have to run this place like a business."* But, when we ask what that means, the responses are often quite vague and not specific. So, we decided to write a monograph that defines – from our perspective – what *"running a law firm like a business"* really means.

We should note that this has been an interesting monograph to develop. Our usual consulting efforts are focused – as they should be – on the specific needs of each client and the recommendations we develop are rightfully guided by the *"facts on the ground"* for each client. Our clients are paying us to creatively address their own issues, not spout our own opinions on the law firm universe (a critique we have often made of competitors). But in monographs like this, we get the opportunity to spout some of our opinions – although we hope, in a productive way. We believe there is real meat in here for law firm management – you may not implement exactly what we suggest, but we hope what we have to say does influence your decisions as you do *"run this place like a business."*

After an initial definition of what we mean by running a law firm like a business, we start with partner management and progress to governance, partner compensation, practice team management, marketing, planning, cost management, and culture. Please note that we have not written this for either *"big law"* or *"small law"* – rather, we have written it for law firms of all sizes. Where there are real differences caused by size, most of our focus and our points are not size related.

DEFINITION OF RUNNING A LAW FIRM LIKE A BUSINESS

Law firms (or, more accurately, the lawyers in a law firm) provide legal services (defined and prescribed by the tenets of the legal profession) to clients in response to clients' stated legal needs and expectations. The purpose of law firm management is to provide the necessary resources to meet those client expectations and attract and retain the resources needed to provide those services and to produce an appropriate surplus or profit, so that the law firm can continue to deliver those services. Peter Drucker (still the consummate management guru years after his death, particularly when compared to the charlatans and mountebanks that followed him) defined profit as *"the cost of successfully doing business in the future."* That definition particularly fits the nature of law firms, their true purpose, and why running a firm like a profitable business is clearly the right thing to do.

SUMMARY

As a brief summary of our thoughts on this topic, we have stolen Jeff Foxworthy's *"you'll know you might be a redneck if…"* construct. Thus, *"you'll know you might be running your law firm like a successful business if you have:"*

(1) Broad based, but professionally sensitive, management of the partner ranks to include an effective partner promotion process, an effective lateral recruiting process, clear and measurable individual (and firm) partner expectations, a well defined process for dealing with underperforming partners, and effective communications to/from partners

(2) A clear governance and decision making structure that provides a voice for all equity partners, firmwide leadership responsibility by a CEO, high performing practice teams with true team leadership, collaboration among teams, and solid non-attorney management

(3) A partner compensation system that rewards those who bring it in, is perceived as fair by the partners, and aligns with and rewards what the firm is strategically trying to achieve

(4) A well-functioning practice team structure focused externally on client service and attracting clients, organized by client need (be it industry, service, or legal specialty), and with all teams responsible for achieving agreed upon plans

(5) A marketing and business development structure focused on the full range of marketing activities, from need identification to a satisfied client; meeting the marketing needs of practice teams, rather than individual partners; and measuring results and activity from all that is done in marketing, in order to determine what is working and what is not

(6) Management processes built on developing, monitoring and following up on key business plans (firmwide and by practice team) – strategic, financial, marketing, and operational

(7) A regular planned review of all firm processes (front office and back office) to result in improved processes, better service to clients, reduced costs, and increased profitability

(8) Finally, a well-defined firm culture that is well understood (by all in the firm), rewarded (for behavior and results consistent with that culture), and sanctioned (for behavior counter to and inconsistent with the culture).

PARTNER MANAGEMENT

The most important asset to any law firm is its partners. They are the most experienced and tested professionals. Their skills are the primary professional product delivered to the clients. And, very importantly, they (in equity status) own the firm. Managing these resources effectively is critical to *"running a firm like a business."* We recognize that many law firms have a corporate legal form – but, shareholder can be substituted for partner in the discussion. So, how do you run a law firm like a business and still remain sensitive to an equity partner's position and rights as a professional and as an owner?

- **Partner selection from within** – should be subject to a rigorous selection process that evaluates exhibited performance (or, in some cases, potential) in all of those qualities expected of a partner. While being a good lawyer is important, it is well short of what is required of a partner. Actually, most firms now do reasonably well in selecting partners from inside/within (a critical business decision), particularly when compared to prior years' decisions, when a good number of people were selected as equity partner merely because they were *"good lawyers."* Processes are in place, they operate reasonably well, and good decisions are being made. Unfortunately, many law firms are still working through the bad decisions made in past years (as in *"there are a number of people here we should not have made equity partners"*).

- **Lateral partner recruitment** is not nearly as well done (i.e. – not nearly as businesslike) as internal partner selection. Many, if not most, law firms view attraction of laterals as their primary growth strategy, yet the generally agreed upon success rate of 25% is daunting (and considerably more risky than ordinarily believed). Most firms do not do this well – but again, some firms do it better than others. The essential *"run it like a business"* step is to create a **continuing and formal lateral recruitment process** that (1) fixes responsibility for lateral recruiting (overall and by task and by definition, broader than just the Managing Partner); (2) sets criteria for desired laterals; and (3) has standard required and repeatable steps (input, approvals, etc.) and specific information required, such as a formal business plan developed by the potential lateral. For more information on such a process, we direct you to two recent monographs developed by our partner, Gary Fiebert (The Lateral Partner Conundrum I and The Lateral Partner Conundrum II).

- **Partner expectations for performance** are very seldom communicated and, if so, they tend to be limited to billable hours and usually just a single billable hour standard for all partners within a firm.

  - If a law firm can learn something from a business, it is the importance of determining and communicating expectations, setting expectations for each individual partner, providing each partner an opportunity to input and react to her/his expectations (which should not be a single billable hour objective), measuring performance against those multiple individualized expectations, and initiating corrective action if required. Businesses look at identifying and achieving the potential for key executives on a long term basis, not just a short-term, one-year, billable hour objective.

  - Not only should the well run firm have a process of development, measuring, and responding to individualized expectations, but it should clearly state (and discuss) the common expectations of all partners in the equity partner group. These common expectations should be clearly disseminated among and understood by all partners – and they should be **a critical part of the firm culture!**

- Perhaps the most important common expectation of an equity partner is that she/he will behave like an owner. Not only should *"behaving like an owner"* be defined (by each firm), but *"not behaving like an owner"* should also be clearly defined and, importantly, sanctioned. As the Vice Chairman of Arthur Young (who John Smock worked for when he was the firm's Marketing Partner) said – *"every now and then you need a truly deserved public execution to remind the partners what is expected of them."*

- **Underperforming partners** continue to be a major area of concern for law firm management. We do not mean those partners that are simply having an off year. *"Chronic underperforming"* partners, as opposed to merely *"underproductive"* ones, should display most or all of a variety of negative criteria over a multi-year period – namely, (1) a lack of sufficient economic value added to her/his firm, expressed either in billable hours or, more appropriately, collected revenue; (2) an unacceptably low work ethic; (3) a dislike, aversion, or resistance to meaningful business development efforts; and (4) a lack of participation in and support for essential firm building activities – most notably people development. In a prior monograph (*"Dealing with Underperforming Partners – at the Top of Every Managing Partner's 'To Do' List"*) John Smock defined *"run-it-like-a-business"* practices for underperforming partners as both short term and longer-term steps – they are summarized below.

  - **Short-term businesslike solutions** – (1) define within a firm, what unacceptable underperformance really means; (2) confront (either at the firm or practice level) those who fit that definition (there has to be a direct intervention – it cannot be avoided); (3) for those whom the firm wants to improve, develop an improvement program/plan with measurable milestones (not just billable hours) and objectives; (4) routinely and periodically measure, evaluate, and communicate results of that program/plan; and (5) directly deal with those who do not achieve their improvement programs (remember the *"public execution"* statement above).

  - **Longer-term businesslike solutions** – (1) streamline the partner expulsion (and/or de-equitization) process; (2) ensure that those who are promoted continue to demonstrate expected and measurable equity partner performance; (3) clearly state and enforce equity partner expectations (to all attorneys); (4) ensure professional development programs at the partner level; and (5) define (and evaluate) the role of each partner within her/his practice team.

- **Communications to/from partners** – is an essential good business management technique, yet most firms (and the individual partners) do a job that can best be rated on a scale from *"passable"* to *"horrible."*

  - Specifically, Firm management needs to regularly provide information to equity partners on all elements that affect their ownership status and expectations (as above). Moreover, equity partners must provide required and regular communications to firm management in such areas as information needed to make compensation decisions (yes, the *"hero memo"*), plans for retirement and succession, and, if underperforming, what has been accomplished to change that situation.

  - Effective communications requires regular partner meetings. In most firms, however, this process can be described as *"same-old, same-old"* (often a recitation of financial information already received and reviewed and discussion of internal issues – with little focus on and discussion about clients, growth, and external strategy implementation). Good partner meetings require advance notice, a clear objective and written agenda (with starting and ending times), preparation by those leading the meeting, a chance for and an encouragement of feedback, and creativity and variety. Every now and then, those partner meetings also have to have a social component.

  - Interestingly, partners in firms of all sizes report that they are afraid to speak up in partners' meetings (that is, the adage *"keep your head down"* is a guiding principle for success in many firms). Yet, that clearly is and should be a requirement of ownership. If a partner is concerned that speaking up (by equity partners/owners) is frowned upon internally, she/he may have selected the wrong firm for a career.

GOVERNANCE

What a commercial business calls a *"management structure,"* law firms call *"governance,"* so we will use the law firm term. Partners love to talk about governance, but not nearly as much as they like to talk about partner compensation. In their discussions on governance, there is a common misperception – namely that there is a perfect governance structure, just like there is a perfect compensation structure. In truth, neither exists.

While there is not a perfect governance structure, some are markedly better than others. Below we point out elements of good governance or good management in law firms of different sizes focused on their utility in running the firms' businesses.

Firms of 25 Attorneys or Fewer	Firms of 25 to 100 Attorneys	Firms Greater Than 100 Attorneys
• All equity partners (owners) have a direct say in selecting leaders • Individual partner professional independence inherent, but not performance/managerial independence (not an *"orgy of democracy"*) • An appointed/selected, and obvious leader/manager – not a dictator, but also not powerless • Attorneys organized in teams (team leaders appointed by firm leader) – but, not too many teams (e.g. – a 25 attorney firm should have about three to four teams) • Management by an Operating Committee – the leader and the team leaders (do not futz with a separate Board, the partners ought to be the Board)	• A bit more formality and structure • Also, all equity partners have say in selecting firm leaders (but, not team leaders) • An appointed/selected leader/manager (CEO, President, Chairman, or Managing Partner) • A representative group of partners to serve as a Board (representing all partners) – **not to manage** the firm • Practice teams with leaders appointed by firm leader • An operating Committee of Practice Team leaders and CEO – to run the firm • COO to manage non-attorney functions and to have a respected say in overall firm management – also, part of the Operating Committee	• Not terribly different than a smaller firm – the idea is to push responsibility down to team leaders • All equity partners have say (a vote, if you will) in firm leadership • An appointed/elected leader/ CEO • An elected Board of Partners to set policy, but **critically** not to manage the firm • Firmwide practice teams led by appointed leaders, but also office leaders – but priority generally more team than office focused • Teams focused on market needs (industry, service, or legal specialty), not just legal specialties • An Operating Committee representing both teams and offices – but, not every team or office – also serves a day-to-day management responsibility in support of the CEO and as the primary marketing/ business development committee of the firm • COO to manage non-attorney functions with a respected say in overall firm management – also, part of the Operating Committee

PARTNER COMPENSATION

Peter Drucker defined the management process as *"the allocation of scarce resources"* – but, he probably never knew how closely that definition fit the modern law firm. Nothing in law firm management takes the time and attention of partner compensation and nothing is as fraught with angst, risk, miscommunication, and emotion. That said, if a law firm is going to *"run like a business"* it has to undertake this process in a truly businesslike manner.

- First, we should state that we do not favor or espouse *"the one best way"* to effectively compensate partners. We have seen both objective (usually a formula) and subjective (usually with a good bit of objective data) systems work very effectively and quite ineffectively in a variety of firms. There are too many factors and variables at work in any firm to declare either type a winner.
- We do believe, however, that an effective partner compensation system (which implies businesslike) requires three things – and all three things – as follows:
  - **Take care of those who bring in the work** – yes, bringing it in is more important than doing the work, while both are important, the acquisition of work has to be rewarded, it is the lifeblood of the firm.
  - **Be as fair as possible** – with fair defined as *"evenhandedness defined and perceived by the partnership."*
  - **Align partner compensation with the agreed upon strategic direction of the firm**. In other words, reward for achieving what the firm – strategically – is trying to achieve.
- Our experience is that usually the first and second of these exist in most systems – but, almost never the third. Most businesses reward based on what their full business wants to achieve – rather, than just on independent, individual performance. This is an enormous hurdle for law firms to get over (and it is not easy), but they have to.

PRACTICE TEAM MANAGEMENT

The area where *"running it like a business"* can possibly have the greatest impact on achieving financial performance and enhancing market position for a law firm is that of *"practice team management"* (notice the deliberate use of the term *"team,"* rather than *"group"*). We find virtually every law firm – regardless of size – substantially sub-optimizes the potential and performance of its practice teams.

What is clearly needed to run like a business (and we sometimes feel that we are *"jousting at windmills"* in pushing for this) is **active, effective practice team management**. This includes:

- **A clear, well understood firmwide practice team organization and a clear articulation of teams' responsibilities** – firms must be clear regarding practice team (leaders and members) job requirements, expectations, and policies/procedures.
- **Assigned leadership** – practice teams require a single leader. They do not work without one – while there may be solid reasons (only on a case-by-case basis) for co-chairs or co-leaders, these should be few and far between.
- ***"It's the team, not the leader"*** – while an effective leader clearly trumps an ineffective leader, the secret to practice team effectiveness is not the leader, but the members operating as a cohesive team. Firms need to focus attention on the involvement of the full team and expect all team members to fully participate.
- **Broad delegation within the team** – partners (and associates, paralegals, and staff) within the team each need some team related responsibility/task for which they are accountable to the full team. Broad based delegation is essential to practice team success, the leader cannot/should not do it all. Ultimately, everyone has a defined and valuable role to play.
- **Planning and budgeting** – these are the critical management tasks that make practice team management work – budgeting should be pushed down to the practice teams (and supported by the CFO) and teams should be held accountable for achieving a budgeted **contribution to profit** (defined as revenue minus direct expenses).
- **Practice team leaders functioning as a team** – firms need deliberate, planned interaction among the practice team leaders to exchange information, to serve as a firm-wide marketing (and cross-marketing) team – and, in some firms – to serve as the primary decision making body for the firm.
- **Meetings, meetings, meetings** – practice teams have to formally get their members together, interact and exchange information. Those meetings must also be effective (i.e. – have an agenda and objectives, encourage and require participation, be creative, and end on time).
- **Sufficient support and resources** – most firms provide leaders and their teams with insufficient support and resources, yet expect the leader to do everything while also practicing law (full-time). The concept works considerably better when sufficient resources (people and technology) and support (finance, marketing, etc.) are provided consistently to the teams and their leaders.

MARKETING

Overall marketing, together with its younger brother, business development, still remain a source of major concern in most law firms and, in the consulting assignments we conduct, a source of many partner complaints about effectiveness (sometimes spot on and other times quite ill informed).

We find **four major common problems** with most firm's law firms' marketing effectiveness (or lack thereof) – (1) the mistaken presumption that promotion (e.g. – advertising and related impersonal *"concierge marketing"* activities) and marketing are the same thing, (2) focusing the bulk of marketing resources on the efforts of individuals (i.e. – responding to the *"squeaky wheel"*) or on firm promotional activities, rather than on teams, and (3) a lack of effective measurement of end results and activity.

While all three of those common problems and the ways to solve them are candidates for a separate monograph/article, we suggest three businesslike steps/strategies.

- First, a law firm needs to base all of its marketing and business development activities on what marketing really is. When John Smock was the Marketing Partner at Arthur Young, he defined it for his partners as *"all of those activities from need identification, service definition, promotion of the benefits, and creating awareness and attracting clients through the actual provision of the service, and very importantly, achieving client satisfaction."* Promotion is a very small piece of that continuum and, often, one of the least important.

- Cease focusing on individual partner marketing efforts. Rather, focus the resources and efforts on marketing the firm's practice teams, particularly those that the firm determines are of high/higher priority (yes Virginia, there are some teams that deserve more resources than others). This includes assigning specific resources and marketing personnel directly to the practice teams.

- Measure results and activity to ensure a focus on what is working and to fix what is not. David Ogilvy (called both the *"King of Madison Avenue"* and the *"Father of Advertising"*) is famous for his quotes, but to paraphrase one of the more famous in the context of law firm marketing, *"if a marketing strategy does not result in more work from present clients and new work from new clients, it is a waste of time, money, and attention."* You will not know how effective marketing is unless you measure it – both results and activity. Sometimes cause and effect are difficult to see. But, that simply means measure more, rather than less.

PLANNING

Smock Law Firm Consultants' practice and reputation have been built on our base and significant history of effective strategic planning. In fact, in a professional service organization like a law firm, we could make a very good argument that effective planning is the most important business function in running the law firm like a business. While we could provide a long narrative on the examples of poor planning, suffice it to say that it suffers from three drawbacks – (1) planning is not done often or comprehensively enough; (2) when it is, it is not done as well as it needs to be; and (3) there is usually very little follow-up to learn what worked and what did not.

We believe there are four types of planning and all are important:

- **Strategic planning** – law firms, importantly, need to plan their future with that future defined and achieved through the effective strategic planning and implementation of that plan. Doing so well can give law firms a competitive advantage (what all businesses are trying to achieve) and, from another perspective, the lack of an effective strategic plan and/or the lack of solid implementation of that plan puts a law firm at a true competitive disadvantage.

- **Financial planning** – is not just preparing the annual budget (for the firm and its teams), but a multi-year budget (three or five years) and, as part of that, establishment of clear and measurable performance objectives, so that all know what the firm is trying to do and how well it has done.

- **Marketing planning** – it is difficult, if not impossible, to effectively market unless a firm has planned what to do and what it expects to achieve from it – in other words, a real marketing plan with real objectives.

- **Operational planning** – on a broad basis this kind of tactical planning sets forth what the firm intends to do operationally (from an IT upgrade to a new lease to work flow process improvements), why, and what it expects to achieve (again, measurements).

It can be easily inferred that a common factor in all types of good effective planning is measurement – what do you plan to achieve. **Good businesses measure, measure, measure** – then they adjust what are doing to the results of those measurements.

COST MANAGEMENT AND PROCESS IMPROVEMENT

Law firms – generally – do a reasonably good job of managing current costs. But, if they are going to run their law firms like a business, they have to manage and affect future costs. Most business managers believe that, generally, there is always a better way to do virtually anything. They believe in *"process improvement"* and, thanks to Deming and his acolytes, the concept of *"continuous improvement."* These concepts have received little attention in law firms until recently.

- The practice of law has changed much less than the practice of virtually any other profession (accountant, architect, etc.) and in spite of technology, use of paraprofessionals, and other changes, the actual service gets to the client in much the same way as it always has.

- The legal profession has resisted and still does resist change in the actual processes that deliver the service, although automation/technology has made some inroads.

- There is real change on the horizon, pushed by the increasing demands of clients. Law firms will have to change the way they provide the service or evolve into non-competitiveness. In a competitive environment (which includes price pressure), you cannot maintain or increase profitability without lowering costs.

- Simply put, running it like a business implies a focus on improving the processes of providing legal services, simplifying where you can, substituting lower cost resources (e.g. – paralegals or contract attorneys), and streamlining the end product.

- It requires a regular, planned review of all firm processes – the front office (delivery of the service to clients) and the back office (the support functions for that delivery of service).
- It also requires a regimen of activity measurement to ensure that planned results are achieved.
- Finally, it requires a mindset of improvement that a firm can always advance to the next stage of performance.

A broader discussion of this topic is included in our prior monograph (*"Operational Efficiency – the Route to Optimizing Profit Margins"*).

CULTURE

Culture is a legal management concept that comes up in virtually every law firm consulting assignment.

- Sometimes – particularly in strategic planning assignments – clients want to ensure that their strategic direction and their culture are in sync (and we agree that doing so is important).
- But more often than not, culture is used as an excuse for not doing what needs to be done, as in *"that will not work here, because of our culture."* Some firms also have the mistaken impression that *"culture"* is something reserved to law firms and not present in those businesses solely dedicated to profit.
- In fact, the most successful businesses, large and small, clearly adhere to their cultures in what they do, the way(s) they do it, and how they treat their customers and stakeholders.
- If law firms are to use culture as a key element of running their firms like a business, they must (1) define that culture, (2) explain – firmwide – what that culture calls for and does not, and (3), very importantly, reward when the culture is followed and penalize (up to asking people to leave) when it is not.

In writing this monograph, we have elaborated on eight elements that we believe are essential to *"running a law firm like a business."* If there is one over-arching theme that pervades all eight elements, it is the theme of *"plan, execute, measure, assess, and re-plan."* All steps in this theme are equally important. Unfortunately, many firms stop at planning. Execution, therefore, is critically important, and is often the most challenging step and it often requires courage. Knowing what to do to run a business-like law firm is easy. Having the guts to do it is hard.

It is worth trying. Good luck!

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Smock Law Firm Consultants serves a wide range of law firm clients on a national basis (and, in some cases, internationally) in seven key areas of practice – strategic planning, strategy execution, practice group management, firm mergers and combinations, high level economic counsel, operational excellence, and resolving vexing strategic management issues. Our four partners – John Smock, Peter Giuliani, Gary Fiebert, and Joe Walker are clearly the most experienced *"first string"* serving the legal marketplace – each of us has greater than forty years of relevant professional service experience.

We invite you to contact us with questions or comments on this or other monographs or visit our website (www.smocklawfirmconsultants.com), more information on our services, our four senior consultants, and a library of the monographs we have written on other topics.

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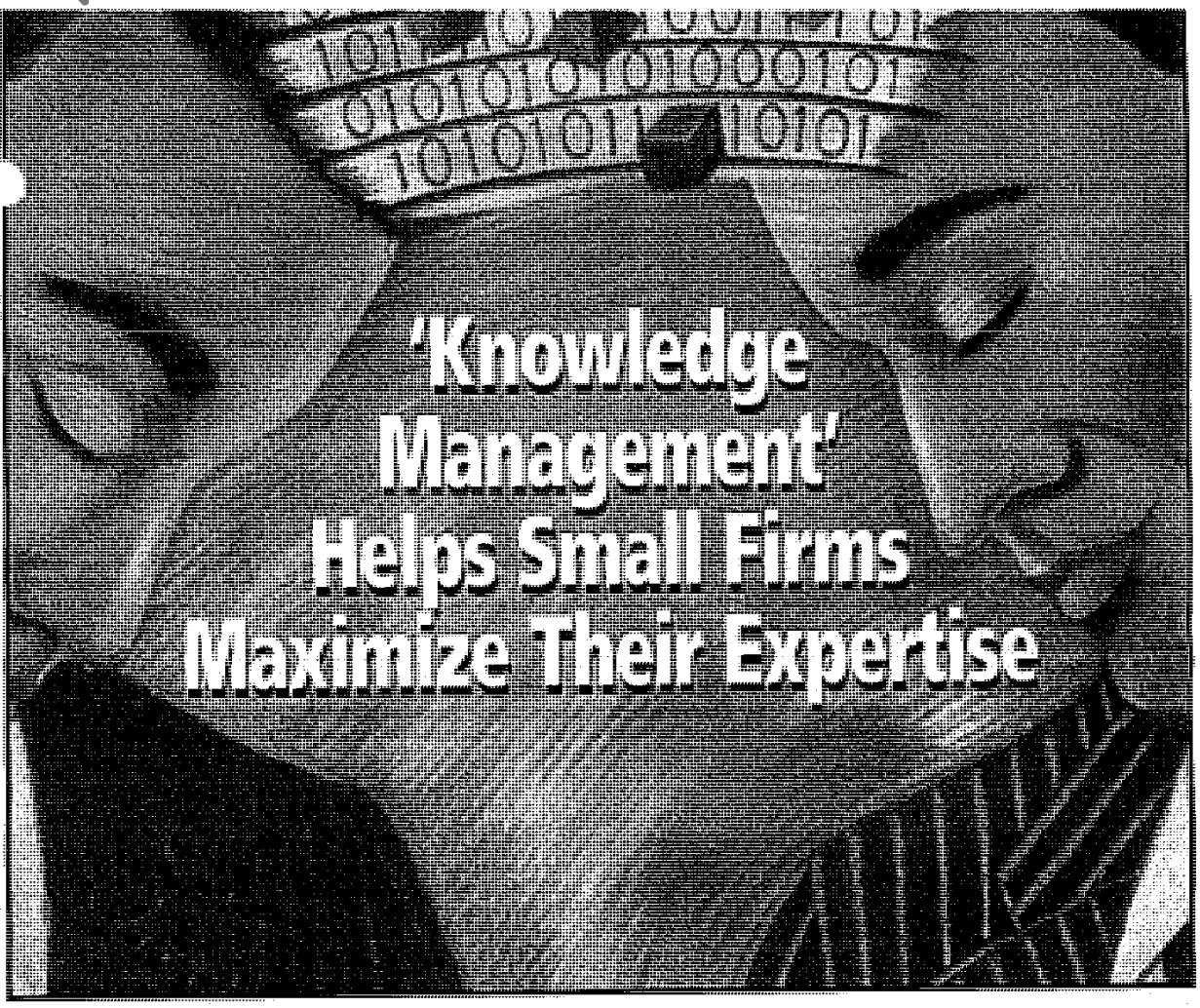


'Knowledge Management' Helps Small Firms Maximize Their Expertise

The Image Bank

By Michael M. Bowden

Imagine for a moment that a valued partner suddenly retires, a hotshot associate leaves for another firm, or a veteran litigator has the audacity to take a vacation. When these people walk out the door, does their knowledge leave with them?

If so, experts say your firm is in dire need of "knowledge management" – a trendy new term for a rather elusive, but nonetheless essential, concept.

The premise is quite simple: For any firm to maximize its expertise, each lawyer must have ready access to the knowledge of his or her colleagues. But for this to happen, the firm must have a formal, institutionalized way for lawyers to transfer their expertise into a central repository. This includes everything from screening questions to practice tips, the quirks of a particular judge to background information on key referral sources. And all of this should be available without necessarily setting up a personal meeting with each attorney.

Maybe one lawyer in your firm has an incredible track record in front of that old bulldog, Judge Jones. But suppose that lawyer just left the firm, or that he's tied up in litigation when another lawyer is forced into an emergency hearing before the old coot. If you're like most small firms, your lawyer is up the creek without a paddle. But if you had a knowledge management system in place, the secrets of success before Judge Jones would be only a few mouse clicks away.

What once was an informal – and completely scattershot – process of one-on-one meetings becomes a formalized system for passing on knowledge.

So how does knowledge management achieve this lofty goal? Experts say there are three main areas to be addressed:

• *Technology.* Don't let this element scare you off. Chances are, you've already got the technology you need: If you've got browser software or, better yet, document management or Intranet software, you've got virtually everything you need. If you don't, it's not very expensive to bring your firm up to speed.

• *Policies and Procedures.* Once you've got the technology in place, you need to ensure that people use it properly and consistently. You need to establish formal procedures that ensure that information regularly flows into the system. To do that, some basic ground rules are advisable. It might be as basic as requiring that every new client's intake information be entered into a central database.

Or experienced partners might be asked to post advice and techniques to a central repository – advice that might once have been passed on to one associate at a time. Lawyers who spend a lot of time in court might be asked to add tips on what style of argument works best with particular judges. When lawyers attend CLE programs, they might be required to post a brief summary of important points from their notes.

• *Overcoming Resistance.* Of course, even the best policies, the best technology and the best intentions won't get you anywhere if the rest of the firm is working against you. An essential step in implementing knowledge management is overcoming cultural resistance within your firm, and creating a consensus that the whole idea is a worthwhile use of a lawyer's time.

Begin With Document Management

Since most legal knowledge is conveyed in documents – memos, motions, briefs, cases, arguments, etc. – knowledge management experts agree that good document management software is the best place for lawyers to start.

"If you want to focus on one system to achieve knowledge management, then a document-management system is where you should focus most centrally," says Dana Shultz, a lawyer and law office technology consultant in Oakland, Calif. (http://www.ds-

Continued on page 4

a.com). "If you use an 80/20 rule, that's the 20 percent of the work that will give you 80 percent of the benefits."

However, choosing the right document-managing software can be tough for the solo or small-firm lawyer because many of the best systems out there, such as iManage, Documentum and PC Docs Open, are designed (and priced) for large firms and corporate law departments. Such systems generally cost tens of thousands of dollars to implement.

"If you're in a small company, don't get dazzled by the technology," advises Wally Bock, a technology consultant based in Wilmington, N.C. (http://www.bockinfo.com). "Especially the expensive technology. Instead, think about the [KM] *concept* and seek out tools that you and your people can use [to achieve it]."

At the other end of the spectrum, many low-end, off-the-shelf "document managers" don't offer the horsepower or capabilities sophisticated enough to meet a law firm's needs. You'll want to your people to be able to work with multiple data fields, and draw information out of the system from a number of different sources.

"Those cheaper approaches give you far lower capabilities," Shultz says. "They aren't going to give you the sort of knowledge management – or work-product retrieval – capabilities you should really focus on."

Experts say the document-management programs most useful for smaller firms are GroupWise 5.5, Worldox 8 and PC Docs Esq. 3.7.2. Of these, Shultz prefers Worldox – an opinion that's shared by the editors of *Law Office Computing*, who ran a review of mid-range document management programs in their April/May 1999 issue.

"Worldox has tried to give the vast majority of the benefits of the big guys at a much lower price by not requiring client-server database technology," Shultz explains. "And in that way, they're gathering quite a bit of market share."

Client-server databases are an advanced, expensive technology generally used for large company networks, and usually required by document-management software.

"So Worldox comes in and says, 'Look, we can give you the vast majority of those capabilities, but you don't need a client-server database, just throw our software on your existing server and workstations, and that's fine,'" says Shultz. "You could probably feel comfortable doing that with up to several dozen users."

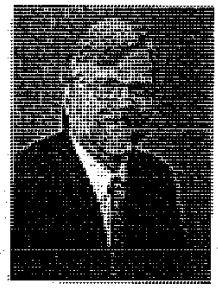
Worldox 8 (http://www.worldox.com) costs $350 per user, plus a required maintenance agreement for an additional $60 per desktop annually for software maintenance releases and premium level support.

"It's a reasonable cost for a relatively powerful capability," Shultz says.

Extra Technology Not Needed

Once you've got a reliable document manager in place, the technological side of your KM system

When you start using most of these programs, you'll be asked to fill out a quick profile about the document you're working on. That information will create links that will enable it to be reached through several databanks – by client, number, case name, date, lawyer, judge, subject matter, etc.



'Rather than people talking to each other at the pop machine in the break room or in occasional conferences, you can make the expertise of your people available all the time so that everybody can use it.'

– LaVerne Pritchard, president of Pritchard Law Webs.

Some KM consultants advise taking the process even further – by integrating your document manager with case management, timekeeping and billing systems so that every program used by your firm can be accessed through a central database. But such enhancements are strictly optional – a technologically huge effort that will yield only a fraction of your potential KM benefits.

"Whereas a document-management system is relatively easy to implement – you plug it in, it hooks itself up to your word-processing program, and you're done – integrating these other systems is a much bigger task," says Shultz.

And frankly, full integration is not yet a reality – at any price, according to LaVern Pritchard, a former litigator, and president of Pritchard Law Webs in Minneapolis, Minn. (http://www.priweb.com).

"The more modern knowledge management concepts are breaking down those barriers and trying to get everything on one system," he says. "So that if you shows up in all the places where you'd possibly want it. But that's still a Holy Grail to some extent, a grand vision."

But this shouldn't stop you from doing a little creative integrating on your own. Use your Intranet to create a series of information boxes, for example. Make them accessible by lawyer's name, subject area, type of information (Anecdote? Checklist? Practice tip?), whatever works best for your firm.

Your system "should be 'quick-and-dirty,' and only as extensive as usage warrants," according to Thomas Davenport, a professor at the Boston University School of Management.

Davenport, whose book, *Working Knowledge: How Organizations Manage What They Know*, was published in 1997 by the Harvard Business School Press, adds that you should never expect to reach a point where your system is "finished."

"The tasks of knowledge management are never-ending," Davenport says. "Like human resource management or financial management, there is never a time when knowledge has been fully managed."

Policies to Ensure the System is Used

Of course, old-fashioned KM – a chat over morning coffee, a business lunch – can still work beautifully. But now you can enhance that traditional the judge's name to your "Judges" database, so lawyers curious about his style can get a quick glimpse of your impression. If you've got a "Probate" database, link it there as well.

The problem, especially at the outset, is that you'll probably have to draft some new policies and procedures within the firm, making clear that these databases aren't simply techno-toys, but are an integral part of the way your firm will now be doing business.

"You often need a change in mindset, but you absolutely need a change in policies and procedures," says Shultz.

He notes that all the technology in the world won't help unless people are forced to use it on a regular basis. People must (a) update it with all new information, (b) steadily input all of their longstanding expertise, and (c) regularly use the system to access that knowledge.

Explain to your firm, "This is the way we do things. Whenever you make a phone call, enter it here. Whenever you prepare a document, e-mail a copy there." A few other tips:

• *Encourage Information-Sharing*

While you're at it, you can give firm members access to each other: set up internal listservs where members of the firm can post tips, observations, questions and answers.

Davenport notes one engineering firm that created a database into which employees could enter their practice tips for comment and suggestion from others in the firm.

"Entries recorded just enough about the practice to pique the reader's interest, and included the name and phone number of a person who could describe it in detail," Davenport explains, adding that "use of the database is solid and growing."

• *Create an 'Experience Bank'*

Encourage members of the firm to collect client, courthouse, and technical lore and put it in a database where

Continued on page 13

Knowledge Management Helps Small Firms Maximize Their Expertise

Continued from page 4

everyone can find it and add to it – don't let good ideas and advice go to waste over the water cooler.

"Rather than people talking to each other at the pop machine in the break room or in occasional conferences, you can make the expertise of your people available all the time so that everybody can use it," says Pritchard.

• *Learn From Experience*

Keep track of which of your "extra" (non-document management) KM databanks get the most use, and concentrate on developing those tools.

For instance, if no one is accessing your "Real Estate" database, perhaps the category is too broad – or is it that your firm simply doesn't do enough real estate work? Modify or kill the database accordingly so that it doesn't draw effort away from the areas where people are more actively using it.

Constantly think about new databases or categories that might be helpful.

"There are a lot of things that need to be recorded and managed," says Pritchard. "Ideally, you want to record them once, and view them in different ways and work as intuitively and as effectively as possible."

Bock notes that you could "Look for key knowledge by asking, 'What do we lose when key people leave?' or 'What do we have to teach every new person?' Then find ways to move some of that technologically."

• *Create a 'Virtual Mentor'*

Raw information from law libraries, brief banks and form books is the data – the experience that puts them to use is what creates knowledge.

"That's what senior partners try to convey to associates," says Pritchard. "How do you tell what are the important things here? What are the relationships? What do you do next, and why? It's the thinking process that puts this information to use."

KM, in this sense, is an attempt to institutionalize the dissemination of that expertise.

"The theory is that we need to 'codify' knowledge, because some of the old systems – like mentoring – aren't working so well on a regular, reliable basis – and maybe you can learn at the knee of a computer instead of a senior partner."

• *Be Innovative.*

Don't hesitate to try your own KM ideas.

"Solo and small-firm practitioners have always been innovators, free to pursue their own visions," says Pritchard. "They could be at the cutting edge of knowledge management. There's always been talk of the equalizing effect of technology. Size is not the same thing as effectiveness."

But there's also no need get revolutionary – just keep a steady eye on KM goals and techniques, and make improvements where you can.

"The good news is that almost anything a firm does in managing knowledge will be a step forward," says Davenport.

Changing the Firm Culture

The rub, of course, is that creative change and innovation are exactly what some lawyers *don't* want. In an essentially conservative profession, you should expect to encounter at least some resistance to KM.

And beyond this general resistance to change is a longstanding culture in which personal knowledge equals power and job security, and translates directly into compensation levels.

"Sharing and using knowledge are often unnatural acts," notes Davenport. "If my knowledge is a valuable resource, why should I share it? If my job is to create knowledge, why should I put my job at risk by using yours instead of mine?"

If such attitudes are a problem in your firm, any attempt at knowledge management may be doomed to failure, unless you can offer some incentives to change – perhaps a bonus for the most frequent contributor to the databases, or an award for the best post of the month.

"The biggest barrier to effective knowledge management in most organizations is a culture that consistently rewards information and knowledge hoarding," says Bock.

But resistance to knowledge management may not be quite so endemic. If your firm isn't used to the concept, it might be a simple case of inertia. Experts recommend putting a person or group of people in charge of "drum-beating" – keeping the system active until it becomes a matter of habit.

"Ever since I've been practicing law, people have been talking about building form banks and brief banks," notes Pritchard. "But then people stop contributing, they lose interest – it takes too much effort. So it gets stale and then it dies."

By assigning persons to monitor progress and smooth over glitches in the system, you can avoid having a valuable system go to waste.

Another formidable barrier is time. All of this sharing and inputting of data takes time – which is among the rarest commodities in any lawyer's life. So if you want the system to work, and you want people to continue to use it after the novelty wears off, you've got to make it easy.

"Anything that takes extra time might prevent people from doing it," says Pritchard. "So a big part of knowledge management is lowering or eliminating those barriers and making it easy to get things into an organizational system that is the way you want it to be."

Also, make sure the people in your firm understand the point of document and knowledge management.

"Explain quite clearly what the benefits are going to be," says Shultz. "Things like, 'You'll always be able to find what you want,' and 'There will never again be such a thing as a lost document.'"

But whatever you do, don't simply ignore the resistance.

"Just because you can do something doesn't mean it's going to be done," notes Pritchard. "Because you're talking about high-level, busy people. They have to believe in it, and want to make it work."

Business Advantages

Although implementing a knowledge management system can take a lot of time and effort, experts say the benefits outweigh the initial inconvenience.

Obviously, ready access to all of your firm's work can dramatically speed your workflow – while removing a lot of frustration and delay.

"If you have a question you can answer it in 30 seconds, rather than asking somebody to go digging through your files and bring back something three hours later," says Pritchard.

Another workflow advantage involves dealing with interruptions.

"One reason that knowledge management is getting more and more important is that there are more and more interruptions in the day," explains Pritchard. "We're bombarded with e-mails and faxes and phone calls and pages. If you're interrupted a hundred times you have to pick up a hundred times – and you don't always get to the end of your project."

A good knowledge management system allows you to quickly pick up where you left off and waste less time getting back up to speed.

It can also be a handy aid in cross-selling services to clients. If you're approached with a particular legal problem, you'll be able to know almost instantly what the firm has learned about such cases and what documents you've got on hand to get the job done.

"Knowledge management can be a vital competitive asset," notes Pritchard. "There's a big difference between getting back to a client in three days and answering him in 30 seconds. People are getting shorter attention spans and higher expectations. They want things to happen quickly and efficiently, and a good knowledge management system can enable you to begin to respond to those increasing expectations." LWUSA

Firm Culture Still Matters: Here's How to Nurture Yours

With all the changes in service and the marketplace, firm culture really doesn't matter much anymore, one managing partner recently asserted. Nothing could be further from the truth. While you may be justifiably proud of your new services, expertise, and response to clients, the truth is that many other firms are offering the exact same thing. It's your culture that differentiates your law firm from the others.

Law firms are people businesses. Successful client and internal relationships determine a firm's future and are the best reasons to guard, nurture, and value firm culture. They are why so many firms have resisted merging or being acquired; why others that decided to merge or be acquired have conducted exhaustive courtships to protect the delicate relationship balances that exist; why lawyers and staff stay with your law firm instead of going to large firms or in-house departments; and why clients keep coming back.

What is your firm's culture? These three steps can help you identify, understand, and nurture your firm's culture:

1. Create a taskforce. Successful firm leaders include both partners and key managers to gain widespread input and foster broad support for the taskforce's recommendations.

2. Look at the clues to your firm's culture. *Questions to consider:*

- What drives your personnel policies? Can you be flexible about issues such as work schedule, dress code, and leaves of absence?
- Do you instill a team-environment or sense of "community" among employees?
- How would you describe your office atmosphere? Is it pleasant—or strictly business?
- How do you respond to employees' childcare and eldercare needs?
- Does the firm sponsor events outside of work?

3. Recognize that the most important aspects of your firm's culture are often hidden or excluded from a formal program. You may be sending implicit messages to members of your law firm in areas like:

- **Inclusion.** Do you include a wide sampling of every member of the firm (both lawyers and staff) in important discussions? Do you solicit input regardless of title or level in the firm?
- **Programs.** Do you carefully analyze the results of strategic plans or new practice areas each quarter or annually? Do you shelve plans without prior ample feedback to those who put them together? The answers speak volumes about your leadership quality and the firm's level of commitment to its stated goals.
- **Mentoring.** Do you make mentoring opportunities available throughout the firm or are they restricted to a select few?
- **Recognition.** Do you recognize lawyers and staff for outstanding performance, privately and publicly?
- **Stimulation.** Is the work environment intellectually stimulating?
- **Rewards.** Does your firm reward new ideas and approaches?
- **Learning.** Is it a priority?
- **Careers.** Are career advancement opportunities plentiful?
- **Values.** What values do you promote, both in actions and in words?

Common Hiring Mistakes

The six biggest staff hiring mistakes, according to a survey by Development Dimensions International (DDI), reported in the *HR Fact Finder,* Jamestown New York. *(reprinted with permission)*

1. **Lowering your standards when under pressure to fill a position.** While the pressure comes from a variety of sources — how long the position has been open, how many resources are being wasted as a result, the degree of attention the partnership is paying to the position, and beyond — it's important not to let it force you to hire someone who's not up to your usual standards.

2. **Focusing on the candidate's credentials instead of his or her motivation.** Credentials and work history are important, but not as important as determining whether the person is motivated to deliver what you and your firm's attorneys seek.

3. **Failing to collect enough job-related information to make a good hiring decision.** Far too often, managers and others waste time on questions that aren't related to job performance. Not only do most people fail when they attempt to be amateur psychologists, they also risk violating EEOC guidelines.

4. **Gathering information in a haphazard, inconsistent manner.** In order to ensure you can make an "apples to apples" comparison of candidates, you need to gather as much of the same information about each prospect as possible. Otherwise, "critical information for decision making is lost," among other things.

5. **Allowing one aspect of the prospect — favorable or unfavorable — to influence your overall judgment.** This mistake, called the "halo effect," causes managers to miss other skills or behaviors of candidates that are crucial to the job at hand.

6. **Having each interviewer ask the same questions.** While it's important to gather similar information about each candidate, it's a waste of time to have each interviewer ask the very same questions of each person.

10 Questions You Should Ask *Before* You Hire Anyone

While law firms' hiring pace is likely to slow somewhat this year, most data suggest that attracting and retaining qualified professional staff will remain a priority for years to come. Indeed, in an exclusive ownership and growth survey conducted by our publisher, the Institute of Management Administration (IOMA), more than half (52%) of the respondents reported this as their top challenge.

"We have advertised for more than four months with no luck," complained one firm leader. Another bemoaned the loss of business from lack of sufficient staff, while yet another charged large firms with the continued theft of his professionals. New graduates don't have the technical skills to make up the labor shortfall, and some firms complain that the going price for experienced lawyers and staff is problematic.

The market is so tight, in fact, that you may rush to hire the first qualified applicant who sits down across from your desk with a reasonable salary request and job objective. But wait! Don't breeze through the initial interview, rubber-stamp the person's resume and references, and put in an order for a new extension. You might make a mistake—or, in your hurry to hire, you might put off the candidate.

The Top 10 Questions *Never* to Ask

The intent of a manager's query is not normally the focus of a hiring-related claim: Usually, it's just the form of the question. As a result, most savvy law firms know to avoid the following questions—we hope. Consider them a review of the basics. Never ask:

1. What's your maiden name so that I can check references? (Instead, ask whether a female applicant has used any other names in the past so that your firm can verify past work experience and education.)

2. How old are you? What year were you born? When did you graduate from high school? (You're even liable for age-related information individuals may offer without prompting, so let them know that it's irrelevant, and don't write it down.)

3. Where were you born? Are you a U.S. citizen? (Instead, ask, "Could you, after employment, submit verification of your legal right to work in the U.S.?")

4. Are you married? Are you planning to have children in the next few years? Can you make adequate provisions for childcare? (Ask whether the applicant will be able to meet the firm's time and travel commitments.)

5. Are you disabled? Do you have any major medical problems? Have you ever filed for workers' compensation? How many days were you sick last year? What prescription drugs do you take? Have you ever been treated for alcoholism or a mental health illness? (Just ask, "Are you able to meet the job's essential requirements, with or without accommodation?")

6. Would your religion prevent you from working weekends? (Instead say, "Weekend and holiday work may be required. Is that acceptable?")

7. Have you ever been arrested? (Instead ask if the person has ever been convicted of a felony. But remember: A felony may be grounds for rejection only if it's related to essential job functions.)

8. What kind of discharge did you get from the military? (Just ask what relevant skills they may have acquired during service.)

9. Have you ever declared bankruptcy or had your wages garnished? (Make the offer contingent on a credit check only if good credit is related to the job description).

10. Who is the nearest relative we should contact in an emergency? (Ask for someone to contact, without regard to the relationship.)

4. Be consistent and persistent in using the new behavior. *Key:* It takes at least 21 consecutive days to break a negative habit or add a positive new one.

5. Get feedback and help from others. It's easier to make changes if you have support. If possible, let one or two of your closest allies in the firm in on your action plan so they can encourage you and offer feedback on how you're doing.

6. Reward yourself as you progress. Give yourself some positive feedback and remind yourself daily how you've changed.

Still looking for answers? In the sidebar, "25 Strategies for Overcoming Negativity—Yours and Others'," may help you and others in your firm get a fresh, positive lease on life—at work and at home.

25 Strategies for Overcoming Negativity—Yours and Others'

The following list of tips and tactics are certain to help you better manage negativity in your law firm.

Strategy #1: Be aware not only of the words you use, but of your nonverbal cues, paralanguage (how you use your words: e.g., the speed with which you speak), and proxemics (the amount of space you keep between yourself and the person to whom you are speaking). Only 20% to 25% of communication is verbal, 50% is nonverbal, 20% to 25% is paralanguage, and 5% to 10% is via proxemics.

Strategy #2: Recognize your negativity trigger points—what behaviors or situations trigger your own negativity.

Strategy #3: Take a time out. Remove yourself from a negative situation.

Strategy #4: Elicit feedback about your attitude. Ask, "How do I come across?"

Strategy #5: Feel better about yourself—exercise, watch your diet, schedule "happy" events each day.

Strategy #6: Use an imaginary "tape recorder" and fast-forward through your negative thoughts.

Strategy #7: Keep your thoughts in the present—don't dwell on the past or anticipate the future.

Strategy #8: Have a favorite phrase, saying, or belief that accentuates the positive or puts things in perspective.

Strategy #9: Set a time limit for negativity.

Strategy #10: See the big picture—don't get "micro" about it.

Strategy #11: Look at quality criticism as a plus.

Strategy #12: Keep a laughter log or joy journal; collect objects that make you laugh.

Strategy #13: Use the *flipside* by practicing positive thinking.

Strategy #14: Re-energize yourself with some PQT (personal quiet time).

Strategy #15: Use the I-CAN model: *Identify* your negative thought, feeling, reaction, or action; *Construct* a positive response; *Assess* alternative actions; and *Name* the option.

Strategy #16: Stop your thoughts. When you find yourself taking a negative train of thought, tell yourself, "Stop! Stop thinking about that!"

Strategy #17: Wear a rubber band around your wrist and snap it when you have a negative thought.

Strategy #18: When you can, use a collaborative approach for resolving conflicts.

Strategy #19: Surround yourself with optimistic people.

Strategy #20: Be your own best friend.

Strategy #21: Play your winners. You have special winners in your life—the more you focus on them, the better.

Strategy #22: Do something to help others.

Strategy #23: Remember you always have choices with the AAA approach: *Alter* the situation; *Avoid* it—this isn't happening; or *Accept* it—if I'm going to work here, I'm going to have to deal with (fill-in-the-blank).

Strategy #24: Reward yourself for being positive.

Strategy #25: Lock out the negativity; leave it at work. Don't bring it home with you.

Remember, it is the firms with low overhead and client oriented focus that will be the most successful.

BUSINESS PLAN

Like any other business, a law firm should have a business plan that includes measurable goals and objectives that address basic issues and competitive concerns. The business plan should ask and answer these questions: Where do we want to be in five years? Ten years? How much work do we want? What kind of work do we want? Where is this work and how do we obtain it? What are our resources now and what additional resources do we need to meet our goals? How can we maintain a competitive edge in technology capabilities and marketing techniques? Below is a list of some sample goals and objectives to help you develop your own plan.

1. GOAL: I want to have a specialized solo practice in the area of: _____. I will have employees, but will not consider taking on additional owners for (length of time) (or do I ever want partners?)
2. GOAL. Immediately upon starting this plan, I will personally focus my firm on meeting the needs of our clients. I will personally meet them within two weeks of accepting their case. We will talk to our clients, we will keep them up to date with the progress of their cases, we will return our clients' phone calls, and we will solicit feedback from our clients and act on it.
3. GOAL: I will start the plan on _____. Immediately upon starting this plan I will focus on moving my practice to my chosen specialties.
    a. OBJECTIVE: I will set an eight hour work day five days a week, and I will start the day early so I may leave early. I will minimize wasted time in the office and hire enough staff to get the work done in a forty-hour week.
    b. OBJECTIVE: I will immediately calendar all present deadlines and schedule work well before those deadlines so I am pro-active with my practice, not deadline active.
    c. OBJECTIVE: All future deadline orientated work will be entered into the calendar immediately and worked on immediately.
    d. OBJECTIVE: I will review five cases each workday to determine their financial viability. I will continue the review on a daily basis until all my cases have been reviewed.

e. OBJECTIVE: Upon review, I will immediately release all "dead weight" cases that have no financial viability.

f. OBJECTIVE: I will refer or release all cases (if possible) not in my chosen specialty that will not resolve within the next six months and will require significant work by my firm.

g. OBJECTIVE: I will refuse or refer all new cases not in my specialty. In doing so, I will implement a written system for tracking referred cases.

h. OBJECTIVE: I will carefully select the new cases in my specialty in order to avoid cases which are not productive.

4. GOAL: Immediately upon starting this plan on _____, I will set aside two, one-week vacation times for my family during the current year. I will hold to those dates for vacation.

5. GOAL: Immediately upon starting this plan on _____, I will establish one night each week as "date night" for me, my spouse, or my significant other.

6. GOAL: Within thirty days of starting this plan on _____, I will start a family business calendar to plan family events and keep track of family anniversaries. I will have access to the calendar at the office. Family appointments will be treated on a par with business appointments.

7. GOAL: I want to make $70, 000 my first year of solo specialized practice, $150,000 the next, $250,000 the third year, and $300,000 thereafter. Within thirty days of starting the plan, I will write a business plan outlining my law practice goals and how I will reach them. The plan will include:

   a. OBJECTIVE: I will write a marketing plan covering a one year period which will consist of: (a) A commitment to the most important part of my market plan: That I will do the best I can on every case I work on to meet the needs of my client. If I do, I will be the beneficiary of a strong referral base and gain the respect of my peers and adversaries; (b) I will write a financial marketing plan to determine what percentage of my gross income I need to set aside for marketing; (c) I will make a conservative estimate of the average income from each case to determine how many cases are needed each year to cover overhead and reach my salary goal; (d) I will make a conservative estimate of how long it takes for a case to mature or pay off; (e) I will make a

liberal estimate of how much immediate cash I need to begin my marketing plan, provide for my family's needs, and pay overhead while my caseload matures.

b. OBJECTIVE: Within sixty days of the plan implementation date, I will establish a retirement plan, which will set aside the maximum amount possible under law from each paycheck.

8. GOAL: Immediately upon starting the plan, I will write an infrastructure building plan which includes:
   a. OBJECTIVE: Within fifteen days of starting the plan, I will design a standardized file for each type case I wish to accept.
   b. OBJECTIVE: Within thirty days, I will clean out all unneeded supplies and equipment from my office. I will move all closed files to permanent storage, and will clean up, paint, and generally improve the appearance of my office.
   c. OBJECTIVE: Within forty-five days I will write out and distribute an office procedure for mail handling, document filing, and case file disposition, storage, and instruction.
   d. OBJECTIVE: Within fifty days I will write out and distribute an office procedure instruction for handling new case calls. It will include a standardized intake for screening and appointment procedures, and specific contact/rejection letters for potential new clients.
   e. OBJECTIVE: Within ninety days, I will write or re-write my employee job descriptions. I will determine who will fit into my specialty practice and fill those needs.
   f. OBJECTIVE: Within six months, I will computerize my bookkeeping, my calendar and tickler, conflict checking system, my word processing, my office forms, and my timekeeping. While doing so, I will establish a complete backup program and procedure, which includes off site storage of backed up data.
   g. OBJECTIVE: I will review this plan monthly to help ensure I comply with the goals I have set. I will enter the deadlines on my office calendar in a way that I can see the deadlines at least one month before scheduled completion

Back to Speaker Topics

Fund Assembly

A Practical Guide to Reading Surveys

Rebecca Wood, *Sr. Underwriting Counsel, The Fund*

Back to Speaker Topics

Speaker Information

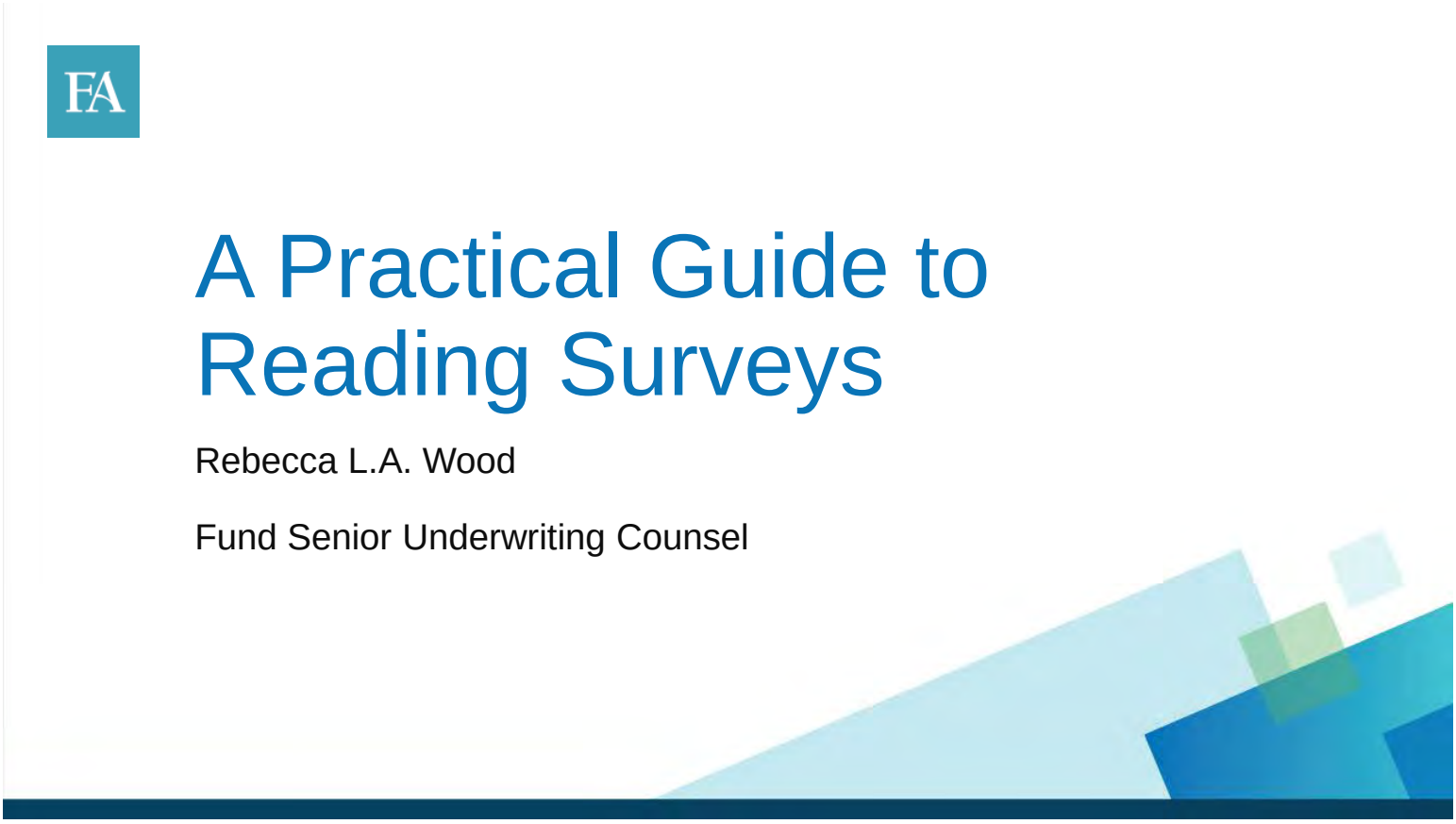
A Practical Guide to Reading Surveys

Rebecca Wood,
Sr. Underwriting Counsel, The Fund

Rebecca L.A. Wood is located at The Fund's headquarters in Orlando, Florida. She earned her B.A. degree in Business Administration from King College in Bristol, TN in 1988, and her J.D. from the University of Florida in 2010. She was a member of the Florida Law Review, and is the Coordinating Editor of The Fund Title Notes. She is a participating member of the Real Property Probate and Trust Law Section of the Florida Bar, and an active member of that Section's Title Standards Committee. Ms. Wood was a contributing author on the Florida Bar's Continuing Legal Education publication entitled "Florida Real Property Title Examination and Insurance, Eighth Edition."

Prior to joining The Fund in August 2014, Ms. Wood was a transactional attorney practicing in Gainesville, Florida where she focused primarily on residential real estate closings and title insurance. She is a Past-President of the North Florida Association of Real Estate Attorneys.

Back to Speaker Topics



A Practical Guide to Reading Surveys

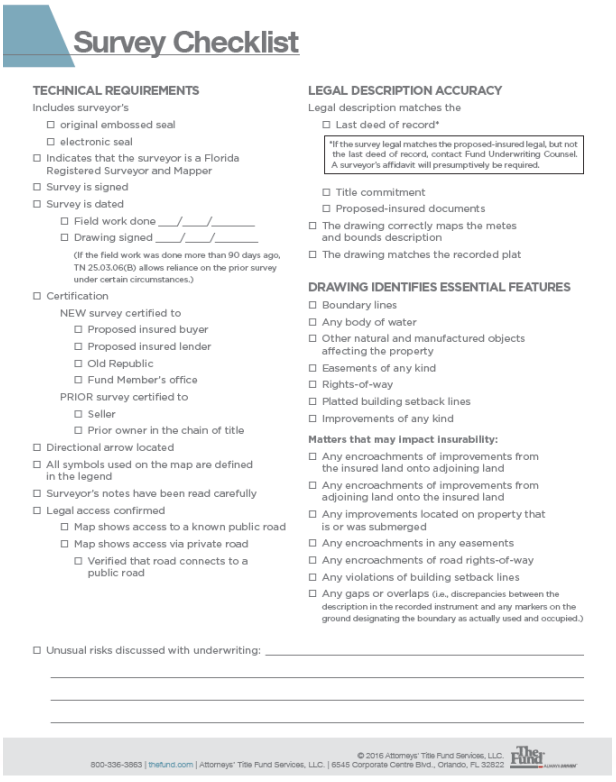
Rebecca L.A. Wood

Fund Senior Underwriting Counsel

I have to pick up the kids
I'm sure the survey will be here in just a minute
What is a survey?
Cool! I'm almost at 10,000 steps!
When can I get my commission check?
The yard is fenced. Why do we need a picture?

The Fund
CONCEPT
DECEMBER 2016 | VOL 48
BACK TO BASICS: A PRACTICAL GUIDE TO READING SURVEYS

A full-sized checklist is provided – last page of materials



Survey Checklist

TECHNICAL REQUIREMENTS

Includes surveyor's
- ☐ original embossed seal
- ☐ electronic seal

☐ Indicates that the surveyor is a Florida Registered Surveyor and Mapper

☐ Survey is signed

☐ Survey is dated
- ☐ Field work done ___/____/_____
- ☐ Drawing signed ____/____/_____

(If the field work was done more than 90 days ago, TN 25.03.06(B) allows reliance on the prior survey under certain circumstances.)

☐ Certification

NEW survey certified to
- ☐ Proposed insured buyer
- ☐ Proposed insured lender
- ☐ Old Republic
- ☐ Fund Member's office

PRIOR survey certified to
- ☐ Seller
- ☐ Prior owner in the chain of title

☐ Directional arrow located

☐ All symbols used on the map are defined in the legend

☐ Surveyor's notes have been read carefully

☐ Legal access confirmed
- ☐ Map shows access to a known public road
- ☐ Map shows access via private road
  - ☐ Verified that road connects to a public road

LEGAL DESCRIPTION ACCURACY

Legal description matches the
- ☐ Last deed of record*

*If the survey legal matches the proposed-insured legal, but not the last deed of record, contact Fund Underwriting Counsel. A surveyor's affidavit will presumptively be required.

- ☐ Title commitment
- ☐ Proposed-insured documents

☐ The drawing correctly maps the metes and bounds description

☐ The drawing matches the recorded plat

DRAWING IDENTIFIES ESSENTIAL FEATURES

☐ Boundary lines

☐ Any body of water

☐ Other natural and manufactured objects affecting the property

☐ Easements of any kind

☐ Rights-of-way

☐ Platted building setback lines

☐ Improvements of any kind

Matters that may impact insurability:

☐ Any encroachments of improvements from the insured land onto adjoining land

☐ Any encroachments of improvements from adjoining land onto the insured land

☐ Any improvements located on property that is or was submerged

☐ Any encroachments in any easements

☐ Any encroachments of road rights-of-way

☐ Any violations of building setback lines

☐ Any gaps or overlaps (i.e., discrepancies between the description in the recorded instrument and any markers on the ground designating the boundary as actually used and occupied.)

☐ Unusual risks discussed with underwriting: _____

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800-336-3863 | thefund.com | Attorneys' Title Fund Services, LLC. | 6545 Corporate Centre Blvd., Orlando, FL 32822

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

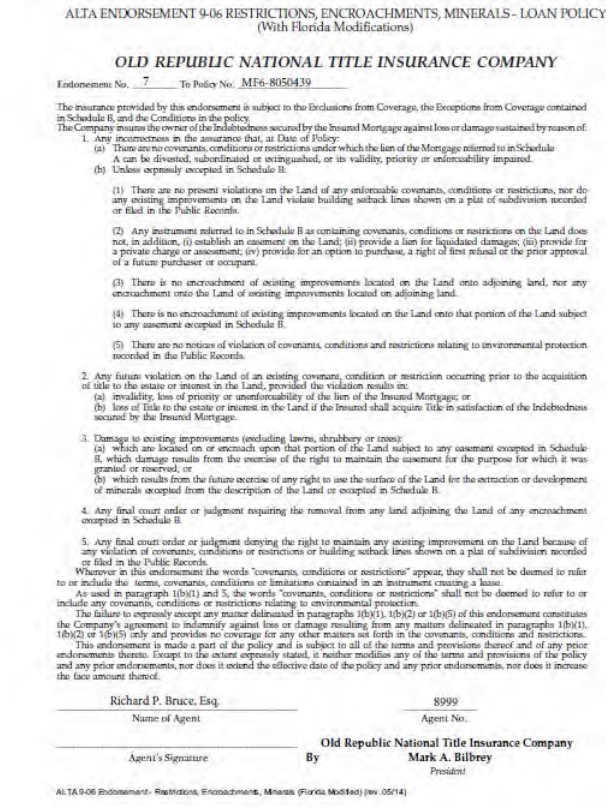
ALTA ENDORSEMENT 9-06 RESTRICTIONS, ENCROACHMENTS, MINERALS - LOAN POLICY
(With Florida Modifications)

ALTA ENDORSEMENT FORM 9.1-06
RESTRICTIONS, ENCROACHMENTS, MINERALS - OWNER'S POLICY - UNIMPROVED LAND
(With Florida Modifications)

ALTA ENDORSEMENT 9.2-06 RESTRICTIONS, ENCROACHMENTS, MINERALS
OWNER'S POLICY - IMPROVED LAND
(With Florida Modifications)

A sample of the lender's Form 9 is provided – immediately behind slides

Example of Restrictions, Encroachments, Minerals Endorsement (ALTA 9-06)



ALTA ENDORSEMENT 9-06 RESTRICTIONS, ENCROACHMENTS, MINERALS - LOAN POLICY
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. 7 To Policy No. MF6-8050439

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. Any incorrectness in the assurance that, at Date of Policy:
   (a) There are no covenants, conditions or restrictions under which the lien of the Mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.
   (b) Unless expressly excepted in Schedule B:

   (1) There are no present violations on the Land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the Land violate building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

   (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the Land does not, in addition, (i) establish an easement on the Land; (ii) provide a lien for liquidated damages; (iii) provide for a private charge or assessment; (iv) provide for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.

   (3) There is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.

   (4) There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.

   (5) There are no notices of violation of covenants, conditions and restrictions relating to environmental protection recorded in the Public Records.

2. Any future violation on the Land of an existing covenant, condition or restriction occurring prior to the acquisition of title to the estate or interest in the Land, provided the violation results in:
   (a) invalidity, loss of priority or unenforceability of the lien of the Insured Mortgage; or
   (b) loss of Title to the estate or interest in the Land if the Insured shall acquire Title in satisfaction of the Indebtedness secured by the Insured Mortgage.

3. Damage to existing improvements (excluding lawns, shrubbery or trees):
   (a) which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
   (b) which results from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.

4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.

5. Any final court order or judgment denying the right to maintain any existing improvement on the Land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.
As used in paragraph 1(b)(1) and 5, the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection.
The failure to expressly except any matter delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) of this endorsement constitutes the Company's agreement to indemnify against loss or damage resulting from any matters delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.
This endorsement is made a part of the policy and is subject to all of the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, it neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and any prior endorsements, nor does it increase the face amount thereof.

Richard P. Bruce, Esq.
Name of Agent

8999
Agent No.

Agent's Signature

Old Republic National Title Insurance Company
By Mark A. Bilbrey
President

ALTA 9-06 Endorsement - Restrictions, Encroachments, Minerals (Florida Modified) (rev. 05/14)

Survey Focused

Detailed forms discussion in

TITLE POLICY ENDORSEMENTS: AN EXAMINATION OF FLORIDA APPROVED FORMS

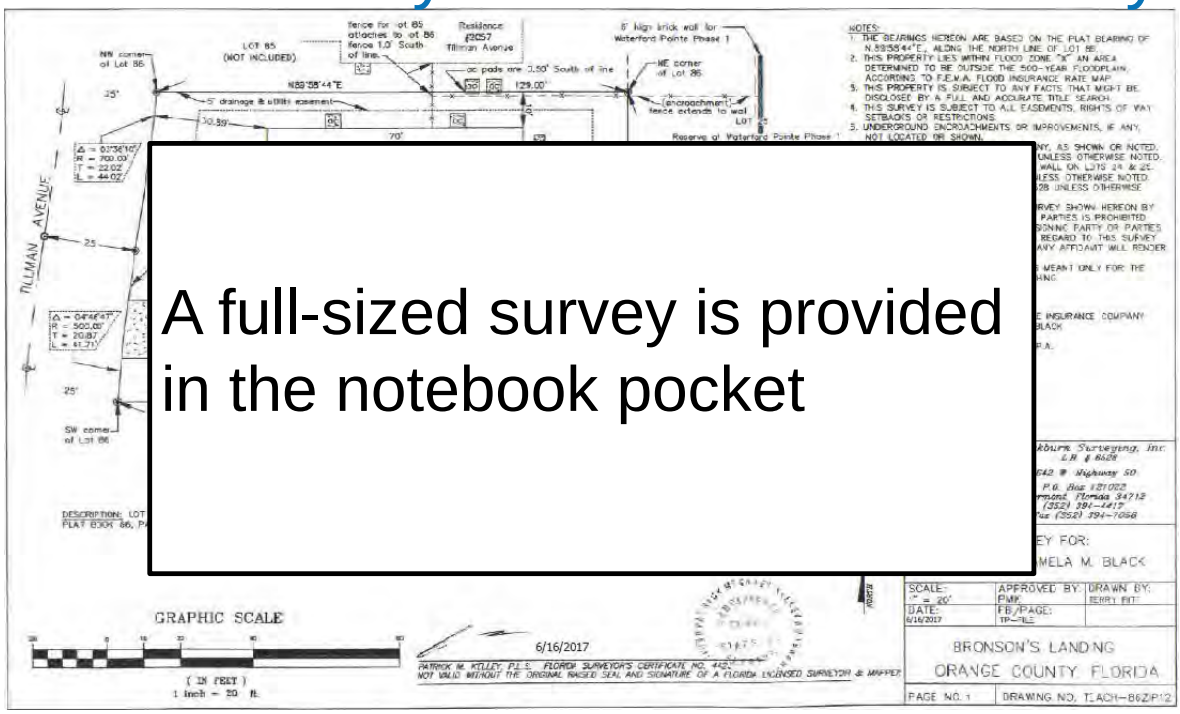
By
Lee Offir

This space intentionally blank

Elements of coverage 1. (b) (1), (3) & (4) require accuracy in describing violations and encroachments on the Schedule B

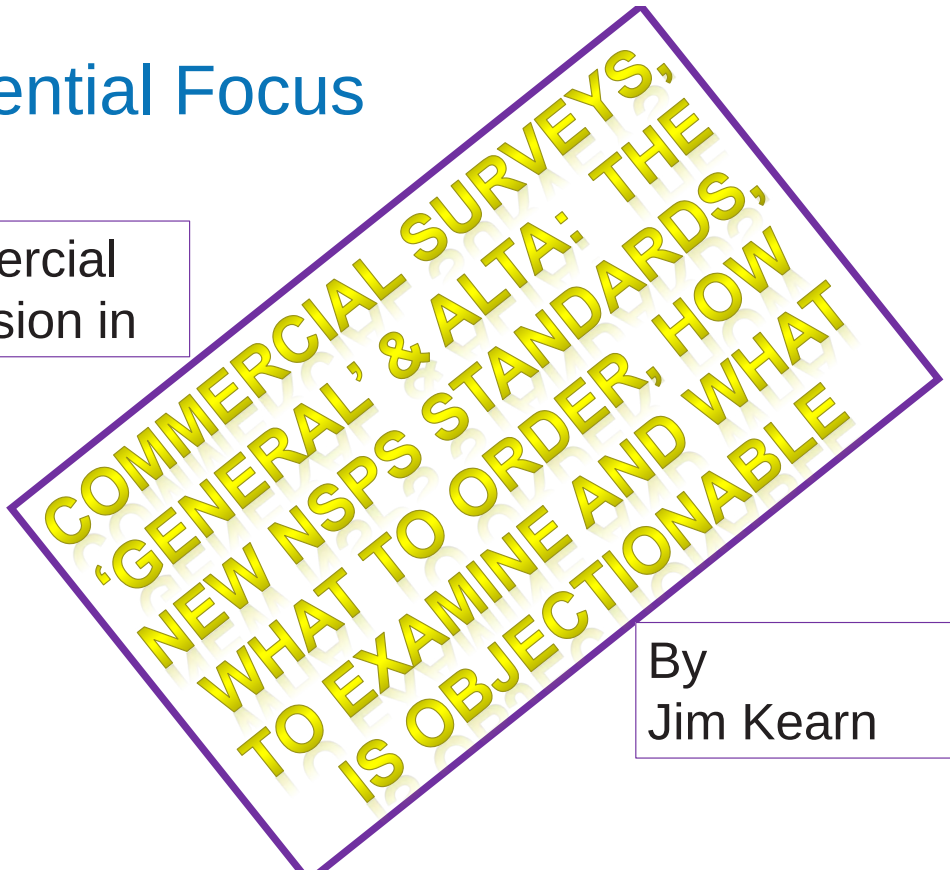
Elements of coverage 3(a), 4 and 5 provide affirmative coverage over certain encroachments and violations that are disclosed on the Sch B

Ask for it early and examine it closely



Residential Focus

Commercial discussion in



By
Jim Kearn

Back to Speaker Topics

Consider the Technical Requirements

Please take a moment to review survey

TECHNICAL REQUIREMENTS

Includes surveyor's

- ☐ original embossed seal
- ☐ electronic seal

☐ Indicates that the surveyor is a Florida Registered Surveyor and Mapper

☐ Survey is signed

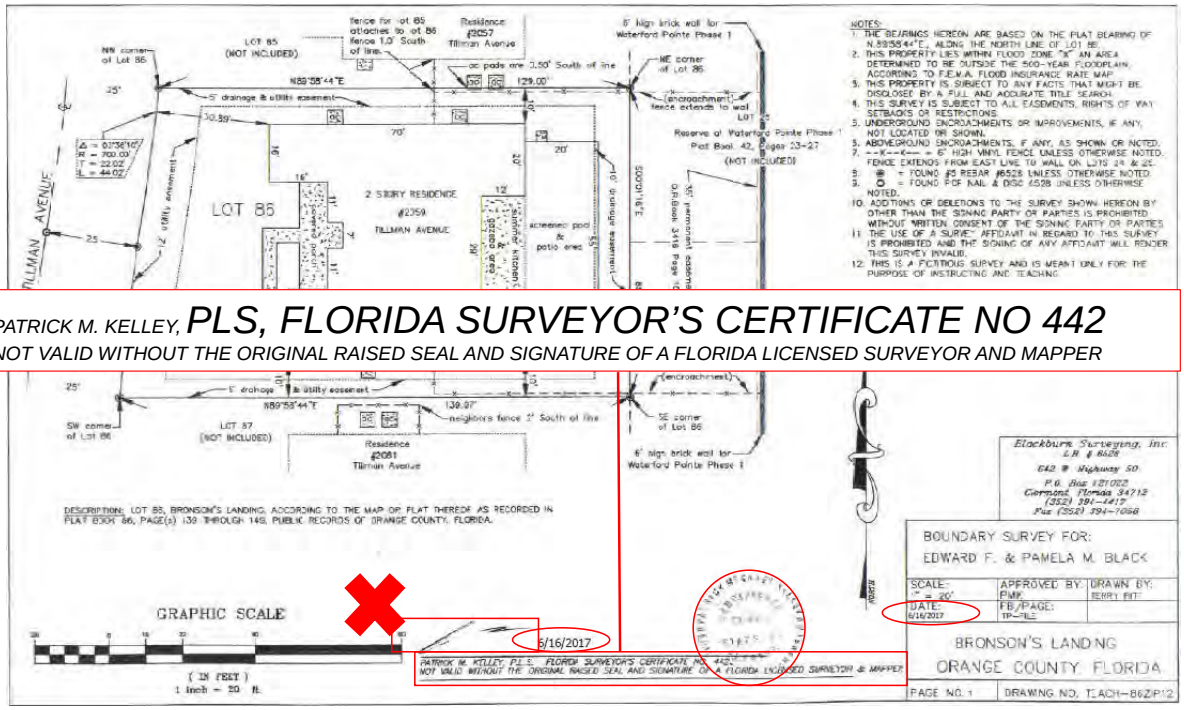
☐ Survey is dated

- ☐ Field work done ____/____/_____
- ☐ Drawing signed ____/____/_____

(If the field work was done more than 90 days ago, TN 25.03.06(B) allows reliance on the prior survey under certain circumstances.)

Threshold Inquiries

Threshold Inquiries



PATRICK M. KELLEY, PLS, FLORIDA SURVEYOR'S CERTIFICATE NO 442
NOT VALID WITHOUT THE ORIGINAL RAISED SEAL AND SIGNATURE OF A FLORIDA LICENSED SURVEYOR AND MAPPER

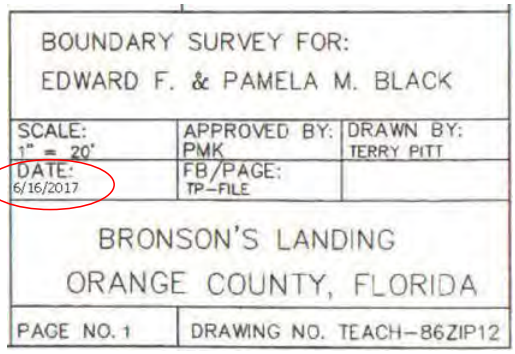
TECHNICAL REQUIREMENTS

Includes surveyor's

- [x] original embossed seal
- [ ] electronic seal

- [x] Indicates that the surveyor is a Florida Registered Surveyor and Mapper
- [x] Survey is signed
- [x] Survey is dated
  - [x] Field work done 6 / 16 / 2017
  - [ ] Drawing signed ____/____/_____

(If the field work was done more than 90 days ago, TN 25.03.06(B) allows reliance on the prior survey under certain circumstances.)



BOUNDARY SURVEY FOR: EDWARD F. & PAMELA M. BLACK		
SCALE: 1" = 20'	APPROVED BY: PMK	DRAWN BY: TERRY PITT
DATE: 6/16/2017	FB/PAGE: TP–FILE	
BRONSON'S LANDING ORANGE COUNTY, FLORIDA		
PAGE NO. 1	DRAWING NO. TEACH–86ZIP12	

TECHNICAL REQUIREMENTS

Includes surveyor's

- ☐ original embossed seal
- ☐ electronic seal

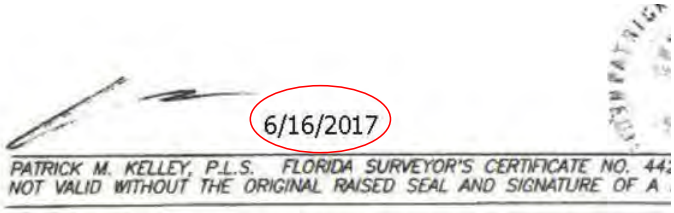
☐ Indicates that the surveyor is a Florida Registered Surveyor and Mapper

☐ Survey is signed

☑ Survey is dated

- ☑ Field work done 6 / 16 / 2017
- ☑ Drawing signed 6 / 16 / 2017

(If the field work was done more than 90 days ago, TN 25.03.06(B) allows reliance on the prior survey under certain circumstances.)



TECHNICAL REQUIREMENTS

Includes surveyor's

- [x] original embossed seal
- [ ] electronic seal

- [x] Indicates that the surveyor is a Florida Registered Surveyor and Mapper
- [x] Survey is signed
- [x] Survey is dated
  - [x] Field work done 6 / 16 / 2017
  - [x] Drawing signed 6 / 16 / 2017

(If the field work was done more than 90 days ago, TN 25.03.06(B) allows reliance on the prior survey under certain circumstances.)

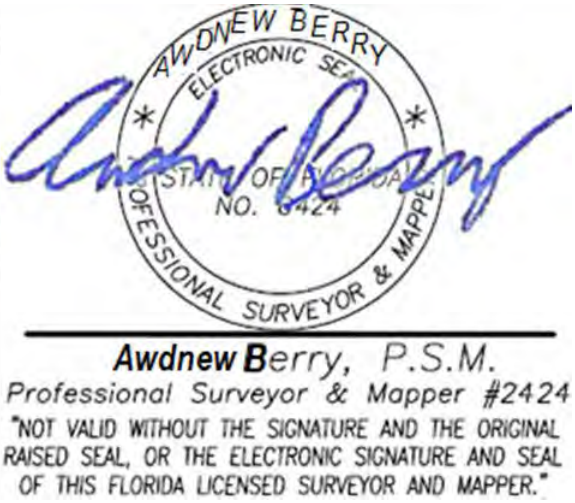
TECHNICAL REQUIREMENTS

Includes surveyor's

- ☑ original embossed seal
- ☐ electronic seal
- ☑ Indicates that the surveyor is a Florida Registered Surveyor and Mapper
- ☑ Survey is signed
- ☑ Survey is dated
  - ☑ Field work done 6 / 16 / 2017
  - ☑ Drawing signed 6 / 16 / 2017

(If the field work was done more than 90 days ago, TN 25.03.06(B) allows reliance on the prior survey under certain circumstances.)

Surveyor's electronic signature and seal



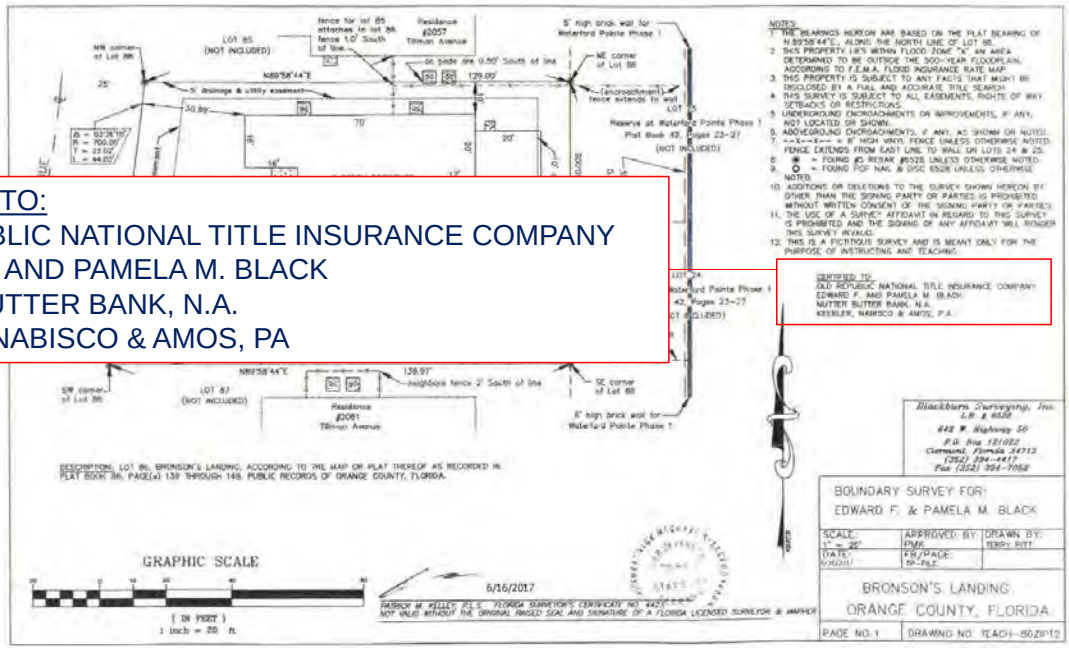
If electronic,
the signature must be digital
If not electronic,
the seal must be raised

Please take a moment to review survey

- ☐ Certification
  - NEW survey certified to
    - ☐ Proposed insured buyer
    - ☐ Proposed insured lender
    - ☐ Old Republic
    - ☐ Fund Member's office
  - PRIOR survey certified to
    - ☐ Seller
    - ☐ Prior owner in the chain of title

Certifications

Certifications



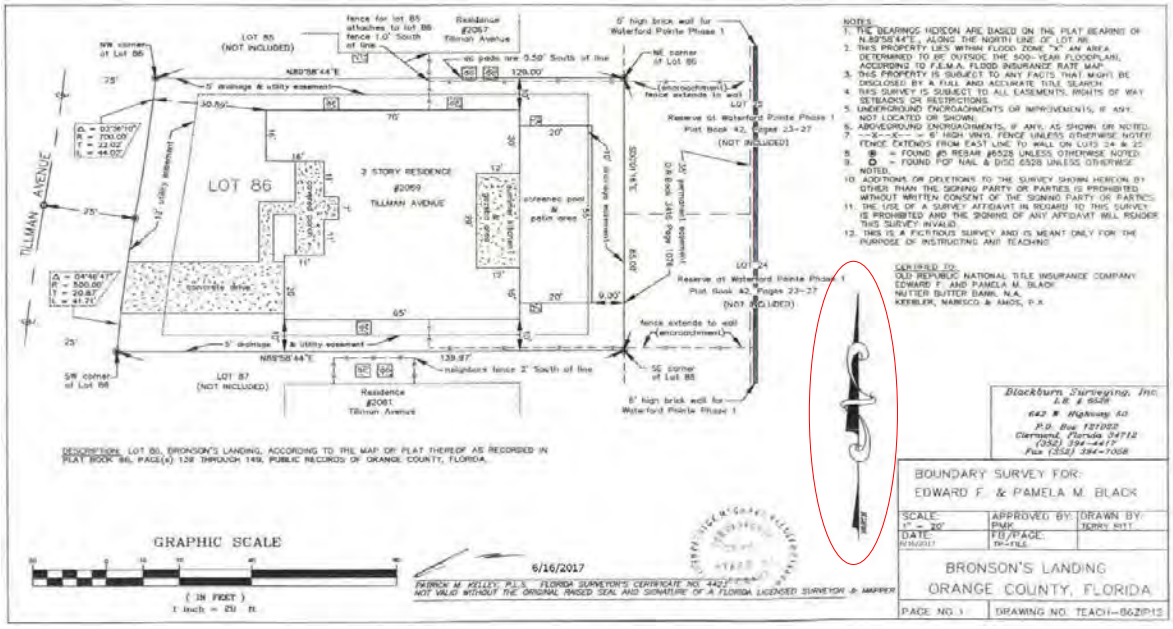
CERTIFIED TO:
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
EDWARD F. AND PAMELA M. BLACK
NUTTER BUTTER BANK, N.A.
KEEBLER, NABISCO & AMOS, PA

Please take a moment to review survey

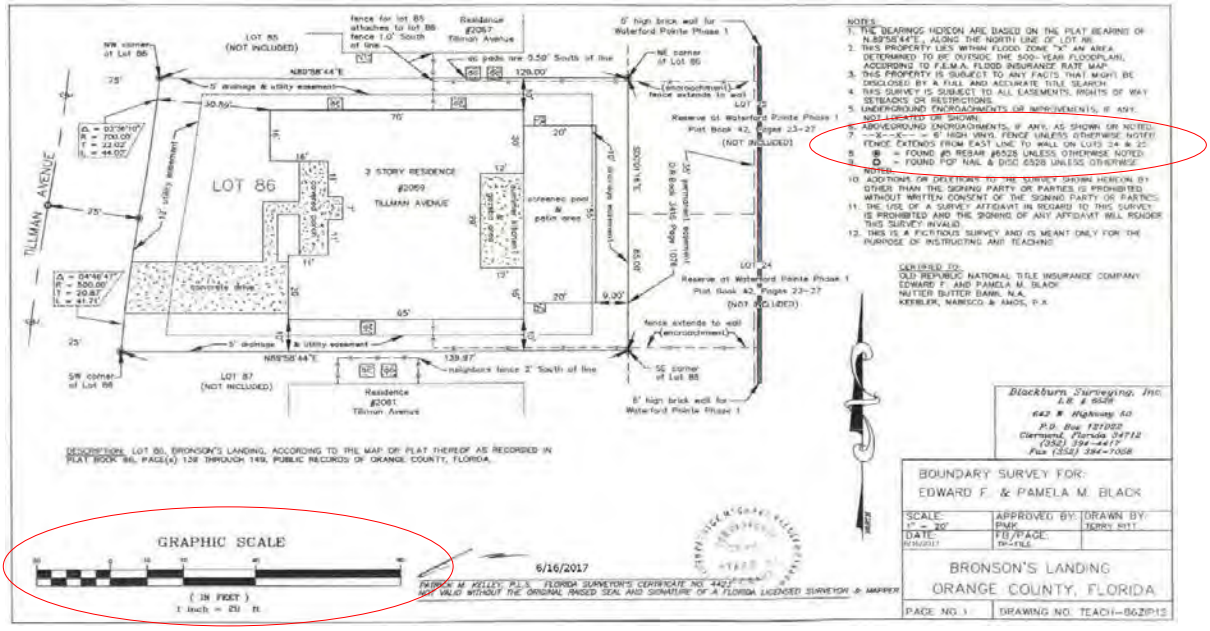
- ☐ Directional arrow located
- ☐ All symbols used on the map are defined in the legend
- ☐ Surveyor's notes have been read carefully
- ☐ Legal access confirmed
  - ☐ Map shows access to a known public road
  - ☐ Map shows access via private road
    - ☐ Verified that road connects to a public road

Essential Content

Directional Arrow



Symbols Defined

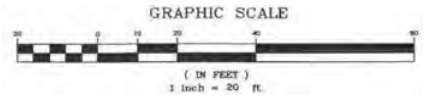


Legend

--X--X-- = 6' HIGH VINYL FENCE

◉ = FOUND#5 REBAR #6528

○ = FOUND PCP NAIL & DISC 6528

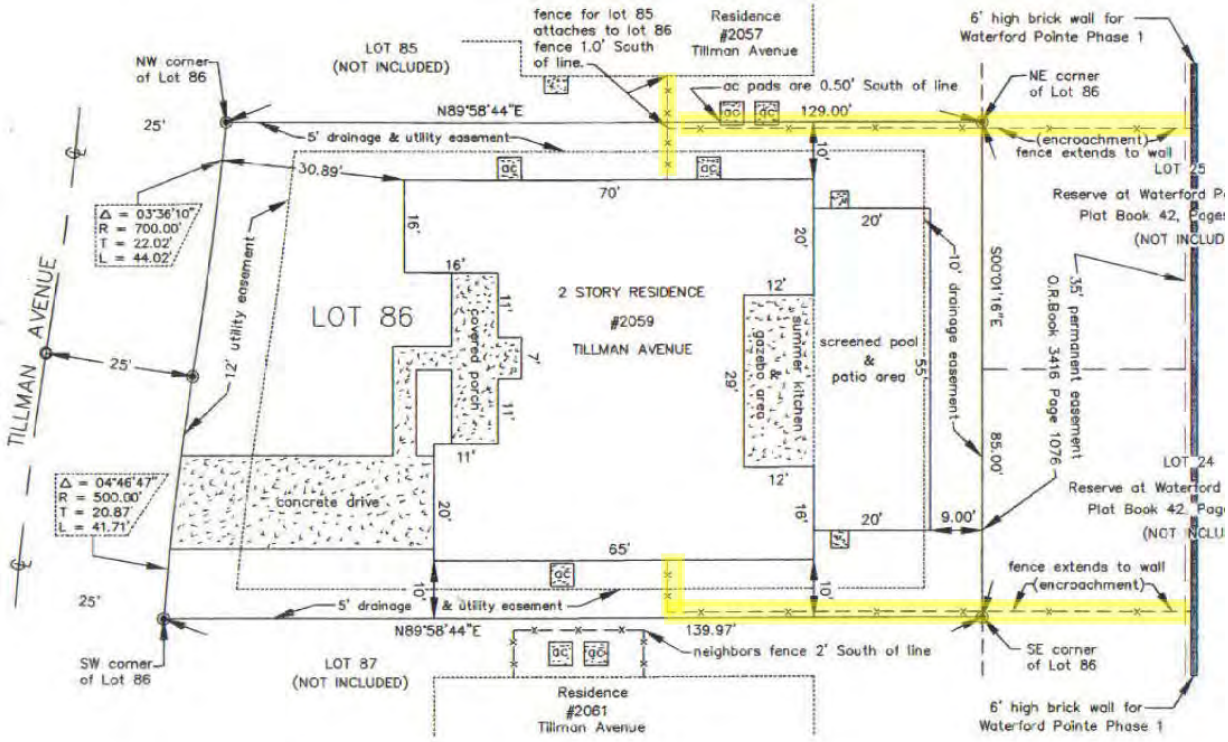


NOTES:

1. THE BEARINGS HEREON ARE BASED ON THE PLAT BEARING OF N.89°58'44"E., ALONG THE NORTH LINE OF LOT 86.
2. THIS PROPERTY LIES WITHIN FLOOD ZONE "X" AN AREA DETERMINED TO BE OUTSIDE THE 500-YEAR FLOODPLAIN, ACCORDING TO F.E.M.A. FLOOD INSURANCE RATE MAP.
3. THIS PROPERTY IS SUBJECT TO ANY FACTS THAT MIGHT BE DISCLOSED BY A FULL AND ACCURATE TITLE SEARCH.
4. THIS SURVEY IS SUBJECT TO ALL EASEMENTS, RIGHTS OF WAY SETBACKS OR RESTRICTIONS.
5. UNDERGROUND ENCROACHMENTS OR IMPROVEMENTS, IF ANY, NOT LOCATED OR SHOWN.
6. ABOVEGROUND ENCROACHMENTS, IF ANY, AS SHOWN OR NOTED.
7. --X--X-- = 6' HIGH VINYL FENCE UNLESS OTHERWISE NOTED. FENCE EXTENDS FROM EAST LINE TO WALL ON LOTS 24 & 25.
8. ◉ = FOUND #5 REBAR #6528 UNLESS OTHERWISE NOTED.
9. ○ = FOUND PCP NAIL & DISC 6528 UNLESS OTHERWISE NOTED.
10. ADDITIONS OR DELETIONS TO THE SURVEY SHOWN HEREON BY OTHER THAN THE SIGNING PARTY OR PARTIES IS PROHIBITED WITHOUT WRITTEN CONSENT OF THE SIGNING PARTY OR PARTIES.
11. THE USE OF A SURVEY AFFIDAVIT IN REGARD TO THIS SURVEY IS PROHIBITED AND THE SIGNING OF ANY AFFIDAVIT WILL RENDER THIS SURVEY INVALID.
12. THIS IS A FICTITIOUS SURVEY AND IS MEANT ONLY FOR THE PURPOSE OF INSTRUCTING AND TEACHING.

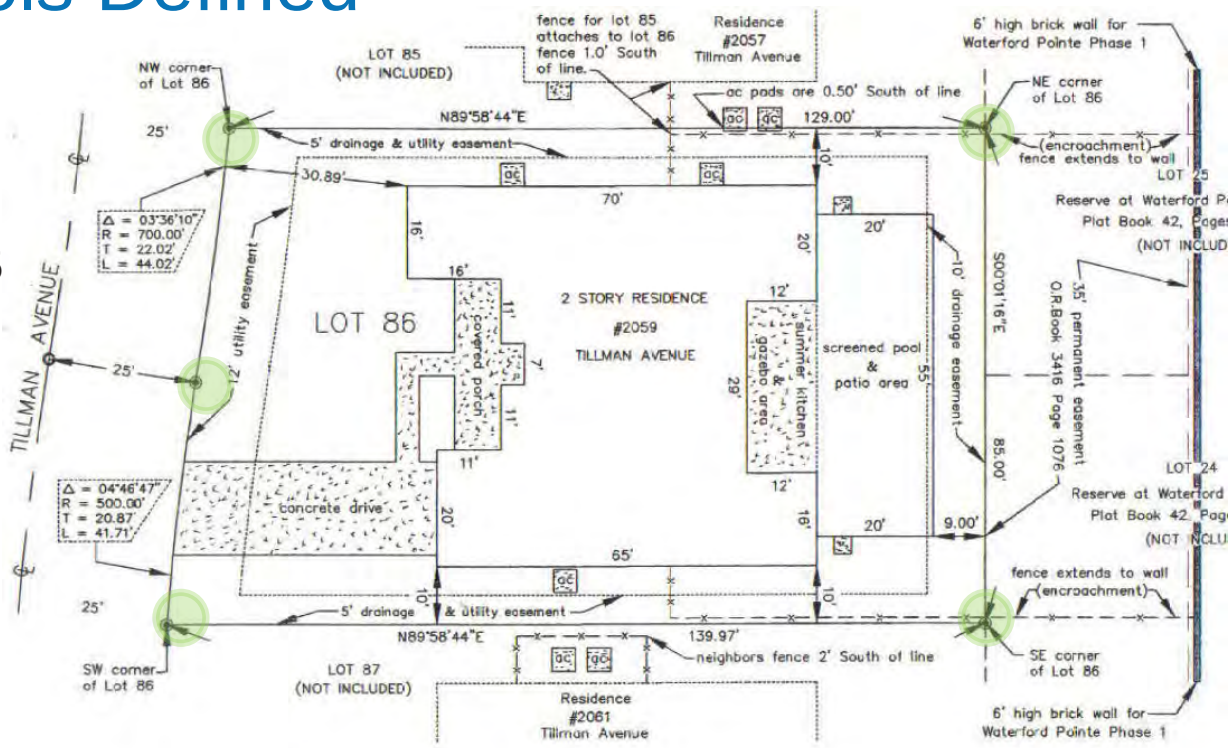
Symbols Defined

6’ HIGH VINYL FENCE



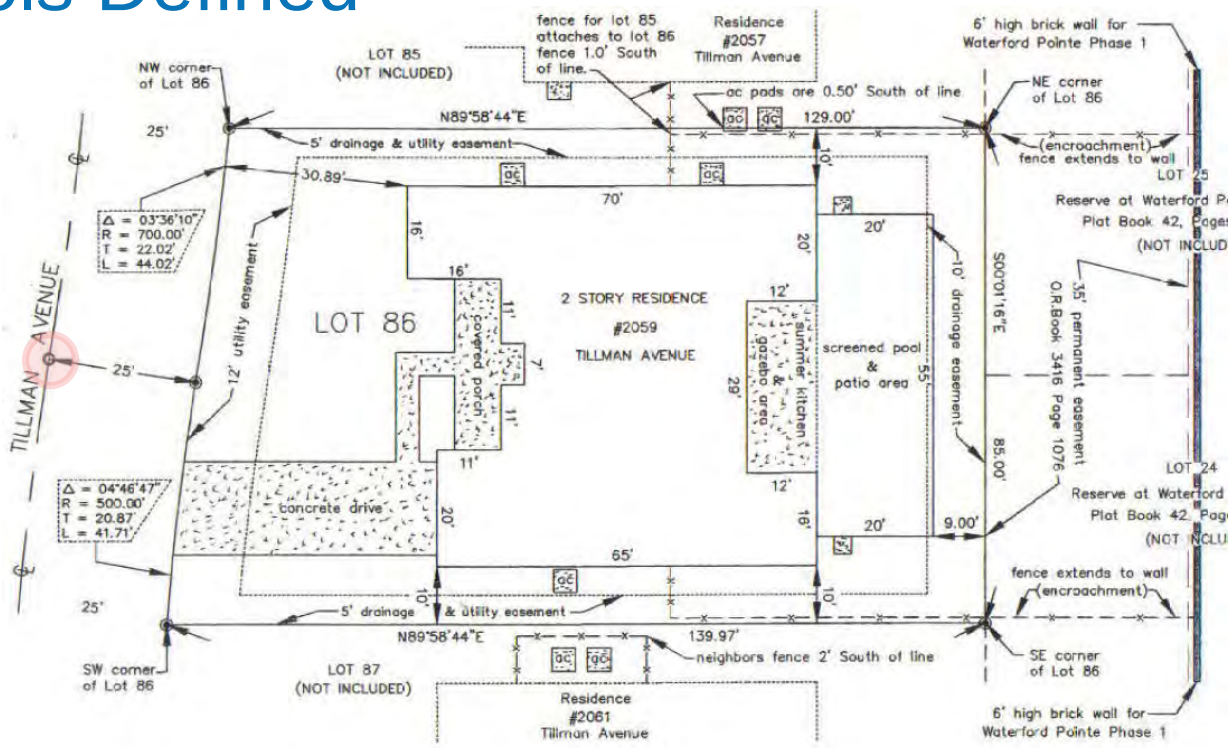
Symbols Defined

FOUND#5
REBAR
#6528



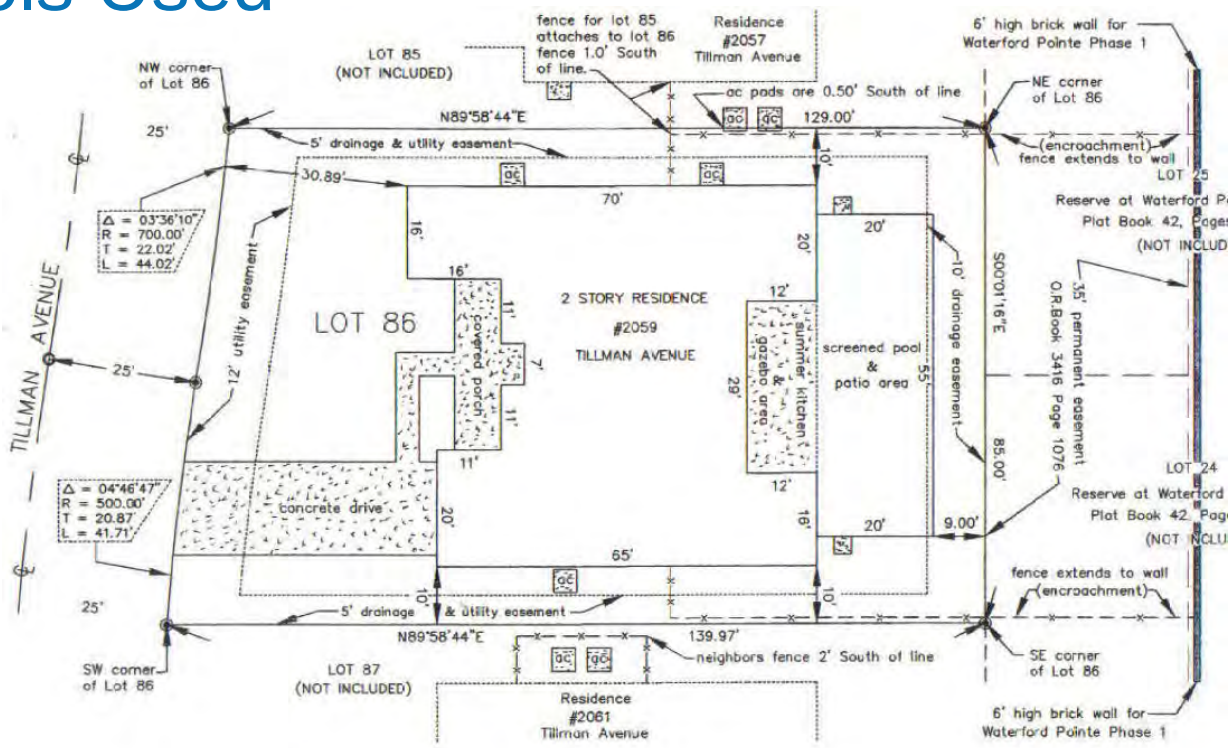
Symbols Defined

FOUND
PCP
NAIL &
DISC
6528

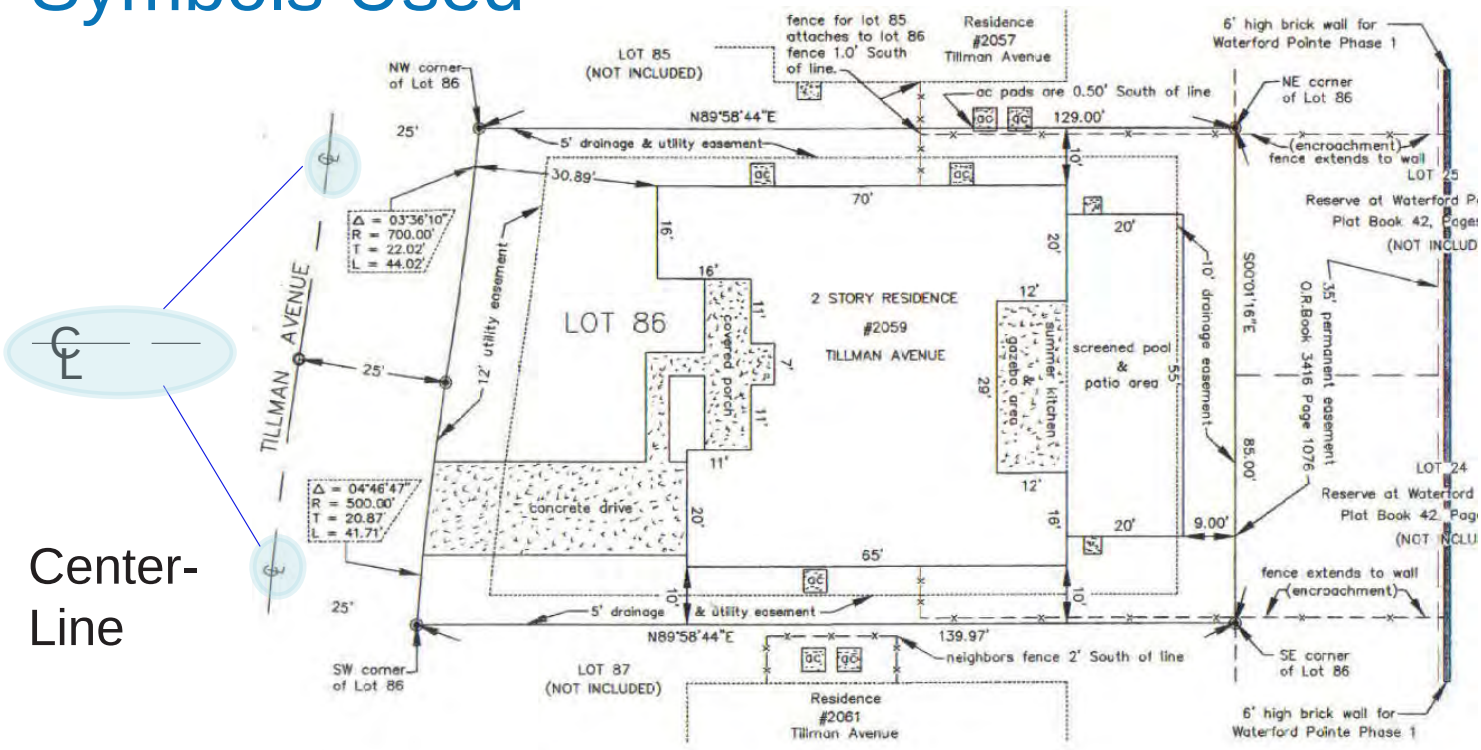


Symbols Used

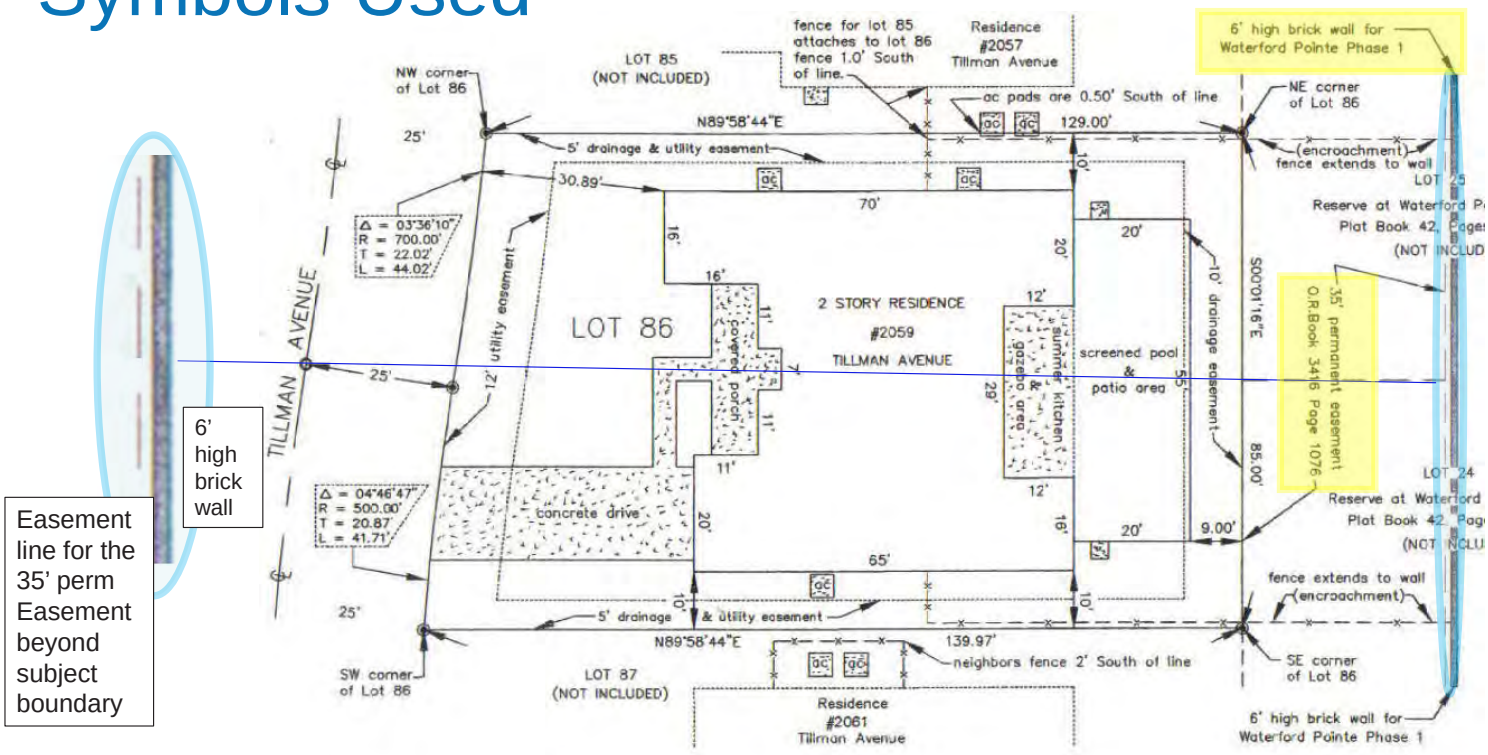
Are there symbols on the map that did not appear on the legend?



Symbols Used



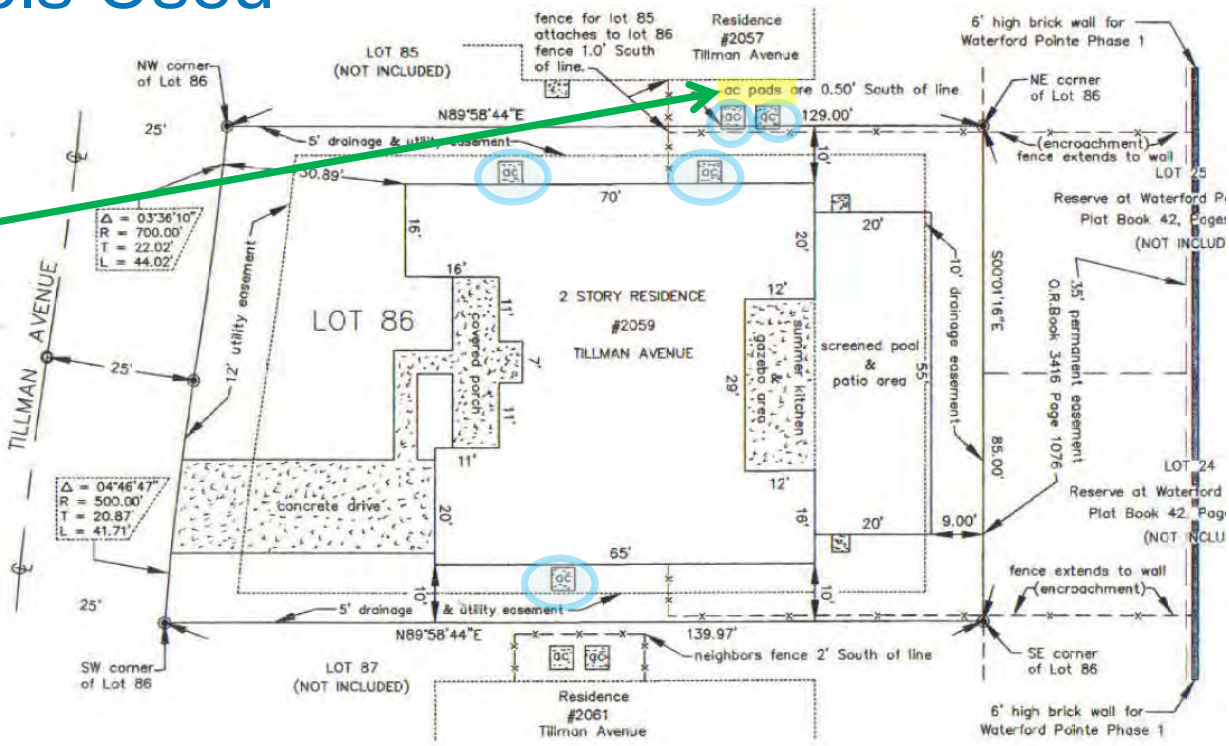
Symbols Used



Symbols Used

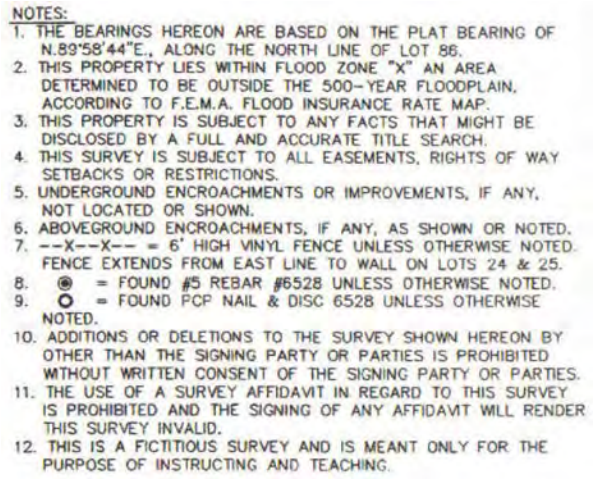
ac

ac pads – Concrete slab for Air Conditioner



Notes

1. The bearings on the survey are based on the plat bearing of N 89º 56’ 44” E, along the north line of lot 86
2. Flood Zone X
3. Subject to any facts a title search would show
4. Subject to all easements, R-O-W, setbacks or restrictions*



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4. THIS SURVEY IS SUBJECT TO ALL EASEMENTS, RIGHTS OF WAY SETBACKS OR RESTRICTIONS.
5. UNDERGROUND ENCROACHMENTS OR IMPROVEMENTS, IF ANY, NOT LOCATED OR SHOWN.
6. ABOVEGROUND ENCROACHMENTS, IF ANY, AS SHOWN OR NOTED.
7. --X--X-- = 6' HIGH VINYL FENCE UNLESS OTHERWISE NOTED. FENCE EXTENDS FROM EAST LINE TO WALL ON LOTS 24 & 25.
8. ◉ = FOUND #5 REBAR #6528 UNLESS OTHERWISE NOTED.
9. O = FOUND PCP NAIL & DISC 6528 UNLESS OTHERWISE NOTED.
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Practice Tip

Before signing the commitment, review the BII items and make a note of any that will need to be contemplated when you review the survey.

Send the commitment to the surveyor and ask that all easements and setbacks be shown on the survey

Commitment

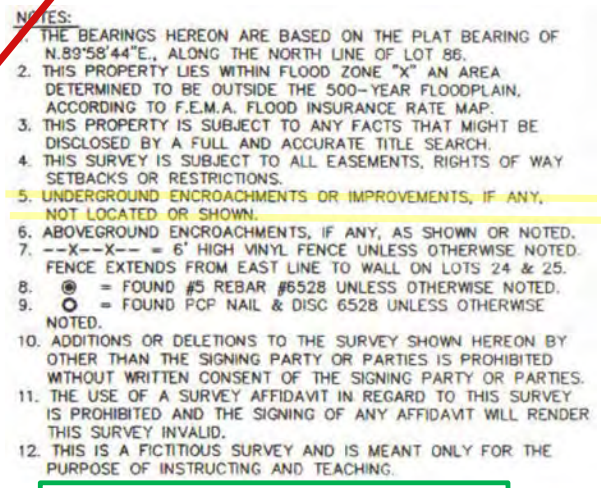
5. All matters contained on the Plat of Bronson's Landings, as recorded in Plat Book 66, Page 139, Public Records of Orange County, Florida. Surveyor must show matters from the plat – we must compare
6. Surveyor's Affidavit recorded in Official Records Book 9361, Page 4281, Public Records of Orange County, Florida. Relates to calls in the metes & bounds on plat – no effect on survey
7. Development Agreement recorded July 8,2002, in Official Records Book 6560, Page 9077, Public Records of Orange County, Florida (hereinafter "Development Agreement"). Such Development Agreement may establish and provide without limitation for restrictions regarding land use and development. Not survey related
8. Use Agreement recorded March 21, 2006, in Official Records Book 8539, Page 4387, Public Records of Orange County, Florida (hereinafter "Use Agreement"). Such Use Agreement may establish and provide without limitation for obligations pertaining to landscaping, irrigation, and maintenance of paved roads and pavement markings. Not survey related
9. Covenants, conditions, rights, assessments, easements and restrictions recorded September 18, 2006, in Official Records Book 8865, Page 1636, Public Records of Orange County, Florida (hereinafter "Declaration"). Such Declaration may establish and provide without limitation for easements, liens, charges, and/or assessments.

#9 Authorizes developer and association to grant easements, but does not create any - No effect on survey.

Notes

5. No underground matters shown
6. All aboveground encroachments are shown or noted
7. Fence (symbol defined) extends beyond east line to wall on Lots 24 & 25**
8. Defined found rebar symbol
9. Defined found nail & disc symbol
10. Prohibits modification except by surveyor
11. Prohibits use of a survey affidavit
12. For educational purposes only

This must be part of the specific survey exception



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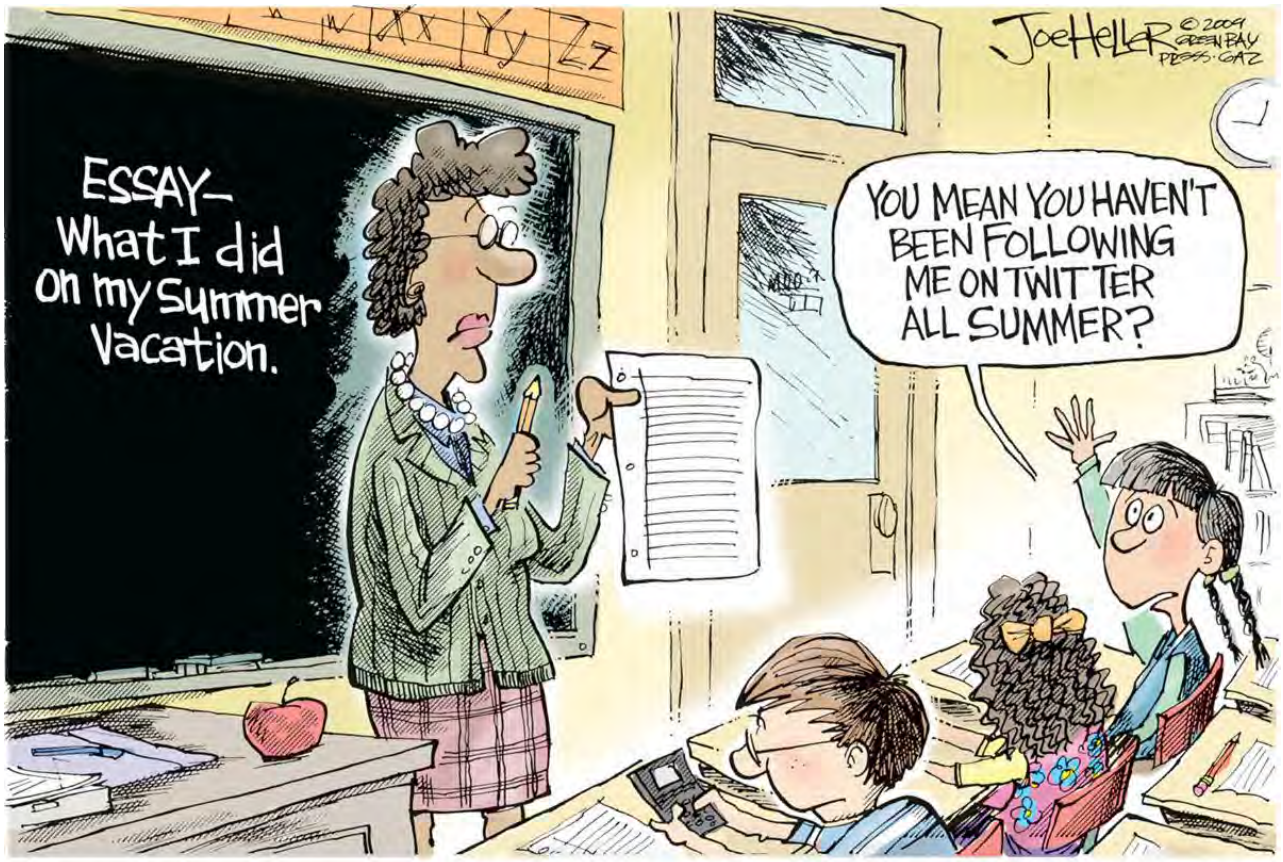
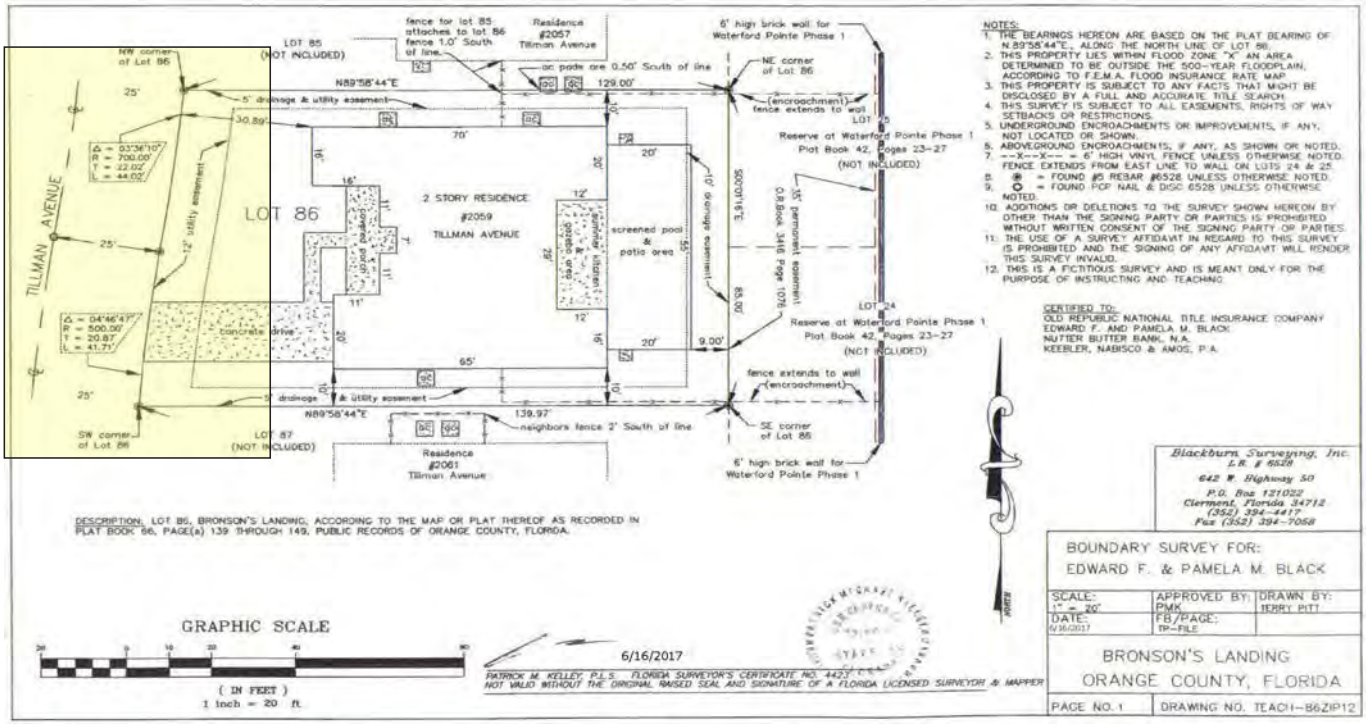
The Fund often allows reliance on an affidavit of no changes in spite of such a limitation on the face of the survey


ESSAY–
What I did
on my summer
vacation.
YOU MEAN YOU HAVEN'T
BEEN FOLLOWING
ME ON TWITTER
ALL SUMMER?
JoeHeller
©2009
GREEN BAY
PRESS-GAZ

Legal Access

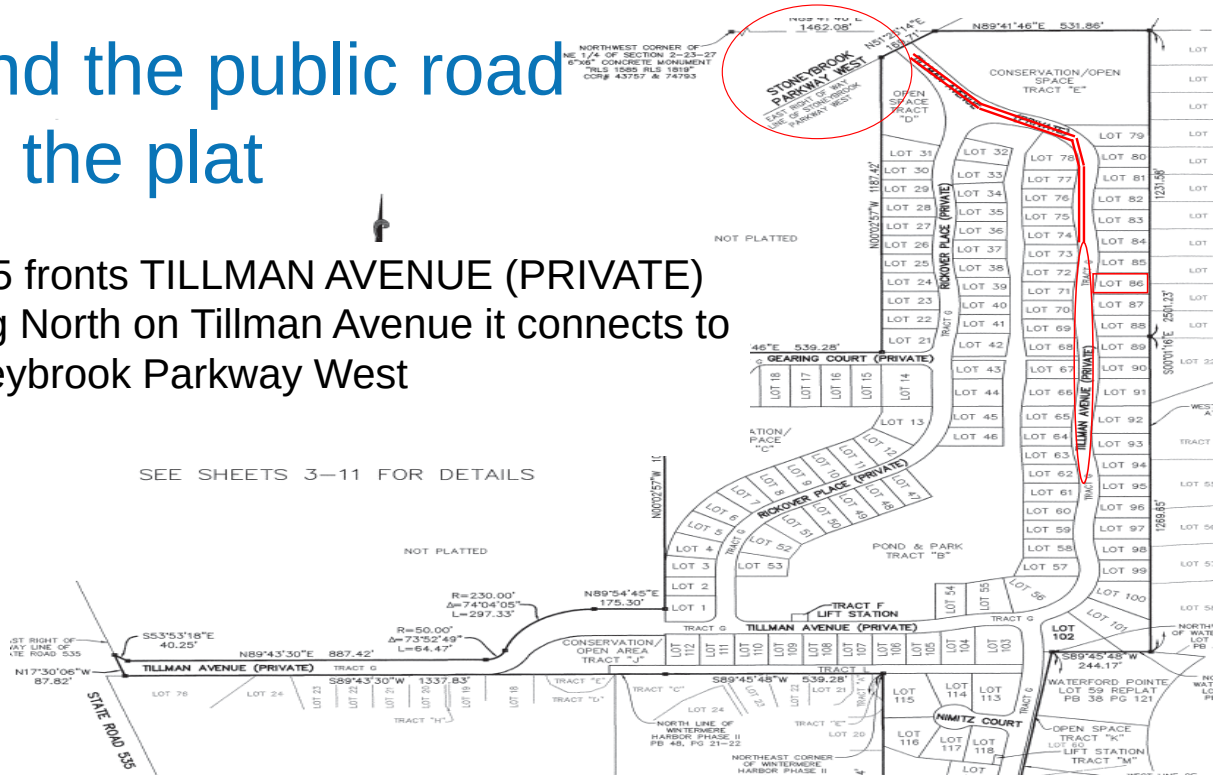


Is Tillman Ave public?

- ☑ Directional arrow located
- ☑ All symbols used on the map are defined in the legend
- ☑ Surveyor's notes have been read carefully
- ☐ Legal access confirmed
  - ☐ Map shows access to a known public road
  - ☐ Map shows access via private road
    - ☐ Verified that road connects to a public road

Find the public road on the plat

Lot 85 fronts TILLMAN AVENUE (PRIVATE)
Going North on Tillman Avenue it connects to Stoneybrook Parkway West

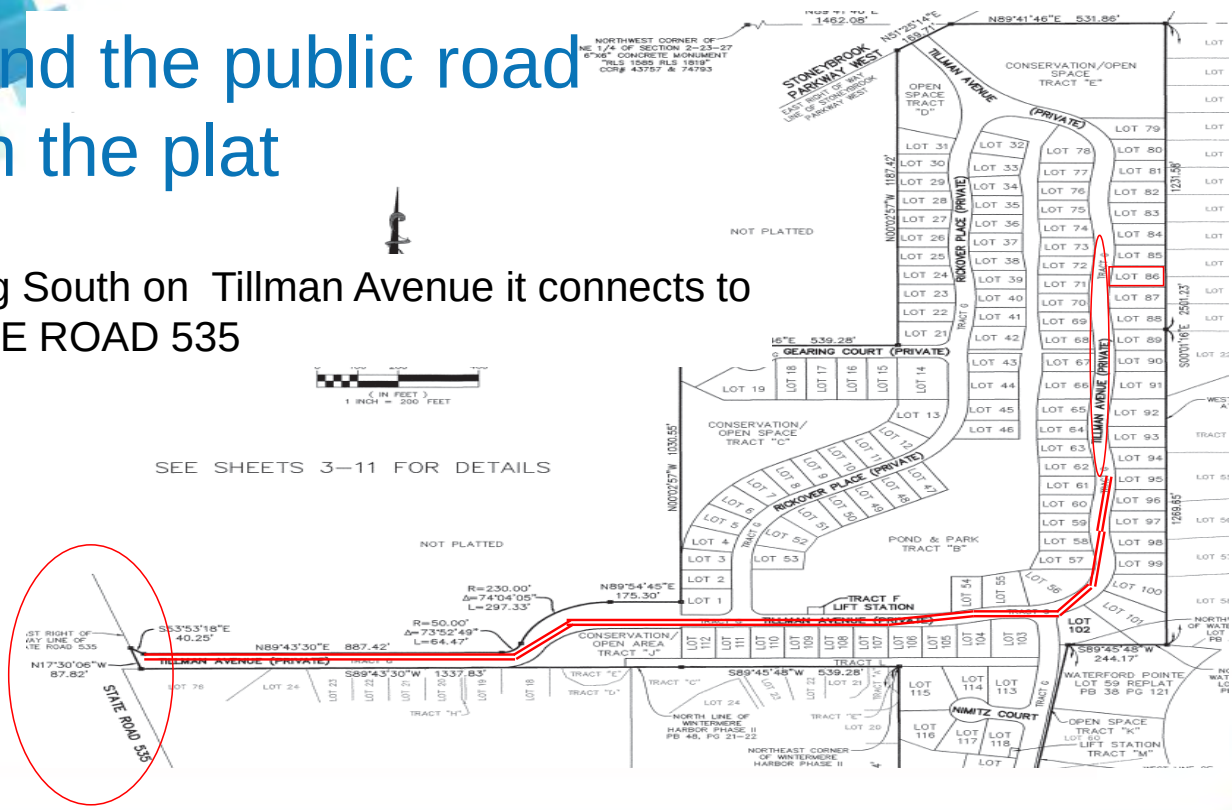


Is Stoneybrook Parkway West a public road?

County Roads Department
State Department of Transportation

Find the public road on the plat

Going South on Tillman Avenue it connects to STATE ROAD 535



I'm so
excited!

- [x] Directional arrow located
- [x] All symbols used on the map are defined in the legend
- [x] Surveyor's notes have been read carefully
- [x] Legal access confirmed
  - [ ] Map shows access to a known public road
  - [x] Map shows access via private road
    - [x] Verified that road connects to a public road

Essential Content

Back to Speaker Topics

Check the Legal Description

LEGAL DESCRIPTION ACCURACY

Legal description matches the

- ☐ Last deed of record*

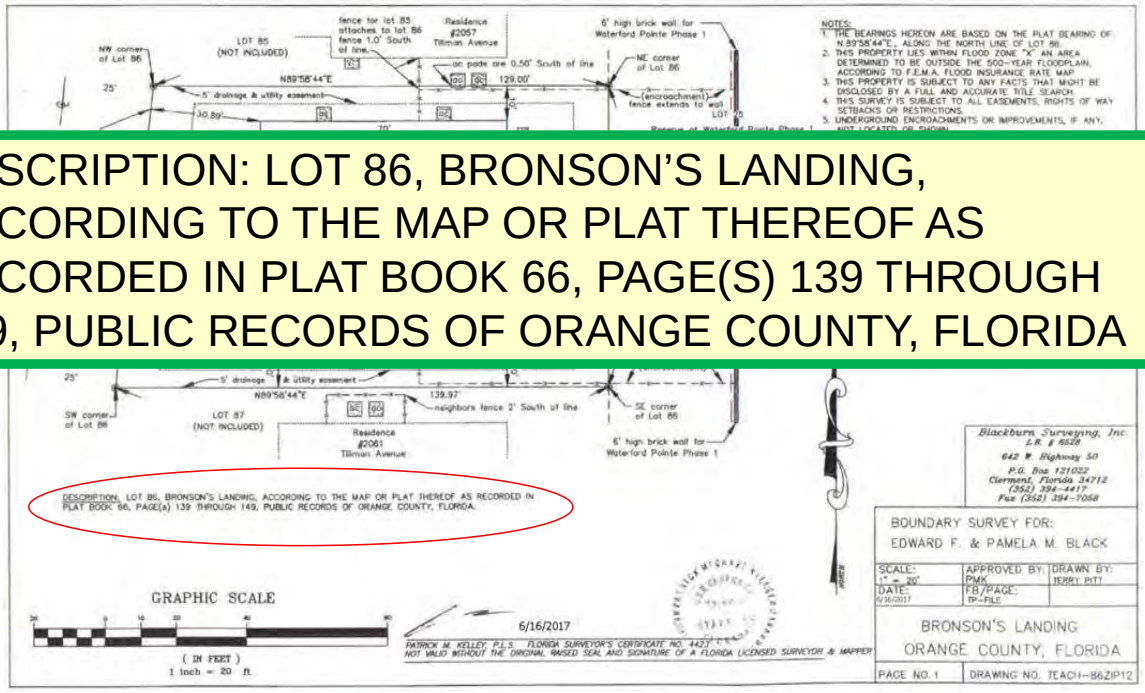
*If the survey legal matches the proposed-insured legal, but not the last deed of record, contact Fund Underwriting Counsel. A surveyor's affidavit will presumptively be required.

- ☐ Title commitment
- ☐ Proposed-insured documents

☐ The drawing correctly maps the metes and bounds description

☐ The drawing matches the recorded plat

Proof the words
and
Check the map


DESCRIPTION: LOT 86, BRONSON'S LANDING, ACCORDING TO THE MAP OR PLAT THEREOF AS RECORDED IN PLAT BOOK 66, PAGE(S) 139 THROUGH 149, PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA
NOTES:
1. THE BEARINGS HEREON ARE BASED ON THE PLAT BEARING OF N 89°58'44"E., ALONG THE NORTH LINE OF LOT 86.
2. THIS PROPERTY LIES WITHIN FLOOD ZONE "X" AN AREA DETERMINED TO BE OUTSIDE THE 500-YEAR FLOODPLAIN, ACCORDING TO F.E.M.A. FLOOD INSURANCE RATE MAP.
3. THIS PROPERTY IS SUBJECT TO ANY FACTS THAT MIGHT BE DISCLOSED BY A FULL AND ACCURATE TITLE SEARCH.
4. THIS SURVEY IS SUBJECT TO ALL EASEMENTS, RIGHTS OF WAY SETBACKS OR RESTRICTIONS.
5. UNDERGROUND ENCROACHMENTS OR IMPROVEMENTS, IF ANY,
Blackburn Surveying, Inc.
L.B. # 6628
642 W. Highway 50
P.O. Box 121032
Clermont, Florida 34712
(352) 394-4417
Fax (352) 394-7058
BOUNDARY SURVEY FOR:
EDWARD F. & PAMELA M. BLACK
SCALE: 1" = 20'
APPROVED BY: PMK
DRAWN BY: TERRY PITT
DATE: 6/16/2017
FB/PAGE: TP-FILE
BRONSON'S LANDING
ORANGE COUNTY, FLORIDA
PAGE NO. 1
DRAWING NO. TEACH-86ZIP12
GRAPHIC SCALE
(IN FEET)
1 inch = 20 ft.
6/16/2017
PATRICK M. KELLEY, P.L.S. FLORIDA SURVEYOR'S CERTIFICATE NO. 4427
NOT VALID WITHOUT THE ORIGINAL RAISED SEAL AND SIGNATURE OF A FLORIDA LICENSED SURVEYOR & MAPPER

Proofing the legal description

LEGAL DESCRIPTION ACCURACY

Legal description matches the

- ☐ Last deed of record*

*If the survey legal matches the proposed-insured legal, but not the last deed of record, contact Fund Underwriting Counsel. A surveyor's affidavit will presumptively be required.

- ☐ Title commitment
- ☐ Proposed-insured documents

☐ The drawing correctly maps the metes and bounds description

☐ The drawing matches the recorded plat

Take a team approach, with one person reading from the source and another person reading the item being checked

Practice Tip

Before signing the commitment, proof the legal description to the last deed of record.

When the survey is delivered, proof the legal to the previously-proofed commitment

Proofing the legal description

LEGAL DESCRIPTION ACCURACY

Legal description matches the

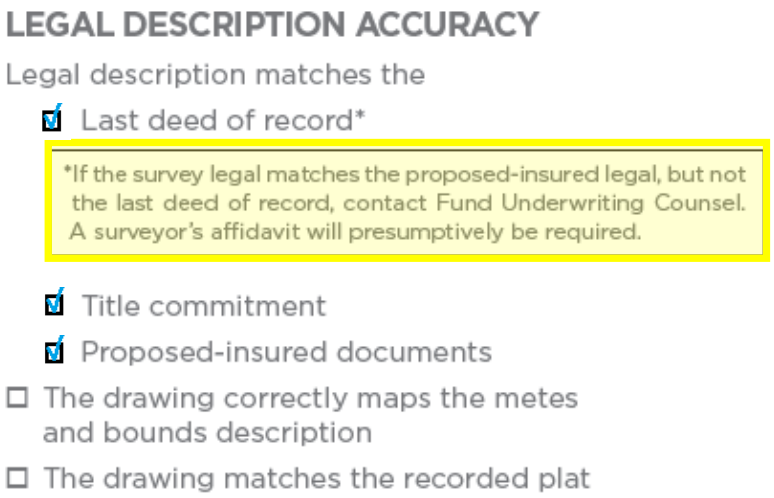
- ☑ Last deed of record*

> *If the survey legal matches the proposed-insured legal, but not the last deed of record, contact Fund Underwriting Counsel. A surveyor's affidavit will presumptively be required.

- ☑ Title commitment
- ☑ Proposed-insured documents
- ☐ The drawing correctly maps the metes and bounds description
- ☐ The drawing matches the recorded plat

Read from the now-confirmed accurate survey to check the buyer's deed

Proofing the legal description



LEGAL DESCRIPTION ACCURACY

Legal description matches the

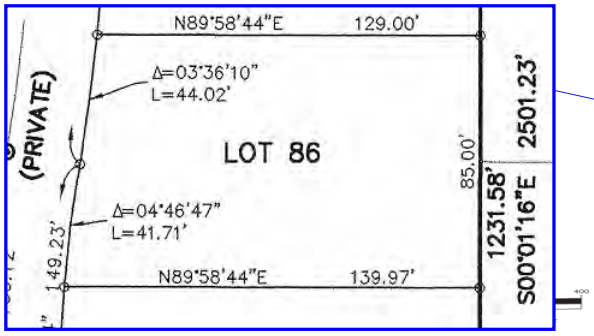
- ☑ Last deed of record*

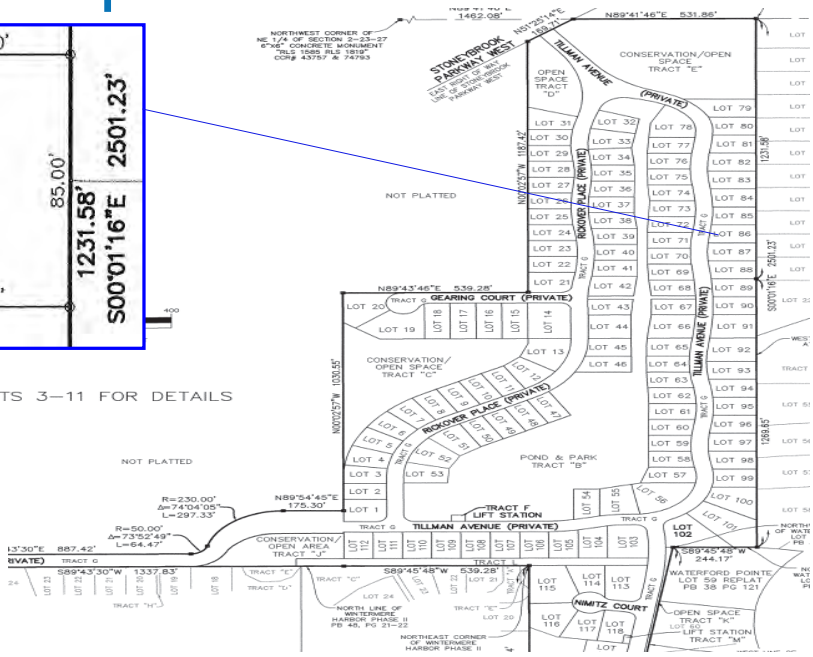
*If the survey legal matches the proposed-insured legal, but not the last deed of record, contact Fund Underwriting Counsel. A surveyor's affidavit will presumptively be required.

- ☑ Title commitment
- ☑ Proposed-insured documents
- ☐ The drawing correctly maps the metes and bounds description
- ☐ The drawing matches the recorded plat

NOTE:
if the deed legal did not match your commitment legal, and now you have a survey supporting the proposed-insured legal, contact Underwriting

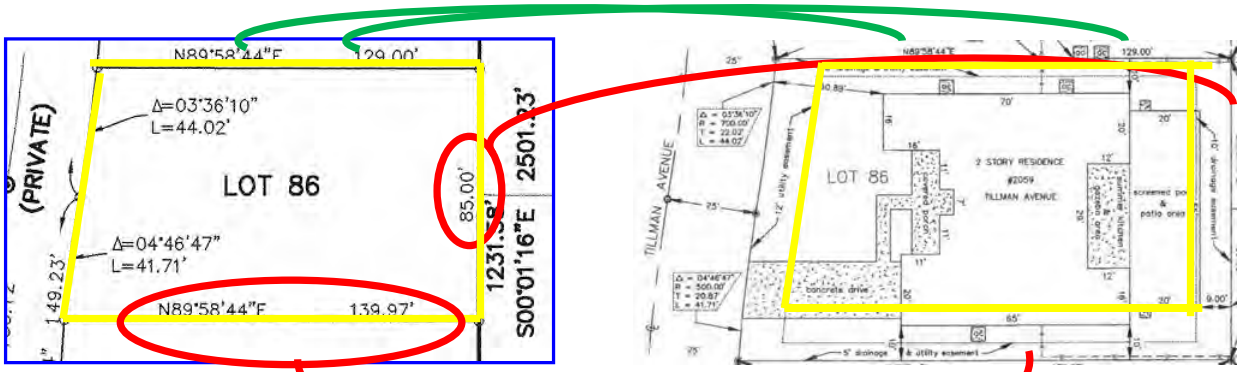
Checking the map – Lot/Block





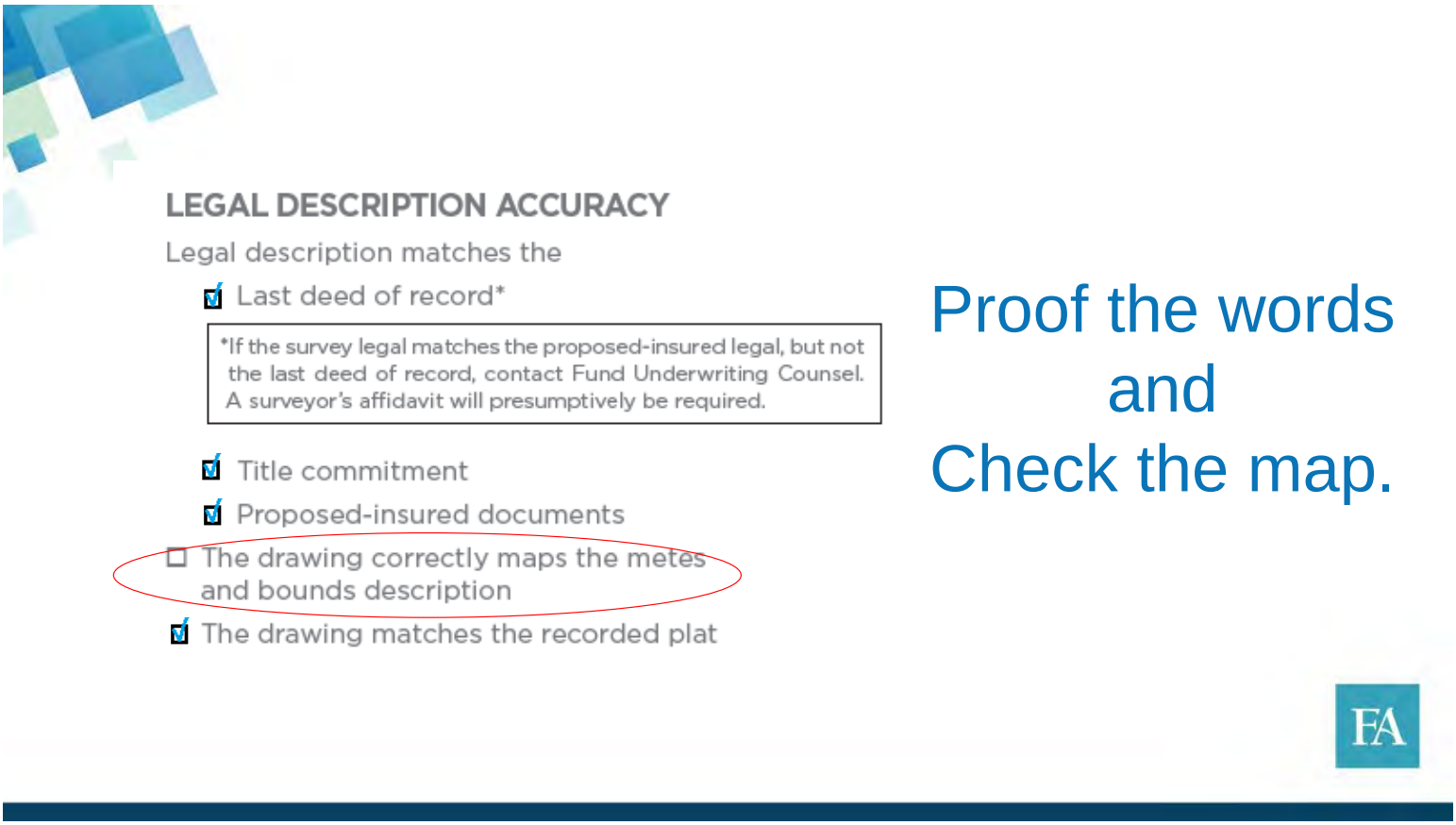
Lot/block legal can be verified by simply locating the lot# on the plat

Compare plat to survey



Confirm that:
shape matches
calls/distances shown on survey match
survey doesn't have conflicting information

NOTE: for a platted lot, it is acceptable for the survey not to show all calls/distances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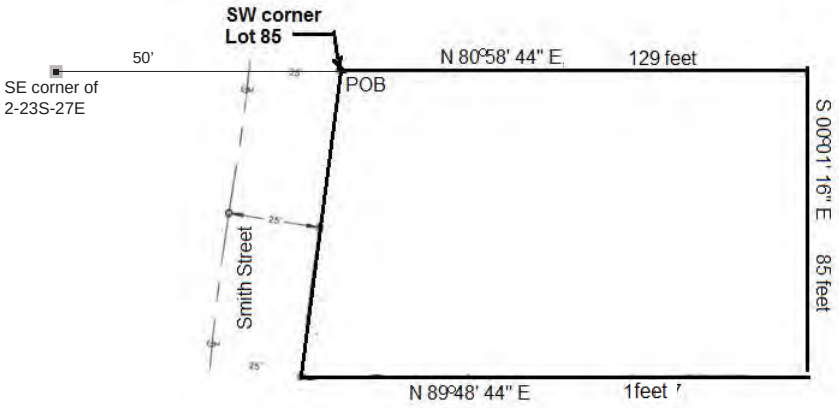
Legal description matches the
Last deed of record*
*If the survey legal matches the proposed-insured legal, but not the last deed of record, contact Fund Underwriting Counsel. A surveyor's affidavit will presumptively be required.
Title commitment
Proposed-insured documents
The drawing correctly maps the metes and bounds description
The drawing matches the recorded plat
Proof the words
and
Check the map.

Checking the map – metes & bounds

Metes and bounds description requires another team approach; one person reading the legal while the other person follows those calls in the actual drawing

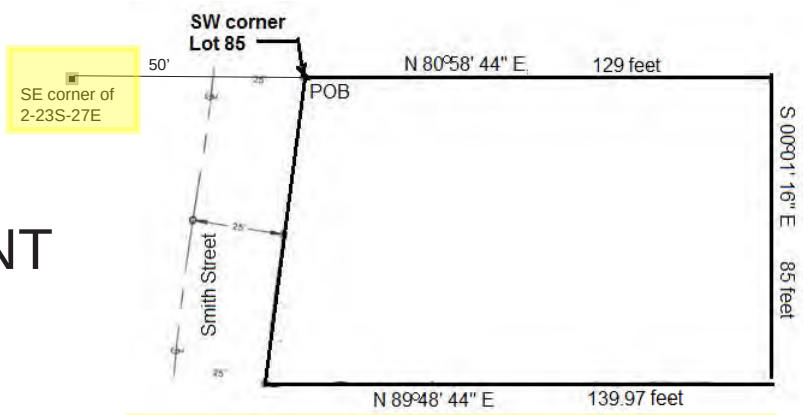


Commence at the SE corner of Section 2, Township 23 South, Range 27 East, and go N 80º 58’ 44” E, 50 feet to the SW corner of Lot 85 of Jalynn’s addition being the POINT OF BEGINNING, thence continue N 80º 58’ 44” E, a distance of 129 feet, thence S 00º 01’ 16” E, a distance of 85 feet, thence N 89º 48’ 44” E, a distance of 139.97 feet, thence N along the ROW of Smith Street, to the POINT OF BEGINNING.

Checking the map – metes & bounds

POINT OF COMMENCEMENT

Commence at the SE corner of 2-23S-27E



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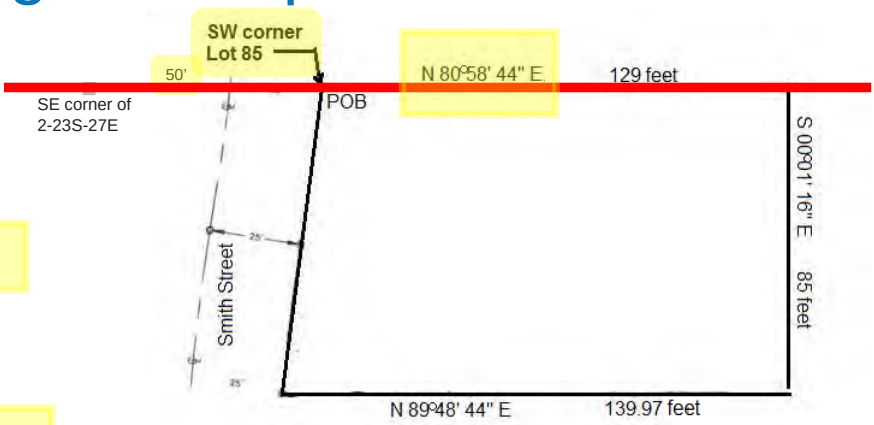
Checking the map – metes & bounds

Go
N 80º 58’ 44” E,
50 feet
to the
SW corner of Lot 85



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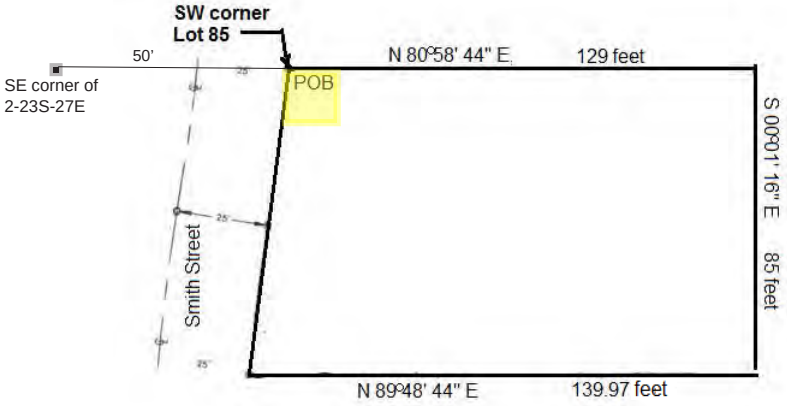
Checking the map – metes & bounds

POINT OF BEGINNING



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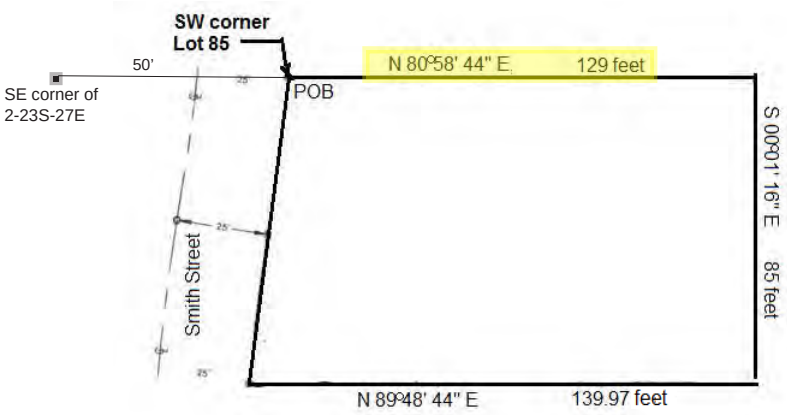
Checking the map – metes & bounds

NORTH LINE:

Go
N 80º 58’ 44” E,
a distance of
129 feet



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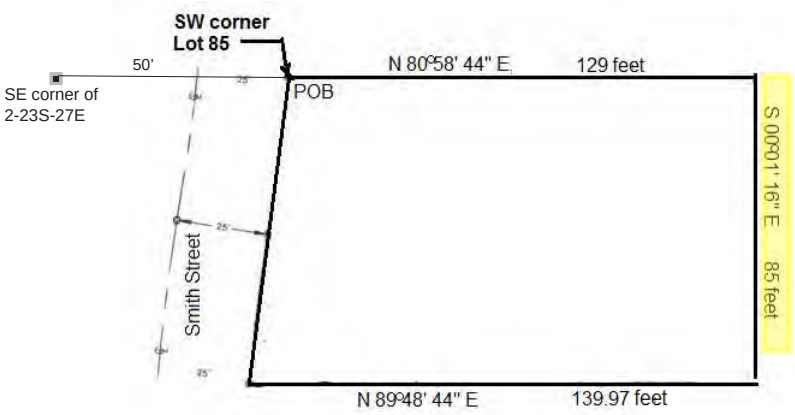
Checking the map – metes & bounds

EAST LINE:

Go
N 00º 01’ 16” E,
a distance of
129 feet



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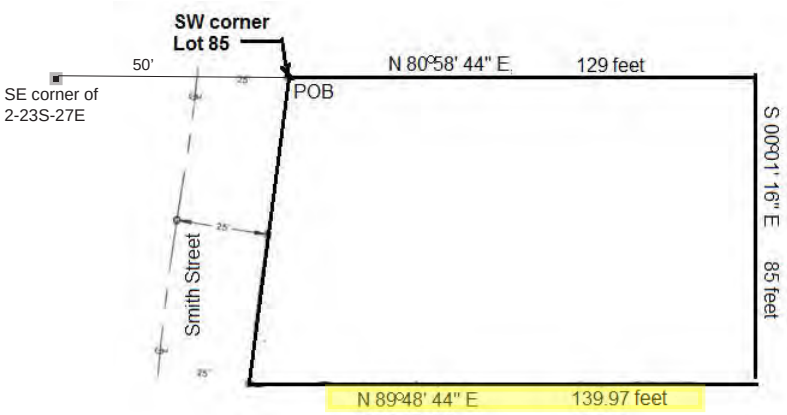
Checking the map – metes & bounds

SOUTH LINE:

Go
N 89º 48’ 44” E,
a distance of
139.97 feet



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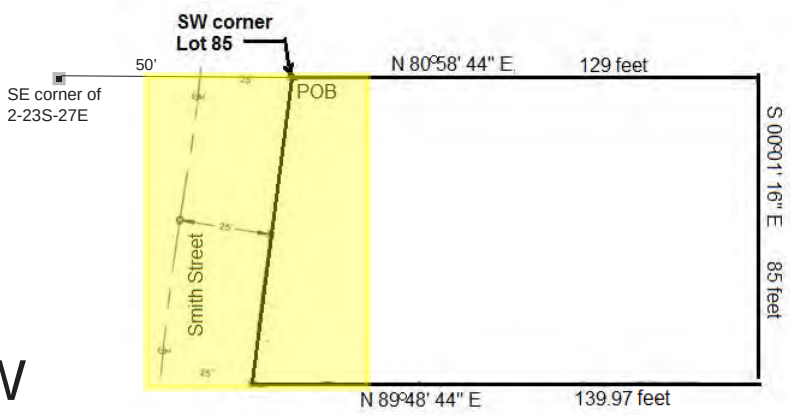
Checking the map – metes & bounds

WEST LINE:

Go
N along the ROW
to the POB



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Locate the easements and setback lines

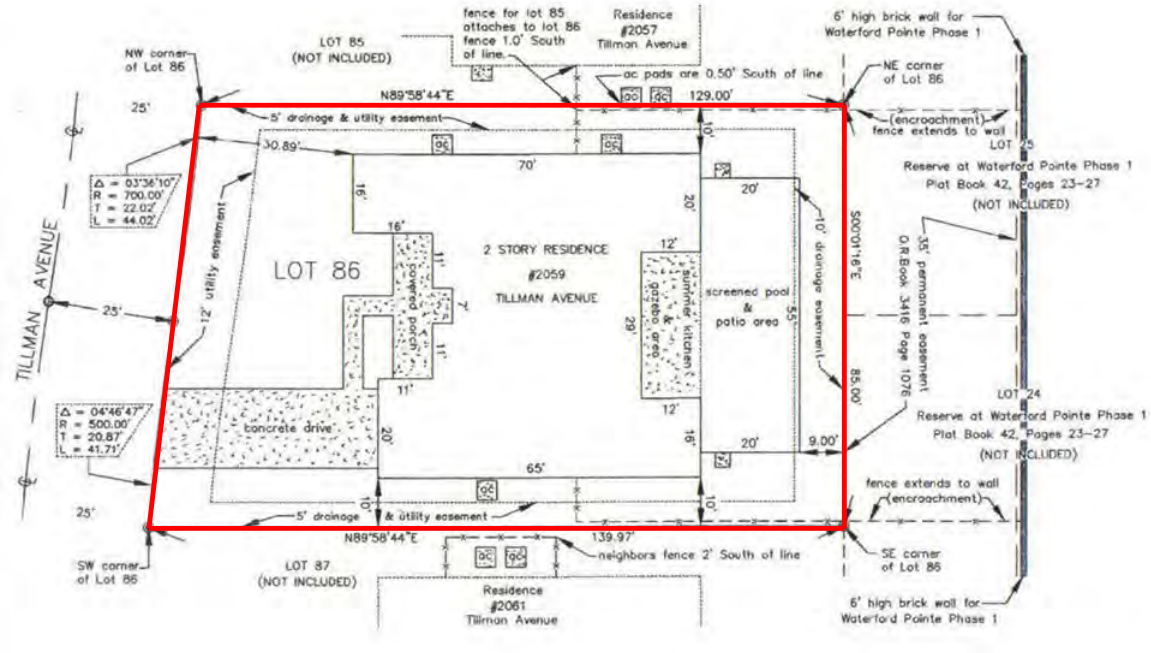
Please take a moment to review survey

DRAWING IDENTIFIES ESSENTIAL FEATURES

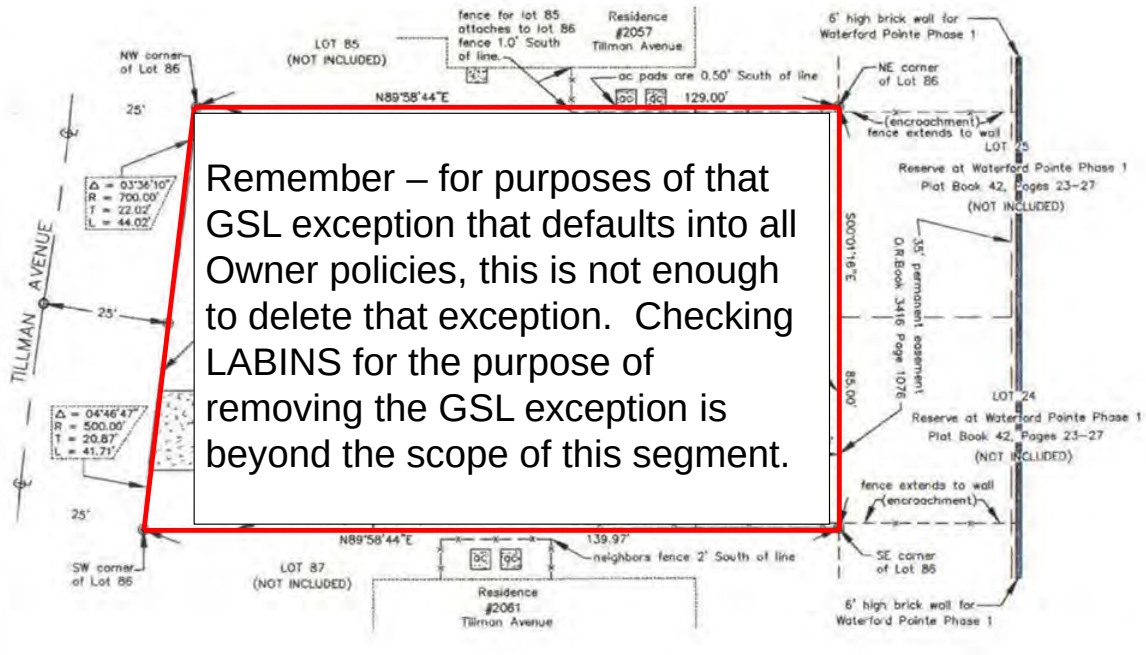
- ☐ Boundary lines
- ☐ Any body of water
- ☐ Other natural and manufactured objects affecting the property
- ☐ Easements of any kind
- ☐ Rights-of-way
- ☐ Platted building setback lines
- ☐ Improvements of any kind

What to locate

Boundary lines



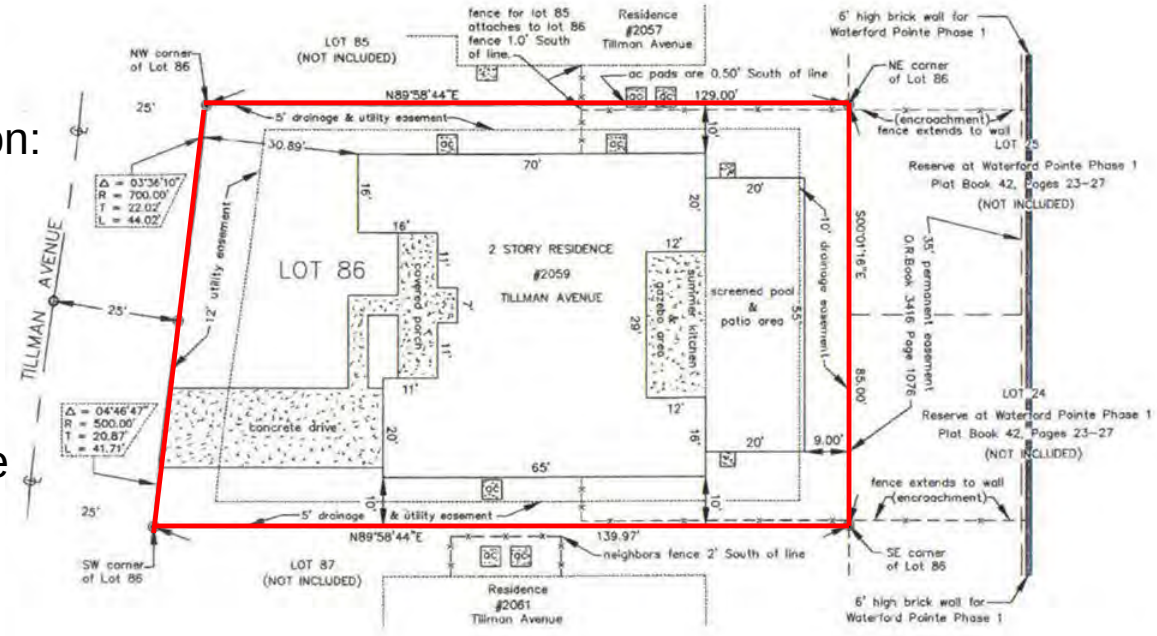
Any body of water - none



Remember – for purposes of that GSL exception that defaults into all Owner policies, this is not enough to delete that exception. Checking LABINS for the purpose of removing the GSL exception is beyond the scope of this segment.

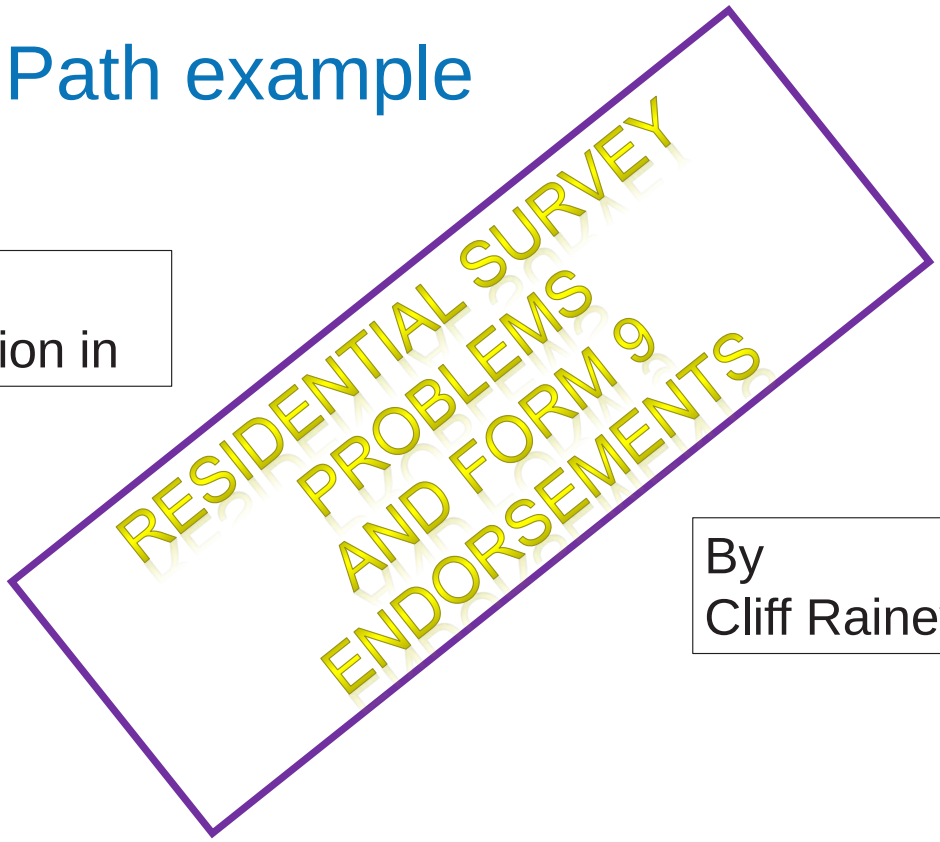
Other natural and manufactured objects affecting the property - none

Special Consideration:
Railroad
Cell tower
Billboard
Worn path
Tent
Mobile home



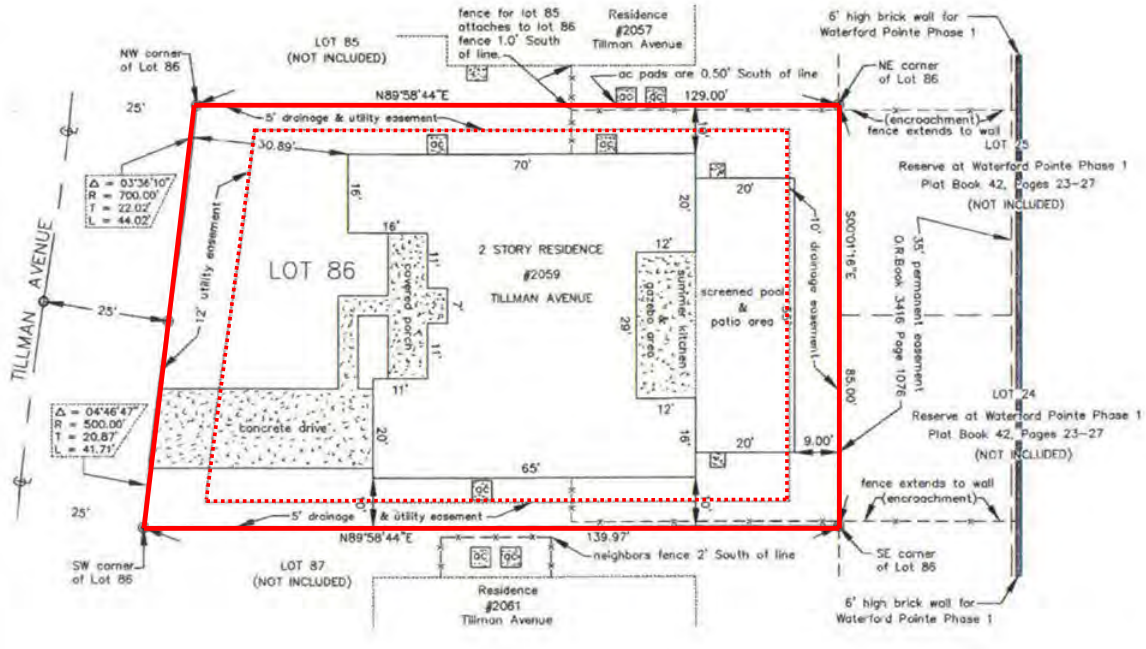
Worn Path example

Further discussion in

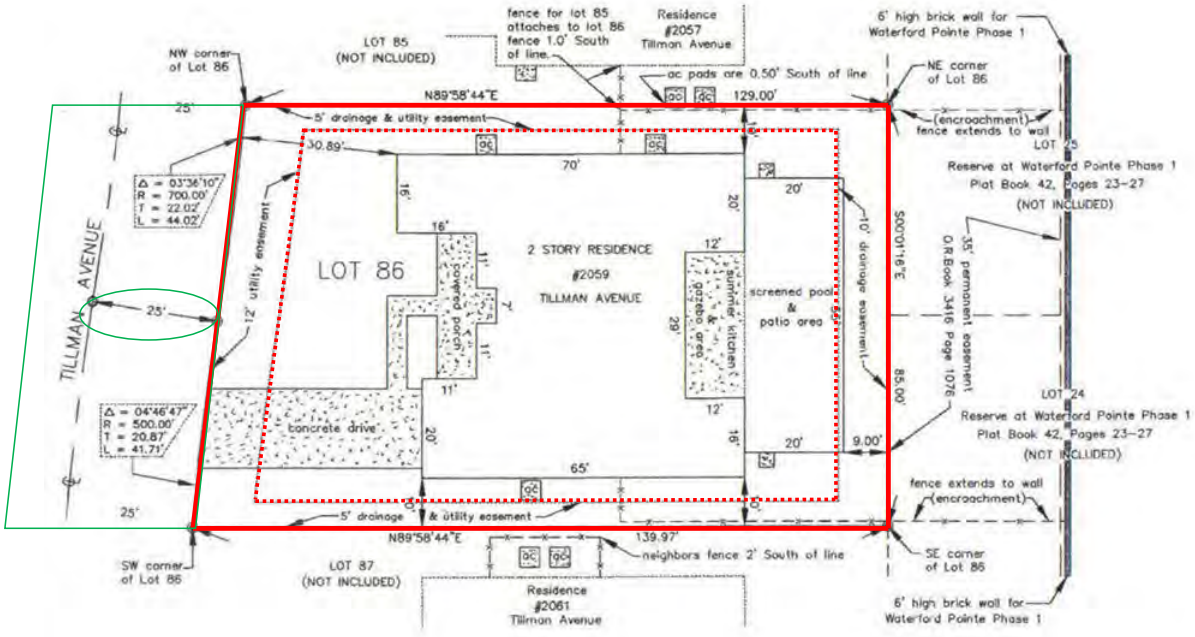


By
Cliff Rainey

Four different easements



Rights of Way



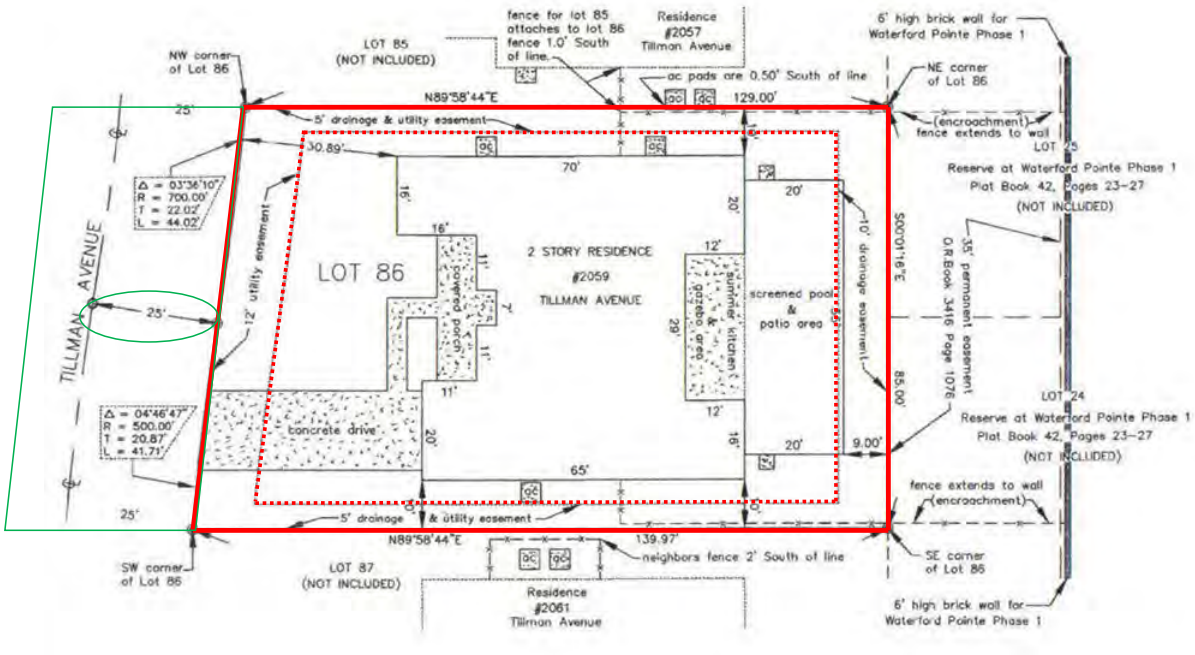
Rights of Way

Further discussion in

RESIDENTIAL SURVEY PROBLEMS AND FORM 9 ENDORSEMENTS

By
Cliff Rainey

Platted setback lines - none



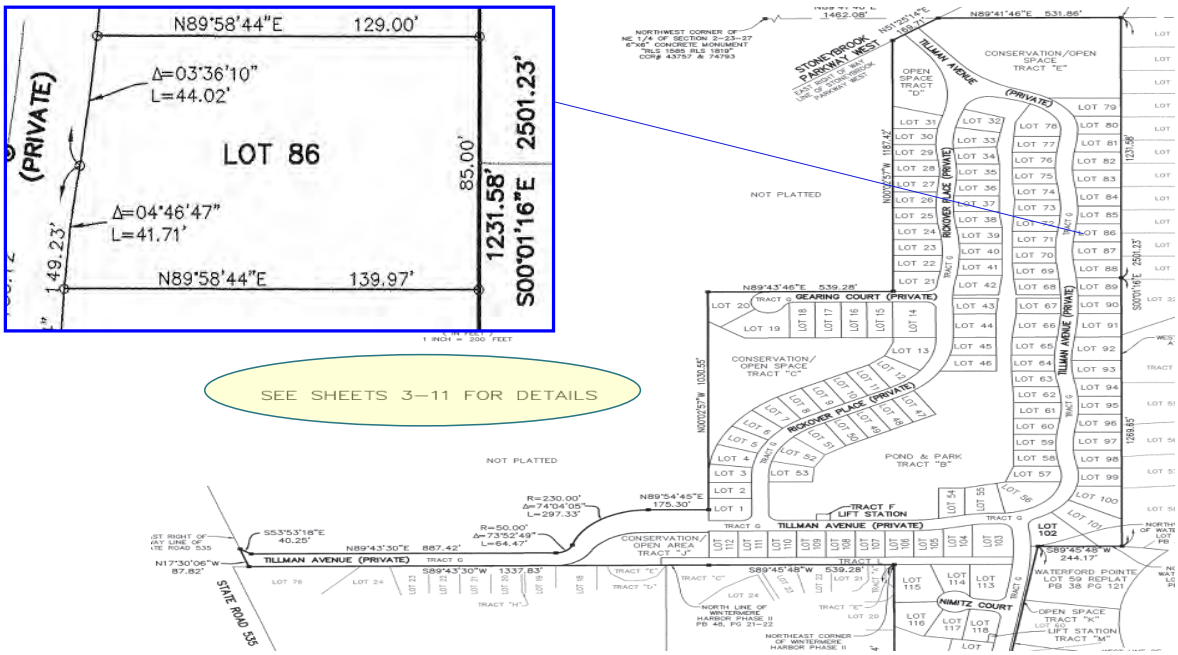
Platted setback lines

Further discussion in

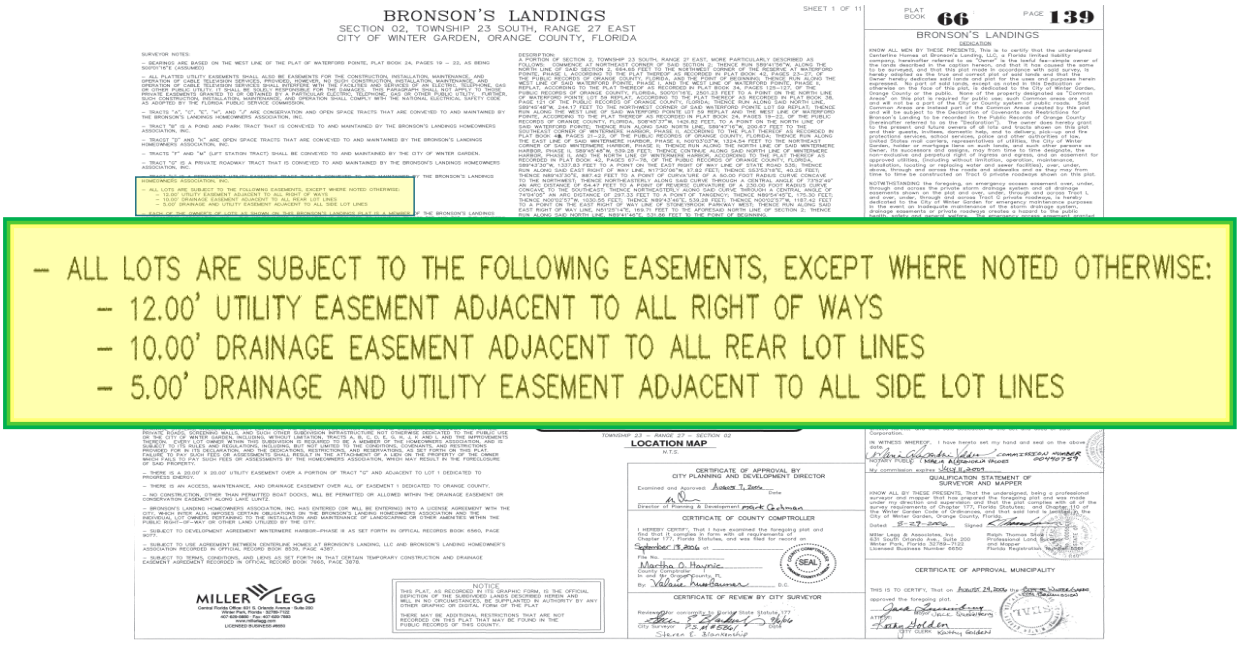
RESIDENTIAL SURVEY PROBLEMS AND FORM 9 ENDORSEMENTS

By
Cliff Rainey

The Plat


N89°58'44"E 129.00'
Δ=03°36'10"
L=44.02'
LOT 86
(PRIVATE)
Δ=04°46'47"
L=41.71'
149.23'
N89°58'44"E 139.97'
85.00'
1231.58'
2501.23'
S00°01'16"E
SEE SHEETS 3–11 FOR DETAILS
NOT PLATTED
STONEYBROOK PARKWAY WEST
TILLMAN AVENUE
CONSERVATION/OPEN SPACE TRACT "E"
OPEN SPACE TRACT "D"
RICKOVER PLACE (PRIVATE)
GEARING COURT (PRIVATE)
CONSERVATION/ OPEN SPACE TRACT "C"
POND & PARK TRACT "B"
TRACT F LIFT STATION
TILLMAN AVENUE (PRIVATE)
CONSERVATION/ OPEN AREA TRACT "J"
NIMITZ COURT
LOT 102
WATERFORD POINTE LOT 59 REPLAT PB 38 PG 121
OPEN SPACE TRACT "K"
LIFT STATION TRACT "M"
STATE ROAD 535
NORTH LINE OF WINTERMERE HARBOR PHASE II PB 45, PG 21-22
NORTHEAST CORNER OF WINTERMERE HARBOR PHASE II

The Plat



BRONSON'S LANDINGS
SECTION 02, TOWNSHIP 23 SOUTH, RANGE 27 EAST
CITY OF WINTER GARDEN, ORANGE COUNTY, FLORIDA

SHEET 1 OF 11

PLAT BOOK 66 PAGE 139

BRONSON'S LANDINGS

DEDICATION

- ALL LOTS ARE SUBJECT TO THE FOLLOWING EASEMENTS, EXCEPT WHERE NOTED OTHERWISE:
  - 12.00' UTILITY EASEMENT ADJACENT TO ALL RIGHT OF WAYS
  - 10.00' DRAINAGE EASEMENT ADJACENT TO ALL REAR LOT LINES
  - 5.00' DRAINAGE AND UTILITY EASEMENT ADJACENT TO ALL SIDE LOT LINES

LOCATION MAP

CERTIFICATE OF APPROVAL BY CITY PLANNING AND DEVELOPMENT DIRECTOR

CERTIFICATE OF COUNTY COMPTROLLER

CERTIFICATE OF REVIEW BY CITY SURVEYOR

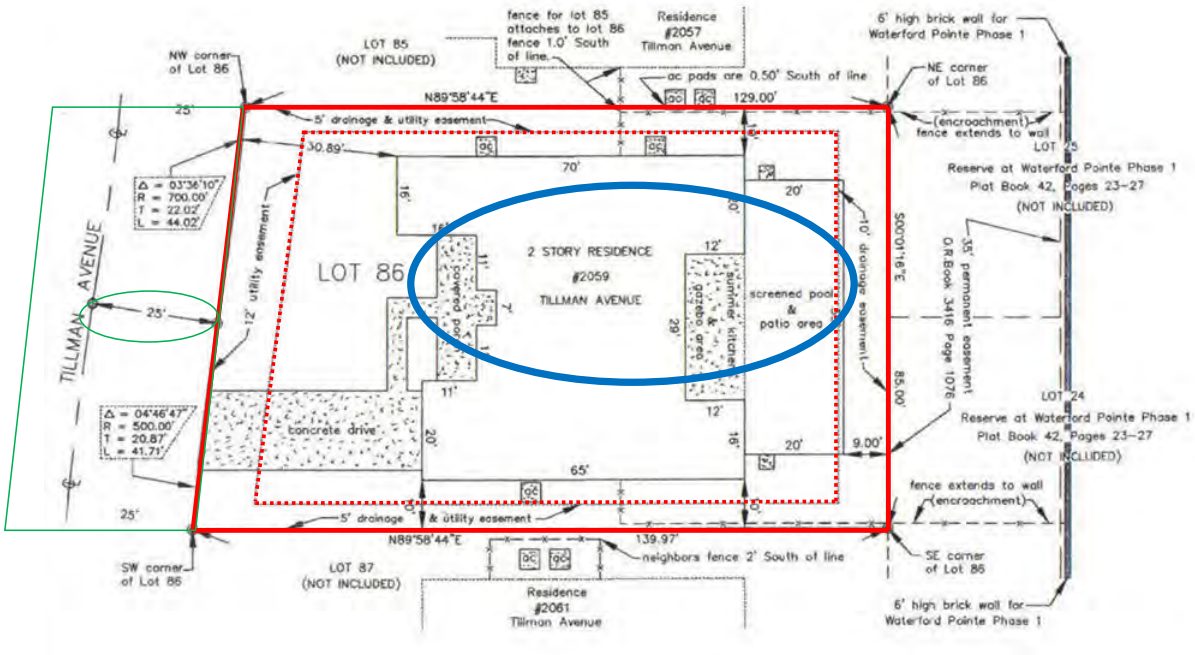
QUALIFICATION STATEMENT OF SURVEYOR AND MAPPER

CERTIFICATE OF APPROVAL MUNICIPALITY

MILLER LEGG

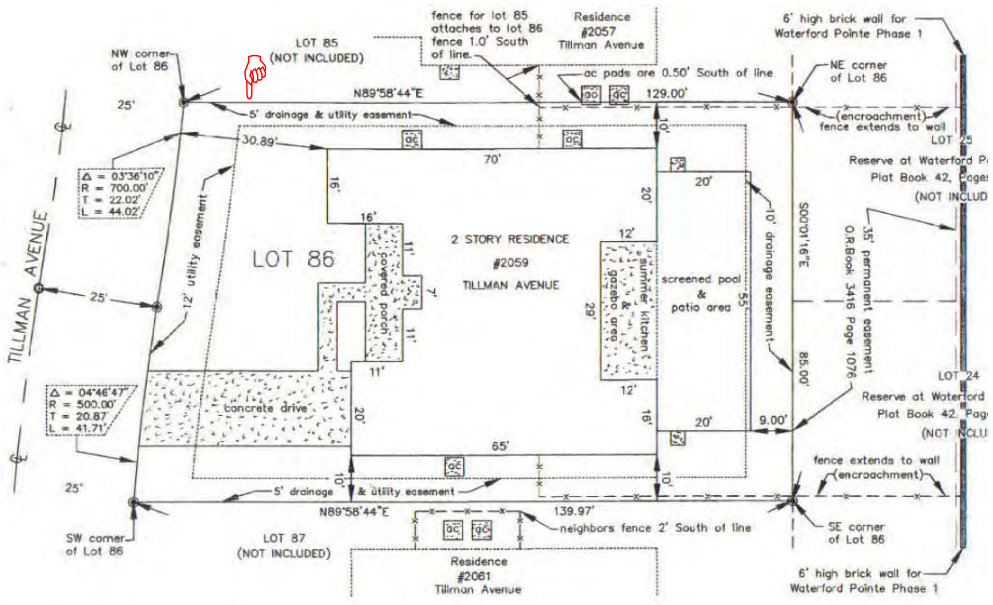
NOTICE

Improvements of any kind

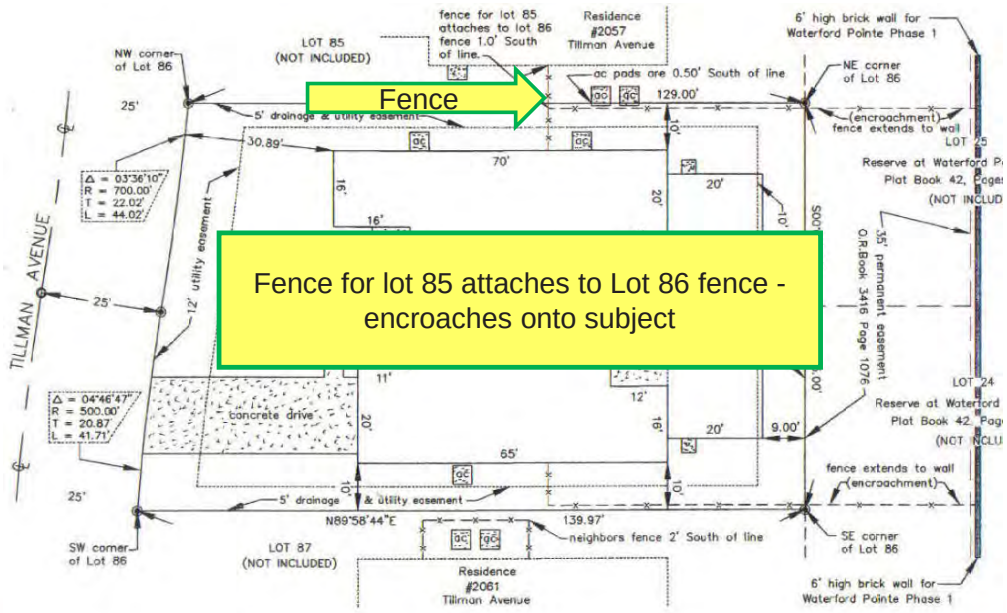


Run the Finger Test

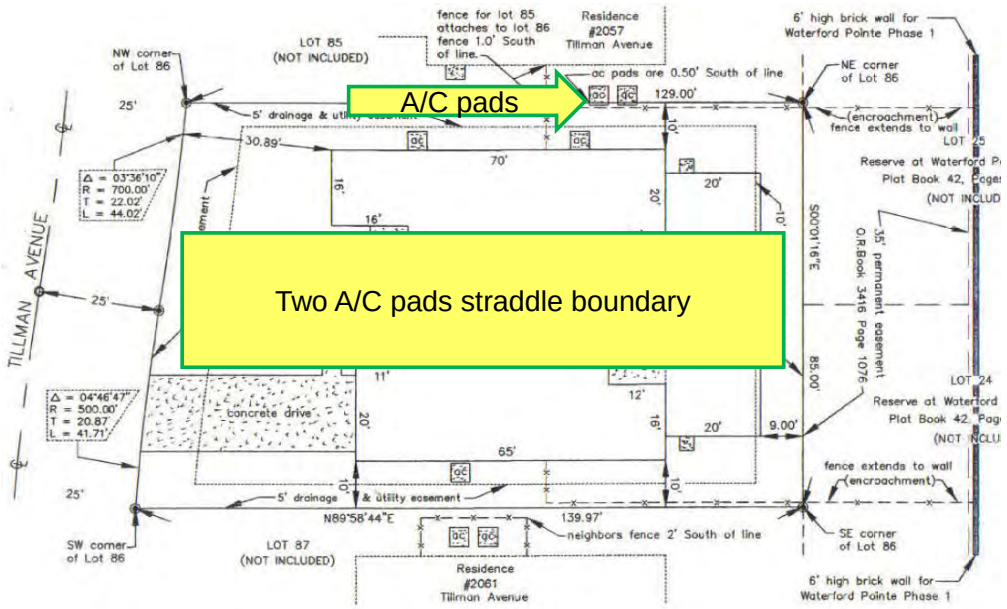
Finger Test - boundary



Lot 85 improvement encroaching onto subject



Lot 85 improvement encroaching onto subject



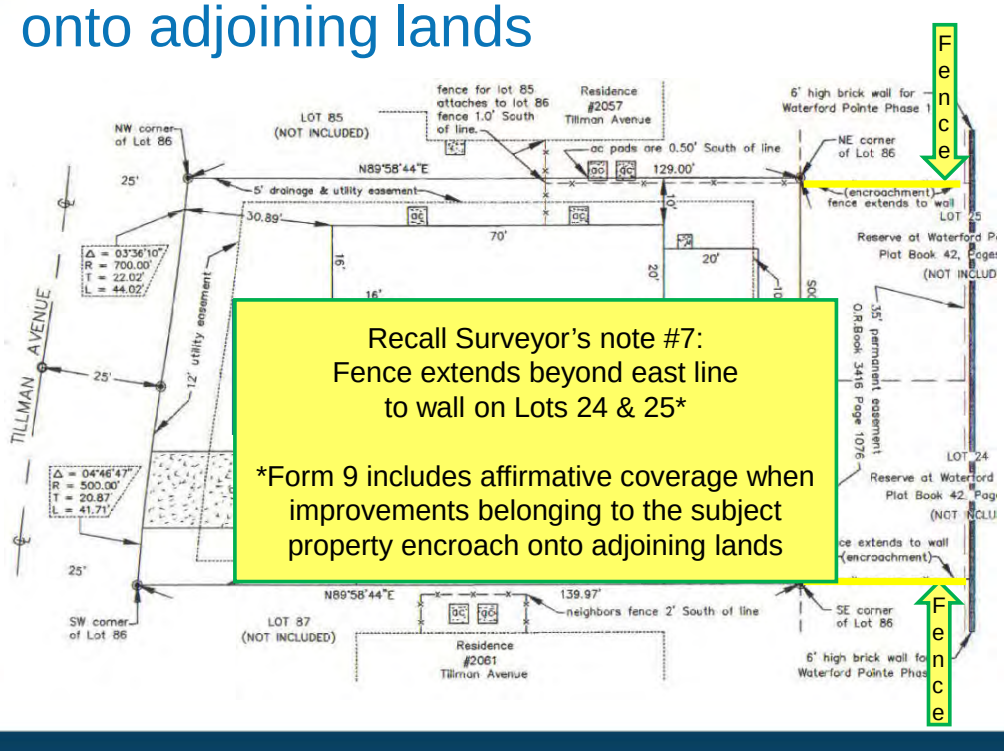
Possible need for Additional exceptions when improvements encroach onto insured lands

Further discussion in

RESIDENTIAL SURVEY PROBLEMS AND FORM 9 ENDORSEMENTS

By
Cliff Rainey

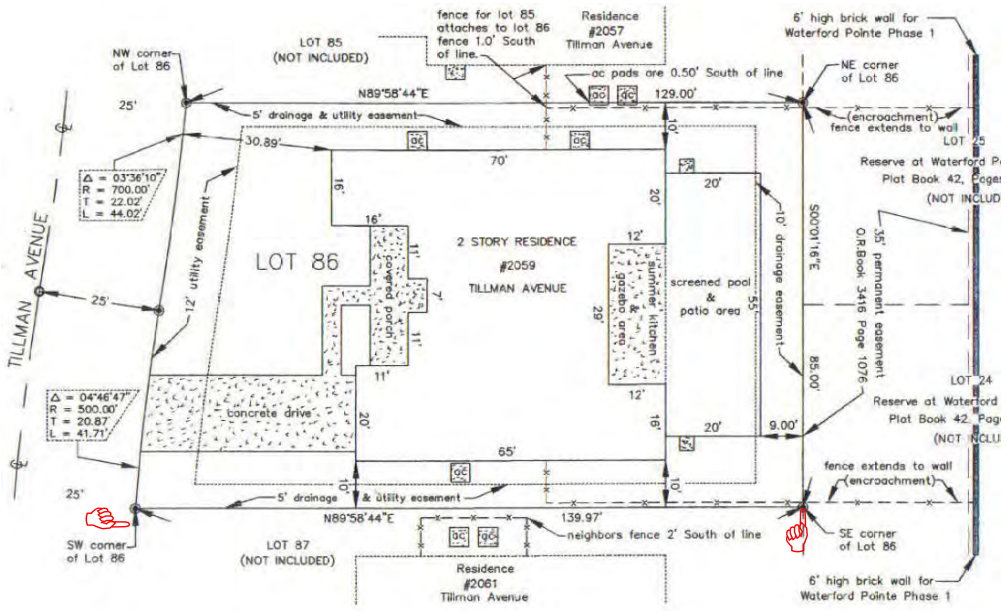
Subject improvements encroaching onto adjoining lands



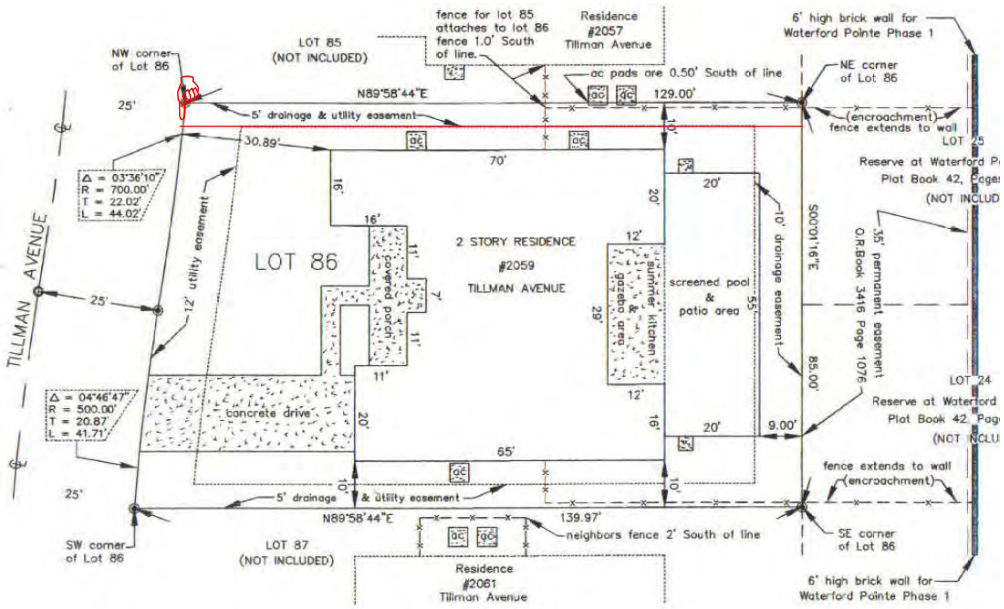
Recall Surveyor's note #7:
Fence extends beyond east line to wall on Lots 24 & 25*

*Form 9 includes affirmative coverage when improvements belonging to the subject property encroach onto adjoining lands

Finger Test - boundary



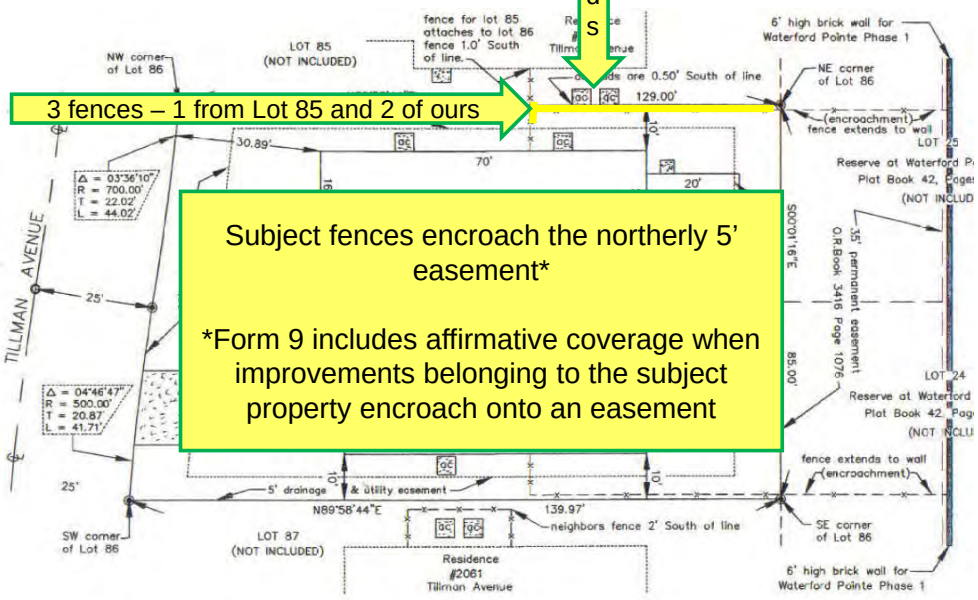
Finger Test - easement



Encroachments in easement

A C p a d s

3 fences – 1 from Lot 85 and 2 of ours



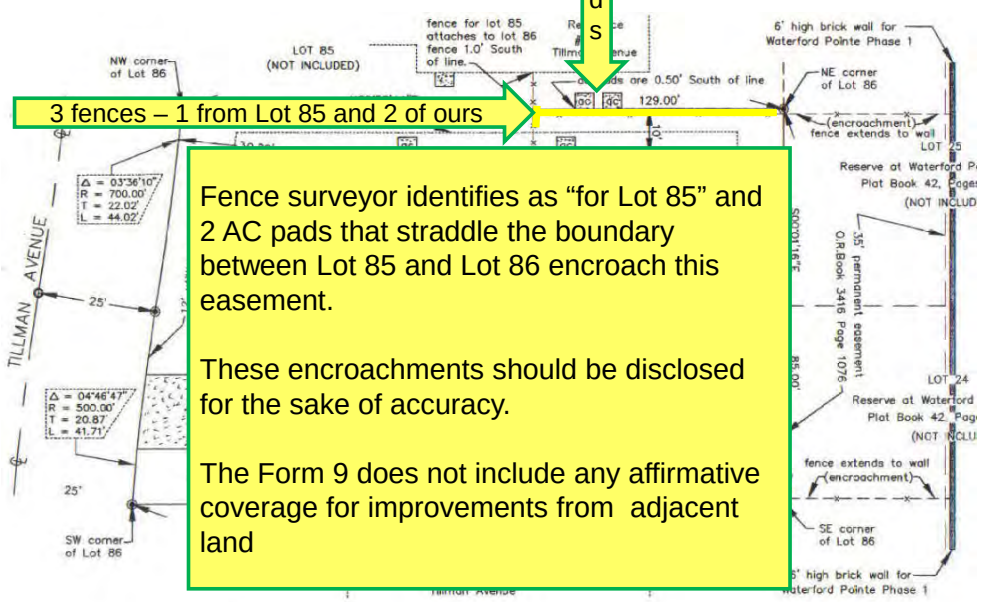
Subject fences encroach the northerly 5' easement*

*Form 9 includes affirmative coverage when improvements belonging to the subject property encroach onto an easement

Encroachments in easement

AC pads

3 fences – 1 from Lot 85 and 2 of ours

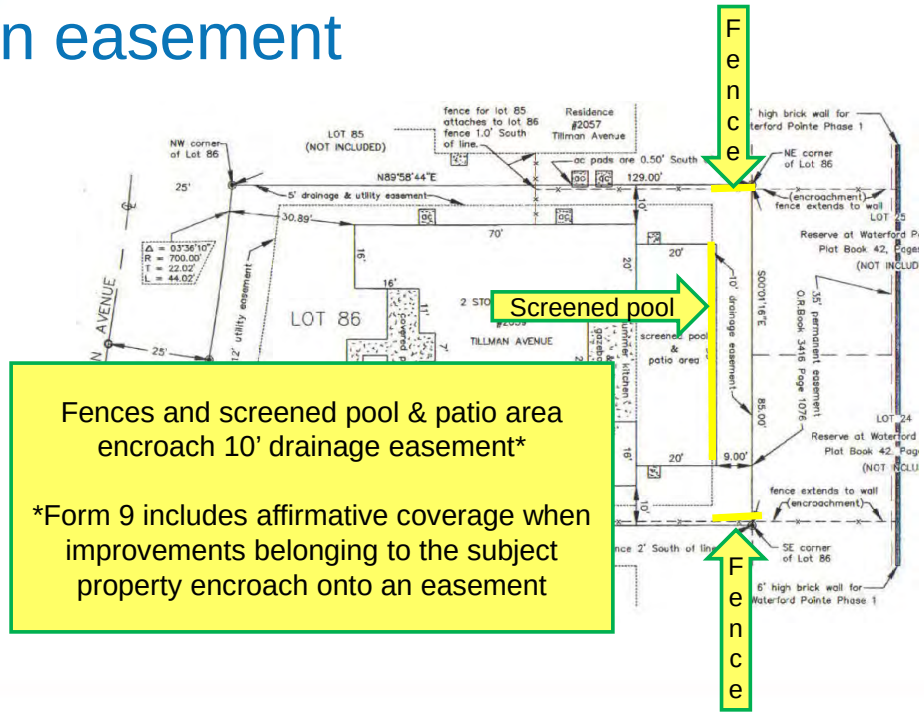


Fence surveyor identifies as “for Lot 85” and 2 AC pads that straddle the boundary between Lot 85 and Lot 86 encroach this easement.

These encroachments should be disclosed for the sake of accuracy.

The Form 9 does not include any affirmative coverage for improvements from adjacent land

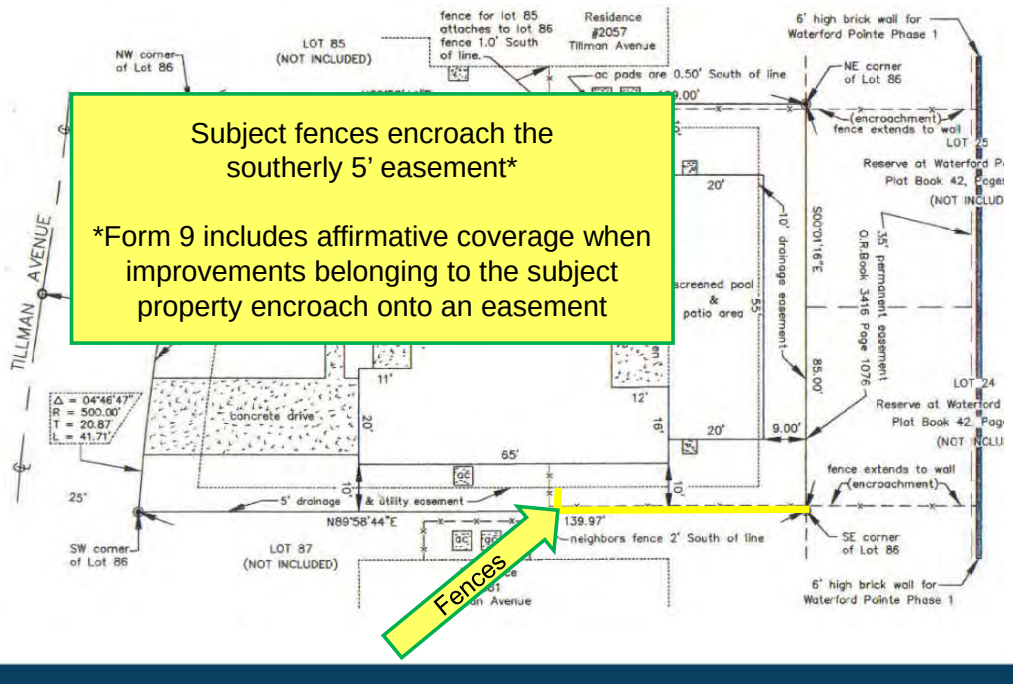
Encroachments in easement



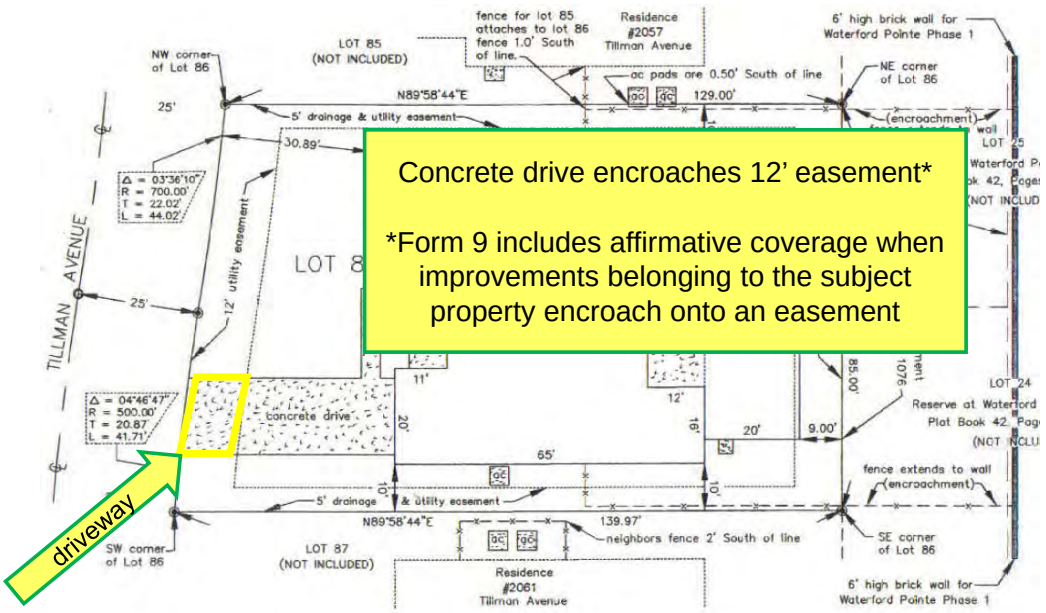
Fences and screened pool & patio area encroach 10' drainage easement*

*Form 9 includes affirmative coverage when improvements belonging to the subject property encroach onto an easement

Encroachments in easement



Encroachments in easement



Concrete drive encroaches 12' easement*

*Form 9 includes affirmative coverage when improvements belonging to the subject property encroach onto an easement

Recap

DRAWING IDENTIFIES ESSENTIAL FEATURES

- [x] Boundary lines
- N/A [ ] Any body of water
- N/A [ ] Other natural and manufactured objects affecting the property
- [x] Easements of any kind
- [x] Rights-of-way
- N/A [ ] Platted building setback lines
- [x] Improvements of any kind

Recap – results of “Finger Test”

- Fence for Lot 85 encroaches onto subject
- Two ac pads straddle the boundary line
- Fence extends beyond east line to wall on Lots 24 & 25*
- Fences and A/C pads encroach the northerly 5’ easement*
- Fences and screened pool & patio area encroach 10’ drainage easement on the east*
- Subject fences encroach the southerly 5’ easement*
- Concrete drive encroaches 12’ easement*

*Affirmative coverage provided under the Form 9

Back to Speaker Topics

Write a detailed survey exception to include in the policy

Matters that may impact insurability:

- ☐ Any encroachments of improvements from the insured land onto adjoining land
- ☐ Any encroachments of improvements from adjoining land onto the insured land
- ☐ Any improvements located on property that is or was submerged
- ☐ Any encroachments in any easements
- ☐ Any encroachments of road rights-of-way
- ☐ Any violations of building setback lines
- ☐ Any gaps or overlaps (i.e., discrepancies between the description in the recorded instrument and any markers on the ground designating the boundary as actually used and occupied.)

Consider what matters might impact insurability –

Contemplate matters mentioned in the Form 9 and more

Any encroachments of improvements from the insured land onto adjoining land

- Fence extends beyond east line to wall on Lots 24 & 25*

Fence encroaches adjoining lands to the east

Any encroachments of improvements from adjoining land onto the insured land

- Lot 85's fence encroaches onto subject
- Two A/C pads straddle boundary line

Improvements apparently belonging to land adjacent to the north encroach onto the subject property

Back to Speaker Topics

Reminder:

Possible need for Additional exceptions when improvements encroach onto insured lands

Further discussion in

RESIDENTIAL SURVEY PROBLEMS AND FORM 9 ENDORSEMENTS

By
Cliff Rainey

Any improvements located on property that is or was submerged

- Not applicable

NOTE: check LABINS before deleting GSL

Any encroachments in any easements

- Fences and A/C pads encroach the northerly 5’ easement*
- Fences and screened pool & patio area encroach 10’ drainage easement on the east*
- Subject fences encroach the southerly 5’ easement*
- Concrete drive encroaches 12’ easement*

Fences encroach easements on North East and South

Any encroachments in any easements

- Subject fences and Lot 85 A/C pads and fence encroach the northerly 5’ easement*
- Fences and screened pool & patio area encroach 10’ drainage easement on the east*
- Subject fences encroach the southerly 5’ easement*
- Concrete drive encroaches 12’ easement*

Concrete drive encroaches easement on west

Any encroachments in any easements

- Subject fences and Lot 85 A/C pads and fence encroach the northerly 5’ easement*
- Fences and screened pool & patio area encroach 10’ drainage easement on the east*
- Subject fences encroach the southerly 5’ easement*
- Concrete drive encroaches 12’ easement*

Screened pool & patio encroach easement on east

Any encroachments in any easements

- Subject fences and Lot 85 A/C pads and fence encroach the northerly 5’ easement*
- Fences and screened pool & patio area encroach 10’ drainage easement on the east*
- Subject fences encroach the southerly 5’ easement*
- Concrete drive encroaches 12’ easement*

Fence for Lot 85 and two AC pads apparently belonging to Lot 85 encroach easement on north

Any encroachments on road rights of way

- Not applicable

NOTE: a right of way may be much wider than the paved road contained within it

Any violations of building setback lines

- Not applicable

NOTE: this refers to platted setback lines; municipal setbacks (unless recorded in the official records) are not a matter covered by the title policy.

Back to Speaker Topics

Reminder:

Encroachments into rights of way and violations of setbacks

Further discussion in

RESIDENTIAL SURVEY PROBLEMS AND FORM 9 ENDORSEMENTS

By
Cliff Rainey

Any gaps or overlaps

- Not applicable

NOTE: a gap may be referred to as a gore or a hiatus, and may be particularly problematic if there is a gap between the insured land and the legal access.

Matters that may impact insurability:

- ☑ Any encroachments of improvements from the insured land onto adjoining land
- ☑ Any encroachments of improvements from adjoining land onto the insured land
- ☑ Any improvements located on property that is or was submerged
- ☑ Any encroachments in any easements
- ☑ Any encroachments of road rights-of-way
- ☑ Any violations of building setback lines
- ☑ Any gaps or overlaps (i.e., discrepancies between the description in the recorded instrument and any markers on the ground designating the boundary as actually used and occupied.)

Consider what matters might impact insurability –

☐ Unusual risks discussed with underwriting: _____

_____

_____

_____

Unusual risks discussed with underwriting

Contemplating unusual risks

The decision to be made is whether a particular matter must be excluded from the affirmative coverage otherwise afforded by the Form 9 Endorsement

Unusual risks discussed with underwriting

☐ Unusual risks discussed with underwriting:

screened pool & patio area

encroach 10' drainage easement

Contemplating unusual risks - LTV

LTV – preferably, there should be at least a 10% equity cushion

- A 10% equity cushion is synonymous with a 90% LTV
- An LTV of 90% or lower is the same thing as an equity cushion of 10% or higher

Contemplating unusual risks - LTV

In this transaction the LTV is 87%

13% equity cushion

Contemplating unusual risks – Nature of Improvement

Nature of the improvement – permanent or easily removable; construction in progress or completed; severity of encroachment

Contemplating unusual risks – Nature of Improvement

We know just from the survey that the concrete deck and screen are not temporary, and that the construction is complete and that they are only 9’ from the boundary, in other words 1’ into the 10’ easement

Contemplating unusual risks – Nature of Improvement

Make some off the record inquiry to determine:

How long the improvement has been there 15 yrs
Where is the actual pool inside this screen 5 feet inside the screen enclosure

Contemplating unusual risks – Uniqueness of the matter

Uniqueness of the matter – is it common for the area?

Contemplating unusual risks – Uniqueness of the matter

Property appraiser's aerial maps show several homes on the block also have screened pools and several are closer to the property boundaries than the enclosure on this property

Not unique

Contemplating unusual risks

Setback violation – N/A

Contemplating unusual risks

Setback violation – in the event of a setback violation, there must be confirmation that the instrument that imposed the setback does not contain a reverter clause.

Reiterating:

ATTEND OR REVIEW CLIFF RAINEY'S SEGMENT FOR MORE DETAILS

Contemplating unusual risks – Objections

Objections – what is the risk of litigation

Contemplating unusual risks – Objections

Discuss with the realtor in the context of familiarity with the neighborhood/other listings in the area/any awareness of neighbors objecting - none

Contemplating unusual risks – Objections

Discuss with the seller in the context of the closing affidavit which is given under penalties of perjury and contains a statement that there are no pending matters of any kind that could result in litigation – no hesitancy about giving that affidavit

Contemplating unusual risks – Objections

Discuss with the buyer in advance of closing – willing to accept title with the encroachment as an exception on the policy

Contemplating unusual risks – Report to Underwriter

13% equity cushion in transaction.
The deck and screen enclosure encroach 1' into a 10' drainage easement (10%),
but the pool itself does not encroach.
It has been this way for 15 years with no objection, and neighbors have similar encroachments on their lots

☑ Unusual risks discussed with underwriting: _____

screened pool & patio area encroach 10’ drainage easement – approved to issue lender’s Form 9 without modifying coverage

Unusual risks discussed with underwriting

Modifying the Form 9 and Issuing the Owner's Form 9

Further discussions

By
Lee Offir

By
Cliff Rainey

Specific Survey Exception

Encroachments, encumbrances, violations, variations, or adverse circumstances, if any, actually shown on the survey prepared by _____, dated_____, bearing Job # _____:

- *[itemize specific survey matter]*
- *[itemize other specific survey matter]*
- *[itemize other specific survey matter]*

Specific Survey Exception

Encroachments, encumbrances, violations, variations, or adverse circumstances, if any, actually shown on the survey prepared by Patrick M. Kelley, dated June 16, 2017, bearing Job #4423:

- *Fence encroaches adjoining lands to the east*
- *Improvements apparently belonging to land adjacent to the north encroach onto the subject property*
- *Fences encroach easements on North East and South*
- *Concrete drive encroaches easement on west*
- *Screened pool & patio encroach easement on east*
- *Lot 85 A/C pads & fence encroach easement on north*

Back to Speaker Topics

Consider the use of old surveys

TN 25.03.06 C – Owner's Policy

The Fund will waive the requirement for a current survey when issuing an Owner's Policy, subject to the following conditions:

1. Property is a platted, single family residential
2. Prior survey is satisfactory (shows boundaries, improvements, etc., and is an original)
3. Prior survey is certified to either the current owner or a prior owner in the chain of title
4. The seller gives an affidavit of no changes

TN 25.03.06 B – Loan Policy & Form 9

Generally the conditions described in TN 25.03.06 C are applicable to a simultaneous loan policy and a Form 9-06 Endorsement.

TN 25.03.06 B – Loan Policy & Form 9

In a refinance transaction, The Fund does not limit the reliance on a prior survey to property that is platted, single family residential.

TN 25.03.06 B – Loan Policy & Form 9

In a refinance, when the property is platted, single family residential, the requirement for the original prior survey may be waived if the owner's policy contains the specific survey exception and that exception is carried forward to the new loan policy.

The affidavit of no changes is still required in this scenario.

Affidavit of No Changes

A satisfactory affidavit will set forth the following facts:

1. The affidavit is based upon the personal knowledge of the affiant.
2. There are no improvements currently located on the subject property that are not shown on the survey.
3. There are no improvements to adjoining lands that encroach upon the subject property.
4. The affidavit is being given to induce Old Republic to rely on the described survey.

TECHNICAL REQUIREMENTS

Includes surveyor's

- [x] original embossed seal
- [ ] electronic seal
- [x] Indicates that the surveyor is a Florida Registered Surveyor and Mapper
- [x] Survey is signed
- [x] Survey is dated
  - [x] Field work done 6 / 16 / 2017
  - [x] Drawing signed 6 / 16 / 2017

(If the field work was done more than 90 days ago, TN 25.03.06(B) allows reliance on the prior survey under certain circumstances.)

NON-CURRENT SURVEY CERTS

- [x] Certification
  - NEW survey certified to
    - [x] Proposed insured buyer
    - [x] Proposed insured lender
    - [x] Old Republic
    - [x] Fund Member's office
  - PRIOR survey certified to
    - [ ] Seller
    - [ ] Prior owner in the chain of title

CERTIFIED TO:
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
EDWARD F. AND PAMELA M. BLACK
NUTTER BUTTER BANK, N.A.
KEEBLER, NABISCO & AMOS, PA

Disclose to the parties

Document the file

Your closing file must clearly document that the proposed insureds were told what exceptions would appear in their policy.

Maintain a record that the survey was shared with the proposed insureds

Disclosing the specific survey exception

BEST PRACTICE:

Endorse or revise the commitment to delete appropriate standard exceptions and add the exact language of the specific survey exception

Sample Form E language:

Exceptions 2 b-e are hereby deleted in their entirety.

The following exception is hereby added:

Encroachments, encumbrances, violations, variations, or adverse circumstances, if any, actually shown on the survey prepared by Patrick M. Kelley, dated June 16, 2017, bearing Job #4423:

- *Fence encroaches adjoining lands to the east*
- *Improvements apparently belonging to land adjacent to the north encroach onto the subject property*
- *Fences encroach easements on North East and South*
- *Concrete drive encroaches easement on west*
- *Screened pool & patio encroach easement on east*
- *Lot 85 A/C pads & fence encroach easement on north*

Disclosing the specific survey exception

OPTION:

Mark up the commitment with the exact language of the specific survey exception

Mark up the commitment

II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the Public Records or attaching subsequent to the Effective Date hereof but prior to the date the Proposed Insured acquires for value of record the estate or interest or Mortgage thereon covered by this Commitment.

DELETE

2. a) General or special taxes and assessments required to be paid in the year 2015 and subsequent years.
   b) ~~Rights or claims of parties in possession not recorded in the Public Records.~~
   c) Any encroachment, encumbrance, violation, variation, or adverse circumstance that would be disclosed by an inspection or an accurate and complete land survey of the Land and inspection of the Land.
   d) ~~Easements, or claims of easements, not recorded in the Public Records.~~
   e) ~~Any lien, or right to a lien, for services, labor, or material furnished, imposed by law and not recorded in the Public Records.~~
3. Any Owner's Policy issued pursuant hereto will contain under Schedule B the following exception: *Any adverse ownership claim by the State of Florida by right of sovereignty to any portion of the Land insured hereunder, including submerged, filled and artificially exposed lands, and lands accreted to such lands.*

ADD:

Encroachments, encumbrances, violations, variations, or adverse circumstances, if any, actually shown on the survey prepared by P.Kelley, dated 6/17/17, bearing Job # 4423.

- *Lot 85's fence encroaches onto subject*
- *Two ac pads encroach onto the subject*
- *Fence extends beyond east line to wall on Lots 24 & 25**
- *Subject fences and Lot 85 A/C pads & fence encroach the northerly 5' easement**
- *Fences and screened pool & patio area encroach 10' drainage easement on the east**
- *Subject fences encroach the southerly 5' easement**
- *Concrete drive encroaches 12' easement**

Practice Tip

Make notes on the commitment as the survey is reviewed.

Disclosing the specific survey exception

ALLOWED:

Mark up the commitment to indicate that a specific survey clause will be added, example:

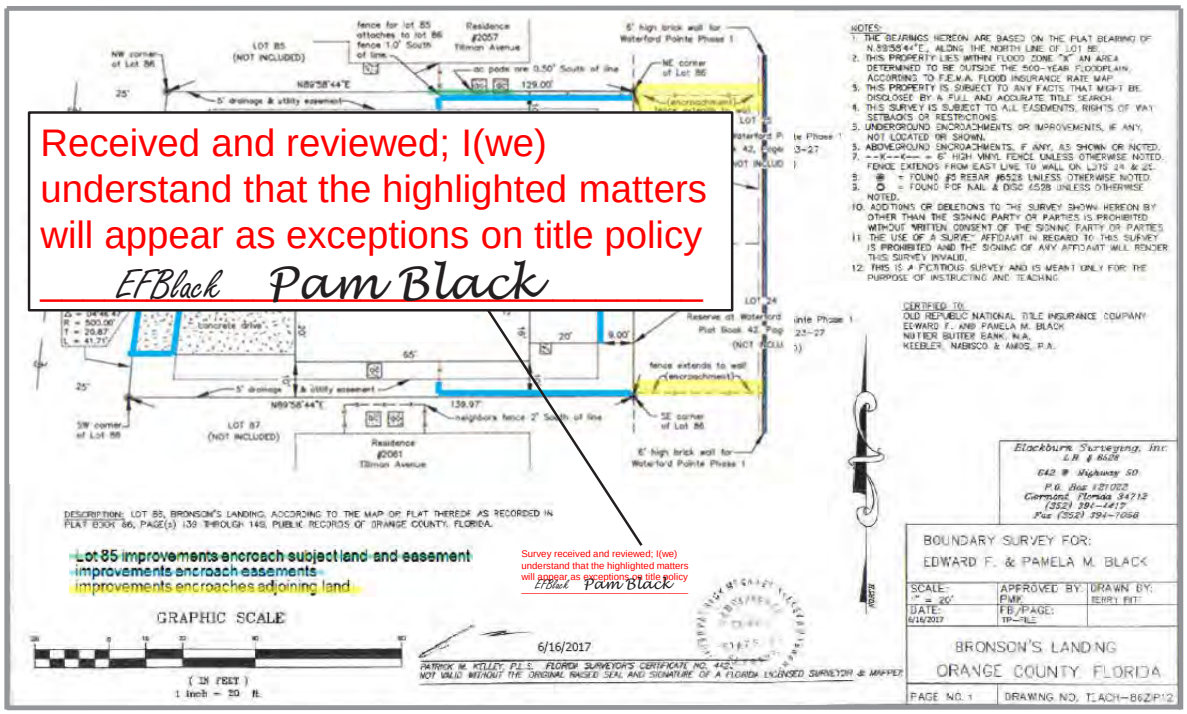
> *Policy will contain a detailed exception consistent with the facts demonstrated on the survey from Patrick M. Kelley, dated June 16, 2017, bearing Job #4423; see attached survey.*

Document the file

In addition to updating the commitment, it is a good practice to mark-up the survey and have the buyer initial or sign it.

Practice Tip

RUBBER STAMP

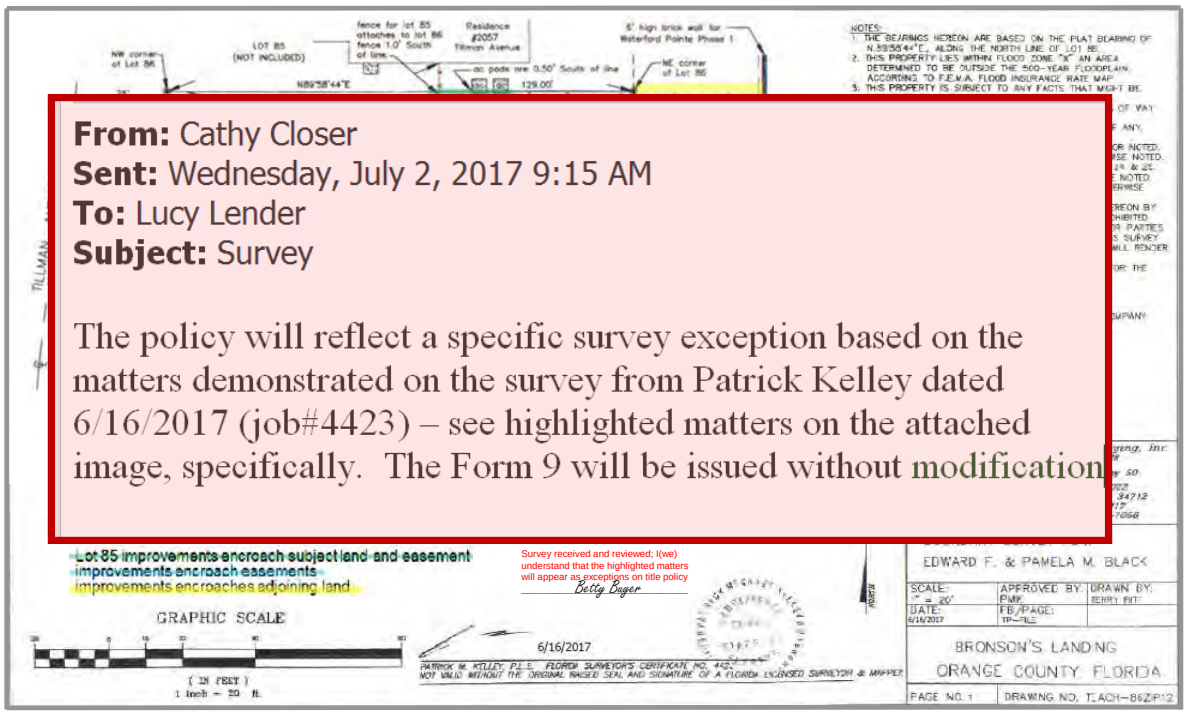


Document the file

Also document your file with proof that you provided the survey and the specific survey clause to the lender prior to disbursing.

Practice Tip

EMAIL SIGNED SURVEY TO LENDER



THANK YOU!

Thank you for your attention; Do you agree that looking closely at the survey together is the most fun part of a closing?
Yes! that was worth having Grandma get the kids
Indeed, and I will consult this survey when I talk to the vendor about re-doing that pool screen
Eh! Sure, if it means that I can get my commission check, now
I only wish someone had explained all of that to us when we bought the house!
And honey, maybe we ought to consider curing the encroachment when we re-do that screen

Example of Restrictions, Encroachments, Minerals Endorsement (ALTA 9-06)

ALTA ENDORSEMENT 9-06 RESTRICTIONS, ENCROACHMENTS, MINERALS - LOAN POLICY
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. 7 To Policy No. MF6-8050439

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. Any incorrectness in the assurance that, at Date of Policy:
   (a) There are no covenants, conditions or restrictions under which the lien of the Mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.
   (b) Unless expressly excepted in Schedule B:

   (1) There are no present violations on the Land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the Land violate building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

   (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the Land does not, in addition, (i) establish an easement on the Land; (ii) provide a lien for liquidated damages; (iii) provide for a private charge or assessment; (iv) provide for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.

   (3) There is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.

   (4) There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.

   (5) There are no notices of violation of covenants, conditions and restrictions relating to environmental protection recorded in the Public Records.

2. Any future violation on the Land of an existing covenant, condition or restriction occurring prior to the acquisition of title to the estate or interest in the Land, provided the violation results in:
   (a) invalidity, loss of priority or unenforceability of the lien of the Insured Mortgage; or
   (b) loss of Title to the estate or interest in the Land if the Insured shall acquire Title in satisfaction of the Indebtedness secured by the Insured Mortgage.

3. Damage to existing improvements (excluding lawns, shrubbery or trees):
   (a) which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
   (b) which results from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.

4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.

5. Any final court order or judgment denying the right to maintain any existing improvement on the Land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

As used in paragraph 1(b)(1) and 5, the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection.

The failure to expressly except any matter delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) of this endorsement constitutes the Company's agreement to indemnify against loss or damage resulting from any matters delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.

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

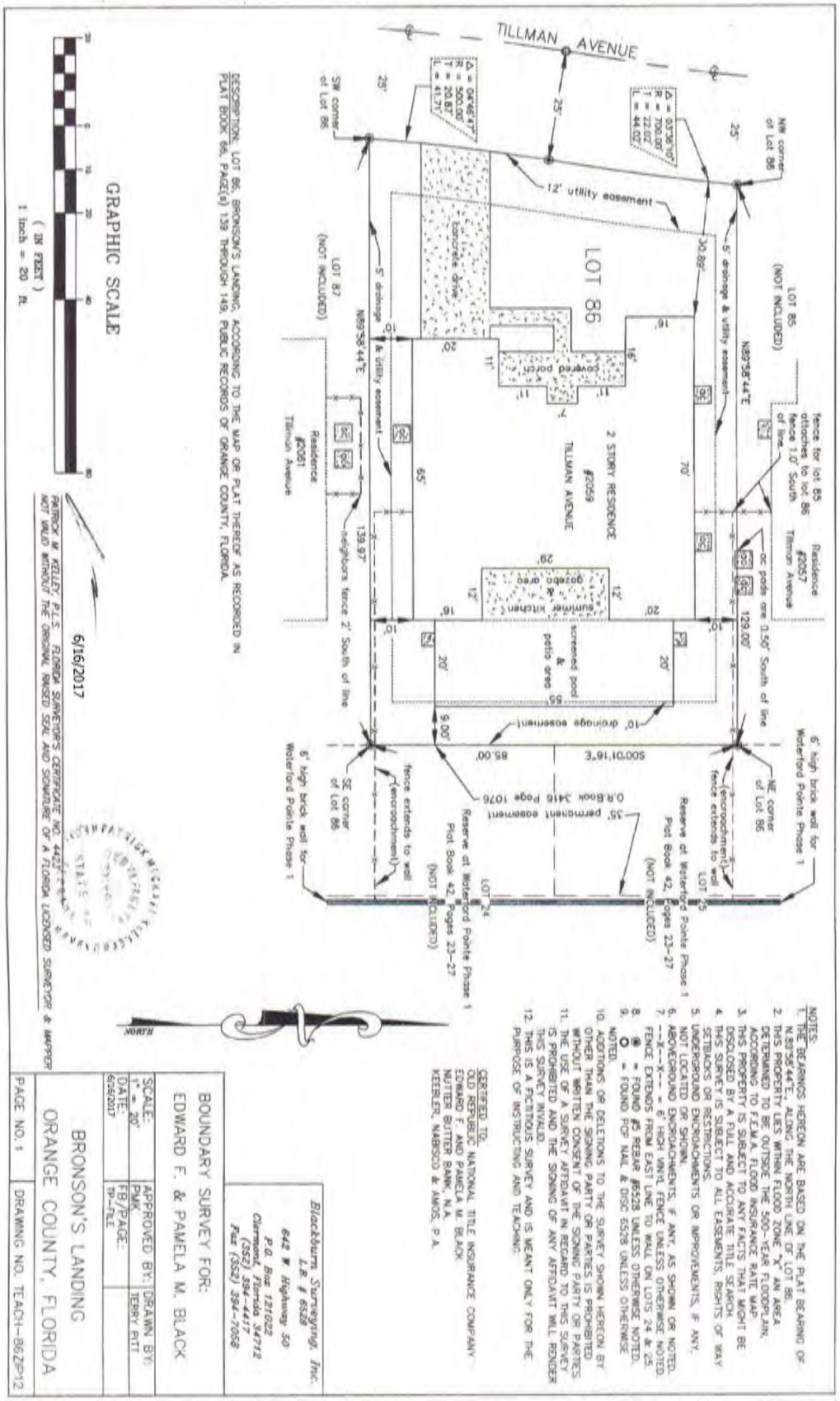
Richard P. Bruce, Esq.
Name of Agent

8999
Agent No.

Agent's Signature

Old Republic National Title Insurance Company
By Mark A. Bilbrey
President

ALTA 9-06 Endorsement - Restrictions, Encroachments, Minerals (Florida Modified) (rev. 05/14)



DESCRIPTION: LOT 86, BRONSON'S LANDING, ACCORDING TO THE MAP OR PLAT THEREOF AS RECORDED IN PLAT BOOK 66, PAGE(s) 139 THROUGH 149, PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA.

NOTES:
1. THE BEARINGS HEREON ARE BASED ON THE PLAT BEARING OF N.89°58'44"E., ALONG THE NORTH LINE OF LOT 86.
2. THIS PROPERTY LIES WITHIN FLOOD ZONE "X" AN AREA DETERMINED TO BE OUTSIDE THE 500-YEAR FLOODPLAIN, ACCORDING TO F.E.M.A. FLOOD INSURANCE RATE MAP.
3. THIS PROPERTY IS SUBJECT TO ANY FACTS THAT MIGHT BE DISCLOSED BY A FULL AND ACCURATE TITLE SEARCH.
4. THIS SURVEY IS SUBJECT TO ALL EASEMENTS, RIGHTS OF WAY SETBACKS OR RESTRICTIONS.
5. UNDERGROUND ENCROACHMENTS OR IMPROVEMENTS, IF ANY, NOT LOCATED OR SHOWN.
6. ABOVEGROUND ENCROACHMENTS, IF ANY, AS SHOWN OR NOTED.
7. -x--x- = 6' HIGH VINYL FENCE UNLESS OTHERWISE NOTED. FENCE EXTENDS FROM EAST LINE TO WALL ON LOTS 24 & 25.
8. ● = FOUND #5 REBAR #6528 UNLESS OTHERWISE NOTED.
9. ○ = FOUND PCP NAIL & DISC 6528 UNLESS OTHERWISE NOTED.
10. ADDITIONS OR DELETIONS TO THE SURVEY SHOWN HEREON BY OTHER THAN THE SIGNING PARTY OR PARTIES IS PROHIBITED WITHOUT WRITTEN CONSENT OF THE SIGNING PARTY OR PARTIES.
11. THE USE OF A SURVEY AFFIDAVIT IN REGARD TO THIS SURVEY IS PROHIBITED AND THE SIGNING OF ANY AFFIDAVIT WILL RENDER THIS SURVEY INVALID.
12. THIS IS A FICTITIOUS SURVEY AND IS MEANT ONLY FOR THE PURPOSE OF INSTRUCTING AND TEACHING.

CERTIFIED TO:
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
EDWARD F. AND PAMELA M. BLACK
NUTTER BUTTER BANK, N.A.
KEEBLER, NABISCO & AMOS, P.A.

Blackburn Surveying, Inc.
LB # 6528
642 W Highway 50
P.O. Box 121022
Clermont, Florida 34712
(352) 394-4417
Fax (352) 394-7058

BOUNDARY SURVEY FOR:
EDWARD F. & PAMELA M. BLACK

SCALE:	APPROVED BY:	DRAWN BY:
1" = 20'	PMK	TERRY PITT
DATE:	FB/PAGE:	
6/16/2017	TP-FILE	

BRONSON'S LANDING
ORANGE COUNTY, FLORIDA

PAGE NO.: 1	DRAWING NO.: TEACH-86ZP12

Back to Speaker Topics

Survey Checklist

TECHNICAL REQUIREMENTS

Includes surveyor's

- ☐ original embossed seal
- ☐ electronic seal

☐ Indicates that the surveyor is a Florida Registered Surveyor and Mapper

☐ Survey is signed

☐ Survey is dated

- ☐ Field work done ___/____/_____
- ☐ Drawing signed ____/____/_____

(If the field work was done more than 90 days ago, TN 25.03.06(B) allows reliance on the prior survey under certain circumstances.)

☐ Certification

NEW survey certified to

- ☐ Proposed insured buyer
- ☐ Proposed insured lender
- ☐ Old Republic
- ☐ Fund Member's office

PRIOR survey certified to

- ☐ Seller
- ☐ Prior owner in the chain of title

☐ Directional arrow located

☐ All symbols used on the map are defined in the legend

☐ Surveyor's notes have been read carefully

☐ Legal access confirmed

- ☐ Map shows access to a known public road
- ☐ Map shows access via private road
  - ☐ Verified that road connects to a public road

LEGAL DESCRIPTION ACCURACY

Legal description matches the

- ☐ Last deed of record*

*If the survey legal matches the proposed-insured legal, but not the last deed of record, contact Fund Underwriting Counsel. A surveyor's affidavit will presumptively be required.

- ☐ Title commitment
- ☐ Proposed-insured documents

☐ The drawing correctly maps the metes and bounds description

☐ The drawing matches the recorded plat

DRAWING IDENTIFIES ESSENTIAL FEATURES

☐ Boundary lines

☐ Any body of water

☐ Other natural and manufactured objects affecting the property

☐ Easements of any kind

☐ Rights-of-way

☐ Platted building setback lines

☐ Improvements of any kind

Matters that may impact insurability:

☐ Any encroachments of improvements from the insured land onto adjoining land

☐ Any encroachments of improvements from adjoining land onto the insured land

☐ Any improvements located on property that is or was submerged

☐ Any encroachments in any easements

☐ Any encroachments of road rights-of-way

☐ Any violations of building setback lines

☐ Any gaps or overlaps (i.e., discrepancies between the description in the recorded instrument and any markers on the ground designating the boundary as actually used and occupied.)

☐ Unusual risks discussed with underwriting: _____

_____

_____

_____

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Back to Speaker Topics

Fund Assembly

Business Email Compromise: A White Collar Crime Perspective

Lance Kim, *Supervisory Special Agent, FBI*

Back to Speaker Topics

Speaker Information

Business Email Compromise: A White Collar Crime Perspective

Lance Kim, *Supervisory Special Agent, FBI*

Lance Kim is a Supervisory Special Agent assigned to the Money Laundering Unit, in the Financial Crime Section, Criminal Investigative Division. SSA Kim is the Money Laundering Unit program manager for the northwest region and the national program manager for the Business Email Compromise scam.

From 2007 through 2015, SSA Kim was a Special Agent assigned to the Financial Institution Fraud squad in the Los Angeles Field Office, where he investigated money laundering, wire fraud, mortgage fraud, bank fraud, identity theft, and bankruptcy fraud. He is a CPA and CFE.

FBI
Money Laundering Unit
935 Pennsylvania Ave., NW
Washington, DC 20535
(202) 324-8630
May 12, 2017

BEC Response & Mitigation Guide

Prepared for The Fund Assembly

If you fall victim to a fraud such as Business Email Compromise scam and are tricked into sending wire transfer, the chance of recovering the funds declines exponentially the longer you wait. After 72 hours of sending a wire, the funds may not be recoverable. Usually, the funds are withdrawn or wired to another bank account to evade recovery measures.

I was a target of BEC/EAC. What do I do if I sent wires?

1. Immediately contact your bank to request a SWIFT recall of the fraudulent wire
    a. Ask for a copy of the "wire report" (to be used when filing your IC3.gov complaint).

2. Go to www.IC3.gov to file a complaint. Be prepared with information from:
    a. Email addresses;
    b. Bank accounts (originator)
    c. Bank accounts (beneficiary)

3. Write a signed letter to provide to your bank with the following details:
    a. Explain the circumstances behind sending the fraudulent wire;
    b. Explain that you were tricked into sending the wire;
    c. Explain that you did not intend to send the wire to the beneficiary and you do not know the beneficiary;
    d. Request the beneficiary bank return the wire to your bank because you are a victim of fraud; and
    e. You consent to the FBI disclosing your personal information with other law enforcement and the financial institutions in order to elicit information and cooperation form the recipient of the information.

4. Take the following steps:
    a. Change your passwords;
    b. Turn on two factor authentication;
    c. Preserve emails (Do not delete them); and
    d. Reassess your security (You can be targeted repeatedly)

I was a target of BEC/EAC. But I did not send any wires. What should I do?

1. Take the following steps:
    a. Change your passwords;
    b. Turn on two factor authentication;
    c. Preserve emails (Do not delete them); and
    d. Reassess your security (You can be targeted repeatedly)

2. Go to www.IC3.gov to file a complaint. Be prepared with information from:
    a. Email addresses;
    b. Bank accounts (originator)
    c. Bank accounts (beneficiary)

Suggestions for Wire Transfers

1. Make sure no one can initiate a payment based solely on an email instruction;
2. Verification phone calls must be made to previously known numbers;
3. Implement (and strictly follow) dual authorization;
4. Make sure all staff members are on the same page; and
5. **Do not allow last second beneficiary account changes.**

Online resources

What is BEC? https://www.ic3.gov/media/2016/160614.aspx

What is EAC? https://www.ic3.gov/media/2015/150827-2.aspx

Learn how to get email headers: https://mxtoolbox.com/Public/Content/EmailHeaders/

Learn about the links you get in your email inbox: www.bustspammers.com/phishing_links.html

The contents of this document should not be considered or construed as legal advice or endorsement. It is intended for general information purposes only and may not be quoted or referred to in any other presentation, publication or proceeding without the prior written consent of the FBI.

Public Service Announcement

FEDERAL BUREAU OF INVESTIGATION

August 27, 2015

Alert Number
I-082715b-PSA

Questions regarding this PSA should be directed to your local **FBI Field Office**.

Local Field Office Locations:
www.fbi.gov/contact-us/field

E-MAIL ACCOUNT COMPROMISE

E-mail Account Compromise (EAC) is a sophisticated scam that targets the general public and professionals associated with, but not limited to, financial and lending institutions, real estate companies, and law firms.

The EAC scam is very similar to the Business E-mail Compromise (BEC) scam, except that it targets individuals rather than businesses.[1]

In EAC scams, criminal actors use social engineering or computer intrusion techniques to compromise the e-mail accounts of unsuspecting victims. In many cases, a criminal actor first gains access to a victim's legitimate e-mail address for reconnaissance purposes. The criminal actor then creates a spoofed e-mail account that closely resembles the legitimate account, but is slightly altered by adding, changing, or deleting a character. The spoofed e-mail address is designed to mimic the legitimate e-mail in a way that is not readily apparent to the targeted individual. The criminal actor then uses either the victim's legitimate e-mail or the spoofed e-mail address to initiate unauthorized wire transfers.

In some cases, the funds from unauthorized wire transfers are directed to money mules[2] located in the United States. In other instances, wire transfers are directed to accounts of financial institutions outside of the United States. Victim reporting indicates criminal actors are starting to follow up on wire transfer requests by calling to confirm the transactions or to comply with wire transfer protocols, thus making the transaction appear more legitimate.

Other schemes seen in complaints filed with the Internet Crime Complaint Center (IC3) and in additional information made known to the IC3 indicates EAC money mules may be victims of employment scams, romance scams, or personal loan scams. It is not known why a specific victim is identified to be targeted.

Between 04/01/2015 and 06/30/2015, 21 complaints related to the EAC scam were filed with the IC3, with reported losses of almost $700,000. The FBI has identified approximately $14 million in attempted losses associated with open FBI EAC investigations.

EXAMPLES OF THE EAC SCAM ARE LISTED BELOW:

Financial/Brokerage Services –

- An individual's e-mail account is compromised by a criminal actor. The criminal actor, who is posing as the victim, sends an e-mail to the victim's financial institution or brokerage firm requesting a wire transfer to a person or account under the control of the criminal actor.
- An accounting firm's e-mail account is compromised and used to request a wire transfer from a client's bank, supposedly on behalf of the client.

Real Estate –

- A seller's or buyer's e-mail account is compromised through an EAC scam. The criminal actor intercepts transactions between the two parties and alters the instructions for the transfer of funds.
- A realtor's e-mail address is used to contact an escrow company to redirect commission proceeds to a bank account associated with the criminal actor.

- A realtor receives a link within an e-mail from an unknown person who is requesting information related to property. When the realtor clicks on the link, the criminal actor is able to access the realtor's e-mail account. The intrusion exposes client information, which the criminal actor then uses to e-mail the clients and attempt to change wire instructions for loan processing proceeds.

Legal -

- A criminal actor compromises an attorney's e-mail account, which results in the exposure of client bank account numbers, e-mail addresses, signatures, and confidential information related to pending legal transactions.
- The attorney's compromised e-mail account is used to send overlaid wire instructions to a client.
- A criminal actor compromises a client's e-mail account and uses it to request wire transfers from trust fund and escrow accounts managed by the firm.

WHAT TO DO IF YOU BELIEVE YOU HAVE BEEN A VICTIM OF THE EAC SCAM:

- Contact your financial institution immediately upon discovering the fraudulent transfer.
- Contact law enforcement.
- Request that your bank reach out to the financial institution where the fraudulent transfer was sent.
- File a complaint at www.IC3.gov, regardless of dollar loss. Provide any relevant information in your complaint and identify that your complaint pertains to the EAC scam.

TIPS TO PROTECT YOURSELF:

- Do not open e-mail messages or attachments from unknown individuals.
- Be cautious of clicking links within e-mails from unknown individuals.
- Be aware of small changes in e-mail addresses that mimic legitimate e-mail addresses.
- Question any changes to wire transfer instructions by contacting the associated parties through a known avenue.
- Have a dual step process in place for wire transfers. This can include verbal communication using a telephone number known by both parties.
- Know your customer. Be aware of your client's typical wire transfer activity and question any variations.

1.To learn more about how the BEC scam affects businesses, see the Public Service Announcement (PSA) dated 01/22/2015 at www.IC3.gov. It is anticipated that an updated BEC PSA will be released in August, 2015.

2.Money Mules are people who are used to transfer and launder stolen money. They are typically given a portion of the money transferred as payment.

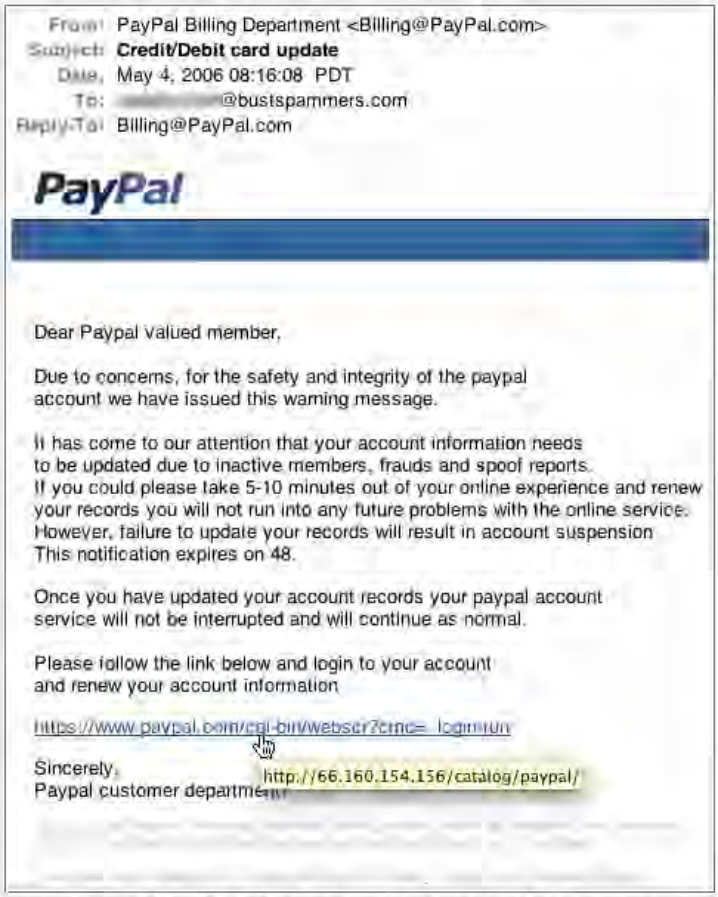
Get smart on Phishing! Learn to read links!

If you came here, you probably received an email like the one to the right. They are fake messages intended to lure you to fake websites that are made to look like e.g. a bank website, but in reality set up by data thieves. If you fill in forms on those sites, you will give all your information to criminals and invite indetity theft, credit card fraud, cleaned out bank accounts etc. This is called "**phishing**".

Phishing can be attempted for anything that requires a login or holds data of some value: banks, eBay, Paypal, Facebook, credit card companies, even your frequent flyer program or popular discussion forums. The emails can look very real and tempting to click. Say, if you have a Facebook account, you are used to the notification emails everytime one of your friends did something on your profile. Imagine a message: *"Your friend XYZ commented on a picture of you. Click here to see comment."* Wouldn't you want to see what your friend wrote? So you click and as expected you get to the Facebook login page. Or did you?

Ideally you should NEVER click on such emails. Instead go the the site on your own by typing e.g. facebook.com directly into the browser, log in from there and check your account. It's like saying: "Don't call me, I call you!"

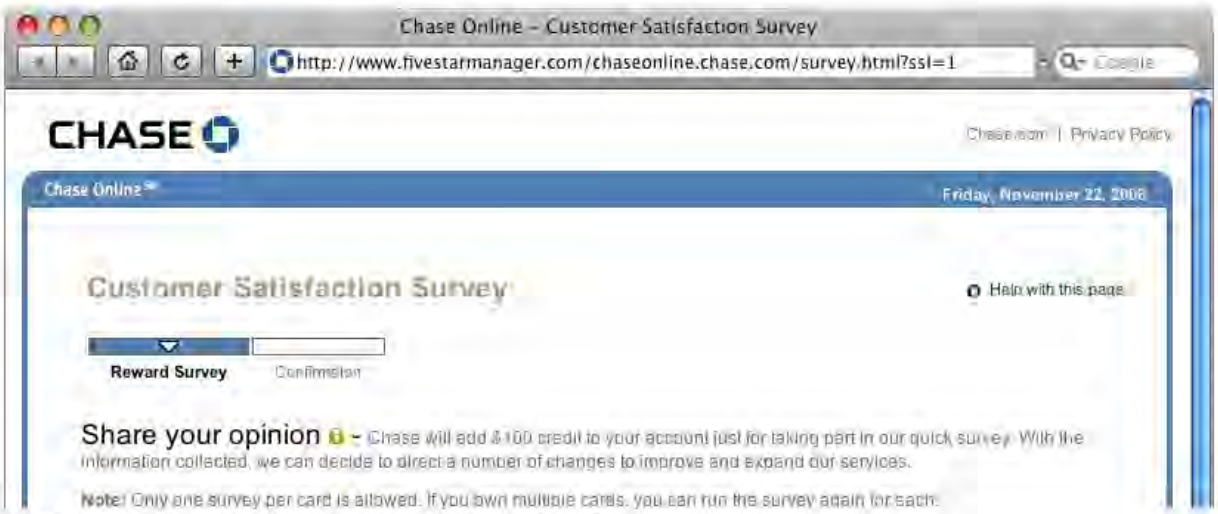
Below, learn how to identify links to fake sites, so you will not be fooled!



A pishing email for Paypal. The Apple Mail program shows the real link target in a pop-up bubble when you hover your mouse over the link

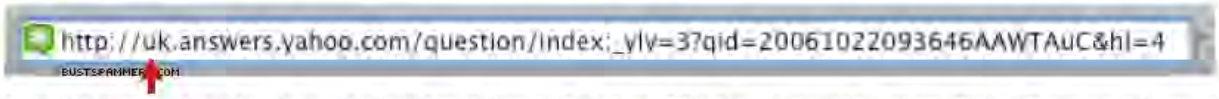
1. **What is the actual link?**
   What you read as link may not be the real destination. We've all seen links like Click here! Obviously, "Click here" is not a web address, but it does link somewhere (in this case, back to this page). You can see the real link target at the bottom of your browser when you hover your mouse over the link. The description ("Click here") and the link target (www.bustspammers.com/phishing_links.html) are two different things and I could make the description anything I want. I could even make it look like another link.

   Look at the Paypal example. It *looks* like it's a link to
   `https://www.paypal.com/cgi-bin/webscr?cmd=_login-run`
   but that's really just the description, it's as meaningless as "Click here" for determining where the link points to. In reality, the link goes to
   `http://66.160.154.156/catalog/paypal/`
   If you do click, that link with the weird number will be what you see in your browser's address bar. And it's not a Paypal site. But how do you know that? After all, it does say "paypal" there at the end?



A pishing page for Chase. Notice the address (URL) in the browser address bar.

2. **What site does the link really point to?**



Look for the first slash after (not including) *http://* then go BACKWARDS from there to the SECOND dot. The main address of a website, also called "domain", consists of two parts separated by a dot (e.g. chase.com) which is why we skip that one dot. If there are no two dots before the first slash, then simply go to the beginning of the URL. You want that to be the expected site name (domain), if it's anything else, it's most likely a phish. Let's take Chase bank as an example:
`http://support.chase.com/something/index.jsp`
The first slash after *http://* is emphasized. In front of it is *chase.com*. This would be legitimate. Whether it says *support*, *www* or something else before the next dot is irrelevant. The following links would all be fake:

- `http://www.fivestarmanager.com/chaseonline.chase.com/survey.html?ssl=1`
  This is the example from the picture above and you are at fivestarmanager.com. This "survey" does not come from Chase!
- `http://www.chase.com@209.131.36.158/something/index.jsp`
  Even though there is a *chase.com* before the first slash, it is not immediately before it. You would be at 209.131.36.158, which is another way to say Yahoo.com, not Chase.
- `www.chase.com.online.to/something/else/index.jsp?p=dw&fr=yfp-t`
  This goes to online.to, which has nothing to do with Chase either.
- `http://onlinebanking-chase.com/checking/ssl/update.php`
  Remember, the domain consists of two parts separated by a dot — ONLY a dot and nothing else! A dash, hyphen, underscore or anything else doesn't count. The second domain part (going backwards from the slash) is *onlinebanking-chase*, not *chase* — not the same! The site you'd be at, onlinebanking-chase.com, is not run by Chase. Same for:
  `http://wwwchase.com/`
  `http://www-chase.com/`
  `http://www.chasecom.com/`
  `http://chase.com.cc/`
  `http://www.chase.com-sweepstakes-2011a.info/`
  They would all be scams.

There are many other signs that give away phishing attempts, like no secure (SSL) connections, no personal details (your name or last digits of account number) that a legitimate sender would know included in the email to you, violation of common sense and the "Too good to be true" rule (No bank will EVER just hand out $100 to every response to a short survey as claimed in the picture above), fake certificates, etc. You can learn more about those and phishing in general with a simple search: http://www.google.com/custom?q=phishing

Stay safe!

What do you want to do next?

Search

Want to learn how to get a handle on spam too? Go to the BustSpammers homepage!

Back to Speaker Topics

Fund Assembly

Lien On Me, But Not Forever: Perfecting, Duration and Extension of Judgments, Federal Tax, Municipal and Code Enforcement Liens

Linda Monaco, *Legal Education Attorney, The Fund*

Back to Speaker Topics

Speaker Information

Lien On Me, But Not Forever: Perfecting, Duration and Extension of Judgments, Federal Tax, Municipal and Code Enforcement Liens

Linda Monaco,
Legal Education Attorney, The Fund

Linda Monaco is a Florida Board Certified Real Estate Lawyer. She received her B.S. in Industrial Distribution from Texas A&M University and J.D. with honors from Quinnipiac University. Ms. Monaco is admitted to practice in Florida, Connecticut and in the United States District Court for Connecticut. She is also a Florida licensed real estate instructor.

Prior to joining The Fund, Ms. Monaco focused her practice in real estate, family, personal injury and small business. Through her representation of borrowers, Ms. Monaco prepared a continuing education seminar on the practices and pitfalls of a residential real estate closing for the New Haven County Bar. She also was an instructor at Branford Hall for the paralegal class in Real Estate.

Since joining The Fund, Ms. Monaco has written several seminars and has presented over 100 seminars as well as serving a master of ceremonies for Affiliate Assembly in south Florida on several occasions.

Table of Contents

		Page Number
Type of Material		
1.	PowerPoint	2
2.	11th Judicial Circuit in and for Miami-Dade County, Florida	53
3.	Delaware Judgment	55
4.	Ontario Judgment	57
5.	Notice of Federal Tax Lien	61
6.	Refiled Notice of Federal Tax Lien	62
7.	Water and/or Sewer Lien	63
8.	Claim of Lien (for utility services)	64
9.	Resolution	65
10.	Improvement Lien book page	69
11.	Improvement Lien Bill	72
12.	Resolution Equalizing the Assessment	73
13.	Code Enforcement Board Lien	79
14.	“Hybrid” Code Enforcement Board Lien	81
15.	References	87

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Lien on me, but not Forever;

Perfection, Duration and Extension of Judgment, Federal Tax, Municipal, and Code Enforcement Liens

Linda Monaco
Legal Education Attorney
Attorneys' Title Fund Services, LLC

Overview

- Judgment Liens
- Federal Tax Liens
- Municipal Liens
- Code Enforcement Liens

2

Drilling Down

- Perfection
- Duration
- Extension

3

Special Concerns – Bankruptcy

- Tolling
  - Pending bankruptcy will toll all time periods for enforcement
    - 11 U.S.C. § 108(c) (2)
      - 30 days after notice of termination or expiration of automatic stay
    - TN 5.06.05
- Validity
  - Lien may still be valid post bankruptcy; not extinguished
    - 11 U.S.C. § 506
    - TN 5.06.07

4

Special Concerns – Homestead

- Constitutional Homestead Protection
  - Fla. Const. art. X, § 4
- Does not apply to:
  - Taxes and assessments on property
  - Obligations contracted for purchase, improvement, etc.
- No lien attaches to proceeds from sale of homestead property
  - As long as proceeds are reinvested in a reasonable amount of time after sale
    - *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So.2d 201 (Fla. 1962)

5

Judgment Liens – 1

Judgments Rendered in State of Florida

Review

- "New Guidelines for Handling Uncertified, Expired, and Otherwise Unperfected Judgment Liens," 40 *Fund Concept* 33 (Apr. 2008)
- Note: contrary to the article, the amount of judgments is $1 million or less

7

Review

- Judgment against one spouse when property is held by the entirety is not a lien
- TN 18.03.05
- Confirm continuous marriage
- If marriage was not continuous – contact underwriting counsel

8

Easy Guide to Perfected Judgment

- Address
- Beginning date of judgment
- Certified copy
- Date of recording certified copy

10

Easy Guide to Perfected Judgment – Address

- Address
  - Does judgment contain the address of judgment creditor?
  - Was an affidavit recorded with certified copy with judgment creditor's address (10 documents either side of certified copy)?
- No – not perfected
- Yes – keep going

11

Easy Guide to Perfected Judgment – B

Beginning date of judgment

- Is the judgment itself less than 20 years old?
- No – not perfected
- Yes – keep going

12

Easy Guide to Perfected Judgment – C

Certified copy

- Is a certified copy of the judgment recorded?
- No – not perfected
- Yes – keep going

13

Easy Guide to Perfected Judgment – D

D ate of recording certified copy

- Is the certified copy less than 10 years old?

- No – not perfected
- Yes – perfected (if all answers are yes)

14

What About Issuing a Policy?

- Ignoring unperfected liens for insured amounts of $1 million or less
  - No certified copy recorded (**C**) AND/OR
  - No address or address affidavit (**A**)
    - Judgment more than one year old
      - May be ignored – TN 18.03.02 B. 1) & TN 18.03.02 D. 1)
    - Judgment up to one year old
      - Escrow funds until gap closed – contact underwriting counsel, will need agreement
      - TN 18.03.02 B. 1) & TN 18.03.02 D. 1)

15

What About Issuing a Policy?

- Ignoring unperfected liens - policy for more than $1 million
  - TN 18.03.02 B. 2) & TN 18.03.02 D. 2)
    - No certified copy recorded (**C**) AND/OR
    - No address or address affidavit (**A**)
  - Contact underwriting counsel

16

54

IN THE COUNTY COURT FOR THE
11TH JUDICIAL CIRCUIT IN
AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NUMBER: 2015-015610-SP-23

CAPITAL ONE BANK (USA) N.A.
Plaintiff,

vs

ELVIRA I. ESPOSITO,
Defendant.

DEFAULT FINAL JUDGMENT

THIS CAUSE, having come before the Court and the Court having reviewed the pleadings and being otherwise duly advised in the premises, it is hereby:

ORDERED and ADJUDGED that Plaintiff, CAPITAL ONE BANK (USA), N.A., 1680 CAPITAL ONE DRIVE, MCLEAN VA 22102, recover from the defendant(s), ELVIRA I. ESPOSITO, 201 EVITA PL, HOLLEMAN FL 33010-4512, the sum of $4332.87 as principal and $393.00 for costs for which let execution issue.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant(s) shall complete the attached Florida Small Claims Rules Form 7.343 (Final Information Sheet) and return it to Zaklanin & LaVar, P.A., 1133 South University Drive, Second Floor, Plantation, Florida 33324, within 45 days from the date of this final judgment, unless the final judgment is satisfied or notice of appeal is filed. Jurisdiction of this case is retained to enter further orders that are proper to compel the defendant(s) to complete Form 7.343 and return it to Zaklanin & LaVar, P.A.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 06/15/16.

DIANA VIZCAINO
COUNTY COURT JUDGE

STATE OF FLORIDA, COUNTY OF DADE
HARVEY RUVIN, Clerk of Courts, County Court
Deputy Clerk

A. – Address?

Yes

B. – Beginning date of judgment?

Less than 20 years ago

C. – Certified copy?

Yes

D. – Date certified copy recorded?

Less than 10 years ago

17

Judgment Liens – 2

Judgments Rendered Outside State of Florida
Including Foreign Countries

Perfection
Judgments from Outside State of Florida

- Record foreign judgment (certified)
  - FLA. STAT. §§ 55.501-.509 – other states and federal courts
  - FLA. STAT. §§ 55.601-.067 – foreign countries
  - Fla. Unif. Title Standard § 9.2, Limitation on Lien of Judgment

19

Perfection
Judgments from Outside State of Florida

- Record affidavit
  - Creditor's address
  - Debtor's address
  - Act does not specify that affidavit is required to perfect lien on real property
  - Without affidavit treat as a valid lien
    - TN 18.01.01 C.

20

Perfection - Notice
Judgments from Outside State of Florida

- Clerk to mail copy to debtor
- Creditor may also mail and record proof with clerk where judgment originates from foreign country
  - Other states and federal courts
    - FLA. STAT. § 55.505(2)
    - TN 18.01.01 A. 2. b)
  - Foreign countries
    - FLA. STAT. § 55.604(1)(b)
    - TN 18.01.01 B. 2. b)

21

Perfection - Objection
Judgments from Outside State of Florida

- Judgment is not enforceable for 30 days
  - Other states and non-Florida federal courts
    - Debtor can file action contesting jurisdiction of judgment
  - Foreign countries
    - Debtor can file notice of objection with clerk specifying grounds for non-recognition or non-enforceability

22

Perfection - Priority
Judgments from Outside State of Florida

- Other states and federal courts
  - Date of recording of judgment
    - TN 18.01.01 A 2. b)
    - *Dollar Sav. and Trust Co. v. Soltesiz*, 636 So.2d 63 (Fla. 2d DCA 1994)

23

Perfection - Priority
Judgments from Outside State of Florida

- Foreign countries
  - Later date of the recording of
    - Clerk's certificate as to no objection or
    - Court order recognizing foreign judgment
      - FLA. STAT. § 55.604(7)
      - TN 18.01.01 B. 2. c)
  - Include an exception once a certified copy is recorded

24

Duration
Judgments from Outside State of Florida

- Judgment itself – 20 years from entry of judgment
  - Courts outside Florida - FLA. STAT. § 55.503(1)
  - Foreign country - FLA. STAT. § 55.604 (5)
  - *Patrick v. Hess,* No. SC15-1147, (Fla. 2017)
  - Fla. Unif. Title Standard § 9.2, Limitation on Lien of Judgment

25

Duration
Judgments from Outside State of Florida

- Lien – 10 years from recording of certified copy (or until judgment expiration – whichever occurs first)
  - FLA. STAT. § 55.10(2)
    - See FLA. STAT. §§ 55.503(1), 55.604(5)
  - Fla. Unif. Title Standard § 9.2, Limitation on Lien of Judgment

26

Extension - Judgment
Judgments from Outside State of Florida

- No provisions

27

Extension - Lien
Judgments from Outside State of Florida

- Re-record certified copy with new affidavit prior to expiration
  - New 10 year period commences upon recording subject to judgment expiration
- Re-record after lien expiration causes loss in priority
  - FLA. STAT. § 55.10(2)
    - FLA. STAT. §§ 55.503(1), 55.604(5)
  - Fla. Unif. Title Standard § 9.2-2, Limitation on Lien of Judgment

28

Perfected Liens
Judgments from Outside State of Florida

- Enforceable after conveyance to third party
  - *Gamez v. First Union Nat'l Bank of Fla.*, 31 So.3d 220 (Fla. 4th DCA 2010)

29

Easy Guide to Perfected Judgment
Judgments from Outside State of Florida

Address – goosed up

Beginning date of judgment

Certified copy

Date of recording certified copy

31

Easy Guide to Perfected Judgment – A
Judgments from Outside State of Florida

Address – goosed up

- Was affidavit recorded with both judgment creditor's and debtor's addresses (10 documents either side of certified copy)?

- No – not perfected, BUT contact underwriting
- Yes – keep going

32

Easy Guide to Perfected Judgment – Judgments from Outside State of Florida

Beginning date of judgment

- Is the judgment itself less than 20 years old?
- No – not perfected
- Yes – keep going

33

Easy Guide to Perfected Judgment – Judgments from Outside State of Florida

Certified copy

- Is judgment certified by the jurisdiction where it was entered and is it recorded?
- No – not perfected
- Yes – keep going

34

Easy Guide to Perfected Judgment – Judgments from Outside State of Florida

Date of recording certified copy

- Is the certified copy less than 10 years old?

- No – not perfected
- Yes – perfected (if all answers are yes)

35

What About Issuing a Policy? Judgments from Outside State of Florida

- Ignoring unperfected liens for proposed insured amounts of $1 million or less
  - No address or address affidavit (**A**)
  - Contact underwriting counsel

36

What About Issuing a Policy?
Judgments from Outside State of Florida

- Ignoring unperfected liens for proposed insured amounts of $1 million or less
  - No certified copy recorded (**C**)
  - Judgment more than one year old
    - May be ignored – TN 18.03.02 B. 1) & TN 18.03.02 D. 1)
  - Judgment up to one year old
    - Escrow funds until gap closed – contact underwriting counsel, will need agreement
    - TN 18.03.02 B. 1) & TN 18.03.02 D. 1)

37

What About Issuing a Policy?
Judgments from Outside State of Florida

- Ignoring unperfected liens - policy for more than $1 million
  - TN 18.03.02 B. 2) & TN 18.03.02 D. 2)
    - No certified copy recorded (**C**) AND/OR
    - No address or address affidavit (**A**)
  - Contact underwriting counsel

38

56

GRANTED

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VICTOR F. BATTAGLIA, Plaintiff, v. JAMES L. SCHALLER, M.D., Defendant.) C.A. No. 12106-VCL

[PROPOSED] ORDER

AND NOW, the Court having considered the Motion of the Plaintiff, Victor F. Battaglia, for Judgment on the Pleadings, and good cause being shown,

IT IS HEREBY ORDERED this 12th day of July 2016 that the Motion of the Plaintiff is Granted and judgment is hereby entered in favor of Plaintiff and against the Defendant James L. Schaller, M.D. in the amount of $140,000.00 with interest from January 29, 2016 and the costs of this action.

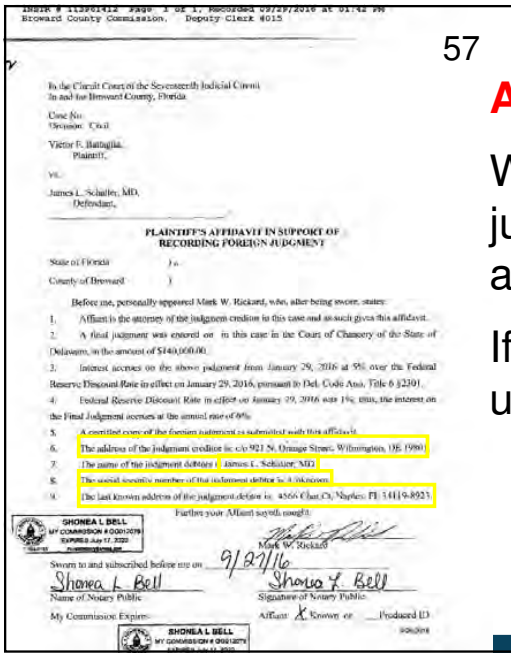
/s/ J. Travis Laster
Vice Chancellor Laster

A. – Address? – goosed up

Should be in the affidavit – if not contact underwriting counsel

39

57



In the Circuit Court of the Seventeenth Judicial Circuit In and for Broward County, Florida

Victor F. Battaglia, Plaintiff, vs. James L. Schaller, MD, Defendant.

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF RECORDING FOREIGN JUDGMENT

State of Florida)
County of Broward)

Before me, personally appeared Mark W. Rickard, who, after being sworn, states:

1. Affiant is the attorney of the judgment creditor in this case and as such gives this affidavit.
2. A final judgment was entered on in this case in the Court of Chancery of the State of Delaware, in the amount of $140,000.00.
3. Interest accrues on the above judgment from January 29, 2016 at 5% over the Federal Reserve Discount Rate in effect on January 29, 2016, pursuant to Del. Code Ann. Title 6 §2301.
4. Federal Reserve Discount Rate in effect on January 29, 2016 was 1%; thus, the interest on the Final Judgment accrues at the annual rate of 6%.
5. A certified copy of the foreign judgment is submitted with this affidavit.
6. The address of the judgment creditor is: c/o 921 N. Orange Street, Wilmington, DE 19801
7. The name of the judgment debtor is: James L. Schaller, MD
8. The social security number of the judgment debtor is: 3[illegible]
9. The last known address of the judgment debtor is: 4566 Clint Ct, Naples, FL 34119-8923.

Further your Affiant sayeth naught.

Mark W. Rickard

SHONEA L BELL MY COMMISSION # GG012079 EXPIRES July 17, 2020

Sworn to and subscribed before me on 9/27/16

Shonea L. Bell
Name of Notary Public

Shonea L. Bell
Signature of Notary Public

My Commission Expires:

Affiant: X Known or Produced ID

SHONEA L BELL MY COMMISSION # GG012079

A. – Address – goosed up

Was affidavit recorded with both judgment creditor's and debtor's addresses?

If there is no affidavit contact underwriting counsel

40

BRSTR # 113961411 Page 1 of 1. Recorded 09/29/2016 at 01:42 PM
Broward County Commission, Deputy Clerk 1032

56

GRANTED

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VICTOR F. BATTAGLIA, Plaintiff, v. JAMES L. SCHALLER, M.D., Defendant.) C.A. No. 12106-VCL

[PROPOSED] ORDER

AND NOW, the Court having considered the Motion of the Plaintiff, Victor F. Battaglia, for Judgment on the Pleadings, and good cause being shown,

IT IS HEREBY ORDERED this 12th day of July, 2016 that the Motion of the Plaintiff is Granted and judgment is hereby entered in favor of Plaintiff and against the Defendant James L. Schaller, M.D. in the amount of $140,000.00 with interest from January 29, 2016 and the costs of this action.

/s/ J. Travis Laster
Vice Chancellor Laster

CERTIFIED AS A TRUE COPY ATTEST REGISTER IN CHANCERY

This is to certify that on 9/29/16 notice of this recording was sent, certified mail, to the Defendant at the addresses given in the affidavit recorded.

County Administrator
By

A. – Address – goosed up?
Should be in the affidavit

B. – Beginning date of judgment?
Less than 20 years ago

C. – Certified copy?
Yes

D. – Date certified copy recorded?
Less than 10 years ago

41

CFN # 1045435998, OR BK 38649 Page 1480, Page 1 of 2, Recorded 12/06/2004 at 02:58 PM, Broward County Commission, Deputy Clerk 1032

58

Court File No: 03-CV-185054

ONTARIO
SUPERIOR COURT OF JUSTICE

The Honourable JUSTICE HOILETT

TUESDAY THE 4TH DAY OF NOVEMBER, 2003

BETWEEN:

JOSE SILVA Plaintiff

- and -

JUAN VALMANA Defendant

JUDGMENT

THIS ACTION was heard on June 9 and 10, 2003 without a jury at 361 University Avenue, Toronto, Ontario. The court having released its decision on June 16, and decision regarding costs released today;

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and submissions of counsel for the plaintiff, no one appearing for the defendant [illegible] defendant appearing in person, although properly served as appears from the affidavit of service and the evidence given by Linda Margarit

1. THIS COURT ORDERS AND ADJUDGES that the defendant do pay to the plaintiff the sum of $149,294.05

This is to certify that on this 5th day of November 2004 a copy of above Notice has been mailed to Debtor.
County Administrator
By Deputy

2. THIS COURT ORDERS that the defendant do pay to the plaintiff his costs of this action, hereby fixed in the sum of $48,500.00

3. AND THIS COURT ORDERS that the defendant do pay to the Ontario Health Insurance Plan $16,045.15.

THIS JUDGMENT BEARS INTEREST at the rate of 4 per cent per year commencing on November 4, 2003.

November 4, 2003

SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE ENTERED / ENTRÉE MAR 12 4, 2004

A. – Address? – goosed up
Should be in the affidavit

42

60

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

JOSE SILVA
Plaintiff
v.
JUAN VALMANA,
Defendant.

CASE NO.

AFFIDAVIT PURSUANT TO FLORIDA STATUTE §55.401

STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

BEFORE ME, the undersigned authority, personally appeared J. T. Haley, Esquire, who after being duly sworn deposes and states that:

1. On November 4, 2003, a Judgment was entered in favor of JOSE SILVA against JUAN VALMANA, in accordance with the laws of Canada.
2. The name and last known post office address of the judgment debtor is

Juan Valmana
12235 Orange Drive
Davie, FL
or
Juan Valmana
c/o Clara Valmana
535 W. 51st Street
Hialeah, FL 33012

3. The name and address of the judgment creditor is

Jose Silva
2 Lambert Lodge
Apt. 233
MCG-5-YA
Ontario, Canada

4. The name and address of the judgment creditor's attorney in the State of Florida is

HALEY, SINAGRA, PAUL & TOLAND, P.A.
Attention: J. T. Haley, Esquire
100 South Biscayne Boulevard, Suite 800
Miami, Florida 33131.

FURTHER AFFIANT SAYETH NAUGHT

J. T. Haley, Esquire

The foregoing instrument was acknowledged before me this 1st day of December, 2004 by J. T. Haley, Esquire, who is personally known to me and who did not take an oath.

Donna Alexander
Notary Public, State of Florida

My Commission Expires:

NOTARIAL SEAL
DONNA ALEXANDER
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. DD 04870
MY COMMISSION EXP. NOV. 4, 2006

43

58

Court File No: 00-CV-185054

ONTARIO
SUPERIOR COURT OF JUSTICE

The Honourable JUSTICE HOILETT
TUESDAY THE 4TH DAY OF NOVEMBER, 2003

BETWEEN:

JOSE SILVA
Plaintiff

- and -

JUAN VALMANA
Defendant

JUDGMENT

THIS ACTION was heard on June 9 and 10, 2003 without a jury at 361 University Avenue, Toronto, Ontario. This court having released its decision on June 16, and decision regarding costs released today;

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and submissions of counsel for the plaintiff, no one appearing for the defendant although the defendant appearing in person, although properly served as appears from the affidavit of service and the evidence given by Leida Margarit:

1. THIS COURT ORDERS AND ADJUDGES that the defendant do pay to the plaintiff the sum of $149,294.05;

This is to certify that on this 5th day of December 2003 a copy of above Notice has been mailed to Debtor.
County Administrator
By Deputy

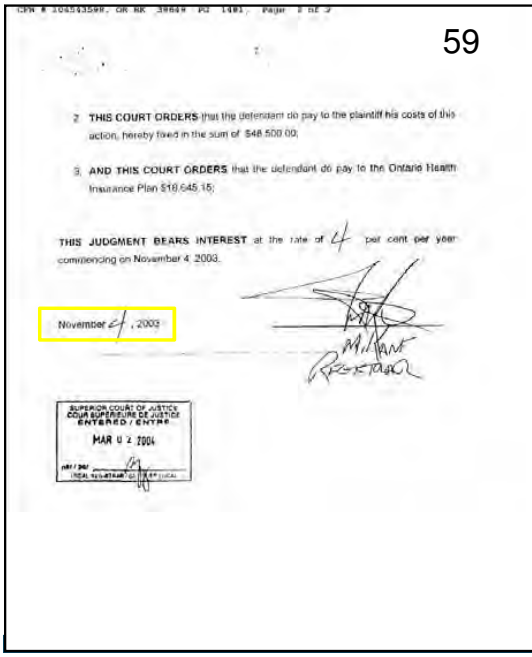
2. THIS COURT ORDERS that the defendant do pay to the plaintiff his costs of this action, hereby fixed in the sum of $48,500.00;
3. AND THIS COURT ORDERS that the defendant do pay to the Ontario Health Insurance Plan $16,645.15;

THIS JUDGMENT BEARS INTEREST at the rate of 4 per cent per year commencing on November 4, 2003.

November 4, 2003

SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE
ENTERED / ENTRÉE
MAR 02 2004

44



2. THIS COURT ORDERS that the defendant do pay to the plaintiff his costs of this action, hereby fixed in the sum of $48,500.00;

3. AND THIS COURT ORDERS that the defendant do pay to the Ontario Health Insurance Plan $19,645.15;

THIS JUDGMENT BEARS INTEREST at the rate of 4 per cent per year commencing on November 4, 2003.

November 4, 2003

SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE
ENTERED / ENTRÉE
MAR 0 2 2004

59

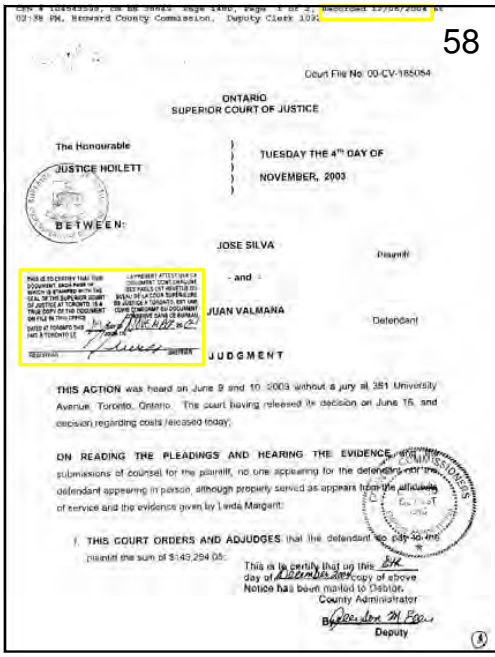
A. – Address – goosed up?

Should be in the affidavit

B. – Beginning date of judgment?

Less than 20 years ago

45



Court File No. 00-CV-185054

ONTARIO
SUPERIOR COURT OF JUSTICE

The Honourable JUSTICE HOILETT

TUESDAY THE 4TH DAY OF NOVEMBER, 2003

BETWEEN:

JOSE SILVA

Plaintiff

- and -

JUAN VALMANA

Defendant

JUDGMENT

THIS ACTION was heard on June 9 and 10, 2003 without a jury at 361 University Avenue, Toronto, Ontario. The court having released its decision on June 16, and decision regarding costs released today;

ON READING THE PLEADINGS AND HEARING THE EVIDENCE ... submissions of counsel for the plaintiff, no one appearing for the defendant ... the defendant appearing in person, although properly served as appears from the affidavits of service and the evidence given by Linda Margaritt:

1. THIS COURT ORDERS AND ADJUDGES that the defendant ... plaintiff the sum of $149,294.05;

This is to certify that on this ... day of December 2003 ... copy of above Notice has been mailed to Debtor.
County Administrator
By ... Deputy

58

A. – Address – goosed up?

Should be in the affidavit

B. – Beginning date of judgment?

Less than 20 years ago

C. – Certified copy?

Yes

D. – Date certified copy recorded?

Less than 10 years ago

46

Judgment Liens

Additional Considerations

Present and Future Interests

- Liens can attach and be enforced against a vested remainder
  - *Aetna Ins. Co. v. LaGasse*, 223 So.2d 727 (Fla. 1969)
- Life estate in a condominium was protected from forced sale to satisfy a judgment lien due to homestead
  - *King v. King*, 652 So.2d 1199 (Fla. 4th DCA 1995)

48

Limited Liability Companies
Multi-Member LLC

- Charging order is sole and exclusive remedy to satisfy judgment against a member
  - FLA. STAT. § 605.0503 (3)
- Charging order constitutes a lien on the judgment debtor's transferable interest of the LLC – not a lien on real property
  - FLA. STAT. § 605.0503 (1)

49

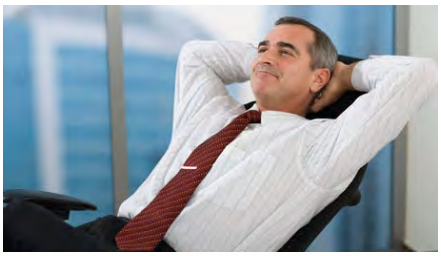
Limited Liability Companies
Single Member LLC – **TN 11.10.01 D.**

- Charging order is sole and exclusive remedy to satisfy judgment against member, UNLESS:
  - Court of competent jurisdiction determines that
    - Charging order will not satisfy judgment in a reasonable time
    - Such determination may be applied for any time after judgment including time of application for charging order
    - Charging order constitutes a lien on the judgment debtor's transferable interest of the LLC – not a lien on real property
- FLA. STAT. § 605.0503 (4)

50

Satisfactions

- Must be filed in the official records
- Can be executed by attorney of record when paid in full
  - TN 18.05.01(A)



51

Federal Tax Liens

Perfection

- File a "Notice of Lien" in the county in which the real property is located
  - FLA. STAT. § 713.901(3)(b)

53

Duration
Collection

- Allowed for 10 years from date of assessment
- Time for collection may be suspended by taxpayers actions (and thus extended)
  - Request for installment plan
  - Bankruptcy
  - And more
  - 26 U.S.C. § 6502(a)(1)

54

Duration
Lien - 10 years and 30 days from assessment

- As a lien on real property
  - From time of recording until day after date specified as "last day for refiling"
    - 26 U.S.C. § 6323(f)(1)(A)(i)
  - If not refiled, lien automatically released day after date specified as "last day for refiling"
    - 26 U.S.C. § 6325(a)(1)

55

Extension

- Refiling prior to "last day for refiling" will extend lien on real property
  - May not have a new "last day for refiling"
  - Should be noted as a refiling
- Duration is dependent upon length of time of suspension
  - Litigation, etc.
  - 26 U.S.C. § 6323(g)(3)

56

Priority

- Federal Tax lien priority is first in time first in right
  - *United States v. McDermott,* 507 U.S. 447 (1993)
- Federal tax liens do not have priority over prior recorded liens
  - *U.S. v. Estate of Romani*, 523 U.S. 517 (1998)
- Re-recording after extension expiration will create a new lien with priority set by the re-recording date

57

Form 668 (Y) (c) (Rev. October 1999) 1056

Department of the Treasury - Internal Revenue Service

Notice of Federal Tax Lien

For Optional Use by Recording Office

District: SOUTH FLORIDA

Serial Number: 650062172

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, we are giving a notice that taxes (including interest and penalties) have been assessed against the following-named taxpayer. We have made a demand for payment of this liability, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer: NEWTON SMITH

Residence: 1013 SW 49TH AVE
MARGATE, FL 33068-4048

IMPORTANT RELEASE INFORMATION: For each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/1994	[redacted]	02/14/2000	03/16/2010	3195.48
1040	12/31/1995	[redacted]	12/28/1998	01/27/2009	6753.72
1040	12/31/1997	[redacted]	06/01/1998	07/01/2008	28.49
1040	12/31/1998	[redacted]	10/18/1999	11/17/2009	4251.07

DEFERRED ITEM
Return Document To
Business Operations

Place of Filing: County Courthouse
Broward County
Ft. Lauderdale, FL 33301

Total $ 14228.76

This notice was prepared and signed at FT. LAUDERDALE, FL, on this, the 18th day of September, 2000.

Signature for P.B. Cate

Title: ACS 65-01-0008

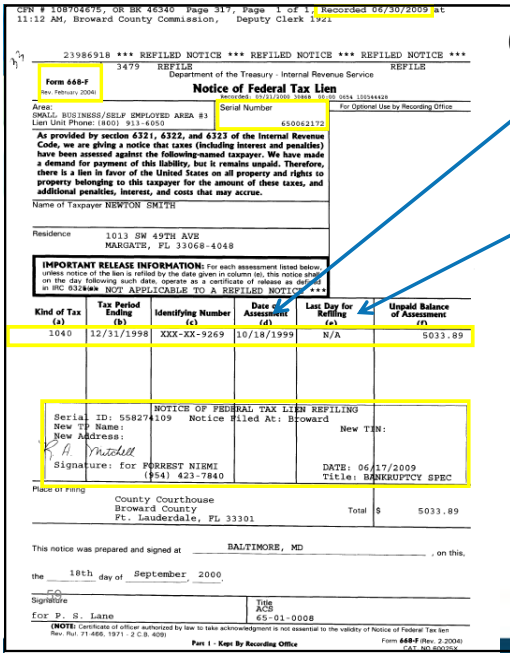
(NOTE: Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien Rev. Rul. 71-466, 1971-2 C.B. 409)

PART 1 - Kept in Recording Office

Form 668 (Y) (c) (Rev. 10-99) CAT. NO. 60025X

62

- Date of Assessment
  - 10/18/1999
- Last date for Refiling
  - 11/17/2009
- Form 668 (Y)(c)
- Serial Number - 650062172



CFN # 108704675, OR BK 46340 Page 317, Page 1 of 1, Recorded 06/30/2009 at 11:12 AM, Broward County Commission, Deputy Clerk 1921

23986918 *** REFILED NOTICE *** REFILED NOTICE *** REFILED NOTICE ***

3479 REFILE REFILE

Department of the Treasury - Internal Revenue Service

Form 668-F (Rev. February 2004)

Notice of Federal Tax Lien

Area: SMALL BUSINESS/SELF EMPLOYED AREA #3
Lien Unit Phone: (800) 913-6050

Serial Number 650062172

For Optional Use by Recording Office

As provided by section 6321, 6322, and 6323 of the Internal Revenue Code, we are giving a notice that taxes (including interest and penalties) have been assessed against the following-named taxpayer. We have made a demand for payment of this liability, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer NEWTON SMITH

Residence 1013 SW 49TH AVE
MARGATE, FL 33068-4048

IMPORTANT RELEASE INFORMATION: For each assessment listed below, unless notice of the lien is refiled by the date given in column (e), this notice shall on the day following such date, operate as a certificate of release as defined in IRC 6325(a). NOT APPLICABLE TO A REFILED NOTICE ***

Kind of Tax (a)	Tax Period Ending (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/1998	XXX-XX-9269	10/18/1999	N/A	5033.89

NOTICE OF FEDERAL TAX LIEN REFILING
Serial ID: 558274109 Notice Filed At: Broward
New TP Name:
New Address:
New TIN:
Signature: for FORREST NIRMI
(954) 423-7840
DATE: 06/17/2009
Title: BANKRUPTCY SPEC

Place of Filing
County Courthouse
Broward County
Ft. Lauderdale, FL 33301

Total $ 5033.89

This notice was prepared and signed at BALTIMORE, MD, on this,
the 18th day of September, 2000

Signature for P. S. Lane
Title ACS 65-01-0008

(NOTE: Certificate of officer authorized by law to take acknowledgment is not essential to the validity of Notice of Federal Tax lien Rev. Rul. 71-466, 1971-2 C.B. 409)

Part 1 - Kept By Recording Office

Form 668-F (Rev. 2-2004) CAT. NO. 60025X

63

- Date of Assessment
  - 10/18/1999
- Last date for Refiling
  - N/A
- Form 668-F
- Serial Number – 650062172
- Refile date – 6/30/2009
- Reason - Bankruptcy

Elimination

- Sheriff's sale **does not** eliminate federal tax liens recorded prior to the sale
  - *Sperling v. U.S.,* 944 So.2d 1139 (2008)
- Foreclosure judgment **will** eliminate if
  - United States is a party defendant and
  - 120 day redemption period after sale has run
    - 26 USC § 7425 (d)(1)

60

Homestead & Entirety Property

- Federal tax liens
  - Attach to property held as estate by the entireties
  - Can be enforced against homestead property
    - 26 U.S.C. § 7421
    - TN 30.02.01

61

Tax Lien – Estate by the Entireties

- *U.S. v. Craft*, 535 U.S. 274 (2002)
  - Tax lien will attach to estate by the entireties property
    - Lien attached to estate by the entireties
    - Debtor quitclaims to non-debtor spouse
    - Tax lien still attached
- TN 30.02.07

62

Tax Lien Against Deceased Debtor
Estate by the Entireties or Joint Tenancy

- Attaches to interest
- I.R.B. 2003-39, Notice 2003-60, Sept. 29, 2003
  - Question 4
    - Tax lien attached to estate by entireties
    - Death of debtor spouse
    - "[S]urviving non-liable spouse takes property unencumbered by the federal tax lien"
- TN 30.02.07

63

Tax Lien Against Deceased Debtor
Estate by the Entireties or Joint Tenancy

- May remain a lien on real property
- *Paternoster v. U.S.*, 640 F.Supp.2d 983 (S.D. Ohio 2009)
  - Tax lien attached to estate by the entireties property
  - Debtor spouse died
  - Tax lien remains valid
- TN 30.02.07

64

Tax Lien Against Deceased Debtor

- May remain a lien on real property
- TN 30.02.07
- Contact underwriting counsel

65

County & Municipal Liens

FLA. STAT. chs. 153, 159 & 170

County Water & Sewer Systems

Municipal Liens – FLA. STAT. ch. 153

County Services & Facilities

- Water
- Sewer

Priority

- Superior to all other liens, including purchase money mortgages
  - Fla. Stat. § 153.67

68

Perfection

- Lien appears to attach when service charge becomes due
  - TN 25.03.09
- No requirement to record any document
  - FL. STAT. § 153.67

69

Duration

- Subject to a 5 year statue of limitation, if recorded in official records books
  - FLA. STAT. § 95.11
  - *City of Riviera Beach v. Reed*, 987 So.2d 168 (Fla. 4th DCA 2008)
- Foreclosure may begin when service charge is 30 days past due
  - FLA. STAT. § 153.67

70

Extension - none

71

64

Prepared on 10/06/2014
Prepared By & Return To:
Shirley Lano
Orange County Utilities Department
Customer Service Division
9150 Curry Ford Road
Orlando, FL 32825-7600

DOC# 20140517890 B: 10818 P: 2308
10/10/2014 12:07:24 PM Page 1 of 1
Rec Fee $10.00
Martha O. Haynie, Comptroller
Orange County, FL
ID - Ret To: ORANGE COUNTY UTILITIES -

WATER AND/OR **SEWER LIEN**

To: **PAMELA D LINKS**
8211 ALVERON AVE
ORLANDO, FL 32817-2404

Orange County, a political subdivision of the State of Florida, does hereby claim a lien upon the real property described below for all fees, rates and charges for water and/or sewer service rendered to the property described below, and fees and costs for the collection thereof and enforcement of this lien. This lien is claimed pursuant to Section Five of Chapter 71-804, Laws of Florida, 1971 and Section 153.67 Florida Statutes, and is in the amount of **$84.40** for services rendered to the below described property from **11/16/2003** to **07/03/2014** (inclusive).

The real property upon which the lien is claimed is described as follows:

ACCOUNT #:	**7813086200**
ADDRESS:	**8211 ALVERON AVE**
PARCEL ID:	**12-22-30-8410-02-310**
LEGAL DESCRIPTION:	**SUN HAVEN X/33 LOT 31 BLK B**

TIMOTHY B. ARMSTRONG
CUSTOMER SERVICE DIVISION MANAGER
ORANGE COUNTY UTILITIES
ORANGE COUNTY, FLORIDA

STATE OF FLORIDA
COUNTY OF ORANGE

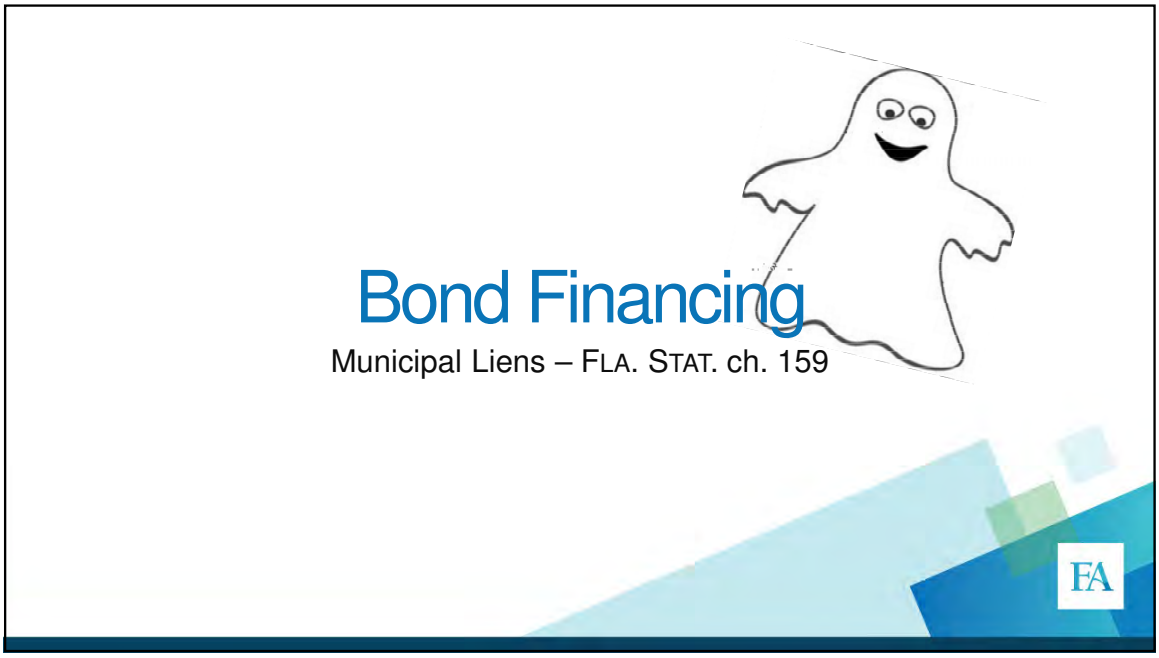
On this day, personally appeared before me, the undersigned Notary Public, Timothy B. Armstrong, to me well known to be Designee of Orange County Utilities Director, who, after being duly sworn, depose and say that the foregoing Water and/or Sewer Lien was executed under authority of the Board of County Commissioners for the purposes therein expressed.
WITNESS my hand and official seal this the 7th day of October 20 14

KATHY ANN GIBSON
Notary Public, State of Florida at Large
My Commission Expires: 3/31/2017

20-56 (3/89)

72

- Priority Fla. Stat. § 153.67
- No requirement to record
- 5 year statute of limitations if recorded – from recording date


Bond Financing
Municipal Liens – FLA. STAT. ch. 159

Municipal Repairs & Improvements
• Governing bodies
• County
• Municipality
• FLA. STAT. § 159.02
74

Municipal Repairs & Improvements

- Waterworks systems
- Sewer systems
- Gas systems
- Bridges
- Causeways
- Tunnels
- Incinerator and solid waste disposal systems
- Harbor and port facilities
- Mass transportation systems
- Expressways
- Marinas
- Civic auditoriums
- Sports arenas
- Parking facilities, and
- Theme and amusement parks

75

Municipal Repairs & Improvements

- Fix and collect
  - Rates
  - Fees
  - Tolls
  - Rentals or
  - Other charges for services and facilities
- FLA. STAT. § 159.03 (3)

76

Priority

- Premises served by such system
- Superior to all other liens, including purchase money mortgages
  - FLA. STAT. § 159.17

77

Perfection

- Lien appears to attach when service charge becomes due
  - TN 25.03.09
- No requirement to record any document
  - FL. STAT. § 159.17

78

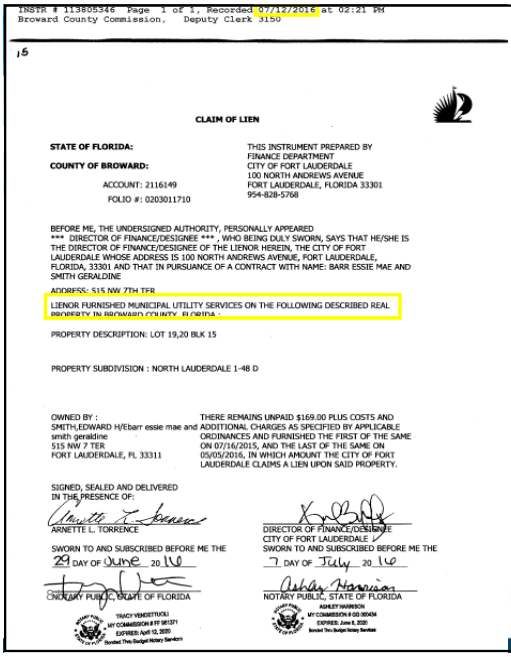
Duration

- Subject to a 5-year statute of limitations, if recorded in official records book
  - FLA. STAT. § 95.11
  - *City of Riviera Beach v. Reed*, 987 So.2d 168 (Fla. 4th DCA 2008)
- Foreclosure may begin when service charge is 30 days past due
  - FLA. STAT. § 159.17

79

Extension - none

80



INSTR # 113805346 Page 1 of 1, Recorded 07/12/2016 at 02:21 PM
Broward County Commission, Deputy Clerk 3150

15

CLAIM OF LIEN

STATE OF FLORIDA:
COUNTY OF BROWARD:

ACCOUNT: 2116149
FOLIO #: 0203011710

THIS INSTRUMENT PREPARED BY
FINANCE DEPARTMENT
CITY OF FORT LAUDERDALE
100 NORTH ANDREWS AVENUE
FORT LAUDERDALE, FLORIDA 33301
954-828-5768

BEFORE ME, THE UNDERSIGNED AUTHORITY, PERSONALLY APPEARED *** DIRECTOR OF FINANCE/DESIGNEE ***, WHO BEING DULY SWORN, SAYS THAT HE/SHE IS THE DIRECTOR OF FINANCE/DESIGNEE OF THE LIENOR HEREIN, THE CITY OF FORT LAUDERDALE WHOSE ADDRESS IS 100 NORTH ANDREWS AVENUE, FORT LAUDERDALE, FLORIDA, 33301 AND THAT IN PURSUANCE OF A CONTRACT WITH NAME: BARR ESSIE MAE AND SMITH GERALDINE

ADDRESS: 515 NW 7TH TER

LIENOR FURNISHED MUNICIPAL UTILITY SERVICES ON THE FOLLOWING DESCRIBED REAL PROPERTY IN BROWARD COUNTY, FLORIDA :

PROPERTY DESCRIPTION: LOT 19,20 BLK 15

PROPERTY SUBDIVISION : NORTH LAUDERDALE 1-48 D

OWNED BY :
SMITH,EDWARD H/Ebarr essie mae and smith geraldine
515 NW 7 TER
FORT LAUDERDALE, FL 33311

THERE REMAINS UNPAID $169.00 PLUS COSTS AND ADDITIONAL CHARGES AS SPECIFIED BY APPLICABLE ORDINANCES AND FURNISHED THE FIRST OF THE SAME ON 07/16/2015, AND THE LAST OF THE SAME ON 05/05/2016, IN WHICH AMOUNT THE CITY OF FORT LAUDERDALE CLAIMS A LIEN UPON SAID PROPERTY.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:

ARNETTE L. TORRENCE

SWORN TO AND SUBSCRIBED BEFORE ME THE 29 DAY OF June 20 16

NOTARY PUBLIC, STATE OF FLORIDA

DIRECTOR OF FINANCE/DESIGNEE
CITY OF FORT LAUDERDALE

SWORN TO AND SUBSCRIBED BEFORE ME THE 7 DAY OF July 20 16

NOTARY PUBLIC, STATE OF FLORIDA

65

- For utility services
- Priority Fla. Stat. § 153.67
- No requirement to record
- 5 year statute of limitations once recorded – from recording date

Supplemental & Alternative Method of Making Local Municipal Improvements

Municipal Liens – FLA. STAT. ch. 170

Local Improvements – FLA. STAT. § 170.01

- Roads
- Walkways
- Drainage for above
- Lighting for above
- Street furniture
- Landscaping
- And other amenities such as parks and seawalls

83

Priority

- Payable in the time and manner as provided in the resolution
- Superior to all other liens, including purchase money mortgages
- Shall bear interest with limitations on interest rate
  - FLA. STAT. § 170.09

84

Perfection

- Resolution required
  - FLA. STAT. § 170.03
- Shall be recorded in "Improvement Lien Book"
- Lien attaches when municipality equalized and approves the special assessment
  - No requirement for improvement to be complete
  - FLA. STAT. § 170.08

85

Duration

- Lien attaches until paid
  - FLA. STAT. § 170.08
- No longer than 30 years
  - FLA. STAT. § 170.09
- Delinquent if not paid when due and governing authority shall bring suit
  - FLA. STAT. § 170.10

86

Extension

- Special act contrary to the 30 year limitation
  - FLA. STAT. § 170.09

87

Resolution

66

RESOLUTION OF THE TOWN COUNCIL OF
THE TOWN OF FORT MYERS BEACH, FLORIDA
RESOLUTION NUMBER 00-03

A RESOLUTION OF THE TOWN OF FORT MYERS BEACH, FLORIDA, DECLARING SPECIAL ASSESSMENTS FOR THE RE-CONSTRUCTION OF PALMETTO STREET AND EASY STREET, PROVIDING AUTHORITY, RE-CONSTRUCTION OF PALMETTO STREET AND EASY STREET; PLANS AND SPECIFICATIONS, WITH ESTIMATED COST OF PROPOSED IMPROVEMENT; PUBLICATION OF RESOLUTION; PRELIMINARY ASSESSMENT ROLL; PUBLICATION OF PRELIMINARY ASSESSMENT ROLL; FINAL CONSIDERATION OF SPECIAL ASSESSMENTS; EQUALIZING BOARD TO HEAR COMPLAINTS AND ADJUST ASSESSMENTS; PRIORITY OF LIEN; INTEREST; AND METHOD OF PAYMENT; LEGAL PROCEEDINGS INSTITUTED UPON FAILURE OF PROPERTY OWNER TO PAY SPECIAL ASSESSMENT OR INTEREST WHEN DUE; FORECLOSURE; SERVICE OF PROCESS; EXPENDITURES FOR IMPROVEMENTS; ASSESSMENT ROLL SUFFICIENT EVIDENCE OF ASSESSMENT AND OTHER PROCEEDINGS; VARIANCE NOT MATERIAL UNLESS PARTY OBJECTING MATERIALLY INJURED THEREBY; SEVERABILITY AND AN EFFECTIVE DATE.

WHEREAS, the Palmetto Street and Easy Street are in desperate need of re-construction; and,
WHEREAS, the Town was unable to obtain the consent of all of the benefited property owners; and,
WHEREAS, the levy of mandatory assessments is the only method available for the re-construction;

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA:

SECTION ONE: Authority. This Resolution is enacted pursuant to the provisions of Chapter 95-493, Laws of Florida, Chapter 170, Florida Statutes, and other applicable provisions of law.

SECTION TWO: Re-construction of Palmetto Street and Easy Street.

(a) There is hereby proposed the assessment of the cost of construction or reconstruction, the cost of all labor and materials, the cost of all lands, property, rights, easements, interest, cost of plans and specifications, surveys of estimates of costs and of revenues, cost of engineering and legal services, and all other expenses necessary or incident to determining the feasibility or practicability of such construction or reconstruction and administrative expense.

(b) The foregoing cost shall be assessed against all lots and lands adjoining and contiguous or bounding and abutting upon such improvements or specially benefited thereby and further designated by the assessment plat hereinafter provided.

...ment is $96,440.00

...With Estimated Cost of Proposed Improvement. There is ...showing the area to be assessed, with plans and ...e proposed improvement, which assessment plat, plans ...the inspection of the public.

Upon the adoption of this resolution, this resolution shall ...ks in a newspaper of general circulation published in the ...

...Upon the adoption of this resolution a preliminary ...of assessment provided for in this resolution, which ...as possible; said assessment roll shall show the lots and ...and the assessment against each lot or parcel of land, ...ents, the number of annual installment in which the ...shown upon said assessment roll.

...sessment Roll. Upon the completion of said preliminary ...olution fix a time and place at which the owners of the ...terested therein may appear before said governing ...advisability of making such improvements, as to the cost ...and as to the amount thereof to be assessed against each ...iting of such time and place shall be given to such ...

...assessment and shall be served by mailing a copy to ...last known address, the names and addresses of such ...records of the property appraiser or from such other ...proof of such mailing to be made by the affidavit of the ..., provided, that failure to mail said notice or notices shall ...nder.

...ng shall also be given by two publications a week apart for ...publication shall be at least 1 week prior to the date of ...streets or other areas to be improved and advise all ...each property to be assessed and the amount to be ...ty may be ascertained at the office of the clerk of the ...shall be verified by the affidavit of the publisher and ...

...special Assessments, Equalizing Board To Hear ...time and place named in the notice provided, the ...meet and hear testimony from affected property owners as ...e improvements and funding them with special ...ments, the governing authority of the municipality shall ...special assessments. Thereafter, the governing authority ...

...sider any and all exemptions as to the special ...essments on a basis of justice and right. When so ...ermine authority, a final assessment roll shall be filed ...and such assessments shall stand confirmed and ...the property against which such assessments are made ...provement. the municipality shall credit to each of the ...originally made, approved, and confirmed and the ...ovement to be paid by special assessments as finally ...ment, but in no event shall the final assessments exceed ...mptly after such confirmation, the assessments shall be ...own as the "Improvement Lien Book," and the record ...are evidence of its validity.

...d Method of Payment. The special assessments shall be ...d in the resolution providing for the improvement; shall ...county, district, and municipal taxes, superior in dignity ...shall bear interest, at a rate of 8 percent per year, from ...and may, be made payable in equal installments over a ...aid when due, there shall be added a penalty at the rate ...e assessments may be paid without interest at any time ...rded and a resolution accepting the same has been ...

...) Upon Failure of Property Owner to Pay Special ...s; Service of Process. Each annual installment provided ...id resolution, with interest upon all deferred payments, ...been paid, and upon the failure of any property owner to ...rest, or any annual interest upon deferred payments, the ...cause to be brought the necessary legal proceedings by a ...th all accrued interest and penalties, together with all ...orney's fee, to be assessed as part of the costs and to the ...tem of an assessment, or any accrued interest on said ...rest and penalties thereon, shall immediately become ...the foreclosure of any special assessment service of ...ulants may be had by publication, as now provided by law ...edings shall be prosecuted to a sale and conveyance of the ...provided by law in suits to foreclose mortgages.

...ms. The governing authority of any municipality shall ...ial fund that may be provided for that purpose such one ...

...ient Evidence Of Assessment And Other Proceedings; ...e Materially Injured Thereby. Any informality or ...with the levy of any special assessment shall not affect the ...assessment roll has been confirmed by the Town Council.

...ffirmed shall be competent and sufficient evidence that ...ment was duly made and adopted, and that all other ...essment roll were duly had, taken, and performed as ...he directions hereunder shall be held material unless it ...terially injured thereby.

...ne of the provisions of this resolution should be held ...nary to the policy of express law, although not expressly ...ny reason whatsoever beheld invalid, then such provision ...rate from the remaining provisions of this resolution, and ...on of this resolution.

...solution shall become effective upon adoption ...

...y the Fort Myers Beach Town Council upon being put ...

...

...

...

...

...

...ay of January, 2000.

Town of Fort Myers Beach

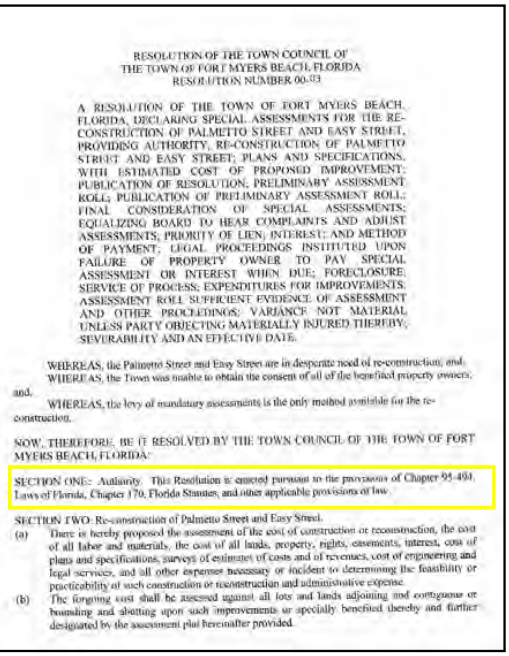
By: John J. MacDonald, Mayor

Resolution

66

- Authority under FLA. STAT. ch. 170
- Project outline and costs
- Assessment plat – who has to pay
- Publication requirements
- Preliminary assessment roll

89



RESOLUTION OF THE TOWN COUNCIL OF
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(a) There is hereby proposed the assessment of the cost of construction or reconstruction, the cost of all labor and materials, the cost of all lands, property, rights, easements, interest, cost of plans and specifications, surveys of estimates of costs and of revenues, cost of engineering and legal services, and all other expenses necessary or incident to determining the feasibility or practicability of such construction or reconstruction and administrative expense.
(b) The foregoing cost shall be assessed against all lots and lands adjoining and contiguous or bounding and abutting upon such improvements or specially benefited thereby and further designated by the assessment plat hereinafter provided.

Improvement Lien Book

70

IMPROVEMENT LIEN BOOK INDEX

NO. 59 **WALDEN DRIVE STREET LIGHTING PROJECT AREA BETWEEN MCGREGOR BOULEVARD AND THE CALOOSAHATCHEE RIVER**

Resolution No. 2007-54 adopted 10/01/2007
Establish district
Advertised 10/08/2007

Resolution No. 2007-56 adopted 10/15/2007
Adopting preliminary assessment roll
Notices mailed 10/26/2007
Advertised 11/16/2007 and 11/23/2007

Resolution No. 2007-64 adopted 12/03/2007
Equalizing assessments
Recorded: 12/13/2007 Instrument No. 2007000366050

Resolution No. 2008-27 adopted 07/21/2008
Amending final pro-rata cost
Recorded: 07/30/2008 Instrument No. 200800020480

90

Improvement Lien Book

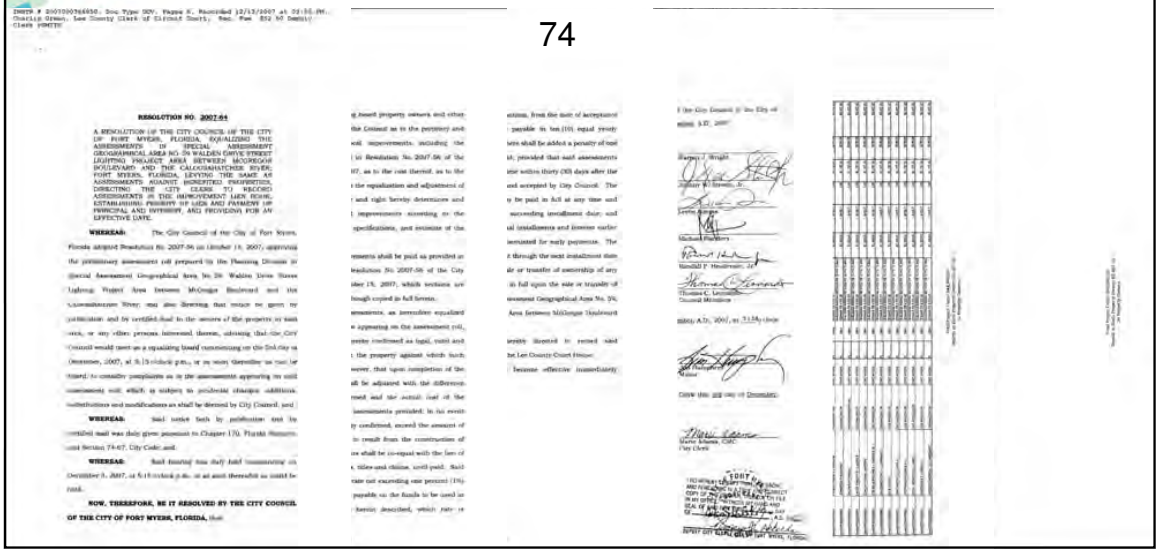
- Separate bill sent
- Owner may pay in full or
- Spread payments over time
  - Will pay interest
  - Maximum time indicated within resolution

91

73

Equalizing the Assessments

74



RESOLUTION NO. 2007-55

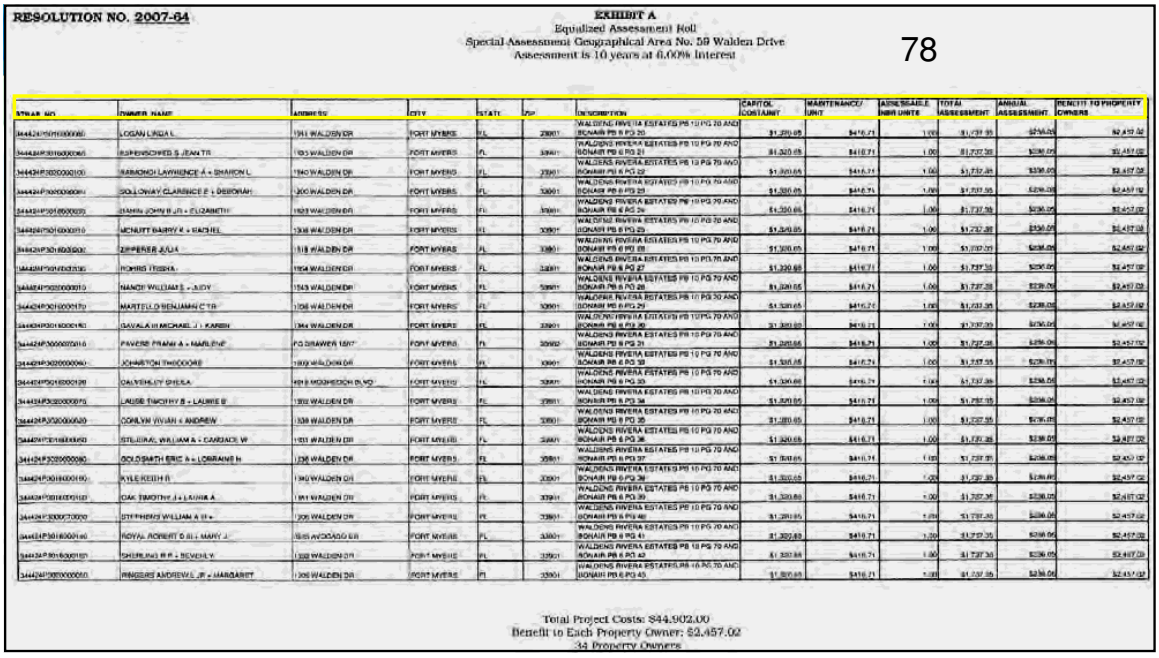
A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF FORT MYERS, FLORIDA, EQUALIZING THE ASSESSMENTS OF SPECIAL ASSESSMENT GEOGRAPHICAL AREA NO. 26 WALDEN DRIVE STREET LIGHTING PROJECT AREA BETWEEN MCGREGOR BOULEVARD AND THE CALOOSAHATCHEE RIVER, FORT MYERS, FLORIDA, LEVYING THE SAME AS ASSESSMENTS AGAINST BENEFITED PROPERTIES, DIRECTING THE CITY CLERK TO RECORD ASSESSMENTS IN THE IMPROVEMENT LIEN BOOK, ESTABLISHING PRIORITY OF LIEN AND PAYMENT OF PRINCIPAL AND INTEREST, AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS: The City Council of the City of Fort Myers, Florida adopted Resolution No. 2007-54 on October 15, 2007, approving the preliminary assessment roll prepared by the Planning Division in Special Assessment Geographical Area No. 26 Walden Drive Street Lighting Project Area between McGregor Boulevard and the Caloosahatchee River; and also directing that notice be given to property owners and other persons interested therein, advising that the City Council would meet as a equalizing board commencing on the 5th day of December, 2007, at 9:15 o'clock p.m., or as soon thereafter as could be heard, to consider complaints as to the assessments appearing on said assessment roll, which, as subject to proposed changes, additions, modifications and modifications as shall be deemed by City Council, and

WHEREAS: Said notice both by publication and by certified mail was duly given pursuant to Chapter 170, Florida Statutes and Section 74-67, City Code; and

WHEREAS: Said hearing was duly held commencing on December 5, 2007, at 9:15 o'clock p.m. at or near thereafter as could be had,

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FORT MYERS, FLORIDA, that



RESOLUTION NO. 2007-64

EXHIBIT A
Equalized Assessment Roll
Special Assessment Geographical Area No. 59 Walden Drive
Assessment is 10 years at 6.00% Interest

78

STRAP NO.	OWNER NAME	ADDRESS	CITY	STATE	ZIP	DESCRIPTION	CAPITOL CONSTAINT	MAINTENANCE/ UNIT	ASSESSABLE UNIT UNITS	TOTAL ASSESSMENT	ANNUAL ASSESSMENT	BENEFIT TO PROPERTY OWNERS
[illegible]	LOGAN LINDA L	1911 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 35	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	ESPENSCHIED S JEAN TR	1915 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 21	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	MARIANCH LAWRENCE A + SHARON L	1940 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 22	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	SOLLOWAY CLARENCE F + DEBORAH	1930 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 23	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	SIMPS JOHN B JR + ELIZABETH	1923 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 24	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	MCNUTT BARRY K + RACHEL	1916 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 25	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	ZIPPERER JULIA	1918 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 26	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	MORRIS TESSA	1924 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 27	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	NANCE WILLIAM E + JUDY	1943 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 28	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	MARTELLO BENJAMIN C TR	1936 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 29	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	GAVALA III MICHAEL J + KAREN	1944 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 30	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	FAVERE FRANK A + MARLENE	PO DRAWER 1507	FORT MYERS	FL	33902	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 31	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	JOHNSTON THEODORE	1920 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 32	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	DALYRHLEY SHEILA	4918 MADISON BLVD	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 33	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	LAUBE TIMOTHY S + LAURIE S	1932 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 34	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	CONLYN VIVIAN + ANDREW	1939 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 35	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	STEJSKAL WILLIAM A + CARDACE W	1933 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 36	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	GOLDSMITH ERIC A + LORRAINE H	1936 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 37	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	KYLE KEITH R	1940 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 38	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	OAK TIMOTHY J + LAVINIA A	1941 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 39	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	STEPHENS WILLIAM A III +	1936 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 40	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	ROYAL ROBERT D III + MARY J	1945 AVOCADO CIR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 41	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	SHERLING R F + BEVERLY	1932 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 42	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	RINGERS ANDREW E JR + MARGARET	1936 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 43	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02

Total Project Costs: $44,902.00
Benefit to Each Property Owner: $2,457.02
34 Property Owners

Paid Assessment

79

RESOLUTION NO. 2007-64

EXHIBIT A
Equalized Assessment Roll
Special Assessment Geographical Area No. 59 Walden Drive
Assessment is 10 years at 6.00% Interest

[illegible]	[illegible]	1933 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 44	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	PORE ARNOLD F	1939 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 45	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	MORRISON CST LIC +	1944 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 46	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	PENDLETON MARTHA J LIE	1945 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 47	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	MORRISON STEVEN K + USA C	1931 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 48	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	STEJSKAL BARRETT W	1927 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 49	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	QUINTASIT IRMA D R	940 EDGE WAY	SARASOTA	FL	34236	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 50	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	MULLER MARK E + CLAIRE L	1140 WALES DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 51	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	SCAGNOTTI KELLY A	1927 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 52	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02
[illegible]	MARTINA BARBARA ERIN	1916 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 53	$1,320.65	$416.71	1.00	$1,737.35	$294.00	$2,457.02

PAID

94

How to Check for Municipal Liens

- Call municipality
  - Sometimes can be difficult to identify
- Submit the form required by the municipality
- Pay a required fee
- OR
- Hire a lien search company

95

County or Municipal Code Enforcement

FLA. STAT. ch. 162

Priority

- From time a certified copy of a code enforcement order imposing a fine or fine plus costs is recorded in public records
  - FLA. STAT. § 162.09(3)
- No super priority
  - *City of Palm Bay v. Wells Fargo Bank, N.A.,* 144 So.3d 924 (Fla. 2013)

97

Perfection

- Record a certified copy of the order imposing a fine or fine plus costs in the public records
- Lien will attach to all real or personal property owned by the violator except constitutional homestead
- May not initiate foreclosure until "three months" after filing of the lien
- FLA. STAT. § 162.09(3)

98

Duration

- Must bring action to enforce lien no later than 20 years from recording of certified copy of order imposing fine
  - FLA. STAT. § 162.10

- Enforceable in same manner as court judgment
  - However not deemed a court judgment
  - FLA. STAT. § 162.09(3)

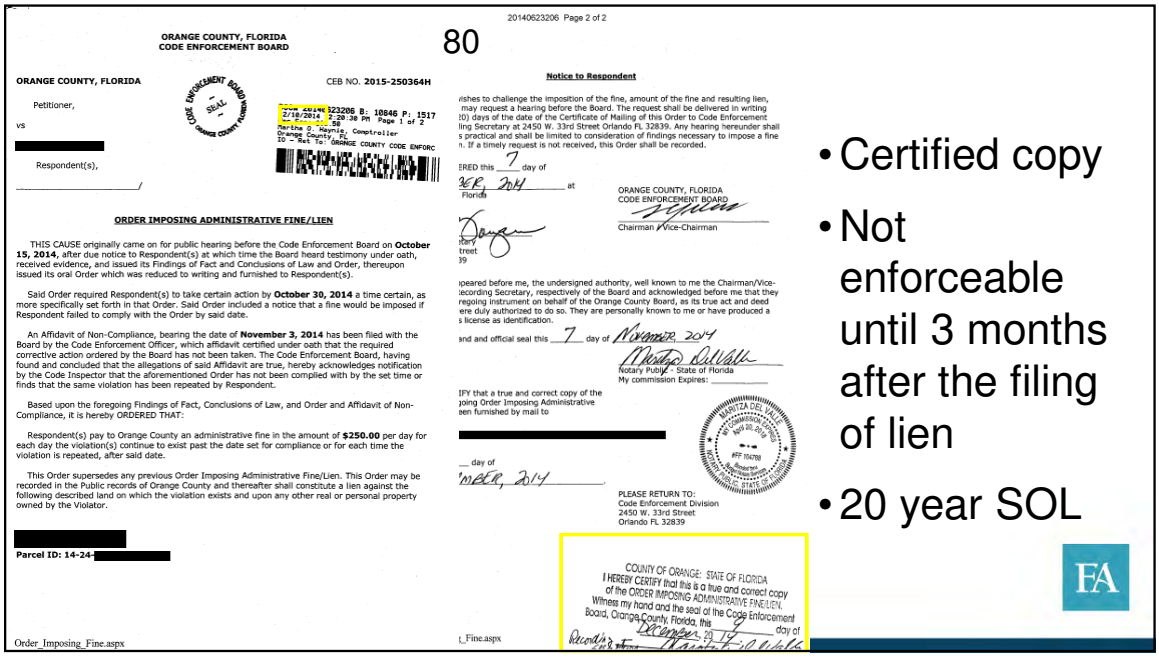
99

Extension

- Action must commence prior to end of 20-year period
- Continuation of such a lien during pendency of action will not bind creditors or subsequent purchaser for valuable consideration without notice, if lis pendens is not filed
  - FLA. STAT. § 162.10

100

80



20140623206 Page 2 of 2

ORANGE COUNTY, FLORIDA
CODE ENFORCEMENT BOARD

ORANGE COUNTY, FLORIDA

Petitioner,

vs

[redacted]

Respondent(s),

CEB NO. 2015-250364H

ORDER IMPOSING ADMINISTRATIVE FINE/LIEN

THIS CAUSE originally came on for public hearing before the Code Enforcement Board on **October 15, 2014**, after due notice to Respondent(s) at which time the Board heard testimony under oath, received evidence, and issued its Findings of Fact and Conclusions of Law and Order, thereupon issued its oral Order which was reduced to writing and furnished to Respondent(s).

Said Order required Respondent(s) to take certain action by **October 30, 2014** a time certain, as more specifically set forth in that Order. Said Order included a notice that a fine would be imposed if Respondent failed to comply with the Order by said date.

An Affidavit of Non-Compliance, bearing the date of **November 3, 2014** has been filed with the Board by the Code Enforcement Officer, which affidavit certified under oath that the required corrective action ordered by the Board has not been taken. The Code Enforcement Board, having found and concluded that the allegations of said Affidavit are true, hereby acknowledges notification by the Code Inspector that the aforementioned Order has not been complied with by the set time or finds that the same violation has been repeated by Respondent.

Based upon the foregoing Findings of Fact, Conclusions of Law, and Order and Affidavit of Non-Compliance, it is hereby ORDERED THAT:

Respondent(s) pay to Orange County an administrative fine in the amount of **$250.00** per day for each day the violation(s) continue to exist past the date set for compliance or for each time the violation is repeated, after said date.

This Order supersedes any previous Order Imposing Administrative Fine/Lien. This Order may be recorded in the Public records of Orange County and thereafter shall constitute a lien against the following described land on which the violation exists and upon any other real or personal property owned by the Violator.

[redacted]

Parcel ID: 14-24-[redacted]

Order_Imposing_Fine.aspx

Notice to Respondent

[redacted]

ORANGE COUNTY, FLORIDA
CODE ENFORCEMENT BOARD

Chairman / Vice-Chairman

PLEASE RETURN TO:
Code Enforcement Division
2450 W. 33rd Street
Orlando FL 32839

COUNTY OF ORANGE: STATE OF FLORIDA
I HEREBY CERTIFY that this is a true and correct copy of the ORDER IMPOSING ADMINISTRATIVE FINE/LIEN.
Witness my hand and the seal of the Code Enforcement Board, Orange County, Florida, this [redacted] day of December, 2014

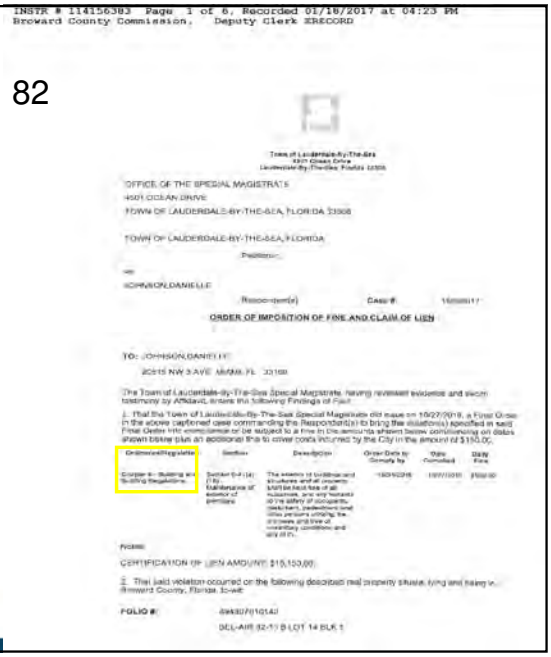
t_Fine.aspx

- Certified copy
- Not enforceable until 3 months after the filing of lien
- 20 year SOL

82

"Hybrid" Code Enforcement

- Code enforcement lien called a tax
- Ordinance/Regulation
  - Chapter 6



INSTR # 114156383 Page 1 of 6, Recorded 01/10/2017 at 04:23 PM
Broward County Commission, Deputy Clerk ERECORD

OFFICE OF THE SPECIAL MAGISTRATE
4501 OCEAN DRIVE
TOWN OF LAUDERDALE-BY-THE-SEA, FLORIDA 33308

TOWN OF LAUDERDALE-BY-THE-SEA, FLORIDA

Petitioner,

vs.

JOHNSON,DANIELLE

Respondent(s)

Case #:

ORDER OF IMPOSITION OF FINE AND CLAIM OF LIEN

TO: JOHNSON,DANIELLE

[redacted] NW 3 AVE MIAMI, FL 33169

The Town of Lauderdale-By-The-Sea Special Magistrate, having reviewed evidence and sworn testimony by Affidavit, enters the following Findings of Fact:

1. That the Town of Lauderdale-By-The-Sea Special Magistrate did issue on 10/27/2016, a Final Order in the above captioned case commanding the Respondent(s) to bring the situation(s) specified in said Final Order into compliance or be subject to a fine in the amounts shown below commencing on dates shown below plus an additional fine to cover costs incurred by the City in the amount of $150.00.

Ordinance/Regulation	Section	Description	Order Date by Comply by	Date Complied	Daily Fine
Chapter 6 - Building and Building Regulations	Section 6-4 (a) (1) Maintenance of exterior of premises	The exterior of buildings and structures and all property shall be kept free of all nuisances, and any hazard to the safety of occupants, members, pedestrians and other persons visiting the premises and free of unsanitary conditions and any of th	10/27/2016	10/27/2016	$150.00

Name:

CERTIFICATION OF LIEN AMOUNT: $15,150.00

2. That said violation occurred on the following described real property situate, lying and being in Broward County, Florida, to-wit:

FOLIO #: [redacted]

SEA-AIR 82-17 B LOT 14 BLK 1

102

Hybrid Code Enforcement

- Paragraph 5, second page
  - Fine and costs as a lien via Code of Ordinances
  - "…**such lien shall be coequal with the liens of all state, county, district, and municipal taxes, and superior in dignity to all other liens, titles and claims regardless of when created or recorded.**"
  - Call underwriting counsel

103

Review

- Judgment Liens – **A**, **B**, **C**, **D**
- Federal Tax Liens – review document face
- Municipal Liens – recording in Official Records book not necessary for lien to attach
- Code Enforcement Liens – need certified copy recorded

104

CFN 2016R0477098 OR BK 30192 Pgs 4534-4535 2Pgs
RECORDED 08/15/2016 15:38:50
HARVEY RUVIN, CLERK OF COURT, MIAMI-DADE COUNTY, FLORIDA

CFN: 20160358842 BOOK 30120 PAGE 2046
DATE:06/20/2016 04:29:53 PM
HARVEY RUVIN, CLERK OF COURT, MIA-DADE C

IN THE COUNTY COURT FOR THE
11TH JUDICIAL CIRCUIT IN
AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NUMBER: 2015-013610-SP-23

CAPITAL ONE BANK (USA), N.A.,
Plaintiff,
vs.

ELVIRA L ESPOSITO,
Defendant.
_____/

DEFAULT FINAL JUDGMENT

THIS CAUSE, having come before the Court and the Court having reviewed the pleadings and being otherwise duly advised in the premises, it is hereby:

ORDERED and ADJUDGED that Plaintiff, CAPITAL ONE BANK (USA), N.A., 1680 CAPITAL ONE DRIVE, MCLEAN VA 22102, recover from the Defendant(s), ELVIRA L ESPOSITO, 661 E 6TH PL, HIALEAH FL 33010-4512, the sum of $4832.87 on principal and $393.00 for costs for which let execution issue.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant(s) shall complete the attached Florida Small Claims Rules Form 7.343 (Fact Information Sheet) and return it to Zakheim & LaVrar, P.A., 1133 South University Drive, Second Floor, Plantation, Florida 33324, within 45 days from the date of this final judgment, unless the final judgment is satisfied or notice of appeal is filed. Jurisdiction of this case is retained to enter further orders that are proper to compel the defendant(s) to complete Form 7.343 and return it to Zakheim & LaVrar, P.A.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 06/15/16.

Diana Vizcaino

DIANA VIZCAINO
COUNTY COURT JUDGE

STATE OF FLORIDA, COUNTY OF DADE
I HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office. August 11th AD 20 16
HARVEY RUVIN, Clerk of Circuit and County Courts
Deputy Clerk

Book30192/Page4534 CFN#20160477098 Page 1 of 2

OR BK 30192 PG 4535
LAST PAGE

CFN: 20160358842 BOOK 30120 PAGE 2047

FINAL ORDERS AS TO ALL PARTIES
SRS DISPOSITION NUMBER 12

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

Judge's Initials DV

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

Copies furnished to:

Zakheim & LaVrar, P.A., Second Floor, 1133 South University Drive, Plantation Florida 33324.

ELVIRA L ESPOSITO, 661 E 6TH PL , HIALEAH FL 33010-4512.

GRANTED

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VICTOR F. BATTAGLIA	)	
	)	C.A. No. 12106-VCL
Plaintiff,	)	
v.	)	
	)	
JAMES L. SCHALLER, M.D.	)	
	)	
Defendant,	)	

[PROPOSED] ORDER

AND NOW, the Court having considered the Motion of the Plaintiff, Victor F. Battaglia, for Judgment on the Pleadings, and good cause being shown,

IT IS HEREBY ORDERED this 12th day of July 2016 that the Motion of the Plaintiff is Granted and judgment is hereby entered in favor of Plaintiff and against the Defendant James L. Schaller, M.D. in the amount of $140,000.00 with interest from January 29, 2016 and the costs of this action.

/s/ J Travis Laster
Vice Chancellor Laster

CERTIFIED:
AS A TRUE COPY:
ATTEST:
REGISTER IN CHANCERY

This is to certify that on 9/29/16, notice of this recording was sent, certified mail, to the Debtor(s) at the addresses given in the affidavit recorded concurrently herewith.

County Administrator

By _____ Deputy

V

In the Circuit Court of the Seventeenth Judicial Circuit
In and for Broward County, Florida

Case No.:
Division: Civil

Victor F. Battaglia,
Plaintiff,

vs.

James L. Schaller, MD,
Defendant,
_____/

PLAINTIFF'S AFFIDAVIT IN SUPPORT OF RECORDING FOREIGN JUDGMENT

State of Florida) ss

County of Broward)

Before me, personally appeared Mark W. Rickard, who, after being sworn, states:

1. Affiant is the attorney of the judgment creditor in this case and as such gives this affidavit.
2. A final judgment was entered on in this case in the Court of Chancery of the State of Delaware, in the amount of $140,000.00.
3. Interest accrues on the above judgment from January 29, 2016 at 5% over the Federal Reserve Discount Rate in effect on January 29, 2016, pursuant to Del. Code Ann. Title 6 §2301.
4. Federal Reserve Discount Rate in effect on January 29, 2016 was 1%; thus, the interest on the Final Judgment accrues at the annual rate of 6%.
5. A certified copy of the foreign judgment is submitted with this affidavit.
6. The address of the judgment creditor is: c/o 921 N. Orange Street, Wilmington, DE 19801.
7. The name of the judgment debtors is James L. Schaller, MD.
8. The social security number of the judgment debtor is: Unknown.
9. The last known address of the judgment debtor is: 4566 Chat Ct, Naples, FL 34119-8923.

Further your Affiant sayeth naught.

SHONEA L BELL
MY COMMISSION # GG012079
EXPIRES July 17, 2020
1-398-0153 FloridaNotaryService.com

Mark W. Rickard

Sworn to and subscribed before me on 9/27/16.

Shonea L. Bell
Name of Notary Public

Shonea L. Bell
Signature of Notary Public

My Commission Expires:

Affiant: X Known or ___ Produced ID

SHONEA L BELL
MY COMMISSION # GG012079
EXPIRES July 17, 2020

9/26/2016

Court File No. 00-CV-185054

ONTARIO
SUPERIOR COURT OF JUSTICE

The Honourable	)	
	)	**TUESDAY THE 4TH DAY OF**
JUSTICE HOILETT	)	
	)	**NOVEMBER, 2003**
	)	

B E T W E E N:

JOSE SILVA

Plaintiff

- and -

JUAN VALMANA

Defendant

THIS IS TO CERTIFY THAT THIS DOCUMENT, EACH PAGE OF WHICH IS STAMPED WITH THE SEAL OF THE SUPERIOR COURT OF JUSTICE AT TORONTO, IS A TRUE COPY OF THE DOCUMENT ON FILE IN THIS OFFICE
DATED AT TORONTO THIS 21 DAY OF NOVEMBER 20 04
REGISTRAR

LA PRÉSENT ATTEST QUE CE DOCUMENT, DONT CHACUNE DES PAGES EST REVÊTUE DU SCEAU DE LA COUR SUPÉRIEURE DE JUSTICE A TORONTO, EST UNE COPIE CONFORME DU DOCUMENT CONSERVÉ DANS CE BUREAU
FAIT À TORONTO LE 21 JOUR DE NOVEMBRE 20 04
GREFFIER

J U D G M E N T

THIS ACTION was heard on June 9 and 10, 2003 without a jury at 361 University Avenue, Toronto, Ontario. The court having released its decision on June 16, and decision regarding costs released today;

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of counsel for the plaintiff, no one appearing for the defendant, nor the defendant appearing in person, although properly served as appears from the affidavits of service and the evidence given by Linda Margarit;

1. **THIS COURT ORDERS AND ADJUDGES** that the defendant do pay to the plaintiff the sum of $149,294.05;

COUNTY COMMISSIONERS CERTIFIED OCT 1ST 1913 BROWARD COUNTY, FLORIDA

This is to certify that on this 6th day of December 2004 copy of above Notice has been mailed to Debtor.
County Administrator
By Deputy

57

(2)

2. **THIS COURT ORDERS** that the defendant do pay to the plaintiff his costs of this action, hereby fixed in the sum of $48,500.00;

3. **AND THIS COURT ORDERS** that the defendant do pay to the Ontario Health Insurance Plan $18,645.15;

THIS JUDGMENT BEARS INTEREST at the rate of 4 per cent per year commencing on November 4, 2003.

November 4, 2003

M. KANT
REGISTRAR

SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE
ENTERED / ENTRÉ
MAR 0 4 2004
per / par:
LOCAL REGISTRAR / GREFFIER LOCAL

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

JOSE SILVA

CASE NO.

Plaintiff

v.

JUAN VALMANA,

Defendant.
_____/

AFFIDAVIT PURSUANT TO FLORIDA STATUTE §55.601

STATE OF FLORIDA)

COUNTY OF MIAMI-DADE)

BEFORE ME, the undersigned authority, personally appeared J. T. Haley, Esquire, who after being duly sworn deposes and states that:

1. On November 4, 2003, a Judgment was entered in favor of JOSE SILVA against JUAN VALMANA, in accordance with the laws of Canada.

2. The name and last known post office address of the judgment debtor is

Juan Valmana
12535 Orange Drive
Davie, FL
or
Juan Valmana
c/o Clara Valmana
535 W. 53rd Street
Hialeah, FL 33012

3. The name and address of the judgment creditor is:

Jose Silva
2 Lambert Lodge
Apt. 213
MCG-3-YA
Ontario, Canada

4. The name and address of the judgment creditor's attorney in the State of Florida is:

HALEY, SINAGRA, PAUL & TOLAND, P.A.
Attention: J. T. Haley, Esquire
100 South Biscayne Boulevard, Suite 800
Miami, Florida 33131

FURTHER AFFIANT SAYETH NAUGHT.

J. T. Haley, Esquire

The foregoing instrument was acknowledged before me this 1st day of December, 2004. by J. T. Haley, Esquire, who is personally known to me and who did not take an oath.

Notary Public, State of Florida

My Commission Expires:

OFFICIAL NOTARY SEAL
DONNA ALEXANDER
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. DD163151
MY COMMISSION EXP. NOV. 4,2006

\\Data_server\data\LITIGATION I\HALEY\4078 - Jose Silva\Affidavit.wpd

Form 668 (Y) (c)
(Rev. October 1999)

1056

Department of the Treasury - Internal Revenue Service

Notice of Federal Tax Lien

District	Serial Number	For Optional Use by Recording Office
SOUTH FLORIDA	650062172	

As provided by sections 6321, 6322, and 6323 of the Internal Revenue Code, we are giving a notice that taxes (including interest and penalties) have been assessed against the following-named taxpayer. We have made a demand for payment of this liability, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

[redacted]

Name of Taxpayer NEWTON SMITH

Residence 1013 SW 49TH AVE
MARGATE, FL 33068-4048

INSTR # 100544428
OR BK 30868 PG 0654
RECORDED 09/21/2000 09:05 AM
BROWARD COUNTY
DEPUTY CLERK 1016

IMPORTANT RELEASE INFORMATION: For each assessment listed below, unless notice of lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a).

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/1994	[redacted]	02/14/2000	03/16/2010	3195.48
1040	12/31/1995	[redacted]	12/28/1998	01/27/2009	6753.72
1040	12/31/1997	[redacted]	06/01/1998	07/01/2008	28.49
1040	12/31/1998	[redacted]	10/18/1999	11/17/2009	4251.07

DEFERRED ITEM
Return Document To
Business Operations

Place of Filing

County Courthouse
Broward County
Ft. Lauderdale, FL 33301

Total $ 14228.76

This notice was prepared and signed at FT. LAUDERDALE, FL, on this,

the 18th day of September, 2000.

Signature for P. S. Lane

Title ACS 65-01-0008

(NOTE: *Certificate of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax lien Rev. Rul. 71-466, 1971-2 C.B. 409)*

PART 1 - KEPT BY RECORDING OFFICE

Form 668 (Y) (c) (Rev. 10-99)
CAT. NO. 60025X

61

23986918 *** REFILED NOTICE *** REFILED NOTICE *** REFILED NOTICE ***

3479 REFILE REFILE

Department of the Treasury - Internal Revenue Service

Form 668-F (Rev. February 2004)

Notice of Federal Tax Lien

Recorded: 09/21/2000 30868 00:00 0654 100544428

Area:
SMALL BUSINESS/SELF EMPLOYED AREA #3
Lien Unit Phone: (800) 913-6050

Serial Number
650062172

For Optional Use by Recording Office

As provided by section 6321, 6322, and 6323 of the Internal Revenue Code, we are giving a notice that taxes (including interest and penalties) have been assessed against the following-named taxpayer. We have made a demand for payment of this liability, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer NEWTON SMITH

Residence
1013 SW 49TH AVE
MARGATE, FL 33068-4048

IMPORTANT RELEASE INFORMATION: For each assessment listed below, unless notice of the lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a)* NOT APPLICABLE TO A REFILED NOTICE ***

Kind of Tax (a)	Tax Period Ending (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/1998	XXX-XX-9269	10/18/1999	N/A	5033.89

NOTICE OF FEDERAL TAX LIEN REFILING
Serial ID: 558274109 Notice Filed At: Broward
New TP Name:
New Address:
New TIN:
R. A. Mitchell
Signature: for FORREST NIEMI
(954) 423-7840
DATE: 06/17/2009
Title: BANKRUPTCY SPEC

Place of Filing
County Courthouse
Broward County
Ft. Lauderdale, FL 33301

Total $ 5033.89

This notice was prepared and signed at BALTIMORE, MD, on this,

the 18th day of September, 2000.

Signature
for P. S. Lane

Title
ACS
65-01-0008

(NOTE: Certificate of officer authorized by law to take acknowledgment is not essential to the validity of Notice of Federal Tax lien Rev. Rul. 71-466, 1971 - 2 C.B. 409)

Part 1 - Kept By Recording Office

Form **668-F** (Rev. 2-2004)
CAT. NO 60025X

Prepared on 10/06/2014
Prepared By & Return To:
Shirley Lano
Orange County Utilities Department
Customer Service Division
9150 Curry Ford Road
Orlando, FL 32825-7600

DOC# 20140517890 B: 10818 P: 2308
10/10/2014 12:07:24 PM Page 1 of 1
Rec Fee: $10.00
Martha O. Haynie, Comptroller
Orange County, FL
IO - Ret To: ORANGE COUNTY UTILITIES -

WATER AND/OR SEWER LIEN

To: PAMELA D LINKS
8211 ALVERON AVE
ORLANDO, FL 32817-2404

Orange County, a political subdivision of the State of Florida, does hereby claim a lien upon the real property described below for all fees, rates and charges for water and/or sewer service rendered to the property described below, and fees and costs for the collection thereof and enforcement of this lien. This lien is claimed pursuant to Section Five of Chapter 71-804, Laws of Florida, 1971 and Section 153.67 Florida Statues, and is in the amount of **$84.48** for services rendered to the below described property from **11/16/2003** to **07/03/2014** (inclusive).

The real property upon which the lien is claimed is described as follows:

ACCOUNT #:	**7813086200**
ADDRESS:	**8211 ALVERON AVE**
PARCEL ID:	**12-22-30-8410-02-310**
LEGAL DESCRIPTION:	**SUN HAVEN X/33 LOT 31 BLK B**

TIMOTHY B. ARMSTRONG
CUSTOMER SERVICE DIVISION MANAGER
ORANGE COUNTY UTILITIES
ORANGE COUNTY, FLORIDA

STATE OF FLORIDA
COUNTY OF ORANGE

On this day, personally appeared before me, the undersigned Notary Public, Timothy B. Armstrong, to me well known to be Designee of Orange County Utilities Director, who, after being duly sworn, depose and say that the foregoing Water and/or Sewer Lien was executed under authority of the Board of County Commissioners for the purposes therein expressed.

WITNESS my hand and official seal this the 7th day of October, 2014.

KATHY ANN GIBSON
Notary Public, State of Florida at Large
My Commission Expires: 3/31/2017

Notary Public State of Florida
Kathy Ann Gibson
My Commission FF 003500
Expires 03/31/2017

20-56 (3/89)

15

CLAIM OF LIEN

STATE OF FLORIDA:

COUNTY OF BROWARD:

ACCOUNT: 2116149

FOLIO #: 0203011710

THIS INSTRUMENT PREPARED BY
FINANCE DEPARTMENT
CITY OF FORT LAUDERDALE
100 NORTH ANDREWS AVENUE
FORT LAUDERDALE, FLORIDA 33301
954-828-5768

BEFORE ME, THE UNDERSIGNED AUTHORITY, PERSONALLY APPEARED *** DIRECTOR OF FINANCE/DESIGNEE *** , WHO BEING DULY SWORN, SAYS THAT HE/SHE IS THE DIRECTOR OF FINANCE/DESIGNEE OF THE LIENOR HEREIN, THE CITY OF FORT LAUDERDALE WHOSE ADDRESS IS 100 NORTH ANDREWS AVENUE, FORT LAUDERDALE, FLORIDA, 33301 AND THAT IN PURSUANCE OF A CONTRACT WITH NAME: BARR ESSIE MAE AND SMITH GERALDINE

ADDRESS: 515 NW 7TH TER

LIENOR FURNISHED MUNICIPAL UTILITY SERVICES ON THE FOLLOWING DESCRIBED REAL PROPERTY IN BROWARD COUNTY, FLORIDA :

PROPERTY DESCRIPTION: LOT 19,20 BLK 15

PROPERTY SUBDIVISION : NORTH LAUDERDALE 1-48 D

OWNED BY :
SMITH,EDWARD H/Ebarr essie mae and
smith geraldine
515 NW 7 TER
FORT LAUDERDALE, FL 33311

THERE REMAINS UNPAID $169.00 PLUS COSTS AND ADDITIONAL CHARGES AS SPECIFIED BY APPLICABLE ORDINANCES AND FURNISHED THE FIRST OF THE SAME ON 07/16/2015, AND THE LAST OF THE SAME ON 05/05/2016, IN WHICH AMOUNT THE CITY OF FORT LAUDERDALE CLAIMS A LIEN UPON SAID PROPERTY.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

ARNETTE L. TORRENCE

SWORN TO AND SUBSCRIBED BEFORE ME THE
29 DAY OF June 20 16

NOTARY PUBLIC, STATE OF FLORIDA

TRACY VENDETTUOLI
MY COMMISSION # FF 981371
EXPIRES: April 12, 2020
Bonded Thru Budget Notary Services

DIRECTOR OF FINANCE/DESIGNEE
CITY OF FORT LAUDERDALE

SWORN TO AND SUBSCRIBED BEFORE ME THE
7 DAY OF July 20 16

NOTARY PUBLIC, STATE OF FLORIDA

ASHLEY HARRISON
MY COMMISSION # GG 000434
EXPIRES: June 8, 2020
Bonded Thru Budget Notary Services

RESOLUTION OF THE TOWN COUNCIL OF
THE TOWN OF FORT MYERS BEACH, FLORIDA
RESOLUTION NUMBER 00-03

A RESOLUTION OF THE TOWN OF FORT MYERS BEACH, FLORIDA, DECLARING SPECIAL ASSESSMENTS FOR THE RE-CONSTRUCTION OF PALMETTO STREET AND EASY STREET, PROVIDING AUTHORITY; RE-CONSTRUCTION OF PALMETTO STREET AND EASY STREET; PLANS AND SPECIFICATIONS, WITH ESTIMATED COST OF PROPOSED IMPROVEMENT; PUBLICATION OF RESOLUTION; PRELIMINARY ASSESSMENT ROLL; PUBLICATION OF PRELIMINARY ASSESSMENT ROLL; FINAL CONSIDERATION OF SPECIAL ASSESSMENTS; EQUALIZING BOARD TO HEAR COMPLAINTS AND ADJUST ASSESSMENTS; PRIORITY OF LIEN; INTEREST; AND METHOD OF PAYMENT; LEGAL PROCEEDINGS INSTITUTED UPON FAILURE OF PROPERTY OWNER TO PAY SPECIAL ASSESSMENT OR INTEREST WHEN DUE; FORECLOSURE; SERVICE OF PROCESS; EXPENDITURES FOR IMPROVEMENTS; ASSESSMENT ROLL SUFFICIENT EVIDENCE OF ASSESSMENT AND OTHER PROCEEDINGS; VARIANCE NOT MATERIAL UNLESS PARTY OBJECTING MATERIALLY INJURED THEREBY; SEVERABILITY AND AN EFFECTIVE DATE.

WHEREAS, the Palmetto Street and Easy Street are in desperate need of re-construction; and,

WHEREAS, the Town was unable to obtain the consent of all of the benefited property owners; and,

WHEREAS, the levy of mandatory assessments is the only method available for the re-construction.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA:

SECTION ONE: Authority. This Resolution is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapter 170, Florida Statutes, and other applicable provisions of law.

SECTION TWO: Re-construction of Palmetto Street and Easy Street.

(a) There is hereby proposed the assessment of the cost of construction or reconstruction, the cost of all labor and materials, the cost of all lands, property, rights, easements, interest, cost of plans and specifications, surveys of estimates of costs and of revenues, cost of engineering and legal services, and all other expenses necessary or incident to determining the feasibility or practicability of such construction or reconstruction and administrative expense.

(b) The forgoing cost shall be assessed against all lots and lands adjoining and contiguous or bounding and abutting upon such improvements or specially benefited thereby and further designated by the assessment plat hereinafter provided.

(c) The total estimated cost of the improvement is $96,446.00

SECTION THREE: Plans and Specifications, With Estimated Cost of Proposed Improvement. There is on file with the town clerk, an assessment plat showing the area to be assessed, with plans and specifications, and an estimate of the cost of the proposed improvement, which assessment plat, plans and specifications and estimate shall be open to the inspection of the public.

SECTION FOUR: Publication of Resolution. Upon the adoption of this resolution, this resolution shall be published once a week for a period of 2 weeks in a newspaper of general circulation published in the Lee County.

SECTION FIVE: Preliminary Assessment Roll. Upon the adoption of this resolution a preliminary assessment roll in accordance with the method of assessment provided for in this resolution, which assessment roll shall be completed as promptly as possible; said assessment roll shall show the lots and lands assessed and the amount of the benefit to and the assessment against each lot or parcel of land, and, if said assessment is to be paid in installments, the number of annual installments in which the assessment is divided shall also be entered and shown upon said assessment roll.

SECTION SIX: Publication of Preliminary Assessment Roll. Upon the completion of said preliminary assessment roll, the Town Council shall by resolution fix a time and place at which the owners of the property to be assessed or any other persons interested therein may appear before said governing authority and be heard as to the propriety and advisability of making such improvements, as to the cost thereof, as to the manner of payment therefor, and as to the amount thereof to be assessed against each property so improved. Thirty days' notice in writing of such time and place shall be given to such property owners.

(a) The notice shall include the amount of the assessment and shall be served by mailing a copy to each of such property owners at his or her last known address, the names and addresses of such property owners to be obtained from the records of the property appraiser or from such other sources as the town clerk deems reliable, proof of such mailing to be made by the affidavit of the clerk, said proof to be filed with the clerk, provided, that failure to mail said notice or notices shall not invalidate any of the proceedings hereunder.
(b) Notice of the time and place of such hearing shall also be given by two publications a week apart in a newspaper of general circulation the last publication shall be at least 1 week prior to the date of the hearing. Said notice shall describe the streets or other areas to be improved and advise all persons interested that the description of each property to be assessed and the amount to be assessed to each piece or parcel of property may be ascertained at the office of the clerk of the municipality. Such service by publication shall be verified by the affidavit of the publisher and filed with the clerk of said municipality.

SECTION SEVEN: Final Consideration Of Special Assessments; Equalizing Board To Hear Complaints And Adjust Assessments. At the time and place named in the notice provided, the governing authority of the municipality shall meet and hear testimony from affected property owners as to the propriety and advisability of making the improvements and funding them with special assessments on property. Following the testimony, the governing authority of the municipality shall make a final decision on whether to levy the special assessments. Thereafter, the governing authority

shall meet as an equalizing board to hear and consider any and all complaints as to the special assessments and shall adjust and equalize the assessments on a basis of justice and right. When so equalized and approved by resolution of the governing authority, a final assessment roll shall be filed with the governing authority of the municipality, and such assessments shall stand confirmed and remain legal, valid, and binding first liens upon the property against which such assessments are made until paid; however, upon completion of the improvement, the municipality shall credit to each of the assessments the difference in the assessment as originally made, approved, and confirmed and the proportionate part of the actual cost of the improvement to be paid by special assessments as finally determined upon the completion of the improvement, but in no event shall the final assessments exceed the amount of benefits originally assessed. Promptly after such confirmation, the assessments shall be recorded by the clerk in a special book, to be known as the "Improvement Lien Book," and the record of the lien in this book shall constitute prima facie evidence of its validity.

SECTION EIGHT: Priority of Lien; Interest; and Method of Payment. The special assessments shall be payable at the time and in the manner stipulated in the resolution providing for the improvement; shall remain liens, coequal with the lien of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims, until paid; shall bear interest, at a rate of 8 percent per year, from the date of the acceptance of the improvement; and may, be made payable in equal installments over a period not to exceed twenty (20) years, if not paid when due, there shall be added a penalty at the rate of 1 percent per month, until paid. However, the assessments may be paid without interest at any time within 30 days after the improvement is completed and a resolution accepting the same has been adopted.

SECTION NINE: Legal Proceedings Instituted Upon Failure of Property Owner to Pay Special Assessment or Interest When Due; Foreclosure; Service of Process. Each annual installment provided for shall be paid upon the dates specified in said resolution, with interest upon all deferred payments, until the entire amount of said assessment has been paid, and upon the failure of any property owner to pay any annual installment due, or any part thereof, or any annual interest upon deferred payments, the governing authority of the municipality shall cause to be brought the necessary legal proceedings by a bill in chancery to enforce payment thereof with all accrued interest and penalties, together with all legal costs incurred, including a reasonable attorney's fee, to be assessed as part of the costs and in the event of default in the payment of any installment of an assessment, or any accrued interest on said assessment, the whole assessment, with the interest and penalties thereon, shall immediately become due and payable and subject to foreclosure. In the foreclosure of any special assessment service of process against unknown or nonresident defendants may be had by publication, as now provided by law in other chancery suits. The foreclosure proceedings shall be prosecuted to a sale and conveyance of the property involved in said proceedings as now provided by law in suits to foreclose mortgages.

SECTION TEN: Expenditures For Improvements. The governing authority of any municipality shall pay out of its general funds or out of any special fund that may be provided for that purpose such one half of the cost of any improvement.

SECTION ELEVEN: Assessment Roll Sufficient Evidence Of Assessment And Other Proceedings; Variance Not Material Unless Party Objecting Materially Injured Thereby. Any informality or irregularity in the proceedings in connection with the levy of any special assessment shall not affect the validity of the special assessment where the assessment roll has been confirmed by the Town Council.

The assessment roll as finally approved and confirmed shall be competent and sufficient evidence that the assessment was duly levied, that the assessment was duly made and adopted, and that all other proceedings adequate to the adoption of the assessment roll were duly had, taken, and performed as required by this chapter, and no variance from the directions hereunder shall be held material unless it be clearly shown that the party objecting was materially injured thereby.

SECTION TWELVE: Severability. If any one of the provisions of this resolution should be held contrary to any express provision of law of contrary to the policy of express law, although not expressly prohibited, or against public policy, or shall for any reason whatsoever beheld invalid, then such provision shall be null and void and shall be deemed separate from the remaining provisions of this resolution, and in no way affect the validity of all other provisions of this resolution.

SECTION THIRTEEN: Effective Date. This resolution shall become effective upon adoption.

The foregoing resolution was adopted by the Fort Myers Beach Town Council upon being put to a vote, the result was as follows:

Anita T. Cereceda	aye
Dan Hughes	aye
John Mulholland	aye
Garr Reynolds	aye
Ray Murphy	aye

DULY PASSED AND ADOPTED this 24th day of January, 2000.

ATTEST:

By: Marsha Segal-George
Marsha Segal-George, Town Clerk

Approved as to form by:

Richard V.S. Roosa, Town Attorney

Town of Fort Myers Beach

By: John J. Mulholland
John J. Mulholland, Mayor

SPECIAL ASSESSMENT DISTRICTS
AND
SPECIAL ASSESSMENT GEOGRAPHICAL AREAS

NO.	NAME
1	Evans Avenue
2	First Street
3	Todd Street (Palm Avenue)
4	Winkler Avenue Extension
5	Metro Parkway
6	Solomon Boulevard between Winkler and Colonial
7	North Colonial Boulevard Drainage – Frank Helmerich
8	Summerlin Road Water and Sewer Mains
9	Rockfill Road 12 Inch Water Line
10	Colonial Boulevard Water and Sewer Lines – Frank Helmerich
11	Solomon Boulevard North between Winkler and Broadway at Collier
12	Winkler Avenue four lane extension from Metro Parkway East to Colonial Boulevard
13	Benchmark Corporate Park Development – Jack Burges
14	Interstate Park 82 – John States
15	Omni Interstate Park 82 – John States
16	Fort Street
17	Omni Interstate Park – Roads – Colonial Boulevard, Six Mile Cypress & Ortiz – Dan Adams
18	Kernal Plaza, Unit 1 – Robert Hughes
19	Luverne Street – Cancelled
19R	Luverne Street – Troy Parnell
20	Northeast Interstate 82 – John States & Irwin Weiser
21	F.M.A.D.
22	Colonial Properties – Cancelled by Resolution No. 91-24
23	Colonial Properties – Roads – Cancelled by Resolution No. 91-24
24	Colonial Properties – Feinstein
25	Carillon Woods Drainage – Repealed by Resolution No. 94-1
26	Vesper Sunbury Street Light Project
27	Riverside Street Light Project
28	Woodford Avenue Residential Project – Repealed by Resolution No. 94-11
29	Rio Vista Way Residential Project
30	Braman Avenue Residential Project
31	Biltmore/Carlene Residential Project
32	Shadow/Wales Canterbury Residential Project
33	Sandra Drive Residential Project
34	Lynwood Avenue Residential Project
35	Carillon Woods Drainage
36	Woodford Avenue Residential Project
37	Coconut Drive

38	Castlebar Circle
39	Cordova/Alcazar
40	Seminole Park
41	Jambalana Lane
42	Poinciana/Alcazar
43	Barkley Circle
44	Downtown Fort Myers Street Light Project
45	Central Fort Myers Street Light Project – Cancelled
46	Aqua Shores Street Lighting Project
47	Alhambra West Street Lighting Project Area
48	Mango Street Lighting Project Area
49	Superior Street Lighting District between East Riverside Drive and Highlands Avenue
50	South Street Lighting District between Jackson Street and one block west of Dixie Parkway
51	Winkler Street Lighting District between McGregor Boulevard and Rogers Street
52	Miracle Lane Street Improvement Project Area between McGregor Boulevard and the Caloosahatchee River
53	Jeffcott Street Lighting Project Area between Jackson Street and US 41
54	C Street Street Lighting and Landscaping Project Area from Henderson Avenue West to the end of the Cul-de-sac (Repealed October 15, 2001)
55	C Street Street Lighting and Landscaping Project Area from Henderson Avenue West to the end of the Cul-de-sac
56	Second Street Street Lighting Project Area between High Street and Ford Street
57	Melaleuca Lane, Caloosa Vista Drive, and Jami Court Street Lighting District between McGregor Boulevard and the Caloosahatchee River
58	Bradford Road Street Lighting Project Area between McGregor Boulevard and the Caloosahatchee River
59	Walden Drive Street Lighting Project Area between McGregor Boulevard and the Caloosahatchee River
60	Edison Park Decorative Street Lighting and Signage Improvement Project Area generally between McGregor Boulevard and Cortez Boulevard north of Manuel's Branch and south of Larchmont Avenue

IMPROVEMENT LIEN BOOK INDEX

NO. 59 **WALDEN DRIVE STREET LIGHTING PROJECT AREA BETWEEN MCGREGOR BOULEVARD AND THE CALOOSAHATCHEE RIVER**

Resolution No. 2007-54 adopted 10/01/2007
Establish district
Advertised 10/08/2007

Resolution No. 2007-56 adopted 10/15/2007
Adopting preliminary assessment roll
Notices mailed 10/26/2007
Advertised 11/16/2007 and 11/23/2007

Resolution No. 2007-64 adopted 12/03/2007
Equalizing assessments
Recorded: 12/13/2007 Instrument No. 2007000366050

Resolution No. 2008-27 adopted 07/21/2008
Amending final pro-rata cost
Recorded: 07/30/2008 Instrument No. 200800020480

NO. 60 **EDISON PARK DECORATIVE STREET LIGHTING AND SIGNAGE IMPROVEMENT PROJECT AREA (GENERALLY BETWEEN MCGREGOR BOULEVARD AND CORTEZ BOULEVARD)**

Resolution No. 2016-4 adopted 07/16/2016
Establish District
Advertised: 03/03/2016

Resolution No. 2016-5 adopted 03/07/2016
Adopting preliminary assessment roll
Notices mailed 03/16/2016
Advertised 04/04/2016 and 04/11/2016

Resolution No. 2016-8 adopted April 18, 2016
Equalizing the assessments
Recorded: 04/20/2016 Instrument No. 2016000083787 Page 14

CITY OF FORT MYERS · PO BOX 2465, FORT MYERS, FL 33902-2465
(239) 321-7175

Customer #	Due Date	Prev Balance	Payments	Cur Activity	Amount Due
132111	9/3/2015	216.35	216.35	216.35	216.35

Amount Enclosed

LAWRENCE RAIMONDI
1240 WALDEN DR
FORT MYERS, FL 33901-8834

Please detach and return top portion with your remittance.

REPRINT - BATCH #: 225

Customer	LAWRENCE RAIMONDI
Address	1240 WALDEN DR · FORT MYERS, FL 33901-8834

Date	Billing Cycle	Description	Amount
08/03/2015	**Previous Balance**		**216.35**
08/10/2015	**Payment - thank you**	Document #: 00080538	**-216.35**cr
	Assessment 059-000003 Parcel: 344424P3020000100	Address: 1240 WALDEN DR FORT MYERS, FL 33901-8834	
08/01/2016	**Billing**	Document #: 00094100	**216.35**
	Assessment 059-000003 Parcel: 344424P3020000100	Address: 1240 WALDEN DR FORT MYERS, FL 33901-8834	
	08/01/2016 07/31/2017	Special Assessment Interest	23.80
	08/01/2016 07/31/2017	Special Assessment Principal	192.55
		Total Charges:	**216.35**

Customer #	Due Date	Prev Balance	Cur Charges	Amount Due
132111	9/1/2016	216.35	216.35	216.35

Payments must be received on or before due date to avoid penalties.

CITY OF FORT MYERS · PO BOX 2465, FORT MYERS, FL 33902-2465 (239) 321-7175

RESOLUTION NO. 2007-64

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF FORT MYERS, FLORIDA, EQUALIZING THE ASSESSMENTS IN SPECIAL ASSESSMENT GEOGRAPHICAL AREA NO. 59 WALDEN DRIVE STREET LIGHTING PROJECT AREA BETWEEN MCGREGOR BOULEVARD AND THE CALOOSAHATCHEE RIVER; FORT MYERS, FLORIDA, LEVYING THE SAME AS ASSESSMENTS AGAINST BENEFITED PROPERTIES, DIRECTING THE CITY CLERK TO RECORD ASSESSMENTS IN THE IMPROVEMENT LIEN BOOK, ESTABLISHING PRIORITY OF LIEN AND PAYMENT OF PRINCIPAL AND INTEREST, AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS: The City Council of the City of Fort Myers, Florida adopted Resolution No. 2007-56 on October 15, 2007, approving the preliminary assessment roll prepared by the Planning Division in Special Assessment Geographical Area No. 59, Walden Drive Street Lighting Project Area between McGregor Boulevard and the Caloosahatchee River, and also directing that notice be given by publication and by certified mail to the owners of the property in said area, or any other persons interested therein, advising that the City Council would meet as a equalizing board commencing on the 3rd day of December, 2007, at 5:15 o'clock p.m., or as soon thereafter as can be heard, to consider complaints as to the assessments appearing on said assessment roll; which is subject to incidental changes, additions, substitutions and modifications as shall be deemed by City Council; and

WHEREAS: Said notice both by publication and by certified mail was duly given pursuant to Chapter 170, Florida Statutes; and Section 74-67, City Code; and

WHEREAS: Said hearing was duly held commencing on December 3, 2007, at 5:15 o'clock p.m., or as soon thereafter as could be held.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FORT MYERS, FLORIDA, that:

RESOLUTION NO. 2007-64

1. The City Council, having heard property owners and other interested persons appearing before the Council as to the propriety and advisability of making certain local improvements including the installation of streetlights described in Resolution No. 2007-56 of the City Council adopted October 15, 2007, as to the cost thereof, as to the manner of payment of said cost, as to the equalization and adjustment of assessments on the basis of justice and right hereby determines and resolves to proceed with the said improvements according to the assessment plat, preliminary plans, specifications, and estimate of the cost on file.

2. The costs of said improvements shall be paid as provided in Sections 1 and 5 of that certain Resolution No. 2007-56 of the City Council heretofore adopted on October 15, 2007, which sections are incorporated hereby by reference as though copied in full herein.

3. The amount of the assessments, as heretofore equalized and adjusted on this date and as now appearing on the assessment roll, attached hereto as "Exhibit A", are hereby confirmed as legal, valid and binding first liens, until paid, upon the property against which such assessments are made; provided, however, that upon completion of the improvements, each assessment shall be adjusted with the difference between the amount hereby confirmed and the actual cost of the improvements to be paid by special assessments provided; in no event shall the final assessments, as hereby confirmed, exceed the amount of such benefits originally determined to result from the construction of such improvements. Said assessments shall be co-equal with the lien of other taxes, superior to all other liens, titles and claims, until paid. Said assessments shall bear interest at a rate not exceeding one percent (1%) per annum above the rate of interest payable on the funds to be used in connection with the improvements herein described, which rate is

currently estimated to be 6.00% per annum, from the date of acceptance of said improvements and shall be payable in ten (10) equal yearly installments. If not paid when due, there shall be added a penalty of one per centum (1%) per month until paid; provided that said assessments may be paid without interest at any time within thirty (30) days after the improvements have been completed and accepted by City Council. The balance due on the assessments may be paid in full at any time and thereafter with interest to the next succeeding installment date; and provide further that payment of annual installments and interest earlier than due in any year shall not be discounted for early payments. The total assessment plus accrued interest through the next installment date and penalties through the date of sale or transfer of ownership of any parcel shall become due and payable in full upon the sale or transfer of ownership of any parcel in Special Assessment Geographical Area No. 59, Walden Drive Street Lighting Project Area between McGregor Boulevard and the Caloosahatchee River.

4. The City Clerk is hereby directed to record said assessments in the public records of the Lee County Court House.

5. This resolution shall become effective immediately upon adoption.

RESOLUTION NO. 2007-64

PASSED IN PUBLIC SESSION of the City Council of the City of Fort Myers, Florida, this 3rd day of December, A.D., 2007.

Absent	Warren J. Wright
Aye	Johnny W. Streets, Jr.
Aye	Levon Simms
Aye	Michael Flanders
Aye	Randall P. Henderson, Jr.
Aye	Thomas C. Leonardo

Council Members

APPROVED this 3rd day of December, A.D., 2007, at 5:38 o'clock p.m.

Aye

Jim Humphrey
Mayor

FILED in the Office of the City Clerk this 3rd day of December, A.D., 2007.

Marie Adams, CMC
City Clerk

I DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID CITY THIS 4 DAY OF , A.D. 2007.

DEPUTY CITY CLERK, CITY OF FORT MYERS, FLORIDA

4

RESOLUTION NO. 2007-64

EXHIBIT A
Equalized Assessment Roll
Special Assessment Geographical Area No. 59 Walden Drive
Assessment is 10 years at 6.00% Interest

STRAP_NO	OWNER_NAME	ADDRESS	CITY	STATE	ZIP	DESCRIPTION	CAPITOL COST/UNIT	MAINTENANCE/ UNIT	ASSESSABLE NBR UNITS	TOTAL ASSESSMENT	ANNUAL ASSESSMENT	BENEFIT TO PROPERTY OWNERS
344424P3016000080	LOGAN LINDA L	1341 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 20	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000060	ESPENSCHIED S JEAN TR	1335 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 21	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3020000100	RAIMONDI LAWRENCE A + SHARON L	1240 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 22	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3020000080	SOLLOWAY CLARENCE E + DEBORAH	1200 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 23	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000030	DAHIN JOHN B JR + ELIZABETH	1323 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 24	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000210	MCNUTT BARRY K + RACHEL	1308 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 25	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000200	ZIPPERER JULIA	1318 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 26	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000130	ROHRS TRISHA	1354 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 27	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3020000010	NANCE WILLIAM S + JUDY	1243 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 28	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000170	MARTELLO BENJAMIN C TR	1338 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 29	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000150	GAVALA III MICHAEL J + KAREN	1344 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 30	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3000070010	PAVESE FRANK A + MARLENE	PO DRAWER 1507	FORT MYERS	FL	33902	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 31	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3020000060	JOHNSTON THEODORE	1203 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 32	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000120	CALVERLEY SHEILA	4316 MCGREGOR BLVD	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 33	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3020000070	LAUSE TIMOTHY B + LAURIE B	1202 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 34	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3020000020	CONLYN VIVIAN + ANDREW	1239 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 35	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000050	STEJSKAL WILLIAM A + CANDACE W	1331 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 36	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3020000090	GOLDSMITH ERIC A + LORRAINE H	1236 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 37	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000160	KYLE KEITH R	1340 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 38	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000100	OAK TIMOTHY J + LAURA A	1351 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 39	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3000070000	STEPHENS WILLIAM A III +	1206 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 40	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000140	ROYAL ROBERT D III + MARY J	3235 AVOCADO DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 41	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000180	SHERLING R P + BEVERLY	1332 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 42	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3020000050	RINGERS ANDREW L JR + MARGARET	1205 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 43	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02

Total Project Costs: $44,902.00
Benefit to Each Property Owner: $2,457.02
34 Property Owners

RESOLUTION NO. 2007-64

EXHIBIT A
Equalized Assessment Roll
Special Assessment Geographical Area No. 59 Walden Drive
Assessment is 10 years at 6.00% Interest

344424P3020000030	HUME HAROLD N JR + MARTHA G	1235 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 44	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000070	FIORE ARNOLD F	1339 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 45	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000220	MORRIS JULIUS T L/E +	1244 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 46	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000090	PENDLETON MARTHA J L/E	1345 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 47	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3020000040	MORRISON STEVEN K + LISA C	1231 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 48	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000040	STEJSKAL BARRETT W	1327 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 49	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000020	SUNTRUST BANK TR	MAILCODE 3043	SARASOTA	FL	34230	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 50	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
344424P3016000190	MULLER MARK E + CLAIRE L	1140 WALES DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 51	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02
~~344424P3000060140~~	~~SCAGLIOTTI KELLY A~~ **PAID**	~~1327 WALDEN DR~~	~~FORT MYERS~~	~~FL~~	~~33901~~	~~WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 52~~	~~$1,320.65~~	~~$416.71~~	~~1.00~~	~~$1,737.35~~	~~$236.05~~	~~$2,457.02~~
344424P3000070020	MARTINA BARBARA BIEHL	1210 WALDEN DR	FORT MYERS	FL	33901	WALDENS RIVERA ESTATES PB 10 PG 70 AND BONAIR PB 6 PG 53	$1,320.65	$416.71	1.00	$1,737.35	$236.05	$2,457.02

Total Project Costs: $44,902.00
Benefit to Each Property Owner: $2,457.02
34 Property Owners

ORANGE COUNTY, FLORIDA
CODE ENFORCEMENT BOARD

ORANGE COUNTY, FLORIDA

Petitioner,

vs

BENAVIDES LUIS A

Respondent(s),

_____/

CEB NO. **2015-250364H**

DOC# 20140623206 B: 10846 P: 1517
12/10/2014 12:20:30 PM Page 1 of 2
Rec Fee: $18.50
Martha O. Haynie, Comptroller
Orange County, FL
IO - Ret To: ORANGE COUNTY CODE ENFORC

ORDER IMPOSING ADMINISTRATIVE FINE/LIEN

THIS CAUSE originally came on for public hearing before the Code Enforcement Board on **October 15, 2014**, after due notice to Respondent(s) at which time the Board heard testimony under oath, received evidence, and issued its Findings of Fact and Conclusions of Law and Order, thereupon issued its oral Order which was reduced to writing and furnished to Respondent(s).

Said Order required Respondent(s) to take certain action by **October 30, 2014** a time certain, as more specifically set forth in that Order. Said Order included a notice that a fine would be imposed if Respondent failed to comply with the Order by said date.

An Affidavit of Non-Compliance, bearing the date of **November 3, 2014** has been filed with the Board by the Code Enforcement Officer, which affidavit certified under oath that the required corrective action ordered by the Board has not been taken. The Code Enforcement Board, having found and concluded that the allegations of said Affidavit are true, hereby acknowledges notification by the Code Inspector that the aforementioned Order has not been complied with by the set time or finds that the same violation has been repeated by Respondent.

Based upon the foregoing Findings of Fact, Conclusions of Law, and Order and Affidavit of Non-Compliance, it is hereby ORDERED THAT:

Respondent(s) pay to Orange County an administrative fine in the amount of **$250.00** per day for each day the violation(s) continue to exist past the date set for compliance or for each time the violation is repeated, after said date.

This Order supersedes any previous Order Imposing Administrative Fine/Lien. This Order may be recorded in the Public records of Orange County and thereafter shall constitute a lien against the following described land on which the violation exists and upon any other real or personal property owned by the Violator.

BENAVIDES LUIS A
11570 KENLEY CIRCLE
Parcel ID: 14-24-29-8214-00-800

Notice to Respondent

If Respondent wishes to challenge the imposition of the fine, amount of the fine and resulting lien, the Respondent may request a hearing before the Board. The request shall be delivered in writing within twenty (20) days of the date of the Certificate of Mailing of this Order to Code Enforcement Division, Recording Secretary at 2450 W. 33rd Street Orlando FL 32839. Any hearing hereunder shall occur as soon as practical and shall be limited to consideration of findings necessary to impose a fine and create a lien. If a timely request is not received, this Order shall be recorded.

DONE and ORDERED this 7 day of NOVEMBER, 2014 at Orange County, Florida

ORANGE COUNTY, FLORIDA
CODE ENFORCEMENT BOARD

Chairman / Vice-Chairman

ATTEST:

Recording Secretary
2450 W. 33rd Street
Orlando FL 32839

PERSONALLY appeared before me, the undersigned authority, well known to me the Chairman/Vice-Chairman and Recording Secretary, respectively of the Board and acknowledged before me that they executed the foregoing instrument on behalf of the Orange County Board, as its true act and deed and that they were duly authorized to do so. They are personally known to me or have produced a Florida's driver's license as identification.

WITNESS my hand and official seal this 7 day of NOVEMBER, 2014

Notary Public - State of Florida
My commission Expires: _____

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Order Imposing Administrative Fine/Lien has been furnished by mail to

BENAVIDES LUIS A at 11570 KENLEY CIR ORLANDO, FL 32824

this 7 day of NOVEMBER, 2014.

MARITZA DEL VALLE
MY COMMISSION EXPIRES
April 20, 2018
#FF 104788
Bonded thru Budget Notary Services
NOTARY PUBLIC, STATE OF FLORIDA

PLEASE RETURN TO:
Code Enforcement Division
2450 W. 33rd Street
Orlando FL 32839

COUNTY OF ORANGE: STATE OF FLORIDA
I HEREBY CERTIFY that this is a true and correct copy of the ORDER IMPOSING ADMINISTRATIVE FINE/LIEN.
Witness my hand and the seal of the Code Enforcement Board, Orange County, Florida, this 9 day of December, 20 14

80
Recording Sec. Initials

Order_Imposing_Fine.aspx

Town of Lauderdale-By-The-Sea
4501 Ocean Drive
Lauderdale-By-The-Sea, Florida 33308

OFFICE OF THE SPECIAL MAGISTRATE

4501 OCEAN DRIVE

TOWN OF LAUDERDALE-BY-THE-SEA, FLORIDA 33308

TOWN OF LAUDERDALE-BY-THE-SEA, FLORIDA

Petitioner,

vs.

JOHNSON,DANIELLE

Respondent(s) **Case #:** 16090017

ORDER OF IMPOSITION OF FINE AND CLAIM OF LIEN

TO: JOHNSON,DANIELLE

20515 NW 3 AVE MIAMI, FL 33169

The Town of Lauderdale-By-The-Sea Special Magistrate, having reviewed evidence and sworn testimony by Affidavit, enters the following Findings of Fact:

1. That the Town of Lauderdale-By-The-Sea Special Magistrate did issue on 10/27/2016, a Final Order in the above captioned case commanding the Respondent(s) to bring the violation(s) specified in said Final Order into compliance or be subject to a fine in the amounts shown below commencing on dates shown below plus an additional fine to cover costs incurred by the City in the amount of $150.00.

Ordinance/Regulation	Section	Description	Order Date to Comply by	Date Complied	Daily Fine
Chapter 6 - Building and Building Regulations...	Section 6-41(a)(18) - Maintenance of exterior of premises.	The exterior of buildings and structures and all property shall be kept free of all nuisances, and any hazards to the safety of occupants, customers, pedestrians and other persons utilizing the premises and free of unsanitary conditions and any of th...	10/31/2016	10/27/2016	$500.00

Notes:

CERTIFICATION OF LIEN AMOUNT: $15,150.00.

2. That said violation occurred on the following described real property situate, lying and being in Broward County, Florida, to-wit:

FOLIO #: 494307010140

BEL-AIR 32-10 B LOT 14 BLK 1

LEGAL DESCRIPTION:

STREET ADDRESS: 1724 BEL-AIR Ave LAUDERDALE BY THE SEA, FL 33062

3. That the Respondent(s) did not comply with the Final Order on or before the date specified therein.

Upon complying with this Final Order, the Respondent(s) **SHALL NOTIFY Foster, S**, the Code Compliance Inspector, who shall have the property inspected and notify the Special Magistrate Clerk if compliance has occurred.

4. A fine in the amounts shown above commencing on dates shown above is hereby confirmed and imposed. This fine shall continue to accrue until such time as the property is brought into compliance at which time the Respondent shall notify the Code Compliance Inspector. **Additionally, a fine of $0.00 to cover costs incurred in the prosecution of this matter is confirmed and imposed.**

5. The fine and costs shall constitute a lien against the above-described real property pursuant to Chapter 162, Florida Statutes and Chapter 6.5 of the Town of Lauderdale-By-The-Sea Code of Ordinances, as currently enacted or as may be amended from time to time, and **such lien shall be co-equal with the liens of all state, county, district, and municipal taxes, and superior in dignity to all other liens, titles and claims regardless of when created or recorded.** The Special Magistrate Clerk is directed to record a true copy of this Order in the Public Records of Broward County, Florida. Any such lien which accrues more than (90) days after the date it is recorded and which remains unpaid, may be referred to a collection agency which shall result in the imposition of additional collection fees.

You may request, in writing, a hearing before the Special Magistrate to contest the finding of non-compliance and imposition of fines. Said hearing shall be limited to consideration of whether the violation(s) was/were timely complied. A written request for a hearing MUST BE MADE TO THE OFFICE OF THE SPECIAL MAGISTRATE AND RECEIVED WITHIN TWENTY (20) DAYS OF THE DATE OF THIS NOTICE. You will be notified of a hearing date and time. If no timely request is received, this Order Imposing Fine and Claim of Lien entered by the Special Magistrate will be recorded in the Public Records of Broward County, constituting a lien on the subject real property.

Respondents may appeal a final administrative order of the Special Magistrate for the Town of Lauderdale-By-The-Sea to the Circuit Court. An appeal must be filed within thirty (30) days of the execution of the Order to be appealed.

DONE AND ORDERED this December 12, 2016

ATTEST:

OFFICE OF THE SPECIAL MAGISTRATE

TOWN OF LAUDERDALE-BY-THE-SEA, FLORIDA

Tom Ansbro

SPECIAL MAGISTRATE CLERK

SPECIAL MAGISTRATE

STATE OF FLORIDA
COUNTY OF BROWARD

The foregoing instrument was acknowledged before me this 12 day of December 20 16 by Shanelle Campbell and Tom Ansbro, Special Magistate, respectively, of the Town of Lauderdale-By-The-Sea, who are personally known to me and who did not take an oath.

My Commission Expires:

Sharon Foster
NOTARY PUBLIC, State of Florida at Large

SHARON FOSTER
Notary Public - State of Florida
My Comm. Expires Jan 23, 2018
Commission # FF 085740

Sharon Foster
Print, type or stamp name of Notary

FF 085740
Commission Number, if any

Note: Mail your payment to the above address made payable to The Town of Lauderdale-By-The-Sea.

Town of Lauderdale-By-The-Sea
4501 Ocean Drive
Lauderdale-By-The-Sea, Florida 33308

OFFICE OF THE SPECIAL MAGISTRATE

TOWN OF LAUDERDALE-BY-THE-SEA, FLORIDA

Case #: 16090017

Petitioner,

vs.

JOHNSON,DANIELLE

Respondent(s)

FINAL ORDER OR STIPULATED FINAL ORDER

IN RE:

STREET ADDRESS: 1724 BEL-AIR Ave LAUDERDALE BY THE SEA, FL 33062

FOLIO: 494307010140

LEGAL DESCRIPTION: BEL-AIR 32-10 B LOT 14 BLK 1

The Town of Lauderdale-By-The-Sea Special Magistrate, having heard testimony under oath and argument at a Public Hearing, in reference to the above-described property , held Thursday, December 8, 2016, after due notice to the Respondent(s). The Respondent(s) were represented by an attorney at the hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence submitted, the Special Magistrate finds the Respondent(s), on the above-referenced property have certain violation(s) and there exists, as a matter of law, those violation(s) of Section(s) of the Town of Lauderdale-By-The-Sea Code of Ordinances. Specific Code Section(s) and description of the violation(s) listed below:

Ordinance/Regulation	Section	Description	Order Date to Comply by	Date Complied	Daily Fine
Chapter 6 - Building and Building Regulations...	Section 6-41(a)(18) - Maintenance of exterior of premises.	The exterior of buildings and structures and all property shall be kept free of all nuisances, and any hazards to the safety of occupants, customers, pedestrians and other persons utilizing the premises and free of unsanitary conditions and any of th...	10/31/2016	10/27/2016	$500.00

Notes:

REVISED FINAL ORDER: AT THE OCTOBER 27, 2016 HEARING, LAWN MAINTENANCE WAS ORDERED TO BE COMPLETED BY OCTOBER 31, 2016. THE MAGISTRATE AUTHORIZED THE TOWN TO ABATE THE VIOLATION ON A CONTINUOUS BASIS SHOULD IT OCCUR AGAIN IN THE FUTURE. THIS ORDER HEREBY INSTITUTES AUTHORIZATION TO TAKE NECESSARY ACTION(S) TO ABATE THE VIOLATION OF OVERGROWN LAWN ON A CONTINUOUS BASIS SHOULD IT OCCUR AGAIN IN THE FUTURE. ANY COSTS INCURRED BY THE TOWN FOR FUTURE VIOLATIONS FOR LAWN MAINTENANCE WILL BECOME A LIEN AGAINST THE SUBJECT PROPERTY.

Accordingly, the Respondent(s) are ordered to bring the property into compliance prior to dates shown above.

Upon complying with this Final Order, the Respondent(s) **SHALL NOTIFY Foster, S**, the Code Compliance Inspector, who shall have the property inspected and notify the Special Magistrate Clerk if compliance has occurred.

If the owner(s) fail(s) to comply, an Order Imposing Fine in the amounts shown above for every day that the violation continues to exist commencing on the dates shown above will be entered and a certified copy shall be recorded in the Public Records of Broward County, Florida and shall constitute a lien against the above-described real property or personal property owned by the violator. (Section 162.09, Florida Statutes). This Order may be enforced like a court judgment. Repeat violations can be fined up to $500.00 per day. (Section 162.09, Florida Statutes). Property owner(s) has/have 30 days from date this Final Order is executed to file an appeal in circuit court. (Section 162.11, Florida Statutes). The property owner must contact the Code Compliance Department to advise when compliance has been reached. **The Special Magistrate has also assessed an additional fee of $0.00 to cover costs incurred by the Town in the prosecution of this matter.** Said amount is now due, and if not paid, may also constitute a lien against the above-referenced property which may also be actionable by law.

You may also have other rights which are set forth in Chapter 6.5 of the Town of Lauderdale-By-The-Sea Code of Ordinances.

Respondents may appeal any decision with respect to any matter considered by the Town of Lauderdale-By-The-Sea Special Magistrate. An appeal must be filed within (30) days of the execution of the Order to be appealed. If a person decides to appeal any decision, such person will need a record of the proceedings and that, for this purpose, such person may need to ensure that a verbatim record of the proceedings is made, which includes the testimony and evidence upon which the appeal is to be based. Section 286.0105, Florida Statutes.

For further information, please contact the Code Compliance Inspector at 754-600-1089.

DONE AND ORDERED this December 12, 2016

ATTEST:

SPECIAL MAGISTRATE CLERK

OFFICE OF THE SPECIAL MAGISTRATE

TOWN OF LAUDERDALE-BY-THE-SEA, FLORIDA

Tom Ansbro

SPECIAL MAGISTRATE

Note: Payments should be mailed to the above address made payable to The Town of Lauderdale-By-The-Sea.

STATE OF FLORIDA
COUNTY OF BROWARD

The foregoing instrument was acknowledged before me on December 12, 2016 Tom Ansbro Special Magistrate, of the Town of Lauderdale-By-The-Sea, who is personally known to me and who did not take an oath.

My Commission Expires:

NOTARY PUBLIC, State of Florida at Large

LORI WYGLADALSKI
MY COMMISSION # FF 136159
EXPIRES: September 6, 2018
Bonded Thru Notary Public Underwriters

References
FLA. CONST. art. X, § 4 Homestead; exemptions
Judgment Liens
Statutes
11 U.S.C. § 108(c) Extension of time
11 U.S.C. § 506 Determination of secured status
28 U.S.C. § 1962 Lien
FLA. STAT. § 55.10 Judgments, orders, and decrees; lien of all, generally; extension of liens; transfer of liens to other security
FLA. STAT. § 55.081 Statute of Limitations, Lien of Judgment
FLA. STAT. §§ 55.501-.509 Florida Enforcement of Foreign Judgment Act
FLA. STAT. §§ 55.601-.067 Uniform Out-of-Country Foreign Money-Judgment Recognition Act
FLA. STAT. § 605.0503 Charging Order
Cases
B. A. Lott, Inc. v. Padgett, 14 So.2d 667 (Fla. 1943)
Petersen v. Whitson, 14 So.2d 300 (Fla. 2d DCA 2009)
Gamez v. First Union Nat'l Bank of Fla., 31 So.3d 220 (Fla. 4th DCA 2010)
Dollar Sav. and Trust Co. v. Soltesiz, 636 So.2d 63 (Fla. 2d DCA 1994)
Patrick v. Hess, No. SC15-1147, (Fla. 2017)
Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So.2d 201 (Fla. 1962)
Aetna Ins. Co. v. LaGasse, 223 So.2d 727 (Fla. 1969)
King v. King, 652 So.2d 1199 (Fla. 4th DCA 1995)
Moye v. General Motors Corporation, 77 So.2d 875 (Fla. 1955)
Garner v. I. E. Schilling Co., 174 So. 837 (Fla. 1937)

Federal Tax Liens
Statutes
26 U.S.C. § 6323(g)(3)
26 U.S.C. § 6502(a)(1)
26 U.S.C. § 7421
FLA. STAT. § 713.901(3)(b) Florida Uniform Federal Lien Registration Act
Cases
United States v. McDermott, 507 U.S. 447(1993)
U.S. v. Estate of Romani, 523 U.S. 517 (1998)
Sperling v. U. S., 944 So.2d 1139 (2008)
U.S. v. Craft, 535 U.S. 274 (2002)
Paternoster v. U.S., 640 F.Supp.2d 983 (S.D. Ohio 2009)

County Water & Sewer Systems – FLA. STAT. ch. 153
Statutes
FLA. STAT. § 95.11 Limitations Other than for the Recovery of Real Property
FLA. STAT. § 153.67 Unpaid Fees to Constitute Lien
Cases
City of Riviera Beach v. Reed, 987 So.2d 168 (Fla. 4th DCA 2008)
Bond Financing – FLA. STAT. ch. 159
Statutes
FLA. STAT. § 95.11 Limitations Other than for the Recovery of Real Property
FLA. STAT. § 159.02 Definitions
FLA. STAT. § 159.03 General Powers
FLA. STAT. § 159.17 Lien of Service Charge
Cases
City of Riviera Beach v. Reed, 987 So.2d 168 (Fla. 4th DCA 2008)
Supplemental & Alternative Method of Making Local Municipal Improvements – FLA. STAT. ch. 170
Statutes
FLA. STAT. § 170.03 Resolution Required to Declare Special Assessment
FLA. STAT. § 170.08 Final Consideration of Special Assessments; Equalizing Board to Hear Complaints and Adjust Assessments; Rebate of Difference in Cost and Assessment
FLA. STAT. § 170.09 Priority of Lien; Interest; and Method of Payment
FLA. STAT. § 170.10 Legal Proceedings Instituted upon Failure of Property Owner to Pay Special Assessment or Interest when Due; Foreclosure; Service of Process

Co**unty or Municipal Code Enforcement – FLA. STAT. ch. 162**
Statutes
FLA. STAT. § 162.09 Administrative Fines; Costs of Repair; Liens
FLA. STAT. § 162.10 Duration of Lien
Cases
City of Palm Bay v. Wells Fargo Bank, N.A., 144 So.3d 924 (Fla. 2013)

Back to Speaker Topics

Fund Assembly

2017 Legislative Update

Michael Mirrington, *Sr. Underwriting Counsel, The Fund*

Back to Speaker Topics

Speaker Information

2017 Legislative Update

Michael Mirrington,
Sr. Underwriting Counsel, The Fund

Michael E. Mirrington is a senior underwriting counsel with The Fund and has served in The Fund's Tampa Bay Branch since 1993. He earned his Bachelor's Degree from the University of Rochester (NY) and his Juris Doctor from The University of Toledo College of Law.

Prior to joining The Fund, Mr. Mirrington worked for a major Sarasota law firm concentrating in commercial litigation and title insurance claims. An A-V rated attorney and Board Certified in Real Estate, he is also a member of the Florida Bar and the Hillsborough County Bar Association. Mr. Mirrington served for five years as president of the Bay Area Real Estate Council and is now vice-president/programs for that organization. In 2015, he completed six years of service on the Florida Bar's Real Estate Certification Committee and was chair of the committee during the 2011-2012 term.

Back to Speaker Topics

Fund Assembly

Quiz on Real Property Cases

Peggy Williams, *Risk Manager, The Fund*

Back to Speaker Topics

Speaker Information

Quiz on Real Property Cases

Peggy Williams,
Risk Manager, The Fund

Margaret A. "Peggy" Williams is The Fund's Risk Manager. She received her bachelor's degree from Florida State University, and her J.D. from the University of Florida. She joined The Fund in 1991 and served as a Legal Assistant handling small claims for several years before law school. After law school, Ms. Williams served as Fund Claims Counsel until 2005 when she became The Fund's Risk Manager. She is also Co-Editor of The Fund's monthly publication, The Fund Concept.

Ms. Williams is a member of the Florida Bar's Real Property, Probate & Trust Law Section's Executive Council and its Problems Study, Title Insurance, and Title Issues and Standards Committees, and chairs the Florida Land Title Association's Claims Prevention, Avoidance and Education Committee. She served a term on a Florida Bar grievance committee for the 9th Judicial Circuit.

Quiz on
Recent Florida Real Property Cases

by Margaret A. (Peggy) Williams

Instructions: For each statement, please circle "T" if you believe that the statement is "True" or circle "F" if you believe that the statement is "False". Please keep a running total of the number of questions you have answered correctly.

---

1. T or F A document entitled "Loan Transfer History" is not sufficient to establish standing to foreclose.

Miller v. Bank of America, N.A.
201 So.3d 1286
(Fla. 5th DCA 2016)

2. T or F The words "subject to" in a deed referencing an easement create an ambiguity allowing a court to properly examine extrinsic evidence to determine the intent of the grantor.

Hastie v. Eckholm
199 So.3d 461
(Fla. 4th DCA 2016)

3. T or F Once a bank exercises its remedy of acceleration and files foreclosure, the five-year statute of limitation begins to run, and unless the bank revokes the acceleration along with dismissing the foreclosure action, after five years, the bank may no longer pursue foreclosure on the property.

Bartram v. US Bank Nat. Assn.
41 Fla. L. Weekly S493
(Fla. 2016)

4. T or F Attorneys hired to collect delinquent HOA fines must comply with the Federal Fair Debt Collection Practices law.

Agrelo v. Affinity Management Services
841 F.3d 944
(11th Cir. 2016)

5. T or F Evidence showing that a grantor was not competent both prior to execution and subsequent to execution is sufficient to show grantor was not competent at the time of execution of a deed.

Marcinkewicz v. Quattrocchi
199 So.3d 513
(Fla. 3d DCA 2016)

6. T or F The words "amended from time to time" in reference to the Condominium Act are required in a condominium declaration in order for subsequent changes to the Condominium Act to affect the condominium

Tropicana Condominium Assn., Inc. v. Tropical Condominium LLC
41 Fla. L. Weekly D2580
(Fla. 3d DCA 2016)

7. T or F A party who purchases from the borrower after a lis pendens is filed has standing to intervene in the foreclosure as a necessary party.

Trust No. 602WO Dated 7/16/15, Dema Investments, LLC v. Wells Fargo Bank
42 Fla. L. Weekly D63
(Fla. 5th DCA 2016)

8. T or F Proceeds from the sale of homestead property lose their homestead exemption when placed into a separate brokerage account and invested in securities.

JBK Associates, Inc. v. Sill Bros. Inc.
191 So.3d 879
(Fla. 2016)

9. T or F A lease will not be enforced when, during the term of the lease, a law is enacted which renders the tenant's business illegal, and the tenant cannot operate within the law without violating the restrictions in the lease.

Lucas Games, Inc. v. Morris AR Associates LLC
197 So.3d 1183
(Fla. 4th DCA 2016)

10. T or F A lender who obtains a promissory note in exchange for funds which are used to make payments on a mortgage has an equitable lien on the property encumbered by that mortgage.

WICHI Management v. Masters
193 So.3d 961
(Fla. 3d DCA 2016)

11. T or F A judgment is a valid lien on real property when a certified copy of it is recorded in the official records of the county where the property is located and contains the address of the lienholder in this form: Judgment Lienholder c/o Judgment Lienholder's Attorney, Attorney's address.

Gomez v. Timberoof Roofing
196 So.3d 1279
(Fla. 4th DCA 2016)

12. T or F If a lender forecloses using an incorrect legal description which is not discovered until after the foreclosure sale is held and the certificate of title is issued, the certificate of title, foreclosure sale, and the final judgment must be vacated, the original action must be dismissed, and the lender must file a new complaint with the correct legal description.

FNMA v. Sanchez
187 So.3d 341
(Fla. 4th DCA 2016)

13. T or F A person whose principal defense to a foreclosure action is that her signature was forged, therefore she is not a party to the mortgage contract, is not entitled to recover her attorneys' fees under Sec. 105(7) F.S. reciprocity provision when the lender voluntarily dismisses her from the action, with prejudice.

Florida Community Bank v. Red Road Residential
197 So.3d 1112
(Fla. 3d DCA 2016)

14. T or F An assignee of a mortgage is required to pay the costs awarded to the defendant upon dismissal of the assignor's foreclosure action before proceeding in a second foreclosure action bases on the same claim as the first.

Villalona v. 21st Mortgage Corporation
195 So.3d 1199
(Fla. 4th DCA 2016)

15. T or F A lender incorporated in another state must obtain a Certificate of Authority from the Florida Department of State before it has standing to foreclose its mortgage on Florida property.

Bank of America v. Nash
200 So.3d 131
(Fla. 5th DCA 2016)

16. T or F In a lender's second foreclosure complaint, filed more than five years after the first foreclosure was dismissed, the lender is barred from recovering any of the installment payments that became due more than five years prior to the filing of the second complaint.

Bollettieri Resort Villas Condominium Assn. v. Bank of New York Mellon
198 So.3d 1140
(Fla. 2d DCA 2016)

17. T or F A court order requiring a bank to release its mortgage in exchange for a security interest in the cash proceeds violates a constitutionally-protected property interest.

Beach Community Bank v. Spellman
206 So.3d 843
(Fla. 1st DCA 2016)

18. T or F A title insurer has a duty to discover public beach access rights which accrued prior to the root of title.

Kahama VI, LLC v. HJH, LLC
2016 WL 7104175
(M.D. Fla., Dec. 6, 2016)

19. T or F Chapter 7 debtors who admit that their house is subject to a bank's valid mortgage and file a statement of their intention to surrender the property to the bank, may contest the bank's foreclosure action if the bankruptcy trustee abandons the property.

In re Failla
838 F.3d 1170
(11th Cir. 2016)

20. T or F Liens placed on property between a final judgment of foreclosure and the judicial sale are not discharged by Sec. 48.23(1)(d) because the lis pendens in a foreclosure action terminates at the time of the final judgment.

Ober v. Town of Lauderdale-by-the-Sea
42 Fla. L. Weekly D246
(Fla. 4th DCA 2017)

RECENT FLORIDA REAL PROPERTY CASES

(January 2016 through March 2017)

Summaries written by:
Connie Clark, Associate Underwriting Manager
John "Jay" St. Lawrence, Fund Legal Education Attorney
Lee Offir, Fund Sr. Underwriting Counsel

I. CLOSING AGENTS & TITLE INSURANCE

A. Title insurer has no duty to discover customary public beach access rights accrued prior to root of title. The U.S. District Court for Middle District of Florida held that Florida's Marketable Record Title Act "represents a codified limitation on the title insurer's obligation to research the public records in connection with the issuance of a title insurance policy," citing *Village Carver*, 128 So.3d 107, 111 (Fla. 3d DCA 2013). *Kahama VI, LLC v. HJH, LLC*, Case No. 8:11-cv-2029-T-30TBM (M. D. Fla., Dec. 6, 2016) (unpublished).

II. CONDOS & CO-OPS

A. Effect of lack of "Kaufman Language". Absent "Kaufman language", the Condominium Act will not have a retroactive application to an association's actions, so long as such application would impair the parties' contractual obligations. *Tropicana Condominium Ass'n, Inc. v. Tropical Condominium, LLC*, 208 So.3d 755 (Fla. 3d DCA 2016).

III. EASEMENTS

A. Extrinsic evidence used to establish easement. When language in a deed is ambiguous as to the creation of an easement, extrinsic evidence of the grantor's intent must be reviewed to determine the validity of the easement. *Hastie v Ekholm*, 199 So.3d 461 (Fla. 4th DCA 2016).

IV. HOMESTEAD

A. Trial court must hear homestead arguments to stay execution of judgment. The trial court erred when it refused to hear the homeowner's arguments that their homestead property was protected from the forced sale. *Hayes v. Norman Harris Services, Inc.*, 198 So.3d 716 (Fla. 2d DCA 2016).

B. Invested proceeds from sale of homestead protected. The Florida Supreme Court held that proceeds from the sale of homestead property were protected from a judgment creditor even though a portion of the proceeds were invested in mutual funds and stocks. *JBK Associates, Inc. v. Sill Bros., Inc.*, 191 So.3d 879 (Fla. 2016).

V. JUDGMENTS

A. Variable judgment interest does not apply to judgments entered between October 1998 and June 30, 2011. The Florida Supreme Court held that the variable rate amendment does not apply to judgments entered between October 1998 and June 30, 2011, reasoning that the prior fixed-rate statute created a substantive right in the judgment creditor that the Legislature did not intend to reduce by way of the amended variable-rate statute. *Townsend v. R.J. Reynolds Tobacco Co*., 192 So.3d 1223 (Fla. 2016).

VI. LEASES & LANDLORD/TENANT

A. Change in law prohibiting purpose of lease renders lease unenforceable. The restrictiveness of a lease provision preventing a tenant both operating legally and complying with the lease renders the lease unenforceable. *Lucas Games Inc. v. Morris AR Associates, LLC,* 197 So.3d 1183 (Fla. 5th DCA 2016).

VII. LIENS

A. No equitable lien without traceable benefit. There are two bases to impose an equitable lien, either by way of indications stemming from a written contract showing an intention to charge a particular property with an obligation; or through a judicial determination out of consideration of a right or justice as applied to a particular case. *WICHI Management, LLC v Masters*, 193 So.3d 961 (Fla. 3d DCA 2016).

B. A creditor's attorney's address on a judgment is insufficient to create a lien. A judgment holder could not use its attorney's address on judgments even though it was in the process of closing its business because Sec. 55.10, F.S. is unambiguous as to the requirement that a judgment contain "the address of the person who has a lien." *Gomez v. Timberoof Roofing*, 196 So.3d 1279 (Fla.4th DCA 2016).

C. Liens placed on property between final judgment of foreclosure and judicial sale ARE discharged by Sec. 48.23, F.S. – An Update on *Ober*. On rehearing, the court withdrew their August 2016 opinion, *Ober v. Town of Lauderdale-By-The-Sea*, 41 Fla. L. Weekly D1978 (Fla 4th DCA 2016), which found that liens placed on property between the final judgment of foreclosure and judicial sale are not discharged, and substituted it with one more consistent with the other districts. "Liens placed on property between final judgment of

foreclosure and a judicial sale…are discharged by [Fla. Stat.] §48.23(1)(d)." *Ober v. Town of Lauderdale-by-the-Sea*, 42 Fla. L. Weekly D246 (Fla. 4th DCA 2016).

VIII. MISCELLANEOUS

A. Free and clear sale from bankruptcy estate. A bankruptcy debtor or trustee can sell real property free and clear of the interests of a non-debtor co-owner upon showing four statutory conditions are met. *In re: Navarro,* 2016 WL 93806 (Bankr. S.D. Fla. 2016).

B. Lack of mutuality of obligation may be cured by subsequent conduct. A liquidated damages clause in a purchase agreement may be defective for lack of mutuality of obligation; however, said defect may be cured by subsequent performance by the non-obligated party. *Victory Christian World Ministries, Inc. v. MJP Distribution LLC*, 199 So.3d 1035 (Fla. 4th DCA 2016).

C. Capacity at the time of deed execution. In order to invalidate a deed of conveyance for lack of capacity of the grantor, the burden is to show a lack of capacity at the time of execution, regardless of capacity for the time period prior or subsequent to execution of the deed. *Marcinkewicz v Quattrocchi*, 199 So.3d 513 (Fla. 3d DCA 2016).

IX. MORTGAGES & MORTGAGE FORECLOSURES

A. Lender cannot foreclose reverse mortgage when property is occupied by wife of deceased borrower. Reverse mortgage cannot be foreclosed while the home is still occupied by the wife of the deceased borrower. *Smith v. Reverse Mortgage Solutions, Inc.*, 40 Fla. L. Weekly D1624 (Fla. 3rd DCA 2015) and *Edwards v. Reverse Mortgage Solutions, Inc.*, 187 So.3d 895 (Fla. 3d DCA 2016).

B. Surplus proceeds from a foreclosure sale. A claim to surplus funds from a foreclosure sale is timely if filled within 60 days after the filing of the certificate of title. *Straub v. Wells Fargo Bank, N.A.*, 40 Fla. L. Weekly D2470 (Fla. 4th DCA 2016).

C. Right of redemption in foreclosure. Exercise of the right of redemption is a matter of right and is effective even if there was no record notice of its exercise and the foreclosure sale was erroneously not cancelled. *Popescu v. Laguna Master Association, Inc.*, 184 So.3d 1196 (Fla. 4th DCA 2016).

D. Lis pendens bars separate action. After a notice of lis pendens has been filed in a foreclosure action, a junior lienholder cannot file a separate action to foreclose its lien because exclusive jurisdiction to foreclose on the property is in the court conducting the foreclosure of the senior lien. *Jallali v. Knightsbridge Village Homeowners Ass'n,* Case No. 4D15-2036, 2016 WL 320601 (Fla. 4th DCA 2016).

E. Owner versus holder of promissory note. The holder of a promissory note is not the same as an owner of the note for purposes of standing in a mortgage foreclosure action. *Angelini v. HSBC Bank USA, N.A., as Trustee*, 189 So.3d 202 (Fla. 4th DCA 2016).

F. Rule 1.540(b)(4) not applicable to orders. Rule 1.540(b)(4) of the Florida Rules of Civil Procedure applies to judgments and decrees of the court, but not to orders. *De La Osa v. Wells Fargo Bank, N.A.*, 2016 WL 517466 (Fla. 3d DCA 2016).

G. Reformation of mortgage after certificate of title. The reformation of a mortgage after the issuance of the certificate of title does not require dismissal of the original action, but rather the vacation of the final judgment, judicial sale and issuance of the certificate of title. *Federal National Mortgage Association v. Sanchez*, 187 So.3d 341 (Fla. 4th DCA 2016).

H. Mortgage reformation requires clear and convincing evidence. In order to prove a count for reformation in a mortgage foreclosure action, the lender must provide evidence of the actual agreement between the borrower and lender. *Losner v. HSBC Bank USA, N.A.*, 190 So.3d 160 (Fla. 4th DCA 2016).

I. Reciprocity of attorneys' fees in mortgage foreclosure. The Third District Court found that in order to be entitled to fees under the Sec 57.105, F.S., reciprocity provisions of a mortgage, litigants must meet a threshold burden to establish status as a party to the mortgage containing the fee provision. *Florida Community Bank NA., v. Red Road Residential, LLC,* 197 So.3d 1112 (Fla. 3d DCA 2016).

J. Subsequent action stayed until compliance with award of fees and costs. Fla. R. Civ. P. 1.420(d) mandates payments for an order awarding fees and costs under a previously dismissed case must be complied with or subsequent actions shall be stayed. *Villalona v 21st Mortgage Corp.*, 195 So.3d 1199 (Fla. 4th DCA 2016).

K. Failure to comply with licensing and registration requirements does not invalidate a mortgage. A lender's failure to register with the State or even comply with the licensing requirements does not impair the validity or enforceability of the mortgage loan. Further it would not prevent the lender from defending any action in the State. *Bank of America, N.A. v Nash*, 200 So.3d 131 (Fla. 5th DCA 2016).

L. Subordinate lien enforcement. When a homeowners association declaration was recorded prior to the lis pendens of a foreclosing lender, the association can proceed in its foreclosure action while a superior mortgage foreclosure action is still pending. The caveat being that the association's foreclosure may be subordinate to the lender's foreclosure of the mortgage. *Jallali v. Knightsbridge Vill. Homeowners Ass'n, Inc.*, 41 Fla. L. Weekly D1517 (Fla. 4th DCA 2016).

M. An independent suit for mortgage deficiency is permissible. Sec. 702.06, F.S. unambiguously provides that a reservation of jurisdiction in a foreclosure judgment does not preclude a separate suit to recover the deficiency where the foreclosure court has not granted or denied a claim for deficiency. *Dyck-O'Neal, Inc. v. McKenna*, 198 So.3d 1038 (Fla. 4th DCA 2016). *See also, GDovin v. Dyck-O'Neal*, 198 So.3d 986 (Fla. 3d DCA 2016).

N. An allegation of missed "subsequent payments" is sufficient to avoid the statute of limitations in foreclosure. An allegation of the lack of "subsequent payments" is sufficient to find the second complaint was based on a default within the statute of limitations. *Bollettieri Resort Villas Condominium Association v. Bank of Ney York Mellon*, 198 So.3d 1140 (Fla. 2d DCA 2016).

O. Statute of limitations does not bar filing of successive foreclosures. Absent a contrary provision, a dismissal of a foreclosure action brings the parties to their pre-foreclosure status. This status keeps the mortgage as an installment note, ensures the borrower of his right to continue making installment payment, and gives the bank the right to exercise its remedy of acceleration in the event of a subsequent default. *Bartram v U.S. Bank National Association*, 41 Fla. L. Weekly S493 (2016).

P. Post-lis pendens purchaser not entitled to intervene in foreclosure. The Fifth District Court characterized a party who purchases property in foreclosure after a lis pendens as a "purchaser *pendent lite*," citing *Bymel v. Bank of America, N.A.*, 159 So.3d 345 (Fla. 3d DCA 2015) and held that it is well settled that a purchaser *pendent lite* is bound by the judgment or decree against the party from whom he purchased as though he were a party himself. *Trust No. 602W0 Dated 7/16/15, Dema Investments LLC v. Wells Fargo, et al.*, 207 So.3d 977 (Fla. 5th DCA 2016).

Q. Loan modification does not modify borrower's rights without specific waiver. The Third District held that "[W]aiver is the intentional or voluntary relinquishment of a known right," and that where neither the bank nor the borrowers had waived rights through a loan modification agreement, the borrowers' defenses could not be dismissed summarily. *Rodriguez v. Ocean Bank*, 208 So.3d 221 (Fla. 3d DCA 2016)

R. Assignee of deficiency judgment may bring separate action. The Second District Court, referencing Sec. 702, F.S. and its recent decision in *Gdovin v. Dyck-O'Neal*, 198 So.3d 986 (Fla. 2d DCA 2016) held that the assignee of a deficiency judgment can bring an independent action outside the original foreclosure. *Dyck-O'Neal v. Konstantinos* 41 Fla. Law Weekly D2728 (Fla. 2d DCA 2016).

S. Mortgage is a constitutionally-protected property interest. A mortgage lien is a contractual, constitutionally-protected property interest so that a court cannot substitute the secured collateral absent an agreement by the parties, judicial sale, or eminent domain. *Beach Community Bank v Spellman*, 206 So.3d 843 (Fla. 1st DCA 2016).

T. Reformation of deed not required in mortgage foreclosure. So long as the legal description in the mortgage being foreclosed contains an accurate description of the encumbered property, an action to foreclose that mortgage would be proper, even if the deed conveying the property to the mortgagor contained scrivener's errors and was not reformed. *Heartwood 2, LLC v. Dori*, 208 So.3d 817 (Fla. 3d DCA 2017).

U. Surplus funds claims must be made within 60 days of sale. Any subordinate lienholders claiming an interest in surplus funds from a resulting foreclosure must do so within sixty days from the sale date, not the date of issuance of the certificate of sale. *Bank of New York Mellon v. Glenville*, 42 Fla. L. Weekly D212 (Fla. 2d DCA 2017).

X. RESTRICTIONS & HOA

A. MRTA and government imposed restrictions. The Marketable Record Title Act cannot eliminate a recorded restrictive covenant imposed as a condition of the zoning approval process. *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So.3d 910 (Fla. 3d DCA 2016).

B. Suit to invalidate restrictive covenants barred by statute of limitations. A suit by homeowners to void two amendments to their subdivision's restrictive covenants was barred by the five year statute of limitations of Sec. 95.11(2)(b), F.S., *Hilton v. Pearson*, 208 So.3d 108 (Fla. 1st DCA 2016).

C. Impossibility of performance prevents compliance with deed restrictions. The court applied the doctrine of impossibility of performance to find that a property owner was not required to build a gate as required by deed restriction when the permit was denied. *Marathon Sunsets, Inc. v. Coldiron*, 189 So.3d 235 (Fla. 3d DCA 2016).

D. Declaration terms govern assessment subordination. The specific language contained in an association's declaration must be reviewed to determine the extent of the promise of subordination made by the association to subsequent lienors. *Ballantrae Homeowners Association, Inc. v FNMA*, 203 So.3d 938 (Fla. 2d DCA 2016).

E. HOA lien collection subject to FCCPA. An obligation to pay HOA assessments creates a debt as defined under the Florida Consumer Collection Practices Act. *Agrelo v. Affinity Management Services*, Case No. 15-14136, 841 F.3d 944 (11th Cir. 2016).

F. Action may lie for declaratory relief; quiet title for amended covenants where association participation is unclear. The Second District Court found that homeowners had a cause of action where an HOA that recorded declaration stating that all record title holders were members and imposed a "55 and over" restrictive covenant, because it was not clear homeowners who had not joined the HOA were not subject to it. *Van Loan, Morelli, Roodhouse and Koontz v. Heather Hills Property Owners Association, Inc.*, 42 Fla. L. Weekly D80 (Fla 2d DCA 2016).

XI. STATE TAXATION

A. **Compliance with Sec. 193.122(2), F.S. required to trigger nonclaim period**. The property appraiser must comply with the procedures set forth in Sec. 193.122(2), F.S., when certifying the tax roll for collection in order to trigger the time for objection set forth in Sec. 194.171(2), F.S. *Miles v. Parrish*, 199 So.3d 1046 (Fla. 4th DCA 2016).

XII. VENDORS & PURCHASERS

A. Florida real estate recovery fund tapped for broker fraud. In an administrative appeal from the Florida Department of Business and Professional Regulation, several purchasers were allowed to recover deposits from the real estate recovery fund for broker fraud. *Hendricks v. Department of Business and Professional Regulation*, 183 So.3d 1172 (Fla. 5th DCA 2016).

XIII. WATER & WATERCOURSES

A. Non-waterfront property does not include submerged land or riparian rights. Property owner's dock permit application was rejected on the basis that the property did not include submerged lands or riparian rights. *Whetstone v. City of St. Augustine***,** 186 So.3d 34 (Fla. 5th DCA 2016).

XIV. ZONING & LAND USE

A. MRTA and government imposed zoning restrictions. The Marketable Record Title Act cannot eliminate a recorded restrictive covenant imposed as a condition of the zoning approval process. *Save Calusa Trust, et al. v. St. Andrews Holdings, Ltd.*, 193 So.3d 910 (Fla. 3d DCA 2016).

Back to Speaker Topics

Fund Assembly

Do it Right. Sleep Well at Night. Ethical Considerations for the Real Estate Attorney

Lynwood Arnold, Jr., *Attorney, Law Offices of Lynwood Arnold, PA*
Frederick W. Jones, *Attorney at Law*

Back to Speaker Topics

Speaker Information

Do it Right. Sleep Well at Night. Ethical Considerations for the Real Estate Attorney

Lynwood Arnold, Jr.,
Attorney, Law Offices of Lynwood Arnold, PA

Lynwood F. Arnold, Jr. received his undergraduate degree from Stetson University and his law degree from Florida State University. He is a member of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar, currently serving as Co-Chair of the Membership and Inclusion Committee and as Lead At Large Member for the Second Judicial Circuit.

Mr. Arnold is a past chair of the Real Property, Probate and Trust Law Section of the Hillsborough County Bar Association. He is a member and past president of the Bay Area Real Estate Council. He is a director of the Capital Region Real Estate Council and member of the Tallahassee Bar Association.

Mr. Arnold serves on the Professional Ethics Committee of The Florida Bar and on the Board of Directors of the Legal Aid Foundation of the Tallahassee Bar Association. He is a Master in the William H. Stafford Chapter of the American Inns of Court.

Mr. Arnold's practice areas include real estate transactions and litigation; estate and trust litigation; wills, trusts and estates; and the mediation of real estate and estate disputes. Mr. Arnold has been certified by the Florida Supreme Court as a Board Certified Real Estate Lawyer and a Circuit Court Mediator. He has an AV rating from Martindale-Hubbell.

Back to Speaker Topics

Speaker Information

Do it Right. Sleep Well at Night. Ethical Considerations for the Real Estate Attorney

Frederick W. Jones,
Attorney at Law

Frederick W. Jones is a Florida Bar Board Certified Real Estate lawyer. He has been a member of The Florida Bar for over 40 years, and his legal career includes serving as Staff Counsel for the Florida Real Estate Commission, private practice and Judicial Magistrate positions. In private practice for more than 35 years, most recently as Partner in the Winter Park law firm of Graham, Builder, Jones, Pratt & Marks, LLP, (now Burr & Forman LLP), he has specialized in residential and commercial real estate transactions, mortgage law, agency, title insurance and lender and broker representation, as well as estate planning and probate. He served as a Special Magistrate for the Orange County ad valorem tax Value Adjust Board and most recently was General Magistrate in Orange County, 9th Judicial Circuit Courts handling residential mortgage foreclosure cases.

Mr. Jones received his B.A. from the University of Florida and his J.D. from the University of Florida College of Law. He holds an “AV” rating by Martindale Hubbell and has been recognized as a Florida Super Lawyer from 2007 – 2012. He is a member of The Florida Bar and United States Supreme Court Bar, and has been an active member of the American Bar Association and Orange County Bar Association.

Mr. Jones is on the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar, has served as Chairman of the Section’s Residential Real Estate & Industry Liaison Committee and currently is an At Large Member representing the 9th Judicial Circuit. Mr. Jones was appointed by The Florida Bar as an Attorney member on the Florida Realtor-Attorney Joint Committee and has continuously served on the Joint Committee since 1997, where he is on the FAR/BAR Contract Sub-Committee.

He is founding member and past chair of the Central Florida Real Estate Attorneys Council and currently serves as President of the Attorneys’ Real Estate Councils of Florida. He is past Chairman of the Real Property Committee of the Orange County Bar Association, and was honored with the Attorney Appreciation Award by Orlando Regional Realtors Association in 1996. Mr. Jones is a member of Florida Blue Key, Rotary Club of Winter Park, Winter Park Chamber of Commerce and serves on the boards of various community and charitable organizations.

Do it Right. Sleep Well at Night.
Ethical Considerations for the Real Estate Attorney

- Lynwood Arnold, Jr., Tallahassee/Tampa
- Frederick W. Jones, Winter Park

1. Overview of Ethics and Professionalism.
2. Who is your client in a residential real estate transaction?
3. What duties are there to a non-client?
4. Non-lawyers handling closing.
5. Fees and costs for legal services.
6. Requisite knowledge by attorney before representing a client. [Competence].
7. Confidentiality of information.
8. Unlawful Inducement
9. Ethical issues when dealing with real estate brokers, lenders and other referral sources.
10. Importance of an Engagement Letter.

1. Overview of Ethics and Professionalism.

Ethics Rules and Resources

a) Rules Regulating The Florida Bar: Chapter 4, Rules of Professional Conduct
b) Rule 4 Preamble - A Lawyer's Responsibilities - overview and terminology
c) Ethics Opinions issued by the Professional Ethics Committee
d) Written Ethics Opinion - Florida Bar Ethics Department staff opinions
e) Oral Advisory Opinion - Ethics Hotline (800-235-8619)
f) Informational Packets
g) Frequently Asked Ethics Questions

Professionalism

Professionalism "standards of behavior" adopted by the Florida Supreme Court in *In re Code for Resolving Professionalism Complaints*, 116 So.3d 280 (Fla. 2013):

1. The Oath of Admission to The Florida Bar.
2. The Florida Bar Creed of Professionalism.
3. The Florida Bar Ideals and Goals of Professionalism (now the Professionalism Expectations).
4. The Rules Regulating the Florida Bar.
5. The decisions of the Florida Supreme Court

Code for Resolving Professionalism Complaints – Exhibit A to above Supreme Court case

The Henry Latimer Center for Professionalism

2. **Who is your client in a residential real estate transaction?**

Sally Star, Broker of Star Tech Realty, New Vulcan, Florida, a friend and long-time client of yours, is the listing and selling agent on a Residential Contract For Sale and Purchase, 2016 FR/BAR form, between Tom and Tina Turner, as Sellers, and A. Storm, as Buyer.

Sally has delivered the fully executed Contract to you and she has advised that the parties are requesting you to conduct the Closing and issue the Owner's Title Insurance Policy. At this point, neither Sellers nor Buyer have retained you nor do either of them have independent counsel in this transaction. Sellers are paying for the Owner's Title Insurance Policy pursuant to the terms of the Contract.

2.1 If you handle the closing on this basis, without more, who is your client?

A. Seller
B. Buyer
C. Both
D. Other (e.g., Sally Star, the lender, the title insurance underwriter, the "deal" or the closing)
E. No one

[Rule 4 Preamble - A Lawyer's Responsibilities; Rule 4-1.7 (Conflict of Interest; Current Clients); Rule 4-4.3 (Dealing with Unrepresented Persons); Ethics Opinion 89-5; Ethics Opinion 97-2]

2.2 Can you ethically represent both Sellers and Buyer (dual representation)?

A. No. You must represent one party or the other in a real estate transaction.
B. Yes, if you give notice to both parties.
C. Yes, with informed consent from both Sellers and Buyer.
D. None of the above.

[Rule 4-1.7 (Conflict of Interest; Current Clients); Rule 4 Preamble – A Lawyer's Responsibilities; see Ethics Opinion 97-2]

2.3 You were the closing agent and represented Tom and Tina Turner, as Buyers, when they purchased this property in 2003. The Buyer, A. Storm, has requested you represent her in this matter. Can you do it?

A. No. Since Sellers were previous clients, you can only represent them.
B. Yes, with informed consent from Sellers.
C. Yes, and you do not need consent from either from either party, because it was a totally different matter.
D. Yes, but you cannot use any information you learned from the previous representation to the disadvantage of the now Sellers, nor can you reveal information relating to the previous representation.
E. B and D are correct.
F. C and D are correct.

[Rule 4-1.6 (Confidentiality of Information); Rule 4-1.9 (Conflict of Interest; Former Client); Rule 4 Preamble – A Lawyer's Responsibilities]

2.4 You represent the Buyer who is getting a purchase money mortgage from First Galaxy Bank of New Vulcan, which you regularly represent in loan transactions. The loan officer has requested that you prepare the loan

documents for the Buyer's $2M purchase money mortgage. In order to comply with this request, do you need Buyer's informed consent?

A. No. You don't need anyone's consent to prepare loan documents to facilitate this closing.
B. No. You cannot do it.
C. Yes, only Buyer's informed consent is required.
D. Yes, but informed consent is required from both Buyer and Lender and you believe you can provide competent representation to both.

[Rule 4-1.7 (Conflict of Interest; Current Clients); Rule 4-1.8 (b), (f) (Conflict of Interest; Prohibited and Other Transactions)]

3. <u>What Duties are there to a non-client?</u>

3.1 If Broker, Sally Star, advises you that the Sellers have requested that you represent them, do you need anything in writing from Sellers or Buyer in order to proceed?

A. No. The Contract delivered to you and the Broker's notice of Sellers' request is sufficient.
B. Yes. You must have Sellers' informed consent.
C. Yes. You must have a separate Engagement Letter signed by the Sellers and informed consent from the Buyer, in writing.
D. None of the above.

[Rule 4-1.7 (Conflict of Interest; Current Client)]

3.2 Now that you represent the Sellers in this transaction, what duties, if any, do you owe the Buyer?

A. Advise the Buyer that you represent the Sellers.
B. Be truthful regarding material facts or law relating to the transaction, while acting in your client's behalf.
C. Conduct the closing and handle all matters and disbursements in a fair and ethical manner.

D. Decline to answer any questions about the Buyer's legal rights (e.g., how title should be taken, tax questions, etc.), other than to advise the Buyer to secure independent counsel.
E. All of the above.

[Rule 4-4.1 (Truthfulness in Statements to Others); Rule 4-4.3 (Dealing with Unrepresented Persons); Rule 4-1.18 (Duties to Prospective Client)]

4. <u>Non-Lawyers handling closing.</u>

You are a board certified real estate lawyer and have been handling residential closings for 30 years. Your paralegal, Pam, has been with you for 25 years and she knows more than most-real estate lawyers. She has handled thousands of closings and you're comfortable with her handling closings without your being present. You have reviewed the contract and all closing documents, and you take full responsibility for everything that Pam does. In 25 years, no one has ever complained with this procedure and no problems have ever arisen.

4.1 May Pam conduct this closing without your being physically present?

A. Yes.
B. Yes, so long as both Seller and Buyer consent to Pam handling the closing.
C. No. Since Pam is not an attorney, this constitutes the unauthorized practice of law.
D. Yes, but only if certain conditions are met.

[Rule 4-5.3(b) (Responsibilities Regarding Nonlawyer Assistants); *Cooperman v. West Coast Title Company,* 75 So.2d 818 (Fla. 1954); Ethics Opinions 73-43, 89-5, & 97-2]

5. <u>Fees and costs for legal services.</u>

You represent the Sellers, Tom and Tina Turner, and you charge them a $1200 attorney's fee. As a part of the transaction you also charge the Buyer a $400 "closing fee". Both fees are shown on the settlement statements signed by the

Sellers and Buyer, but there is no other documentation signed by the parties regarding fees.

5.1 Are there any problems, ethically or otherwise?

A. No, since both parties clearly indicated their consent to the fees by signing the settlement statements.
B. No, but it would have been a problem had you charged the Buyer a $400 attorney's fee instead of a closing fee.
C. Yes. You cannot charge a fee to a non-client.
D. Yes, unless both parties give their written consent to the arrangement, after full disclosure of potential conflicts of interest, but even then there is the possibility that the Buyer has now become your client.

[Rule 4-1.5 (Fees and Costs for Legal Services); Rule 4-1.7 (Conflict of Interest; Current Client); *The Florida Bar v. Teitelman*, 261 So. 2d 140 (Fla. 1972); *The Florida Bar v. Belleville*, 591 So. 2d 170 (Fla. 1991); *The Florida Bar v. Reed,* 644 So. 2d 1355 (Fla. 1994)]

Special Note

Rule 4-1.5(e) provides that where there is not a regular representation of the client, the basis or rate of the fee and costs must be communicated at **the commencement** of the representation, preferably **in writing**. Fees can be defined as:

(1) a **Retainer** (payment to guarantee lawyer's future availability, is not a payment for past or future services); a **Non-Refundable Retainer must be deposited to operating account**, not trust account;

(2) a **Flat Fee** (payment for all legal services, may be called "nonrefundable"); a **Flat Fee must be deposited to operating account**, not trust account; or

(3) an **Advance Fee** (money paid an advance against which the lawyer will bill the client); an **Advance Fee must be deposited to trust account**, not operating account.

[see also Comment to Rule 4-1.5 under "Terms of payment"]

In a typical residential real estate closing, fees will usually be "flat fees", seldom "advance fees" and never "retainers".

6. **Requisite knowledge by attorney before representing a client. [Competence].**

After the successful closing between Tom and Tina Turner and A. Storm, the Buyer contacts you for assistance with a hearing in a land use matter involving the same property which she purchased. The hearing is scheduled in 3 days. You have never handled a land use case and you're unaware of the procedural issues or evidence required, but you need the business and would like to add land use to your practice areas.

6.1 Can you ethically handle this land use case for A. Storm?

A. Yes. You are familiar with real estate principles in general and, really, how hard could it be?
B. No. Neither you nor anyone else in your firm has ever handled a land use hearing.
C. Yes, you can handle the land use matter, but only if you can "get up to speed" through necessary study.
D. Yes, you can handle the land use matter, but only by associating another lawyer with established competence in the field of land-use hearings.
E. Both C and D are correct.

[Rule 4-1.1 (Competence)]

7. **Confidentiality of Information.**

Buyer delivers to you an Assignment of Contract, assigning all of her right, title and interest in the Contract to "ADELE, LLC". The property is in Palm Beach County, Florida and the purchase price is $3.5M.

7.1 You are advised by the Buyer that this will be a "cash" purchase and the Buyer be delivering all or a portion of the closing proceeds to you at closing in the form of a cashier's check. As a result, you may be required to comply with the January 13, 2016 FinCEN GTO, as extended to include Palm Beach County, Florida. Do you need Buyer's informed consent to disclose her personal and confidential information to your title underwriter and the IRS in the Form 8300?

A. No
B. Yes

7.2 Alternatively, Buyer advises you that she is getting a $2M purchase money mortgage from First Galaxy Bank of New Vulcan. Do you need her informed consent to disclosure her personal and confidential information to your title underwriter and the IRS in the Form 8300 pursuant to the FinCEN GTO?

A. No
B. Yes

[Rule 4-1.6 (Confidentiality of Information); Financial Crimes Enforcement Geographic Targeting Orders (FinCEN GTO); see ALTA Fact Sheet for FinCEN on thefund.com website]

7.3 As a result of the information you obtained through the closing, you learn that the contract Buyer, A. Storm, is actually the Super Star vocalist, ADELE. You are the chair of your local Chamber of Commerce Economic Development Committee and you feel the news that Adele is buying in and moving to New Vulcan might be just the boost needed for the sagging economy in New Vulcan. You can't wait to share this information which you have learned from your closing. Can you ethically share this information with your committee and Chamber executives?

A. No, this is confidential information no matter whom you represent.
B. Yes, if you represent the Sellers.
C. No, if you represent the Buyer, unless she has given informed consent.
D. No, unless both Sellers and Buyer given informed consent.

[Rule 4.1-6 (Confidentiality of Information)]

8. **<u>Unlawful Inducement.</u>**

Since Sally Star refers you a lot of high end residential closings and, in gratitude and as an accommodation to her, you routinely order and pay for certain services or requirements, like surveys, permit and municipal lien searches, and Condo/HOA estoppel letters, incident to the deals she sends to you.

8.1 Is this a violation of Florida's Unlawful Inducement rule and unethical?

A. Yes.
B. No.
C. No, provided you had reasonable expectation that you would be reimbursed at closing.

[F.A.C. 69B-186.010 Unlawful Inducements Related to Title Insurance Transactions, interpretation of 626.9541(1)(h)3., F.S.; Rule 4 Preamble – A Lawyer's Responsibility]

9. <u>Dealing with non-clients. Ethical issues when dealing with real estate brokers, lenders and other referral sources</u>.

Sally Star has been a great referral source for you for many years, not only sending your real estate closings, but also referring many of her clients to you to handle their other legal matters. Sally has asked you to prepare specific contract addendum language for a deal which she is brokering and has told you exactly what terms are to be included. She has not, however, given you any other details regarding the parties or the negotiations because the deal hasn't been finalized. She also wants you to put in language that the Buyer will forfeit the $100,000.00 deposit if Buyer fails to close for any reason.

9.1 Can you ethically prepare this Addendum without getting additional information?

A. Yes, Sally has never done anything wrong so you can trust her.

B. Yes, because Sally is your client for purposes of preparing this addendum and nothing further is needed.

C. Yes, because you haven't been retained by either party in the transaction, so there is no conflict of interest.

D. No, because you don't have informed consent of Sellers and Buyer.

E. No, because you must have all of the parties' names so you can determine if you have a conflict of interest.

[Rule 4-1.2(c) (Objectives and Scope of Representation); Rule 4-1.7 (Conflict of Interest; Current Clients); Rule 4-1.9 (Conflict of Interest; Former Client)]

10. Importance of an Engagement Letter.

Top 10 Reasons to Use an Engagement Letter

1. Clearly establish the basis or rate of your fees and comply with Rule 4-1.5(e), including providing written confirmation of (a) a **flat** or nonrefundable **fee,** which **must not be** deposited into trust account, or (b) an **advanced fee** which **must be** deposited into trust account. "Retainer fee" should be not used unless you are referring to a representation where the client is paying for your availability, not past or future fees.
2. Establish the scope of your representation.
3. Exclude areas for which you will not be providing representation (e.g., land use, community association issues, estate planning, asset protection, etc.).
4. Provide any required disclosures and obtain informed consents.
5. Provide for reimbursement of any costs advanced to avoid violating unlawful inducements rules of Florida Department of Financial Services.
6. Provide consent to title underwriter's audit of firm's trust account.
7. Provide consent to electronic communications.
8. Provide dispute resolution procedures, such as The Florida Bar's Fee Arbitration Program, in the event of a dispute over fees or otherwise.
9. Address client's expectations of attorney's conduct consistent with Professionalism Expectations.
10. Use the engagement letter as an opportunity to differentiate your services as an attorney (providing legal representation) from a lay title company (merely confirming that the title is insurable).

["The Engagement Letter and the Residential Real Estate Attorney", by Scott A. Marcus, Esq., *ActionLine*, Summer. 2016; Rule 4-1.5(e), Duty to Communicate Basis or Rate of Fee or Costs to Client and Definitions, (Fees and Costs for Legal Services)]

Included Documents

Homepage from The Florida Bar's Website

Ethics Homepage from The Florida Bar's Website

Professionalism Homepage from The Florida Bar's Website

The Oath of Admission to The Florida Bar

The Florida Bar Creed of Professionalism

Professionalism Expectations

Rules of Professional Conduct of The Florida Bar

1. Rule 4 Preamble - A Lawyer's Responsibilities
2. Rule 4-1.1 Competence
3. Rule 4-1.2 Objectives and Scope of Representation
4. Rule 4-1.5 Fees and Costs for Legal Services
5. Rule 4-1.6 Confidentiality of Information
6. Rule 4-1.7 Conflict of Interest; Current Clients
7. Rule 4-1.8 Conflict of Interest; Prohibited and Other Transactions
8. Rule 4-1.9 Conflict of Interest; Former Clients
9. Rule 4-1.18 Duties to Prospective Client
10. Rule 4-4.1 Truthfulness in Statements to Others
11. Rule 4-4.3 Dealing with Unrepresented Persons
12. Rule 4-5.3 Responsibilities Regarding Nonlawyer Assistants
13. Rule 4-8.4 Misconduct

Ethics Opinions

1. Opinion 65-34 (seller's attorney should not charge fee to buyer where buyer did not employ attorney or agree to pay fee)
2. Opinion 70-62 (attorney may not delegate closing to lay personnel)
3. Opinion 73-43 (paralegal may prepare real estate documents)
4. Opinion 89-5 (paralegals may conduct closings under certain conditions)
5. Opinion 97-2 (attorney may not act as "closing agent", representing both buyer and seller, in the sale of a business)

Supreme Court Opinions

1. *Cooperman v. West Coast Title Company*, 75 So.2d 818 (Fla. 1954)
2. *The Florida Bar v. Teitelman*, 261 So.2d 140 (Fla. 1972)
3. *The Florida Bar v. Belleview*, 591 So.2d 170 (Fla. 1981)
4. *The Florida Bar v. Reed*, 644 So.2d 1355 (Fla. 1994)
5. *In Re Oath of Admission to The Florida Bar*,73 So.3d 149 (Fla. 2011)
6. *In Re Code for Resolving Professionalism Complaints*,116 So.3d 280 (Fla. 2013)

FinCEN GTO NOTICE (FR/BAR residential contracts, Rev. 4/17, Standard I.(iii))

F.A.C. 69B-186.010 Unlawful Inducements Related to Title Insurance Transactions, interpretation of 626.9541(1)(h)3., F.S.

"The Engagement Letter and the Residential Real Estate Attorney" by Scott A. Marcus, Esq., *ActionLine*, Summer 2016

Professionalism Cases Provided by The Florida Bar Ethics Department

Back to Speaker Topics

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The Florida Bar Ethics Page

Ethics Opinion Search

Advisory ethics opinions are not binding

Search

Opinion Number or Search Words

Proposed Advisory Opinions

Subject Index of Ethics Opinions

List of Florida Ethics Opinions by Number

The Florida Bar Ethics Hotline

Ethics inquiry form PDF / Word

News

Articles on Ethics Issues

Resources

Professional Ethics Committee

Rules Regulating The Florida Bar: Chapter 4. Rules of Professional Conduct

Researching Ethics Questions

Frequently Asked Ethics Questions

Informational Packets

Ethics Alert

Lobbying Q&A

Florida Bar Procedures For Ruling On Questions Of Ethics (Revised by the Board of Governors on July 29, 2016)

Trust Account Compliance Certificate Instructions

Advertising Regulation and Information

Professional Ethics Committee Agenda and Minutes

[Revised: 03-22-2017]

Supreme Court of Florida

No. SC13-688

IN RE: CODE FOR RESOLVING PROFESSIONALISM COMPLAINTS

[June 6, 2013]

LEWIS, J.

The Supreme Court of Florida Commission on Professionalism has requested that the Court adopt a Code for Resolving Professionalism Complaints which would include a structure to provide a process to more critically address professionalism issues in Florida. We have jurisdiction, art. V, § 15, Fla. Const. ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted"), and grant the request.

The current professionalism movement in Florida traces its formal beginning to a Florida Bar task force created in 1989 which generated a report to this Court in 1996 that reported lawyers' professionalism to be in a state of "steep decline." In July of 1996, The Florida Bar requested that this Court create the Supreme Court of Florida Commission on Professionalism with the overarching objective of

increasing the professionalism aspirations of all lawyers in Florida and ensuring that the practice of law remains a high calling with lawyers invested in not only the service of individual clients but also service to the public good as well.

Recognizing that professionalism involves principles, character, critical and reflective judgment, along with an understanding of ourselves and others working in and under stressful circumstances, Florida has traditionally followed a more passive, academic approach to enhance and improve professionalism. Continuing legal education programs, speeches, contests, meetings and other academic methods of addressing professionalism have been implemented on both state and local levels. During the last two years, the Professionalism Commission has studied and reviewed both our status and progress in advancing professionalism. Although it is impossible to determine with scientific certainty the true or exact status of professionalism today, the passive academic approach to such problems has probably had a positive impact toward improving professionalism or at least maintaining the status quo by preventing a further decline as reported in 1996, the Professionalism Commission has concluded that we continue to experience significant problems that are unacceptable, requiring further and more concrete action. Surveys of both lawyers and judges continue to consistently reflect that professionalism is one of the most significant adverse problems that negatively impacts the practice of law in Florida today. While we continue our educational

approach, the Professionalism Commission concluded that further integrated, affirmative, practical and active measures are now needed. We agree.

Over the years, we have come to understand that professionalism or acceptable professional behavior is not simply a matter of character or principles nor is it simply an issue of rule-following or rule-violating. To the contrary, unacceptable professional conduct and behavior is often a matter of choice or decision-making. Therefore, we accept the proposal of the Professionalism Commission to create a structure for affirmatively addressing unacceptable professional conduct. This first step admittedly contains small initial measures designed to firmly encourage better behavior. This structure attempts to utilize a wide range of interventions from mere conversations to written communications to more severe sanctions as may be applied under our existing Florida Code of Professional Responsibility, which continues above and beyond the structure we approve today.

As a first step, the Professionalism Commission has concluded and now proposes that we should not attempt to create an entirely new code of "professional" or "unprofessional" conduct nor should we, at this time, attempt to codify an entirely new "Code of Professionalism." We agree with this approach. The Professionalism Commission has proposed, and we adopt, the collection and integration of our current and already existing standards of behavior as already

codified in: (1) the Oath of Admission to The Florida Bar; (2) The Florida Bar Creed of Professionalism; (3) The Florida Bar Ideals and Goals of Professionalism; (4) The Rules Regulating The Florida Bar; and (5) the decisions of the Florida Supreme Court into and as part of the Code for Resolving Professionalism Complaints we adopt today. This provides an integrated standard based on the standards previously adopted and already in existence for many years. These standards have been previously approved and are in use, but are not expressed and placed in one location as our standards of expected professional behavior.

The Professionalism Commission has also proposed that the mechanism for initiating, processing, and resolving professionalism complaints be the Attorney Consumer Assistance and Intake Program (ACAP) created by The Florida Bar. We agree and adopt this mechanism. ACAP has been previously created and already accepts, screens, mediates and attempts to resolve any complaints concerning professional behavior. This structure exists to receive and resolve any complaints before and in the place of the initiation of formal grievance proceedings.

The Professionalism Commission also recognized that pursuant to the Administrative Order issued by this Court on June 11, 1998, the Chief Judge of each circuit was directed to create and maintain in continuous operation a Circuit Committee on Professionalism. The Professionalism Commission has proposed

that a local committee in each circuit be activated to receive, screen and act upon any and all complaints of unprofessional conduct and to resolve those complaints informally, if possible, or refer to The Florida Bar if necessary. We agree with this proposal and also adopt the Local Professionalism Panel plan. The Chief Judge of every circuit shall create a Local Professionalism Panel to receive and resolve professionalism complaints informally if possible. In the discretion of the Chief Judge, the Circuit Committee on Professionalism may be designated as the Local Professionalism Panel. The Chief Judge of each circuit is responsible for activating the respective committees.

The Code for Resolving Professionalism Complaints, attached as Exhibit A, was published for comments, comments were received and considered by the Professionalism Commission, and a public hearing was conducted. The Conference of County Court Judges and the Conference of Circuit Court Judges have responded in favor of the proposed Code as an initial step toward improving professional conduct in Florida. We hereby adopt the Code for Resolving Professionalism Complaints attached as Exhibit A, effective immediately. The Court extends its gratitude to the members of the Professionalism Commission, the Standing Committee on Professionalism, The Florida Bar Center for Professionalism, and The Florida Bar for the extensive work expended in connection with this major project.

It is so ordered.

POLSTON, C.J., and PARIENTE, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceedings – Code for Resolving Professionalism Complaints

EXHIBIT A

Code for Resolving Professionalism Complaints

Standards of Professionalism

Members of The Florida Bar shall not engage in unprofessional conduct. "Unprofessional conduct" means substantial or repeated violations of the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court.*

Unprofessional conduct, as defined above, in many instances will constitute a violation of one or more of the *Rules of Professional Conduct*. In particular, Rule 4-8.4(d) of *The Rules Regulating The Florida Bar* has been the basis for imposing discipline in such instances. *See generally, The Florida Bar v. Ratiner,* 46 So. 3d 35 (Fla. 2010); *The Florida Bar v. Abramson,* 3 So. 3d 964 (Fla. 2009); and *The Florida Bar v. Martocci,* 791 So. 2d 1074 (Fla. 2001).

Implementation Procedures

1. Terminology

1.1. **Standards of Professionalism:** The Standards of Professionalism are set forth in the *Oath of Admission to The Florida Bar, The Florida Bar Creed of*

Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar and the decisions of The Florida Supreme Court.

1.2. **Complainant**: The person who complains that an attorney's conduct has violated the Standards of Professionalism.

1.3. **Respondent:** The attorney whose behavior is the subject of the complaint.

1.4. **Attorney Consumer Assistance and Intake Program (ACAP):** The program of The Florida Bar which fields and screens complaints against members of The Florida Bar. Depending upon the nature and severity of the professionalism complaint, ACAP can resolve the complaint informally as provided herein or it can refer the matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further action.

1.5. **Local Professionalism Panel**: An entity independent of The Florida Bar which is established at the local level for the purpose of resolving complaints of alleged unprofessional conduct by attorneys practicing in that circuit.

1.6. **Practice and Professionalism Enhancement Programs:** The various programs of The Florida Bar which exist for use in diversion cases or as a condition of discipline. These programs include Ethics School, Professionalism Workshops, Law Office Management Assistance Service (LOMAS), Anger Management Classes, Florida Lawyers Assistance, Inc., and the Trust Accounting Workshop.

2. Initiating Professionalism Complaints

2.1. **Commencement of the Process**: Any person may initiate a professionalism complaint against a member of The Florida Bar through a Local Professionalism Panel when available and appropriate, or through ACAP. Complaints received by a Local Professionalism Panel may be referred to ACAP at any time depending upon the nature and severity of the complaint.

3. Processing Professionalism Complaints Through ACAP

3.1. Complaints initiated through ACAP can be an informal request for assistance either through a telephone call or by a written request. The complaint can also be a formal complaint either under oath as required by Rule 3-7.3(c) of *The Rules Regulating The Florida Bar* or as an unsworn judicial referral as outlined in

Standing Board Policy 15.91 of The Florida Bar. The Bar may also lodge a complaint on its own initiative.

3.2. **Initial Screening**

3.2.1. Upon receipt of a complaint, ACAP will create a record of the request by obtaining the contact information for both the Complainant and the Respondent. The information will then be forwarded to an ACAP Attorney for Initial Screening.

3.2.2. If the ACAP Attorney determines that the concerns raised in the complaint could be resolved informally, the ACAP Attorney will contact the Respondent to discuss the professionalism issues and provide remedial guidance as necessary, or refer the complaint to a Local Professionalism Panel. If the matter cannot be resolved informally, the ACAP Attorney will contact the Complainant and explain any further available options.

3.2.3. Upon receipt of a complaint that cannot be resolved informally, the ACAP Attorney will determine whether the allegations, if proven, would constitute a violation of *The Rules of Professional Conduct* relating to professionalism. If the ACAP Attorney determines the facts as alleged would constitute a violation, an inquiry will be opened and the ACAP Attorney will investigate the allegations. If the ACAP Attorney determines the facts as alleged would not constitute a violation, the ACAP Attorney will advise the Complainant and the Respondent of the decision not to pursue an inquiry and will provide the reasons for doing so.

3.2.4. If the ACAP Attorney determines after investigation that the facts show the Respondent did not violate *The Rules of Professional Conduct*, the ACAP Attorney may dismiss the case after taking informal action if necessary, such as providing remedial guidance. The Complainant and Respondent will be notified of the dismissal and will be provided the reasons for doing so.

3.2.5. If the ACAP Attorney determines after investigation that a complaint warrants further action for a possible violation of one or more of *The Rules of Professional Conduct*, the ACAP Attorney will forward the

matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further consideration.

3.3. **Review at the Branch Level:** Upon a referral to the branch office, branch Bar counsel may dismiss the case after further review and/or investigation, recommend Diversion to a Practice and Professionalism Enhancement Program in accordance with Rule 3-5.3(d) of *The Rules Regulating The Florida Bar*, or refer to a Grievance Committee for further investigation.

3.4. **Review by the Grievance Committee:** Upon referral and conclusion of the investigation, the Grievance Committee will make one of the following findings:

A. No probable cause;
B. No probable cause and include a letter of advice to the Respondent;
C. Recommendation of Diversion to one of the Practice and Professionalism Enhancement Programs;
D. Recommendation of Admonishment for Minor Misconduct; or
E. Probable cause. Probable cause under Rule 3-2.1 of *The Rules Regulating The Florida Bar* is a finding of guilt justifying disciplinary action.

3.5. **Confidentiality:** The confidentiality of disciplinary investigations and proceedings is outlined in Rule 3-7.1 of *The Rules Regulating the Florida Bar*. Any record of informal attempts to resolve a dispute as outlined in paragraph 3.2.2. would also be subject to the provisions of Rule 3-7.1 except that notes of any telephonic communication between the ACAP Attorney and the Complainant, the Respondent, or any third party would be considered the work product of The Florida Bar and would remain confidential and not become part of the public record.

FLORIDA SUPREME COURT

NOTICE OF CORRECTION

DATE: JULY 11, 2013

CASE OF: IN RE CODE FOR RESOLVING PROFESSIONALISM COMPLAINTS

DOCKET NO.: SC13-688 **OPINION FILED: JUNE 6, 2013**

ATTENTION: ALL PUBLISHERS

THE FOLLOWING CORRECTIONS HAVE BEEN MADE TO EXHIBIT A IN THE ABOVE OPINION:

On page 7, under subsection 1.6, "Anger Management Classes" has been corrected to read "Stress Management Workshop."

On page 9, under subsection 3.4 E., the definition of probable cause is corrected to read "a finding by an authorized agency that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action."

SIGNED: OPINIONS CLERK

The corrected hard copy will follow by mail.

Supreme Court of Florida

No. SC15-75

IN RE: AMENDMENT TO THE CODE FOR RESOLVING PROFESSIONALISM COMPLAINTS.

[January 29, 2015]

PER CURIAM.

In 2013 the Court adopted the Code for Resolving Professionalism Complaints (Code), after considering the request of the Supreme Court of Florida Commission on Professionalism. See In re Code for Resolving Professionalism Complaints, 116 So. 3d 280 (Fla. 2013). The Code provides a process to address attorney professionalism issues at a crucial point, which is the local level. After further study of the Code by the Commission on Professionalism, the Court, on its own motion, amends the Code.[1]

The Code provides for the establishment of Local Professionalism Panels. These are entities independent of The Florida Bar that are "established at the local level for the purpose of resolving complaints of alleged unprofessional conduct by

1. We have jurisdiction. See art. V, § 15, Fla. Const.

attorneys practicing in [those circuits]." Id. at 283. The structure for addressing professionalism issues also includes Circuit Committees on Professionalism. The Committees were established pursuant to the Administrative Order issued by this Court on June 11, 1998, that directed the Chief Judge of each circuit to create and maintain in continuous operation a Circuit Committee on Professionalism. Id. at 281. After considering the responsibilities performed by the Local Professionalism Panels and the Circuit Committees on Professionalism, we hereby amend the Code by adding Section 4, "Immunity," to provide immunity from civil liability to members of the Local Professionalism Panels and members of the Circuit Committees on Professionalism, as well as to staff persons for these entities, for all acts performed in the course of their official duties. See generally R. Regulating Fla. Bar 10-10.1 (Immunity); R. Regulating Fla. Bar 14-7.1(a) (Immunity).

Accordingly, the Court amends the Code for Resolving Professionalism Complaints as set forth in the appendix to this opinion. The amendment shall become effective immediately upon the release of this opinion. Because the amendment was not previously published for comment, interested persons shall have sixty days from the date of this opinion in which to file comments with the Court.[2]

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2. All comments must be filed with the Court on or before March 30, 2015, with a certificate of service verifying that a copy has been served on the Director of The Florida Bar Center for Professionalism, Linda Calvert Hanson, 651 E.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceedings – Code for Resolving Professionalism Complaints

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Jefferson Street, Tallahassee, Florida 32399-2300, lcalvert@flabar.org, as well as a separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case. If filed by an attorney in good standing with The Florida Bar, the comment must be electronically filed via the Portal in accordance with In re Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal, Fla. Admin. Order No. AOSC13-7 (Feb. 18, 2013). If filed by a nonlawyer or a lawyer not licensed to practice in Florida, the comment must be electronically filed via e-mail in accordance with In re Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004). Electronically filed documents must be submitted in Microsoft Word 97 or higher. Any person unable to submit a comment electronically must mail or hand-deliver the originally signed comment to the Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927; no additional copies are required or will be accepted.

APPENDIX

Section 4. Immunity

4.1. Local Professionalism Panels and Circuit Committees on Professionalism: The members of the Local Professionalism Panels, staff persons assisting those panels, members of the Circuit Committees on Professionalism, and staff persons assisting those committees, shall have absolute immunity from civil liability for all acts in the course and scope of their official duties.

Supreme Court of Florida

No. SC15-944

IN RE: AMENDMENTS TO THE CODE FOR RESOLVING PROFESSIONALISM COMPLAINTS.

[September 10, 2015]

PER CURIAM.

The Court, on its own motion, amends the Code for Resolving Professionalism Complaints (Code). We have jurisdiction. See art. V, § 15, Fla. Const.

We amend the provisions in the Code addressing the "Standards of Professionalism" to replace references to "The Florida Bar Ideals and Goals of Professionalism" with "The Florida Bar Professionalism Expectations." The Chair of The Florida Bar Standing Committee on Professionalism informed the Court that the Professionalism Expectations, which were approved by The Florida Bar Board of Governors on January 30, 2015, replaced the Ideals and Goals of Professionalism referenced in the Code.

Accordingly, the Code for Resolving Professionalism Complaints is amended as set forth in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The amendments shall become effective immediately upon the release of this opinion. Because the amendments were not previously published for comment, interested persons shall have sixty days from the date of this opinion in which to file comments with the Court.[1]

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – Code for Resolving Professionalism Complaints

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1. All comments must be filed with the Court on or before November 10, 2015. If filed by an attorney in good standing with The Florida Bar, the comment must be electronically filed via the Florida Courts E-Filing Portal in accordance with In re Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal, Fla. Admin. Order No. AOSC13-7 (Feb. 18, 2013). If filed by a nonlawyer or a lawyer not licensed to practice in Florida, the comment must be electronically filed via e-mail in accordance with In re Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004). Electronically filed documents must be submitted in Microsoft Word 97 or higher. Any person unable to submit a comment electronically must mail or hand-deliver the originally signed comment to the Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927; no additional copies are required or will be accepted.

APPENDIX

Standards of Professionalism

Members of The Florida Bar shall not engage in unprofessional conduct. "Unprofessional conduct" means substantial or repeated violations of the *Oath of Admission to The Florida Bar*, *The Florida Bar Creed of Professionalism*, *The Florida Bar ~~Ideals and Goals of~~ Professionalism Expectations*, *The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court.*

Unprofessional conduct, as defined above, in many instances will constitute a violation of one or more of the *Rules of Professional Conduct*. In particular, Rule 4-8.4(d) of *The Rules Regulating The Florida Bar* has been the basis for imposing discipline in such instances. *See generally*, *The Florida Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010); *The Florida Bar v. Abramson*, 3 So. 3d 964 (Fla. 2009); and *The Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001).

Implementation Procedures

Section 1. Terminology

1.1. Standards of Professionalism: The Standards of Professionalism are set forth in the *Oath of Admission to The Florida Bar*, *The Florida Bar Creed of Professionalism*, *The Florida Bar ~~Ideals and Goals of~~ Professionalism Expectations*, *The Rules Regulating The Florida Bar* and the decisions of The Florida Supreme Court.

1.2. – 1.6 [No Change]

Sections 2. – 4. [No Change]

Oath of Admission to The Florida Bar

The general principles which should ever control the lawyer in the practice of the legal profession are clearly set forth in the following oath of admission to the Bar, which the lawyer is sworn on admission to obey and for the willful violation to which disbarment may be had.

"I do solemnly swear:

"I will support the Constitution of the United States and the Constitution of the State of Florida;

"I will maintain the respect due to courts of justice and judicial officers;

"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

*"To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;

"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God."

*Amended September 12, 2011 to add civility pledge.

Creed of Professionalism

I revere the law, the judicial system, and the legal profession and will at all times in my professional and private lives uphold the dignity and esteem of each.

I will further my profession's devotion to public service and to the public good.

I will strictly adhere to the spirit as well as the letter of my profession's code of ethics, to the extent that the law permits and will at all times be guided by a fundamental sense of honor, integrity, and fair play.

I will not knowingly misstate, distort, or improperly exaggerate any fact or opinion and will not improperly permit my silence or inaction to mislead anyone.

I will conduct myself to assure the just, speedy and inexpensive determination of every action and resolution of every controversy.

I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy.

I will respect the time and commitments of others.

I will be diligent and punctual in communicating with others and in fulfilling commitments.

I will exercise independent judgment and will not be governed by a client's ill will or deceit.

My word is my bond.

Professionalism Expectations

"Professionalism is the pursuit and practice of the highest ideals and tenets of the legal profession. It embraces far more than simply complying with the minimal standards of professional conduct. The essential ingredients of professionalism are character, competence, commitment, and civility."

- The Florida Bar Standing Committee on Professionalism

Preamble:

As The Florida Bar grows, it becomes more important to articulate the bar's professionalism expectations and for Florida lawyers to demonstrate these expectations in practice. The guidance provided in these Professionalism Expectations originates both from (1) the ethical duties established by the Florida Supreme Court in the Rules Regulating The Florida Bar and (2) the long-standing customs of fair, civil, and honorable legal practice in Florida. Where a Professionalism Expectation is coextensive with a lawyer's ethical duty, the expectation is stated as an imperative, cast in the terms of "must" or "must not." Where a Professionalism Expectation is drawn from a professional custom that is not directly provided for in the Rules Regulating The Florida Bar, the expectation is stated as a recommendation of correct action, cast in terms of "should" or "should not." To The Florida Bar, lawyer professionalism is:

1. embracing a commitment to serve others;

2. dedicating to properly using knowledge and skills to promote a fair and just result;

3. endeavoring to enhance knowledge, skills, and competence;

4. ensuring that concern for a client's desired result does not subvert the lawyer's fairness, honesty, civility, respect, and courtesy during interactions with fellow professionals, clients, opponents, public officials, members of the judiciary, or the public;

5. contributing skill, knowledge, and influence to further the profession's commitment to service and the public good, including efforts to provide all persons, regardless of their means or popularity of their causes, with access to the law and the judicial system;

6. enhancing the legal system's reputation by educating the public about the profession's capabilities and limits, specifically about what the legal system can achieve and the appropriate methods of obtaining those results; and

7. accepting responsibility for one's own professional conduct and the conduct of others in the profession, including encouraging other lawyers to meet these civility and Professionalism Expectations and fostering peer regulation to ensure that each lawyer is competent and public-spirited.

To reinforce and communicate its expectations of lawyer professionalism among our members, The Florida Bar adopts the following Professionalism Expectations:

1. Commitment to Equal Justice Under the Law and to the Public Good

A license to practice law is a privilege that gives the lawyer a special position of trust, power, and influence in our society. This privilege requires a lawyer to use that position to promote the public good and to foster the reputation of the legal profession while protecting our system of equal justice under the law.

Expectations:

1.1 A lawyer should avoid the appearance of impropriety.

1.2 A lawyer should counsel and encourage other lawyers to abide by these Professionalism Expectations.

1.3 A lawyer should promote the public's understanding of the lawyer's role in the legal profession and protect public confidence in a just and fair legal system founded on the rule of law.

1.4 A lawyer should not enter into a lawyer-client relationship when the lawyer cannot provide competent and diligent service to the client throughout the course of the representation.

1.5 A lawyer must not seek clients through the use of misleading or manipulative oral and written representations or advertisements. (*See* R. Regulating Fla. Bar 4-7.13 and 4-7.14). Contingency fee arrangements must be in writing and follow R. Regulating Fla. Bar 4-1.5(f).

1.6 When employed by a new client, a lawyer should discuss fee and cost arrangements at the outset of the representation and promptly confirm those arrangements in writing.

1.7 A lawyer must place a client's best interest ahead of the lawyer's or another party's interests. (*See* R. Regulating Fla. Bar 4-1.7(a)(2)).

1.8 A lawyer must maintain and preserve the confidence and private information of clients. (*See* R. Regulating Fla. Bar 4-1.6).

1.9 In any representation where the fee arrangement is other than a contingent percentage-of-recovery fee or a fixed, flat-sum fee or in which the representation is anticipated to be of more than brief duration, a lawyer should bill clients on a regular, frequent interim basis, and avoid charging unnecessary expenses to the client.

1.10 When a fee dispute arises that cannot be amicably resolved, a lawyer should endeavor to utilize an alternative dispute resolution mechanism such as fee arbitration.

1.11 A lawyer must routinely keep clients informed and attempt to resolve client concerns. (*See* R. Regulating Fla. Bar 4-1.4). In the case of irreconcilable disagreements with a client, the lawyer must provide diligent representation until the lawyer-client relationship is formally dissolved in compliance with the law and the client's best interests. (*See* R. Regulating Fla. Bar 4-1.16).

1.12 A lawyer must devote professional time and resources and use civic influence to ensure equal access to our system of justice. (*See* R. Regulating Fla. Bar 4-6.1).

1.13 A lawyer must avoid discriminatory conduct prejudicial to the administration of justice in connection with the practice of law. (*See* R. Regulating Fla. Bar 4-8.4(d)).

2. Honest and Effective Communication

A lawyer's word is his or her bond. Effective communication requires lawyers to be honest, diligent, civil, and respectful in their interactions with others.

Expectations:

2.1 A lawyer should inform every client what the lawyer expects from the client and what the client can expect from the lawyer during the term of the legal representation.

2.2 Candor and civility must be used in all oral and written communications. (*See* R. Regulating Fla. Bar 4-8.4(c)).

2.3 A lawyer must avoid disparaging personal remarks or acrimony toward opposing parties, opposing counsel, third parties or the court. (*See* R. Regulating Fla. Bar 4-8.4(d)).

2.4 A lawyer must timely serve all pleadings to prevent prejudice or delay to the opposing party. (*See* R. Regulating Fla. Bar 4-3.2).

2.5 A lawyer's communications in connection with the practice of law, including communications on social media, must not disparage another's character or competence or be used to inappropriately influence or contact others. (*See* R. Regulating Fla. Bar 4-8.4(d)).

2.6 A lawyer should use formal letters or e-mails for legal correspondence and should not use text messages to correspond with a client or opposing counsel unless mutually agreed.

2.7 In drafting a proposed letter of intent, the memorialization of an oral agreement, or a written contract reflecting an agreement reached in concept, a lawyer should draft a document that fairly reflects the agreement of the parties.

2.8 In drafting documents, a lawyer should point out to opposing counsel all changes that the lawyer makes or causes to be made from one draft to another.

2.9 A lawyer should not withhold information from a client to serve the lawyer's own interest or convenience.

2.10 A lawyer must not knowingly misstate, misrepresent, or distort any fact or legal authority to the court or to opposing counsel and must not mislead by inaction or silence. Further, the discovery of additional evidence or unintentional misrepresentations must immediately be disclosed or otherwise corrected. (*See* R. Regulating Fla. Bar 4-3.3 and 4-8.4).

2.11 A lawyer must not inappropriately communicate with a party represented by a lawyer (*See* R. Regulating Fla. Bar 4-4.2), including not responding "reply all" to e-mails.

2.12 A lawyer should diligently prepare legal forms and documents to avoid future harm or litigation for the client while ensuring compliance with the requirements of the law.

2.13 Social media must not be used to disparage opposing parties, lawyers, judges, and members of the public. (*See* R. Regulating Fla. Bar 4-8.2(a) and 4-8.4(d)).

2.14 Social media should not be used to avoid the ethical rules regulating lawyer advertising.

2.15 Social media must not be used to inappropriately contact judges, mediators, jurors, witnesses, or represented parties. (*See* R. Regulating Fla. Bar 4-3.5 and 4-4.2).

2.16 Social media must not be used for the purpose of influencing adjudicative proceedings. (*See* R. Regulating Fla. Bar 4-3.6).

2.17 A lawyer must ensure that the use of electronic devices does not impair the attorney-client privilege or confidentiality. (*See* R. Regulating Fla. Bar 4-1.6).

2.18 A lawyer must diligently respond to calls, correspondences, complaints, and investigations by The Florida Bar. (*See* R. Regulating Fla. Bar 4-8.4(g)).

3. Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play

Courtesy, cooperation, integrity, fair play, and abiding by a sense of honor are paramount for preserving the integrity of the profession and to ensuring fair, efficient, and effective administration of justice for the public.

Expectations:

3.1 A lawyer must not engage in dilatory or delay tactics. (*See* R. Regulating Fla. Bar 4-3.2).

3.2 A lawyer should not make scheduling decisions that limit opposing counsel's opportunity to prepare or respond.

3.3 A lawyer should not unreasonably oppose an adversary's motion.

3.4 A lawyer must not permit non-lawyer personnel to communicate with a judge or judicial officer on any matters pending before the judge or officer or with other court personnel except on scheduling and other ministerial matters. (*See* R. Regulating Fla. Bar 4-3.5(b) and 4-8.4(a)).

3.5 A lawyer must avoid substantive *ex parte* communications in a pending case with a presiding judge. The lawyer must notify opposing counsel of all communications with the court or other tribunal, except those involving only scheduling or clerical matters. (*See* R. Regulating Fla. Bar 4-3.5).

3.6 When submitting a written communication to a court or other tribunal, a lawyer should provide opposing counsel with a copy of the document contemporaneously or sufficiently in advance of any related hearing.

3.7 A lawyer must promptly prepare a proposed order, ensure that the order fairly and adequately represents the court's ruling before submitting the order to the court, and advise the court whether opposing counsel has approved the order. (*See* R. Regulating Fla. Bar 4-3.4(c)).

3.8 A lawyer should only schedule depositions to ascertain relevant facts and not to generate income or harass deponents or opposing counsel.

3.9 A lawyer must not ask a deponent irrelevant personal questions or questions designed to embarrass a deponent. (*See* R. Regulating Fla. Bar 4-4.4(a)).

3.10 A lawyer should not make improper objections in depositions.

3.11 A lawyer must not prevent a deponent from answering questions unless a legal privilege applies. (*See* R. Regulating Fla. Bar 4-3.4(c)).

3.12 When scheduling depositions, hearings, and other court proceedings, a lawyer should request an amount of time that permits all parties in the case the opportunity to be fully and fairly heard on the matter.

3.13 A lawyer should immediately provide a scheduling notice for a hearing, deposition, or trial to all opposing parties.

3.14 A lawyer should notify opposing parties and subpoenaed witnesses of a cancelled or rescheduled hearing, deposition, or trial.

3.15 During pre-trial disclosure, a lawyer should make a reasonable, good-faith effort to identify witnesses likely to be called to testify.

3.16 During pre-trial disclosure, a lawyer should make a reasonable good-faith effort to identify exhibits to be proffered into evidence.

3.17 A lawyer should not mark on or alter exhibits, charts, graphs, or diagrams without opposing counsel's permission or leave of court.

3.18 A lawyer must not threaten opposing parties with sanctions, disciplinary complaints, criminal charges, or additional litigation to gain a tactical advantage. (*See* R. Regulating Fla. Bar 4-3.4(g) and (h)).

4. Fair and Efficient Administration of Justice

The just, speedy, and inexpensive determination of every controversy is necessary to preserve our system of justice.

Expectations:

4.1 A lawyer should be familiar with the court's administrative orders, local rules, and each judge's published standing orders, practices, and procedures.

4.2 A lawyer should endeavor to achieve the client's lawful objectives as economically and expeditiously as possible.

4.3 A lawyer should counsel the client concerning the benefits of mediation, arbitration, and other alternative methods of resolving disputes.

4.4 A lawyer should counsel the client to consider settlement in good faith.

4.5 A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.

4.6 A lawyer must not invoke a rule for the purpose of creating undue delay, or propose frivolous oral or written arguments which do not have an adequate basis in the law nor fact. (*See* R. Regulating Fla. Bar 4-3.1).

4.7 A lawyer must not use discovery to harass or improperly burden an adversary or cause the adversary to incur unnecessary expense. (*See* R. Regulating Fla. Bar 4-4.4).

4.8 A lawyer should frame reasonable discovery requests tailored to the matter at hand.

4.9 A lawyer should assure that responses to proper discovery requests are timely, complete, and consistent with the obvious intent of the request. A lawyer should not avoid disclosure unless a legal privilege prevents disclosure.

4.10 A lawyer should not respond to discovery requests in a disorganized, unintelligible, or inappropriate manner, in an attempt to conceal evidence.

4.11 A lawyer should stipulate to all facts and principles of law that are not in dispute and should promptly respond to requests for stipulations of fact or law.

4.12 After consulting with the client, a lawyer should voluntarily withdraw claims and defenses that are without merit, superfluous, or cumulative.

4.13 A lawyer should be fully prepared when appearing in court or at hearings.

4.14 A lawyer should not use *voir dire* to extract promises from or to suggest desired verdicts to jurors.

4.15 A lawyer should abstain from all acts, comments, and attitudes calculated to curry favor with jurors.

4.16 A lawyer should not express bias or personal opinion concerning any matter at issue in opening statements and in arguments to the jury.

4.17 A lawyer should not make offers or requests for a stipulation in front of the jury.

4.18 A lawyer should not use the post-hearing submission of proposed orders as an opportunity to argue or reargue a matter's merits.

4.19 A lawyer must not request rescheduling, cancellations, extensions, and postponements without legitimate reasons or solely for the purpose of delay or obtaining unfair advantage. (*See* R. Regulating Fla. Bar 4-4.4).

4.20 A lawyer must not criticize or denigrate opposing parties, witnesses, or the court to clients, media, or members of the public. (*See* R. Regulating Fla. Bar 4-8.2(a) and 4-8.4(d)).

5. Decorum and Courtesy

When lawyers display reverence for the law, the judicial system, and the legal profession by acting with respect, decorum, and courtesy, they earn the trust of the public and help to preserve faith in the operation of a fair judicial system.

Expectations:

5.1 A lawyer should abstain from rude, disruptive, and disrespectful behavior. The lawyer should encourage clients and support personnel to do the same.

5.2 A lawyer should be civil and courteous in all situations, both professional and personal, and avoid conduct that is degrading to the legal profession. (*See* R. Regulating Fla. Bar 3-4.3).

5.3 A lawyer must always behave in a courteous and formal manner in hearings, depositions, and trials and should refrain from seeking special consideration from a judge or juror.

5.4 A lawyer should refer to all parties, witnesses, and other counsel by their last names during legal proceedings.

5.5 A lawyer should request permission from the court before approaching the bench or submitting any document.

5.6 A lawyer should state only the legal grounds for an objection unless the court requests further argument or elaboration.

5.7 A lawyer should inform clients and witnesses that approving and disapproving gestures, facial expressions, or audible comments are absolutely prohibited in legal proceedings.

5.8 A lawyer should abstain from conduct that diverts the fact-finder's attention from the relevant facts or causes a fact-finder to make a legally impermissible decision.

5.9 A lawyer should address objections, requests, and observations to the judge.

5.10 A lawyer should attempt to resolve disagreements before requesting a court hearing or filing a motion to compel or for sanctions.

6. Respect for the Time and Commitments of Others

Respecting the time and commitments of others is essential to the efficient and fair resolution of legal matters.

Expectations:

6.1 A lawyer should not impose arbitrary or unreasonable deadlines on others.

6.2 A lawyer should schedule a deposition during a time period sufficient to allow all parties to examine the deponent.

6.3 Unless circumstances compel more expedited scheduling, a lawyer should provide litigants, witnesses, and other affected persons with ample advance notice of hearings, depositions, meetings, and other proceedings, and whenever practical, schedule these events at times convenient for all interested persons.

6.4 A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair, and prompt adjudication.

6.5 A lawyer should promptly agree to a proposed time for a hearing, deposition, meeting or other proceeding or make his or her own counter proposal of time.

6.6 A lawyer should promptly call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal.

6.7 A lawyer should avoid last-minute cancellations of hearings, depositions, meetings, and other proceedings.

6.8 A lawyer should promptly notify the court or tribunal when a scheduled court appearance becomes unnecessary.

6.9 A lawyer should be punctual in attending all court appearances, depositions, meetings, conferences, and other proceedings.

6.10 A lawyer must respond promptly to inquiries and communications from clients and others. (*See* R. Regulating Fla. Bar 4-1.4.)

7. Independence of Judgment

An enduring value of a lawyer's service is grounded in the lawyer's willingness to exercise independent judgment in practice and while giving the client advice and counsel.

Expectations:

7.1 A lawyer should exercise independent judgment and should not be governed by the client's ulterior motives, ill will, or deceit.

7.2 A lawyer should counsel a client or prospective client, even with respect to a meritorious claim or defense, about the public and private burdens of pursuing the claim as compared with the benefits to be achieved.

7.3 In advising a client, a lawyer should not understate or overstate achievable results or otherwise create unrealistic expectations.

7.4 A lawyer should not permit a client's ill will toward an adversary, witness, or tribunal to become that of the lawyer.

7.5 A lawyer must counsel a client against using tactics designed: (a) to hinder or improperly delay a legal process; or (b) to embarrass, harass, intimidate, improperly burden, or oppress an adversary, party or any other person and should withdraw from representation if the client insists on such tactics. (*See* R. Regulating Fla. Bar 4-1.16, 4-3.2, and 4-4.4).

7.6 In contractual and business negotiations, a lawyer should counsel the client concerning what is reasonable and customary under the circumstances.

History

The Florida Bar Commission on Lawyer Professionalism promulgated a set of Standards of Professionalism submitted to the Board of Governors in May of 1989. The Board appointed a Special Committee who revised the Standards and amended the title to the "Ideals and Goals of Professionalism." These aspirational guidelines were adopted by the Board of Governors of The Florida Bar on May 16, 1990.

The Florida Supreme Court has added the civility provision in the Oath of Admission to The Florida Bar adopted on September 10, 2011, and implemented SC13-688: Code for Resolving Professionalism Complaints adopted on June 6, 2013.

As a result of this change and a perceived decline in the lack of professionalism in the practice of law, in May 2014, The Florida Bar Standing Committee on Professionalism was requested by Bar leadership to review and develop uniform professionalism guidelines including electronic communications for statewide distribution. The Professionalism Expectations resulted from pairing existing professionalism guides with new technological concepts and this document was approved by the Standing Committee on Professionalism on October 16, 2014, and The Florida Bar Board of Governors on January 30, 2015.

4 PREAMBLE - A LAWYER'S RESPONSIBILITIES

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PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., rules 4-1.12 and 4-2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See rule 4-8.4.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or by law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Zealous advocacy is not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved, preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and heed their legal obligations, when they know their communications will be private.

In the practice of law, conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving these conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has

been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

Scope:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms of "must," "must not," or "may not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of that discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term "should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law. The comments are sometimes used to alert lawyers to their responsibilities under other law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, for example confidentiality under rule 4-1.6, which attach when the lawyer agrees to consider whether a client-lawyer relationship will be established. See rule 4-1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating a substantive legal duty. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct.

Terminology:

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably

sufficient to permit the client to appreciate the significance of the matter in question.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See "informed consent" below. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time.

"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in the legal department of a corporation or other organization.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Lawyer" denotes a person who is a member of The Florida Bar or otherwise authorized to practice in any court of the State of Florida.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is

obligated to protect under these rules or other law.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in writing

If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time.

Firm

Whether 2 or more lawyers constitute a firm above can depend on the specific facts. For example, 2 practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by 1 lawyer is attributed to another.

With respect to the law department of an organization, including the government,

there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

When used in these rules, the terms "fraud" or "fraudulent" refer to conduct that has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed consent

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., rules 4-1.2(c), 4-1.6(a), 4-1.7(b), and 4-1.18. The communication necessary to obtain consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type

involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, these persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules state that a person's consent be confirmed in writing. See, e.g., rule 4-1.7(b). For a definition of "writing" and "confirmed in writing," see terminology above. Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., rule 4-1.8(a). For a definition of "signed," see terminology above.

Screened

This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under rules 4-1.11, 4-1.12, or 4-1.18.

The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake these procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening.

[Revised: 10/01/2015]

RULE 4-1.1 COMPETENCE

RULE 4-1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal knowledge and skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2.

Thoroughness and preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Maintaining competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

[Revised: 05/22/2006]

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

EXCERPT: 4-1.2(c)

(c) Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

RULE 4-1.5 FEES AND COSTS FOR LEGAL SERVICES

RULE 4-1.5 FEES AND COSTS FOR LEGAL SERVICES

(a) Illegal, Prohibited, or Clearly Excessive Fees and Costs. An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost, or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee or cost is clearly excessive when:

(1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

(2) the fee or cost is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

(b) Factors to Be Considered in Determining Reasonable Fees and Costs.
(1) Factors to be considered as guides in determining a reasonable fee include:

(A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

(F) the nature and length of the professional relationship with the client;

(G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

(H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

(2) Factors to be considered as guides in determining reasonable costs include:

(A) the nature and extent of the disclosure made to the client about the costs;

(B) whether a specific agreement exists between the lawyer and client as to the costs a client is expected to pay and how a cost is calculated that is charged to a client;

(C) the actual amount charged by third party providers of services to the attorney;

(D) whether specific costs can be identified and allocated to an individual client or a reasonable basis exists to estimate the costs charged;

(E) the reasonable charges for providing in-house service to a client if the cost is an in-house charge for services; and

(F) the relationship and past course of conduct between the lawyer and the client.

All costs are subject to the test of reasonableness set forth in subdivision (a) above. When the parties have a written contract in which the method is established for charging costs, the costs charged thereunder shall be presumed reasonable.

(c) Consideration of All Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

(d) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.

(e) Duty to Communicate Basis or Rate of Fee or Costs to Client and Definitions.

(1) *Duty to Communicate*. When the lawyer has not regularly represented the client, the basis or rate of the fee and costs shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. A fee for legal services that is nonrefundable in any part shall be confirmed in writing and shall explain the intent of the parties as to the nature and amount of the nonrefundable fee. The test of reasonableness found in subdivision (b), above, applies to all fees for legal services without regard to their characterization by the parties.

The fact that a contract may not be in accord with these rules is an issue between the attorney and client and a matter of professional ethics, but is not the proper basis for an action or defense by an opposing party when fee-shifting litigation is involved.

(2) *Definitions.*

(A) Retainer. A retainer is a sum of money paid to a lawyer to guarantee the lawyer's future availability. A retainer is not payment for past legal services and is not payment for future services.

(B) Flat Fee. A flat fee is a sum of money paid to a lawyer for all legal services to be provided in the representation. A flat fee may be termed "non-refundable."

(C) Advance Fee. An advanced fee is a sum of money paid to the lawyer against which the lawyer will bill the client as legal services are provided.

(f) Contingent Fees. As to contingent fees:

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by subdivision (f)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement

thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts.

(3) A lawyer shall not enter into an arrangement for, charge, or collect:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(B) a contingent fee for representing a defendant in a criminal case.

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:

(A) The contract shall contain the following provisions:

(i) "The undersigned client has, before signing this contract, received and read the statement of client’s rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s)."

(ii) "This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client."

(B) The contract for representation of a client in a matter set forth in subdivision (f)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:

(i) Without prior court approval as specified below, any contingent fee that exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:

1. 33 1/3% of any recovery up to $1 million; plus
2. 30% of any portion of the recovery between $1 million and $2 million; plus
3. 20% of any portion of the recovery exceeding $2 million.

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

1. 40% of any recovery up to $1 million; plus
2. 30% of any portion of the recovery between $1 million and $2 million; plus
3. 20% of any portion of the recovery exceeding $2 million.

c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

1. 33 1/3% of any recovery up to $1 million; plus
2. 20% of any portion of the recovery between $1 million and $2 million; plus
3. 15% of any portion of the recovery exceeding $2 million.

d. An additional 5% of any recovery after institution of any appellate proceeding is filed or post-judgment relief or action is required for recovery on the judgment.

(ii) If any client is unable to obtain an attorney of the client's choice because of the limitations set forth in subdivision (f)(4)(B)(i), the client may petition the court in which the matter would be filed, if litigation is necessary, or if such court will not accept jurisdiction for the fee division, the circuit court wherein the cause of action arose, for approval of any fee contract between the client and an attorney of the client's choosing. Such authorization shall be given if the court determines the client has a complete understanding of the client's rights and the terms of the proposed contract. The application for authorization of such a

contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service on the defendant and this aspect of the file may be sealed. A petition under this subdivision shall contain a certificate showing service on the client and, if the petition is denied, a copy of the petition and order denying the petition shall be served on The Florida Bar in Tallahassee by the member of the bar who filed the petition. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under subdivisions (a) and (b).

(iii) Subject to the provisions of 4-1.5(f)(4)(B)(i) and (ii) a lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for medical liability whereby the compensation is dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall provide the language of article I, section 26 of the Florida Constitution to the client in writing and shall orally inform the client that:

a. Unless waived, in any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000 of all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000, exclusive of reasonable and customary costs and regardless of the number of defendants.

b. If a lawyer chooses not to accept the representation of a client under the terms of article I, section 26 of the Florida Constitution, the lawyer shall advise the client, both orally and in writing of alternative terms, if any, under which the lawyer would accept the representation of the client, as well as the client's right to seek representation by another lawyer willing to accept the representation under the terms of article I, section 26 of the Florida Constitution, or a lawyer willing to accept the representation on a fee basis that is not contingent.

c. If any client desires to waive any rights under article I, section 26 of the Florida Constitution in order to obtain a lawyer of the client's choice, a client may do so by waiving such rights in writing, under oath, and in the form provided in this rule. The lawyer shall provide each client a copy of the written waiver and shall afford each client a

full and complete opportunity to understand the rights being waived as set forth in the waiver. A copy of the waiver, signed by each client and lawyer, shall be given to each client to retain, and the lawyer shall keep a copy in the lawyer's file pertaining to the client. The waiver shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements provided in 4-1.5(f)(5).

WAIVER OF THE CONSTITUTIONAL RIGHT PROVIDED IN ARTICLE I, SECTION 26 OF THE FLORIDA CONSTITUTION

On November 2, 2004, voters in the State of Florida approved The Medical Liability Claimant's Compensation Amendment that was identified as Amendment 3 on the ballot. The amendment is set forth below:

The Florida Constitution

Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

The undersigned client understands and acknowledges that (initial each provision):

_____ I have been advised that signing this waiver releases an important constitutional right; and

_____ I have been advised that I may consult with separate counsel before signing this waiver; and that I may request a hearing before a judge to further explain this waiver; and

_____ By signing this waiver I agree to an **increase in the attorney fee** that might otherwise be owed if the constitutional provision listed above is not waived. Without prior court approval, the increased fee that I agree to may be up to the maximum contingency fee percentages set forth in Rule Regulating The Florida Bar 4-1.5(f)(4)(B)(i). Depending on the circumstances of my case, the maximum agreed upon fee may range from 33 1/3% to 40% of any recovery up to $1 million; plus 20% to 30% of any portion of the recovery between $1 million and $2 million; plus 15% to 20% of any recovery exceeding $2 million; and

_____ I have three (3) business days following execution of this waiver in which to cancel this waiver; and

_____ I wish to engage the legal services of the lawyers or law firms listed below in an action or claim for medical liability the fee for which is contingent in whole or in part upon the successful prosecution or settlement thereof, but I am unable to do so because of the provisions of the constitutional limitation set forth above. In consideration of the lawyers' or law firms' agreements to represent me and my desire to employ the lawyers or law firms listed below, I hereby knowingly, willingly, and voluntarily waive any and all rights and privileges that I may have under the constitutional provision set forth above, as apply to the contingency fee agreement only. Specifically, I waive the percentage restrictions that are the subject of the constitutional provision and confirm the fee percentages set forth in the contingency fee agreement; and

____ I have selected the lawyers or law firms listed below as my counsel of choice in this matter and would not be able to engage their services without this waiver; and I expressly state that this waiver is made freely and voluntarily, with full knowledge of its terms, and that all questions have been answered to my satisfaction.

ACKNOWLEDGMENT BY CLIENT FOR PRESENTATION TO THE COURT

The undersigned client hereby acknowledges, under oath, the following:

I have read and understand this entire waiver of my rights under the constitutional provision set forth above.

I am not under the influence of any substance, drug, or condition (physical, mental, or emotional) that interferes with my understanding of this entire waiver in which I am entering and all the consequences thereof.

I have entered into and signed this waiver freely and voluntarily.

I authorize my lawyers or law firms listed below to present this waiver to the appropriate court, if required for purposes of approval of the contingency fee agreement. Unless the court requires my attendance at a hearing for that purpose, my lawyers or law firms are authorized to provide this waiver to the court for its consideration without my presence.

Dated this _____ day of _____, ____.

By: _____
CLIENT

Sworn to and subscribed before me this _____ day of _____, _____ by _____, who is personally known to me, or has produced the following identification: _____.

_____
Notary Public

My Commission Expires:

Dated this _____ day of _____, ____.

By: _____
ATTORNEY

(C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a copy of the statement of client's rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client's file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(5).

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) shall be on the following basis:

(i) To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.

(ii) To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.

(iii) The 25% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply to the court in which the matter would be filed, if litigation is necessary, or if such court will not accept jurisdiction for the fee division, the circuit court wherein the cause of action arose, for authorization of the fee division in excess of 25%, based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed. The application for authorization of such a contract

may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint, or within 10 days of execution of a contract for division of fees when new counsel is engaged. Proceedings thereon may occur before service of process on any party and this aspect of the file may be sealed. Authorization of such contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this subdivision shall contain a certificate showing service on the client and, if the application is denied, a copy of the petition and order denying the petition shall be served on The Florida Bar in Tallahassee by the member of the bar who filed the petition. Counsel may proceed with representation of the client pending court approval.

(iv) The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.

(5) In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement shall be executed by all participating lawyers, as well as the client, and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

(6) In cases in which the client is to receive a recovery that will be paid to the client on a future structured or periodic basis, the contingent fee percentage shall be calculated only on the cost of the structured verdict or settlement or, if the cost is unknown, on the present money value of the structured verdict or settlement, whichever is less. If the damages and the fee are to be paid out over the long term future schedule, this limitation does not apply. No attorney may negotiate separately with the defendant for that attorney's fee in a structured verdict or settlement when separate negotiations would place the attorney in a position of conflict.

(g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is in proportion to the services performed by each lawyer; or

(2) by written agreement with the client:

(A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and

(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

(h) Credit Plans. A lawyer or law firm may accept payment under a credit plan. No higher fee shall be charged and no additional charge shall be imposed by reason of a lawyer's or law firm's participation in a credit plan.

(i) Arbitration Clauses. A lawyer shall not make an agreement with a potential client prospectively providing for mandatory arbitration of fee disputes without first advising that person in writing that the potential client should consider obtaining independent legal advice as to the advisability of entering into an agreement containing such mandatory arbitration provisions. A lawyer shall not make an agreement containing such mandatory arbitration provisions unless the agreement contains the following language in bold print:

NOTICE: This agreement contains provisions requiring arbitration of fee disputes. Before you sign this agreement you should consider consulting with another lawyer about the advisability of making an agreement with mandatory arbitration requirements. Arbitration proceedings are ways to resolve disputes without use of the court system. By entering into agreements that require arbitration as the way to resolve fee disputes, you give up (waive) your right to go to court to resolve those disputes by a judge or jury. These are important rights that should not be given up without careful consideration.

STATEMENT OF CLIENT'S RIGHTS
FOR CONTINGENCY FEES

Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer, but, as a prospective client, you should be aware of these rights:

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with 1 lawyer you may talk with other lawyers.

2. Any contingent fee contract must be in writing and you have 3 business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within 3 business days of signing the contract. If you withdraw from the contract within the first 3 business days, you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. If your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the 3-day period, you may have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you, the client, have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a contingent fee contract with you, a lawyer must advise you whether the lawyer intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers, the lawyer should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least 1 lawyer from each law firm must sign the contingent fee contract.

5. If your lawyer intends to refer your case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contract that includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interests and is legally responsible for the acts of the other lawyers involved in the case.

6. You, the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money will be or has been spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to lend or advance you money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered

or on the amount recovered minus the costs.

7. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include money that you might have to pay to your lawyer for costs and liability you might have for attorney's fees, costs, and expenses to the other side.

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement your lawyer cannot pay any money to anyone, including you, without an appropriate order of the court. You also have the right to have every lawyer or law firm working on your case sign this closing statement.

9. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

10. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

11. If at any time you, the client, believe that your lawyer has charged an excessive or illegal fee, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar, call 850/561-5600, or contact the local bar association. Any disagreement between you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement. Usually fee disputes must be handled in a separate lawsuit, unless your fee contract provides for arbitration. You can request, but may not require, that a provision for arbitration (under Chapter 682, Florida Statutes, or under the fee arbitration rule of the Rules Regulating The Florida Bar) be included in your fee contract.

_____

Client Signature

_____

Date

_____

Attorney Signature

_____

Date

Comment

Bases or rate of fees and costs

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. The conduct of the lawyer and client in prior relationships is relevant when analyzing the requirements of this rule. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee but only those that are directly involved in its computation. It is sufficient, for example, to state the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. Although hourly billing or a fixed fee may be the most common bases for computing fees in an area of practice, these may not be the only bases for computing fees. A lawyer should, where appropriate, discuss alternative billing methods with the client. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

General overhead should be accounted for in a lawyer's fee, whether the lawyer charges hourly, flat, or contingent fees. Filing fees, transcription, and the like should be charged to the client at the actual amount paid by the lawyer. A lawyer may agree with the client to charge a reasonable amount for in-house costs or services. In-house costs include items such as copying, faxing, long distance telephone, and computerized research. In-house services include paralegal services, investigative services, accounting services, and courier services. The lawyer should sufficiently communicate with the client regarding the costs charged to the client so that the client understands the amount of costs being charged or the method for calculation of those costs. Costs appearing in sufficient detail on closing statements and approved by the parties to the transaction should meet the requirements of this rule.

Rule 4-1.8(e) should be consulted regarding a lawyer's providing financial assistance to a client in connection with litigation.

Lawyers should also be mindful of any statutory, constitutional, or other requirements or restrictions on attorneys' fees.

In order to avoid misunderstandings concerning the nature of legal fees, written documentation is required when any aspect of the fee is nonrefundable. A written contract provides a method to resolve misunderstandings and to protect the lawyer in the event of continued misunderstanding. Rule 4-1.5(e) does not require the client to sign a written document memorializing the terms of the fee. A letter from the lawyer to the client setting forth the basis or rate of the fee and the intent of the parties in regard to the nonrefundable nature of the fee is sufficient to meet the requirements of this rule.

All legal fees and contracts for legal fees are subject to the requirements of the Rules Regulating The Florida Bar. In particular, the test for reasonableness of legal fees found in rule 4-1.5(b) applies to all types of legal fees and contracts related to them.

Terms of payment

A lawyer may require advance payment of a fee but is obliged to return any unearned portion. See rule 4-1.16(d). A lawyer is not, however, required to return retainers that, pursuant to an agreement with a client, are not refundable. A nonrefundable retainer or nonrefundable flat fee is the property of the lawyer and should not be held in trust. If a client gives the lawyer a negotiable instrument that represents both an advance on costs plus either a nonrefundable retainer or a nonrefundable flat fee, the entire amount should be deposited into the lawyer’s trust account, then the portion representing the earned nonrefundable retainer or nonrefundable flat fee should be withdrawn within a reasonable time. An advance fee must be held in trust until it is earned. Nonrefundable fees are, as all fees, subject to the prohibition against excessive fees.

A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to rule 4-1.8(i). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer’s special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client’s interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the

client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Prohibited contingent fees

Subdivision (f)(3)(A) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony, or other financial orders because such contracts do not implicate the same policy concerns.

Contingent fees are prohibited in criminal and certain domestic relations matters. In domestic relations cases, fees that include a bonus provision or additional fee to be determined at a later time and based on results obtained have been held to be impermissible contingency fees and therefore subject to restitution and disciplinary sanction as elsewhere stated in these Rules Regulating The Florida Bar.

Contingent fee regulation

Subdivision (e) is intended to clarify that whether the lawyer's fee contract complies with these rules is a matter between the lawyer and client and an issue for professional disciplinary enforcement. The rules and subdivision (e) are not intended to be used as procedural weapons or defenses by others. Allowing opposing parties to assert noncompliance with these rules as a defense, including whether the fee is fixed or contingent, allows for potential inequity if the opposing party is allowed to escape responsibility for their actions solely through application of these rules.

Rule 4-1.5(f)(4) should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context.

Rule 4-1.5(f)(4)(B) is intended to apply only to contingent aspects of fee agreements. In the situation where a lawyer and client enter a contract for part noncontingent and part contingent attorney's fees, rule 4-1.5(f)(4)(B) should not be construed to apply to and prohibit or limit the noncontingent portion of the fee agreement. An attorney could properly charge and retain the noncontingent portion of the fee even if the matter was not successfully prosecuted or if the noncontingent portion of the fee

exceeded the schedule set forth in rule 4-1.5(f)(4)(B). Rule 4-1.5(f)(4)(B) should, however, be construed to apply to any additional contingent portion of such a contract when considered together with earned noncontingent fees. Thus, under such a contract a lawyer may demand or collect only such additional contingent fees as would not cause the total fees to exceed the schedule set forth in rule 4-1.5(f)(4)(B).

The limitations in rule 4-1.5(f)(4)(B)(i)c are only to be applied in the case where all the defendants admit liability at the time they file their initial answer and the trial is only on the issue of the amount or extent of the loss or the extent of injury suffered by the client. If the trial involves not only the issue of damages but also such questions as proximate cause, affirmative defenses, seat belt defense, or other similar matters, the limitations are not to be applied because of the contingent nature of the case being left for resolution by the trier of fact.

Rule 4-1.5(f)(4)(B)(ii) provides the limitations set forth in subdivision (f)(4)(B)(i) may be waived by the client upon approval by the appropriate judge. This waiver provision may not be used to authorize a lawyer to charge a client a fee that would exceed rule 4-1.5(a) or (b). It is contemplated that this waiver provision will not be necessary except where the client wants to retain a particular lawyer to represent the client or the case involves complex, difficult, or novel questions of law or fact that would justify a contingent fee greater than the schedule but not a contingent fee that would exceed rule 4-1.5(b).

Upon a petition by a client, the trial court reviewing the waiver request must grant that request if the trial court finds the client: (a) understands the right to have the limitations in rule 4-1.5(f)(4)(B) applied in the specific matter; and (b) understands and approves the terms of the proposed contract. The consideration by the trial court of the waiver petition is not to be used as an opportunity for the court to inquire into the merits or details of the particular action or claim that is the subject of the contract.

The proceedings before the trial court and the trial court’s decision on a waiver request are to be confidential and not subject to discovery by any of the parties to the action or by any other individual or entity except The Florida Bar. However, terms of the contract approved by the trial court may be subject to discovery if the contract (without court approval) was subject to discovery under applicable case law or rules of evidence.

Rule 4-1.5 (f)(4)(B)(iii) is added to acknowledge the provisions of Article 1, Section 26 of the Florida Constitution, and to create an affirmative obligation on the part of an attorney contemplating a contingency fee contract to notify a potential client with a medical liability claim of the limitations provided in that constitutional provision. This addition to the rule is adopted prior to any judicial interpretation of the meaning or scope of the constitutional provision and this rule is not intended to make any

substantive interpretation of the meaning or scope of that provision. The rule also provides that a client who wishes to waive the rights of the constitutional provision, as those rights may relate to attorney's fees, must do so in the form contained in the rule.

Rule 4-1.5(f)(6) prohibits a lawyer from charging the contingent fee percentage on the total, future value of a recovery being paid on a structured or periodic basis. This prohibition does not apply if the lawyer’s fee is being paid over the same length of time as the schedule of payments to the client.

Fees that provide for a bonus or additional fees and that otherwise are not prohibited under the Rules Regulating The Florida Bar can be effective tools for structuring fees. For example, a fee contract calling for a flat fee and the payment of a bonus based on the amount of property retained or recovered in a general civil action is not prohibited by these rules. However, the bonus or additional fee must be stated clearly in amount or formula for calculation of the fee (basis or rate). Courts have held that unilateral bonus fees are unenforceable. The test of reasonableness and other requirements of this rule apply to permissible bonus fees.

Division of fee

A division of fee is a single billing to a client covering the fee of 2 or more lawyers who are not in the same firm. A division of fee facilitates association of more than 1 lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Subject to the provisions of subdivision (f)(4)(D), subdivision (g) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in rule 4-5.1 for purposes of the matter involved.

Disputes over fees

Since the fee arbitration rule (chapter 14) has been established by the bar to provide a procedure for resolution of fee disputes, the lawyer should conscientiously consider submitting to it. Where law prescribes a procedure for determining a lawyer’s fee, for example, in representation of an executor or administrator, a class, or a person entitled to a reasonable fee as part of the measure of damages, the lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Referral fees and practices

A secondary lawyer shall not be entitled to a fee greater than the limitation set forth in rule 4-1.5(f)(4)(D)(ii) merely because the lawyer agrees to do some or all of the following: (a) consults with the client; (b) answers interrogatories; (c) attends depositions; (d) reviews pleadings; (e) attends the trial; or (f) assumes joint legal responsibility to the client. However, the provisions do not contemplate that a secondary lawyer who does more than the above is necessarily entitled to a larger percentage of the fee than that allowed by the limitation.

The provisions of rule 4-1.5(f)(4)(D)(iii) only apply where the participating lawyers have for purposes of the specific case established a co-counsel relationship. The need for court approval of a referral fee arrangement under rule 4-1.5(f)(4)(D)(iii) should only occur in a small percentage of cases arising under rule 4-1.5(f)(4) and usually occurs prior to the commencement of litigation or at the onset of the representation. However, in those cases in which litigation has been commenced or the representation has already begun, approval of the fee division should be sought within a reasonable period of time after the need for court approval of the fee division arises.

In determining if a co-counsel relationship exists, the court should look to see if the lawyers have established a special partnership agreement for the purpose of the specific case or matter. If such an agreement does exist, it must provide for a sharing of services or responsibility and the fee division is based upon a division of the services to be rendered or the responsibility assumed. It is contemplated that a co-counsel situation would exist where a division of responsibility is based upon, but not limited to, the following: (a) based upon geographic considerations, the lawyers agree to divide the legal work, responsibility, and representation in a convenient fashion. Such a situation would occur when different aspects of a case must be handled in different locations; (b) where the lawyers agree to divide the legal work and representation based upon their particular expertise in the substantive areas of law involved in the litigation; or (c) where the lawyers agree to divide the legal work and representation along established lines of division, such as liability and damages, causation and damages, or other similar factors.

The trial court’s responsibility when reviewing an application for authorization of a fee division under rule 4-1.5(f)(4)(D)(iii) is to determine if a co-counsel relationship exists in that particular case. If the court determines a co-counsel relationship exists and authorizes the fee division requested, the court does not have any responsibility to review or approve the specific amount of the fee division agreed upon by the lawyers and the client.

Rule 4-1.5(f)(4)(D)(iv) applies to the situation where appellate counsel is retained during the trial of the case to assist with the appeal of the case. The percentages set forth in subdivision (f)(4)(D) are to be applicable after appellate counsel’s fee is

established. However, the effect should not be to impose an unreasonable fee on the client.

Credit Plans

Credit plans include credit cards. If a lawyer accepts payment from a credit plan for an advance of fees and costs, the amount must be held in trust in accordance with chapter 5, Rules Regulating The Florida Bar, and the lawyer must add the lawyer's own money to the trust account in an amount equal to the amount charged by the credit plan for doing business with the credit plan.

[Revised: 10/01/2015]

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with the Rules Regulating The Florida Bar; or

(6) to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.

(e) Inadvertent Disclosure of Information. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(f) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(c) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of confidential information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based on experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose confidential information except as authorized or required by the Rules Regulating The Florida Bar or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See

also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In this situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer must reveal information in order to prevent these consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in

present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the lawyer to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure this advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (c)(5) permits this disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct

or representation of a former client. The lawyer's right to respond arises when an assertion of complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges complicity, so that the defense may be established by responding directly to a third party who has made the assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. A charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against a supersession.

Detection of Conflicts of Interest

Subdivision (c)(6) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, for example, when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See comment to rule 4-1.17. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. The disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, subdivision (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules.

Any information disclosed under this subdivision may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. This subdivision does not restrict the use of information acquired by means independent of any disclosure under this subdivision. This subdivision also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, for example, when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

Acting Competently to Preserve Confidentiality

Paragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See rules 4-1.1, 4-5.1 and 4-5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made

reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forgo security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, for example state and federal laws that govern data privacy or that impose notification requirements on the loss of, or unauthorized access to, electronic information, is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see the comment to rule 4-5.3.

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule. Whether a lawyer may be required to take additional steps in order to comply with other law, for example state and federal laws that govern data privacy, is beyond the scope of these rules.

Former client

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.

[Revised: 10/01/2015]

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b)Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood, Adoption, or Marriage. A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.

(e)Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the

representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Comment

Loyalty to a client

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see rule 4-1.8. For former client conflicts of interest, see rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to

accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (a), (b), and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivisions (b) and (c) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is

permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

The purpose of Rule 4-1.7(d) is to prohibit representation of adverse interests, unless informed consent is given by the client, by a lawyer related to another lawyer by blood, adoption, or marriage as a parent, child, sibling, or spouse so as to include those with biological or adopted children and within relations by marriage those who

would be considered in-laws and stepchildren and stepparents.

Representation of insureds

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Consent confirmed in writing or stated on the record at a hearing

Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time afterwards. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[Revised: 06/01/2014]

RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS

4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) Using Information to Disadvantage of Client. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

(c) Gifts to Lawyer or Lawyer's Family. A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.

(d) Acquiring Literary or Media Rights. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) Financial Assistance to Client. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) Compensation by Third Party. A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by rule 4-1.6.

(g) Settlement of Claims for Multiple Clients. A lawyer who represents 2 or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) Limiting Liability for Malpractice. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) Acquiring Proprietary Interest in Cause of Action. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee.

(j) Representation of Insureds. When a lawyer undertakes the defense of an insured other than a governmental entity, at the expense of an insurance company, in regard to

an action or claim for personal injury or for property damages, or for death or loss of services resulting from personal injuries based upon tortious conduct, including product liability claims, the Statement of Insured Client's Rights shall be provided to the insured at the commencement of the representation. The lawyer shall sign the statement certifying the date on which the statement was provided to the insured. The lawyer shall keep a copy of the signed statement in the client's file and shall retain a copy of the signed statement for 6 years after the representation is completed. The statement shall be available for inspection at reasonable times by the insured, or by the appropriate disciplinary agency. Nothing in the Statement of Insured Client's Rights shall be deemed to augment or detract from any substantive or ethical duty of a lawyer or affect the extradisciplinary consequences of violating an existing substantive legal or ethical duty; nor shall any matter set forth in the Statement of Insured Client's Rights give rise to an independent cause of action or create any presumption that an existing legal or ethical duty has been breached.

STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has selected a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation. This disclosure statement highlights many, but not all, of your rights when your legal representation is being provided by the insurance company.

1. *Your Lawyer.* If you have questions concerning the selection of the lawyer by the insurance company, you should discuss the matter with the insurance company and the lawyer. As a client, you have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours and give you this information in writing, if you request it. Your lawyer is responsible for keeping you reasonably informed regarding the case and promptly complying with your reasonable requests for information. You are entitled to be informed of the final disposition of your case within a reasonable time.

2. *Fees and Costs.* Usually the insurance company pays all of the fees and costs of defending the claim. If you are responsible for directly paying the lawyer for any fees or costs, your lawyer must promptly inform you of that.

3. *Directing the Lawyer.* If your policy, like most insurance policies, provides for the insurance company to control the defense of the lawsuit, the lawyer will be taking instructions from the insurance company. Under such policies, the lawyer cannot act solely on your instructions, and at the same time, cannot act contrary to your interests. Your preferences should be communicated to the lawyer.

4. *Litigation Guidelines.* Many insurance companies establish guidelines governing

how lawyers are to proceed in defending a claim. Sometimes those guidelines affect the range of actions the lawyer can take and may require authorization of the insurance company before certain actions are undertaken. You are entitled to know the guidelines affecting the extent and level of legal services being provided to you. Upon request, the lawyer or the insurance company should either explain the guidelines to you or provide you with a copy. If the lawyer is denied authorization to provide a service or undertake an action the lawyer believes necessary to your defense, you are entitled to be informed that the insurance company has declined authorization for the service or action.

5. *Confidentiality*. Lawyers have a general duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have a duty to share with the insurance company information relating to the defense or settlement of the claim. If the lawyer learns of information indicating that the insurance company is not obligated under the policy to cover the claim or provide a defense, the lawyer's duty is to maintain that information in confidence. If the lawyer cannot do so, the lawyer may be required to withdraw from the representation without disclosing to the insurance company the nature of the conflict of interest which has arisen. Whenever a waiver of the lawyer-client confidentiality privilege is needed, your lawyer has a duty to consult with you and obtain your informed consent. Some insurance companies retain auditing companies to review the billings and files of the lawyers they hire to represent policyholders. If the lawyer believes a bill review or other action releases information in a manner that is contrary to your interests, the lawyer should advise you regarding the matter.

6. *Conflicts of Interest.* Most insurance policies state that the insurance company will provide a lawyer to represent your interests as well as those of the insurance company. The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you believe the lawyer provided by the insurance company cannot fairly represent you because of conflicts of interest between you and the company (such as whether there is insurance coverage for the claim against you), you should discuss this with the lawyer and explain why you believe there is a conflict. If an actual conflict of interest arises that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. *Settlement.* Many policies state that the insurance company alone may make a final decision regarding settlement of a claim, but under some policies your agreement is required. If you want to object to or encourage a settlement within policy limits, you should discuss your concerns with your lawyer to learn your rights and possible consequences. No settlement of the case requiring you to pay money in excess of your policy limits can be reached without your agreement, following full disclosure.

8. *Your Risk.* If you lose the case, there might be a judgment entered against you for more than the amount of your insurance, and you might have to pay it. Your lawyer has a duty to advise you about this risk and other reasonably foreseeable adverse results.

9. *Hiring Your Own Lawyer.* The lawyer provided by the insurance company is representing you only to defend the lawsuit. If you desire to pursue a claim against the other side, or desire legal services not directly related to the defense of the lawsuit against you, you will need to make your own arrangements with this or another lawyer. You also may hire another lawyer, at your own expense, to monitor the defense being provided by the insurance company. If there is a reasonable risk that the claim made against you exceeds the amount of coverage under your policy, you should consider consulting another lawyer.

10. *Reporting Violations.* If at any time you believe that your lawyer has acted in violation of your rights, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar call (850) 561-5839 or you may access the Bar at www.FlaBar.org.

IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS,
PLEASE ASK FOR AN EXPLANATION.

CERTIFICATE

The undersigned hereby certifies that this Statement of Insured Client's Rights has been provided to.....(name of insured/client(s)).....
by .....(mail/hand delivery)..... at .....(address of insured/client(s) to which mailed or delivered, on .....date).....

_____

[Signature of Attorney]

_____

[Print/Type Name]

Florida Bar No.: _____

(k) Imputation of Conflicts. While lawyers are associated in a firm, a prohibition in the foregoing subdivisions (a) through (i) that applies to any one of them shall apply to all of them.

Comment

Business transactions between client and lawyer

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client. The requirements of subdivision (a) must be met even when the transaction is not closely related to the subject matter of the representation. The rule applies to lawyers engaged in the sale of goods or services related to the practice of law. See rule 4-5.7. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by rule 4-1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment for all or part of a fee. In addition, the rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions the lawyer has no advantage in dealing with the client, and the restrictions in subdivision (a) are unnecessary and impracticable. Likewise, subdivision (a) does not prohibit a lawyer from acquiring or asserting a lien granted by law to secure the lawyer’s fee or expenses.

Subdivision (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Subdivision (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Subdivision (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See terminology (definition of informed consent).

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of subdivision (a), but also with the requirements of rule 4-1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that rule 4-1.7 will preclude the lawyer from seeking the

client's consent to the transaction.

If the client is independently represented in the transaction, subdivision (a)(2) of this rule is inapplicable, and the subdivision (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as subdivision (a)(1) further requires.

Gifts to lawyers

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness and if the lawyer does not prepare the instrument bestowing the gift. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in subdivision (c). If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide and the lawyer should advise the client to seek advice of independent counsel. Subdivision (c) recognizes an exception where the client is related by blood or marriage to the donee or the gift is not substantial.

This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in rule 4-1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of a personal representative or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary rights

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the

client may detract from the publication value of an account of the representation. Subdivision (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property if the arrangement conforms to rule 4-1.5 and subdivision (a) and (i).

Financial assistance

Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.These dangers do not warrant a prohibition on a lawyer advancing a client court costs and litigation expenses, including the expenses of diagnostic medical examination used for litigation purposes and the reasonable costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person paying for lawyer's services

Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company), or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also rule 4-5.4(d) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with rule 4-1.7. The lawyer must also conform to the requirements of rule 4-1.6 concerning confidentiality. Under rule 4-1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party

payer is a co-client). Under rule 4-1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that subdivision. Under rule 4-1.7(b), the informed consent must be confirmed in writing or clearly stated on the record at a hearing.

Aggregate settlements

Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under rule 4-1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, rule 4-1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this subdivision is a corollary of both these rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also terminology (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Acquisition of interest in litigation

Subdivision (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in rule 4-1.5 and the exception for certain advances of the costs of litigation set forth in subdivision (e).

This rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

Representation of insureds

As with any representation of a client when another person or client is paying for the representation, the representation of an insured client at the request of the insurer creates a special need for the lawyer to be cognizant of the potential for ethical risks. The nature of the relationship between a lawyer and a client can lead to the insured or the insurer having expectations inconsistent with the duty of the lawyer to maintain confidences, avoid conflicts of interest, and otherwise comply with professional

standards. When a lawyer undertakes the representation of an insured client at the expense of the insurer, the lawyer should ascertain whether the lawyer will be representing both the insured and the insurer, or only the insured. Communication with both the insured and the insurer promotes their mutual understanding of the role of the lawyer in the particular representation. The Statement of Insured Client's Rights has been developed to facilitate the lawyer's performance of ethical responsibilities. The highly variable nature of insurance and the responsiveness of the insurance industry in developing new types of coverages for risks arising in the dynamic American economy render it impractical to establish a statement of rights applicable to all forms of insurance. The Statement of Insured Client's Rights is intended to apply to personal injury and property damage tort cases. It is not intended to apply to workers' compensation cases. Even in that relatively narrow area of insurance coverage, there is variability among policies. For that reason, the statement is necessarily broad. It is the responsibility of the lawyer to explain the statement to the insured. In particular cases, the lawyer may need to provide additional information to the insured.

Because the purpose of the statement is to assist laypersons in understanding their basic rights as clients, it is necessarily abbreviated. Although brevity promotes the purpose for which the statement was developed, it also necessitates incompleteness. For these reasons, it is specifically provided that the statement shall not serve to establish any legal rights or duties, nor create any presumption that an existing legal or ethical duty has been breached. As a result, the statement and its contents should not be invoked by opposing parties as grounds for disqualification of a lawyer or for procedural purposes. The purpose of the statement would be subverted if it could be used in such a manner.

The statement is to be signed by the lawyer to establish that it was timely provided to the insured, but the insured client is not required to sign it. It is in the best interests of the lawyer to have the insured client sign the statement to avoid future questions, but it is considered impractical to require the lawyer to obtain the insured client's signature in all instances.

Establishment of the statement and the duty to provide it to an insured in tort cases involving personal injury or property damage should not be construed as lessening the duty of the lawyer to inform clients of their rights in other circumstances. When other types of insurance are involved, when there are other third-party payors of fees, or when multiple clients are represented, similar needs for fully informing clients exist, as recognized in rules 4-1.7(c) and 4-1.8(f).

Imputation of prohibitions

Under subdivision (k), a prohibition on conduct by an individual lawyer in subdivisions (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, 1 lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with subdivision (a), even if the first lawyer is not personally involved in the representation of the client.

[Revised: 02/01/2010]

RULE 4-1.9 CONFLICT OF INTEREST; FORMER CLIENT

RULE 4-1.9 CONFLICT OF INTEREST; FORMER CLIENT

A lawyer who has formerly represented a client in a matter must not afterwards:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;

(b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or

(c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this rule. The principles in rule 4-1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of rule 4-1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Matters are "substantially related" for purposes of this rule if they involve the same

transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client. For example, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

Lawyers owe confidentiality obligations to former clients, and thus information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client without the former client's consent. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Information that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonably prudent lawyer who had never represented the former client, should be considered generally known and ordinarily will not be disqualifying. The essential question is whether, but for having represented the former client, the lawyer would know or discover the information.

Information acquired in a prior representation may have been rendered obsolete by the passage of time. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

The provisions of this rule are for the protection of clients and can be waived if the former client gives informed consent. See terminology.

With regard to an opposing party’s raising a question of conflict of interest, see comment to rule 4-1.7. With regard to disqualification of a firm with which a lawyer is associated, see rule 4-1.10.

[Revised: 06/01/2014]

RULE 4-1.18 DUTIES TO PROSPECTIVE CLIENT

RULE 4-1.18 DUTIES TO PROSPECTIVE CLIENT

(a) Prospective Client. A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Confidentiality of Information. Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client may not use or reveal that information, except as rule 4-1.9 would permit with respect to information of a former client.

(c) Subsequent Representation. A lawyer subject to subdivision (b) may not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be used to the disadvantage of that person in the matter, except as provided in subdivision (d). If a lawyer is disqualified from representation under this rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter, except as provided in subdivision (d).

(d) Permissible Representation. When the lawyer has received disqualifying information as defined in subdivision (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(A) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(B) written notice is promptly given to the prospective client.

Comment

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and the lawyer sometimes

required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn this information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Subdivision (b) prohibits the lawyer from using or revealing that information, except as permitted by rule 4-1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial consultation to only information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under rule 4-1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See terminology for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information

received from the prospective client.

Even in the absence of an agreement, under subdivision (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be used to the disadvantage of the prospective client in the matter.

Under subdivision (c), the prohibition in this rule is imputed to other lawyers as provided in rule 4-1.10, but, under subdivision (d)(1), the prohibition and its imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, the prohibition and its imputation may be avoided if the conditions of subdivision (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See terminology (requirements for screening procedures). Subdivision (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

The duties under this rule presume that the prospective client consults the lawyer in good faith. A person who consults a lawyer simply with the intent of disqualifying the lawyer from the matter, with no intent of possibly hiring the lawyer, has engaged in a sham and should not be able to invoke this rule to create a disqualification.

For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see rule 4-1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see chapter 5, Rules Regulating The Florida Bar.

[Revised: 10/01/2015]

RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

Comment

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see rule 4-8.4.

Statements of fact

This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or fraud by client

Under rule 4-1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Subdivision (b) states a

specific application of the principle set forth in rule 4-1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under subdivision (b) the lawyer is required to do so, unless the disclosure is prohibited by rule 4-1.6.

[Revised: 05/22/2006]

RULE 4-4.3 DEALING WITH UNREPRESENTED PERSONS

RULE 4-4.3 DEALING WITH UNREPRESENTED PERSONS

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Comment

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see rule 4-1.13(d).

This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[Revised: 05/22/2006]

RULE 4-5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

RULE 4-5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

(a) Use of Titles by Nonlawyer Assistants. A person who uses the title of paralegal, legal assistant, or other similar term when offering or providing services to the public must work for or under the direction or supervision of a lawyer or law firm.

(b) Supervisory Responsibility. With respect to a nonlawyer employed or retained by or associated with a lawyer or an authorized business entity as defined elsewhere in these Rules Regulating The Florida Bar:

(1) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(2) a lawyer having direct supervisory authority over the nonlawyer must make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(3) a lawyer is responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer:

(A) orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(B) is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(c) Ultimate Responsibility of Lawyer. Although paralegals or legal assistants may perform the duties delegated to them by the lawyer without the presence or active involvement of the lawyer, the lawyer must review and be responsible for the work product of the paralegals or legal assistants.

Comment

Lawyers generally employ assistants in their practice, including secretaries,

investigators, law student interns, and paraprofessionals such as paralegals and legal assistants. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. The measures employed in supervising nonlawyers should take account of the level of their legal training and the fact that they are not subject to professional discipline. If an activity requires the independent judgment and participation of the lawyer, it cannot be properly delegated to a nonlawyer employee.

Subdivision (b)(1) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See comment to rule 1.1 (retaining lawyers outside the firm) and comment to rule 4-5.1 (responsibilities with respect to lawyers within a firm). Subdivision (b)(2) applies to lawyers who have supervisory authority over nonlawyers within or outside the firm. Subdivision (b)(3) specifies the circumstances in which a lawyer is responsible for conduct of nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nothing provided in this rule should be interpreted to mean that a nonlawyer may have any ownership or partnership interest in a law firm, which is prohibited by rule 4-5.4. Additionally, this rule does not permit a lawyer to accept employment by a nonlawyer or group of nonlawyers, the purpose of which is to provide the supervision required under this rule. This conduct is prohibited by rules 4-5.4 and 4-5.5.

Nonlawyers Outside the Firm

A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using these services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend on the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly

with regard to confidentiality. See also rules 4-1.1 (competence), 4-1.2 (allocation of authority), 4-1.4 (communication with client), 4-1.6 (confidentiality), 4-5.4 (professional independence of the lawyer), and 4-5.5 (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making this allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these rules.

[Revised: 10/01/2015]

RULE 4-8.4 MISCONDUCT

RULE 4-8.4 MISCONDUCT

A lawyer shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made:

(1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors;

(2) within 10 days of the date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors;

(3) within the time stated in any subpoena issued under these Rules Regulating The Florida Bar (without additional time allowed for mailing);

(4) as provided in the Florida Rules of Civil Procedure or order of the referee in matters assigned to a referee; and

(5) as provided in the Florida Rules of Appellate Procedure or order of the Supreme Court of Florida for matters pending action by that court.

Except as stated otherwise herein or in the applicable rules, all times for response shall be calculated as provided elsewhere in these Rules Regulating The Florida Bar and may be extended or shortened by bar counsel or the disciplinary agency making the official inquiry upon good cause shown.

Failure to respond to an official inquiry with no good cause shown may be a matter of contempt and processed in accordance with rule 3-7.11(f) of these Rules Regulating The Florida Bar.

(h) willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation; or

(i) engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship.

If the sexual conduct commenced after the lawyer-client relationship was formed it shall be presumed that the sexual conduct exploits or adversely affects the interests of the client or the lawyer-client relationship. A lawyer may rebut this presumption by proving by a preponderance of the evidence that the sexual conduct did not exploit or adversely affect the interests of the client or the lawyer-client relationship.

The prohibition and presumption stated in this rule do not apply to a lawyer in the same firm as another lawyer representing the client if the lawyer involved in the sexual conduct does not personally provide legal services to the client and is screened from access to the file concerning the legal representation.

Comment

Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Subdivision (a), however, does not prohibit a lawyer from advising a client

concerning action the client is legally entitled to take, provided that the client is not used to indirectly violate the Rules of Professional Conduct.

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of rule 4-1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

Subdivision (c) recognizes instances where lawyers in criminal law enforcement agencies or regulatory agencies advise others about or supervise others in undercover investigations, and provides an exception to allow the activity without the lawyer engaging in professional misconduct. The exception acknowledges current, acceptable practice of these agencies. Although the exception appears in this rule, it is also applicable to rules 4-4.1 and 4-4.3. However, nothing in the rule allows the lawyer to engage in such conduct if otherwise prohibited by law or rule.

Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.

Lawyers holding public office assume legal responsibilities going beyond those of

other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, or agent and officer, director, or manager of a corporation or other organization.

A lawyer's obligation to respond to an inquiry by a disciplinary agency is stated in subdivision (g) of this rule and subdivision (h)(2) of rule 3-7.6. While response is mandatory, the lawyer may deny the charges or assert any available privilege or immunity or interpose any disability that prevents disclosure of a certain matter. A response containing a proper invocation thereof is sufficient under the Rules Regulating The Florida Bar. This obligation is necessary to ensure the proper and efficient operation of the disciplinary system.

Subdivision (h) of this rule was added to make consistent the treatment of attorneys who fail to pay child support with the treatment of other professionals who fail to pay child support, in accordance with the provisions of section 61.13015, Florida Statutes. That section provides for the suspension or denial of a professional license due to delinquent child support payments after all other available remedies for the collection of child support have been exhausted. Likewise, subdivision (h) of this rule should not be used as the primary means for collecting child support, but should be used only after all other available remedies for the collection of child support have been exhausted. Before a grievance may be filed or a grievance procedure initiated under this subdivision, the court that entered the child support order must first make a finding of willful refusal to pay. The child support obligation at issue under this rule includes both domestic (Florida) and out-of-state (URESA) child support obligations, as well as arrearages.

Subdivision (i) proscribes exploitation of the client or the lawyer-client relationship by means of commencement of sexual conduct. The lawyer-client relationship is grounded on mutual trust. A sexual relationship that exploits that trust compromises the lawyer-client relationship. Attorneys have a duty to exercise independent professional judgment on behalf of clients. Engaging in sexual relationships with clients has the capacity to impair the exercise of that judgment.

Sexual conduct between a lawyer and client violates this rule, regardless of when the sexual conduct began when compared to the commencement of the lawyer-client relationship, if the sexual conduct exploits the lawyer-client relationship, negatively affects the client's interest, creates a conflict of interest between the lawyer and client, or negatively affects the exercise of the lawyer's independent professional judgment in representing the client.

Subdivision (i) creates a presumption that sexual conduct between a lawyer and client exploits or adversely affects the interests of the client or the lawyer-client relationship

if the sexual conduct is entered into after the lawyer-client relationship begins. A lawyer charged with a violation of this rule may rebut this presumption by a preponderance of the evidence that the sexual conduct did not exploit the lawyer-client relationship, negatively affect the client's interest, create a conflict of interest between the lawyer and client, or negatively affect the exercise of the lawyer's independent professional judgment in representing the client.

For purposes of this rule, a "representative of a client" is an agent of the client who supervises, directs, or regularly consults with the organization's lawyer concerning a client matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

[Revised: 02/01/2010]

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 65-34
June 15, 1965

A seller's attorney who prepares all of the documents used in a real estate transaction should not present a statement to the buyer for a portion of the attorney's fee for these services when the buyer did not employ the attorney or agree to pay him a fee.

Canons: 6, 12

Chairman Smith stated the opinion of the committee:

A member of The Florida Bar poses the following inquiry for our response. A is selling real estate to B. A portion of the consideration is to be financed by a purchase money mortgage to be given to A by B. A insists that his attorney prepare all legal instruments involved. B has an attorney, however, and this attorney examines the title and represents B at the closing. A's attorney prepares the contract for sale, the deed, the promissory note, the mortgage and the closing statement. There is no dispute as to the type of contract, deed, note and mortgage to be used. Subsequent to the closing, B receives from A's attorney a statement for one-half of the costs of the preparation of the instruments prepared by A's attorney. Prior to that time, neither the parties nor the attorneys involved had discussed payment of fees and/or costs.

The position of this Committee is asked regarding the procedure outlined above. Presumably the inquiry is primarily as to the ethical propriety of A's attorney submitting the statement to B without prior contract or agreement.

A majority of the Committee has construed this inquiry as posing, primarily, a question of law and not of legal ethics. This Committee, of course, is not authorized to answer questions of law.

A seller of real estate may, if he wishes, insist that his attorney draw all papers involved in the transaction. The buyer, in turn, may execute or refuse to execute these papers. Who pays an attorney is a matter of contract. If the seller employs the attorney he is primarily liable for the fees. Unless the buyer in some way contracts to pay these fees, he is under no obligation to do so.

The Committee agrees that an attorney should not send a statement for costs and professional services to one who has not become legally obligated to pay that bill. However, since the person receiving the statement may simply refuse to pay it, it is our opinion that no substantial violation of the Canons of Ethics is involved.

[Revised: 08-24-2011]

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 70-62
February 12, 1971

Lay personnel may be used in a law office only to the extent that they are delegated mechanical, clerical or administrative duties. The attorney may not ethically delegate to a lay employee any activity which requires the attorney's personal judgment and participation.

Canon: 3
CPR: EC 3-5, 3-6

Chairman Massey stated the opinion of the committee:

Inquiry is made pertaining to the use of lay personnel within a law office. The opinion will be divided into two parts.

The first portion is quoted from the inquiry as follows:

We anticipate using the lay person in the real estate field to handle the following matters:

1. After the contract between the parties has been executed and a file set up by the attorney's secretary, the file will be delivered to the lay specialist who will obtain all preliminary data. This would include location and ordering of abstracts and survey where appropriate, checking our internal files to determine if a prior opinion or title policy has been issued by our firm on said property, obtaining pay-off or assumption figures on existing mortgages and liens and, in general, gathering all necessary data involving said transaction.

2. We envision that after the contract stage the next time the file would come back to the attorney would be after the abstract continuation, surveys, and all necessary data has been compiled. The lay assistant would then forward the file back to the responsible attorney with all such data included. The responsible attorney would then examine the abstract and dictate either an Opinion of Title or title binder based on his examination. The file would then go back to the lay assistant who would, following the directives of the attorney, prepare closing statements, and notify all parties of the scheduled closing.

3. All work and documents prepared by the lay assistant would be forwarded back to the responsible attorney at some predetermined time prior to the closing for the attorney's review and approval.

4. The attorney closes the real estate transaction.

5. After the closing the attorney forwards a file back to the lay assistant with appropriate directives as to the recording of documents, pay off of any liens, and disbursements of expenses not disbursed during the closing.
The Committee basically approves the proposal as outlined in the inquiry finding that there is no ethical problem. The sole reservation to be expressed by the Committee is that the attorney should at no time leave to the lay employee those matters calling for the expertise of an attorney. For example, if lay personnel prepare all closing documents, such lay personnel should not be allowed to draw complicated escrow agreements or other collateral

contracts. See Canon 3 and ethical considerations thereunder (EC 3-5 and 3-6).

The second part of the inquiry is not quite as easy to answer. It asks of the propriety of:

. . . In the probate field we propose the utilization of lay personnel to prepare estate forms, accountings, tax returns, obtain necessary facts from outside sources for preparation of such estate pleadings, and perform other duties of this nature. In the litigation field we propose utilization of lay personnel to index depositions, prepare interrogatories, prepare schedules of witnesses to be deposed, schedules of witnesses necessary for trial, summarize facts, interview witnesses, and other such related matters. We propose that all work done by a lay person in our office shall be reviewed and approved by a responsible attorney before any item either goes to the files or outside of the office as a completed item of work.

These plans are similar to the proposal as to real estate transactions but not as detailed. Again, the Committee does recognize and approve the use of lay personnel in probate and litigation under the appropriate considerations of Canon 3. Delegation to lay employees of the mechanical, clerical and administrative duties is encouraged. However, the attorney may not ethically delegate an activity in which he personally should give his judgment and participation.

While generally approving the concept stated in this second part of the inquiry, the Committee gives it but a qualified approval as the Committee would prefer to determine such matters on specific factual cases. This is true because the Committee does have reservations as to authorizing lay personnel to prepare interrogatories and to interview all witnesses in every case. What may be permissible in a “run-of-the-mill” case may not be so in complicated, unusual matters.

[Revised: 08-24-2011]

OPINION 73-43
(March 18, 1974)

A graduate of a paralegal institute who is employed by a law firm may, under the supervision and direction of an attorney, prepare real estate documents for which the attorney takes complete professional responsibility.

Note: The portions of this opinion concerning use of the term "Legal Assistant" and business cards have been overruled by Opinion 86-4. The portions of this opinion concerning the nonlawyer employee's attendance at closings have been overruled by Opinion 89-5.

CPR: EC 3-6
Opinions: 73-4; ABA Informal 909, 1185

Vice Chairman Sullivan stated the opinion of the committee:

A Florida firm has hired an employee who is a graduate of the Paralegal Institute of New York. One of the firm's clients is a condominium developer. A member of the firm asks:

1. Whether the employee, working under the supervision and direction of an attorney in the firm, may prepare for that attorney real estate documents which the attorney is preparing for the firm's condominium developer client.

2. Whether the employee may attend closings of sales of condominium units to be held in the firm's office but without any attorneys in the firm being present. She will give no legal advice.

3. Whether the employee may identify herself in telephone conversations and when writing letters on firm stationery as a Legal Assistant below her name.

4. Whether the employee may use business cards with the firm name and with the words Legal Assistant below her name.

We answer the first question in the affirmative. We recognize the increased use of such personnel and that EC 3-6 of the Code of Professional Responsibility not only permits but encourages their use provided the attorney supervises the work so delegated and takes complete professional responsibility for the work product.

We answer the second question in the negative. The question itself recognizes that the employee may not give legal advice or perform any acts that would amount to practicing law. The Committee, one member dissenting in part, is of the opinion that there is no reason for the employee to attend the closings except to give legal advice and that her presence could be construed as answering unasked questions about the propriety or legality of documents. One Committeeman is of the opinion that the employee may properly attend such closings provided she does nothing more than distribute documents for signature.

We answer the third question in the negative, two members of the Committee dissenting in part. The Supreme Court of Florida, which has exclusive jurisdiction to regulate the admission of persons to the practice of law, has not authorized any non-lawyers to do work that would constitute the practice of law. It has not created any category of personnel designated as Legal Assistant or Paralegal. Those terms have no official meaning and no precise definition that is generally applied or accepted.

The majority of the Committee is of the opinion that the use of the term Legal Assistant might mislead clients or others into believing that such a non-lawyer assistant is a licensed lawyer or has expertise or authority he or she does not in fact possess. Two members of the Committee are of the opinion that it is not improper for such an employee to use the designation Legal Assistant as long as it is clear from the conversation or letter that the employee is acting on behalf of a lawyer and not purporting to give legal advice or to express opinions on matters involving professional judgment.

We answer the fourth question in the negative. In Opinion 73-4 [since withdrawn], the Committee, after considering ABA Opinions 909 and 1185 which appeared to allow it, stated that the name of the law firm should not be shown on the business card of a lay employee because of the appearance of professional status and the suggestion of advertising. We adhere to that opinion here.

[Revised: 08-24-2011]

OPINION 89-5
(November 1, 1989)

A law firm may permit a paralegal or other trained employee to handle a real estate closing at which no lawyer in the firm is present if certain conditions are met.

RPC: 4-5.5(b)
Opinion: 73-43
Case: Cooperman v. West Coast Title Company, 75 So.2d 818 (Fla. 1954)

In Opinion 73-43, this Committee concluded that it was permissible for a lawyer to have a legal assistant prepare real estate documents under the lawyer's supervision, but that it would be improper for the legal assistant to attend closings at which no attorney in the firm was present. The committee reasoned that there was no purpose for the legal assistant to attend closings except to give legal advice and that the legal assistant's presence could be construed by the clients as answering unasked questions about the propriety or legality of the closing documents.

The Unlicensed Practice of Law Committee has requested that we reconsider the issue of whether a legal assistant or other nonlawyer employee with real estate expertise may be permitted to conduct or otherwise participate in a closing in place of a lawyer in the firm. That committee does not agree with the premise of Opinion 73-43: that conducting a closing necessarily involves the giving of legal advice, in fact or by implication. That committee notes that title companies are permitted by the supreme court to conduct closings. Cooperman v. West Coast Title Company, 75 So.2d 818 (Fla. 1954). The committee also points out that the typical residential real estate transaction is nonadversarial and that allowing a trained paralegal to handle the closing will enable a law firm to assist in real estate transactions at a lower cost to clients.

The majority of this Committee (seven members dissent) now concludes that law firms should be permitted to have trained nonlawyer employees conduct closings at which no lawyer in the firm is present if certain conditions are met. Accordingly, this Committee recedes from Opinion 73-43.

Rule 4-5.5(b), Rules Regulating The Florida Bar, forbids a lawyer to assist a person who is not a member of the Bar in the performance of activity that constitutes the unlicensed practice of law. But, as the comment states, this rule "does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."

The majority of this Committee concludes that under Rule 4-5.5(b), a law firm may permit a nonlawyer employee to conduct or attend a closing if the following conditions are met:

1. A lawyer supervises and reviews all work done up to the closing;

2. The supervising lawyer determines that handling or attending the closing will be no more than a ministerial act. Handling the closing will constitute a ministerial act only if the supervising lawyer determines that the client understands the closing documents in advance of the closing;

3. The clients consent to the closing being handled by a nonlawyer employee of the firm.

This requires that written disclosure be made to the clients that the person who will handle or attend the closing is a nonlawyer and will not be able to give legal advice at the closing;

4. The supervising lawyer is readily available, in person or by telephone, to provide legal advice or answer legal questions should the need arise;

5. The nonlawyer employee will not give legal advice at the closing or make impromptu decisions that should be made by the supervising lawyer.

When a law firm's involvement in a real estate transaction is limited to issuing title insurance as an agent for a title insurance company, and does not involve representation of either party to the transaction, condition number 3 does not apply. However, the law firm should take care that the parties understand that the firm does not represent their interests.

[Revised: 08-24-2011]

OPINION 97-2
(May 1, 1997)

An attorney may not ethically act as "closing agent" for a transaction where material terms of the contract have not been agreed to or have not been discussed by the parties.

RPC: Rule 4-1.7(a), Rule 4-1.7, Rule 4-1.7(b), Model Rule 1.7(b), Model Rule 2.2,

Cases: *The Florida Bar v. Reed* , 644 So.2d 1355 (Fla. 1994), *The Florida Bar v. Belleville* , 591 So.2d 170 (Fla. 1991), *The Florida Bar v. Teitelman* , 261 So.2d 140 (Fla. 1972), *People v. McDowell* , 718 P.2d 541 (Colo. 1986), *Stark Co. Bar Ass'n v. Ergazos* , 442 N.E.2d 1286 (Ohio 1982), *Baldasarre v. Butler* , 625 A.2d 458 (N.J. Sup. Ct. 1993)

Opinions: 65-34, Maine Ethics Opinion 106, Connecticut Informal Opinion 91-14, New York State Opinion 611, Massachusetts Bar Opinion 1990-3, West Virginia Opinion 89-1, Maryland Bar Opinion 84-85

A member of The Florida Bar has requested an advisory ethics opinion as to whether he can represent both buyer and seller in the closing of the sale of a business in Florida, acting as "closing agent" for the transaction. The inquirer had been requested by a licensed business broker to act as a "closing agent" for the sale and transfer of business assets. The member explains that the majority of these sales are a sale of assets only and not of a corporate entity. The business brokers envision a "closing agent" as an attorney who will prepare all closing documents and other instruments that may be required by the terms and conditions of the transaction. The buyer and seller would each agree to pay 50% of the closing agent's fees and expenses. The inquiring attorney asks whether it would be ethically permissible for him to act as a "closing agent" under the circumstances set forth above.

The member has particular concerns regarding the financing of these transactions. He would be required to prepare promissory notes and security agreements which, although somewhat standardized documents, must be negotiated between buyer and seller as to interest rate, payment terms, and especially as to the extent of the security given to the seller for the financing and the terms and conditions imposed upon the purchaser in the event of a default. Under these circumstances, could one attorney handle such negotiations and drafting for both parties as part of acting as "closing agent" for the sale of a business?

Rule 4-1.7(a), Florida Rules of Professional Conduct generally provides that attorneys may not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation of that client will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

As set forth in the Comment to Rule 4-1.7, loyalty to a client prohibits an attorney from undertaking representation directly adverse to that client or another client's interests without the affected client's consent. A client may consent to representation where there is some conflict or potential conflict after full disclosure and consent of the affected clients. However, as stated in the Comment, "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved

cannot properly ask for such agreement or provide representation on the basis of the client's consent."

The Comment to Rule 4-1.7 specifically addresses common representation of multiple parties to a negotiation, such as the question now before the Committee:

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Court decisions from Florida and other states are useful in determining the types of transactions in which the parties are "fundamentally antagonistic" such that common representation is not possible. In The Florida Bar v. Reed , 644 So.2d 1355 (Fla. 1994) the Court found an attorney's attempt to represent both buyer and seller of the same property and to assume multiple roles in the transaction to be unethical and suspended the attorney for six months. Similarly, in The Florida Bar v. Belleville , 591 So.2d 170 (Fla. 1991), the Court found it improper for the attorney representing the buyer in a real estate transaction to ask the seller to pay all or part of his fees. The attorney was disciplined for improper representation of conflicting interests. See also The Florida Bar v. Teitelman , 261 So.2d 140 (Fla. 1972) (attorney reprimanded for representing mortgage and title companies in real estate closings, but charging unrepresented sellers a portion of his attorney's fee); Florida Ethics Opinion 65-34 (seller's attorney who prepares all documentation in sale of property may not charge buyer for a portion of the attorneys' fees when the buyer did not employ the attorney or agree to pay him a fee; attorney erred in not explaining adverse nature of transaction and attorney's loyalty to seller).

Ethics opinions and caselaw from other states dealing directly with the ethics of an attorney acting as closing agent for the sale of a business have found an irreconcilable conflict between the interests of buyers and sellers of businesses, prohibiting dual representation of both parties by the same lawyer. Maine Bar Ethics Opinion 106, May 25, 1990, ruled that an attorney or law firm may not act as escrow agent or closing agent for both parties involved in sale of a business. A Maine firm had attempted to act as a neutral "closing agent" in the sale of a business, telling both parties it would not 'represent' either of them, but would draft documents to complete the sale. The committee found that the attorneys involved had improperly represented two parties with conflicting interests and that disclosure could not cure the violation. Accord , People v. McDowell , 718 P.2d 541 (Colo. 1986) (held unethical for attorney to represent both buyer and seller in sale of a business; court found attorney would be unable to maintain independent professional judgment required by Model Rule 1.7(b) [Florida Rule 4-1.7(b)]; Stark Co. Bar Ass'n v. Ergazos , 442 N.E.2d 1286 (Ohio 1982)(lawyer could not ethically represent buyer and seller of business where the parties had conflicting interests regarding assumption of existing debts of the business). See also , Baldasarre v. Butler , 625 A.2d 458 (N.J. Sup. Ct. 1993) (attorney cannot represent both buyer and seller in "complex commercial real estate transaction;" consent of clients is immaterial; conflict cannot be waived).

Other state bar ethics opinions have only allowed one attorney to close a sale of business transaction between buyer and seller where there was little or no adversity between the parties and buyer and seller have already agreed to all critical terms of financing and security agreements. Connecticut Bar Informal Opinion 91-14. The Connecticut opinion allowed one attorney to draft the sales contract and handle the closing of the sale of a

business between two longstanding clients, where both parties agreed to the dual representation. However, the opinion deals with the very narrow factual situation where both buyer and seller are long time clients of the same attorney and relies upon Model Rule of Professional Conduct 2.2, allowing an attorney to act as intermediary between two clients under certain specified circumstances.

Other state bar opinions allowing dual representation of buyer and seller at a closing, deal only with sales of real estate, not sales of entire businesses. See , New York State Bar Association Opinion 611(attorney may represent both buyer and seller in same real estate transaction if the parties are in agreement on price, time, manner of payment and security; if the parties' interests diverge, attorney must withdraw); Massachusetts Bar Association Opinion 1990-3 (lawyer may represent both borrower and lender in real estate purchase, provided that there are no apparent disputes or conflicts between the parties and both parties consent in writing after full disclosure); West Virginia State Bar Opinion 89-1(lawyer may represent multiple parties in same real estate transaction if full disclosure to all parties and written consent; lawyer may not represent any of the parties in subsequent litigation relating to the transaction); Maryland State Bar Opinion 84-85 (attorney may represent all parties to a real estate closing, with proper disclosures and waivers as to all parties).

It is an unavoidable fact that the sale of a business, even in the friendliest of circumstances, is by its very nature an adversarial process. The buyer is relying upon sales and profit figures produced by the seller as well as projections of future profits based upon those figures. Security and financing are critical issues in any business purchase and, particularly in the case of smaller businesses, such transactions are often financed by the seller. The closing often includes the transfer of licenses or applications by the new owners for special licenses, zoning changes, and so forth. Such closings often include assumption of existing debts of the selling corporation and representations by the seller as to other actual and potential claims against the seller. Such transactions are fraught with adversity and conflict, even for the most scrupulous attorney in the friendliest of deals.

The facts presented by the inquirer reference the typical situation in which some or all terms of the sale, particularly elements of financing, must be negotiated between buyer and seller. Where there is disagreement or material terms of an agreement have not been addressed between buyer and seller as to financing, security, consulting agreements with the seller, title defects, or any other material matter relating to the sale, conflicts may exist or develop. Under the foregoing circumstances, it would be unethical for a Florida attorney to represent both buyer and seller in the closing of the sale of a business in Florida, acting as "closing agent" for the transaction. A member of The Florida Bar may not be involved in negotiations of the parties to a sale of a business and then attempt to represent both parties to the transaction at closing of the sale. Under the foregoing circumstances, such representation presents a nonwaivable conflict under Rule 4-1.7(a) and (b) and is ethically prohibited.

[Revised: 08-24-2011]

Page 818

75 So.2d 818
Loenard W. COOPERMAN et al., Appellants,
v.
WEST COAST TITLE COMPANY et al., Appellees.
Leonard W. COOPERMAN et al., Appellants,
v.
GUARANTEE ABSTRACT COMPANY et al., Appellees.
Florida Association of Realtors, St. Petersburg Board of Realtors, Warren P.Hunnicutt and other individual real estate brokers, and The Florida Bar, Intervenors.
Supreme Court of Florida, En Banc.
Nov. 5, 1954.
Rehearing Denied Dec. 8, 1954.

Leonard W. Cooperman, Walter G. Ramseur, St. Petersburg, Hubert C. Smith, Fort Lauderdale, Unauthorized Practice Committee of The Florida Bar, Darrey Davis, President of The Florida Bar, J. A. McClure, Jr., St. Petersburg, as President of St. Petersburg Bar Ass'n, for appellants.

Harold A. Kooman and William S. Fielding (of Grazier, Fielding, Greene & Coit), St. Petersburg, for West Coast Title Co.

Baynard, Baynard & McLeod and Carroll R. Runyon, St. Petersburg, for Guarantee Abstract Co.

Page 819

W. H. Poe of Maguire, Voorhis & Wells, Orlando, for intervenors-appellees.

Wm. H. Rogers, Jacksonville, amicus curiae.

THOMAS, Justice.

The original plaintiffs were members of The Florida Bar practicing law in St. Petersburg and officers of the St. Petersburg Bar Association and the original defendants were Florida corporations engaged in the business of preparing abstracts of title to real property and issuing policies of title insurance as agents of title insurance corporations. In the course of the proceedings in the chancery court, Florida Association of Realtors, St. Petersburg Board of Realtors, Warren P. Hunnicutt and other individual real estate brokers, and The Florida Bar were permitted to intevene.

It was charged in the bills that West Coast Title Company and Guarantee Abstract Company were, in effect, representing that they were qualified to practice law; that they were giving legal advice; and that they were preparing deeds, mortgages, and other instruments incident to conveyancing, and forms necessary to the procurement of guaranty or insurance of loans by the Federal Housing Authority and the Veterans' Administration. It was further asserted that these companies were rendering opinions on the quality of titles of various tracts of real estate based on examinations made by their employees.

The court was asked to determine whether the challenged acts constituted unauthorized practice of law and if so, to enjoin such activities on the part of the corporations.

The corporations denied that they gave legal advice, but admitted that they filled out the forms required by the Federal Housing Authority and the Veteran's Administration for the guaranty or insurance of loans, and admitted also that they examined titles and issued commitments for title insurance. They asserted that all examinations were made simply to determine the insurability of title.

After much pleading and intervening and taking of depositions, the chancellor decreed

that these appellees could with impunity fill out standard forms of conveyancing instruments and alter them to suit the occasion, so long as they were acting as agents for their principals, the title insurance companies. He also held that these appellees could decide from the examination of abstracts and public and other records whether as agents they would grant commitments for policies of insurance eventually to be issued by their principals. He ruled that the companies could complete forms requisite to guaranty or insurance of loans by the Federal Housing Administration and the Veterans' Administration. 'Real estate brokers,' he decided, could complete standard conveyancing forms such as preliminary contracts, deeds, mortgages, notes, assignments and satisfactions where in the instruments, subsequent to the contract, only names, dates, descriptions, amounts and 'latest tax year liability' were to be inserted.

In the appeal from this decree the appellants have brought us three questions for our consideration. The first two deal with the activities of the corporations and the third with the activities of 'realtors.'

The gist of the immediate controversy, so far as it concerns the two corporations, is the extent to which they may go; first, in advising themselves about the condition of the title in a prospective grantor in order to determine whether a commitment to insure it should issue; and second, what they may do in respect of getting the title transferred to the grantee in such way that their principals will assume the risk of insuring an interest or a loan, that is, honor the agents' commitments.

The history of a typical transaction will make the question and, we hope, the solution, simpler. When a customer applies for title insurance, the agent causes an examination to be made of its own records, the public records, and available abstracts of title, for the purpose of ascertaining and reporting to its principal whether the title is insurable. If the condition of title in the

Page 820

grantor as it is evaluated from these sources justifies the action, the agent issues in its own name a 'commitment' for title insurance showing defects, and excepting items not to be insured, if any. In the commitment it is stipulated that the policy will issue upon payment of the premium and upon recordation of a proper instrument from grantor to grantee creating the estate or interest to be insured. So the commitment is made before, the policy is issued after, the transfer.

As we understand the procedure, the agents, if the closing takes place in their offices, after the commitment is made, prepare final statements, complete forms of deeds, mortgages, notes, assignments and satisfactions, and supervise their execution, check intangible taxes, compute proration of taxes, interest, and rents, draft assumption clauses, and construct clauses showing that property is taken subject to restrictions and easements.

When all requirements are satisfied and insurability of a particular title or interest in the grantee is reported by the agent to its principal, the policy is issued, and there is no charge for any of the services rendered by the corporation except the premium in which, presumably, it and its principal share. In cases where the corporation acts as disbursing agent of loans secured from the Federal Housing Authority or the Veterans' Administration either connected or unconnected with title insurnce a fee is charged for the service.

We accept appellant's premises that person unauthorized to do so may not practice law, either in a court or an office, and that a corporation may not practice law under any circumstances. Our concern in this phase

of this controversy is whether the appellee-corporations are practicing law in all or part of their functions as representatives of other corporations engaged in issuing title insurance policies. The solution is difficult because of the lack of a definition of 'practice of law.' Clearly the appellee-corporations cannot hold themselves out to all persons advisors on legal matters and as scriveners whose services are available for a fee to all who may seek them. Nor could they appear in court to represent a litigant or defend an indictee.

In our opinion the appellee-corporations may take such steps as necessary to inform themselves of the status of any title to insure which they are asked to issue a commitment. So, from the examination of their own records, abstracts that may be furnished, and the public records accessible to all, they may ascertain the state of title at the time. Up to this point we feel no hesitancy in holding that in the search for intelligence upon which must depend the decision either to issue or decline a commitment, the corporations cannot be said to be engaging in the practice of law, for to practice law one must have a client and in such instances their clients are themselves. Obviously the information to the time of commitment relates to the condition of title or interest of the proposed grantor, not of the prospective grantee to whom the policy will finally issue if the obligation is undertaken by the appellee-corporations' principals.

Having concluded that the appellee-corporations may advise themselves about a present condition of title, we come to the auestion: What then, may they do towards effecting a transfer in such manner that the interest or title of the grantee will be of such quality that the principal will assume the risk and honor the commitment?

In answering this difficult question, we think it should be borne in mind that the prime purpose is to determine the nature of the risk and that the effect of the transfer on the chain of title is consequential. When the corporations supervise the transfer, they are not undertaking to see that a flawless title vests but that a title is passed which they will insure despite any flaws. So long as they are but satisfying themselves and their principals that the premium justifies the risk, we cannot see the logic in requiring that from the time the commitment issues, they must employ counsel, else they will be charged with practicing law.

We do not understand that the appellees undertake to pass primarily upon the marketability

Page 821

or validity of the title or interest, but upon its insurability. In other words, the whole effort of the appellee-corporations is to determine the risk that will be taken if the policy issues. Conceivably a title that would not be declared merchantable by a careful attorney might nevertheless be insured by charging a premium that would compensate for the risk that would be run due to a defect of some kind or other.

If the purchaser wishes to engage an attorney to advise him relative to the marketability of the title, as distinguished from its insurability, there is nothing to prevent his doing so.

The fact that the remuneration of the appellee-corporations consists solely of their part of the premium and that their incentive to accomplish an acceptable transfer is to earn that premium but emphasizes the thought that in such activities after commitment they are still representing themselves. We have not overlooked the contention of the appellants that in these transactions the corporations are, in effect, practicing law because they are agents, hence their principals are their clients. But the whole picture and especially that part of it

relating to the manner and source of compensation for their labors repels us from the view adopted by the appellants.

So we decide that what the companies do to inform themselves about the advisability of issuing a commitment and what they do to accomplish a transfer of a title or interest of such kind that a policy of title insurance is warranted are not services the performance of which amount to unauthorized practice of law. But what we have written applies only to the performance of those acts which are indispensable to the determination of insurability and must not be construed as sanctioning a charge of any sort, in addition to the premium for the issuance of title insurance, or approving charges for services rendered in connection with the guaranty or insurance of loans by the Federal Housing Authority or the Veterans' Administration, whether the loans be connected with title insurance transactions or not.

Before passing to the final question we should observe that evidently at one time the appellee-corporations gave advice relative to the effect of taking title as estates by the entirety and completed instruments and acted as escrow agents in transactions where no title insurance was involved, but these actions have now been enjoined by the lower court's decree entered in this cause and as there seems to be no challenge of this part of the decree, there is no need further to discuss this aspect of the case.

Question three, prompted by the admission into the case of real estate brokers, challenges the propriety of brokers' completing conveyancing and other related standard forms when they have nointerest 'except as brokers.'

In the case of Keyes Co. v. Dade County Bar Ass'n, Fla., 46 So.2d 605, we decided the question now presented and we do not find occasion to deviate or recede from that opinion. The chancellor's view of the importance of the preliminary memorandum as expressed in his decree did not coincide with the opinion we expressed in the cited case. As a consequence, his premise sent him in a direction we cannot approve.

In the main the decree is affirmed, but those parts of the decree inharmonious with the views we have expressed or with the case just cited are reversed.

Reversed in part; affirmed in part.

ROBERTS, C. J., and SEBRING, HOBSON, MATHEWS and DREW, JJ., concur.

TERRELL, J., not participating.

Page 140

261 So.2d 140
68 A.L.R.3d 959
THE FLORIDA BAR, Complainant,
v.
Harry H. TEITELMAN, Petitioner.
No. 41290.
Supreme Court of Florida.
April 5, 1972.

Page 141

Lyle D. Holcomb, Jr., Edward J. Atkins, Miami, Earl Drayton Farr, Jr., Punta Gorda, and Norman A. Faulkner, Tallahassee, for complainant, The Florida Bar.

Leo Greenfield, of Street & Greenfield, Miami, for petitioner, Harry H. Teitelman.

DEKLE, Justice.

Although this is a disciplinary proceeding for a 'private' reprimand pursuant to Integration Rule of The Florida Bar, Art. XI, Rule 11.09(3)(f), 32 F.S.A., it has apparently reached us with an overriding purpose of prevailing upon this Court to render an opinion which will be helpful to the members of The Bar regarding the issues involved. Such goal apparently transcends the disciplinary recommendation by the Referee and The Florida Bar. (It is only for such higher purpose that we render this opinion, for, if affirmed, it would not be published, since any reprimand would otherwise not be 'private'.)

We recognize the conscientious concern which is expressed and therefore proceed with this opinion to crystalize in the affected area, what action constitutes the practice of law and improper professional conduct under the canons involved. We have also given the petition 'precedence over all other civil causes in the Supreme Court' in accordance with Integration Rule 11.09(4).

The situation which arose involves real estate closings for a mortgage company. Petitioner-attorney regularly represents the title insurance company and mortgage company involved, in a large volume of residential closings, set one after the other in his law offices. He is apparently representing the buyer as well (who is getting the loan) in most instances. Many times the seller is not represented; on other occasions,

Page 142

as here, he has an attorney. In either instance there are fixed forms which petitioner urges are required of the seller by his lending institution. He prepares and furnishes these in a 'package form' to be executed by sellers. For this he charges an 'attorney's fee of $25.00, for preparation of legal documents.' It is so listed on the closing statement. The attorney (petitioner) estimates that for a period of years now he has closed approximately 300 such loans per year. (At $25.00 per closing--if a seller's attorney's fee were received in each case--this would amount to $7,500 a year.) Petitioner testified that under Federal Housing Authority Rules (most closings) he is 'allowed' to charge the Buyer $25.00 for a 'package' of documents (consisting of mortgage, note, various affidavits, etc.). The charge allowed has since been raised. An expert witness testified that as to the Seller, however, FHA has no control over the charges and fees and that '(I)t is open season on the seller. . . .'

Testimony also reflected that usually there is no notice to the seller prior to closing that he will be responsible for certain documents nor that a fee will be charged him for them; that usually there is no question raised and the matter proceeds without any problem; that where the seller has an attorney the petitioner usually ignores any documents the seller's attorney has prepared and asks him to use instead the 'package' documents; that if there is any objection to the $25.00

charge for the documents then petitioner usually deletes the charge.

That this is what might be termed a 'workship' approach to a transaction which has apparently been treated here as almost a mechanical procedure, with time and money the principal concerns, is reflected by petitioner's testimony that in his opinion it is to a seller's advantage to attend the closing without an attorney because 'no attorney would go to a closing for $25.00 and prepare all those documents.' He rejects the Grievance Committee's position which would require him to advise sellers they may have attorneys at closing, because it would 'make a hardship upon the sellers.' (See Canon 7, 32 F.S.A., footnote 2, infra).

In this particular case the seller had engaged his own attorney, who likewise recognized the limited amount of time that was justified for the fee which he felt he could charge the seller. He prepared certain documents for the closing, to which he sent a law clerk in the office with the documents and closing instructions. A copy of a closing statement had been requested by him but was not furnished. At the closing petitioner informed the law clerk (in line with his usual practice) that he preferred to use his 'package' of forms and the law clerk agreed to this but questioned that there should be any charge (the $25.00) for them. Petitioner said this was his standard charge. The seller also personally questioned this charge being levied in addition to that of her own attorney. The law clerk appeased her by saying that they should go ahead and that the attorney in his office would take care of the problem when he got back. The seller testified that she was angry at the additional charge being made; that she understood the petitioner at the closing to say that the FHA would not accept her attorney's papers and that she signed petitioner's documents 'under protest.' Petitioner denied seller's objection being made in his presence, stating that he would have taken the charge out had she done so, but confirmed that her attorney's documents would have been unacceptable. He was concerned with a gap of 14 days between execution of the no-lien affidavit which had been brought and the date of closing, during which repairs might have been made.

It becomes apparent that all of this, in the seller's presence and under these circumstances, was at the very least most unseemly in the practice of law on the high level which is demanded by the profession. The reaction of the seller as a client is proof of the bad effect which this type of 'closing mill' has upon our public image and the standing of attorneys at law. For

Page 143

many members of the public, a real estate transaction is one of the few contacts which they have with the law and with attorneys personally, so that it is the only opportunity they have to form an impression from direct contact. It is therefore important that such transactions be treated on the same high professional standard as litigation in the courts, preparation of contracts and other legal procedures. Despite the pressures and temptations present, and at times the limited remuneration, an attorney must not allow the $ mark to blind or even to dim the guiding light from our profession's polar star--the legal ethic.

Opportunity should be afforded to have an attorney's representation, no matter the amount of the recompense or whether the attorney finds it more expedient to use 'package' instruments in the transaction. Lawyer referral services by Bar groups over the state fulfill this very purpose. The profession's image and standing are more important than the expediency which supposedly demands mass production procedures.

There is no doubt whatever that petitioner's use of the 'package' forms, or any

related forms of a legal nature, clearly constitutes the practice of law. The challenge of that fact by an attorney seems almost a reflection upon an understanding of the law and of professional ethics. The suggestion that it is merely a 'scrivener's' task borders on the presumptuous. In the completion of legal forms it is what may be left out as well as that included which can be a very serious consequence. The advices essential to the completion of such documents almost invariably place their completion in the realm of the practice of law. It requires one skilled in the law for a proper completion of such matters, particularly those dealing with transactions involving real property which are treated by the law upon the highest level as requiring the greatest formalities and safeguards.

As we have said in the early case on the subject, Keyes Co. v. Dade County Bar Ass'n., 46 So.2d 605 at 606 (Fla.1950):

'(T)he preparation and execution of the instruments effectuating the transfer should be under the lawyer's supervision, if the parties decide that they need expert advice and service.'

There is evidence in this record that petitioner prepared legal documents to be executed by the seller in furtherance of her contract to sell land, which documents were in fact employed by the seller for that purpose and petitioner charged the seller a fee therefor. This is unmistakably representing the seller.

Where the seller is represented by other counsel there is no justification for an attorney for the buyer or lender charging any fee to the seller unless it is definitely agreed between the attorneys with the express agreement of the seller. And where the seller is NOT so represented, he can be charged NO fee by the buyer's or lender's attorney absent 1) a client-attorney relationship between such attorney and the seller, 2) together with a full disclosure that the attorney also represents adverse interests in the closing, of which full disclosure must be made to the seller of all circumstances, relationships and interests involved and 3) after such full disclosure the attorney obtains the consent of the seller for an agreed representation by the attorney and only then 4) a fee which must be agreed upon between them prior to undertaking any services. [1] This is so basic to the practice of law and ethical considerations of the profession that the present

Page 144

emphatic renunciation of it should place the matter at rest for all time.

Opinion 64--56 (Sept. 29, 1964), Selected Opinions, Professional Ethics Committee, The Florida Bar, 1959--67, pp. 237, 238, holds as follows:

'It is improper for the mortgage company attorney to charge Seller an attorney's fee In the absence of any agreement between the attorney and Seller. It is not improper for the attorney to collect a reasonable fee for his services provided Seller has agreed with Buyer to pay all closing costs and providing the fee is part of the closing costs.

'Further, Seller should be fully advised of the circumstances because the attorney represents the lending institution, not the Seller, and the interest of these parties could well be in conflict. Preferably, Seller should be represented by an attorney of his own choice.' (Emphasis ours.)

Opinion 65--34, p. 298 (June 15, 1965), Professional Ethics Committee of The Florida Bar, points out the same rule applying in the reverse circumstances:

'A seller of real estate may, if he wishes, insist that his attorney draw all papers involved in the transaction. The buyer, in turn, may execute or refuse to execute these papers.

Who pays the attorney is a matter of contract. If the seller employs the attorney he is primarily liable for the fees. Unless the buyer in some way contracts to pay these fees, he is under no obligation to do so.' (Emphasis ours.)

Other states hold likewise. The Standing Committee on Legal Ethics of the Virginia State Bar in its Opinion No. 70 (Feb. 13, 1957) dealt with representation of conflicting interests in holding the following:

'Should there be no apparent conflict of interest between the parties at the time of their joint employment of Mr. X, the Committee is of the opinion that it is proper for him to undertake such employment, Provided a full disclosure of that fact is made to all parties.' (Emphasis ours.)

The State Bar of Michigan's Committee on Professional and Judicial Ethics in Opinion 98 (Nov.1946), involving a lawyer employed full time by a bank to draw deeds and handle transactions for the bank held the following:

'Confusion is apt to be caused over reimbursement of the bank-lawyer's fee when such reimbursement is not made directly to the bank but is, at its direction, paid by the borrower directly to the bank's lawyer. The borrower may easily gain the impression that such lawyer represents him, either individually or jointly with the bank.

'It is the active duty of the bank's lawyer under these circumstances to make clear to the borrower that he represents solely the bank in all of the legal incidents of such transaction. . . .'

'(W)e have not overlooked the possibility of conflicting interest which the lawyer may be called upon to represent in case the borrower should attempt to employ the same lawyer to represent him in the transaction. . . . It seems probable that if the borrower were frankly informed that the lawyer was already on the bank's payroll, or in its constant employ, he might reasonably object to paying an additional fee, presumably equal to what would be charged by a disinterested lawyer of his own choice. In short, the 'full disclosure' contemplated by Canon 6 would probably be fatal to such employment in a large number of cases. The lawyer who thus acts for both the bank and the borrower must bear the burden, if the matter is ever questioned, of showing that every relevant fact was disclosed by him to the borrower before he undertook such dual representation.' (Reported in 29 Mich.St.Bar J. No. 5, at pages 124--126.)

Except for the unusual circumstances and apparent misunderstandings involved between the attorneys in this particular case, there would likewise appear to be a breach

Page 145

of Canon 7, [2] regarding interference with employment to other counsel.

This has been the clear holding of other states throughout the Union. To cite just a typical example we refer to Pioneer Title Ins. & Trust Co. v. State Bar of Nevada, 74 Nev. 186, 326 P.2d 408 (1958), enjoining company stenographers from preparing deeds, mortgages, notes and like instruments from printed forms previously approved by the company attorney and thereafter checked by him. The court held at p. 411:

'The difficulty with the company's position is that its services did not end with the clerical preparation of the instruments by the escrow officer and stenographer. It was the company itself which judged of the Legal sufficiency of the instruments to accomplish the agreement of the parties. In the drafting of any instrument, simple or complex, This exercise of judgment distinguishes the legal from the clerical service.' (Emphasis ours.)

To like effect are: Indiana ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n., Inc., 244 Ind. 214, 191 N.E.2d 711 (Ind.1963); State Bar of Michigan v. Kupris, 366 Mich. 688, 116 N.W.2d 341 (Mich.1962); In Re Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (Mass.1935).

In light of the inconclusive and unusual circumstances giving rise to the unfortunate developments here, and in the higher interest of devoting an opinion to higher standards, we conclude that the recommendation for and issuance of private reprimand in these circumstances was not warranted and accordingly the Private Reprimand of the Eleventh Judicial Circuit Grievance Committee 'F' on April 14, 1970, pursuant to Integration Rule of The Florida Bar, Article XI, Rule 11.04 'C', and the confirming Private Reprimand by The Florida Bar on April 27, 1971, are hereby quashed.

It is assumed that the principles herein announced will be fully recognized and followed hereafter by petitioner. Any future deviation therefrom would in any subsequent proceeding be weighed in the light of this clear admonition.

It is so ordered.

ROBERTS, C.J., and ERVIN, CARLTON and McCAIN, JJ., concur.

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1 Canon 6 (representing differing interests; disclosure). Now in Canon 5, DR 5--101(A), 5--105(C); EC 5--14, 5--15, 5--16, 5--19, 32 F.S.A. See Cross Ref. Table of Canons, The Florida Bar Journal, Oct. 1969, pp. 1210--12; 32 F.S.A. Pocket Part.

DR 5--105(C): '(A) lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.'

2 Now encompassed in Canon 2, DR 2--103(A), 2--104(A), 2--107 and EC 2--2, 2--3, 2--4 and 2--8. Excerpts:

'DR 2--103 Recommendation of Professional Employment.

'(A) A lawyer Shall not recommend employment, as a private practitioner, of Himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.' (Emphasis ours.)

'DR 2--104 Suggestion of Need of Legal Services.

'(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: . . .' (not applicable here).

Page 170

591 So.2d 170
THE FLORIDA BAR, Complainant,
v.
Walter J. BELLEVILLE, Respondent.
No. 75116.
591 So.2d 170, 16 Fla. L. Week. S770
Supreme Court of Florida.
Dec. 5, 1991.

Page 171

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and Jan Wichrowski, Bar Counsel, Orlando, for complainant.

Dennis F. Fountain, Longwood, for respondent.

PER CURIAM.

We have this case on complaint of The Florida Bar for review of a referee's report recommending that Walter J. Belleville, an attorney licensed in Florida, be found not guilty of alleged ethical violations. We have jurisdiction. Art. V, Sec. 15, Fla. Const.

In the summer of 1988, Belleville was retained as counsel for Bradley M. Bloch. Bloch had entered into an agreement with James F. Cowan to purchase property owned by the latter. Cowan was an elderly man, eighty-three years of age, who had a third-grade education. While the evidence showed that Cowan had substantial prior experience in selling real estate when he was younger, neither party to this cause disputes that the various written documents alleged to constitute the agreement overwhelmingly favored the buyer, Mr. Bloch. Cowan, in fact, has subsequently disputed that he ever agreed to some of the terms embodied in these documents. [1]

Although Cowan and Bloch had negotiated only for the sale of an apartment building, the documents stated that Cowan was selling both the apartment building and his residence, which was located across the street from the apartments. The referee specifically found that Cowan had no intention of selling his residence and did not know that it was included in the sale. The record substantially supports this finding, which accordingly must be accepted as fact by this Court. The Fla. Bar v. Bajoczky, 558 So.2d 1022 (Fla.1990).

It is unclear whether Belleville knowingly participated in his client's activities or merely followed the client's instructions without question. Whatever the case, Belleville drafted the relevant documents to include the legal description of Cowan's house in the instruments of sale. Cowan then apparently signed the documents without realizing he was transferring title to his house. No one at the closing explained the significance of the legal description to him. Belleville only sent a paralegal to the closing and did not attend it himself. In fact, he had never met Cowan to this point in time.

In exchange for the apartment and his residence, Cowan received only a promissory note, not a mortgage. The loan thus was unsecured. This note provided for ten percent interest amortized over twenty-five years. However, the first payment was deferred for four months with no apparent provision for interest to accumulate during this time, and the note by its own terms will become unenforceable upon Cowan's death. Finally, the documents called for Cowan to pay the closing costs, which Bloch and Belleville construed as including Belleville's attorney fee of $625.

When Cowan received the promissory note and closing documents, he realized that their terms varied from the agreement he thought he had entered. Cowan contacted an attorney, who wrote a letter to Belleville explaining the points of disagreement. The

next day, Bloch attempted to evict Cowan from his home.

The referee recommended no discipline based on his conclusion that Belleville owed no attorney-client obligation to Cowan. The Board of Governors of The Florida Bar voted to appeal this decision, and the Bar now seeks a thirty-day suspension.

While it is true that the factual findings of a referee may not be disturbed unless clearly and convincingly wrong, Bajoczky, we do not find that the present case turns on a dispute about the facts. The essential facts are not in question; and Belleville himself concedes with some understatement that "Mr. Cowan did not have a particularly good deal as a result of his negotiations with Mr. Bloch." Rather, the disagreement in this case is over Belleville's guilt and the appropriate discipline, if any.

Page 172

This is a question entirely of law that we must decide. As former Chief Justice Ehrlich has noted, a referee's recommendation "is a recommendation and nothing more. It does not carry the authority or weight of a finding of fact by the referee." Bajoczky, 558 So.2d at 1025.

Based on the facts, we cannot accept the referee's recommendation about guilt and punishment. The referee's factual findings established that Cowan had negotiated to sell the apartment, that he did not intend to sell anything other than the apartment, and that he did not know that the documents of sale would result in the loss of his residence. It also is clear Belleville should have harbored suspicions about the documents he was preparing, because the documents established on their face a transaction so one-sided as to put Belleville on notice of the likelihood of their unconscionability.

When faced with this factual scenario, we believe an attorney is under an ethical obligation to do two things. First, the attorney must explain to the unrepresented opposing party the fact that the attorney is representing an adverse interest. Second, the attorney must explain the material terms of the documents that the attorney has drafted for the client so that the opposing party fully understands their actual effect. [2] When the transaction is as one-sided as that in the present case, counsel preparing the documents is under an ethical duty to make sure that an unrepresented party understands the possible detrimental effect of the transaction and the fact that the attorney's loyalty lies with the client alone. R. Regulating Fla.Bar 4-1.7.

We recognize that The Florida Bar relies on The Florida Bar v. Teitelman, 261 So.2d 140 (Fla.1972), which is somewhat distinguishable from the present case. Teitelman dealt with those situations in which an attorney, while representing one party, also directly bills the other party a fee for preparing legal documents. In the present case, the parties themselves contractually agreed that one would pay the other's attorney's fee. [3]

We do not believe Teitelman stands for the proposition that an agreement by one party to pay the other party's attorney fee always makes the payor a client of the attorney, provided dual representation has not occurred and provided the payor either is represented by counsel or is given the warnings required in this opinion if the payor is relying on legal statements or documents prepared by the attorney for the client. However, Teitelman does stand for the proposition that an attorney must avoid the appearance of simultaneously representing adverse interests, especially where the opposing party may be unfairly induced to rely on the attorney's advice or skill in preparing legal documents. Here, Belleville breached that duty. R. Regulating Fla.Bar 4-1.7.

For the foregoing reasons, we adopt the referee's findings of fact but reject the recommendations regarding guilt and discipline. The violation Belleville committed is a serious one in light of the fact that he previously has been disciplined for an ethical violation. The Fla. Bar v. Belleville, 529 So.2d 1109 (Fla.1988). Accordingly, we grant the request of The Florida Bar. Walter J. Belleville is hereby suspended from the practice of law for a period of thirty days, commencing on January 6, 1992. Belleville shall take all steps necessary to protect his present clients' interests and shall provide them with notice of his suspension, as required by the Rules Regulating The Florida Bar. He shall accept no new business from the date this opinion is issued. Judgment for costs in the amount of $1,220.30 is entered against Belleville in

Page 173

favor of The Florida Bar, for which sum let execution issue.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

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1 The Florida Bar has not charged Belleville with any fraud-related violation, and we accordingly express no opinion as to whether such a violation occurred.

2 We limit this holding to the facts of this case. We have no intent to mandate that an attorney who has prepared documents for a real estate closing always must be present at the closing to explain the documents to the respective parties.

3 We do not imply that such an agreement existed here in an enforceable form. Cowan has disputed many of the terms of the alleged agreement. We assume solely for resolving the ethical issues of this case that Cowan had agreed to pay Bloch's attorney fees.

fastcase

Page 1355

644 So.2d 1355
19 Fla. L. Weekly S506
THE FLORIDA BAR, Complainant,
v.
Yvonne E. REED, Respondent.
No. 79766.
Supreme Court of Florida.
Oct. 6, 1994.
Rehearing Denied Nov. 22, 1994.

Page 1356

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and Kevin P. Tynan, Bar Counsel, Fort Lauderdale, for complainant.

Louis M. Jepeway, Jr. of Jepeway and Jepeway, P.A., Miami, for respondent.

PER CURIAM.

Yvonne E. Reed, a member of The Florida Bar, petitions this Court for review of a referee's report recommending she be suspended from the practice of law for two years. [1] We have jurisdiction pursuant to article V, section 15 of the Florida Constitution.

Reed's misconduct arose from her involvement in a real estate transaction that went bad. In August of 1990, Michael and Kathie Heller were selling their home in Lighthouse Point, Florida. Dimetrio Garcia and Carol Sullivan wanted to purchase the Hellers' home. Ultimately, Garcia, Sullivan and the Hellers reached an agreement under which Garcia and Sullivan agreed to pay $290,000 in cash for the Hellers' home. Reed acted as both realtor and attorney for Garcia and Sullivan.

On August 30, 1990, the Hellers executed a warranty deed and all other documents necessary to perfect the sale of their home. Reed prepared all closing documents, including a warranty deed executed by the Hellers to conclude the sale of the property. On August 31, 1990, Sullivan and Garcia informed Reed that they were having difficulties in securing the cash necessary to close on the transaction. Sullivan and Garcia communicated to Reed that they had only $90,000 to bring to closing. However, they further represented to Reed that they would have the balance of the cash within a few days.

Notwithstanding Garcia's and Sullivan's failure to secure all $290,000 for the closing, the Hellers demanded to close by August 31, 1990. In response to that demand, Reed restructured the parties' agreement such that Garcia and Sullivan would pay $90,000 at closing and take the property subject to two mortgages which were to be satisfied within thirty days of closing. Pursuant to the restructured agreement, the closing proceeded and Sullivan took title to the property. [2]

On August 31, 1990, Reed instructed Sullivan to execute a quit claim deed in which the space for designating the grantee was left blank. On September 25, 1990, Reed was advised that the cashier's check received from Garcia was in fact a $90.00 cashiers check which had been altered. The relevant bank made a claim for return of the $90,000. Reed immediately began to liquidate assets to assure that the bank's threatened action against her trust account would not affect other clients' monies held in trust. Reed stopped writing checks against the $90,000 until the bank informed her that the problem was resolved and funds were available.

On October 25, 1990, Reed inserted her name as grantee on the quit claim deed and took title to the property without tendering any consideration for the property. On October 31, 1990, Reed had Garcia and Sullivan served with a notice of eviction. Sullivan and Garcia left the property. Shortly thereafter, Reed marketed the property for

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resale and leased the property while it was on the market. In November of 1990, with the knowledge that the actual ownership of the $90,000 was in dispute, Reed began to write checks against the $90,000. Reed made mortgage payments from the $90,000 in order to avoid foreclosure on the property. Further, Reed

Page 1357

expended additional portions of the $90,000 in order to conserve the property. In January of 1991, Reed sold the property to Roseanna Martino for $265,000, and both outstanding mortgages on the property were satisfied.

The Hellers filed a complaint against Reed with The Florida Bar, alleging that Reed had engaged in certain unethical acts during the sale of their home to Garcia and Sullivan. The Bar investigated Reed. Ultimately, the Bar filed a four-count complaint against Reed. In count I, the Bar alleged that Reed violated various enumerated ethical rules based on her handling of the $90,000 cashier's check. [3] In count III, the Bar alleged that Reed violated various enumerated ethical rules based on her dual representation in the Heller to Sullivan and Garcia transaction. Finally, in count IV, the Bar alleged that Reed violated various enumerated ethical rules based on conflict born of Reed's attempt to perform multiple roles--Sullivan's and Garcia's realtor; Sullivan and Garcia's attorney; the Hellers' attorney to a limited extent; closing agent; escrow agent; property owner; and landlord. The referee found Reed guilty on counts I, III, and IV. [4]

The referee recommended as an appropriate discipline that Reed be suspended from the practice of law for a period of two years and that costs be taxed against her. A referee's recommendation for discipline is persuasive. However, it is ultimately our task to determine the appropriate sanction. See The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla.1989). Reed contends that the recommended discipline is too harsh. [5] We agree.

Upon review of the record, we are firmly convinced that Reed is guilty of the conduct alleged in counts I, III, and IV, as well as the exercise of extremely poor judgment. Reed should not have undertaken to serve more than one party to the same transaction. That decision seems to be the genesis

Page 1358

of many of the problems which emerged as the transaction began to unravel. However, there is nothing in the record to suggest that Reed intentionally violated ethical rules in order to enrich herself. To the contrary, the Bar concedes that after all expenses, Reed made no more than $5,904.58. This amount obviously does not reflect the time Reed devoted to this matter. Moreover, as the referee noted, Reed "took the only rational path that would conserve the property and would reduce the exposure of all parties[,]" and her "actions ensured that the least harm would come to the most people from a situation ... which she was neither responsible for, nor did she promote." While we do not countenance Reed's ethical violations, we cannot say that her conduct warrants a two-year suspension. In The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983), we enumerated the three purposes of disciplining unethical conduct by a member of The Florida Bar:

First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Id. at 986. We conclude that the purposes of disciplining Reed would be fulfilled by a six-month suspension.

Accordingly, Yvonne E. Reed is hereby suspended from the practice of law for a period of six months. Reed is suspended effective thirty days from the date of this opinion to allow her time to wind up her practice and attend to the protection of her clients' interests. She shall provide her clients with notice of her suspension, as required by rule 3-5.1(g) of the Rules Regulating The Florida Bar. Further, she shall accept no new business from the date this opinion issues. Judgment for costs of this proceeding is hereby entered against Yvonne E. Reed in the amount of $2,728.18, for which sum let execution issue.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN and HARDING, JJ., concur.

WELLS, J., recused.

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1 Reed challenges the propriety of the referee's recommendation for discipline, not the referee's findings of guilt.

2 Even though Garcia supplied the $90,000, he was not named in the warranty deed.

3 Because Reed was found not guilty on count II, we need not be distracted by the allegations contained in count II.

4 As to count I, the referee concluded that:

By reason of the misuse of trust account monies, the Respondent has technically violated Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] and 3-43 [The commission of any act contrary to honesty and justice may be cause for discipline.] of the Rules of Discipline; Rules 4-1.15(a) [A lawyer shall hold in trust, funds belonging to clients or third parties.], 4-1.15(c) [When a lawyer is in possession of disputed funds, those funds must be held in trust], 4-1.15(d) [An attorney shall comply with the Rules Regulating Trust Accounts.], 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct and Rule 5-1.1 [Money entrusted for a specific purpose must only be used for that specific purpose.] of the Rules Regulating Trust Accounts. However Respondent took the only rational path that would conserve the property and would reduce the exposure of all parties. Respondent's actions ensured that the least harm would come to the most people from a situation for which she was neither responsible for, nor did she promote.

As to count III, the referee concluded that:

By reason of the conflict of interest caused by the aforesaid dual representation, the Respondent has violated Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] and 3-4.3 [The commission of any act contrary to honesty and justice may be cause for discipline.] of the Rules of Discipline and Rules 4-1.7(a) [A lawyer shall not represent a client if the representation will be directly adverse to the interests of another client.], 4-1.16(a) [A lawyer shall withdraw from representation if the representation will result in violation of the Rules of Professional Conduct.] and 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct. Although disclosures were made, the prudent lawyer should have mentioned the potential adverse consequences and its implications.

As to count IV, the referee concluded that:

Based upon the conflict of interest, caused by the Respondent's interests being adverse to her clients, the Respondent has violated Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for Discipline.] and 3-4.3 [The commission of any act contrary to

honesty and justice may be cause for discipline.] of the Rules of Discipline and Rules 4-1.7(b) [A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment may be materially limited by the lawyer's own interests.], 4-1.8(a) [A lawyer shall not enter into a business transaction with a client or secure an ownership interest adverse to the client unless certain enumerated steps are taken.] and 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct.

5 Reed challenges the two-year suspension, not the costs taxed against her.

73 So.3d 149

In re Oath of Admission to THE FLORIDA BAR.

No. SC11–1702.

Supreme Court of Florida.

Sept. 12, 2011.

PER CURIAM.

Today we revise the Oath of Attorney administered to new members of The Florida

[73 So.3d 150]

Bar to recognize "[t]he necessity for civility in the inherently contentious setting of the adversary process." *In re Snyder,* 472 U.S. 634, 647, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985).[1]

In recent years, concerns have grown about acts of incivility among members of the legal profession. Among others, the American Board of Trial Advocates (ABOTA) has sought to increase awareness of the importance of civility in the practice of law. The Code of Professionalism of ABOTA contains a pledge to "[b]e respectful in my conduct toward my adversaries." ABOTA Code of Professionalism, http:// www. abota. org/ index. cfm? pg = professionalism. Since 2003, the Lawyer's Oath sworn by admittees of the South Carolina Bar has contained the following pledge: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." S.C.App.Ct. R. 402(k)(3). We have determined that a similar pledge should be added to Florida's oath.

Recognizing the importance of respectful and civil conduct in the practice of law, we therefore revise the Oath of Admission to The Florida Bar as set forth below. New language is indicated by underscoring.

OATH OF ADMISSION

I do solemnly swear:

I will support the Constitution of the United States and the Constitution of the State of Florida;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ, for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

<u>To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;</u>

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God.

This oath shall be effective immediately, and no rehearing will be permitted in this case.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

Notes:

1. *See* art. V, § 15, Fla. Const.

116 So.3d 280

In re CODE FOR RESOLVING PROFESSIONALISM COMPLAINTS.

No. SC13–688.

Supreme Court of Florida.

June 6, 2013.

Original Proceedings—Code for Resolving Professionalism Complaints.
LEWIS, J.

The Supreme Court of Florida Commission on Professionalism has requested that the Court adopt a Code for Resolving Professionalism Complaints which would include a structure to provide a process to more critically address professionalism issues in Florida. We have jurisdiction, art. V, § 15, Fla. Const. ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted"), and grant the request.

The current professionalism movement in Florida traces its formal beginning to a Florida Bar task force created in 1989 which generated a report to this Court in 1996 that reported lawyers' professionalism to be in a state of "steep decline." In July of 1996, The Florida Bar requested that this Court create the Supreme Court of Florida Commission on Professionalism with the overarching objective of increasing the professionalism aspirations of all lawyers in Florida and ensuring that the practice of law remains a high calling with lawyers invested in not only the service of individual clients but also service to the public good as well.

Recognizing that professionalism involves principles, character, critical and reflective judgment, along with an understanding of ourselves and others working in and under stressful circumstances, Florida has traditionally followed a more passive, academic approach to enhance and improve professionalism. Continuing legal education programs, speeches, contests, meetings and other academic methods of addressing professionalism have been implemented on both state and local levels. During the last two years, the Professionalism Commission has studied and reviewed both our status and progress in advancing professionalism. Although it is impossible to determine with scientific certainty

[116 So.3d 281]

the true or exact status of professionalism today, the passive academic approach to such problems has probably had a positive impact toward improving professionalism or at least maintaining the status quo by preventing a further decline as reported in 1996, the Professionalism Commission has concluded that we continue to experience significant problems that are unacceptable, requiring further and more concrete action. Surveys of both lawyers and judges continue to consistently reflect that professionalism is one of the most significant adverse problems that negatively impacts the practice of law in Florida today. While we continue our educational approach, the Professionalism Commission concluded that further integrated, affirmative, practical and active measures are now needed. We agree.

Over the years, we have come to understand that professionalism or acceptable professional behavior is not simply a matter of character or principles nor is it simply an issue of rule-following or rule-violating. To the contrary, unacceptable professional conduct and behavior is often a matter of choice or decision-making. Therefore, we accept the proposal of the Professionalism Commission to create a structure for affirmatively addressing unacceptable professional conduct. This first step admittedly contains small initial measures designed to firmly encourage better

behavior. This structure attempts to utilize a wide range of interventions from mere conversations to written communications to more severe sanctions as may be applied under our existing Florida Code of Professional Responsibility, which continues above and beyond the structure we approve today.

As a first step, the Professionalism Commission has concluded and now proposes that we should *not* attempt to create an entirely new code of "professional" or "unprofessional" conduct nor should we, at this time, attempt to codify an entirely new "Code of Professionalism." We agree with this approach. The Professionalism Commission has proposed, and we adopt, the collection and integration of our current and already existing standards of behavior as already codified in: (1) the Oath of Admission to The Florida Bar; (2) The Florida Bar Creed of Professionalism; (3) The Florida Bar Ideals and Goals of Professionalism; (4) The Rules Regulating The Florida Bar; and (5) the decisions of the Florida Supreme Court into and as part of the Code for Resolving Professionalism Complaints we adopt today. This provides an integrated standard based on the standards previously adopted and already in existence for many years. These standards have been previously approved and are in use, but are not expressed and placed in one location as our standards of expected professional behavior.

The Professionalism Commission has also proposed that the mechanism for initiating, processing, and resolving professionalism complaints be the Attorney Consumer Assistance and Intake Program (ACAP) created by The Florida Bar. We agree and adopt this mechanism. ACAP has been previously created and already accepts, screens, mediates and attempts to resolve any complaints concerning professional behavior. This structure exists to receive and resolve any complaints before and in the place of the initiation of formal grievance proceedings.

The Professionalism Commission also recognized that pursuant to the Administrative Order issued by this Court on June 11, 1998, the Chief Judge of each circuit was directed to create and maintain in continuous operation a Circuit Committee on Professionalism. The Professionalism Commission has proposed that a local committee in each circuit be activated to receive, screen and act upon any and all

[116 So.3d 282]

complaints of unprofessional conduct and to resolve those complaints informally, if possible, or refer to The Florida Bar if necessary. We agree with this proposal and also adopt the Local Professionalism Panel plan. The Chief Judge of every circuit shall create a Local Professionalism Panel to receive and resolve professionalism complaints informally if possible. In the discretion of the Chief Judge, the Circuit Committee on Professionalism may be designated as the Local Professionalism Panel. The Chief Judge of each circuit is responsible for activating the respective committees.

The Code for Resolving Professionalism Complaints, attached as Exhibit A, was published for comments, comments were received and considered by the Professionalism Commission, and a public hearing was conducted. The Conference of County Court Judges and the Conference of Circuit Court Judges have responded in favor of the proposed Code as an initial step toward improving professional conduct in Florida. We hereby adopt the Code for Resolving Professionalism Complaints attached as Exhibit A, effective immediately. The Court extends its gratitude to the members of the Professionalism Commission, the Standing Committee on Professionalism, The Florida Bar Center for Professionalism, and The Florida Bar for the extensive work expended in connection with this major project.

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It is so ordered.

POLSTON, C.J., and PARIENTE, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

EXHIBIT A
Code for Resolving Professionalism Complaints

Standards of Professionalism

Members of The Florida Bar shall not engage in unprofessional conduct. "Unprofessional conduct" means substantial or repeated violations of the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court.*

Unprofessional conduct, as defined above, in many instances will constitute a violation of one or more of the *Rules of Professional Conduct.* In particular, Rule 4–8.4(d) of *The Rules Regulating The Florida Bar* has been the basis for imposing discipline in such instances. *See generally, The Florida Bar v. Ratiner,* 46 So.3d 35 (Fla.2010); *The Florida Bar v. Abramson,* 3 So.3d 964 (Fla.2009); and *The Florida Bar v. Martocci,* 791 So.2d 1074 (Fla.2001).

Implementation Procedures

1. Terminology

1.1. **Standards of Professionalism:** The Standards of Professionalism are set forth in the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar* and the decisions of The Florida Supreme Court.

1.2. **Complainant:** The person who complains that an attorney's conduct has violated the Standards of Professionalism.

1.3. **Respondent:** The attorney whose behavior is the subject of the complaint.

1.4. **Attorney Consumer Assistance and Intake Program (ACAP):** The program of The Florida Bar which fields and screens complaints against members of The Florida Bar. Depending upon the nature and severity of the professionalism complaint, ACAP can resolve the complaint informally as provided herein or it

[116 So.3d 283]

can refer the matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further action.

1.5. **Local Professionalism Panel:** An entity independent of The Florida Bar which is established at the local level for the purpose of resolving complaints of alleged unprofessional conduct by attorneys practicing in that circuit.

1.6. **Practice and Professionalism Enhancement Programs:** The various programs of The Florida Bar which exist for use in diversion cases or as a condition of discipline. These programs include Ethics School, Professionalism Workshops, Law Office Management Assistance Service (LOMAS), Stress Management Workshop, Florida Lawyers Assistance, Inc., and the Trust Accounting Workshop.

2. Initiating Professionalism Complaints

2.1. **Commencement of the Process:** Any person may initiate a professionalism complaint against a member of The Florida Bar through a Local Professionalism Panel when available and appropriate, or through ACAP. Complaints received by a Local

Professionalism Panel may be referred to ACAP at any time depending upon the nature and severity of the complaint.

3. Processing Professionalism Complaints Through ACAP

3.1. Complaints initiated through ACAP can be an informal request for assistance either through a telephone call or by a written request. The complaint can also be a formal complaint either under oath as required by Rule 3–7.3(c) of *The Rules Regulating The Florida Bar* or as an unsworn judicial referral as outlined in Standing Board Policy 15.91 of The Florida Bar. The Bar may also lodge a complaint on its own initiative.

3.2. **Initial Screening**

3.2.1. Upon receipt of a complaint, ACAP will create a record of the request by obtaining the contact information for both the Complainant and the Respondent. The information will then be forwarded to an ACAP Attorney for Initial Screening.

3.2.2. If the ACAP Attorney determines that the concerns raised in the complaint could be resolved informally, the ACAP Attorney will contact the Respondent to discuss the professionalism issues and provide remedial guidance as necessary, or refer the complaint to a Local Professionalism Panel. If the matter cannot be resolved informally, the ACAP Attorney will contact the Complainant and explain any further available options.

3.2.3. Upon receipt of a complaint that cannot be resolved informally, the ACAP Attorney will determine whether the allegations, if proven, would constitute a violation of *The Rules of Professional Conduct* relating to professionalism. If the ACAP Attorney determines the facts as alleged would constitute a violation, an inquiry will be opened and the ACAP Attorney will investigate the allegations. If the ACAP Attorney determines the facts as alleged would not constitute a violation, the ACAP Attorney will advise the Complainant and the Respondent of the decision not to pursue an inquiry and will provide the reasons for doing so.

[116 So.3d 284]

3.2.4. If the ACAP Attorney determines after investigation that the facts show the Respondent did not violate *The Rules of Professional Conduct,* the ACAP Attorney may dismiss the case after taking informal action if necessary, such as providing remedial guidance. The Complainant and Respondent will be notified of the dismissal and will be provided the reasons for doing so.

3.2.5. If the ACAP Attorney determines after investigation that a complaint warrants further action for a possible violation of one or more of *The Rules of Professional Conduct,* the ACAP Attorney will forward the matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further consideration.

3.3. **Review at the Branch Level:** Upon a referral to the branch office, branch Bar counsel may dismiss the case after further review and/or investigation, recommend Diversion to a Practice and Professionalism Enhancement Program in accordance with Rule 3–5.3(d) of *The Rules Regulating The Florida Bar,* or refer to a Grievance Committee for further investigation.

3.4. **Review by the Grievance Committee:** Upon referral and conclusion of the investigation, the Grievance Committee will make one of the following findings:

A. No probable cause;

B. No probable cause and include a letter of advice to the Respondent;

C. Recommendation of Diversion to one of the Practice and Professionalism Enhancement Programs;

D. Recommendation of Admonishment for Minor Misconduct; or

E. Probable cause. Probable cause under Rule 3–2.1 of *The Rules Regulating The Florida Bar* is a finding by an authorized agency that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action.

3.5. **Confidentiality:** The confidentiality of disciplinary investigations and proceedings is outlined in Rule 3–7.1 of *The Rules Regulating the Florida Bar*. Any record of informal attempts to resolve a dispute as outlined in paragraph 3.2.2. would also be subject to the provisions of Rule 3–7.1 except that notes of any telephonic communication between the ACAP Attorney and the Complainant, the Respondent, or any third party would be considered the work product of The Florida Bar and would remain confidential and not become part of the public record.

FR/BAR Contract 2017 Revision

STANDARD I. CLOSING LOCATION; DOCUMENTS; and PROCEDURE:

(iii) FinCEN GTO NOTICE. *If Closing Agent is required to comply with the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") Geographic Targeting Orders ("GTOs"), then Buyer shall provide Closing Agent with the information related to Buyer and the transaction contemplated by this Contract that is required to complete IRS Form 8300, and Buyer consents to Closing Agent's collection and report of said information to IRS.*

69B-186.010 Unlawful Inducements Related to Title Insurance Transactions.

(1) The purpose of this rule is to interpret subparagraph 626.9541(1)(h)3., F.S., which provides that it is an unfair method of competition and unfair or deceptive act or practice prohibited by Section 626.9521, F.S., to engage in certain activities related to title insurance.

(2) All lists contained within this rule are intended as examples and are not exhaustive. This rule does not prohibit inducements or rebates provided by filed or approved rates or rating manuals, advertising gifts allowed by paragraph 626.9541(1)(m), F.S., or inducements and rebates otherwise expressly allowed by law.

(3) For purposes of this rule, the term "referrer of settlement service business" means any person who is in a position to refer title insurance business incident to or part of a real estate transaction, or an associate of such person. A referrer of settlement service business may be a title insurance agent, title insurance agency, title insurance company, attorney, real estate broker, real estate agent, real estate licensee, broker associate, sales associate, mortgage banker, mortgage broker, lender, real estate developer, builder, property appraiser, surveyor, escrow agent, closing agent, or any other person or entity involved in a real estate transaction for which title insurance could be issued; or any employee, officer, director, or representative of such a person or entity.

(4) As they relate to the transaction of title insurance, the following activities, whether performed directly or indirectly, for or by any referrer of settlement service business, are inducements for the sale, placement or referral of title insurance business in violation of Section 626.9521 and subparagraph 626.9541(1)(h)3., F.S.:

(a) Facilitating any discount, reduction, credit, or paying any fee or portion of the cost of an inspection, inspection report, appraisal, or survey, including wind inspection, to a purchaser or prospective purchaser of title insurance.

(b) Providing membership in any organization, society, association, guild, union, alliance or club at a discount, reduced rate, or at no cost to a referrer of settlement service business.

(c) Making or offering to make a charitable or other tax-deductible contribution on behalf of the purchaser or prospective purchaser of title insurance.

(d) Providing or offering stocks, bonds, securities, property, or any dividend or profit accruing or to accrue thereon to a referrer of settlement service business. However, the use of lawful affiliated business arrangements that are permitted under the Federal Real Estate Settlement Procedure Act would not violate this subparagraph and would be allowable under subsection (2) of this rule.

(e) Providing or offering employment to a referrer of settlement service business in exchange for the purchase of title insurance.

(f) Providing or paying for the printing of bulletins, flyers, post cards, labels, etc. that promote the business of a referrer of settlement service business.

(g) Furnishing or paying for the furnishing of office equipment (fax machines, telephones, copy machines, etc.) to a referrer of settlement service business.

(h) Providing or paying for cellular telephone contracts for a referrer of settlement service business.

(i) Providing simulated panoramic home and property tours to real estate brokers or real estate sales associates that they utilize to promote their listings.

(j) Providing or paying for gift cards or gift certificates to or for a referrer of settlement service business or to a purchaser or prospective purchaser of title insurance.

(k) Sponsoring and hosting, or paying for the sponsoring and hosting, of open houses for real estate brokers or real estate sales associates to promote their listings.

(l) Providing or paying for food, beverages, or room rentals at events designed to promote the business of a referrer of settlement service business other than the title insurance agent or agency.

(m) Paying advertising costs to advertise and promote the listings of real estate brokers or real estate sales associates via publications, signs, emails, websites, web pages, banners, or other forms of media.

(n) Providing an endorsement, designation of preferred status, approved status, or featured partner status on publications, signs, emails, websites, web pages, banners or other forms of media promoting the business of real estate brokers or real estate sales associates.

(o) Paying a referrer of settlement service business to fill out processing (order) forms in exchange for title insurance contracts.

(p) Providing "leads" or mailing lists to or on behalf of a referrer of settlement service business at no cost or a reduced cost.

(q) Entering into any arrangement to provide unearned compensation to a referrer of settlement service business.

(r) Providing, or offering to provide, non-title services, without a charge that is commensurate with the actual cost, to a referrer of settlement service business.

(5) Except as prohibited by Section 626.9541, F.S., expenditures for the following are not in violation of Section 626.9521 and subparagraph 626.9541(1)(h)3., F.S., or in violation of this rule:

(a) Promotional items with a company logo of the title insurance agent or agency, with a value not to exceed the amount allowed by paragraph 626.9541(1)(m), F.S., per item. "Promotional item" does not include a gift certificate, gift card, or other item that has a specific monetary value on its face, or that may be exchanged for any other item having a specific monetary value.

(b) Furnishing educational materials, such as fliers, brochures, pamphlets, or Frequently Asked Question sheets, exclusively related to title insurance for a referrer of settlement service business that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by a referrer of settlement service business.

(c) Compensation paid to a referrer of settlement service business for goods and services actually performed at amounts not exceeding the reasonable fair market value of the goods and services and that is not intended to induce the referral of title insurance business.

(d) Any advertising or marketing activities that directly promote the title insurance business of the title insurance agent or agency, which may include joint participation in marketing with another party provided that the agent or agency pays the proportionate share or fair market value of the costs, and does not violate paragraph (5)(a) of this rule.

(e) A payment by a title insurance company to its duly appointed agent for services actually performed in the issuance of a title insurance policy.

(f) A payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

Rulemaking Authority 624.308(1), 626.9611 FS. Law Implemented 626.9521, 626.9541(1)(h), (m), 626.9611 FS. History–New 2-9-16.

626.9541 Unfair methods of competition and unfair or deceptive acts or practices defined.—

(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.—The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

(a) *Misrepresentations and false advertising of insurance policies.*—Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, comparison, or property and casualty certificate of insurance altered after being issued, which:

1. Misrepresents the benefits, advantages, conditions, or terms of any insurance policy.
2. Misrepresents the dividends or share of the surplus to be received on any insurance policy.
3. Makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy.
4. Is misleading, or is a misrepresentation, as to the financial condition of any person or as to the legal reserve system upon which any life insurer operates.
5. Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof.
6. Is a misrepresentation for the purpose of inducing, or tending to induce, the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy.
7. Is a misrepresentation for the purpose of effecting a pledge or assignment of, or effecting a loan against, any insurance policy.
8. Misrepresents any insurance policy as being shares of stock or misrepresents ownership interest in the company.
9. Uses any advertisement that would mislead or otherwise cause a reasonable person to believe mistakenly that the state or the Federal Government is responsible for the insurance sales activities of any person or stands behind any person's credit or that any person, the state, or the Federal Government guarantees any returns on insurance products or is a source of payment of any insurance obligation of or sold by any person.

(b) *False information and advertising generally.*—Knowingly making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public:

1. In a newspaper, magazine, or other publication,
2. In the form of a notice, circular, pamphlet, letter, or poster,
3. Over any radio or television station, or
4. In any other way,

an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance, which is untrue, deceptive, or misleading.

(c) *Defamation.*—Knowingly making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of, any oral or written statement, or any pamphlet, circular, article, or literature, which is false or maliciously critical of, or derogatory to, any person and which is calculated to injure such person.

(d) *Boycott, coercion, and intimidation.*—Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion, or intimidation resulting in, or tending to result in, unreasonable restraint of, or monopoly in, the business of insurance.

(e) *False statements and entries.*—

1. Knowingly:

a. Filing with any supervisory or other public official,

b. Making, publishing, disseminating, circulating,

c. Delivering to any person,

d. Placing before the public,

e. Causing, directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public,

any false material statement.

2. Knowingly making any false entry of a material fact in any book, report, or statement of any person, or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report, or statement of such person.

(f) *Stock operations and advisory board contracts.*—Issuing or delivering, promising to issue or deliver, or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns or profits as an inducement to insurance.

(g) *Unfair discrimination.*—

1. Knowingly making or permitting unfair discrimination between individuals of the same actuarially supportable class and equal expectation of life, in the rates charged for a life insurance or annuity contract, in the dividends or other benefits payable thereon, or in any other term or condition of such contract.

2. Knowingly making or permitting unfair discrimination between individuals of the same actuarially supportable class, as determined at the time of initial issuance of the coverage, and essentially the same hazard, in the amount of premium, policy fees, or rates charged for a policy or contract of accident, disability, or health insurance, in the benefits payable thereunder, in the terms or conditions of such contract, or in any other manner.

3. For a health insurer, life insurer, disability insurer, property and casualty insurer, automobile insurer, or managed care provider to underwrite a policy, or refuse to issue, reissue, or renew a policy, refuse to pay a claim, cancel or otherwise terminate a policy, or increase rates based upon the fact that an insured or applicant who is also the proposed insured has made a claim or sought or should have sought medical or psychological treatment in the past for abuse, protection from abuse, or shelter from abuse, or that a claim was caused in the past by, or might occur as a result of, any future assault, battery, or sexual assault by a family or household member upon another family or household member as defined in s. 741.28. A health insurer, life insurer, disability insurer, or managed care provider may refuse to underwrite, issue, or renew a policy based on the applicant's medical condition, but may not consider whether such condition was caused by an act of abuse. For purposes of this section, the term "abuse" means the occurrence of one or more of the following acts:

a. Attempting or committing assault, battery, sexual assault, or sexual battery;

b. Placing another in fear of imminent serious bodily injury by physical menace;

c. False imprisonment;

d. Physically or sexually abusing a minor child; or

e. An act of domestic violence as defined in s. 741.28.

This subparagraph does not prohibit a property and casualty insurer or an automobile insurer from excluding coverage for intentional acts by the insured if such exclusion is not an act of unfair discrimination as defined in this paragraph.

4. For a personal lines property or personal lines automobile insurer to:

a. Refuse to issue, reissue, or renew a policy; cancel or otherwise terminate a policy; or charge an unfairly discriminatory rate in this state based on the lawful use, possession, or ownership of a firearm or ammunition by the insurance applicant, insured, or a household member of the applicant or insured. This sub-subparagraph does not prevent an insurer from charging a supplemental premium that is not unfairly discriminatory for a separate rider voluntarily requested by the insurance applicant to insure a firearm or a firearm collection whose value exceeds the standard policy coverage.

b. Disclose the lawful ownership or possession of firearms of an insurance applicant, insured, or household member of the applicant or insured to a third party or an affiliated entity of the insurer unless the insurer discloses to the applicant or insured the specific need to disclose the information and the applicant or insured expressly consents to the disclosure, or the disclosure is necessary to quote or bind coverage, continue coverage, or adjust a claim. For purposes of underwriting and issuing insurance coverage, this sub-subparagraph does not prevent the sharing of information between an insurance company and its licensed insurance agent if a separate rider has been voluntarily requested by the policyholder or prospective policyholder to insure a firearm or a firearm collection whose value exceeds the standard policy coverage.

(h) *Unlawful rebates.*—

1. Except as otherwise expressly provided by law, or in an applicable filing with the office, knowingly:

a. Permitting, or offering to make, or making, any contract or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon;

b. Paying, allowing, or giving, or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance contract, any unlawful rebate of premiums payable on the contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract;

c. Giving, selling, or purchasing, or offering to give, sell, or purchase, as inducement to such insurance contract or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the insurance contract.

2. Nothing in paragraph (g) or subparagraph 1. of this paragraph shall be construed as including within the definition of discrimination or unlawful rebates:

a. In the case of any contract of life insurance or life annuity, paying bonuses to all policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance; provided that any such bonuses or abatement of premiums is fair and equitable to all policyholders and for the best interests of the company and its policyholders.

b. In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expenses.

c. Readjustment of the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

d. Issuance of life insurance policies or annuity contracts at rates less than the usual rates of premiums for such policies or contracts, as group insurance or employee insurance as defined in this code.

e. Issuing life or disability insurance policies on a salary savings, bank draft, preauthorized check, payroll deduction, or other similar plan at a reduced rate reasonably related to the savings made by the use of such plan.

3.a. No title insurer, or any member, employee, attorney, agent, or agency thereof, shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as inducement to title insurance, or after such insurance has been effected, any rebate or abatement of the premium or any other charge or fee, or provide any special favor or advantage, or any monetary consideration or inducement whatever.

b. Nothing in this subparagraph shall be construed as prohibiting the payment of fees to attorneys at law duly licensed to practice law in the courts of this state, for professional services, or as prohibiting the payment of earned portions of the premium to duly appointed agents or agencies who actually perform services for the title insurer. Nothing in this subparagraph shall be construed as prohibiting a rebate or abatement of an attorney fee charged for professional services, or that portion of the premium that is not required to be retained by the insurer pursuant to s. 627.782(1), or any other agent charge or fee to the person responsible for paying the premium, charge, or fee.

c. No insured named in a policy, or any other person directly or indirectly connected with the transaction involving the issuance of such policy, including, but not limited to, any mortgage broker, real estate broker, builder, or attorney, any employee, agent, agency, or representative thereof, or any other person whatsoever, shall knowingly receive or accept, directly or indirectly, any rebate or abatement of any portion of the title insurance premium or of any other charge or fee or any monetary consideration or inducement whatsoever, except as set forth in sub-subparagraph b.; provided, in no event shall any portion of the attorney fee, any portion of the premium that is not required to be retained by the insurer pursuant to s. 627.782(1), any agent charge or fee, or any other monetary consideration or inducement be paid directly or indirectly for the referral of title insurance business.

(i) *Unfair claim settlement practices.—*

1. Attempting to settle claims on the basis of an application, when serving as a binder or intended to become a part of the policy, or any other material document which was altered without notice to, or knowledge or consent of, the insured;

2. A material misrepresentation made to an insured or any other person having an interest in the proceeds payable under such contract or policy, for the purpose and with the intent of effecting settlement of such claims, loss, or damage under such contract or policy on less favorable terms than those provided in, and contemplated by, such contract or policy; or

3. Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Failing to adopt and implement standards for the proper investigation of claims;

b. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

c. Failing to acknowledge and act promptly upon communications with respect to claims;

d. Denying claims without conducting reasonable investigations based upon available information;

e. Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of the insured within 30 days after proof-of-loss statements have been completed;

f. Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement;

g. Failing to promptly notify the insured of any additional information necessary for the processing of a claim; or

h. Failing to clearly explain the nature of the requested information and the reasons why such information is necessary.

i. Failing to pay personal injury protection insurance claims within the time periods required by s. 627.736(4)(b). The office may order the insurer to pay restitution to a policyholder, medical provider, or other claimant, including interest at a rate consistent with the amount set forth in s.55.03(1), for the time period within which an insurer fails to pay claims as required by law. Restitution is in addition to any other penalties allowed by law, including, but not limited to, the suspension of the insurer's certificate of authority.

4. Failing to pay undisputed amounts of partial or full benefits owed under first-party property insurance policies within 90 days after an insurer receives notice of a residential property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage, unless payment of the undisputed benefits is prevented by an act of God, prevented by the impossibility of performance, or due to actions by the insured or claimant that constitute fraud, lack of cooperation, or intentional misrepresentation regarding the claim for which benefits are owed.

(j) *Failure to maintain complaint-handling procedures.*—Failure of any person to maintain a complete record of all the complaints received since the date of the last examination. For purposes of this paragraph, "complaint" means any written communication primarily expressing a grievance.

(k) *Misrepresentation in insurance applications.*—

1. Knowingly making a false or fraudulent written or oral statement or representation on, or relative to, an application or negotiation for an insurance policy for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual.

2. Knowingly making a material omission in the comparison of a life, health, or Medicare supplement insurance replacement policy with the policy it replaces for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual. For the purposes of this subparagraph, a material omission includes the failure to advise the insured of the existence and operation of a preexisting condition clause in the replacement policy.

(l) *Twisting.*—Knowingly making any misleading representations or incomplete or fraudulent comparisons or fraudulent material omissions of or with respect to any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any insurance policy or to take out a policy of insurance in another insurer.

(m) *Advertising gifts permitted.*—No provision of paragraph (f), paragraph (g), or paragraph (h) shall be deemed to prohibit a licensed insurer or its agent from giving to insureds, prospective insureds, and others, for the purpose of advertising, any article of merchandise having a value of not more than $25.

(n) *Free insurance prohibited.*—

1. Advertising, offering, or providing free insurance as an inducement to the purchase or sale of real or personal property or of services directly or indirectly connected with such real or personal property.

2. For the purposes of this paragraph, "free" insurance is:

a. Insurance for which no identifiable and additional charge is made to the purchaser of such real property, personal property, or services.

b. Insurance for which an identifiable or additional charge is made in an amount less than the cost of such insurance as to the seller or other person, other than the insurer, providing the same.

3. Subparagraphs 1. and 2. do not apply to:

a. Insurance of, loss of, or damage to the real or personal property involved in any such sale or services, under a policy covering the interests therein of the seller or vendor.

b. Blanket disability insurance as defined in s. 627.659.

c. Credit life insurance or credit disability insurance.

d. Any individual, isolated, nonrecurring unadvertised transaction not in the regular course of business.

e. Title insurance.

f. Any purchase agreement involving the purchase of a cemetery lot or lots in which, under stated conditions, any balance due is forgiven upon the death of the purchaser.

g. Life insurance, trip cancellation insurance, or lost baggage insurance offered by a travel agency as part of a travel package offered by and booked through the agency.

4. Using the word "free" or words which imply the provision of insurance without a cost to describe life or disability insurance, in connection with the advertising or offering for sale of any kind of goods, merchandise, or services.

(o) *Illegal dealings in premiums; excess or reduced charges for insurance.*—

1. Knowingly collecting any sum as a premium or charge for insurance, which is not then provided, or is not in due course to be provided, subject to acceptance of the risk by the insurer, by an insurance policy issued by an insurer as permitted by this code.

2. Knowingly collecting as a premium or charge for insurance any sum in excess of or less than the premium or charge applicable to such insurance, in accordance with the applicable classifications and rates as filed with and approved by the office, and as specified in the policy; or, in cases when classifications, premiums, or rates are not required by this code to be so filed and approved, premiums

and charges collected from a Florida resident in excess of or less than those specified in the policy and as fixed by the insurer. Notwithstanding any other provision of law, this provision shall not be deemed to prohibit the charging and collection, by surplus lines agents licensed under part VIII of this chapter, of the amount of applicable state and federal taxes, or fees as authorized by s. 626.916(4), in addition to the premium required by the insurer or the charging and collection, by licensed agents, of the exact amount of any discount or other such fee charged by a credit card facility in connection with the use of a credit card, as authorized by subparagraph (q)3., in addition to the premium required by the insurer. This subparagraph shall not be construed to prohibit collection of a premium for a universal life or a variable or indeterminate value insurance policy made in accordance with the terms of the contract.

3.a. Imposing or requesting an additional premium for a policy of motor vehicle liability, personal injury protection, medical payment, or collision insurance or any combination thereof or refusing to renew the policy solely because the insured was involved in a motor vehicle accident unless the insurer's file contains information from which the insurer in good faith determines that the insured was substantially at fault in the accident.

b. An insurer which imposes and collects such a surcharge or which refuses to renew such policy shall, in conjunction with the notice of premium due or notice of nonrenewal, notify the named insured that he or she is entitled to reimbursement of such amount or renewal of the policy under the conditions listed below and will subsequently reimburse him or her or renew the policy, if the named insured demonstrates that the operator involved in the accident was:

(I) Lawfully parked;

(II) Reimbursed by, or on behalf of, a person responsible for the accident or has a judgment against such person;

(III) Struck in the rear by another vehicle headed in the same direction and was not convicted of a moving traffic violation in connection with the accident;

(IV) Hit by a "hit-and-run" driver, if the accident was reported to the proper authorities within 24 hours after discovering the accident;

(V) Not convicted of a moving traffic violation in connection with the accident, but the operator of the other automobile involved in such accident was convicted of a moving traffic violation;

(VI) Finally adjudicated not to be liable by a court of competent jurisdiction;

(VII) In receipt of a traffic citation which was dismissed or nolle prossed; or

(VIII) Not at fault as evidenced by a written statement from the insured establishing facts demonstrating lack of fault which are not rebutted by information in the insurer's file from which the insurer in good faith determines that the insured was substantially at fault.

c. In addition to the other provisions of this subparagraph, an insurer may not fail to renew a policy if the insured has had only one accident in which he or she was at fault within the current 3-year period. However, an insurer may nonrenew a policy for reasons other than accidents in accordance

with s. 627.728. This subparagraph does not prohibit nonrenewal of a policy under which the insured has had three or more accidents, regardless of fault, during the most recent 3-year period.

4. Imposing or requesting an additional premium for, or refusing to renew, a policy for motor vehicle insurance solely because the insured committed a noncriminal traffic infraction as described in s. 318.14 unless the infraction is:

a. A second infraction committed within an 18-month period, or a third or subsequent infraction committed within a 36-month period.

b. A violation of s. 316.183, when such violation is a result of exceeding the lawful speed limit by more than 15 miles per hour.

5. Upon the request of the insured, the insurer and licensed agent shall supply to the insured the complete proof of fault or other criteria which justifies the additional charge or cancellation.

6. No insurer shall impose or request an additional premium for motor vehicle insurance, cancel or refuse to issue a policy, or refuse to renew a policy because the insured or the applicant is a handicapped or physically disabled person, so long as such handicap or physical disability does not substantially impair such person's mechanically assisted driving ability.

7. No insurer may cancel or otherwise terminate any insurance contract or coverage, or require execution of a consent to rate endorsement, during the stated policy term for the purpose of offering to issue, or issuing, a similar or identical contract or coverage to the same insured with the same exposure at a higher premium rate or continuing an existing contract or coverage with the same exposure at an increased premium.

8. No insurer may issue a nonrenewal notice on any insurance contract or coverage, or require execution of a consent to rate endorsement, for the purpose of offering to issue, or issuing, a similar or identical contract or coverage to the same insured at a higher premium rate or continuing an existing contract or coverage at an increased premium without meeting any applicable notice requirements.

9. No insurer shall, with respect to premiums charged for motor vehicle insurance, unfairly discriminate solely on the basis of age, sex, marital status, or scholastic achievement.

10. Imposing or requesting an additional premium for motor vehicle comprehensive or uninsured motorist coverage solely because the insured was involved in a motor vehicle accident or was convicted of a moving traffic violation.

11. No insurer shall cancel or issue a nonrenewal notice on any insurance policy or contract without complying with any applicable cancellation or nonrenewal provision required under the Florida Insurance Code.

12. No insurer shall impose or request an additional premium, cancel a policy, or issue a nonrenewal notice on any insurance policy or contract because of any traffic infraction when adjudication has been withheld and no points have been assessed pursuant to s. 318.14(9) and (10).

However, this subparagraph does not apply to traffic infractions involving accidents in which the insurer has incurred a loss due to the fault of the insured.

(p) *Insurance cost specified in "price package".—*

1. When the premium or charge for insurance of or involving such property or merchandise is included in the overall purchase price or financing of the purchase of merchandise or property, the vendor or lender shall separately state and identify the amount charged and to be paid for the insurance, and the classifications, if any, upon which based; and the inclusion or exclusion of the cost of insurance in such purchase price or financing shall not increase, reduce, or otherwise affect any other factor involved in the cost of the merchandise, property, or financing as to the purchaser or borrower.

2. This paragraph does not apply to transactions which are subject to the provisions of part I of chapter 520, entitled "The Motor Vehicle Sales Finance Act."

3. This paragraph does not apply to credit life or credit disability insurance which is in compliance with s. 627.681(4).

(q) *Certain insurance transactions through credit card facilities prohibited.—*

1. Except as provided in subparagraph 3., no person shall knowingly solicit or negotiate insurance; seek or accept applications for insurance; issue or deliver any policy; receive, collect, or transmit premiums, to or for an insurer; or otherwise transact insurance in this state, or relative to a subject of insurance resident, located, or to be performed in this state, through the arrangement or facilities of a credit card facility or organization, for the purpose of insuring credit card holders or prospective credit card holders. The term "credit card holder" as used in this paragraph means a person who may pay the charge for purchases or other transactions through the credit card facility or organization, whose credit with such facility or organization is evidenced by a credit card identifying such person as being one whose charges the credit card facility or organization will pay, and who is identified as such upon the credit card by name, account number, symbol, insignia, or other method or device of identification. This subparagraph does not apply as to health insurance or to credit life, credit disability, or credit property insurance.

2. If any person does or performs in this state any of the acts in violation of subparagraph 1. for or on behalf of an insurer or credit card facility, such insurer or credit card facility shall be deemed to be doing business in this state and, if an insurer, shall be subject to the same state, county, and municipal taxes as insurers that have been legally qualified and admitted to do business in this state by agents or otherwise are subject, the same to be assessed and collected against such insurers; and such person so doing or performing any of such acts is personally liable for all such taxes.

3. A licensed agent or insurer may solicit or negotiate insurance; seek or accept applications for insurance; issue or deliver any policy; receive, collect, or transmit premiums, to or for an insurer; or otherwise transact insurance in this state, or relative to a subject of insurance resident, located, or to

be performed in this state, through the arrangement or facilities of a credit card facility or organization, for the purpose of insuring credit card holders or prospective credit card holders if:

a. The insurance or policy which is the subject of the transaction is noncancelable by any person other than the named insured, the policyholder, or the insurer;

b. Any refund of unearned premium is made to the credit card holder by mail or electronic transfer; and

c. The credit card transaction is authorized by the signature of the credit card holder or other person authorized to sign on the credit card account.

The conditions enumerated in sub-subparagraphs a.-c. do not apply to health insurance or to credit life, credit disability, or credit property insurance; and sub-subparagraph c. does not apply to property and casualty insurance if the transaction is authorized by the insured.

4. No person may use or disclose information resulting from the use of a credit card in conjunction with the purchase of insurance if such information is to the advantage of the credit card facility or an insurance agent, or is to the detriment of the insured or any other insurance agent; except that this provision does not prohibit a credit card facility from using or disclosing such information in a judicial proceeding or consistent with applicable law on credit reporting.

5. Such insurance may not be sold through a credit card facility in conjunction with membership in any automobile club. The term "automobile club" means a legal entity that, in consideration of dues, assessments, or periodic payments of money, promises its members or subscribers to assist them in matters relating to the ownership, operation, use, or maintenance of a motor vehicle; however, the term does not include persons, associations, or corporations that are organized and operated solely for the purpose of conducting, sponsoring, or sanctioning motor vehicle races, exhibitions, or contests upon racetracks, or upon race courses established and marked as such for the duration of such particular event. The words "motor vehicle" used herein shall be the same as defined in chapter 320.

(r) *Interlocking ownership and management.*—

1. Any domestic insurer may retain, invest in, or acquire the whole or any part of the capital stock of any other insurer or insurers, or have a common management with any other insurer or insurers, unless such retention, investment, acquisition, or common management is inconsistent with any other provision of this code, or unless by reason thereof the business of such insurers with the public is conducted in a manner which substantially lessens competition generally in the insurance business.

2. Any person otherwise qualified may be a director of two or more domestic insurers which are competitors, unless the effect thereof is substantially to lessen competition between insurers generally or materially tend to create a monopoly.

3. Any limitation contained in this paragraph does not apply to any person who is a director of two or more insurers under common control or management.

(s) *Prohibited arrangements as to funerals.—*

1. No life insurer shall designate in any life insurance policy the person to conduct the funeral of the insured, or organize, promote, or operate any enterprise or plan to enter into any contract with any insured under which the freedom of choice in the open market of the person having the legal right to such choice is restricted as to the purchase, arrangement, and conduct of a funeral service or any part thereof for any individual insured by the insurer. No life insurer shall designate in any life insurance policy the person to conduct the funeral of the insured as the owner of the policy.

2. No insurer shall contract or agree to furnish funeral merchandise or services in connection with the disposition of any person upon the death of any person insured by such insurer.

3. No insurer shall contract or agree with any funeral director or direct disposer to the effect that such funeral director or direct disposer shall conduct the funeral of any person insured by such insurer.

4. No insurer shall provide, in any insurance contract covering the life of any person in this state, for the payment of the proceeds or benefits thereof in other than legal tender of the United States and of this state, or for the withholding of such proceeds or benefits, all for the purpose of either directly or indirectly providing, inducing, or furthering any arrangement or agreement designed to require or induce the employment of a particular person to conduct the funeral of the insured.

(t) *Certain life insurance relations with funeral directors prohibited.—*

1. No life insurer shall permit any funeral director or direct disposer to act as its representative, adjuster, claim agent, special claim agent, or agent for such insurer in soliciting, negotiating, or effecting contracts of life insurance on any plan or of any nature issued by such insurer or in collecting premiums for holders of any such contracts except as prescribed in s.626.785(3).

2. No life insurer shall:

a. Affix, or permit to be affixed, advertising matter of any kind or character of any licensed funeral director or direct disposer to such policies of insurance.

b. Circulate, or permit to be circulated, any such advertising matter with such insurance policies.

c. Attempt in any manner or form to influence policyholders of the insurer to employ the services of any particular licensed funeral director or direct disposer.

3. No such insurer shall maintain, or permit its agent to maintain, an office or place of business in the office, establishment, or place of business of any funeral director or direct disposer in this state.

(u) *False claims; obtaining or retaining money dishonestly.—*

1. Any agent, physician, claimant, or other person who causes to be presented to any insurer a false claim for payment, knowing the same to be false; or

2. Any agent, collector, or other person who represents any insurer or collects or does business without the authority of the insurer, secures cash advances by false statements, or fails to turn over when required, or satisfactorily account for, all collections of such insurer,

shall, in addition to the other penalties provided in this act, be guilty of a misdemeanor of the second degree and, upon conviction thereof, shall be subject to the penalties provided by s. 775.082 or s. 775.083.

(v) *Proposal required.*—If a person simultaneously holds a securities license and a life insurance license, he or she shall prepare and leave with each prospective buyer a written proposal, on or before delivery of any investment plan. "Investment plan" means a mutual funds program, and the proposal shall consist of a prospectus describing the investment feature and a full illustration of any life insurance feature. The proposal shall be prepared in duplicate, dated, and signed by the licensee. The original shall be left with the prospect, the duplicate shall be retained by the licensee for a period of not less than 3 years, and a copy shall be furnished to the department upon its request. In lieu of a duplicate copy, a receipt for standardized proposals filed with the department may be obtained and held by the licensee.

(w) *Soliciting or accepting new or renewal insurance risks by insolvent or impaired insurer prohibited; penalty.*—

1. Whether or not delinquency proceedings as to the insurer have been or are to be initiated, but while such insolvency or impairment exists, no director or officer of an insurer, except with the written permission of the office, shall authorize or permit the insurer to solicit or accept new or renewal insurance risks in this state after such director or officer knew, or reasonably should have known, that the insurer was insolvent or impaired. "Impaired" includes impairment of capital or surplus, as defined in s. 631.011(12) and (13).

2. Any such director or officer, upon conviction of a violation of this paragraph, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(x) *Refusal to insure.*—In addition to other provisions of this code, the refusal to insure, or continue to insure, any individual or risk solely because of:

1. Race, color, creed, marital status, sex, or national origin;

2. The residence, age, or lawful occupation of the individual or the location of the risk, unless there is a reasonable relationship between the residence, age, or lawful occupation of the individual or the location of the risk and the coverage issued or to be issued;

3. The insured's or applicant's failure to agree to place collateral business with any insurer, unless the coverage applied for would provide liability coverage which is excess over that provided in policies maintained on property or motor vehicles;

4. The insured's or applicant's failure to purchase noninsurance services or commodities, including automobile services as defined in s. 624.124;

5. The fact that the insured or applicant is a public official; or

6. The fact that the insured or applicant had been previously refused insurance coverage by any insurer, when such refusal to insure or continue to insure for this reason occurs with such frequency as to indicate a general business practice.

(y) *Powers of attorney.*—Except as provided in s. 627.842(2):

1. Requiring, as a condition to the purchase or continuation of an insurance policy, that an applicant for insurance or an insured execute a power of attorney in favor of an insurance agent or agency or employee thereof; or

2. Presenting to the applicant or the insured, as a routine business practice, a form that authorizes the insurance agent or agency to sign the applicant's or insured's name on any insurance-related document or application for the purchase of motor vehicle services as described in s. 624.124. To be valid, a power of attorney must be an act or practice other than as described in this paragraph, must be a separate writing in a separate document, must be executed with the full knowledge and consent of the applicant or insured who grants the power of attorney, must be in the best interests of the insured or applicant, and a copy of the power of attorney must be provided to the applicant or insured at the time of the transaction.

(z) *Sliding.*—Sliding is the act or practice of:

1. Representing to the applicant that a specific ancillary coverage or product is required by law in conjunction with the purchase of insurance when such coverage or product is not required;

2. Representing to the applicant that a specific ancillary coverage or product is included in the policy applied for without an additional charge when such charge is required; or

3. Charging an applicant for a specific ancillary coverage or product, in addition to the cost of the insurance coverage applied for, without the informed consent of the applicant.

[1](aa) *Churning.*—

1. Churning is the practice whereby policy values in an existing life insurance policy or annuity contract, including, but not limited to, cash, loan values, or dividend values, and in any riders to that policy or contract, are directly or indirectly used to purchase another insurance policy or annuity contract with that same insurer for the purpose of earning additional premiums, fees, commissions, or other compensation:

a. Without an objectively reasonable basis for believing that the replacement or extraction will result in an actual and demonstrable benefit to the policyholder;

b. In a fashion that is fraudulent, deceptive, or otherwise misleading or that involves a deceptive omission;

c. When the applicant is not informed that the policy values including cash values, dividends, and other assets of the existing policy or contract will be reduced, forfeited, or used in the purchase of the replacing or additional policy or contract, if this is the case; or

d. Without informing the applicant that the replacing or additional policy or contract will not be a paid-up policy or that additional premiums will be due, if this is the case.

Churning by an insurer or an agent is an unfair method of competition and an unfair or deceptive act or practice.

2. Each insurer shall comply with sub-subparagraphs 1.c. and 1.d. by disclosing to the applicant at the time of the offer on a form designed and adopted by rule by the commission if, how, and the extent to which the policy or contract values (including cash value, dividends, and other assets) of a previously issued policy or contract will be used to purchase a replacing or additional policy or contract with the same insurer. The form must include disclosure of the premium, the death benefit of the proposed replacing or additional policy, and the date when the policy values of the existing policy or contract will be insufficient to pay the premiums of the replacing or additional policy or contract.

3. Each insurer shall adopt written procedures to reasonably avoid churning of policies or contracts that it has issued, and failure to adopt written procedures sufficient to reasonably avoid churning shall be an unfair method of competition and an unfair or deceptive act or practice.

(bb) *Deceptive use of name.*—Using the name or logo of a financial institution, as defined in s.655.005(1), or its affiliates or subsidiaries when marketing or soliciting existing or prospective customers if such marketing materials are used without the written consent of the financial institution and in a manner that would lead a reasonable person to believe that the material or solicitation originated from, was endorsed by, or is related to or the responsibility of the financial institution or its affiliates or subsidiaries.

(cc) *Unfair rate increases for persons in military service.*—Charging an increased premium for reinstating a motor vehicle insurance policy that was canceled or suspended by the insured solely for the reason that he or she was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. It is also an unfair practice for an insurer to charge an increased premium for a new motor vehicle insurance policy if the applicant for coverage or his or her covered dependents were previously insured with a different insurer and canceled that policy solely for the reason that he or she was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. For purposes of determining premiums, an insurer shall consider such persons as having maintained continuous coverage.

(dd) *Life insurance limitations based on past foreign travel experiences or future foreign travel plans.*—

1. An insurer may not refuse life insurance to; refuse to continue the life insurance of; or limit the amount, extent, or kind of life insurance coverage available to an individual based solely on the individual's past lawful foreign travel experiences.

2. An insurer may not refuse life insurance to; refuse to continue the life insurance of; or limit the amount, extent, or kind of life insurance coverage available to an individual based solely on the individual's future lawful travel plans unless the insurer can demonstrate and the Office of Insurance Regulation determines that:

a. Individuals who travel are a separate actuarially supportable class whose risk of loss is different from those individuals who do not travel; and

b. Such risk classification is based upon sound actuarial principles and actual or reasonably anticipated experience that correlates to the risk of travel to a specific destination.

3. The commission may adopt rules pursuant to ss. 120.536(1) and 120.54 necessary to implement this paragraph and may provide for limited exceptions that are based upon national or international emergency conditions that affect the public health, safety, and welfare and that are consistent with public policy.

4. Each market conduct examination of a life insurer conducted pursuant to s. 624.3161 shall include a review of every application under which such insurer refused to issue life insurance; refused to continue life insurance; or limited the amount, extent, or kind of life insurance issued, based upon future lawful travel plans.

5. The administrative fines provided in s. 624.4211(2) and (3) shall be trebled for violations of this paragraph.

6. The Office of Insurance Regulation shall report to the President of the Senate and the Speaker of the House of Representatives by March 1, 2007, and on the same date annually thereafter, on the implementation of this paragraph. The report shall include, but not be limited to, the number of applications under which life insurance was denied, continuance was refused, or coverage was limited based on future travel plans; the number of insurers taking such action; and the reason for taking each such action.

[1](ee) *Fraudulent signatures on an application or policy-related document.*—Willfully submitting to an insurer on behalf of a consumer an insurance application or policy-related document bearing a false or fraudulent signature.

[1](ff) *Unlawful use of designations; misrepresentation of agent qualifications.*—

1. A licensee may not, in any sales presentation or solicitation for insurance, use a designation or title in such a way as to falsely imply that the licensee:

a. Possesses special financial knowledge or has obtained specialized financial training; or

b. Is certified or qualified to provide specialized financial advice to senior citizens.

2. A licensee may not use terms such as "financial advisor" in such a way as to falsely imply that the licensee is licensed or qualified to discuss, sell, or recommend financial products other than insurance products.

3. A licensee may not, in any sales presentation or solicitation for insurance, falsely imply that he or she is qualified to discuss, recommend, or sell securities or other investment products in addition to insurance products.

4. A licensee who also holds a designation as a certified financial planner (CFP), chartered life underwriter (CLU), chartered financial consultant (ChFC), life underwriter training council fellow (LUTC), or the appropriate license to sell securities from the Financial Industry Regulatory Authority (FINRA) may inform the customer of those licenses or designations and make recommendations in accordance with those licenses or designations, and in so doing does not violate this paragraph.

(gg) *Out-of-network reimbursement.*—Willfully failing to comply with s. 627.64194 with such frequency as to indicate a general business practice.

(2) ALTERNATIVE RATES OF PAYMENT.—Nothing in this section shall be construed to prohibit an insurer or insurers from negotiating or entering into contracts with licensed health care providers for alternative rates of payment, or from limiting payments under policies pursuant to agreements with insureds, as long as the insurer offers the benefit of such alternative rates to insureds who select designated providers.

(3) INPATIENT FACILITY NETWORK.—This section may not be construed to prohibit a Medicare supplement insurer from granting a premium credit to insureds for using an in-network inpatient facility.

(4) PARTICIPATION IN A WELLNESS OR HEALTH IMPROVEMENT PROGRAM.—

(a) *Authorization to offer rewards or incentives for participation.*—An insurer issuing a group or individual health benefit plan may offer a voluntary wellness or health improvement program and may encourage or reward participation in the program by authorizing rewards or incentives, including, but not limited to, merchandise, gift cards, debit cards, premium discounts, contributions to a member's health savings account, or modifications to copayment, deductible, or coinsurance amounts. Any advertisement of the program is not subject to the limitations set forth in paragraph (1)(m).

(b) *Verification of medical condition by nonparticipants due to medical condition.*—An insurer may require a member of a health benefit plan to provide verification, such as an affirming statement from the member's physician, that the member's medical condition makes it unreasonably difficult or inadvisable to participate in the wellness or health improvement program in order for that nonparticipant to receive the reward or incentive.

(c) *Disclosure requirement.*—A reward or incentive offered under this subsection shall be disclosed in the policy or certificate.

(d) *Other incentives.*—This subsection does not prohibit insurers from offering other incentives or rewards for adherence to a wellness or health improvement program if otherwise authorized by state or federal law.

History.—s. 9, ch. 76-260; s. 1, ch. 77-174; s. 19, ch. 77-468; s. 1, ch. 78-377; s. 1, ch. 79-289; s. 1, ch. 80-152; s. 1, ch. 80-373; s. 1, ch. 82-235; s. 807, ch. 82-243; s. 90, ch. 83-216; ss. 1, 2, ch. 83-342; s. 1, ch. 84-157; s. 14, ch. 85-62; s. 3, ch. 85-182; s. 1, ch. 85-233; s. 4, ch. 86-160; s. 27, ch. 87-226; s. 13, ch. 88-370; ss. 60, 65, ch. 89-360; s. 1, ch. 90-85; s. 33, ch. 90-119; ss. 186, 206, 207, ch. 90-363; s. 58, ch. 91-110; s. 256, ch. 91-224; s. 4, ch. 91-429; s. 38, ch. 92-146; s. 6, ch. 95-187; s. 1, ch. 95-219; s. 314, ch. 97-102; s. 24, ch. 99-3; s. 5, ch. 99-286; s. 1, ch. 99-388; s. 2, ch. 2000-192; s. 1, ch. 2001-178; s. 2, ch. 2002-25; s. 7, ch. 2002-55; s. 65, ch. 2002-206; s. 88, ch. 2003-1; s. 2, ch. 2003-139; s. 1028, ch. 2003-261; ss. 4, 65, ch. 2003-267; ss. 58, 80, ch. 2003-281; s. 4, ch. 2004-340; s. 87, ch. 2004-390; s. 1, ch. 2005-41; s. 2, ch. 2006-277; s. 2, ch. 2007-44; s. 8, ch. 2008-66; s. 7, ch. 2008-237; s. 6, ch. 2010-175; s. 1, ch. 2011-167; s. 10, ch. 2012-151; s. 5, ch. 2012-197; s. 7, ch. 2014-103; s. 1, ch. 2014-180; s. 14, ch. 2015-180; s. 11, ch. 2016-222.

[1]**Note.**—Section 12, ch. 2008-237, provides in part that "[e]ffective [June 30, 2008,] the Department of Financial Services may adopt rules to implement this act."

Professionalism cases (from Elizabeth Tarbert)

The Florida Bar v. Adams, 641 So.2d 399 (Fla. 1994). Attorney who made frivolous charges of criminal and unethical conduct against other attorneys guilty of violating Rules 3-4.3, 4-4.1(a), 4-4.4, 4-8.4(a),(c),(d). Suspension for 90 days.

The Florida Bar v. Abramson, 3 So. 3d 964 (Fla. 2009). Attorney suspended for 91 days for disruptive conduct at jury selection in which the attorney repeatedly interrupted the judge, ignored the court's order to stop arguing a particular issue, and tried to convince the jury panel which was present for most of the lawyer's conduct that the judge was at fault and was disrespectful and unprofessional toward the attorney. The client ultimately fired the attorney that day and the panel was dismissed because of the lawyer's actions.

The Florida Bar v. Buckle, 771 So.2d 1131 (Fla. 2000). Attorney publicly reprimanded for sending letter to alleged victim of battery that insinuated that the attorney would "take her away from her job and her children and to expose her to ridicule, contempt, and hatred." Religious tracts were attached to the letter. The letter was sent after the attorney had spoken with the alleged victim by phone and had been told not to contact her. The court found that the attorney clearly intended to get the alleged victim to drop charges against the attorney's client. The court specifically found that the contents of the letter, not the religious tracts themselves, violated Rule 4-4.4, 4-8.4(a) and 4-8.4(d); however, they stated that "we agree with the referee that an attorney should carefully exercise his or her professional judgment and discretion with regard to the dissemination of religious materials enclosed with legal correspondence."

The Florida Bar v. Martocci, 699 So.2d 1357 (Fla. 1997). Although declining to discipline attorney, court pointed out that conduct was "patently unprofessional" for the "childish and demeaning conduct" which took place in an exchange during a deposition in which attorney poked another in the chest and used profane language. Martocci was later disciplined (public reprimand) for similar conduct when he called an opposing party "nut case" "crazy" "stupid idiot" and told the opposing counsel "go back to Puerto Rico." *The Florida Bar v. Martocci*, 791 So.2d 1074 (Fla. 2001).

The Florida Bar v. Martocci, 791 So.2d 1074 (Fla. 2001), reh. den. (2001). Attorney who insulted opposing counsel and her client (calling opposing party "nut case" and "crazy", making "demeaning facial gestures" and sticking out his tongue at depos, calling opposing counsel "stupid idiot" and that she should "go back to Puerto Rico," calling opposing counsel "b****," telling opposing counsel she needed to go back to law school, threatening to harm opposing party's father in courtroom during recess) was found guilty of violation of Rule 4-8.4(d), received public reprimand and 2 years probation.

The Florida Bar v. Mogil, 763 So.2d 303 (Fla. 2000). Attorney disbarred after being removed as judge in New York for sending threatening letters to another attorney, handing out offensive remarks about attorneys on judicial letterhead, and making statements that attorneys who make complaints against judges may face retaliation.

The Florida Bar v. Norkin,132 So.3d 77 (Fla. 2013). Lawyer suspended for 2 years for multiple instances of disrupting the courtroom by shouting at judges during hearings (2 separate judges had to end hearings), disparaging a judge with no basis in a motion to recuse, falsely accused a senior judge of having a "cozy, conspiratorial" relationship with opposing counsel, disparaging opposing counsel in emails (copying others), shouting at opposing counsel in the courthouse (that he was dishonest and a scumbag), and disparaging and shouting at bar counsel in the referee hearing. Rules 4-3.5(c), 4-8.2(a), 4-8.4(a), 4-8.4(d).

The Florida Bar v. Norkin, 183 So.3d 1018 (Fla. 2015), reh. den (2016). Suspended lawyer permanently disbarred for not notifying clients of suspension, continuing practice of law during suspension, insulting and threatening e-mails to bar counsel and smirking and staring down justices at public reprimand.

The Florida Bar v. Nunes, 734 So.2d 393 (Fla. 1999), reh. den. (1999). Accusing opposing counsel of having stolen court file in case, among other violations warranted 3 year suspension under rules 4-3.1, 4-4.4, 4-8.4(d).

The Florida Bar v. Ratiner, 46 So.3d 35 (Fla. 2010). Opinion dated Jun. 24, 2010. Attorney publicly reprimanded and suspended for 60 days for misconduct at a deposition, including running around the table at opposing counsel, engage in a "tirade" against opposing counsel while tearing up an evidence sticker and flicking it at opposing counsel, intimidating the witness, opposing counsel and court reporter.

The Florida Bar v. Sayler, 721 So.2d 1152 (Fla. 1998). Letter to opposing counsel which referenced the murder of another attorney who handled similar types of matters and enclosing news clippings about the murder were threatening, violated 4-8.4 (c) and (d) regarding acts of against justice, and knowingly disparaging another, and 4-4.4 regarding acts with no purpose other than to embarrass, delay or burden a third person.

The Florida Bar v. Uhrig, 666 So.2d 887, 888 (Fla. 1996). Attorney who sent insulting and highly unprofessional letter to opposing party violated Rule 4- 8.4(d). Letter was devoid of any purpose other than humiliation and disparagement and recipient was a member of the class intended to be protected by the rule. (Public Reprimand)

The Florida Bar v. Wasserman, 675 So.2d 103 (Fla. 1996). Attorney who made profane statements to judicial assistant over the phone and was found guilty of indirect criminal contempt, violated Rules 3-4.3 (committing an act that is unlawful or contrary to honesty or justice) and 4-8.4(a). 6 month suspension.

The Florida Bar v. Will SC15-2255 Consent judgment public reprimand. Attorney mischaracterized the testimony of a witness, made demeaning and ridiculing personal attacks during his closing argument by repeatedly referred to the defendant as a "crackhead" lacking in morals and disparaged opposing counsel's theory of defense and improperly sought to have the jury show sympathy for the victim.

The Engagement Letter and the Residential Real Estate Attorney

By Scott A. Marcus, Becker & Poliakoff, P.A., Fort Lauderdale, Florida

S. MARCUS

Introduction

In most legal scenarios, the reason an attorney is sought out and eventually hired by a client is to assist that client with a specific legal need. For example, a person charged in a criminal action hires counsel (or has counsel appointed by the State) to defend him or her against criminal prosecution. In a contract dispute, the attorney is retained by a client to seek money damages or an equitable remedy. Those who wish to prepare for death (life's inevitable end), retain counsel to prepare their estate - and consequently attempt to alleviate their loved ones from legal complications which could arise upon their passing. The real estate attorney's practice, however, can be unlike other practices of law. Each real estate transaction could potentially contain a number of non-real estate related legal components - all of which could affect the ownership of the real property, the client, as well as the attorney. So why is it that so many real estate law practitioners fail to obtain even the most simplified form of written engagement letter or fail to adequately define the *scope of their engagement* with their clients? Although the above scenario is not limited to the *residential real estate practitioner* (attorneys handling commercial transactions are certainly not immune to these same issues), this article is tailored for the attorney handling residential real estate transactions on a regular basis. Retainer agreement, engagement letter, whatever you want to call them. Have one.[1]

The General Rule Regarding Written (and Signed) Engagement Letters

With the exception of contingent fee cases,[2] the Rules Regulating the Florida Bar ("Rules" or "Rule") do not require that the attorney-client relationship be reduced to a written contract, signed by both attorney and client. Rather, in circumstances where the attorney has not regularly represented the client, prior to or within a reasonable time after commencing the representation, the Rules establish *a preference* for written communication between the attorney and the client as to the basis or rate of the fee as well as the costs.[3] In addition, where a legal fee is *nonrefundable*, the Rules require that the nature and amount of the nonrefundable fee be *confirmed* in writing.[4] This confirmation does not however require the attorney to obtain a signed acknowledgment from the client memorializing the terms of the fee. A letter from the attorney to the client setting forth the basis or rate of the fee and the intent of the parties in regards to the nonrefundable nature of the fee is sufficient to meet the requirements of this rule.[5]

Contingency Fee Arrangements

The Florida Bar has well established rules by which engagement letters in contingency fee cases are governed. Rule 4-1.5(f)(1) states that:

> [a] contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.[6]

In addition, Florida Bar Rule 4-1.5(f)(2) states that

> [e]very lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered...whereby the lawyer's compensation is to be...contingent in whole or in part upon the successful prosecution or settlement thereof **shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer**....[7] (Emphasis added)

The Rules provide parameters governing the percentage the attorney is entitled to collect for his or her fee in addition to how those fees can be divided between lawyers in different law firms.[8]

The Unique Role of the Residential Real Estate Attorney

As alluded to in the preamble of this article, the residential real estate attorney's practice can be rather ambiguous. When dissected, a standard real estate transaction has potentially many components in addition to contract and title law. There are aspects of community association law, corporate law, tax law (both foreign and domestic), estate planning and asset protection that could all affect any particular transaction. While the attorney need not be versed in all of the above areas of law, it is the duty of the attorney to identify the aspects of the transaction which could potentially impact the client and allow the client to determine how he or she would like to address those areas not serviced by the attorney. The client may choose to retain the services of a Certified Public Accountant to address the tax-related issues or the client may choose to retain separate counsel for the services not covered under the attorney's scope of representation. It is also possible that the client may decide that he or she is not concerned with any of the additional aspects of the transaction and forego that type of representation all together. At a minimum, however, the

The Engagement Letter and the Residential Real Estate Attorney, from page 33

client should clearly comprehend the scope of representation offered by the attorney and have the choice to expand that scope either with the assistance of the attorney or through alternate means. Based on the breadth of any one residential real estate transaction, the potential for attorney malpractice can be significant based on the damage potential to the client; yet it is all too common for the residential real estate practitioner to forge head-on into a matter without even the most informal confirmation to the client (written or otherwise) setting forth the aspects of the transaction the attorney *is*, and more importantly, *is not* handling.

Transitioning to the Engagement Letter as a Standard Practice

Why would a real estate attorney willingly assume legal liability on a transaction by failing to properly outline the scope of engagement in writing to the client? I was guilty of this practice during my early years in private practice; however, upon taking refuge in a large firm with strict governance policies and procedures, it became evident that my days of handling a transaction without even so much as a handshake were, by mandate, a thing of the past. This was not an easy transition. Clients whom I had serviced for years were at first confused by the formal nature of the engagement letter process. They attributed the additional layer of "bureaucracy" to the large firm culture and equated this new procedure to increased fees. This was an incorrect assessment made by the client and served to reinforce, for me, that part of a lawyer's role is to educate clients on non-billable procedural matters as well as to abate any fears associated therewith. Clear and effective communication became a cornerstone of each new engagement. After some discussion, clients realized the benefits of the engagement letter for both the attorney and the client and it generally has avoided confusion and misunderstanding as to the role of the attorney in the transaction.

You know it is needed, so what's stopping you?

Timing. If you have practiced in the area of residential real estate law long enough, you have most likely been on the receiving end of the following statement from a potential client: "I purchased a house and I would like to know how much you would charge to represent me." Knowing exactly what was meant by the statement, my response is always the same: "If you've already *purchased* a house, you don't need me." This prompts the potential client to rephrase with what they believe sets them apart from other clients. "No (chuckle) I signed a contract, I just want to know how much you will charge to represent me." My reply is no less cynical: "So you've served as your own counsel for the contractual phase - now you want me to step in and handle the rest?" This primes a discussion which usually starts with the potential client saying "isn't it just a form?" and ending with the client feeling - shall we say - a tad bit humbled. Point being, the nature of our practice is that we often are faced with picking up where our "lawyer-clients" leave off. *What can go wrong, right? It is just a form.* The above scenario could give the attorney a false sense of informality that they are merely needed to make sure title is marketable. Stop. Take a moment and realize this is more (not less) of a reason to require an engagement letter. You want to make it clear to the client that they arrived at your doorstep with an already executed contract. If you did not assist the client with this portion of the service, why would you want to assume responsibility for the client's work?

The Title Company Dilemma. In Florida, a "title insurance agent" is a defined term under § 626.841, F.S. In order to be licensed to act as a title insurance agent, one need not be an attorney; the applicant need only pass a state exam to become licensed.[9] An attorney may issue title insurance without the requirement of licensure due to an exemption contained in the chapter.[10] The implication is that an attorney is not required to take the state licensing exam due to the fact that the attorney passed the Florida Bar exam. The involvement of non-attorney owned or non-attorney managed title agencies in the residential real estate arena has blurred the line between *legal representation* and *title insurance*. While this portion of the article is not intended as an attack on non-attorney owned title agencies, there is a stark difference between comprehensive legal representation and merely confirming title is insurable. Title agencies do not provide legal representation. However, they have become the norm in residential closing circles. The formality involved with the engagement letter process is a necessary break from that norm. The attorney who subscribes to a level of informality on par with title agencies is forgetting that the title agency protects itself with disclosure documents outlining their limited role. If it is important enough for a title agency to disclose to a customer that the agency is not providing legal representation, it is even more critical for the attorney to disclose to the client the scope of the attorney's representation.

Referral Sources. The typical real estate attorney acquires a significant number of his or her matters from licensed real estate agents. This referral source, when correctly educated by the attorney, can be a blessing. Where the real estate agent is not properly briefed by the attorney on both the importance of timing and the difference between legal representation and title insurance, the referral source can actually impede timely and effective representation, potentially damaging the client and the transaction. I have learned that it is critical to educate my referral sources on timing their referrals properly and that the terms of art in the industry of "closing agent" and "settlement agent" do not automatically denote legal representation. The correct timing to refer a buyer or seller of real property to an attorney is in advance of that person making an offer or accepting that offer, whichever is the case. While this may seem like a rather obvious consideration, real estate agents are often under significant pressures from

The Engagement Letter and the Residential Real Estate Attorney, from page 34

the buyer and seller as well as other realtors to expedite the process. The suggestion of attorney involvement during the negotiation phase could be perceived by those involved as an additional impediment to a binding contract. To overcome these negatives, the attorney must be responsive, in addition to knowledgeable. In larger law firms, the system for conflicts checks needs to be streamlined to avoid delaying the attorney's ability to converse with a potential client. In smaller firms without the same level of formality, managing a business as well as practicing law can be overwhelming and prevent the attorney from responding in a timely fashion. Whether large firm or small firm practice, the role of the attorney with respect to the referral source is the same. Specifically, the lawyer should educate the referral source on the benefits to the client and the referral source of the involvement of a competent real estate attorney prior to having a binding contract, the difference between legal representation and title insurance as well as your process of engagement. These should all be concepts your referral sources are versed in so the referral is smooth.

Fear of Judgment. Too often, attorneys expand their services to include real estate transactions and title work without much knowledge of the area. This is due in part to survival and, in some cases, greed. To those facing either or both scenarios, "don't take on work for the money [without the appropriate experience]."[11] You are not doing your clients or the practice any favors. Whatever your reason for practicing in this area without significant training, remember, this is not just another real estate transaction. A real estate acquisition (residential or commercial) is often the largest financial investment a client will make. The client's needs must be paramount. Only practice in this arena once you have a firm grasp of contract, real estate and title law. In addition, at a minimum, know enough to know the other aspects of law which impact the prospective transaction and do not fear telling a client "I don't do that work."[12] Use the engagement letter as a tool to define the scope of your involvement and do not allow your moral compass to waiver.

The Template Engagement Letter and Conclusion

The Residential Real Estate and Industry Liaison ("RREIL") Committee of the RPPTL Section of the Florida Bar, through a subcommittee chaired by this author, has drafted a sample form engagement letter which addresses most elements present within a residential real estate transaction. The template is available to all members of the RPPTL Section by accessing the member login at www.rpptl.org and proceeding to the RREIL Committee's web page.

The county in which the property is located will, along with the contract, dictate whether the buyer or the seller is responsible for selecting and paying the Closing Agent[13] for the title insurance premium and as such, the role of the attorney will fluctuate depending on the location of the property, the contract and the services selected by the client. This particular template was drafted with a "buyer-pay" contract in mind, and is intended as a starting point for the residential real estate attorney to tailor to the specific needs of the transaction and the client. At a minimum, the template engagement letter should define the scope of representation as well as detail the services not included in that scope.

A fee and/or cost retainer should become a standard practice, particularly to avoid violating the unlawful inducements rules of the Florida Department of Financial Services.[14] The Template Engagement Letter also addresses that any costs advanced by the attorney on behalf of the client would be reimbursed by the client. These provisions were added to clarify that the attorney is not advancing these costs as part of an unlawful inducement to obtain business and that the intention is for the attorney to be reimbursed for these costs. Provisions pertaining to granting consent to the title underwriter's audit of the firm's trust account and consent to electronic communication were included in response to avoid ethical concerns.

In sum, a retainer agreement/engagement letter can (in addition to all of the reasons discussed in this article) be a marketing opportunity used to differentiate yourself from a title agency and from other attorneys. Use it to show your value to your prospective clients.

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Endnotes

1 Brian Tannebaum, *The Practice* (American Bar Association, 2015).
2 R. Reg. Fla. Bar 4-1.5(f).
3 R. Reg. Fla. Bar 4-1.5(e).
4 R. Reg. Fla. Bar 4-1.5(e), "A fee for legal services that is nonrefundable in any part **shall be** confirmed in writing...." (Emphasis added).
5 R. Reg. Fla. Bar 4-1.5 Editors' Notes.
6 R. Reg. Fla. Bar 4-1.5(f)(1).
7 R. Reg. Fla. Bar 4-1.5(f)(2).
8 R. Reg. Fla. Bar 4-1.5(f)(4) (B) and 4-1.5(g).
9 §626.8417(3)(a) and (b), F.S. contain the full requirements for licensure.
10 §626.8417, F.S., states: "Title insurers or attorneys duly admitted to practice law in [Florida] and in good standing with The Florida Bar are exempt from the provisions of this chapter **related to title insurance licensing and appointment requirements.**" (Emphasis Added). Note, the exemption only applies to the licensing and appointment requirements, not the Chapter's entirety.
11 Brian Tannebaum, *The Practice* (American Bar Association 2015).
12 *Id.*
13 Defined term in the FAR/BAR Purchase and Sale Contract.
14 Fla. Admin. Code 69B-186.010, interpretation of §626.9541(1)(h)3, F.S.

Back to Speaker Topics

Fund Assembly

Learn to Love the FR/BAR Contracts

Salomé Zikakis, *Shareholder, Parady & Zikakis, P.A.*

Back to Speaker Topics

Speaker Information

Learn to Love the FR/BAR Contracts

Salomé Zikakis,
Shareholder, Parady & Zikakis, P.A.

Salomé J. Zikakis is a Board Certified Real Estate Attorney and a shareholder with Parady & Zikakis, P.A., in Fort Lauderdale, Florida. She was born and raised in Delaware, graduated from the University of Delaware with a B.S. in accounting, and earned her Juris Doctor, with honors, from the University of Florida.

Ms. Zikakis is the chair of the Residential Real Estate and Industry Liaison Committee of the Real Property, Probate and Trust Law Section (RPPTL) of the Florida Bar, a past Chair of the Mortgages and Other Encumbrances Committee of RPPTL, a member of the Executive Council of RPPTL, as well as an active member of several other RPPTL committees. She is a Florida licensed real estate broker and “AV” rated as independently determined by Martindale-Hubbell.

LEARN TO LOVE THE FR/BAR CONTRACTS

Presented by Salome J. Zikakis, Parady & Zikakis, P.A.

Fund Assembly, May 13, 2017

A. WHEN, WHO AND WHY?

a. In 1973, a Joint Accord was entered into between The Florida Bar and the Florida Association of Realtors® (now known as FloridaRealtors®). The statewide Florida Realtor®-Attorney Joint Committee was established and first met that same year.

b. The purpose of the Joint Committee was, among other reasons, to promote cordial relations between the Realtors®/licensed brokers and attorneys, to enhance the relationship between both of the professions and the public, and to promulgate and revise the FR/BAR Contract documents for use by attorneys, Realtors® and consumers to provide for a statewide form to facilitate Florida residential sales transactions. Up until then, there were over 20 different "standard" residential contract forms throughout the State. The Board of Realtors for each town/metropolitan area had its own contract form, and each thought its form was the best.

c. The FR/BAR Contract started as a one-page Deposit Receipt Contract and grew to two-pages with the addition of the Standards to the second page. At the time, the controversy among the Joint Committee members was whether anyone would bother to read past the first page. The current Residential Contract for Sale and Purchase is 13 pages and the "AS-IS" Residential Contract for Sale and Purchase is 12 pages, plus the numerous riders that can be attached as needed to address the most frequently encountered additional scenarios.

d. The FR/BAR Contract forms are the most utilized and well-recognized residential contract forms in Florida. It is the author's opinion that these forms and the Joint Committee merit our continued support. We should not turn back now or we risk that someone else will fill the void and provide an alternative form, and then we (i.e., attorneys) lose our seat at the table. The Joint Committee has to balance the often incongruous needs and wants of Realtors®, attorneys, buyers and sellers in divergent areas throughout Florida. The primary focus in providing these forms is that the contract is for the benefit of the buyer and the seller, not the brokers or the attorneys. Accordingly, these forms attempt to treat the buyer and the seller fairly under the circumstances that may arise throughout the transaction.

B. ARE OTHER RESIDENTIAL CONTRACT FORMS STILL IN VOGUE?

a. FloridaRealtors® continues to maintain its form
   i. Without input from The Florida Bar, it is a pro-broker form
      1. Binding arbitration, but the broker can opt out
      2. FR form provides that the seller and buyer are respectively liable to broker for damages caused by the seller's or buyer's misstatements or failure to perform.
   ii. Time periods are calculated using business days, in contrast to the FR/BAR Contracts that calculate time periods using calendar days
   iii. Some brokers prefer the FR Contract because it is a shorter form (barely 10 pages vs. a solid 12 to 14 pages for the FR/BAR contracts)

b. Naples Area Board of Realtors (NABOR) form
   i. The NABOR Sales Contract (Residential Improved Property) leans in favor of the buyer.
   ii. Time is of the essence only as to the Closing Date. For example, if you represent the seller and the buyer has not timely paid the second deposit, you must provide written notice to the buyer and an opportunity to cure. There is no "time is of the essence" clause to rely upon other than as to the Closing Date.
   iii. Few transactions in the Naples area are "as-is" – buyers want the property free of defects and sellers have grown accustomed to this traditional course of dealing. The inspection clause is broad and there is no cap on the seller's responsibility to remediate or provide a credit. However, the seller can refuse the buyer's request to remediate or to provide a credit, and the buyer can then terminate the contract or proceed with the purchase notwithstanding the defects. This is similar to the negotiations that can occur with the FR/BAR As-Is Contract; however, NABOR has incorporated a particular written procedure with specific time frames into its Contract.
   iv. If there is a financing contingency, the buyer's deposit is not forfeited unless the buyer waives the financing contingency. Even if the buyer provides evidence of loan commitment or loan approval within the stated time period (45 days is the default time frame), this is not considered waiver of the financing contingency. While the deposit is not at risk, the seller has the right to terminate the contract if the buyer has not waived the financing contingency within the stated time frame.
   v. Standard E provides that the seller pays the premium for the owner's title insurance policy if the property is located in Lee County or Charlotte

County, and the buyer selects the closing agent. Standard F provides that the buyer pays the premium for the owner's title insurance policy if the property is located in Collier County, and the buyer selects the closing agent. It is great to be the buyer's closing agent under the NABOR Sales Contract!

vi. A Timeline of Events (see sample attached at the end of the exhibits) provides a nifty guideline for this specific contract form.

c. Northeast Florida Board of Realtors (NEFAR) form

i. According to Dane Leslie, Managing Broker for Watson Realty Corp. and one of several brokers who serves on NEFAR's Form's Committee along with three real estate attorneys, their committee has very spirited conversations about the wording and layout of the NEFAR documents. NEFAR contends that by having their own forms, they can be more reactive to changes in the real estate industry, both from a legislative point as well as unique issues in their local markets. Notwithstanding this viewpoint, the NEFAR Form's Committee members realize that the FR/BAR Contract forms are the standard bearer for residential real estate transactions, and they refer to the FR/BAR Contracts for direction on how to address critical aspects of the NEFAR forms. Features of the NEFAR contract forms that are often cited by NEFAR brokers as preferred over the FR/BAR Contract forms include the following:

1. The check-the-box sections that are grouped together for buyer and seller closing costs, items that may be included with the purchase, and addenda that serve as reminders to their members of matters to address in a format that provides a handy checklist.
2. Reminders/notes to assist the agent in explaining provisions and procedures to their customers. For example, when the deposit is held by one of the brokers, there is the option of requesting an Escrow Disbursement Order from the Florida Division of Real Estate if a dispute develops. There is also the often critical provision that requires the seller's spouse to execute the contract on the sale of homestead property even if the spouse is not on the title to the homestead. Apparently some sellers intentionally omit their spouse from the title to the homestead and react negatively when informed of their spouse's homestead rights. This provision indicates that spousal joinder is a Florida legal requirement rather than just an agent making a quirky demand. This provision, along with two others in the NEFAR form contract that pertain to the NEFAR local market, are as follows:

--Under Florida law, financing of the BUYER's principal residence requires BUYER and BUYER's spouse to sign the mortgage(s). Under Florida law, the sale of a principal residence requires SELLER's spouse to sign the deed even if the spouse's name is not on SELLER's present deed.
--Airport Notice Zones: If the Property is in Noise Zones A, B and/or an Airport Notice Zone, BUYER and SELLER agree to comply with the City of Jacksonville Ordinance Code Section 656.1010.
--Historic Districts: BUYER is advised to verify with appropriate government agencies whether the Property is in an historic district; if so, the Property is subject to additional guidelines and restrictions. See Historic District Disclosure for further information.-

ii. Dane indicated that brokers and agents prefer to utilize a document that they are comfortable presenting to their customers, and the NEFAR Purchase and Sales Agreement accomplishes that goal in their market. However, familiarity with the FR/BAR forms is critical for the NEFAR agents because the FR/BAR Contracts are often presented by other agents on the NEFAR agent's listings. The NEFAR offers classes to their agents on the FR/BAR Contracts as an acknowledgment of the pervasive use of the forms. It is the author's opinion that perhaps NEFAR should consider adopting the FR/BAR Contracts as NEFAR's preferred forms and offer a local addendum to the FR/BAR Contract forms to incorporate their local issues and concerns.

d. The Tallahassee Board of Realtors elected in 2016 to switch from its own form to the FR/BAR Contract forms for 2017. However, implementation has been delayed to allow for education of the Realtors on usage of the forms.

C. WHAT ARE THE FR/BAR CONTRACT FORMS? (see attached as exhibits to this Outline)

a. The **two Contract forms** are as follows:

--Residential Contract for Sale and Purchase – Rev 2017 (hereinafter the "**Standard Contract**")

--"AS-IS" Residential Contract for Sale and Purchase – Rev 2017 (hereinafter the "**As-Is Contract**")

b. The **Riders**, which counsel should use as a guideline and revise based on the particular circumstances and depending upon who you represent, are as follows:

- Comprehensive Rider (includes all 27 Riders from A through BB, but is not included with your materials; instead, each of the 27 individual Riders is included since it is rare that you would want all 27 Riders in one transaction)

- Appraisal Contingency Rider F (Rev 09/15)

- As Is Rider K (Rev 09/15)

- Assumption of Existing Mortgages Rider D (Rev 09/15)

- Back-Up Contract Rider W (Rev 09/15)

- Binding Arbitration Rider BB (Rev 09/15)

- Buyers Attorney Approval Rider Z (Rev 09/15)

- Coastal Construction Control Line Rider N (Rev 09/15)

- Condominium Association Disclosure Rider A (Rev 09/15)

- Defective Drywall Rider M (Rev 09/15)

- FHA/VA Rider E (Rev 09/15)

- Homeowner's/Flood Insurance Contingency Rider H (Rev 09/15)

- Homeowners Association/Community Disclosure Rider B (Rev 09/15)

- Housing for Older Persons Rider Q (Rev 09/15)

- Insulation Disclosure for New Residence Rider O (Rev 09/15)

- Interest-Bearing Account Rider J (Rev 09/15)

- Kick Out Clause Rider X (Rev 09/15)

- Lead-Based Paint Disclosure Rider P (Rev 09/15)

- Lease Purchase/Lease Option Rider S (Rev 09/15)

- Licensee Disclosure of Personal Interest in Property Rider AA (Rev 09/15)

- Post-Closing Occupancy by Seller Rider U (Rev 09/15)

- Pre-Closing Occupancy by Buyer Rider T (Rev 09/15)

- Rezoning Contingency Rider R (Rev 09/15)

- Right to Inspect and Right to Cancel Rider L (Rev 09/15)

- Sale of Buyers Property Rider V (Rev 09/15)

- Seller Financing Rider C (Rev 09/15)

- Sellers Attorney Approval Rider Y (Rev 09/15)

- Short Sale Approval Contingency Rider G (Rev 09/15)

D. HOW DO I MAKE THE FR/BAR CONTRACT FORMS BETTER FOR MY CLIENT (or at least focus on the typical critical aspects that will impact my client throughout the process)?

a. I REPRESENT A BUYER WITH A FINANCING CONTINGENCY:

If Buyer's obligations under the contract are contingent upon Financing (i.e., subparagraph 8.(b) has been selected), the 2017 version of the Contracts are significantly revised. The term "Loan Commitment", which was not particularly well defined, has been replaced by the term "Loan Approval", which is also not particularly well defined other than stating that Loan Approval is when Buyer has used good faith and diligent effort to obtain approval of a loan meeting the Financing terms. The Joint Committee has struggled to define these terms because a necessary party to that definition (i.e., the lender) is not a party to the Contract and there is no one-size-fits-all definition to the term "Loan Approval". This is dangerous for Buyer because the typical Loan Approval will have contingencies, but would still be considered Loan Approval for purposes of satisfying the Financing contingency and placing the Deposit at risk. It is clearly stated, however, that a Loan Approval that is contingent upon Buyer selling an unrelated property is not deemed Loan Approval for purposes of the subparagraph.

Buyer must use "diligent effort" to obtain Loan Approval, which includes, but is not limited to, timely furnishing all documents and information and paying all fees and charges requested by Buyer's mortgage broker and lender. This is a fair requirement and you, as counsel, should inform your client of this obligation from the start of your representation, and inquire as to the extent of your client's diligent efforts at least weekly (email is easy and efficient, though include consent to receiving electronic communication in your representation agreement). Intriguing additions to the Contract are Buyer's obligation to keep Seller and Broker fully informed about the status of Buyer's mortgage loan application, Loan Approval, and loan processing and, further, Buyer specifically authorizing Buyer's mortgage broker, lender, and Closing Agent to disclose such status and progress, and to release preliminary and finally-executed closing disclosures and settlement statements, to Seller and Broker. How does this conflict with the intent of federal privacy laws? Notwithstanding the apparent authorization from Buyer in the FR/BAR Contract, if you are the Closing Agent, I suggest taking the conservative approach and continue to prepare and provide

the ALTA Settlement Statement to Seller and Broker rather than providing Buyer's closing disclosure to anyone other than Buyer and Buyer's lender.

Buyer must promptly deliver written notice to Seller when Buyer obtains Loan Approval. The Contract does not require Loan Approval to be in writing, though it takes a financially confident Buyer to risk the Deposit on a verbal Loan Approval. The default time period to obtain Loan Approval has been reduced to 30 days in the 2017 version of the Contract, from 45 days in the prior Contract version. It was determined that lenders did not need as much time as was previously anticipated to have loans approved under the new CFPB requirements, so this provision was updated to reflect that reality. If your client has a particularly challenging financial situation and more time is needed, either revise the time frame in the original offer or be prepared to ask Seller for more time in advance of the expiration of the Loan Approval Period. As a professional courtesy, try not to wait until the last day of the Loan Approval Period to make the extension request. If you have been communicating frequently with your client, you should be well aware of the loan's status and Seller will be more inclined to accept an extension of the Loan Approval Period if not blindsided at the last minute.

What if Buyer is fairly certain that Loan Approval will not occur during the Loan Approval Period or any written and signed extension thereof, and Buyer wants to terminate and receive the refund of the Deposit? Buyer (or you as Buyer's counsel) must provide written notice to Seller, BEFORE the expiration of the Loan Approval Period, stating that Buyer has been unable to obtain Loan Approval and has elected to terminate the Contract and receive the refund of the Deposit. Failure to provide this notice places the Deposit at risk. Buyer is not permitted to terminate the Contract after the Loan Approval Period has expired.

What if Buyer is fairly certain that Loan Approval will not occur during the Loan Approval Period or any written and signed extension thereof, but Buyer really wants to purchase the Property, feels fairly confident that the Financing will be approved in time for Closing, has sufficient cash to buy the Property if the Financing is not approved, or otherwise wants to proceed with the purchase? In a significant change from the prior FR/BAR Contract, Buyer cannot stay silent and expect to stay in the Contract. Buyer (or you as Buyer's counsel) must take the affirmative action of providing written notice to Seller stating that Buyer is waiving Loan Approval.

WARNING: If Buyer does not provide to Seller written notice of Loan Approval, or written notice that Buyer has waived Loan Approval, then even though the Contract deems that Loan Approval has been waived, **Seller has the option to terminate the Contract at any time within three days from the expiration of**

the Loan Approval Period. Why would any Seller want to terminate a Contract when the Contract otherwise deems the Loan Approval contingency as waived? A few reasons could include that (i) Seller received an all cash offer with no contingencies, which offer Seller prefers to accept, (ii) Buyer's Deposit is so small that the Deposit would not sufficiently compensate Seller for waiting and risking Buyer's subsequent default (due to failure to actually close with the Financing or otherwise), or (iii) Seller has a more attractive or solid back-up contract. Even if Buyer obtains Loan Approval during the three days after the expiration of the Loan Approval Period, Seller still has the right to terminate the Contract pursuant to the 2017 Contracts.

b. I REPRESENT A SELLER WHOSE BEST OFFER INCLUDES A FINANCING CONTINGENCY:

If your Seller client is unable to obtain a satisfactory offer with subparagraph 8(a) selected, then Seller needs to limit the time period that the Property is off the market and that Seller is missing other opportunities while waiting for Loan Approval. If Buyer has a particularly diligent lender and can commit to a shorter time frame than the default time period of 30 days, then insert a shorter time frame into the blank on subparagraph 8(b). If Buyer agrees and thereafter, prior to the expiration of the Loan Approval Period, Buyer asks for an extension, Seller can agree if there is no better offer, or can disagree and exercise Seller's right to terminate the Contract and move on to a presumably better deal.

Since obtaining a satisfactory appraisal is typically an integral aspect of Loan Approval, and this is an aspect that can be somewhat controlled from a timing standpoint, **insert a provision into Paragraph 20** similar to the following: ***Buyer's right to terminate the Contract based upon dissatisfaction with the appraisal of the Property shall terminate within fifteen (15) days of the Effective Date.*** You may need to revise the time frame depending on the lender's reality, but the point is to encourage Buyer and the lender to resolve this issue early in the process. The goal for Seller is to remove as many contingencies as possible as soon as possible.

Unfortunately for Seller, the FR/BAR Contracts provide a few scenarios under which Buyer can still be refunded the Deposit even if Loan Approval has been obtained or deemed to be obtained. Subparagraph 8(b)(vii) used to contain four additional contingencies, but has been revised in the 2017 Contracts to just three additional contingencies. If you represent Seller, you should attempt to remove clause (3) pertaining to the appraisal of the Property being insufficient to meet the terms of the Loan Approval. You may have to educate Buyer's counsel and/or realtor that this is not tantamount to eliminating the appraisal contingency. Rather, removal of this clause encourages the appraisal to be

completed prior to Loan Approval and transfers the risk to Buyer in the event Buyer's lender elects to obtain an additional appraisal after Loan Approval. If clause (3) has been crossed out and the lender obtains an additional unsatisfactory appraisal after Loan Approval, then Buyer would not be entitled to the refund of the Deposit based on the additional unsatisfactory appraisal. If clause (3) is not crossed out, then Buyer receives the refund of the Deposit if an unsatisfactory appraisal is obtained after Loan Approval.

c. AMOUNT OF AND TIMING FOR THE DEPOSIT:

For purposes of the As-Is Contract, Buyer can be refunded the Deposit if Buyer properly exercises Buyer's right to terminate the Contract prior to the expiration of the Inspection Period. Accordingly, absent unusual circumstances, neither Buyer nor Seller should be troubled by a small initial Deposit. If Buyer does not properly terminate the Contract based on subparagraph 12(a), then an additional Deposit should be made and stated in subparagraph 2(b). Buyer will want to limit this amount, yet make it strong enough to show Seller that Buyer is serious and is willing to place meaningful money at risk. Seller, on the other hand, wants a total Deposit of 10% or more (obviously a lesser amount if Financing exceeds 90% loan to value) such that if Buyer defaults, Seller will be somewhat compensated for Seller's expenses made in reliance upon Buyer performing pursuant to the Contract.

As for the Standard Contract, if General Repair, WDO Repair, and Permit Limits are not exceeded, or if Seller is accepting responsibility even if those limits are exceeded, then Buyer does not have an absolute "out" of the Contract and Seller should want the initial Deposit to be significant, or for a significant additional Deposit to be made within ten (10) days of the Effective Date.

For both Contract forms, if you represent Seller, cross out the last sentence of subparagraph 15(a) as it seems unjust for Cooperating Broker to obtain compensation for Buyer's default and potentially refund to Buyer the sum received by Cooperating Broker.

d. FORCE MAJEURE AND CLOSING DATE EXTENSION:

The 2017 Contracts simplify and amend subparagraph 5(b) and Standard G. A material change in the time periods is reflected in the following clause from Standard G: ***All time periods, including Closing Date, will be extended a reasonable time up to seven (7) days after the Force Majeure no longer prevents performance under this Contract, provided, however, if such Force Majeure continues to prevent performance under this Contract more than thirty (30) days beyond Closing Date, then either party may terminate this Contract by delivering written notice to the other and the Deposit shall be***

refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract. If you represent a Seller who is counting on the Closing being on the Closing Date, you need to inform Seller of these provisions, especially if it is hurricane season. These clauses are beneficial to you as well if you are the Closing Agent in that you are afforded time for your office to resume normal functioning (or to secure alternative arrangements for Closing if your office blew away). As we approach another hurricane season, this would be a good time to review your disaster preparedness plans.

e. INSPECTIONS, PERMITS AND MUNICIPAL LIEN SEARCH:

The As-Is Contract places no burden on Seller to remediate improvements constructed without required permits, or to close open or expired permits. However, if Seller has knowledge of improvements made without required permits, or knowledge of open or expired permits, then Seller must disclose. Subparagraph 10(b) has been revised to add the following: ***If Seller identifies permits which have not been properly closed or improvements which were not permitted, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open permits or unpermitted improvements.*** A similar clause has been added to subparagraph 12(d)(i) of the Standard Contract.

In contrast to Paragraph 12 of the As-Is Contract, Paragraph 12 of the Standard Contract places a considerable burden on Seller, but offers the benefit to Seller of controlling whether the transaction will terminate or proceed based upon the physical condition of the Property. If Seller prefers not to be bothered with repairs, then Seller should insist on the As-Is Contract form. If Seller is willing to remediate up to the General Repair Limit, WDO Repair Limit, and/or Permit Limit and is more interested in removing Buyer's ability to terminate the Contract based upon inspections, then the Standard Contract would be preferable for such a Seller.

When representing a Buyer pursuant to the As-Is Contract, to avoid the timing dilemma of not incurring the expense of ordering the municipal lien and permit search until Buyer is otherwise satisfied with inspections during the Inspection Period, or if the Inspection Period is short and the results of the municipal lien and permit search will not be available prior to the expiration of the Inspection Period, **add to Paragraph 20** the following clause: ***Seller, at Seller's expense, shall close any open or expired permits or code enforcement matters prior to Closing.*** If you represent Seller and are presented with such a clause, ask Seller if any open or expired permits or code enforcement matters exist. If this information is available online at no cost, look it up prior to allowing Seller to

execute a Contract with this clause. If the information is only available by paying a fee to the municipality or a third party search company, Seller should obtain this information in advance to be aware of potential unanticipated expenditures when executing a contract with such a clause. If the Standard Contract is being used, Seller is responsible for any such matters up to the Permit Limit.

A definition of "municipal lien search" has been added to subparagraph 9(c) of both 2017 Contract forms, as follows: ***For purposes of this Contract "municipal lien search" means a search of records necessary for the owner's policy of title insurance to be issued without exception for unrecorded liens imposed pursuant to Chapters 159 or 170, F.S. in favor of any governmental body, authority or agency.*** From a title standpoint, open or expired permits are not, in and of themselves, a title defect. However, from a due diligence standpoint, Buyer needs to be aware of these matters and either accept responsibility for them, or allocate responsibility as suggested in the prior paragraph, or terminate the Contract within the Inspection Period (if an As-Is Contract). In certain parts of Florida, it has not become common practice to obtain a municipal lien search or a municipal lien and permit search. However, in South Florida and various other areas of Florida, it is the standard course of practice for the Closing Agent to order a municipal lien and permit search. The definition offered by the Contract does not prohibit the ordering of permit, code enforcement and other information, but could create a different allocation between Buyer and Seller of the cost of these additional items. For example, if the municipal lien search costs $150 and there is an additional $30 fee for the permit search, Seller may be paying $150 for the municipal lien search and Buyer paying $30 for the permit search.

f. SELLER DISCLOSURE:

Subparagraph 10(j) of the 2017 Standard Contract was revised and includes a new second sentence pertaining to violations. The subparagraph is as follows: ***SELLER DISCLOSURE: Seller knows of no facts materially affecting the value of the Real Property which are not readily observable and which have not been disclosed to Buyer. Except as otherwise disclosed in writing Seller has received no written or verbal notice from any governmental entity or agency as to a currently uncorrected building, environmental or safety code violation.***

Subparagraph 10(j) of the As-Is Contract already included the sentence added to the above clause for the Standard Contract. As should be expected based upon the title of the Contract form, the subparagraph includes an additional sentence that is significantly different from the Standard Contract. Subparagraph 10(j) of the As-Is Contract is as follows: ***SELLER DISCLOSURE: Seller knows of no facts materially affecting the value of the Real Property which are not readily***

observable and which have not been disclosed to Buyer. Except as provided for in the preceding sentence, Seller extends and intends no warranty and makes no representation of any type, either express or implied, as to the physical condition or history of the Property. Except as otherwise disclosed in writing Seller has received no written or verbal notice from any governmental entity or agency as to a currently uncorrected building, environmental or safety code violation.

Other than the unavoidable disclosures necessitated by *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985), and its progeny, the As-Is Contract offers the fewest traps for Seller. From Buyer's perspective, the free-look and ability to terminate are attractive if Buyer is considering more than one property or decides during the Inspection Period that the Property is not as ideal as it initially appeared. However, Buyer's due diligence needs to be thorough to avoid the money pit.

g. FINCEN GTO NOTICE:

Standard I(iii) has been added to both 2017 Contracts as follows: ***FinCEN GTO NOTICE. If Closing Agent is required to comply with the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") Geographic Targeting Orders ("GTOs"), then Buyer shall provide Closing Agent with the information related to Buyer and the transaction contemplated by this Contract that is required to complete IRS Form 8300, and Buyer consents to Closing Agent's collection and report of said information to IRS.*** The addition of this clause to the Contracts addresses the concern that a foreign Buyer could refuse to provide the detailed information required for the Closing Agent to comply with the FinCEN GTO. This would place the Closing Agent in the untenable position of either having to close and violate federal law (i.e., by not providing complete reporting information to the IRS) or having to withdraw as Closing Agent so as not to violate federal law.

h. NOTICE, DELIVERY AND E-SIGNATURES:

Standard O is not new to the 2017 Contracts, yet it bears mentioning as providing contractual authority for many practices that have become routine as technology has advanced. This paragraph contains the following practical clauses that permit, among other things, the electronic delivery of notice and electronic signatures, as follows: ***Notice and delivery given by or to the attorney or broker (including such broker's real estate licensee) representing any party shall be as effective as if given by or to that party. All notices must be in writing and may be made by mail, personal delivery or electronic (including "pdf") media. A facsimile or electronic (including "pdf") copy of this Contract and any signatures hereon shall be considered for all purposes as an original. This***

Contract may be executed by use of electronic signatures, as determined by Florida's Electronic Signature Act and other applicable laws.

i. ATTEMPTS TO REDUCE COMMISSION MAY NOT BE BINDING:

On the last page of both Contract forms is an unnumbered paragraph entitled "BROKER". This paragraph provides direction to the Closing Agent to disburse the commission to the named Broker ***as specified in separate brokerage agreements,*** and also includes the following sentence: ***This Contract shall not modify any MLS or other offer of compensation made by Seller or Listing Broker to Cooperating Brokers.*** Brokers occasionally agree to a reduced commission as an enticement to Seller to accept an offer. Since the Contract does not govern the commission or compensation to Broker but, instead, such commission or compensation is governed by separate brokerage agreements, the addition of a clause to the Contract wherein the Broker agrees to accept a reduced commission would not be binding on the Broker since the Broker is not executing the Contract. Seller would have more leverage if the clause was added as a contingency, such as "**Seller's obligations under this Contract are contingent upon Listing Broker and Cooperating Broker each accepting a reduced commission of 2% of the Purchase Price, for total compensation to Brokers of 4% of the Purchase Price.**" Seller needs to obtain a separate written confirmation signed by the Broker as to any modification of the Listing Agreement or MLS offer of compensation.

E. **DID YOU KNOW THIS ABOUT THE CONTRACT RIDERS?**

a. Seller Financing Rider: This Rider was created in response to the Dodd Frank Wall Street Reform and Consumer Protection Act's financing provisions and limitations imposed in 2014. Guidelines are provided for seller financing terms that comply with the Dodd Frank regulations to the extent promulgated. Deviation from these limited scenarios is not recommended unless you wish to be the court test case.

b. Homeowners Association/Community Disclosure Rider: This document is being revised and is likely to more closely resemble the format of the Condominium Association Disclosure Rider, as well as to provide for disclosures pertaining to multiple homeowner associations (if applicable) and to address other matters that merit disclosure when purchasing property governed by a homeowner's association. Expect the revised rider later this year.

c. Federal Housing Administration (FHA)/U.S. Department of Veterans Affairs (VA) Rider: If you represent Seller and Seller wants to accept an offer that contains this

contingency, insert "0" in the blank for Paragraph 2. If FHA, insert "0" in the blank for subparagraph 3(a). If VA, **cross out** this clause from subparagraph 4(a): ***Seller shall pay for the WDO inspection and tax service, underwriting, and document preparation fees required by the lender, and for recording fees for assigning Purchaser's mortgage.*** If Buyer insists on keeping this clause or the lender insists that Seller must pay these expenses, inform your Seller client of the estimated financial obligation so that Seller can make the business decision as to whether to accept the offer.

d. Licensee Disclosure of Personal Interest in Property Rider: If either Buyer or Seller has an active or inactive real estate license, this must be disclosed. The rider can be used, or the disclosure can be made on Paragraph 20 of the Contract.

e. Post-Closing Occupancy by Seller: If you represent Buyer, and Seller will not agree to sell the Property unless Seller has the right to retain possession after Closing, you should want any such possession to be considered a tenancy under Chapter 83, Florida Statutes. Further, you should specifically state that Buyer, as landlord, will be entitled to summary proceedings in the event of default of the lease by Seller, as tenant.

Residential Contract For Sale And Purchase

THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR

PARTIES: _____ ("Seller"), and _____ ("Buyer"), agree that Seller shall sell and Buyer shall buy the following described Real Property and Personal Property (collectively "Property") pursuant to the terms and conditions of this Residential Contract For Sale And Purchase and any riders and addenda ("Contract"):

1. PROPERTY DESCRIPTION:

(a) Street address, city, zip: _____

(b) Located in: _____ County, Florida. Property Tax ID #: _____

(c) Real Property: The legal description is _____

_____

_____

together with all existing improvements and fixtures, including built-in appliances, built-in furnishings and attached wall-to-wall carpeting and flooring ("Real Property") unless specifically excluded in Paragraph 1(e) or by other terms of this Contract.

(d) Personal Property: Unless excluded in Paragraph 1(e) or by other terms of this Contract, the following items which are owned by Seller and existing on the Property as of the date of the initial offer are included in the purchase: range(s)/oven(s), refrigerator(s), dishwasher(s), disposal, ceiling fan(s), intercom, light fixture(s), drapery rods and draperies, blinds, window treatments, smoke detector(s), garage door opener(s), security gate and other access devices, and storm shutters/panels ("Personal Property").

Other Personal Property items included in this purchase are: _____

_____

Personal Property is included in the Purchase Price, has no contributory value, and shall be left for the Buyer.

(e) The following items are excluded from the purchase: _____

_____

PURCHASE PRICE AND CLOSING

2. PURCHASE PRICE (U.S. currency): ..... **$** _____

(a) Initial deposit to be held in escrow in the amount of **(checks subject to COLLECTION)** .....$ _____
The initial deposit made payable and delivered to "Escrow Agent" named below
(CHECK ONE): (i) ☐ accompanies offer or (ii) ☐ is to be made within _____ (if left blank, then 3) days after Effective Date. IF NEITHER BOX IS CHECKED, THEN OPTION (ii) SHALL BE DEEMED SELECTED.
Escrow Agent Information: Name: _____
Address: _____
Phone: _____ E-mail: _____ Fax: _____

(b) Additional deposit to be delivered to Escrow Agent within _____ (if left blank, then 10) days after Effective Date ..... $ _____
(All deposits paid or agreed to be paid, are collectively referred to as the "Deposit")

(c) Financing: Express as a dollar amount or percentage ("Loan Amount") see Paragraph 8..... _____

(d) Other: _____ ..... $ _____

(e) Balance to close (not including Buyer's closing costs, prepaids and prorations) by wire transfer or other **COLLECTED** funds ..... $ _____
NOTE: For the definition of "COLLECTION" or "COLLECTED" see STANDARD S.

3. TIME FOR ACCEPTANCE OF OFFER AND COUNTER-OFFERS; EFFECTIVE DATE:

(a) If not signed by Buyer and Seller, and an executed copy delivered to all parties on or before _____, this offer shall be deemed withdrawn and the Deposit, if any, shall be returned to Buyer. Unless otherwise stated, time for acceptance of any counter-offers shall be within 2 days after the day the counter-offer is delivered.

(b) The effective date of this Contract shall be the date when the last one of the Buyer and Seller has signed or initialed and delivered this offer or final counter-offer ("Effective Date").

4. CLOSING DATE: Unless modified by other provisions of this Contract, the closing of this transaction shall occur and the closing documents required to be furnished by each party pursuant to this Contract shall be delivered ("Closing") on _____ ("Closing Date"), at the time established by the Closing Agent.

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5. EXTENSION OF CLOSING DATE:

(a) If Paragraph 8(b) is checked and Closing funds from Buyer's lender(s) are not available on Closing Date due to Consumer Financial Protection Bureau Closing Disclosure delivery requirements ("CFPB Requirements"), then Closing Date shall be extended for such period necessary to satisfy CFPB Requirements, provided such period shall not exceed 10 days.

(b) If an event constituting "Force Majeure" causes services essential for Closing to be unavailable, including the unavailability of utilities or issuance of hazard, wind, flood or homeowners' insurance, Closing Date shall be extended as provided in STANDARD G.

6. OCCUPANCY AND POSSESSION:

(a) Unless the box in Paragraph 6(b) is checked, Seller shall, at Closing, deliver occupancy and possession of the Property to Buyer free of tenants, occupants and future tenancies. Also, at Closing, Seller shall have removed all personal items and trash from the Property and shall deliver all keys, garage door openers, access devices and codes, as applicable, to Buyer. If occupancy is to be delivered before Closing, Buyer assumes all risks of loss to the Property from date of occupancy, shall be responsible and liable for maintenance from that date, and shall be deemed to have accepted the Property in its existing condition as of time of taking occupancy, except with respect to any items identified by Buyer pursuant to Paragraph 12, prior to taking occupancy, which require repair, replacement, treatment or remedy.

(b) ☐ **CHECK IF PROPERTY IS SUBJECT TO LEASE(S) OR OCCUPANCY AFTER CLOSING**. If Property is subject to a lease(s) after Closing or is intended to be rented or occupied by third parties beyond Closing, the facts and terms thereof shall be disclosed in writing by Seller to Buyer and copies of the written lease(s) shall be delivered to Buyer, all within 5 days after Effective Date. If Buyer determines, in Buyer's sole discretion, that the lease(s) or terms of occupancy are not acceptable to Buyer, Buyer may terminate this Contract by delivery of written notice of such election to Seller within 5 days after receipt of the above items from Seller, and Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract. Estoppel Letter(s) and Seller's affidavit shall be provided pursuant to STANDARD D. If Property is intended to be occupied by Seller after Closing, see Rider U. POST-CLOSING OCCUPANCY BY SELLER.

7. ASSIGNABILITY: (**CHECK ONE):** Buyer ☐ may assign and thereby be released from any further liability under this Contract; ☐ may assign but not be released from liability under this Contract; or ☐ may not assign this Contract.

FINANCING

8. FINANCING:

☐ (a) Buyer will pay cash for the purchase of the Property at Closing. There is no financing contingency to Buyer's obligation to close. If Buyer obtains a loan for any part of the Purchase Price of the Property, Buyer acknowledges that any terms and conditions imposed by Buyer's lender(s) or by CFPB Requirements shall not affect or extend the Buyer's obligation to close or otherwise affect any terms or conditions of this Contract.

☐ (b) This Contract is contingent upon Buyer obtaining approval of a ☐ conventional ☐ FHA ☐ VA or ☐ other _____ (describe) loan within _____ (if left blank, then 30) days after Effective Date ("Loan Approval Period") for **(CHECK ONE):** ☐ fixed, ☐ adjustable, ☐ fixed or adjustable rate in the Loan Amount (See Paragraph 2(c)), at an initial interest rate not to exceed _____ % (if left blank, then prevailing rate based upon Buyer's creditworthiness), and for a term of _____(if left blank, then 30) years ("Financing").

(i) Buyer shall make mortgage loan application for the Financing within _____ (if left blank, then 5) days after Effective Date and use good faith and diligent effort to obtain approval of a loan meeting the Financing terms ("Loan Approval") and thereafter to close this Contract. Loan Approval which requires a condition related to the sale by Buyer of other property shall not be deemed Loan Approval for purposes of this subparagraph.

Buyer's failure to use diligent effort to obtain Loan Approval during the Loan Approval Period shall be considered a default under the terms of this Contract. For purposes of this provision, "diligent effort" includes, but is not limited to, timely furnishing all documents and information and paying of all fees and charges requested by Buyer's mortgage broker and lender in connection with Buyer's mortgage loan application.

(ii) Buyer shall keep Seller and Broker fully informed about the status of Buyer's mortgage loan application, Loan Approval, and loan processing and authorizes Buyer's mortgage broker, lender, and Closing Agent to disclose such status and progress, and release preliminary and finally executed closing disclosures and settlement statements, to Seller and Broker.

(iii) Upon Buyer obtaining Loan Approval, Buyer shall promptly deliver written notice of such approval to Seller.

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(iv) If Buyer is unable to obtain Loan Approval after the exercise of diligent effort, then at any time prior to expiration of the Loan Approval Period, Buyer may provide written notice to Seller stating that Buyer has been unable to obtain Loan Approval and has elected to either:

(1) waive Loan Approval, in which event this Contract will continue as if Loan Approval had been obtained; or

(2) terminate this Contract.

(v) If Buyer fails to timely deliver either notice provided in Paragraph 8(b)(iii) or (iv), above, to Seller prior to expiration of the Loan Approval Period, then Loan Approval shall be deemed waived, in which event this Contract will continue as if Loan Approval had been obtained, provided however, Seller may elect to terminate this Contract by delivering written notice to Buyer within 3 days after expiration of the Loan Approval Period.

(vi) If this Contract is timely terminated as provided by Paragraph 8(b)(iv)(2) or (v), above, and Buyer is not in default under the terms of this Contract, Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract.

(vii) If Loan Approval has been obtained, or deemed to have been obtained, as provided above, and Buyer fails to close this Contract, then the Deposit shall be paid to Seller unless failure to close is due to: (1) Seller's default or inability to satisfy other contingencies of this Contract; (2) Property related conditions of the Loan Approval have not been met (except when such conditions are waived by other provisions of this Contract); or (3) appraisal of the Property obtained by Buyer's lender is insufficient to meet terms of the Loan Approval, in which event(s) the Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

* ☐ (c) Assumption of existing mortgage (see rider for terms).

* ☐ (d) Purchase money note and mortgage to Seller (see riders; addenda; or special clauses for terms).

CLOSING COSTS, FEES AND CHARGES

9. CLOSING COSTS; TITLE INSURANCE; SURVEY; HOME WARRANTY; SPECIAL ASSESSMENTS:

(a) **COSTS TO BE PAID BY SELLER:**

- Documentary stamp taxes and surtax on deed, if any
- Owner's Policy and Charges (if Paragraph 9(c)(i) is checked)
- Title search charges (if Paragraph 9(c)(iii) is checked)
- Municipal lien search (if Paragraph 9(c)(i) or (iii) is checked)
- HOA/Condominium Association estoppel fees
- Recording and other fees needed to cure title
- Seller's attorneys' fees
- Other:_____

Seller shall pay the following amounts/percentages of the Purchase Price for the following costs and expenses:

* (i) up to $ _____ or _____ % (1.5% if left blank) for General Repair Items ("General Repair Limit"); and

* (ii) up to $ _____ or _____ % (1.5% if left blank) for WDO treatment and repairs ("WDO Repair Limit"); and

* (iii) up to $ _____ or _____ % (1.5% if left blank) for costs associated with closing out open or expired building permits and obtaining required building permits for any existing improvement for which a permit was not obtained ("Permit Limit").

If, prior to Closing, Seller is unable to meet the Maintenance Requirement as required by Paragraph 11 or the repairs, replacements, treatments or permitting as required by Paragraph 12 then, sums equal to 125% of estimated costs to complete the applicable item(s) (but not in excess of applicable General Repair, WDO Repair, and Permit Limits set forth above, if any) shall be escrowed at Closing. If actual costs of required repairs, replacements, treatment or permitting exceed applicable escrowed amounts, Seller shall pay such actual costs (but not in excess of applicable General Repair, WDO Repair, and Permit Limits set forth above). Any unused portion of escrowed amount(s) shall be returned to Seller.

(b) **COSTS TO BE PAID BY BUYER:**

- Taxes and recording fees on notes and mortgages
- Recording fees for deed and financing statements
- Owner's Policy and Charges (if Paragraph 9(c)(ii) is checked)
- Survey (and elevation certification, if required)
- Lender's title policy and endorsements
- HOA/Condominium Association application/transfer fees
- Municipal lien search (if Paragraph 9(c)(ii) is checked)
- Loan expenses
- Appraisal fees
- Buyer's Inspections
- Buyer's attorneys' fees
- All property related insurance
- Owner's Policy Premium (if Paragraph 9 (c)(iii) is checked.)

* • Other:_____

* (c) **TITLE EVIDENCE AND INSURANCE:** At least _____ (if left blank, then 15, or if Paragraph 8(a) is checked, then 5) days prior to Closing Date ("Title Evidence Deadline"), a title insurance commitment issued by a Florida licensed title insurer, with legible copies of instruments listed as exceptions attached thereto ("Title Commitment") and, after Closing, an owner's policy of title insurance (see STANDARD A for terms) shall be

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obtained and delivered to Buyer. If Seller has an owner's policy of title insurance covering the Real Property, a copy shall be furnished to Buyer and Closing Agent within 5 days after Effective Date. The owner's title policy premium, title search and closing services (collectively, "Owner's Policy and Charges") shall be paid, as set forth below. The title insurance premium charges for the owner's policy and any lender's policy will be calculated and allocated in accordance with Florida law, but may be reported differently on certain federally mandated closing disclosures and other closing documents. For purposes of this Contract "municipal lien search" means a search of records necessary for the owner's policy of title insurance to be issued without exception for unrecorded liens imposed pursuant to Chapters 159 or 170, F.S., in favor of any governmental body, authority or agency.

(**CHECK ONE):**

* ☐ (i) Seller shall designate Closing Agent and pay for Owner's Policy and Charges, and Buyer shall pay the premium for Buyer's lender's policy and charges for closing services related to the lender's policy, endorsements and loan closing, which amounts shall be paid by Buyer to Closing Agent or such other provider(s) as Buyer may select; or

* ☐ (ii) Buyer shall designate Closing Agent and pay for Owner's Policy and Charges and charges for closing services related to Buyer's lender's policy, endorsements and loan closing; or

* ☐ (iii) [**MIAMI-DADE/BROWARD REGIONAL PROVISION**]**:** Seller shall furnish a copy of a prior owner's policy of title insurance or other evidence of title and pay fees for: (A) a continuation or update of such title evidence, which is acceptable to Buyer's title insurance underwriter for reissue of coverage; (B) tax search; and (C) municipal lien search. Buyer shall obtain and pay for post-Closing continuation and premium for Buyer's owner's policy, and if applicable, Buyer's lender's policy. Seller shall not be obligated to pay more than $_____ (if left blank, then $200.00) for abstract continuation or title search ordered or performed by Closing Agent.

(d) **SURVEY:** On or before Title Evidence Deadline, Buyer may, at Buyer's expense, have the Real Property surveyed and certified by a registered Florida surveyor ("Survey"). If Seller has a survey covering the Real Property, a copy shall be furnished to Buyer and Closing Agent within 5 days after Effective Date.

* (e) **HOME WARRANTY:** At Closing, ☐ Buyer ☐ Seller ☐ N/A shall pay for a home warranty plan issued by _____ at a cost not to exceed $_____. A home warranty plan provides for repair or replacement of many of a home's mechanical systems and major built-in appliances in the event of breakdown due to normal wear and tear during the agreement's warranty period.

(f) **SPECIAL ASSESSMENTS:** At Closing, Seller shall pay: (i) the full amount of liens imposed by a public body ("public body" does not include a Condominium or Homeowner's Association) that are certified, confirmed and ratified before Closing; and (ii) the amount of the public body's most recent estimate or assessment for an improvement which is substantially complete as of Effective Date, but that has not resulted in a lien being imposed on the Property before Closing. Buyer shall pay all other assessments. If special assessments may be paid in installments **(CHECK ONE):**

* ☐ (a) Seller shall pay installments due prior to Closing and Buyer shall pay installments due after Closing. Installments prepaid or due for the year of Closing shall be prorated.

* ☐ (b) Seller shall pay the assessment(s) in full prior to or at the time of Closing.

IF NEITHER BOX IS CHECKED, THEN OPTION (a) SHALL BE DEEMED SELECTED.

This Paragraph 9(f) shall not apply to a special benefit tax lien imposed by a community development district (CDD) pursuant to Chapter 190, F.S., which lien shall be prorated pursuant to STANDARD K.

DISCLOSURES

10. DISCLOSURES:

(a) **RADON GAS:** Radon is a naturally occurring radioactive gas that, when it is accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county health department.

(b) **PERMITS DISCLOSURE:** Except as may have been disclosed by Seller to Buyer in a written disclosure, Seller does not know of any improvements made to the Property which were made without required permits or made pursuant to permits which have not been properly closed. If Seller identifies permits which have not been properly closed or improvements which were not permitted, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open permits or unpermitted improvements.

(c) **MOLD:** Mold is naturally occurring and may cause health risks or damage to property. If Buyer is concerned or desires additional information regarding mold, Buyer should contact an appropriate professional.

(d) **FLOOD ZONE; ELEVATION CERTIFICATION:** Buyer is advised to verify by elevation certificate which flood zone the Property is in, whether flood insurance is required by Buyer's lender, and what restrictions apply to

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improving the Property and rebuilding in the event of casualty. If Property is in a "Special Flood Hazard Area" or "Coastal Barrier Resources Act" designated area or otherwise protected area identified by the U.S. Fish and Wildlife Service under the Coastal Barrier Resources Act and the lowest floor elevation for the building(s) and/or flood insurance rating purposes is below minimum flood elevation or is ineligible for flood insurance coverage through the National Flood Insurance Program or private flood insurance as defined in 42 U.S.C. §4012a, Buyer may terminate this Contract by delivering written notice to Seller within _____ (if left blank, then 20) days after Effective Date, and Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract, failing which Buyer accepts existing elevation of buildings and flood zone designation of Property. The National Flood Insurance Program may assess additional fees or adjust premiums for pre-Flood Insurance Rate Map (pre-FIRM) non-primary structures (residential structures in which the insured or spouse does not reside for at least 50% of the year) and an elevation certificate may be required for actuarial rating.

(e) **ENERGY BROCHURE:** Buyer acknowledges receipt of Florida Energy-Efficiency Rating Information Brochure required by Section 553.996, F.S.

(f) **LEAD-BASED PAINT:** If Property includes pre-1978 residential housing, a lead-based paint disclosure is mandatory.

(g) **HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE: BUYER SHOULD NOT EXECUTE THIS CONTRACT UNTIL BUYER HAS RECEIVED AND READ THE HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE, IF APPLICABLE.**

(h) **PROPERTY TAX DISCLOSURE SUMMARY:** BUYER SHOULD NOT RELY ON THE SELLER'S CURRENT PROPERTY TAXES AS THE AMOUNT OF PROPERTY TAXES THAT THE BUYER MAY BE OBLIGATED TO PAY IN THE YEAR SUBSEQUENT TO PURCHASE. A CHANGE OF OWNERSHIP OR PROPERTY IMPROVEMENTS TRIGGERS REASSESSMENTS OF THE PROPERTY THAT COULD RESULT IN HIGHER PROPERTY TAXES. IF YOU HAVE ANY QUESTIONS CONCERNING VALUATION, CONTACT THE COUNTY PROPERTY APPRAISER'S OFFICE FOR INFORMATION.

(i) **FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT ("FIRPTA"):** Seller shall inform Buyer in writing if Seller is a "foreign person" as defined by the Foreign Investment in Real Property Tax Act ("FIRPTA"). Buyer and Seller shall comply with FIRPTA, which may require Seller to provide additional cash at Closing. If Seller is not a "foreign person", Seller can provide Buyer, at or prior to Closing, a certification of non-foreign status, under penalties of perjury, to inform Buyer and Closing Agent that no withholding is required. See STANDARD V for further information pertaining to FIRPTA. Buyer and Seller are advised to seek legal counsel and tax advice regarding their respective rights, obligations, reporting and withholding requirements pursuant to FIRPTA.

(j) **SELLER DISCLOSURE:** Seller knows of no facts materially affecting the value of the Real Property which are not readily observable and which have not been disclosed to Buyer. Except as otherwise disclosed in writing Seller has received no written or verbal notice from any governmental entity or agency as to a currently uncorrected building, environmental or safety code violation.

PROPERTY MAINTENANCE, CONDITION, INSPECTIONS AND EXAMINATIONS

11. PROPERTY MAINTENANCE: Except for ordinary wear and tear and Casualty Loss, and those repairs, replacements or treatments required to be made by this Contract, Seller shall maintain the Property, including, but not limited to, lawn, shrubbery, and pool, in the condition existing as of Effective Date ("Maintenance Requirement").

12. PROPERTY INSPECTION AND REPAIR:

(a) **INSPECTION PERIOD:** Buyer shall have _____ (if left blank, then 15) days after Effective Date ("Inspection Period"), within which Buyer may, at Buyer's expense, conduct "General", "WDO", and "Permit" Inspections described below. If Buyer fails to timely deliver to Seller a written notice or report required by (b), (c), or (d) below, then, except for Seller's continuing Maintenance Requirement, Buyer shall have waived Seller's obligation(s) to repair, replace, treat or remedy the matters not inspected and timely reported. If this Contract does not close, Buyer shall repair all damage to Property resulting from Buyer's inspections, return Property to its pre-inspection condition and provide Seller with paid receipts for all work done on Property upon its completion.

(b) **GENERAL PROPERTY INSPECTION AND REPAIR:**

(i) **General Inspection:** Those items specified in Paragraph 12(b) (ii) below, which Seller is obligated to repair or replace ("General Repair Items") may be inspected ("General Inspection") by a person who specializes in and holds an occupational license (if required by law) to conduct home inspections or who holds a Florida license to repair and maintain the items inspected ("Professional Inspector"). Buyer shall, within the Inspection Period, inform Seller of any General Repair Items that are not in the condition required by (b)(ii) below by

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delivering to Seller a written notice and upon written request by Seller a copy of the portion of Professional Inspector's written report dealing with such items.

(ii) **Property Condition:** The following items shall be free of leaks, water damage or structural damage: ceiling, roof (including fascia and soffits), exterior and interior walls, doors, windows, and foundation. The above items together with pool, pool equipment, non-leased major appliances, heating, cooling, mechanical, electrical, security, sprinkler, septic and plumbing systems and machinery, seawalls, and dockage, are, and shall be maintained until Closing, in "Working Condition" (defined below). Torn screens (including pool and patio screens), fogged windows, and missing roof tiles or shingles shall be repaired or replaced by Seller prior to Closing. Seller is not required to repair or replace "Cosmetic Conditions" (defined below), unless the Cosmetic Conditions resulted from a defect in an item Seller is obligated to repair or replace. "Working Condition" means operating in the manner in which the item was designed to operate. "Cosmetic Conditions" means aesthetic imperfections that do not affect Working Condition of the item, including, but not limited to: pitted marcite; tears, worn spots and discoloration of floor coverings, wallpapers, or window treatments; nail holes, scrapes, scratches, dents, chips or caulking in ceilings, walls, flooring, tile, fixtures, or mirrors; and minor cracks in walls, floor tiles, windows, driveways, sidewalks, pool decks, and garage and patio floors. Cracked roof tiles, curling or worn shingles, or limited roof life shall not be considered defects Seller must repair or replace, so long as there is no evidence of actual leaks, leakage or structural damage.

(iii) **General Property Repairs:** Seller is only obligated to make such general repairs as are necessary to bring items into the condition specified in Paragraph 12(b) (ii) above. Seller shall within 10 days after receipt of Buyer's written notice or General Inspection report, either have the reported repairs to General Repair Items estimated by an appropriately licensed person and a copy delivered to Buyer, or have a second inspection made by a Professional Inspector and provide a copy of such report and estimates of repairs to Buyer. If Buyer's and Seller's inspection reports differ and the parties cannot resolve the differences, Buyer and Seller together shall choose, and equally split the cost of, a third Professional Inspector, whose written report shall be binding on the parties.

If cost to repair General Repair Items equals or is less than the General Repair Limit, Seller shall have repairs made in accordance with Paragraph 12(f). If cost to repair General Repair Items exceeds the General Repair Limit, then within 5 days after a party's receipt of the last estimate: (A) Seller may elect to pay the excess by delivering written notice to Buyer, or (B) Buyer may deliver written notice to Seller designating which repairs of General Repair Items Seller shall make (at a total cost to Seller not exceeding the General Repair Limit) and agreeing to accept the balance of General Repair Items in their "as is" condition, subject to Seller's continuing Maintenance Requirement. If neither party delivers such written notice to the other, then either party may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

(c) **WOOD DESTROYING ORGANISM ("WDO") INSPECTION AND REPAIR:**

(i) **WDO Inspection:** The Property may be inspected by a Florida-licensed pest control business ("WDO Inspector") to determine the existence of past or present WDO infestation and damage caused by infestation ("WDO Inspection"). Buyer shall, within the Inspection Period, deliver a copy of the WDO Inspector's written report to Seller if any evidence of WDO infestation or damage is found. "Wood Destroying Organism" ("WDO") means arthropod or plant life, including termites, powder-post beetles, oldhouse borers and wood-decaying fungi, that damages or infests seasoned wood in a structure, excluding fences.

(ii) **WDO Repairs:** If Seller previously treated the Property for the type of WDO found by Buyer's WDO Inspection, Seller does not have to retreat the Property if there is no visible live infestation, and Seller, at Seller's cost, transfers to Buyer at Closing a current full treatment warranty for the type of WDO found. Seller shall within 10 days after receipt of Buyer's WDO Inspector's report, have reported WDO damage estimated by an appropriately licensed person, necessary corrective treatment, if any, estimated by a WDO Inspector, and a copy delivered to Buyer. Seller shall have treatments and repairs made in accordance with Paragraph 12(f) below up to the WDO Repair Limit. If cost to treat and repair the WDO infestations and damage to Property exceeds the WDO Repair Limit, then within 5 days after receipt of Seller's estimate, Buyer may deliver written notice to Seller agreeing to pay the excess, or designating which WDO repairs Seller shall make (at a total cost to Seller not exceeding the WDO Repair Limit), and accepting the balance of the Property in its "as is" condition with regard to WDO infestation and damage, subject to Seller's continuing Maintenance Requirement. If Buyer does not deliver such written notice to Seller, then either party may terminate this Contract by written notice to the other, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

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(d) **INSPECTION AND CLOSE-OUT OF BUILDING PERMITS:**
(i) **Permit Inspection:** Buyer may have an inspection and examination of records and documents made to determine whether there exist any open or expired building permits or unpermitted improvements to the Property ("Permit Inspection"). Buyer shall, within the Inspection Period, deliver written notice to Seller of the existence of any open or expired building permits or unpermitted improvements to the Property. If Buyer's inspection of the Property identifies permits which have not been properly closed or improvements which were not permitted, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open permits or unpermitted improvements.
(ii) **Close-Out of Building Permits:** Seller shall, within 10 days after receipt of Buyer's Permit Inspection notice, have an estimate of costs to remedy Permit Inspection items prepared by an appropriately licensed person and a copy delivered to Buyer. No later than 5 days prior to Closing Date, Seller shall, up to the Permit Limit, have open and expired building permits identified by Buyer or known to Seller closed by the applicable governmental entity, and obtain and close any required building permits for improvements to the Property. Prior to Closing Date, Seller will provide Buyer with any written documentation that all open and expired building permits identified by Buyer or known to Seller have been closed out and that Seller has obtained and closed required building permits for improvements to the Property. If final permit inspections cannot be performed due to delays by the governmental entity, Closing Date shall be extended for up to 10 days to complete such final inspections, failing which, either party may terminate this Contract, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.
If cost to close open or expired building permits or to remedy any permit violation of any governmental entity exceeds Permit Limit, then within 5 days after a party's receipt of estimates of cost to remedy: (A) Seller may elect to pay the excess by delivering written notice to Buyer; or (B) Buyer may deliver written notice to Seller accepting the Property in its "as is" condition with regard to building permit status and agreeing to receive credit from Seller at Closing in the amount of Permit Limit. If neither party delivers such written notice to the other, then either party may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

(e) **WALK-THROUGH INSPECTION/RE-INSPECTION:** On the day prior to Closing Date, or on Closing Date prior to time of Closing, as specified by Buyer, Buyer or Buyer's representative may perform a walk-through (and follow-up walk-through, if necessary) inspection of the Property solely to confirm that all items of Personal Property are on the Property and to verify that Seller has maintained the Property as required by the Maintenance Requirement, has made repairs and replacements required by this Contract, and has met all other contractual obligations.

(f) **REPAIR STANDARDS; ASSIGNMENT OF REPAIR AND TREATMENT CONTRACTS AND WARRANTIES:** All repairs and replacements shall be completed in a good and workmanlike manner by an appropriately licensed person, in accordance with all requirements of law, and shall consist of materials or items of quality, value, capacity and performance comparable to, or better than, that existing as of the Effective Date. Except as provided in Paragraph 12(c)(ii), at Buyer's option and cost, Seller will, at Closing, assign all assignable repair, treatment and maintenance contracts and warranties to Buyer.

ESCROW AGENT AND BROKER

13. ESCROW AGENT: Any Closing Agent or Escrow Agent (collectively "Agent") receiving the Deposit, other funds and other items is authorized, and agrees by acceptance of them, to deposit them promptly, hold same in escrow within the State of Florida and, subject to **COLLECTION**, disburse them in accordance with terms and conditions of this Contract. Failure of funds to become **COLLECTED** shall not excuse Buyer's performance. When conflicting demands for the Deposit are received, or Agent has a good faith doubt as to entitlement to the Deposit, Agent may take such actions permitted by this Paragraph 13, as Agent deems advisable. If in doubt as to Agent's duties or liabilities under this Contract, Agent may, at Agent's option, continue to hold the subject matter of the escrow until the parties agree to its disbursement or until a final judgment of a court of competent jurisdiction shall determine the rights of the parties, or Agent may deposit same with the clerk of the circuit court having jurisdiction of the dispute. An attorney who represents a party and also acts as Agent may represent such party in such action. Upon notifying all parties concerned of such action, all liability on the part of Agent shall fully terminate, except to the extent of accounting for any items previously delivered out of escrow. If a licensed real estate broker, Agent will comply with provisions of Chapter 475, F.S., as amended and FREC rules to timely resolve escrow disputes through mediation, arbitration, interpleader or an escrow disbursement order.
In any proceeding between Buyer and Seller wherein Agent is made a party because of acting as Agent hereunder, or in any proceeding where Agent interpleads the subject matter of the escrow, Agent shall recover reasonable

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attorney's fees and costs incurred, to be paid pursuant to court order out of the escrowed funds or equivalent. Agent shall not be liable to any party or person for mis-delivery of any escrowed items, unless such mis-delivery is due to Agent's willful breach of this Contract or Agent's gross negligence. This Paragraph 13 shall survive Closing or termination of this Contract.

14. PROFESSIONAL ADVICE; BROKER LIABILITY: Broker advises Buyer and Seller to verify Property condition, square footage, and all other facts and representations made pursuant to this Contract and to consult appropriate professionals for legal, tax, environmental, and other specialized advice concerning matters affecting the Property and the transaction contemplated by this Contract. Broker represents to Buyer that Broker does not reside on the Property and that all representations (oral, written or otherwise) by Broker are based on Seller representations or public records. **BUYER AGREES TO RELY SOLELY ON SELLER, PROFESSIONAL INSPECTORS AND GOVERNMENTAL AGENCIES FOR VERIFICATION OF PROPERTY CONDITION, SQUARE FOOTAGE AND FACTS THAT MATERIALLY AFFECT PROPERTY VALUE AND NOT ON THE REPRESENTATIONS (ORAL, WRITTEN OR OTHERWISE) OF BROKER.** Buyer and Seller (individually, the "Indemnifying Party") each individually indemnifies, holds harmless, and releases Broker and Broker's officers, directors, agents and employees from all liability for loss or damage, including all costs and expenses, and reasonable attorney's fees at all levels, suffered or incurred by Broker and Broker's officers, directors, agents and employees in connection with or arising from claims, demands or causes of action instituted by Buyer or Seller based on: (i) inaccuracy of information provided by the Indemnifying Party or from public records; (ii) Indemnifying Party's misstatement(s) or failure to perform contractual obligations; (iii) Broker's performance, at Indemnifying Party's request, of any task beyond the scope of services regulated by Chapter 475, F.S., as amended, including Broker's referral, recommendation or retention of any vendor for, or on behalf of, Indemnifying Party; (iv) products or services provided by any such vendor for, or on behalf of, Indemnifying Party; and (v) expenses incurred by any such vendor. Buyer and Seller each assumes full responsibility for selecting and compensating their respective vendors and paying their other costs under this Contract whether or not this transaction closes. This Paragraph 14 will not relieve Broker of statutory obligations under Chapter 475, F.S., as amended. For purposes of this Paragraph 14, Broker will be treated as a party to this Contract. This Paragraph 14 shall survive Closing or termination of this Contract.

DEFAULT AND DISPUTE RESOLUTION

15. DEFAULT:

(a) **BUYER DEFAULT:** If Buyer fails, neglects or refuses to perform Buyer's obligations under this Contract, including payment of the Deposit, within the time(s) specified, Seller may elect to recover and retain the Deposit for the account of Seller as agreed upon liquidated damages, consideration for execution of this Contract, and in full settlement of any claims, whereupon Buyer and Seller shall be relieved from all further obligations under this Contract, or Seller, at Seller's option, may, pursuant to Paragraph 16, proceed in equity to enforce Seller's rights under this Contract. The portion of the Deposit, if any, paid to Listing Broker upon default by Buyer, shall be split equally between Listing Broker and Cooperating Broker; provided however, Cooperating Broker's share shall not be greater than the commission amount Listing Broker had agreed to pay to Cooperating Broker.

(b) **SELLER DEFAULT:** If for any reason other than failure of Seller to make Seller's title marketable after reasonable diligent effort, Seller fails, neglects or refuses to perform Seller's obligations under this Contract, Buyer may elect to receive return of Buyer's Deposit without thereby waiving any action for damages resulting from Seller's breach, and, pursuant to Paragraph 16, may seek to recover such damages or seek specific performance.

This Paragraph 15 shall survive Closing or termination of this Contract.

16. DISPUTE RESOLUTION: Unresolved controversies, claims and other matters in question between Buyer and Seller arising out of, or relating to, this Contract or its breach, enforcement or interpretation ("Dispute") will be settled as follows:

(a) Buyer and Seller will have 10 days after the date conflicting demands for the Deposit are made to attempt to resolve such Dispute, failing which, Buyer and Seller shall submit such Dispute to mediation under Paragraph 16(b).

(b) Buyer and Seller shall attempt to settle Disputes in an amicable manner through mediation pursuant to Florida Rules for Certified and Court-Appointed Mediators and Chapter 44, F.S., as amended (the "Mediation Rules"). The mediator must be certified or must have experience in the real estate industry. Injunctive relief may be sought without first complying with this Paragraph 16(b). Disputes not settled pursuant to this Paragraph 16 may be resolved by instituting action in the appropriate court having jurisdiction of the matter. This Paragraph 16 shall survive Closing or termination of this Contract.

17. ATTORNEY'S FEES; COSTS: The parties will split equally any mediation fee incurred in any mediation permitted by this Contract, and each party will pay their own costs, expenses and fees, including attorney's fees, incurred in conducting the mediation. In any litigation permitted by this Contract, the prevailing party shall be entitled to recover

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from the non-prevailing party costs and fees, including reasonable attorney's fees, incurred in conducting the litigation. This Paragraph 17 shall survive Closing or termination of this Contract.

STANDARDS FOR REAL ESTATE TRANSACTIONS ("STANDARDS")

18. STANDARDS:

A. TITLE:

(i) **TITLE EVIDENCE; RESTRICTIONS; EASEMENTS; LIMITATIONS:** Within the time period provided in Paragraph 9(c), the Title Commitment, with legible copies of instruments listed as exceptions attached thereto, shall be issued and delivered to Buyer. The Title Commitment shall set forth those matters to be discharged by Seller at or before Closing and shall provide that, upon recording of the deed to Buyer, an owner's policy of title insurance in the amount of the Purchase Price, shall be issued to Buyer insuring Buyer's marketable title to the Real Property, subject only to the following matters: (a) comprehensive land use plans, zoning, and other land use restrictions, prohibitions and requirements imposed by governmental authority; (b) restrictions and matters appearing on the Plat or otherwise common to the subdivision; (c) outstanding oil, gas and mineral rights of record without right of entry; (d) unplatted public utility easements of record (located contiguous to real property lines and not more than 10 feet in width as to rear or front lines and 7 1/2 feet in width as to side lines); (e) taxes for year of Closing and subsequent years; and (f) assumed mortgages and purchase money mortgages, if any (if additional items, attach addendum); provided, that, unless waived by Paragraph 12 (a), there exists at Closing no violation of the foregoing and none prevent use of the Property for **RESIDENTIAL PURPOSES**. If there exists at Closing any violation of items identified in (b) – (f) above, then the same shall be deemed a title defect. Marketable title shall be determined according to applicable Title Standards adopted by authority of The Florida Bar and in accordance with law.

(ii) **TITLE EXAMINATION:** Buyer shall have 5 days after receipt of Title Commitment to examine it and notify Seller in writing specifying defect(s), if any, that render title unmarketable. If Seller provides Title Commitment and it is delivered to Buyer less than 5 days prior to Closing Date, Buyer may extend Closing for up to 5 days after date of receipt to examine same in accordance with this STANDARD A. Seller shall have 30 days ("Cure Period") after receipt of Buyer's notice to take reasonable diligent efforts to remove defects. If Buyer fails to so notify Seller, Buyer shall be deemed to have accepted title as it then is. If Seller cures defects within Cure Period, Seller will deliver written notice to Buyer (with proof of cure acceptable to Buyer and Buyer's attorney) and the parties will close this Contract on Closing Date (or if Closing Date has passed, within 10 days after Buyer's receipt of Seller's notice). If Seller is unable to cure defects within Cure Period, then Buyer may, within 5 days after expiration of Cure Period, deliver written notice to Seller: (a) extending Cure Period for a specified period not to exceed 120 days within which Seller shall continue to use reasonable diligent effort to remove or cure the defects ("Extended Cure Period"); or (b) electing to accept title with existing defects and close this Contract on Closing Date (or if Closing Date has passed, within the earlier of 10 days after end of Extended Cure Period or Buyer's receipt of Seller's notice), or (c) electing to terminate this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. If after reasonable diligent effort, Seller is unable to timely cure defects, and Buyer does not waive the defects, this Contract shall terminate, and Buyer shall receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

B. SURVEY: If Survey discloses encroachments on the Real Property or that improvements located thereon encroach on setback lines, easements, or lands of others, or violate any restrictions, covenants, or applicable governmental regulations described in STANDARD A (i)(a), (b) or (d) above, Buyer shall deliver written notice of such matters, together with a copy of Survey, to Seller within 5 days after Buyer's receipt of Survey, but no later than Closing. If Buyer timely delivers such notice and Survey to Seller, such matters identified in the notice and Survey shall constitute a title defect, subject to cure obligations of STANDARD A above. If Seller has delivered a prior survey, Seller shall, at Buyer's request, execute an affidavit of "no change" to the Real Property since the preparation of such prior survey, to the extent the affirmations therein are true and correct.

C. INGRESS AND EGRESS: Seller represents that there is ingress and egress to the Real Property and title to the Real Property is insurable in accordance with STANDARD A without exception for lack of legal right of access.

D. LEASE INFORMATION: Seller shall, at least 10 days prior to Closing, furnish to Buyer estoppel letters from tenant(s)/occupant(s) specifying nature and duration of occupancy, rental rates, advanced rent and security deposits paid by tenant(s) or occupant(s)("Estoppel Letter(s)"). If Seller is unable to obtain such Estoppel Letter(s), the same information shall be furnished by Seller to Buyer within that time period in the form of a Seller's affidavit, and Buyer may thereafter contact tenant(s) or occupant(s) to confirm such information. If Estoppel Letter(s) or Seller's affidavit, if any, differ materially from Seller's representations and lease(s) provided pursuant to Paragraph 6, or if tenant(s)/occupant(s) fail or refuse to confirm Seller's affidavit, Buyer may deliver written notice to Seller within 5 days after receipt of such information, but no later than 5 days prior to Closing Date, terminating this

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STANDARDS FOR REAL ESTATE TRANSACTIONS ("STANDARDS") CONTINUED

Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. Seller shall, at Closing, deliver and assign all leases to Buyer who shall assume Seller's obligations thereunder.

E. LIENS: Seller shall furnish to Buyer at Closing an affidavit attesting (i) to the absence of any financing statement, claims of lien or potential lienors known to Seller and (ii) that there have been no improvements or repairs to the Real Property for 90 days immediately preceding Closing Date. If the Real Property has been improved or repaired within that time, Seller shall deliver releases or waivers of construction liens executed by all general contractors, subcontractors, suppliers and materialmen in addition to Seller's lien affidavit setting forth names of all such general contractors, subcontractors, suppliers and materialmen, further affirming that all charges for improvements or repairs which could serve as a basis for a construction lien or a claim for damages have been paid or will be paid at Closing.

F. TIME: Calendar days shall be used in computing time periods. **Time is of the essence in this Contract.** Other than time for acceptance and Effective Date as set forth in Paragraph 3, any time periods provided for or dates specified in this Contract, whether preprinted, handwritten, typewritten or inserted herein, which shall end or occur on a Saturday, Sunday, or a national legal holiday (see 5 U.S.C. 6103) shall extend to 5:00 p.m. (where the Property is located) of the next business day.

G. FORCE MAJEURE: Buyer or Seller shall not be required to perform any obligation under this Contract or be liable to each other for damages so long as performance or non-performance of the obligation, or the availability of services, insurance or required approvals essential to Closing, is disrupted, delayed, caused or prevented by Force Majeure. "Force Majeure" means: hurricanes, floods, extreme weather, earthquakes, fire, or other acts of God, unusual transportation delays, or wars, insurrections, or acts of terrorism, which, by exercise of reasonable diligent effort, the non-performing party is unable in whole or in part to prevent or overcome. All time periods, including Closing Date, will be extended a reasonable time up to 7 days after the Force Majeure no longer prevents performance under this Contract, provided, however, if such Force Majeure continues to prevent performance under this Contract more than 30 days beyond Closing Date, then either party may terminate this Contract by delivering written notice to the other and the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

H. CONVEYANCE: Seller shall convey marketable title to the Real Property by statutory warranty, trustee's, personal representative's, or guardian's deed, as appropriate to the status of Seller, subject only to matters described in STANDARD A and those accepted by Buyer. Personal Property shall, at request of Buyer, be transferred by absolute bill of sale with warranty of title, subject only to such matters as may be provided for in this Contract.

I. CLOSING LOCATION; DOCUMENTS; AND PROCEDURE:

(i) **LOCATION:** Closing will be conducted by the attorney or other closing agent ("Closing Agent") designated by the party paying for the owner's policy of title insurance and will take place in the county where the Real Property is located at the office of the Closing Agent, or at such other location agreed to by the parties. If there is no title insurance, Seller will designate Closing Agent. Closing may be conducted by mail, overnight courier, or electronic means.

(ii) **CLOSING DOCUMENTS:** Seller shall, at or prior to Closing, execute and deliver, as applicable, deed, bill of sale, certificate(s) of title or other documents necessary to transfer title to the Property, construction lien affidavit(s), owner's possession and no lien affidavit(s), and assignment(s) of leases. Seller shall provide Buyer with paid receipts for all work done on the Property pursuant to this Contract. Buyer shall furnish and pay for, as applicable, the survey, flood elevation certification, and documents required by Buyer's lender.

(iii) **FinCEN GTO NOTICE**. **If Closing Agent is required to comply with the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") Geographic Targeting Orders ("GTOs"), then Buyer shall provide Closing Agent with the information related to Buyer and the transaction contemplated by this Contract that is required to complete IRS Form 8300, and Buyer consents to Closing Agent's collection and report of said information to IRS.**

(iv) **PROCEDURE:** The deed shall be recorded upon **COLLECTION** of all closing funds. If the Title Commitment provides insurance against adverse matters pursuant to Section 627.7841, F.S., as amended, the escrow closing procedure required by STANDARD J shall be waived, and Closing Agent shall, **subject to COLLECTION of all closing funds**, disburse at Closing the brokerage fees to Broker and the net sale proceeds to Seller.

J. ESCROW CLOSING PROCEDURE: If Title Commitment issued pursuant to Paragraph 9(c) does not provide for insurance against adverse matters as permitted under Section 627.7841, F.S., as amended, the following escrow and closing procedures shall apply: (1) all Closing proceeds shall be held in escrow by the Closing Agent for a period of not more than 10 days after Closing; (2) if Seller's title is rendered unmarketable, through no fault of Buyer, Buyer shall, within the 10 day period, notify Seller in writing of the defect and Seller shall have 30 days from

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STANDARDS FOR REAL ESTATE TRANSACTIONS ("STANDARDS") CONTINUED

date of receipt of such notification to cure the defect; (3) if Seller fails to timely cure the defect, the Deposit and all Closing funds paid by Buyer shall, within 5 days after written demand by Buyer, be refunded to Buyer and, simultaneously with such repayment, Buyer shall return the Personal Property, vacate the Real Property and re-convey the Property to Seller by special warranty deed and bill of sale; and (4) if Buyer fails to make timely demand for refund of the Deposit, Buyer shall take title as is, waiving all rights against Seller as to any intervening defect except as may be available to Buyer by virtue of warranties contained in the deed or bill of sale.

K. PRORATIONS; CREDITS: The following recurring items will be made current (if applicable) and prorated as of the day prior to Closing Date, or date of occupancy if occupancy occurs before Closing Date: real estate taxes (including special benefit tax assessments imposed by a CDD), interest, bonds, association fees, insurance, rents and other expenses of Property. Buyer shall have option of taking over existing policies of insurance, if assumable, in which event premiums shall be prorated. Cash at Closing shall be increased or decreased as may be required by prorations to be made through day prior to Closing. Advance rent and security deposits, if any, will be credited to Buyer. Escrow deposits held by Seller's mortgagee will be paid to Seller. Taxes shall be prorated based on current year's tax. If Closing occurs on a date when current year's millage is not fixed but current year's assessment is available, taxes will be prorated based upon such assessment and prior year's millage. If current year's assessment is not available, then taxes will be prorated on prior year's tax. If there are completed improvements on the Real Property by January 1st of year of Closing, which improvements were not in existence on January 1st of prior year, then taxes shall be prorated based upon prior year's millage and at an equitable assessment to be agreed upon between the parties, failing which, request shall be made to the County Property Appraiser for an informal assessment taking into account available exemptions. In all cases, due allowance shall be made for the maximum allowable discounts and applicable homestead and other exemptions. A tax proration based on an estimate shall, at either party's request, be readjusted upon receipt of current year's tax bill. This STANDARD K shall survive Closing.

L. ACCESS TO PROPERTY TO CONDUCT APPRAISALS, INSPECTIONS, AND WALK-THROUGH: Seller shall, upon reasonable notice, provide utilities service and access to Property for appraisals and inspections, including a walk-through (or follow-up walk-through if necessary) prior to Closing.

M. RISK OF LOSS: If, after Effective Date, but before Closing, Property is damaged by fire or other casualty ("Casualty Loss") and cost of restoration (which shall include cost of pruning or removing damaged trees) does not exceed 1.5% of Purchase Price, cost of restoration shall be an obligation of Seller and Closing shall proceed pursuant to terms of this Contract. If restoration is not completed as of Closing, a sum equal to 125% of estimated cost to complete restoration (not to exceed 1.5% of Purchase Price) will be escrowed at Closing. If actual cost of restoration exceeds escrowed amount, Seller shall pay such actual costs (but, not in excess of 1.5% of Purchase Price). Any unused portion of escrowed amount shall be returned to Seller. If cost of restoration exceeds 1.5% of Purchase Price, Buyer shall elect to either take Property "as is" together with the 1.5%, or receive a refund of the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract. Seller's sole obligation with respect to tree damage by casualty or other natural occurrence shall be cost of pruning or removal.

N. 1031 EXCHANGE: If either Seller or Buyer wish to enter into a like-kind exchange (either simultaneously with Closing or deferred) under Section 1031 of the Internal Revenue Code ("Exchange"), the other party shall cooperate in all reasonable respects to effectuate the Exchange, including execution of documents; provided, however, cooperating party shall incur no liability or expense related to the Exchange, and Closing shall not be contingent upon, nor extended or delayed by, such Exchange.

O. CONTRACT NOT RECORDABLE; PERSONS BOUND; NOTICE; DELIVERY; COPIES; CONTRACT EXECUTION: Neither this Contract nor any notice of it shall be recorded in any public records. This Contract shall be binding on, and inure to the benefit of, the parties and their respective heirs or successors in interest. Whenever the context permits, singular shall include plural and one gender shall include all. Notice and delivery given by or to the attorney or broker (including such broker's real estate licensee) representing any party shall be as effective as if given by or to that party. All notices must be in writing and may be made by mail, personal delivery or electronic (including "pdf") media. A facsimile or electronic (including "pdf") copy of this Contract and any signatures hereon shall be considered for all purposes as an original. This Contract may be executed by use of electronic signatures, as determined by Florida's Electronic Signature Act and other applicable laws.

P. INTEGRATION; MODIFICATION: This Contract contains the full and complete understanding and agreement of Buyer and Seller with respect to the transaction contemplated by this Contract and no prior agreements or representations shall be binding upon Buyer or Seller unless included in this Contract. No modification to or change in this Contract shall be valid or binding upon Buyer or Seller unless in writing and executed by the parties intended to be bound by it.

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STANDARDS FOR REAL ESTATE TRANSACTIONS ("STANDARDS") CONTINUED

Q. WAIVER: Failure of Buyer or Seller to insist on compliance with, or strict performance of, any provision of this Contract, or to take advantage of any right under this Contract, shall not constitute a waiver of other provisions or rights.

R. RIDERS; ADDENDA; TYPEWRITTEN OR HANDWRITTEN PROVISIONS: Riders, addenda, and typewritten or handwritten provisions shall control all printed provisions of this Contract in conflict with them.

S. COLLECTION or COLLECTED: "COLLECTION" or "COLLECTED" means any checks tendered or received, including Deposits, have become actually and finally collected and deposited in the account of Escrow Agent or Closing Agent. Closing and disbursement of funds and delivery of closing documents may be delayed by Closing Agent until such amounts have been COLLECTED in Closing Agent's accounts.

T. RESERVED.

U. APPLICABLE LAW AND VENUE: This Contract shall be construed in accordance with the laws of the State of Florida and venue for resolution of all disputes, whether by mediation, arbitration or litigation, shall lie in the county where the Real Property is located.

V. FIRPTA TAX WITHHOLDING: If a seller of U.S. real property is a "foreign person" as defined by FIRPTA, Section 1445 of the Internal Revenue Code ("Code") requires the buyer of the real property to withhold up to 15% of the amount realized by the seller on the transfer and remit the withheld amount to the Internal Revenue Service (IRS) unless an exemption to the required withholding applies or the seller has obtained a Withholding Certificate from the IRS authorizing a reduced amount of withholding.

(i) No withholding is required under Section 1445 of the Code if the Seller is not a "foreign person". Seller can provide proof of non-foreign status to Buyer by delivery of written certification signed under penalties of perjury, stating that Seller is not a foreign person and containing Seller's name, U.S. taxpayer identification number and home address (or office address, in the case of an entity), as provided for in 26 CFR 1.1445-2(b). Otherwise, Buyer shall withhold the applicable percentage of the amount realized by Seller on the transfer and timely remit said funds to the IRS.

(ii) If Seller is a foreign person and has received a Withholding Certificate from the IRS which provides for reduced or eliminated withholding in this transaction and provides same to Buyer by Closing, then Buyer shall withhold the reduced sum required, if any, and timely remit said funds to the IRS.

(iii) If prior to Closing Seller has submitted a completed application to the IRS for a Withholding Certificate and has provided to Buyer the notice required by 26 CFR 1.1445-1(c) (2)(i)(B) but no Withholding Certificate has been received as of Closing, Buyer shall, at Closing, withhold the applicable percentage of the amount realized by Seller on the transfer and, at Buyer's option, either (a) timely remit the withheld funds to the IRS or (b) place the funds in escrow, at Seller's expense, with an escrow agent selected by Buyer and pursuant to terms negotiated by the parties, to be subsequently disbursed in accordance with the Withholding Certificate issued by the IRS or remitted directly to the IRS if the Seller's application is rejected or upon terms set forth in the escrow agreement.

(iv) In the event the net proceeds due Seller are not sufficient to meet the withholding requirement(s) in this transaction, Seller shall deliver to Buyer, at Closing, the additional COLLECTED funds necessary to satisfy the applicable requirement and thereafter Buyer shall timely remit said funds to the IRS or escrow the funds for disbursement in accordance with the final determination of the IRS, as applicable.

(v) Upon remitting funds to the IRS pursuant to this STANDARD, Buyer shall provide Seller copies of IRS Forms 8288 and 8288-A, as filed.

ADDENDA AND ADDITIONAL TERMS

* **19. ADDENDA:** The following additional terms are included in the attached addenda or riders and incorporated into this Contract (**Check if applicable**):

☐ A. Condominium Rider	☐ K. "As Is"	☐ T. Pre-Closing Occupancy
☐ B. Homeowners' Assn.	☐ L. Right to Inspect/ Cancel	☐ U. Post-Closing Occupancy
☐ C. Seller Financing	☐ M. Defective Drywall	☐ V. Sale of Buyer's Property
☐ D. Mortgage Assumption	☐ N. Coastal Construction Control Line	☐ W. Back-up Contract
☐ E. FHA/VA Financing		☐ X. Kick-out Clause
☐ F. Appraisal Contingency	☐ O. Insulation Disclosure	☐ Y. Seller's Attorney Approval
☐ G. Short Sale	☐ P. Lead Paint Disclosure (Pre-1978)	☐ Z. Buyer's Attorney Approval
☐ H. Homeowners'/Flood Ins	☐ Q. Housing for Older Persons	☐ AA. Licensee Property Interest
☐ I. RESERVED	☐ R. Rezoning	☐ BB. Binding Arbitration
☐ J. Interest-Bearing Acct.	☐ S. Lease Purchase/ Lease Option	☐ Other:_____

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20. ADDITIONAL TERMS: _____

_____

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COUNTER-OFFER/REJECTION

☐ Seller counters Buyer's offer (to accept the counter-offer, Buyer must sign or initial the counter-offered terms and deliver a copy of the acceptance to Seller).

☐ Seller rejects Buyer's offer.

THIS IS INTENDED TO BE A LEGALLY BINDING CONTRACT. IF NOT FULLY UNDERSTOOD, SEEK THE ADVICE OF AN ATTORNEY PRIOR TO SIGNING.

THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR.

Approval of this form by the Florida Realtors and The Florida Bar does not constitute an opinion that any of the terms and conditions in this Contract should be accepted by the parties in a particular transaction. Terms and conditions should be negotiated based upon the respective interests, objectives and bargaining positions of all interested persons.

AN ASTERISK (*) FOLLOWING A LINE NUMBER IN THE MARGIN INDICATES THE LINE CONTAINS A BLANK TO BE COMPLETED.

Buyer: _____ Date: _____

Buyer: _____ Date: _____

Seller: _____ Date: _____

Seller: _____ Date: _____

Buyer's address for purposes of notice	Seller's address for purposes of notice
_____	_____
_____	_____
_____	_____

BROKER: Listing and Cooperating Brokers, if any, named below (collectively, "Broker"), are the only Brokers entitled to compensation in connection with this Contract. Instruction to Closing Agent: Seller and Buyer direct Closing Agent to disburse at Closing the full amount of the brokerage fees as specified in separate brokerage agreements with the parties and cooperative agreements between the Brokers, except to the extent Broker has retained such fees from the escrowed funds. This Contract shall not modify any MLS or other offer of compensation made by Seller or Listing Broker to Cooperating Brokers.

_____	_____
Cooperating Sales Associate, if any	**Listing Sales Associate**
_____	_____
Cooperating Broker, if any	**Listing Broker**

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"AS IS" Residential Contract For Sale And Purchase

THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR

PARTIES: _____ ("Seller"), and _____ ("Buyer"), agree that Seller shall sell and Buyer shall buy the following described Real Property and Personal Property (collectively "Property") pursuant to the terms and conditions of this AS IS Residential Contract For Sale And Purchase and any riders and addenda ("Contract"):

1. PROPERTY DESCRIPTION:

(a) Street address, city, zip: _____

(b) Located in: _____ County, Florida. Property Tax ID #: _____

(c) Real Property: The legal description is _____

_____

_____

together with all existing improvements and fixtures, including built-in appliances, built-in furnishings and attached wall-to-wall carpeting and flooring ("Real Property") unless specifically excluded in Paragraph 1(e) or by other terms of this Contract.

(d) Personal Property: Unless excluded in Paragraph 1(e) or by other terms of this Contract, the following items which are owned by Seller and existing on the Property as of the date of the initial offer are included in the purchase: range(s)/oven(s), refrigerator(s), dishwasher(s), disposal, ceiling fan(s), intercom, light fixture(s), drapery rods and draperies, blinds, window treatments, smoke detector(s), garage door opener(s), security gate and other access devices, and storm shutters/panels ("Personal Property").

Other Personal Property items included in this purchase are: _____

_____

Personal Property is included in the Purchase Price, has no contributory value, and shall be left for the Buyer.

(e) The following items are excluded from the purchase: _____

_____

PURCHASE PRICE AND CLOSING

2. PURCHASE PRICE (U.S. currency): ..... **$** _____

(a) Initial deposit to be held in escrow in the amount of **(checks subject to COLLECTION)** ..... $ _____
The initial deposit made payable and delivered to "Escrow Agent" named below
(CHECK ONE): (i) ☐ accompanies offer or (ii) ☐ is to be made within _____ (if left blank, then 3) days after Effective Date. IF NEITHER BOX IS CHECKED, THEN OPTION (ii) SHALL BE DEEMED SELECTED.
Escrow Agent Information: Name: _____
Address: _____
Phone: _____ E-mail: _____ Fax: _____

(b) Additional deposit to be delivered to Escrow Agent within _____ (if left blank, then 10) days after Effective Date ..... $ _____
(All deposits paid or agreed to be paid, are collectively referred to as the "Deposit")

(c) Financing: Express as a dollar amount or percentage ("Loan Amount") see Paragraph 8 ..... _____

(d) Other: _____ ..... $ _____

(e) Balance to close (not including Buyer's closing costs, prepaids and prorations) by wire transfer or other **COLLECTED** funds ..... $ _____

NOTE: For the definition of "COLLECTION" or "COLLECTED" see STANDARD S.

3. TIME FOR ACCEPTANCE OF OFFER AND COUNTER-OFFERS; EFFECTIVE DATE:

(a) If not signed by Buyer and Seller, and an executed copy delivered to all parties on or before _____, this offer shall be deemed withdrawn and the Deposit, if any, shall be returned to Buyer. Unless otherwise stated, time for acceptance of any counter-offers shall be within 2 days after the day the counter-offer is delivered.

(b) The effective date of this Contract shall be the date when the last one of the Buyer and Seller has signed or initialed and delivered this offer or final counter-offer ("Effective Date").

4. CLOSING DATE: Unless modified by other provisions of this Contract, the closing of this transaction shall occur and the closing documents required to be furnished by each party pursuant to this Contract shall be delivered ("Closing") on _____ ("Closing Date"), at the time established by the Closing Agent.

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5. EXTENSION OF CLOSING DATE:

(a) If Paragraph 8(b) is checked and Closing funds from Buyer's lender(s) are not available on Closing Date due to Consumer Financial Protection Bureau Closing Disclosure delivery requirements ("CFPB Requirements"), then Closing Date shall be extended for such period necessary to satisfy CFPB Requirements, provided such period shall not exceed 10 days.

(b) If an event constituting "Force Majeure" causes services essential for Closing to be unavailable, including the unavailability of utilities or issuance of hazard, wind, flood or homeowners' insurance, Closing Date shall be extended as provided in STANDARD G.

6. OCCUPANCY AND POSSESSION:

(a) Unless the box in Paragraph 6(b) is checked, Seller shall, at Closing, deliver occupancy and possession of the Property to Buyer free of tenants, occupants and future tenancies. Also, at Closing, Seller shall have removed all personal items and trash from the Property and shall deliver all keys, garage door openers, access devices and codes, as applicable, to Buyer. If occupancy is to be delivered before Closing, Buyer assumes all risks of loss to the Property from date of occupancy, shall be responsible and liable for maintenance from that date, and shall be deemed to have accepted the Property in its existing condition as of time of taking occupancy.

(b) ☐ **CHECK IF PROPERTY IS SUBJECT TO LEASE(S) OR OCCUPANCY AFTER CLOSING.** If Property is subject to a lease(s) after Closing or is intended to be rented or occupied by third parties beyond Closing, the facts and terms thereof shall be disclosed in writing by Seller to Buyer and copies of the written lease(s) shall be delivered to Buyer, all within 5 days after Effective Date. If Buyer determines, in Buyer's sole discretion, that the lease(s) or terms of occupancy are not acceptable to Buyer, Buyer may terminate this Contract by delivery of written notice of such election to Seller within 5 days after receipt of the above items from Seller, and Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract. Estoppel Letter(s) and Seller's affidavit shall be provided pursuant to STANDARD D. If Property is intended to be occupied by Seller after Closing, see Rider U. POST-CLOSING OCCUPANCY BY SELLER.

7. ASSIGNABILITY: (CHECK ONE): Buyer ☐ may assign and thereby be released from any further liability under this Contract; ☐ may assign but not be released from liability under this Contract; or ☐ may not assign this Contract.

FINANCING

8. FINANCING:

☐ (a) Buyer will pay cash for the purchase of the Property at Closing. There is no financing contingency to Buyer's obligation to close. If Buyer obtains a loan for any part of the Purchase Price of the Property, Buyer acknowledges that any terms and conditions imposed by Buyer's lender(s) or by CFPB Requirements shall not affect or extend the Buyer's obligation to close or otherwise affect any terms or conditions of this Contract.

☐ (b) This Contract is contingent upon Buyer obtaining approval of a ☐ conventional ☐ FHA ☐ VA or ☐ other _____ (describe) loan within _____ (if left blank, then 30) days after Effective Date ("Loan Approval Period") for **(CHECK ONE):** ☐ fixed, ☐ adjustable, ☐ fixed or adjustable rate in the Loan Amount (See Paragraph 2(c)), at an initial interest rate not to exceed _____ % (if left blank, then prevailing rate based upon Buyer's creditworthiness), and for a term of _____(if left blank, then 30) years ("Financing").

(i) Buyer shall make mortgage loan application for the Financing within _____ (if left blank, then 5) days after Effective Date and use good faith and diligent effort to obtain approval of a loan meeting the Financing terms ("Loan Approval") and thereafter to close this Contract. Loan Approval which requires a condition related to the sale by Buyer of other property shall not be deemed Loan Approval for purposes of this subparagraph.

Buyer's failure to use diligent effort to obtain Loan Approval during the Loan Approval Period shall be considered a default under the terms of this Contract. For purposes of this provision, "diligent effort" includes, but is not limited to, timely furnishing all documents and information and paying of all fees and charges requested by Buyer's mortgage broker and lender in connection with Buyer's mortgage loan application.

(ii) Buyer shall keep Seller and Broker fully informed about the status of Buyer's mortgage loan application, Loan Approval, and loan processing and authorizes Buyer's mortgage broker, lender, and Closing Agent to disclose such status and progress, and release preliminary and finally executed closing disclosures and settlement statements, to Seller and Broker.

(iii) Upon Buyer obtaining Loan Approval, Buyer shall promptly deliver written notice of such approval to Seller.

(iv) If Buyer is unable to obtain Loan Approval after the exercise of diligent effort, then at any time prior to expiration of the Loan Approval Period, Buyer may provide written notice to Seller stating that Buyer has been unable to obtain Loan Approval and has elected to either:

(1) waive Loan Approval, in which event this Contract will continue as if Loan Approval had been obtained; or

(2) terminate this Contract.

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(v) If Buyer fails to timely deliver either notice provided in Paragraph 8(b)(iii) or (iv), above, to Seller prior to expiration of the Loan Approval Period, then Loan Approval shall be deemed waived, in which event this Contract will continue as if Loan Approval had been obtained, provided however, Seller may elect to terminate this Contract by delivering written notice to Buyer within 3 days after expiration of the Loan Approval Period.

(vi) If this Contract is timely terminated as provided by Paragraph 8(b)(iv)(2) or (v), above, and Buyer is not in default under the terms of this Contract, Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract.

(vii) If Loan Approval has been obtained, or deemed to have been obtained, as provided above, and Buyer fails to close this Contract, then the Deposit shall be paid to Seller unless failure to close is due to: (1) Seller's default or inability to satisfy other contingencies of this Contract; (2) Property related conditions of the Loan Approval have not been met (except when such conditions are waived by other provisions of this Contract); or (3) appraisal of the Property obtained by Buyer's lender is insufficient to meet terms of the Loan Approval, in which event(s) the Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

* ☐ (c) Assumption of existing mortgage (see rider for terms).

* ☐ (d) Purchase money note and mortgage to Seller (see riders; addenda; or special clauses for terms).

CLOSING COSTS, FEES AND CHARGES

9. CLOSING COSTS; TITLE INSURANCE; SURVEY; HOME WARRANTY; SPECIAL ASSESSMENTS:

(a) **COSTS TO BE PAID BY SELLER:**

- Documentary stamp taxes and surtax on deed, if any
- Owner's Policy and Charges (if Paragraph 9(c)(i) is checked)
- Title search charges (if Paragraph 9(c)(iii) is checked)
- Municipal lien search (if Paragraph 9(c)(i) or (iii) is checked)
- HOA/Condominium Association estoppel fees
- Recording and other fees needed to cure title
- Seller's attorneys' fees
- Other:_____

If, prior to Closing, Seller is unable to meet the AS IS Maintenance Requirement as required by Paragraph 11 a sum equal to 125% of estimated costs to meet the AS IS Maintenance Requirement shall be escrowed at Closing. If actual costs to meet the AS IS Maintenance Requirement exceed escrowed amount, Seller shall pay such actual costs. Any unused portion of escrowed amount(s) shall be returned to Seller.

(b) **COSTS TO BE PAID BY BUYER:**

- Taxes and recording fees on notes and mortgages
- Recording fees for deed and financing statements
- Owner's Policy and Charges (if Paragraph 9(c)(ii) is checked)
- Survey (and elevation certification, if required)
- Lender's title policy and endorsements
- HOA/Condominium Association application/transfer fees
- Municipal lien search (if Paragraph 9(c)(ii) is checked)
- Loan expenses
- Appraisal fees
- Buyer's Inspections
- Buyer's attorneys' fees
- All property related insurance
- Owner's Policy Premium (if Paragraph 9 (c)(iii) is checked.)
- Other:_____

(c) **TITLE EVIDENCE AND INSURANCE:** At least _____ (if left blank, then 15, or if Paragraph 8(a) is checked, then 5) days prior to Closing Date ("Title Evidence Deadline"), a title insurance commitment issued by a Florida licensed title insurer, with legible copies of instruments listed as exceptions attached thereto ("Title Commitment") and, after Closing, an owner's policy of title insurance (see STANDARD A for terms) shall be obtained and delivered to Buyer. If Seller has an owner's policy of title insurance covering the Real Property, a copy shall be furnished to Buyer and Closing Agent within 5 days after Effective Date. The owner's title policy premium, title search and closing services (collectively, "Owner's Policy and Charges") shall be paid, as set forth below. The title insurance premium charges for the owner's policy and any lender's policy will be calculated and allocated in accordance with Florida law, but may be reported differently on certain federally mandated closing disclosures and other closing documents. For purposes of this Contract "municipal lien search" means a search of records necessary for the owner's policy of title insurance to be issued without exception for unrecorded liens imposed pursuant to Chapters 159 or 170, F.S., in favor of any governmental body, authority or agency.

(CHECK ONE):

* ☐ (i) Seller shall designate Closing Agent and pay for Owner's Policy and Charges, and Buyer shall pay the premium for Buyer's lender's policy and charges for closing services related to the lender's policy, endorsements and loan closing, which amounts shall be paid by Buyer to Closing Agent or such other provider(s) as Buyer may select; or

* ☐ (ii) Buyer shall designate Closing Agent and pay for Owner's Policy and Charges and charges for closing services related to Buyer's lender's policy, endorsements and loan closing; or

☐ (iii) [**MIAMI-DADE/BROWARD REGIONAL PROVISION**]**:** Seller shall furnish a copy of a prior owner's policy of title insurance or other evidence of title and pay fees for: (A) a continuation or update of such title evidence, which is acceptable to Buyer's title insurance underwriter for reissue of coverage; (B) tax search; and (C) municipal lien search. Buyer shall obtain and pay for post-Closing continuation and premium for Buyer's owner's policy, and if applicable, Buyer's lender's policy. Seller shall not be obligated to pay more than $_____ (if left blank, then $200.00) for abstract continuation or title search ordered or performed by Closing Agent.

(d) **SURVEY:** On or before Title Evidence Deadline, Buyer may, at Buyer's expense, have the Real Property surveyed and certified by a registered Florida surveyor ("Survey"). If Seller has a survey covering the Real Property, a copy shall be furnished to Buyer and Closing Agent within 5 days after Effective Date.

(e) **HOME WARRANTY:** At Closing, ☐ Buyer ☐ Seller ☐ N/A shall pay for a home warranty plan issued by _____ at a cost not to exceed $_____. A home warranty plan provides for repair or replacement of many of a home's mechanical systems and major built-in appliances in the event of breakdown due to normal wear and tear during the agreement's warranty period.

(f) **SPECIAL ASSESSMENTS:** At Closing, Seller shall pay: (i) the full amount of liens imposed by a public body ("public body" does not include a Condominium or Homeowner's Association) that are certified, confirmed and ratified before Closing; and (ii) the amount of the public body's most recent estimate or assessment for an improvement which is substantially complete as of Effective Date, but that has not resulted in a lien being imposed on the Property before Closing. Buyer shall pay all other assessments. If special assessments may be paid in installments **(CHECK ONE):**

☐ (a) Seller shall pay installments due prior to Closing and Buyer shall pay installments due after Closing. Installments prepaid or due for the year of Closing shall be prorated.

☐ (b) Seller shall pay the assessment(s) in full prior to or at the time of Closing.

IF NEITHER BOX IS CHECKED, THEN OPTION (a) SHALL BE DEEMED SELECTED.

This Paragraph 9(f) shall not apply to a special benefit tax lien imposed by a community development district (CDD) pursuant to Chapter 190, F.S., which lien shall be prorated pursuant to STANDARD K.

DISCLOSURES

10. DISCLOSURES:

(a) **RADON GAS:** Radon is a naturally occurring radioactive gas that, when it is accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county health department.

(b) **PERMITS DISCLOSURE:** Except as may have been disclosed by Seller to Buyer in a written disclosure, Seller does not know of any improvements made to the Property which were made without required permits or made pursuant to permits which have not been properly closed. If Seller identifies permits which have not been properly closed or improvements which were not permitted, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open permits or unpermitted improvements.

(c) **MOLD:** Mold is naturally occurring and may cause health risks or damage to property. If Buyer is concerned or desires additional information regarding mold, Buyer should contact an appropriate professional.

(d) **FLOOD ZONE; ELEVATION CERTIFICATION:** Buyer is advised to verify by elevation certificate which flood zone the Property is in, whether flood insurance is required by Buyer's lender, and what restrictions apply to improving the Property and rebuilding in the event of casualty. If Property is in a "Special Flood Hazard Area" or "Coastal Barrier Resources Act" designated area or otherwise protected area identified by the U.S. Fish and Wildlife Service under the Coastal Barrier Resources Act and the lowest floor elevation for the building(s) and/or flood insurance rating purposes is below minimum flood elevation or is ineligible for flood insurance coverage through the National Flood Insurance Program or private flood insurance as defined in 42 U.S.C. §4012a, Buyer may terminate this Contract by delivering written notice to Seller within _____ (if left blank, then 20) days after Effective Date, and Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract, failing which Buyer accepts existing elevation of buildings and flood zone designation of Property. The National Flood Insurance Program may assess additional fees or adjust premiums for pre-Flood Insurance Rate Map (pre-FIRM) non-primary structures (residential structures in which the insured or spouse does not reside for at least 50% of the year) and an elevation certificate may be required for actuarial rating.

(e) **ENERGY BROCHURE:** Buyer acknowledges receipt of Florida Energy-Efficiency Rating Information Brochure required by Section 553.996, F.S.

(f) **LEAD-BASED PAINT:** If Property includes pre-1978 residential housing, a lead-based paint disclosure is mandatory.

(g) **HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE: BUYER SHOULD NOT EXECUTE THIS CONTRACT UNTIL BUYER HAS RECEIVED AND READ THE HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE, IF APPLICABLE.**

(h) **PROPERTY TAX DISCLOSURE SUMMARY:** BUYER SHOULD NOT RELY ON THE SELLER'S CURRENT PROPERTY TAXES AS THE AMOUNT OF PROPERTY TAXES THAT THE BUYER MAY BE OBLIGATED TO PAY IN THE YEAR SUBSEQUENT TO PURCHASE. A CHANGE OF OWNERSHIP OR PROPERTY IMPROVEMENTS TRIGGERS REASSESSMENTS OF THE PROPERTY THAT COULD RESULT IN HIGHER PROPERTY TAXES. IF YOU HAVE ANY QUESTIONS CONCERNING VALUATION, CONTACT THE COUNTY PROPERTY APPRAISER'S OFFICE FOR INFORMATION.

(i) **FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT ("FIRPTA"):** Seller shall inform Buyer in writing if Seller is a "foreign person" as defined by the Foreign Investment in Real Property Tax Act ("FIRPTA"). Buyer and Seller shall comply with FIRPTA, which may require Seller to provide additional cash at Closing. If Seller is not a "foreign person", Seller can provide Buyer, at or prior to Closing, a certification of non-foreign status, under penalties of perjury, to inform Buyer and Closing Agent that no withholding is required. See STANDARD V for further information pertaining to FIRPTA. Buyer and Seller are advised to seek legal counsel and tax advice regarding their respective rights, obligations, reporting and withholding requirements pursuant to FIRPTA.

(j) **SELLER DISCLOSURE:** Seller knows of no facts materially affecting the value of the Real Property which are not readily observable and which have not been disclosed to Buyer. Except as provided for in the preceding sentence, Seller extends and intends no warranty and makes no representation of any type, either express or implied, as to the physical condition or history of the Property. Except as otherwise disclosed in writing Seller has received no written or verbal notice from any governmental entity or agency as to a currently uncorrected building, environmental or safety code violation.

PROPERTY MAINTENANCE, CONDITION, INSPECTIONS AND EXAMINATIONS

11. PROPERTY MAINTENANCE: Except for ordinary wear and tear and Casualty Loss, Seller shall maintain the Property, including, but not limited to, lawn, shrubbery, and pool, in the condition existing as of Effective Date ("AS IS Maintenance Requirement").

12. PROPERTY INSPECTION; RIGHT TO CANCEL:

(a) ***PROPERTY INSPECTIONS AND RIGHT TO CANCEL: Buyer shall have _____ (if left blank, then 15) days after Effective Date ("Inspection Period") within which to have such inspections of the Property performed as Buyer shall desire during the Inspection Period. If Buyer determines, in Buyer's sole discretion, that the Property is not acceptable to Buyer, Buyer may terminate this Contract by delivering written notice of such election to Seller prior to expiration of Inspection Period. If Buyer timely terminates this Contract, the Deposit paid shall be returned to Buyer, thereupon, Buyer and Seller shall be released of all further obligations under this Contract; however, Buyer shall be responsible for prompt payment for such inspections, for repair of damage to, and restoration of, the Property resulting from such inspections, and shall provide Seller with paid receipts for all work done on the Property (the preceding provision shall survive termination of this Contract). Unless Buyer exercises the right to terminate granted herein, Buyer accepts the physical condition of the Property and any violation of governmental, building, environmental, and safety codes, restrictions, or requirements, but subject to Seller's continuing AS IS Maintenance Requirement, and Buyer shall be responsible for any and all repairs and improvements required by Buyer's lender.***

(b) **WALK-THROUGH INSPECTION/RE-INSPECTION:** On the day prior to Closing Date, or on Closing Date prior to time of Closing, as specified by Buyer, Buyer or Buyer's representative may perform a walk-through (and follow-up walk-through, if necessary) inspection of the Property solely to confirm that all items of Personal Property are on the Property and to verify that Seller has maintained the Property as required by the AS IS Maintenance Requirement and has met all other contractual obligations.

(c) **SELLER ASSISTANCE AND COOPERATION IN CLOSE-OUT OF BUILDING PERMITS:** If Buyer's inspection of the Property identifies open or needed building permits, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open or needed Permits, and shall promptly cooperate in good faith with Buyer's efforts to obtain estimates of repairs or other work necessary to resolve such Permit issues. Seller's obligation to cooperate shall include Seller's execution of necessary authorizations,

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consents, or other documents necessary for Buyer to conduct inspections and have estimates of such repairs or work prepared, but in fulfilling such obligation, Seller shall not be required to expend, or become obligated to expend, any money.

(d) **ASSIGNMENT OF REPAIR AND TREATMENT CONTRACTS AND WARRANTIES:** At Buyer's option and cost, Seller will, at Closing, assign all assignable repair, treatment and maintenance contracts and warranties to Buyer.

ESCROW AGENT AND BROKER

13. ESCROW AGENT: Any Closing Agent or Escrow Agent (collectively "Agent") receiving the Deposit, other funds and other items is authorized, and agrees by acceptance of them, to deposit them promptly, hold same in escrow within the State of Florida and, subject to **COLLECTION**, disburse them in accordance with terms and conditions of this Contract. Failure of funds to become **COLLECTED** shall not excuse Buyer's performance. When conflicting demands for the Deposit are received, or Agent has a good faith doubt as to entitlement to the Deposit, Agent may take such actions permitted by this Paragraph 13, as Agent deems advisable. If in doubt as to Agent's duties or liabilities under this Contract, Agent may, at Agent's option, continue to hold the subject matter of the escrow until the parties agree to its disbursement or until a final judgment of a court of competent jurisdiction shall determine the rights of the parties, or Agent may deposit same with the clerk of the circuit court having jurisdiction of the dispute. An attorney who represents a party and also acts as Agent may represent such party in such action. Upon notifying all parties concerned of such action, all liability on the part of Agent shall fully terminate, except to the extent of accounting for any items previously delivered out of escrow. If a licensed real estate broker, Agent will comply with provisions of Chapter 475, F.S., as amended and FREC rules to timely resolve escrow disputes through mediation, arbitration, interpleader or an escrow disbursement order.

In any proceeding between Buyer and Seller wherein Agent is made a party because of acting as Agent hereunder, or in any proceeding where Agent interpleads the subject matter of the escrow, Agent shall recover reasonable attorney's fees and costs incurred, to be paid pursuant to court order out of the escrowed funds or equivalent. Agent shall not be liable to any party or person for mis-delivery of any escrowed items, unless such mis-delivery is due to Agent's willful breach of this Contract or Agent's gross negligence. This Paragraph 13 shall survive Closing or termination of this Contract.

14. PROFESSIONAL ADVICE; BROKER LIABILITY: Broker advises Buyer and Seller to verify Property condition, square footage, and all other facts and representations made pursuant to this Contract and to consult appropriate professionals for legal, tax, environmental, and other specialized advice concerning matters affecting the Property and the transaction contemplated by this Contract. Broker represents to Buyer that Broker does not reside on the Property and that all representations (oral, written or otherwise) by Broker are based on Seller representations or public records. **BUYER AGREES TO RELY SOLELY ON SELLER, PROFESSIONAL INSPECTORS AND GOVERNMENTAL AGENCIES FOR VERIFICATION OF PROPERTY CONDITION, SQUARE FOOTAGE AND FACTS THAT MATERIALLY AFFECT PROPERTY VALUE AND NOT ON THE REPRESENTATIONS (ORAL, WRITTEN OR OTHERWISE) OF BROKER.** Buyer and Seller (individually, the "Indemnifying Party") each individually indemnifies, holds harmless, and releases Broker and Broker's officers, directors, agents and employees from all liability for loss or damage, including all costs and expenses, and reasonable attorney's fees at all levels, suffered or incurred by Broker and Broker's officers, directors, agents and employees in connection with or arising from claims, demands or causes of action instituted by Buyer or Seller based on: (i) inaccuracy of information provided by the Indemnifying Party or from public records; (ii) Indemnifying Party's misstatement(s) or failure to perform contractual obligations; (iii) Broker's performance, at Indemnifying Party's request, of any task beyond the scope of services regulated by Chapter 475, F.S., as amended, including Broker's referral, recommendation or retention of any vendor for, or on behalf of, Indemnifying Party; (iv) products or services provided by any such vendor for, or on behalf of, Indemnifying Party; and (v) expenses incurred by any such vendor. Buyer and Seller each assumes full responsibility for selecting and compensating their respective vendors and paying their other costs under this Contract whether or not this transaction closes. This Paragraph 14 will not relieve Broker of statutory obligations under Chapter 475, F.S., as amended. For purposes of this Paragraph 14, Broker will be treated as a party to this Contract. This Paragraph 14 shall survive Closing or termination of this Contract.

DEFAULT AND DISPUTE RESOLUTION

15. DEFAULT:

(a) **BUYER DEFAULT:** If Buyer fails, neglects or refuses to perform Buyer's obligations under this Contract, including payment of the Deposit, within the time(s) specified, Seller may elect to recover and retain the Deposit for the account of Seller as agreed upon liquidated damages, consideration for execution of this Contract, and in full settlement of any claims, whereupon Buyer and Seller shall be relieved from all further obligations under

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this Contract, or Seller, at Seller's option, may, pursuant to Paragraph 16, proceed in equity to enforce Seller's rights under this Contract. The portion of the Deposit, if any, paid to Listing Broker upon default by Buyer, shall be split equally between Listing Broker and Cooperating Broker; provided however, Cooperating Broker's share shall not be greater than the commission amount Listing Broker had agreed to pay to Cooperating Broker.

(b) **SELLER DEFAULT:** If for any reason other than failure of Seller to make Seller's title marketable after reasonable diligent effort, Seller fails, neglects or refuses to perform Seller's obligations under this Contract, Buyer may elect to receive return of Buyer's Deposit without thereby waiving any action for damages resulting from Seller's breach, and, pursuant to Paragraph 16, may seek to recover such damages or seek specific performance.

This Paragraph 15 shall survive Closing or termination of this Contract.

16. DISPUTE RESOLUTION: Unresolved controversies, claims and other matters in question between Buyer and Seller arising out of, or relating to, this Contract or its breach, enforcement or interpretation ("Dispute") will be settled as follows:

(a) Buyer and Seller will have 10 days after the date conflicting demands for the Deposit are made to attempt to resolve such Dispute, failing which, Buyer and Seller shall submit such Dispute to mediation under Paragraph 16(b).

(b) Buyer and Seller shall attempt to settle Disputes in an amicable manner through mediation pursuant to Florida Rules for Certified and Court-Appointed Mediators and Chapter 44, F.S., as amended (the "Mediation Rules"). The mediator must be certified or must have experience in the real estate industry. Injunctive relief may be sought without first complying with this Paragraph 16(b). Disputes not settled pursuant to this Paragraph 16 may be resolved by instituting action in the appropriate court having jurisdiction of the matter. This Paragraph 16 shall survive Closing or termination of this Contract.

17. ATTORNEY'S FEES; COSTS: The parties will split equally any mediation fee incurred in any mediation permitted by this Contract, and each party will pay their own costs, expenses and fees, including attorney's fees, incurred in conducting the mediation. In any litigation permitted by this Contract, the prevailing party shall be entitled to recover from the non-prevailing party costs and fees, including reasonable attorney's fees, incurred in conducting the litigation. This Paragraph 17 shall survive Closing or termination of this Contract.

STANDARDS FOR REAL ESTATE TRANSACTIONS ("STANDARDS")

18. STANDARDS:

A. TITLE:

(i) **TITLE EVIDENCE; RESTRICTIONS; EASEMENTS; LIMITATIONS:** Within the time period provided in Paragraph 9(c), the Title Commitment, with legible copies of instruments listed as exceptions attached thereto, shall be issued and delivered to Buyer. The Title Commitment shall set forth those matters to be discharged by Seller at or before Closing and shall provide that, upon recording of the deed to Buyer, an owner's policy of title insurance in the amount of the Purchase Price, shall be issued to Buyer insuring Buyer's marketable title to the Real Property, subject only to the following matters: (a) comprehensive land use plans, zoning, and other land use restrictions, prohibitions and requirements imposed by governmental authority; (b) restrictions and matters appearing on the Plat or otherwise common to the subdivision; (c) outstanding oil, gas and mineral rights of record without right of entry; (d) unplatted public utility easements of record (located contiguous to real property lines and not more than 10 feet in width as to rear or front lines and 7 1/2 feet in width as to side lines); (e) taxes for year of Closing and subsequent years; and (f) assumed mortgages and purchase money mortgages, if any (if additional items, attach addendum); provided, that, none prevent use of Property for **RESIDENTIAL PURPOSES**. If there exists at Closing any violation of items identified in (b) – (f) above, then the same shall be deemed a title defect. Marketable title shall be determined according to applicable Title Standards adopted by authority of The Florida Bar and in accordance with law.

(ii) **TITLE EXAMINATION:** Buyer shall have 5 days after receipt of Title Commitment to examine it and notify Seller in writing specifying defect(s), if any, that render title unmarketable. If Seller provides Title Commitment and it is delivered to Buyer less than 5 days prior to Closing Date, Buyer may extend Closing for up to 5 days after date of receipt to examine same in accordance with this STANDARD A. Seller shall have 30 days ("Cure Period") after receipt of Buyer's notice to take reasonable diligent efforts to remove defects. If Buyer fails to so notify Seller, Buyer shall be deemed to have accepted title as it then is. If Seller cures defects within Cure Period, Seller will deliver written notice to Buyer (with proof of cure acceptable to Buyer and Buyer's attorney) and the parties will close this Contract on Closing Date (or if Closing Date has passed, within 10 days after Buyer's receipt of Seller's notice). If Seller is unable to cure defects within Cure Period, then Buyer may, within 5 days after expiration of Cure Period,

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STANDARDS FOR REAL ESTATE TRANSACTIONS ("STANDARDS") CONTINUED

deliver written notice to Seller: (a) extending Cure Period for a specified period not to exceed 120 days within which Seller shall continue to use reasonable diligent effort to remove or cure the defects ("Extended Cure Period"); or (b) electing to accept title with existing defects and close this Contract on Closing Date (or if Closing Date has passed, within the earlier of 10 days after end of Extended Cure Period or Buyer's receipt of Seller's notice), or (c) electing to terminate this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. If after reasonable diligent effort, Seller is unable to timely cure defects, and Buyer does not waive the defects, this Contract shall terminate, and Buyer shall receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

B. SURVEY: If Survey discloses encroachments on the Real Property or that improvements located thereon encroach on setback lines, easements, or lands of others, or violate any restrictions, covenants, or applicable governmental regulations described in STANDARD A (i)(a), (b) or (d) above, Buyer shall deliver written notice of such matters, together with a copy of Survey, to Seller within 5 days after Buyer's receipt of Survey, but no later than Closing. If Buyer timely delivers such notice and Survey to Seller, such matters identified in the notice and Survey shall constitute a title defect, subject to cure obligations of STANDARD A above. If Seller has delivered a prior survey, Seller shall, at Buyer's request, execute an affidavit of "no change" to the Real Property since the preparation of such prior survey, to the extent the affirmations therein are true and correct.

C. INGRESS AND EGRESS: Seller represents that there is ingress and egress to the Real Property and title to the Real Property is insurable in accordance with STANDARD A without exception for lack of legal right of access.

D. LEASE INFORMATION: Seller shall, at least 10 days prior to Closing, furnish to Buyer estoppel letters from tenant(s)/occupant(s) specifying nature and duration of occupancy, rental rates, advanced rent and security deposits paid by tenant(s) or occupant(s)("Estoppel Letter(s)"). If Seller is unable to obtain such Estoppel Letter(s) the same information shall be furnished by Seller to Buyer within that time period in the form of a Seller's affidavit and Buyer may thereafter contact tenant(s) or occupant(s) to confirm such information. If Estoppel Letter(s) or Seller's affidavit, if any, differ materially from Seller's representations and lease(s) provided pursuant to Paragraph 6, or if tenant(s)/occupant(s) fail or refuse to confirm Seller's affidavit, Buyer may deliver written notice to Seller within 5 days after receipt of such information, but no later than 5 days prior to Closing Date, terminating this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. Seller shall, at Closing, deliver and assign all leases to Buyer who shall assume Seller's obligations thereunder.

E. LIENS: Seller shall furnish to Buyer at Closing an affidavit attesting (i) to the absence of any financing statement, claims of lien or potential lienors known to Seller and (ii) that there have been no improvements or repairs to the Real Property for 90 days immediately preceding Closing Date. If the Real Property has been improved or repaired within that time, Seller shall deliver releases or waivers of construction liens executed by all general contractors, subcontractors, suppliers and materialmen in addition to Seller's lien affidavit setting forth names of all such general contractors, subcontractors, suppliers and materialmen, further affirming that all charges for improvements or repairs which could serve as a basis for a construction lien or a claim for damages have been paid or will be paid at Closing.

F. TIME: Calendar days shall be used in computing time periods. **Time is of the essence in this Contract.** Other than time for acceptance and Effective Date as set forth in Paragraph 3, any time periods provided for or dates specified in this Contract, whether preprinted, handwritten, typewritten or inserted herein, which shall end or occur on a Saturday, Sunday, or a national legal holiday (see 5 U.S.C. 6103) shall extend to 5:00 p.m. (where the Property is located) of the next business day.

G. FORCE MAJEURE: Buyer or Seller shall not be required to perform any obligation under this Contract or be liable to each other for damages so long as performance or non-performance of the obligation, or the availability of services, insurance or required approvals essential to Closing, is disrupted, delayed, caused or prevented by Force Majeure. "Force Majeure" means: hurricanes, floods, extreme weather, earthquakes, fire, or other acts of God, unusual transportation delays, or wars, insurrections, or acts of terrorism, which, by exercise of reasonable diligent effort, the non-performing party is unable in whole or in part to prevent or overcome. All time periods, including Closing Date, will be extended a reasonable time up to 7 days after the Force Majeure no longer prevents performance under this Contract, provided, however, if such Force Majeure continues to prevent performance under this Contract more than 30 days beyond Closing Date, then either party may terminate this Contract by delivering written notice to the other and the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

H. CONVEYANCE: Seller shall convey marketable title to the Real Property by statutory warranty, trustee's, personal representative's, or guardian's deed, as appropriate to the status of Seller, subject only to matters described in STANDARD A and those accepted by Buyer. Personal Property shall, at request of Buyer, be

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transferred by absolute bill of sale with warranty of title, subject only to such matters as may be provided for in this Contract.

I. CLOSING LOCATION; DOCUMENTS; AND PROCEDURE:

(i) **LOCATION:** Closing will be conducted by the attorney or other closing agent ("Closing Agent") designated by the party paying for the owner's policy of title insurance and will take place in the county where the Real Property is located at the office of the Closing Agent, or at such other location agreed to by the parties. If there is no title insurance, Seller will designate Closing Agent. Closing may be conducted by mail, overnight courier, or electronic means.

(ii) **CLOSING DOCUMENTS:** Seller shall at or prior to Closing, execute and deliver, as applicable, deed, bill of sale, certificate(s) of title or other documents necessary to transfer title to the Property, construction lien affidavit(s), owner's possession and no lien affidavit(s), and assignment(s) of leases. Seller shall provide Buyer with paid receipts for all work done on the Property pursuant to this Contract. Buyer shall furnish and pay for, as applicable, the survey, flood elevation certification, and documents required by Buyer's lender.

(iii) **FinCEN GTO NOTICE**. **If Closing Agent is required to comply with the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") Geographic Targeting Orders ("GTOs"), then Buyer shall provide Closing Agent with the information related to Buyer and the transaction contemplated by this Contract that is required to complete IRS Form 8300, and Buyer consents to Closing Agent's collection and report of said information to IRS.**

(iv) **PROCEDURE:** The deed shall be recorded upon **COLLECTION** of all closing funds. If the Title Commitment provides insurance against adverse matters pursuant to Section 627.7841, F.S., as amended, the escrow closing procedure required by STANDARD J shall be waived, and Closing Agent shall, **subject to COLLECTION of all closing funds**, disburse at Closing the brokerage fees to Broker and the net sale proceeds to Seller.

J. ESCROW CLOSING PROCEDURE: If Title Commitment issued pursuant to Paragraph 9(c) does not provide for insurance against adverse matters as permitted under Section 627.7841, F.S., as amended, the following escrow and closing procedures shall apply: (1) all Closing proceeds shall be held in escrow by the Closing Agent for a period of not more than 10 days after Closing; (2) if Seller's title is rendered unmarketable, through no fault of Buyer, Buyer shall, within the 10 day period, notify Seller in writing of the defect and Seller shall have 30 days from date of receipt of such notification to cure the defect; (3) if Seller fails to timely cure the defect, the Deposit and all Closing funds paid by Buyer shall, within 5 days after written demand by Buyer, be refunded to Buyer and, simultaneously with such repayment, Buyer shall return the Personal Property, vacate the Real Property and re-convey the Property to Seller by special warranty deed and bill of sale; and (4) if Buyer fails to make timely demand for refund of the Deposit, Buyer shall take title as is, waiving all rights against Seller as to any intervening defect except as may be available to Buyer by virtue of warranties contained in the deed or bill of sale.

K. PRORATIONS; CREDITS: The following recurring items will be made current (if applicable) and prorated as of the day prior to Closing Date, or date of occupancy if occupancy occurs before Closing Date: real estate taxes (including special benefit tax assessments imposed by a CDD), interest, bonds, association fees, insurance, rents and other expenses of Property. Buyer shall have option of taking over existing policies of insurance, if assumable, in which event premiums shall be prorated. Cash at Closing shall be increased or decreased as may be required by prorations to be made through day prior to Closing. Advance rent and security deposits, if any, will be credited to Buyer. Escrow deposits held by Seller's mortgagee will be paid to Seller. Taxes shall be prorated based on current year's tax. If Closing occurs on a date when current year's millage is not fixed but current year's assessment is available, taxes will be prorated based upon such assessment and prior year's millage. If current year's assessment is not available, then taxes will be prorated on prior year's tax. If there are completed improvements on the Real Property by January 1st of year of Closing, which improvements were not in existence on January 1st of prior year, then taxes shall be prorated based upon prior year's millage and at an equitable assessment to be agreed upon between the parties, failing which, request shall be made to the County Property Appraiser for an informal assessment taking into account available exemptions. In all cases, due allowance shall be made for the maximum allowable discounts and applicable homestead and other exemptions. A tax proration based on an estimate shall, at either party's request, be readjusted upon receipt of current year's tax bill. This STANDARD K shall survive Closing.

L. ACCESS TO PROPERTY TO CONDUCT APPRAISALS, INSPECTIONS, AND WALK-THROUGH: Seller shall, upon reasonable notice, provide utilities service and access to Property for appraisals and inspections, including a walk-through (or follow-up walk-through if necessary) prior to Closing.

M. RISK OF LOSS: If, after Effective Date, but before Closing, Property is damaged by fire or other casualty ("Casualty Loss") and cost of restoration (which shall include cost of pruning or removing damaged trees) does not exceed 1.5% of Purchase Price, cost of restoration shall be an obligation of Seller and Closing shall proceed pursuant to terms of this Contract. If restoration is not completed as of Closing, a sum equal to 125% of estimated

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cost to complete restoration (not to exceed 1.5% of Purchase Price) will be escrowed at Closing. If actual cost of restoration exceeds escrowed amount, Seller shall pay such actual costs (but, not in excess of 1.5% of Purchase Price). Any unused portion of escrowed amount shall be returned to Seller. If cost of restoration exceeds 1.5% of Purchase Price, Buyer shall elect to either take Property "as is" together with the 1.5%, or receive a refund of the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract. Seller's sole obligation with respect to tree damage by casualty or other natural occurrence shall be cost of pruning or removal.

N. 1031 EXCHANGE: If either Seller or Buyer wish to enter into a like-kind exchange (either simultaneously with Closing or deferred) under Section 1031 of the Internal Revenue Code ("Exchange"), the other party shall cooperate in all reasonable respects to effectuate the Exchange, including execution of documents; provided, however, cooperating party shall incur no liability or expense related to the Exchange, and Closing shall not be contingent upon, nor extended or delayed by, such Exchange.

O. CONTRACT NOT RECORDABLE; PERSONS BOUND; NOTICE; DELIVERY; COPIES; CONTRACT EXECUTION: Neither this Contract nor any notice of it shall be recorded in any public records. This Contract shall be binding on, and inure to the benefit of, the parties and their respective heirs or successors in interest. Whenever the context permits, singular shall include plural and one gender shall include all. Notice and delivery given by or to the attorney or broker (including such broker's real estate licensee) representing any party shall be as effective as if given by or to that party. All notices must be in writing and may be made by mail, personal delivery or electronic (including "pdf") media. A facsimile or electronic (including "pdf") copy of this Contract and any signatures hereon shall be considered for all purposes as an original. This Contract may be executed by use of electronic signatures, as determined by Florida's Electronic Signature Act and other applicable laws.

P. INTEGRATION; MODIFICATION: This Contract contains the full and complete understanding and agreement of Buyer and Seller with respect to the transaction contemplated by this Contract and no prior agreements or representations shall be binding upon Buyer or Seller unless included in this Contract. No modification to or change in this Contract shall be valid or binding upon Buyer or Seller unless in writing and executed by the parties intended to be bound by it.

Q. WAIVER: Failure of Buyer or Seller to insist on compliance with, or strict performance of, any provision of this Contract, or to take advantage of any right under this Contract, shall not constitute a waiver of other provisions or rights.

R. RIDERS; ADDENDA; TYPEWRITTEN OR HANDWRITTEN PROVISIONS: Riders, addenda, and typewritten or handwritten provisions shall control all printed provisions of this Contract in conflict with them.

S. COLLECTION or COLLECTED: "COLLECTION" or "COLLECTED" means any checks tendered or received, including Deposits, have become actually and finally collected and deposited in the account of Escrow Agent or Closing Agent. Closing and disbursement of funds and delivery of closing documents may be delayed by Closing Agent until such amounts have been COLLECTED in Closing Agent's accounts.

T. RESERVED.

U. APPLICABLE LAW AND VENUE: This Contract shall be construed in accordance with the laws of the State of Florida and venue for resolution of all disputes, whether by mediation, arbitration or litigation, shall lie in the county where the Real Property is located.

V. FIRPTA TAX WITHHOLDING: If a seller of U.S. real property is a "foreign person" as defined by FIRPTA, Section 1445 of the Internal Revenue Code ("Code") requires the buyer of the real property to withhold up to 15% of the amount realized by the seller on the transfer and remit the withheld amount to the Internal Revenue Service (IRS) unless an exemption to the required withholding applies or the seller has obtained a Withholding Certificate from the IRS authorizing a reduced amount of withholding.

(i) No withholding is required under Section 1445 of the Code if the Seller is not a "foreign person". Seller can provide proof of non-foreign status to Buyer by delivery of written certification signed under penalties of perjury, stating that Seller is not a foreign person and containing Seller's name, U.S. taxpayer identification number and home address (or office address, in the case of an entity), as provided for in 26 CFR 1.1445-2(b). Otherwise, Buyer shall withhold the applicable percentage of the amount realized by Seller on the transfer and timely remit said funds to the IRS.

(ii) If Seller is a foreign person and has received a Withholding Certificate from the IRS which provides for reduced or eliminated withholding in this transaction and provides same to Buyer by Closing, then Buyer shall withhold the reduced sum required, if any, and timely remit said funds to the IRS.

(iii) If prior to Closing Seller has submitted a completed application to the IRS for a Withholding Certificate and has provided to Buyer the notice required by 26 CFR 1.1445-1(c) (2)(i)(B) but no Withholding Certificate has been received as of Closing, Buyer shall, at Closing, withhold the applicable percentage of the amount realized by Seller on the transfer and, at Buyer's option, either (a) timely remit the withheld funds to the IRS or (b) place the funds in escrow, at Seller's expense, with an escrow agent selected by Buyer and pursuant to terms negotiated by the

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parties, to be subsequently disbursed in accordance with the Withholding Certificate issued by the IRS or remitted directly to the IRS if the Seller's application is rejected or upon terms set forth in the escrow agreement.
(iv) In the event the net proceeds due Seller are not sufficient to meet the withholding requirement(s) in this transaction, Seller shall deliver to Buyer, at Closing, the additional COLLECTED funds necessary to satisfy the applicable requirement and thereafter Buyer shall timely remit said funds to the IRS or escrow the funds for disbursement in accordance with the final determination of the IRS, as applicable.
(v) Upon remitting funds to the IRS pursuant to this STANDARD, Buyer shall provide Seller copies of IRS Forms 8288 and 8288-A, as filed.

W. RESERVED

X. BUYER WAIVER OF CLAIMS: ***To the extent permitted by law, Buyer waives any claims against Seller and against any real estate licensee involved in the negotiation of this Contract for any damage or defects pertaining to the physical condition of the Property that may exist at Closing of this Contract and be subsequently discovered by the Buyer or anyone claiming*** **by, through, under or against the Buyer.** ***This provision does not relieve Seller's obligation to comply with Paragraph 10(j). This Standard X shall survive Closing.***

ADDENDA AND ADDITIONAL TERMS

* **19. ADDENDA:** The following additional terms are included in the attached addenda or riders and incorporated into this Contract (**Check if applicable**):

☐ A. Condominium Rider	☐ K. RESERVED	☐ T. Pre-Closing Occupancy
☐ B. Homeowners' Assn.	☐ L. RESERVED	☐ U. Post-Closing Occupancy
☐ C. Seller Financing	☐ M. Defective Drywall	☐ V. Sale of Buyer's Property
☐ D. Mortgage Assumption	☐ N. Coastal Construction Control Line	☐ W. Back-up Contract
☐ E. FHA/VA Financing		☐ X. Kick-out Clause
☐ F. Appraisal Contingency	☐ O. Insulation Disclosure	☐ Y. Seller's Attorney Approval
☐ G. Short Sale	☐ P. Lead Paint Disclosure (Pre-1978)	☐ Z. Buyer's Attorney Approval
☐ H. Homeowners/Flood Ins.	☐ Q. Housing for Older Persons	☐ AA. Licensee Property Interest
☐ I. RESERVED	☐ R. Rezoning	☐ BB. Binding Arbitration
☐ J. Interest-Bearing Acct.	☐ S. Lease Purchase/ Lease Option	☐ Other:_____

* **20. ADDITIONAL TERMS:**_____

COUNTER-OFFER/REJECTION

* ☐ Seller counters Buyer's offer (to accept the counter-offer, Buyer must sign or initial the counter-offered terms and deliver a copy of the acceptance to Seller).
* ☐ Seller rejects Buyer's offer.

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THIS IS INTENDED TO BE A LEGALLY BINDING CONTRACT. IF NOT FULLY UNDERSTOOD, SEEK THE ADVICE OF AN ATTORNEY PRIOR TO SIGNING.

THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR.

Approval of this form by the Florida Realtors and The Florida Bar does not constitute an opinion that any of the terms and conditions in this Contract should be accepted by the parties in a particular transaction. Terms and conditions should be negotiated based upon the respective interests, objectives and bargaining positions of all interested persons.

AN ASTERISK (*) FOLLOWING A LINE NUMBER IN THE MARGIN INDICATES THE LINE CONTAINS A BLANK TO BE COMPLETED.

Buyer: _____ Date: _____

Buyer: _____ Date: _____

Seller: _____ Date: _____

Seller: _____ Date: _____

Buyer's address for purposes of notice	Seller's address for purposes of notice
_____	_____
_____	_____
_____	_____

BROKER: Listing and Cooperating Brokers, if any, named below (collectively, "Broker"), are the only Brokers entitled to compensation in connection with this Contract. Instruction to Closing Agent: Seller and Buyer direct Closing Agent to disburse at Closing the full amount of the brokerage fees as specified in separate brokerage agreements with the parties and cooperative agreements between the Brokers, except to the extent Broker has retained such fees from the escrowed funds. This Contract shall not modify any MLS or other offer of compensation made by Seller or Listing Broker to Cooperating Brokers.

_____	_____
Cooperating Sales Associate, if any	**Listing Sales Associate**
_____	_____
Cooperating Broker, if any	**Listing Broker**

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

F. APPRAISAL CONTINGENCY

This Contract is contingent upon Buyer obtaining, at Buyer's expense, a written appraisal from a licensed Florida appraiser, on or before _____ (if left blank, then at least ten (10) days prior to Closing), stating that the appraised value of the Property is at least $_____ (if left blank, the Purchase Price). If the appraisal states that the appraised value of the Property is less than the above value, Buyer shall deliver a copy of such appraisal to Seller within 3 days after the above date and deliver written notice to Seller, either: a) terminating this Contract in which event the Deposit paid shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract; or b) waiving and removing this contingency and continuing with this Contract without regard to the appraised value of the Property, except as provided in Paragraph 8(b) if it is checked.

If Buyer fails to timely obtain an appraisal, or having timely obtained such appraisal fails to timely deliver notice of Buyer's exercise of the right to terminate granted above, this contingency shall be waived and removed, and Buyer shall continue with this Contract, without waiving any of Buyer's rights in Paragraph 8(b) if it is checked.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

K. "AS IS"

1. SELLER'S OBLIGATIONS WITH RESPECT TO THE PROPERTY; LIMITATIONS:

(a) Paragraph 9(a)(i) (General Repair Limit), Paragraph 9(a)(ii) (WDO Repair Limit), Paragraph 9(a)(iii) (Permit Limit), Paragraph 11 (Property Maintenance), and Paragraph 12 (Property Inspection and Repair) are deleted.

(b) This Rider does not relieve Seller's disclosure obligations under Paragraph 10(j). Except as provided for in this Rider, (1) Seller has received no written or verbal notice from any governmental entity or agency as to a currently uncorrected building, environmental or safety code violation and (2) Seller extends and intends no warranty and makes no representation of any type, either express or implied, as to the physical condition or history of the Property.

(c) Subject to the provisions and limitations of this Rider, and to the extent permitted by law, Buyer waives any claims against Seller and against any real estate licensee involved in the negotiation of this Contract for any damage or defects pertaining to the physical condition of the Property that may exist at Closing of this Contract and be subsequently discovered by the Buyer or anyone claiming by, through, under or against the Buyer. The terms of this Rider shall survive Closing.

2. INSPECTION PERIOD AND RIGHT TO CANCEL:

(a) Buyer shall have _____ (if left blank, then 15) days from Effective Date ("Inspection Period") within which to have such inspections of the Property performed as Buyer shall desire and utilities shall be made available by the Seller during the Inspection Period.

(b) If this Contract is terminated or if the transaction contemplated by this Contract does not close, Buyer shall repair all damage to Property resulting from Buyer's inspections, return Property to its pre-inspection condition and provide Seller with paid receipts for all work done on Property upon its completion. This provision shall survive termination of this Contract.

(c) If Buyer determines, in Buyer's sole discretion, that the Property is not acceptable to Buyer, Buyer may terminate this Contract by delivering written notice of such election to Seller on or before expiration of the Inspection Period. If Buyer timely terminates this Contract, the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller of all further obligations under this Contract, except as provided in Subparagraph 2(b), above.

(d) If Buyer elects to proceed with this Contract or fails to timely terminate this Contract on or before expiration of the Inspection Period, then, except for Seller's continuing AS IS Maintenance Requirement under Paragraph 3 below, Buyer waives Seller's obligation(s) to make repair(s), replacement(s), or treatment(s) or close open or expired Permits, accepts the physical condition of the Property and any violation of governmental, building, environmental, and safety codes, restrictions, or requirements, in their "as is" condition(s), and Buyer shall be responsible for any and all repairs and improvements required by Buyer's lender.

3. PROPERTY MAINTENANCE; PROPERTY ACCESS; ASSIGNMENT OF CONTRACTS AND WARRANTIES:

Except for ordinary wear and tear and Casualty Loss, Seller shall maintain the Property, including, but not limited to, lawn, shrubbery, and pool, in the condition existing as of Effective Date ("AS IS Maintenance Requirement"). Seller shall, upon reasonable notice, provide utilities service and access to the Property for appraisal and inspections, including a walk-through prior to Closing, to confirm that all items of Personal Property are on the Real Property and that the Property has been maintained as required by this Paragraph 3. At Buyer's option and cost, Seller shall, at Closing, assign all assignable repair, treatment and maintenance contracts and warranties to Buyer.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

D. ASSUMPTION OF EXISTING MORTGAGE(S)

The Property is encumbered by an existing mortgage, in the amount of $_____, which has ☐ a variable interest rate; or ☐ a fixed interest rate of _____% per annum. At time of title transfer, some fixed interest rates are subject to increase; if increased, the rate shall not exceed _____% per annum. Seller shall furnish a statement from each mortgagee stating the principal balance, method of payment, interest rate and status of mortgage or authorize Buyer or Closing Agent to obtain the same. If Buyer has agreed to assume a mortgage which requires approval of Buyer by the mortgagee for assumption, then Buyer shall promptly obtain the necessary application and diligently complete and return it to the mortgagee. Any mortgagee charge(s), not to exceed $_____ (1% of amount assumed if left blank), shall be paid by Buyer. If Buyer is not accepted by mortgagee or the requirements for assumption are not in accordance with the terms of this Contract or mortgagee makes a charge in excess of the stated amount, Seller or Buyer may rescind this Contract by written notice to the other party unless either elects to pay the increase in interest rate or excess mortgage charges.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

W. BACK-UP CONTRACT

This back-up contract is subject to the termination of a prior executed contract between Seller and a third party for the sale of the Property. If the prior executed contract is terminated and Seller delivers written notice of the termination to Buyer before 5:00 p.m. on _____, this contingency shall be removed and this back-up contract shall move into first position. The "Effective Date" of this back-up contract shall be the date Seller delivers written notice of the termination of the prior executed contract. Buyer may terminate this back-up Contract by delivering written notice to the Seller prior to the date Seller delivers written notice of the termination of the prior executed Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

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Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

BB. BINDING ARBITRATION

If initialed here by both Buyer and Seller, any Dispute not resolved pursuant to mediation as provided in Paragraph 16(b) of this Contract shall be settled by binding arbitration, using the Real Estate Industry Arbitration Rules of the American Arbitration Association (http://www.adr.org) unless the parties mutually agree to use other arbitration rules. The arbitrator may not alter the terms of this Contract nor award any remedy not provided for in this Contract. The parties shall be allowed discovery in accordance with the Florida Rules of Civil Procedure.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

Z. BUYER'S ATTORNEY APPROVAL

This Contract is contingent upon Buyer's attorney approving this Contract. If Buyer's attorney disapproves this Contract, then Buyer may terminate this Contract by delivering written notice to Seller on or before _____, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

N. COASTAL CONSTRUCTION CONTROL LINE

The Real Property which is the subject of this Contract is or may be located either partially or totally seaward of the Coastal Construction Control Line ("CCCL"), as defined in Section 161.053 F.S. The Property being purchased may be subject to coastal erosion and to federal, state, or local regulations that govern coastal property, including the delineation of the coastal construction control line, rigid coastal protection structures, beach nourishment, and the protection of marine turtles. Additional information can be obtained from the Florida Department of Environmental Protection, including whether there are significant erosion conditions associated with the shoreline of the Property being purchased. Florida law requires Seller to provide Buyer with an affidavit, or a survey meeting the requirements of Chapter 472 of the Florida Statutes, delineating the location of the CCCL on the Real Property at or prior to the Closing, unless Buyer waives this requirement in writing. This Property may be in the Coastal Building Zone ("CBZ") and therefore be subject to governmental regulation.

☐ Buyer waives the right to receive a CCCL affidavit or survey.

☐ Buyer requests a CCCL affidavit or survey within the time allowed to deliver evidence of title.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

A. CONDOMINIUM RIDER

1. CONDOMINIUM ASSOCIATION APPROVAL:
The Association's approval of Buyer (**CHECK ONE**): ☐ is ☐ is not required. If approval is required, this Contract is contingent upon Buyer being approved by the Association no later than _____ (if left blank, then 5) days prior to Closing. Within _____ (if left blank, then 5) days after Effective Date Seller shall initiate the approval process with the Association and Buyer shall apply for such approval. Buyer and Seller shall sign and deliver any documents required by the Association in order to complete the transfer of the Property and each shall use diligent effort to obtain such approval, including making personal appearances if required. If Buyer is not approved within the stated time period, this Contract shall terminate and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

2. RIGHT OF FIRST REFUSAL:
(a) The Association (**CHECK ONE**): ☐ has ☐ does not have a right of first refusal ("Right"). If the Association has a Right, this Contract is contingent upon the Association, within the time permitted for the exercise of such Right, either providing written confirmation to Buyer that the Association is not exercising that Right, or failing to timely exercise such Right pursuant to the terms of the Declaration of Condominium ("Declaration", which reference includes all amendments thereto).
(b) The members of the Association (**CHECK ONE**): ☐ have ☐ do not have a Right. If the members do have a Right, this Contract is contingent upon the members, within the time permitted for the exercise of such Right, either providing written confirmation to Buyer that the members are not exercising that Right, or failing to timely exercise such Right pursuant to the terms of the Declaration.
(c) Buyer and Seller shall, within _____ (if left blank, then 5) days after Effective Date, sign and deliver any documents required as a condition precedent to the exercise of the Right, and shall use diligent effort to submit and process the matter with the Association and members, including personal appearances, if required.
(d) If, within the stated time period, the Association, the members of the Association, or both, fail to provide the written confirmation or the Right has not otherwise expired, then this Contract shall terminate and the Deposit shall be refunded to the Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.
(e) If the Association or a member timely exercises its or their Right, this Contract shall terminate and the Deposit shall be refunded to Buyer (unless this Contract provides otherwise), thereby releasing Buyer and Seller from all further obligations under this Contract, and Seller shall pay to Broker the full commission at Closing in recognition that Broker procured the sale.

3. FEES; ASSESSMENTS; PRORATIONS; LITIGATION:
(a) Condominium Association assessment(s) and Rents: Seller represents that the current Association assessment(s) installments is/are

$ _____ payable **(CHECK ONE):** ☐ monthly ☐ quarterly ☐ semi-annually ☐ annually

and if more than one Association assessment
$ _____ payable (**CHECK ONE):** ☐ monthly ☐ quarterly ☐ semi-annually ☐ annually

and the current rent on recreation areas, if any, is
$ _____ payable (**CHECK ONE):** ☐ monthly ☐ quarterly ☐ semi-annually ☐ annually

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A. CONDOMINIUM RIDER (CONTINUED)

All annual assessments levied by the Association and rent on recreational areas, if any, shall be made current by Seller at Closing, and Buyer shall reimburse Seller for prepayments.

(b) Fees: Seller shall, at Closing, pay all fines imposed against the Unit by the Condominium Association as of Closing Date and any fees the Association charges to provide information about the Property, assessment(s) and fees.

If Property is part of a Homeowners' Association, see Rider B. HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE for further information including additional assessments and fees.

(c) Special Assessments and Prorations:

(i) Seller represents that Seller is not aware of any special or other assessment that has been levied by the Association or that has been an item on the agenda, or reported in the minutes, of the Association within twelve (12) months prior to Effective Date, ("pending") except as follows:_____

_____

_____

(ii) If special assessments levied or pending exist as of the Effective Date are disclosed above by Seller and may be paid in installments (**CHECK ONE**): ☐ Buyer ☐ Seller (if left blank, then Buyer) shall pay installments due after Closing Date. **If Seller is checked, Seller shall pay the assessment in full prior to or at the time of Closing.**

(iii) If special assessments levied or pending exist as of the Effective Date and have not been disclosed above by Seller, then Seller shall pay such assessments in full at the time of Closing.

(iv) If, after Effective Date, the Association imposes a special assessment for improvements, work or services, which was not pending as of the Effective Date, then Seller shall pay all amounts due before Closing Date and Buyer shall pay all amounts due after Closing Date.

(v) A special assessment shall be deemed levied for purposes of this paragraph on the date when the assessment has been approved as required for enforcement pursuant to Florida law and the condominium documents listed in Paragraph 5.

(vi) Association assets and liabilities, including Association reserve accounts, shall not be prorated.

(d) Litigation: Seller represents that Seller is not aware of pending or anticipated litigation affecting the Property or the common elements, if any, except as follows: _____

_____

_____

4. SPRINKLER SYSTEM RETROFIT:
If, pursuant to Sections 718.112(2)(l), F.S., the Association has voted to forego retrofitting its fire sprinkler system or handrails and guardrails for the condominium units, then prior to Closing Seller shall furnish to Buyer the written notice of Association's vote to forego such retrofitting.

5. NON-DEVELOPER DISCLOSURE:
(**CHECK ONE**):

☐ (a) THE BUYER HEREBY ACKNOWLEDGES THAT BUYER HAS BEEN PROVIDED A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES OF INCORPORATION OF THE ASSOCIATION, BYLAWS AND RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND FREQUENTLY ASKED QUESTIONS AND ANSWERS DOCUMENT MORE THAN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, PRIOR TO EXECUTION OF THIS CONTRACT.

☐ (b) THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER AND RECEIPT BY BUYER OF A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES OF INCORPORATION, BYLAWS AND RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND FREQUENTLY ASKED QUESTIONS AND ANSWERS DOCUMENT IF SO REQUESTED IN WRITING. ANY PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND

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LEGAL HOLIDAYS, AFTER THE BUYER RECEIVES THE DECLARATION, ARTICLES OF INCORPORATION, BYLAWS AND RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND FREQUENTLY ASKED QUESTIONS AND ANSWERS DOCUMENT IF REQUESTED IN WRITING. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.

6. BUYER'S REQUEST FOR DOCUMENTS:
Buyer is entitled, at Seller's expense, to current copies of the condominium documents specified in Paragraph 5, above. Buyer (**CHECK ONE**): ☐ requests ☐ does not request a current copy of the documents specified in Paragraph 5, above. If this Contract does not close, Buyer shall immediately return the documents to Seller or reimburse Seller for the cost of the documents.

7. BUYER'S RECEIPT OF DOCUMENTS:
(**COMPLETE AND CHECK ONLY IF CORRECT**) ☐ Buyer received the documents described in Paragraph 5, above, on _____.

8. COMMON ELEMENTS; PARKING:
The Property includes the unit being purchased and an undivided interest in the common elements and appurtenant limited common elements of the condominium, as specified in the Declaration. Seller's right and interest in or to the use of the following parking space(s), garage, and other areas are included in the sale of the Property and shall be assigned to Buyer at Closing, subject to the Declaration:
Parking Space(s) # _____ Garage # _____ Other: _____

9. INSPECTIONS AND REPAIRS:
The rights and obligations arising under Paragraphs 11 and 12 of this Contract to maintain, repair, replace or treat are limited to Seller's individual condominium unit and unless Seller is otherwise responsible do not extend to common elements, limited common elements, or any other part of the condominium property.

10. GOVERNANCE FORM:
PURSUANT TO CHAPTER 718, FLORIDA STATUTES, BUYER IS ENTITLED TO RECEIVE FROM SELLER A COPY OF THE GOVERNANCE FORM IN THE FORMAT PROVIDED BY THE DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES AND MOBILE HOMES OF THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, SUMMARIZING THE GOVERNANCE OF THE CONDOMINIUM ASSOCIATION.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

M. DEFECTIVE DRYWALL

During the time Florida was experiencing building material shortages, some homes were built or renovated using drywall imported from or manufactured in China or elsewhere which reportedly emit levels of sulfur, methane and/or other volatile organic compounds that cause corrosion of air conditioner and refrigerator coils, copper tubing, electrical wiring, computer wiring and other household items as well as create noxious odors which may also pose health risks ("Defective Drywall").

1. **Seller's Knowledge:** Except as indicated below, Seller has no actual knowledge of the presence of Defective Drywall or the existence of any information, records, reports, or other documents pertaining to Defective Drywall affecting the Property: (describe all known Defective Drywall information and list all available documents pertaining to Defective Drywall and provide documents, if any, to Buyer before accepting Buyer's offer) _____

   _____

   _____

2. **Defective Drywall Inspection: (Check One):**
   (a) ☐ Buyer waives the opportunity to conduct a risk assessment or inspection for the presence of Defective Drywall and accepts the Drywall in the Property in its existing condition.
   (b) ☐ Buyer, at Buyer's expense, may have a home inspector, licensed contractor or other licensed professional (if required by law) to conduct an inspection or risk assessment of the Property for the presence of Defective Drywall within _____ (if left blank, then 15) days from the Effective Date ("Drywall Inspection Period"). If the drywall inspection or risk assessment reveals the presence of Defective Drywall or reveals damage to the Property resulting from the Defective Drywall and the cost to remove/replace the Defective Drywall or damage resulting from the Defective Drywall exceeds $_____ (if left blank, $500.00), Buyer may cancel this Contract by giving written notice to Seller on or before expiration of the Drywall Inspection Period. If Buyer timely terminates this Contract, the Deposit shall be refunded to Buyer; thereby releasing Buyer and Seller of all further obligations under this Contract, except as provided in Paragraph 3 below. If Buyer fails to timely cancel or fails to conduct the inspections permitted in this Paragraph, Buyer may not terminate this Contract pursuant to this Addendum.

   IF NEITHER BOX IS CHECKED, THEN OPTION (b) SHALL BE DEEMED SELECTED.

3. **Repair of Inspection Damages to Property:** Buyer shall be responsible for prompt payment for such inspections and repair all damages to the Property resulting from the inspections.

4. **Professional Advice:** Buyer acknowledges that Broker has not conducted any independent investigations to verify the accuracy or completeness of any representations about Defective Drywall made by Broker or Seller. Buyer agrees to rely solely on Seller, professional inspectors, governmental agencies or any third parties retained by the Buyer regarding any issue related to Defective Drywall.

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If initialed by all parties, the clauses below will be incorporated into the Florida Realtors®/Florida Bar Residential Contract For Sale And Purchase between_____ (SELLER) and_____(BUYER) concerning the Property described as_____

_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

E. FEDERAL HOUSING ADMINISTRATION (FHA)/U.S. DEPARTMENT OF VETERANS AFFAIRS (VA)

1. **DEFINITIONS:**
   (a) "Contract" is the Florida Realtors®/Florida Bar Residential Contract For Sale And Purchase (2014 ed.), to which this Rider is attached and intended to amend.
   (b) "Property" is the Property which is the subject matter of this Contract.
   (c) "HUD" is the Department of Housing and Urban Development.
   (d) "Purchaser" is the Buyer named in this Contract.
2. **INSPECTIONS AND APPRAISAL:**
   In addition to the requirements of Paragraph 12 of this Contract, Seller shall comply with applicable FHA or VA regulations regarding termite inspection, roof inspection, and appraisal repairs (collectively "Appraisal Repairs"). The cost to Seller for Appraisal Repairs shall not exceed $_____, which cost is in addition to the costs required to be paid under Paragraphs 9 (a) and 12 (b), (c) and (d).
3. ☐ **(CHECK IF APPLICABLE): FHA FINANCING:** It is expressly agreed that notwithstanding any other provisions of this Contract, the Purchaser shall not be obligated to complete the purchase of the Property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the Purchaser has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Veterans Administration, or a Direct Endorsement lender setting forth the appraised value of the Property of not less than $ _____. The Purchaser shall have the privilege and option of proceeding with consummation of this Contract without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development will insure. HUD does not warrant the value or the condition of the Property. The Purchaser should satisfy himself/herself that the price and condition of the Property are acceptable.
   (a) **Fees, Prepayments:** Purchaser shall pay all loan expenses, except tax service fee which fee, if charged by Buyer's lender, shall be paid by Seller up to a maximum of $_____.
   (b) **Appraisal Repairs:** If the cost of Appraisal Repairs exceeds the limit imposed by Paragraph 2 above, Seller must, within 3 days after receiving notice of the excess cost, give Purchaser written notice of Seller's intention to pay some, all, or none of the excess amount. If Seller elects to pay less than the full amount of the excess cost, Purchaser may elect to pay the balance or cancel this Contract. Purchaser's election must be in writing and provided to Seller within 3 days after receiving written notice of Seller's election.
   (c) **Certification:** We, the undersigned Seller, Purchaser and Broker involved in this transaction each certify individually and jointly that the terms of this Contract are true and correct to the best of our knowledge and belief and that any other agreements entered into by any of these parties in connection with this transaction are part of, or attached to, this Contract.
4. ☐ **(CHECK IF APPLICABLE): VA FINANCING:** It is expressly agreed that, notwithstanding any other provision of this Contract, the Purchaser shall not incur any penalty by forfeiture of earnest money or otherwise be obligated to complete the purchase of the Property described herein, if this Contract purchase price or cost exceeds the reasonable value of the Property as established by the U.S. Department of Veterans Affairs. The Purchaser shall, however, have the privilege and option of proceeding with the consummation of this Contract without regard to the amount of reasonable value established by the U.S. Department of Veterans Affairs.

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(a) **Fees, Prepayments:** Seller shall pay for the WDO inspection and tax service, underwriting, and document preparation fees required by the lender, and for recording fees for assigning Purchaser's mortgage. Purchaser shall pay all prepayments and escrows for taxes, hazard insurance, flood insurance, when applicable.

(b) **Appraisal Repairs:** If the cost of Appraisal Repairs exceeds the limit imposed by Paragraph 2 above, Seller must, within 3 days after receiving notice of the excess cost, give Purchaser written notice of Seller's intention to pay some, all, or none of the excess amount. If Seller elects to pay less than the full amount of the excess cost, Purchaser may elect to pay the balance or cancel this Contract. Purchaser's election must be in writing and provided to Seller within 3 days after receiving written notice of Seller's election.

5. ELECTION TO PROCEED WITH CONTRACT: In the event Purchaser elects under Paragraph 3 or 4 above to proceed with this Contract without regard to the amount of reasonable value established by the Federal Housing Commissioner, U.S. Department of Veterans Affairs, or Direct Endorsement lender, such election must be made within 3 days after Purchaser receives the appraisal. (If Purchaser and Seller agree to adjust the sales price in response to an appraised value which is less than the sales price, a new rider is not required. However, the loan application package must include the original sales contract with the same price as shown on the above clause, along with the revised or amended sales contract.)

_____	_____	_____	_____
BUYER	Date	SELLER	Date
_____	_____	_____	_____
BUYER	Date	SELLER	Date
_____	_____	_____	_____
BROKER	Date	BROKER	Date

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

H. HOMEOWNER'S/FLOOD INSURANCE

(CHECK IF APPLICABLE)

☐ (a) **Homeowner's Insurance:** If Buyer is unable to obtain homeowner's insurance coverage (including windstorm) from a standard carrier or the Citizen's Property Insurance Corporation at a first year annual premium(s) not to exceed $_____ or _____% of the Purchase Price by _____, 20____ (if left blank, then the earlier of 30 days after Effective Date or 10 days prior to Closing Date), Buyer may terminate this Contract by delivering written notice to the Seller by the date set forth in this Paragraph, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

☐ (b) **Flood Insurance:** In addition to the right of termination provided to Buyer in Paragraph 10(d), if Buyer is unable to obtain flood insurance coverage through the National Flood Insurance Program or through private flood insurance (as defined in 42 U.S.C. §4012a) at a first year premium not to exceed $_____ or _____% of the purchase price by _____, 20____ (if left blank, then the earlier of 30 days after Effective Date or 10 days prior to Closing Date), Buyer may terminate this Contract by delivering written notice to the Seller by the date set forth in this Paragraph, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

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When initialed by all parties, the parties acknowledge that the disclosure set forth below was provided to Buyer prior to execution of the Florida Realtors/Florida Bar Residential Contract For Sale and Purchase between

_____(SELLER)

and_____(BUYER)

concerning the Property described as_____

_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

B. HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE

IF THE DISCLOSURE SUMMARY REQUIRED BY SECTION 720.401, FLORIDA STATUTES, HAS NOT BEEN PROVIDED TO THE PROSPECTIVE PURCHASER BEFORE EXECUTING THIS CONTRACT FOR SALE, THIS CONTRACT IS VOIDABLE BY BUYER BY DELIVERING TO SELLER OR SELLER'S AGENT OR REPRESENTATIVE WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS AFTER RECEIPT OF THE DISCLOSURE SUMMARY OR PRIOR TO CLOSING, WHICHEVER OCCURS FIRST. ANY PURPORTED WAIVER OF THIS VOIDABILITY RIGHT HAS NO EFFECT. BUYER'S RIGHT TO VOID THIS CONTRACT SHALL TERMINATE AT CLOSING.

BUYER SHOULD NOT EXECUTE THIS CONTRACT UNTIL BUYER HAS RECEIVED AND READ THIS DISCLOSURE.

Disclosure Summary For _____
(Name of Community)

(a) AS A BUYER OF PROPERTY IN THIS COMMUNITY, YOU WILL BE OBLIGATED TO BE A MEMBER OF A HOMEOWNERS' ASSOCIATION ("ASSOCIATION").

(b) THERE HAVE BEEN OR WILL BE RECORDED RESTRICTIVE COVENANTS ("COVENANTS") GOVERNING THE USE AND OCCUPANCY OF PROPERTIES IN THIS COMMUNITY.

(c) YOU WILL BE OBLIGATED TO PAY ASSESSMENTS TO THE ASSOCIATION. ASSESSMENTS MAY BE SUBJECT TO PERIODIC CHANGE. IF APPLICABLE, THE CURRENT AMOUNT IS $_____ PER _____. YOU WILL ALSO BE OBLIGATED TO PAY ANY SPECIAL ASSESSMENTS IMPOSED BY THE ASSOCIATION. SUCH SPECIAL ASSESSMENTS MAY BE SUBJECT TO CHANGE. IF APPLICABLE, THE CURRENT AMOUNT IS $_____ PER _____.

(d) YOU MAY BE OBLIGATED TO PAY SPECIAL ASSESSMENTS TO THE RESPECTIVE MUNICIPALITY, COUNTY, OR SPECIAL DISTRICT. ALL ASSESSMENTS ARE SUBJECT TO PERIODIC CHANGE.

(e) YOUR FAILURE TO PAY SPECIAL ASSESSMENTS OR ASSESSMENTS LEVIED BY A MANDATORY HOMEOWNERS' ASSOCIATION COULD RESULT IN A LIEN ON YOUR PROPERTY.

(f) THERE MAY BE AN OBLIGATION TO PAY RENT OR LAND USE FEES FOR RECREATIONAL OR OTHER COMMONLY USED FACILITIES AS AN OBLIGATION OF MEMBERSHIP IN THE HOMEOWNERS' ASSOCIATION. IF APPLICABLE, THE CURRENT AMOUNT IS $_____ PER _____.

(g) THE DEVELOPER MAY HAVE THE RIGHT TO AMEND THE RESTRICTIVE COVENANTS WITHOUT THE APPROVAL OF THE ASSOCIATION MEMBERSHIP OR THE APPROVAL OF THE PARCEL OWNERS.

(h) THE STATEMENTS CONTAINED IN THIS DISCLOSURE FORM ARE ONLY SUMMARY IN NATURE, AND, AS A PROSPECTIVE PURCHASER, YOU SHOULD REFER TO THE COVENANTS AND THE ASSOCIATION GOVERNING DOCUMENTS BEFORE PURCHASING PROPERTY.

(i) THESE DOCUMENTS ARE EITHER MATTERS OF PUBLIC RECORD AND CAN BE OBTAINED FROM THE RECORD OFFICE IN THE COUNTY WHERE THE PROPERTY IS LOCATED, OR ARE NOT RECORDED AND CAN BE OBTAINED FROM THE DEVELOPER.

_____ _____
DATE BUYER

_____ _____
DATE BUYER

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

Q. HOUSING FOR OLDER PERSONS

Buyer acknowledges that the owners' association, developer or other housing provider intends the Property to provide housing for older persons as defined by federal law. While Seller and Broker make no representation that the Property actually qualifies as housing for older persons, the housing provider has stated that it provides housing for persons who are ☐ 62 years of age and older ☐ 55 years of age and older.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

O. INSULATION DISCLOSURE FOR NEW RESIDENCE

Insulation has been or will be installed in the new residence as follows:

Location	Type	Thickness	Manufacturer R-Value
Interior Walls			
Flat Ceiling Area			
Sloped Ceiling Area			
Common Walls Between House & Garage			
Exterior Walls			
Other _____			

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

J. INTEREST-BEARING ACCOUNT

All Deposits shall be held by Escrow Agent in an interest-bearing escrow account at _____ (Financial Institution) with all accrued interest to be paid to _____ at Closing. Deposits shall accrue interest only from the date the Financial Institution receives and credits the Deposits through the date Escrow Agent is notified that the transaction is scheduled for Closing and the funds are transferred. Escrow Agent is authorized to deduct $_____ as a service charge from the earned interest before disbursing the funds.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

X. KICK OUT CLAUSE

Seller will have the right to continue to show the Property and solicit and enter into bona fide back-up purchase contracts with third parties that are subject to the termination of this primary Contract. Upon entering into a back-up contract, Seller will give Buyer a copy of the back-up contract with the third parties' identification and purchase price information obliterated. To continue with this primary Contract, Buyer must make an additional deposit of $_____ to Escrow Agent, within 3 days from receipt of the back-up contract. By giving the additional deposit to Escrow Agent within 3 days, Buyer waives all contingencies for financing and sale of Buyer's property and the parties will close on Closing Date. The additional deposit will be credited to Buyer at Closing. If Buyer fails to timely make the additional deposit, then this primary Contract shall terminate and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

P. LEAD-BASED PAINT DISCLOSURE (Pre-1978 Housing)

Lead-Based Paint Warning Statement

"Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspection in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase."

Seller's Disclosure (INITIAL)

_____ **(a)** Presence of lead-based paint or lead-based paint hazards (**CHECK ONE BELOW**):

☐ Known lead-based paint or lead-based paint hazards are present in the housing.

☐ Seller has no knowledge of lead-based paint or lead-based paint hazards in the housing.

_____ **(b)** Records and reports available to the Seller (**CHECK ONE BELOW**):

☐ Seller has provided the Buyer with all available records and reports pertaining to lead-based paint or lead-based paint hazards in the housing. List documents: _____

_____

☐ Seller has no reports or records pertaining to lead-based paint or lead-based paint hazards in the housing.

Buyer's Acknowledgement (INITIAL)

_____ **(c)** Buyer has received copies of all information listed above.

_____ **(d)** Buyer has received the pamphlet *Protect Your Family* from *Lead in Your Home*.

_____ **(e)** Buyer has (**CHECK ONE BELOW**):

☐ Received a 10-day opportunity (or other mutually agreed upon period) to conduct a risk assessment or inspection for the presence of lead-based paint or lead-based paint hazards; or

☐ Waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint or lead-based paint hazards.

Licensee's Acknowledgement (INITIAL)

_____ **(f)** Licensee has informed the Seller of the Seller's obligations under 42 U.S.C. 4852(d) and is aware of Licensee's responsibility to ensure compliance.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information they have provided is true and accurate.

_____ SELLER	_____ Date	_____ BUYER	_____ Date
_____ SELLER	_____ Date	_____ BUYER	_____ Date
_____ Listing Licensee	_____ Date	_____ Selling Licensee	_____ Date

Any person or persons who knowingly violate the provisions of the Residential Lead-Based Paint Hazard Reduction Act of 1992 may be subject to civil and criminal penalties and potential triple damages in a private civil lawsuit.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

S. LEASE PURCHASE/LEASE OPTION

This Contract is contingent upon Buyer and Seller executing a ☐ lease/purchase ☐ lease/option agreement containing mutually agreeable terms within 5 days from Effective Date. Attorney's fees for preparation of the lease/purchase or lease/option agreement shall be paid by: (**CHECK ONE**) ☐ Buyer ☐ Seller ☐ split equally by the Buyer and Seller (if not checked, then split equally). If the lease/purchase of lease/option agreement is not executed within the time stated above, this Contract shall be terminated and the Deposit refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

AA. LICENSEE DISCLOSURE OF PERSONAL INTEREST IN PROPERTY

_____ has an active or inactive real estate license and has a personal interest in the Property (specify if licensee is related to a party, or is acting as Buyer or Seller, etc.) _____

_____

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

U. POST-CLOSING OCCUPANCY BY SELLER

This Contract is contingent upon Buyer and Seller within _____ (if left blank, then 10) days prior to Closing Date delivering to each other a mutually acceptable written lease prepared at (**CHECK ONE**): ☐ Seller's expense ☐ Buyer's expense, ☐ split equally by the Buyer and Seller (if not checked, then split equally), for Seller to remain in possession of the Property until _____ days after Closing. The written lease shall provide that Seller shall pay a monthly rent of $_____ payable monthly in advance and that Seller's maintenance obligation under Paragraph 11 shall continue after Closing until possession is delivered to Buyer; however, Seller's repair, replacement, treatment and remedy obligations under Paragraph 12 shall not be extended beyond Closing.

If the parties fail to deliver a mutually acceptable written lease within the time period stated above, then either party by written notice to the other may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

T. PRE-CLOSING OCCUPANCY BY BUYER

This Contract is contingent upon Buyer and Seller within _____ (if left blank, then 10) days after Effective Date delivering to each other a mutually agreeable written lease prepared at (**CHECK ONE**): ☐ Seller's expense ☐ Buyer's expense ☐ split equally by the Buyer and Seller (if not checked, then split equally), for Buyer to take possession of the Property on _____. The written lease shall provide that upon Buyer taking possession, Paragraph 11 (Property Maintenance) and 12 (Property Inspection and Repair) are no longer applicable and Buyer thereby accepts the Property in its existing condition, relieving Seller of any repair, replacement, treatment or remedy obligations, except with respect to any items identified by Buyer pursuant to Paragraph 12 prior to taking occupancy which require repair, replacement, treatment or remedy; Buyer shall then have the sole obligation of maintaining the Property and shall assume all risk of loss; and Buyer shall pay a monthly rent of $_____ , plus applicable sales tax, if any, payable monthly in advance.

If the parties fail to mutually agree to a written lease within the time period stated above and Buyer has not taken occupancy of the Property, then either party by written notice to the other may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

R. REZONING CONTINGENCY

Buyer's obligations hereunder are expressly conditioned upon Buyer, at Buyer's expense, applying for and obtaining rezoning or change of land use of the described Property to the zoning or land use category of _____, under (☐ county/☐ city) ordinances and land use regulations. Buyer's obligations are further conditioned upon obtaining such Comprehensive Land Use Plan ("CLUP") amendment(s) as may be necessary to permit such rezoning. Seller agrees to such rezoning/CLUP amendment(s).

Buyer agrees to promptly apply for and diligently pursue said rezoning/CLUP amendment(s). If final government action on said rezoning application has not been obtained by _____ ("Date"), then either party thereafter, by written notice to the other, may terminate this Contract, in which event the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract; provided, however, if as of Date, the final public hearing has been scheduled before the governmental board or commission having final authority, then the deadline for satisfaction of this condition shall be extended to the day after the public hearing, but in no event more than _____ (if left blank, then 10) days after Date. The Closing shall occur within _____ (if left blank, then 10) days following final rezoning approval and, if applicable, land use change.

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

L. RIGHT TO INSPECT AND RIGHT TO CANCEL

1. In lieu of the Inspection Period set forth in Paragraph 12(a), Buyer shall have _____ (if left blank, then 15) days from Effective Date ("Right To Inspect Period") within which to have such inspections of the Property performed as Buyer shall desire and utilities shall be made available by the Seller during the Right To Inspect Period. Any inspections permitted under Paragraph 12 which Buyer desires to make must be completed during the Right To Inspect Period.

2. If this Contract is terminated or the transaction contemplated by this Contract does not close, Buyer shall repair all damage to Property resulting from Buyer's inspections, return Property to its pre-inspection condition and provide Seller with paid receipts for all work done on Property upon its completion. This provision shall survive termination of this Contract.

3. If Buyer determines, in Buyer's sole discretion, that the Property is not acceptable to Buyer, Buyer may terminate this Contract by delivering written notice to Seller on or before expiration of the Right To Inspect Period and the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract, except as provided in Subparagraph 2, above.

4. If Buyer elects to proceed with this Contract or fails to timely terminate this Contract on or before expiration of the Right To Inspect Period, then this Contract shall remain in effect and:

(a) If, during the Right To Inspect Period, Buyer has conducted inspections permitted by Paragraph 12 and timely reports to Seller in writing within the Right To Inspect Period any items requiring repair, replacement, treatment, or the need to obtain and close Permits under such Paragraph 12, then Seller shall pay up to the applicable amounts required by Paragraph 9(a)(i),(ii), or (iii); or

(b) If, during the Right To Inspect Period Buyer: (i) fails to conduct inspections permitted by Paragraph 12, or (ii) conducts inspections, but fails to timely deliver to Seller a written notice or report required by Paragraphs 12 (b), (c), or (d), then, except for Seller's continuing Maintenance Requirement, Buyer shall have waived Seller's obligation(s) to repair, replace, treat or remedy the matters not inspected and timely reported.

5. If this Contract does not close, Buyer shall repair all damage to Property resulting from Buyer's inspections, return Property to its pre-inspection condition and provide Seller with paid receipts for all work done on Property upon its completion.

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Comprehensive Rider to the Residential Contract For Sale And Purchase

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FloridaRealtors®

If initialed by all parties, the clauses below will be incorporated into the Florida Realtors®/Florida Bar Residential Contract For Sale And Purchase between _____ (SELLER) and _____ (BUYER) concerning the Property described as _____
_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

V. SALE OF BUYER'S PROPERTY

This Contract is contingent on the sale and closing of Buyer's property located at _____
_____
Upon entering into a contract for the sale of Buyer's property, Buyer shall give Seller a copy of such contract with the third parties' identification and purchase price information obliterated. If the sale of Buyer's property does not close by _____, Buyer may, within 3 days thereafter deliver written notice to Seller, either: a) terminating this Contract in which event the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract; or b) waiving and removing this contingency and all financing contingences, and continue with this Contract.

Buyer's property ☐ is ☐ is not presently under contract for sale. If Buyer's property is under contract, Buyer shall provide Seller with a copy of the contract on or before _____ .

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_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

C. SELLER FINANCING
(PURCHASE MONEY MORTGAGE; SECURITY AGREEMENT TO SELLER)

WARNING – PRIOR TO ENTERING INTO THE FINANCING CONTEMPLATED BELOW, SELLER AND BUYER ARE ADVISED TO SEEK THE ADVICE OF LEGAL COUNSEL TO DETERMINE IF THIS FINANCING COMPLIES WITH THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (DODD- FRANK) AND OTHER RELEVANT FEDERAL AND STATE REQUIREMENTS.

I. SUMMARY OF SELLER FINANCING UNDER DODD-FRANK – PLEASE READ CAREFULLY

Dodd-Frank has made significant and important changes affecting seller financing on residential properties. Effective January 10, 2014, a seller of residential dwelling(s) who finances buyer's purchase of seller's residential property may be considered a "loan originator" under Dodd-Frank, and required to comply with certain Truth In Lending Act ("TILA") rules and disclosures, unless the seller is entitled to one of the two exclusions set forth in Dodd-Frank:

1. *The "one property exclusion" where seller finances only **ONE** property in any 12 month period, and:*
   - *(a) The seller owns the property and is a natural person, a trust or an estate; and*
   - *(b) The seller did not construct or act as the contractor for the construction of a residence on the property in the ordinary course of business; and*
   - *(c) The financing does not result in negative amortization; and*
   - *(d) The financing has a fixed rate or an adjustable rate that does not adjust for the first 5 years and is subject to reasonable annual and lifetime rate adjustment limits.*

OR

2. *The "three property exclusion" where seller finances no more than **THREE** properties in any 12 month period, and:*
   - *(a) The seller owns the property and is a natural person or organization (corporation, LLC, partnership, trust, estate, association, etc.); and*
   - *(b) The seller did not construct or act as the contractor for the construction of a residence on the property in the ordinary course of business; and*
   - *(c) The loan is fully amortized, specifically there is no balloon payment or negative amortization; and*
   - *(d) The financing has a fixed rate or an adjustable rate that does not adjust for the first 5 years and is subject to reasonable annual and lifetime rate adjustment limits; and*
   - *(e) The seller determines in good faith that the buyer/borrower has the reasonable ability to repay the loan.*

A seller who finances the buyer's purchase of seller's residential property and who meets either of the two exclusions outlined above may use this Seller Financing Rider.

A seller who finances the buyer's purchase of seller's residential property and who is <u>not</u> exempt from Dodd-Frank should seek the advice of legal counsel regarding use of this Seller Financing Rider, including modifications or disclosures that may be required by Dodd-Frank, prior to completing this Rider.

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C. SELLER FINANCING (CONTINUED)

II. SELLER FINANCING

Seller agrees to hold a note secured by **(CHECK ONE):** ☐ a first or ☐ a second purchase money mortgage, executed by Buyer in the principal amount of $_____ at _____% interest per annum that will be **(CHECK ONE*):**

(a) ☐ fully amortized for a term of _____ (if left blank, then 30) years; or

(b) ☐ an interest only mortgage loan that complies with the requirements of Dodd-Frank, set forth above, for a term of ____ (if left blank, then 60) months, and requires monthly, quarterly, annual or other periodic interest payments (Permitted for the one property exclusion only); or

(c) ☐ a balloon mortgage that complies with the requirements of Dodd-Frank, set forth above, and initially amortized for a term of _____ (if left blank, then 30) years (Permitted for the one property exclusion only); or

(d) ☐ an adjustable rate mortgage loan for a minimum term of _____ (if left blank, then 30) years, with interest rate adjustments as follows:

(i) The initial annual interest rate may change after ____ (but no less than 5, which shall be the number if left blank) years, and thereafter every ____ (if left blank, then 1) year(s). Each date on which the interest rate changes is called a "Change Date."

(ii) The interest rate adjustments shall be based on a widely available index identified in (c) (iii), below. As of each Change Date, the new interest rate will be calculated by adding ____ percentage points (if left blank, then 1) to the then current index; however, the difference between the interest rate paid during the preceding twelve months and the new interest rate shall be limited to a change in the interest rate of _____ percentage points (but no more than 2, which shall be the number if left blank), and the lifetime interest rate change from the initial annual interest rate shall be limited to ____ percentage points (but no more than 6, which shall be the number if left blank).

(iii) The widely available index to be used to calculate interest rate adjustments shall be the _____ _____ (if left blank, then the index shall be the weekly average yield on United States Treasury securities adjusted to a constant maturity of one year, as made available by the Federal Reserve Board on the date 45 days before each Change Date.)

*** PURSUANT TO DODD-FRANK NO OTHER OPTIONS ARE PERMITTED.**

Principal plus interest shall be payable (in the event of an adjustable rate mortgage loan, initially) in equal **(CHECK ONE):** ☐ monthly ☐ quarterly or ☐ annual payments of $_____ each, including interest, with the first payment due _____ month(s) after Closing. If a balloon mortgage, the final payment will exceed the periodic payments thereon, and the entire unpaid principal balance plus accrued interest shall be due and payable in ____ (if left blank, then 60) months from date of Closing.

If a second mortgage, the amount of the first mortgage shall not exceed the amount set forth in Paragraph 2(c) of the Contract, and a default in the first mortgage shall, at the option of the holder, constitute a default of the second mortgage.

The purchase money mortgage and mortgage note to Seller shall provide for a 30 day grace period in the event of default if a first mortgage and a 15 day grace period if a second or lesser mortgage; shall provide for right of repayment in whole or in part without penalty; shall permit acceleration in event of transfer of the Real Property; shall require all prior liens and encumbrances to be kept in good standing; shall forbid modifications of, or future advances under, prior mortgage(s); shall require Buyer to maintain policies of insurance containing a standard mortgagee clause covering all improvements located on the Real Property against fire and all perils included within the term "extended coverage endorsements" and such other risks and perils as Seller may reasonably require, in an amount equal to their highest insurable value; and the mortgage, mortgage note and security agreement shall be otherwise in form and content required by Seller, but Seller may only require clauses and coverage customarily found in mortgages, mortgage notes and security agreements generally utilized by state or national banks or other residential lending institutions located in the county where the Real Property is located. All Personal Property and leases being conveyed or assigned shall, at Seller's option, be subject to the lien of a security agreement evidenced by recorded or filed financing statements or certificates of title.

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If initialed by all parties, the clauses below will be incorporated into the Florida Realtors®/Florida Bar Residential Contract For Sale And Purchase between _____ (SELLER) and _____ (BUYER) concerning the Property described as _____

_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

Y. SELLER'S ATTORNEY APPROVAL

This Contract is contingent upon Seller's attorney approving this Contract. If Seller's attorney disapproves this Contract, then Seller may terminate this Contract by delivering written notice to Buyer on or before _____ , and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

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FloridaRealtors®

If initialed by all parties, the clauses below will be incorporated into the Florida Realtors®/Florida Bar Residential Contract For Sale And Purchase between _____ (SELLER) and _____ (BUYER) concerning the Property described as _____

_____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

G. SHORT SALE APPROVAL CONTINGENCY

1. **Approval of Seller's Lender(s) and Requirements for Seller's Approval of Short Sale.** This Contract is contingent upon: (a) Seller's lender(s) and all other lien holder(s) (collectively "Seller's Lender") approving the Purchase Price, terms of this Contract and the HUD-1 settlement statement; (b) Seller's Lender's agreement to accept a payoff which is less than the balance due on the loan or other indebtedness; and (c) Seller's Lender's agreement to release and provide a satisfaction of the mortgage(s) and/or other lien(s) encumbering the Property (the "Mortgage(s)") upon receipt of reduced payoff amount(s).

   Approval of, or agreement to, items (a) through (c) by Seller's Lender is referred to as "Short Sale Approval". However, an approval by Seller's Lender which does not provide a waiver and complete release of any claim(s) for a deficiency against Seller for sums due Seller's Lender under the Mortgage(s) as of the payoff date, or which requires additional terms or obligations affecting either party shall not be deemed "Short Sale Approval" unless the party affected accepts those additional terms or obligations in writing. A copy of a Short Sale Approval accepted by Seller shall be delivered by Seller to Buyer and Closing Agent within 3 days of Seller's receipt of such Short Sale Approval.

2. **Application for Approval of Short Sale.** Seller shall within _____ (if left blank, then 10) days after Effective Date obtain from Seller's Lender their application forms for a "short sale", and Seller shall diligently complete and return such forms to Seller's Lender within 5 days thereafter and promptly provide such additional documents as may be requested by Seller's Lender.

3. **Status of Short Sale Approval Application.** Seller hereby authorizes Seller's Lender to provide Buyer and Buyer's Broker and Closing Agent with information stating the status of Seller's application for approval of a Short Sale and notice of the approval(s) or denial(s) of such application(s). Seller shall promptly notify Buyer when Seller obtains Short Sale Approval as provided in Paragraph 1 above, or denial of such approval from Seller's Lender.

4. **Short Sale Approval Deadline; Termination.** If Seller does not deliver a copy of Seller's accepted Short Sale Approval to Buyer within _____ (if left blank, then 90) days from Effective Date ("Short Sale Approval Deadline"), then either party may thereafter terminate this Contract by delivering written notice to the other party, and the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

   This Contract shall automatically terminate if Seller has not delivered the Short Sale Approval to Buyer within 30 days after expiration of the Short Sale Approval Deadline, including any extension(s) of the Short Sale Approval Deadline ("Contract Expiration Date"), in which event the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

5. **Time Periods.** The time for making the initial deposit specified in Paragraph 2(a) and for calculating the Short Sale Approval Deadline shall be computed from the Effective Date. All other time periods and other obligations under this Contract shall commence from the date of Buyer's receipt of Short Sale Approval pursuant to Paragraph 1 above.

6. **Closing Date.** The Closing Date shall be _____ (if left blank, then 45) days after Buyer receives Short Sale Approval pursuant to Paragraph 1 above.

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7. Back-up Offers. (CHECK ONE - If no option is checked, then option (a) shall be deemed selected):

(a) ☐ **Seller's Agreement Not to Accept Other Contracts or Offers.** During the term of this Contract, Seller shall not accept or enter into any back-up offers, contracts, options or other agreements concerning the sale of the Property.

(b) ☐ **Seller's Right to Accept Back-up Contracts or Offers.** During the term of this Contract, Seller may accept or enter into bona fide "back-up" contracts or offers to purchase the Property that are conditioned upon a failure of the Closing of the sale contemplated by this Contract.

8. Acknowledgement by Seller.

(a) If Seller is advised of Seller's Lender's refusal to participate in any short sale, Seller agrees to immediately communicate this to Buyer and Broker.

(b) Seller acknowledges that Broker has advised Seller to consult with professionals for any tax, legal or specialized advice and has been encouraged to discuss other options with legal counsel of Seller's choosing prior to entering into this short sale transaction.

9. Acknowledgement by Buyer.

(a) Buyer acknowledges Seller's Lender is not a party to this Contract and therefore is not obligated to approve this Contract; that Seller's acceptance of this Contract does not guarantee Seller's Lender's acceptance; and Seller's Lender is under no obligation to consider, respond, approve or advise either Seller or Buyer, or Broker as to any offer submitted to it.

(b) Buyer further acknowledges that Seller and/or Broker shall not be liable for delays caused by Seller's Lender or costs and expenses (such as payments for loan applications, inspections and appraisals) incurred by Buyer under this Contract if Seller's Lender does not complete the short sale after Seller's receipt of Short Sale Approval.

10. Termination Upon Foreclosure Sale. If during the term of this Contract, the Property is sold at foreclosure sale prior to the parties obtaining Short Sale Approval and Closing the transaction contemplated by this Contract, this Contract shall be terminated, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

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TIMELINE OF EVENTS

NABOR Sales Contract (Residential Improved Property) Dated: January 1, 2017

EQUAL HOUSING OPPORTUNITY

Buyer(s): _____ Seller(s) _____

Property Address: _____

Effective Date (*Line 49*): _____ Closing Date (*Line 52*): _____

Event/Reference	Responsible Party	Due Date	Completed
Buyer's Initial Deposit (Line 34)	B	see contract	☐
Listing Licensee change A to PC or P	LL	3 business days after Effective Date	☐
Condominium Document Delivery (Line 369)	S	at time of or immediately after contract execution	☐
Condominium Document Rescission Expires (Line 370)	B	3 business days after condominium document delivery date	☐
Condo Fire Sprinkler Retrofit Review Contingency (Line 190)	B	3 business days after condominium document delivery date	☐
Homeowners' Association Disclosure Summary (Line 359)	B	prior to or at contract execution	☐
Buyer's Additional Deposit (Line 37)	B	see contract	☐
Buyer's Loan Application (Line 66)	B	5 days after Effective Date if left blank	☐
Buyer's Financing Contingency Deadline (Line 69)	B	45 days after Effective Date if left blank	☐
Buyer Application for Association Approval (Line 385)	B	10 days after Effective Date	☐
Seller Title Evidence (Line 126)	CAS	10 days after Effective Date	☐
Seller Survey (Line 147)	S	10 days after Effective Date	☐
Buyer's Inspection Period (Line 221)	B	15 days after Effective Date	☐
Buyer's Notice of Defective Inspection Items (Line 249)	B	5 days after Inspection Period	☐
Seller's Response Deadline Inspection Items (Line 259)	S	10 days after receipt of Buyer's Notice & inspection reports	☐
Buyer's Right to Terminate for Inspection Items (Line 260)	B	5 days after Seller's Response	☐
Buyer's Titling Instructions (Line 119)	CAB	15 days prior to Closing Date	☐
Buyer's Survey Review & Objection Period (Line 147)	B	10 days prior to Closing Date	☐
Buyer's Title Examination Period (Line 129)	CAB	30 days after Effective Date	☐
Condo/Homeowners' Association Estoppel (Line 388)	1	15 days prior to Closing Date	☐
Buyer's Walk - through Inspection (Line 298)	B	prior to Closing Date or possession if earlier	☐
Listing Licensee change MLS info to CS	LL	not later than 3 business days after Closing	☐

Note: B = Buyer; S = Seller; CA = Closing Agent; LL = Listing Licensee

* Quick closing timelines (*Line 426*) **Calendar days (*Line 450*) ***Following business day (*Line 451*)

****This is not legal advice provided by attorneys but rather a proposed guideline from NABOR, therefore any users of this form agree to indemnify, save and hold NABOR harmless from any and all claims, actions, suits, judgments, demands, attorney's fees and costs whatsoever. Nothing herein reflects any time periods found in any Contract addendum or amendment.

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Serial#: 024828-000148-8924773
Prepared by: John Conroy | John Thomas Conroy III | tconroy@ccdlegal.com |
formsimplicity

Back to Speaker Topics

Fund Assembly

Evolution of the Closing Process – 2017 Regulations and Technology Update

Moderator:
Maggie Thumberg, *Sr. Underwriting Counsel & Legal and Branch Education Manager, The Fund*

Panelists:
Dan Wold, *Senior Vice President, General Counsel, and Corporate Secretary, Old Republic National Title Insurance Company*
Shannon Widman, *Attorney, Porath & Associates, P.A.*
Sally Freudenberg, *VP – Business Systems Consultant, Wells Fargo Home and Consumer Finance Group, Wells Fargo Home Mortgage*

Back to Speaker Topics

Speaker Information

Evolution of the Closing Process – 2017 Regulations and Technology Update

Maggie Thumberg,
Sr. Underwriting Counsel & Legal and Branch Education Manager, The Fund

Margaret Atkins Thumberg is Sr. Underwriting Counsel and Legal & Branch Education Manager at The Fund. Ms. Thumberg received her B.A. in history from the University of South Florida and her M.A. in history and J.D. from the University of Florida. Ms. Thumberg is a Florida Bar Board Certified Real Estate Lawyer and has also been admitted to practice in the United States District Court for the Southern District of Florida.

While at The Fund, Ms. Thumberg has presented hundreds of live seminars and Fundinars, including the New Member Training Program, and has been a speaker at the 2011 and 2012 Affiliate Assemblies and moderated the CFPB Practice Tips Panel at the 2016 Assembly. She is also the co-editor of The Fund's monthly publication, The Fund Concept.

Prior to joining The Fund, Ms. Thumberg focused her practice in real estate and corporate matters including representation of lenders and developers in financing and acquisition matters and borrowers in foreclosure defense and bankruptcy. Through her representation of non-profit affordable housing developers, Ms. Thumberg prepared a practical guide to mortgage foreclosure mitigation counseling and presented numerous seminars on foreclosure related topics, including the Truth-in-Lending Act and Home Affordable Modification Program. Ms. Thumberg has also published an article on the Freedom of Information Act.

Back to Speaker Topics

Speaker Information

Evolution of the Closing Process – 2017 Regulations and Technology Update

Dan Wold,

Senior Vice President, General Counsel, and Corporate Secretary, Old Republic National Title Insurance Company

Daniel M. Wold is Senior Vice President, General Counsel, and Corporate Secretary of Old Republic National Title Insurance Company. He is located in Minneapolis, Minnesota. He manages the Corporate Legal Department's underwriting, regulatory and transaction groups. He also provides legal advice on bankruptcy underwriting and regulatory issues (including RESPA and the CFPB), and advises and assists in the handling of a wide range of corporate matters, including general corporate governance, contracts and related issues, mergers and acquisitions, joint ventures and other corporate transactions, and employment law issues.

He is active in the American Land Title Association, and has served: 1) as Chairperson of ALTA's RESPA Reform Task Force since January of 2009 (which is now called ALTA's TRID Task Force); 2) on the ALTA's Title Insurance Underwriter's Section Executive Committee since October of 2013; and 3) on the ALTA's Board of Governors since October of 2015. He was formerly a partner of Hughes, Thorsness, Powell, Huddleston & Bauman LLC of Anchorage, Alaska, with a practice emphasizing bankruptcy, real estate, banking law, and commercial litigation. He is a member of the Minnesota State Bar Association and its Bankruptcy Section.

He formerly served as co-editor of the Bankruptcy Bulletin, which is a publication of the Minnesota State Bar Association Bankruptcy Section. He obtained a Bachelor of Arts degree from St. Olaf College in Northfield, Minnesota, and a Juris Doctor degree from the University of Minnesota Law School.

Back to Speaker Topics

Speaker Information

Evolution of the Closing Process – 2017 Regulations and Technology Update

Shannon Widman, *Attorney, Porath & Associates, P.A.*

Shannon L. Widman graduated with a Bachelors of Science in Political Science from Syracuse University. She earned her Juris Doctor at the University of Miami School of Law. Upon graduation, Ms. Widman moved from her hometown of Palm Beach Gardens to Santa Rosa Beach where she was admitted to The Florida Bar in 2000 and the Federal Court Northern District of Florida in 2001.

Since 2000, Ms. Widman has practiced in South Walton County. What started as a focus on general litigation matters, quickly transitioned to an exclusive practice in real estate transactions. She has used her early litigation experience to draft contracts, easements, and other legal documents in such a way as to avoid future conflict, which ultimately leads to a successful transaction.

Ms. Widman handles a wide variety of real estate matters including title insurance coverage, condominium development, planned unit development, complex commercial and residential transactions and business entity development. Over the years, she has represented homeowners, lenders, realtors, owners' associations, and commercial enterprises.

Since 2009, Ms. Widman and the firm's Closing Manager, Nicole Smith, led the firm to be recognized as a member of the "President's Circle" of Attorney's Title Fund Services, LLC. Ms. Widman has been a loyal Fund Member for well over a decade, and since 2005 has used The Fund exclusively.

Ms. Widman served as a Director for Attorneys' Title Insurance Fund, Inc. and currently serves on the Board of Trustees for Attorneys' Title Insurance Fund, a business trust, representing the First Judicial Circuit.

Ms. Widman lives with her husband Brian and two children in Santa Rosa Beach.

Back to Speaker Topics

Fund Assembly

Residential Survey Problems and Form 9 Endorsements

Clifford Rainey, *Associate Underwriting Manager, The Fund*

Back to Speaker Topics

Speaker Information

Residential Survey Problems and Form 9 Endorsements

Clifford Rainey,
Associate Underwriting Manager, The Fund

Clifford W. Rainey is an Associate Underwriting Manager with The Fund. Previously, Mr. Rainey served The Fund as its Georgia State Counsel. He has also been an Assistant Vice President and Regional Counsel for another attorney-related Title Insurer.

Prior to entering the field of title insurance, Mr. Rainey was associated with two law firms in Tallahassee. His practice included a wide array of matters relating to the representation of banks. He also has experience in litigation, most recently as a title litigation attorney with two large firms whose practice largely relates to foreclosures and the representation of lenders.

Mr. Rainey has a B.S. in Finance and J.D. from Florida State University. He is admitted to the Florida Bar and the Georgia Bar. Mr. Rainey has presented for the Board Certification Review courses on the topics of Homestead and the Marketable Record Title Act.

Back to Speaker Topics

Residential Survey Problems and Form 9 Endorsements

Clifford W. Rainey

Survey Problems and Form 9

- Overview of ALTA Form 9 Series Coverages as related to Survey Matters
- Showing Exceptions for Survey Matters
- ALTA Form 9 Series Analysis
- “Clean” Form 9 Series Coverage vs Altered Form 9 Series Coverage
- Survey Examples

Back to Speaker Topics

ALTA Form 9 Series Overview as related to Survey Matters

ALTA Series 9 Endorsements

ALTA ENDORSEMENT 9-06 RESTRICTIONS, ENCROACHMENTS, MINERALS - LOAN POLICY
(With Florida Modifications)

ALTA ENDORSEMENT FORM 9.1-06
RESTRICTIONS, ENCROACHMENTS, MINERALS - OWNER'S POLICY - UNIMPROVED LAND
(With Florida Modifications)

ALTA ENDORSEMENT 9.2-06 RESTRICTIONS, ENCROACHMENTS, MINERALS
OWNER'S POLICY - IMPROVED LAND
(With Florida Modifications)

ALTA Form 9-06

- For Loan Policies
- Requires an additional premium
- Not automatically given
- Disclosure – the top portion of the form
- Affirmative Coverage – the bottom portion of the form

ALTA Form 9-06

Disclosure

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. Any incorrectness in the assurance that, at Date of Policy:

(b) Unless expressly excepted in Schedule B:

(1) There are no present violations on the Land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the Land violate building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

(3) There is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.

(4) There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.

ALTA Form 9-06

Affirmative Coverage

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

3. Damage to existing improvements (excluding lawns, shrubbery or trees):
   (a) which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or

4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.

5. Any final court order or judgment denying the right to maintain any existing improvement on the Land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

ALTA Form 9.1-06

- For Owner's Policies
- Unimproved Property
- Requires additional premium
- Less frequently issued/Less frequently authorized
- Disclosure Section
- Does not have similar Affirmative Coverage Section

ALTA Form 9.1-06

The Company insures the insured against loss or damage sustained by reason of:

1. The existence, at Date of Policy, of any of the following unless expressly excepted in Schedule B.

(b) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land which, in addition, (i) establishes an easement on the land

(c) Any encroachment onto the land of existing improvements located on adjoining land.

ALTA Form 9.2-06

- For Owner's Policies
- Improved Property
- Requires additional premium
- Less frequently issued/Less frequently authorized
- Disclosure Section
- Affirmative Coverage Section

ALTA Form 9.2-06

Disclosure

The Company insures the Insured against loss or damage sustained by reason of:

1. The existence, at Date of Policy, of any of the following unless expressly excepted in Schedule B:
   (a) Present violations on the Land of any enforceable covenants, conditions, or restrictions, or any existing improvements on the Land which violate any building setback lines shown on a plat of subdivision recorded or filed in the Public Records.
   (b) Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land which, in addition, (i) establishes an easement on the Land;
   (c) Any encroachment of existing improvements located on the Land onto adjoining land, or any encroachment onto the Land of existing improvements located on adjoining land.
   (d) Any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.

ALTA Form 9.2-06

Affirmative Coverage

The Company insures the Insured against loss or damage sustained by reason of:

2. Damage to existing buildings at Date of Policy:
   (a) Which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved;
3. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment, other than fences, landscaping, or driveways, excepted in Schedule B.
4. Any final court order or judgment denying the right to maintain any existing building on the Land because of any violation of covenants, conditions, or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the Public Records at Date of Policy.

Back to Speaker Topics

What does Form 9 Cover

Disclosure - “The Top” of the Form 9

- One of the purposes of a Title policy is to disclose matters that effect title
- The top of the Form 9 (Element 1(b)) takes this concept further
- Element 1 (b) provides coverage for loss due to the incorrectness of the assurance that certain matters do not exist
- Element 1.(b)(1) Violations of platted setback lines
- Element 1.(b)(3) Encroachments of our improvements/neighbor’s improvements
- Element 1.(b)(4) Encroachments of improvements onto easements for which you have made an exception.

Disclosure - Continued

Viewed in a somewhat simplistic manner, Form 9-06 assures the insured that, unless an exception was made for:

the violation of the platted set back;

the encroachment into the easement for which an exception was made;

“In-croachments” and “ex-croachments” involving neighbors

They don’t exist.

A Word on Survey/Title Slang

- Title Attorneys will sometimes use a word or phrase out of habit or because the word or phrase is descriptive
- A Form 9-06 = a “Form 9” or a “Lender’s Form 9”
- A Form 9.1-06 or Form 9.2-06 = an “Owner’s Form 9”
- “In-croachment” and “Ex-croachments” are not real legal terms
- “Ex-croachment” = An encroachment of “our” improvements in someone else’s rights
- “In-croachment” = Neighbor’s improvements encroaching into “our” property
- RTI = Right, title and interest

Affirmative Coverage - “Bottom” of Form 9

- Element 3 - The forced removal of improvements which are located in an easement for which exception is made in the policy
- Element 4 - The forced removal of improvements belonging to the borrower which encroach into the neighbor’s property for which exception was made
- Element 5 - Coverage for a judicial denial of the right to maintain improvements due to a violation of the restrictive covenants or building setback lines shown on the plat

Affirmative Coverage - Continued

- All of the Affirmative Coverages pertain to “Ex-Croachments
- Form 9.1-06 does not contain the Affirmative Coverages
- Form 9.2-06 contains similar Affirmative Coverages

Back to Speaker Topics

What Does the Form 9 Series Not Cover

Form 9 Does not Cover - Zoning

- Zoning set backs depicted on a survey do not need to be shown as an exception
- Violations of (encroachments into) zoning set backs depicted on the survey do not need to be shown as an exception
- Form 9 Series endorsements do not provide coverage for zoning set back violations
- When a zoning encroachment exists, Form 9 Series endorsements do not need to be altered
- Regulatory exclusion in the jacket - regulatory matters are not considered covered unless evidence of the violation appears of record

Form 9 Does Not Cover “In-croachments”

- Members should show exceptions for encroachments of the neighbor’s improvements into the insured parcel
- Depending on the severity of the encroachment, it may be important to make an additional exception – RTI of neighbor
- Form 9-06 Element 1.(b)(3) provides coverage to the extent that the “in-croachment” is not disclosed as an exception
- The Form 9-06 provides coverage for “ex-croachments” for which an exception has been made but not for “in-croachments”

Back to Speaker Topics

Showing Exceptions on Schedule B

Showing Exceptions

- A careful evaluation of your survey is an integral part of the process for deleting and replacing the standard survey exception with exceptions for the matters you have found
- The evaluation of the survey should include both the surveyor's notations and the sketch itself
- The title examination should be considered and, if the surveyor has not included items such as easements in the survey, the surveyor should be asked to include them and show encroachments, if any

Showing Exceptions

- Analysis of the survey and consideration of more tailored exceptions and potential Form 9 issues as part of your pre-closing process is critical
- Upon receipt and analysis of survey just before or at closing, the more tailored exceptions should be added and Form 9 issues must also be considered to determine insurability
- Analysis of the survey for Form 9 issues after the closing may result in insurability problems (where unaltered Form 9 coverage not authorized)

Showing Exceptions

- Exceptions for each encroachment/violation can be made separately.
- Exceptions should be simple descriptive statements rather than an attempt to describe the precise measurements of the encroachments (e.g. Encroachment of chain link fence into adjoining property along the easterly boundary).
- A suggested format for survey exceptions can be found in the Standard Commitment Clause Book, SCC E-3.2

Showing Exceptions E-3.2

- This policy does not insure against loss or damage by reason of the following exceptions:

  Encroachments, encumbrances, violations, variations, or adverse circumstances, if any, actually shown on the survey prepared by_____ dated _____, bearing Job # :

  a. [itemize specific survey matter];

  b. [itemize other specific survey matter];

  c. [itemize other specific survey matter].

Showing Exceptions

- Reminder:
  - No need to show an exception for a zoning set back or a violation thereof unless evidence of same appears of record
  - “Ex-croachments” AND “In-croachments” should be shown as exceptions
  - “In-croachments” may trigger the need for an additional exception due to the neighbor’s possession of part of the property.

Back to Speaker Topics

Form 9 Series Analysis

Form 9 Series Analysis

- The Fund Procedures Handbook, Chapter “Preparing the Forms” - detailed discussions of the Form 9 Series Endorsements
- The determination of whether to provide Form 9 coverage with respect to a particular encroachment or violation relates to Elements 3.a., 4., and 5. (Elements 2.a., 3. and 4 for Form 9.2-06)
- Survey matters to evaluate:
  - “Our” improvements encroaching into easements
  - Encroachments of “our” improvements into adjoining property
  - Encroachments/Violations of restrictive covenants or plat set back lines

Form 9 Series Analysis

- Things to consider
  - How much equity is in the property
  - How valuable/material is the improvement that encroaches
  - Severity/Magnitude
  - How long has the encroachment existed in its current state
  - Form 9.2-06, equity is not a factor

“Clean” Form 9 vs Altered

More Definitions - Clean vs Altered

- Clean = Unmodified = Unaltered
  - The issuance of a Form 9 Series endorsement without removing elements of coverage. Just note the encroachment on Schedule BII or the Commitment and Schedule B of the policy.
- Altered = Modified = "Dirty"
  - The issuance of a Form 9 Series endorsement but removing element(s) of coverage
  - Example where No Survey Obtained –

ALTA Endorsement 9-06 (Restrictions, Encroachments, Minerals - Loan Policy) is attached to this Policy as Endorsement No.____. Element of coverage 1(b)(1) thereof is hereby modified to read as follows: "There are no present violations on the land of any enforceable covenants, conditions, or restrictions. Elements of coverage 1(b)(3), 1(b)(4), 3, 4, and 5 are hereby deleted from the Endorsement in their entirety."

“Clean” Form 9-06

- Generally “Minor Encroachments” for the purpose of providing unaltered Form 9-06 Coverage
  - Air Conditioner Pad
  - Side walks, Drives, Mail box
  - Fences
  - Soffit overhangs
  - Unfixed sheds
  - Pool decks, screen enclosures
  - Docks

“Clean” Form 9-06?

- “Not so minor”
  - Swimming pool shell
  - Ornate Perimeter Wall
  - Expensive Dock with Gazebo
  - Separate fixed structure
  - A wall of the home or even a more involved part of the main structure

“Clean” Form 9-06

- Reminder
  - The decision to give unaltered Form 9-06 coverage is dependent in part of what rights does the improvement encroach into and how long the improvement has been there.
  - E.g. An encroachment of the home into a utility easement that has been there for only 2 years may be treated differently than that same material encroachment that represents the violation of a platted set back and has been located there for 20 years

How to provide “Clean” Form 9-06

- How do you provide “Clean” Form 9?
  - Make the appropriate exceptions for each of the encroachments/violations
  - Affix the Form 9-06 (check the box for lenders that prefer not to have the physical endorsement)
  - Collect the Premium

Altered Form 9-06

- Members routinely encounter more material encroachments/violations
- Lenders sometimes will accept an altered Form 9-06
- It is possible to provide Form 9 Series coverage for some encroachments/violations found but carve out the coverage for one of them
- Depending on the severity of the issue, a lender's objection may not only be to the presence of the exception but the presence of the violation/encroachment itself

How to Alter Form 9-06

- Make exceptions for each of the encroachments/violations found
- For encroachments that you have made exception for which Form 9-06 coverage can be provided, do nothing more
- For more material/severe encroachments for which Form 9-06 coverage is not extended, add the following language as a second sentence to the applicable exception:
  - Element of coverage No.4 (or 3.a. or 5 as applicable) of the ALTA 9.06 endorsement (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.

Altering Form 9.1-06 and 9.2-06

- Owner's Form 9 coverage is less often authorized because equity is not factored in
- The same encroachments/violations are evaluated for the Form 9.2-06
- Form 9.1-06 does not contain the affirmative coverage section relating to present encroachments
- If the Owner's Form 9 is issued, it is altered in the same manner as the Lender's Form 9.

Back to Speaker Topics

Survey Examples

Survey Examples

- Rear pocket of your binder
- Survey # 1
- Survey # 2
- Survey # 3
- Survey # 4
- Survey # 5

Survey # 1 - Transaction

- Refinance Transaction
- Mortgagee policy for $300,000
- Value of property $350,000
- Lender requested unaltered Form 9-06
- Home currently situated has existed for more than 20 years; however, pool and deck were installed 5 years ago.

Survey # 1 - Observations

- Asphalt Drive encroaches in front and both side set backs and ROW
- Carport encroaches in to front set back
- Non-descript concrete pad encroaches into rear and side set back on the east
- Swimming pool shell and wood deck encroaches into rear set back
- Concrete wall encroaches into the property
- Note that the sketch does not identify if the set backs are zoning or plat set backs

Survey # 1 Exceptions

1. Encroachment of asphalt drive into the right of way along the northerly boundary.
2. Encroachment of asphalt drive into the front and side set back lines.
3. Encroachment of carport in front set back line.
4. Encroachment of concrete pad in side and rear set back line.
5. Encroachment of swimming pool deck and swimming pool shell into rear set back.
6. Encroachment of concrete wall along the southerly boundary.

Survey # 1 - BSL

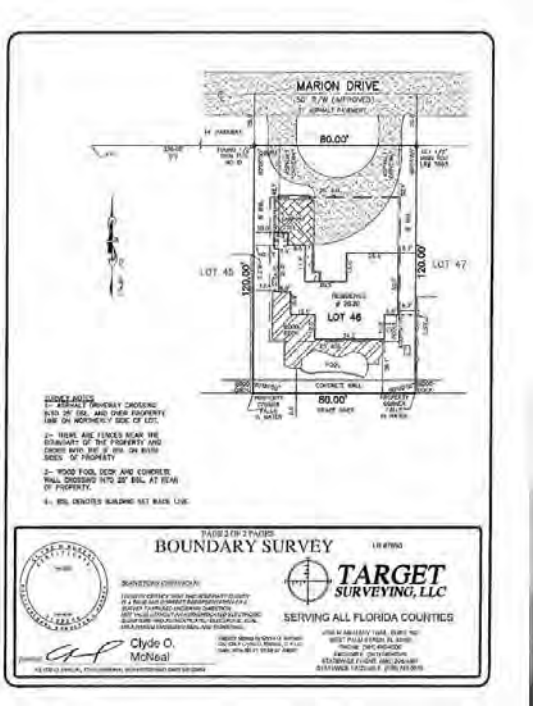
- The reference to the building set back line on this survey does not disclose whether it is a zoning set back or a plat or restrictive covenant set back
- If you find that no such set back appears in the official records, you should confirm with the surveyor these are zoning set backs
- If zoning set backs, exceptions 1 and 6 remain and the other exceptions are not necessary.

Survey # 1 – Form 9 Series Endorsements

- If zoning set backs and only exceptions 1 and 6 are included:
  - Form 9-06 may be issued without alteration
  - Form 9.1-06 is not applicable
  - Form 9.2-06 may be issued
- If set backs are plat set backs or imposed by recorded restrictions:
  - Form 9-06 may be issued without alteration
  - A modified Form 9.2-06 may be issued

Survey # 1

- For the Form 9.2-06 exception # 5:
- 5. Encroachment of swimming pool deck and swimming pool shell into rear set back. *Element of coverage No. 4 of the Florida Endorsement Form 9.2-06 (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.*


MARION DRIVE
50' R/W (IMPROVED)
80.00'
LOT 45
120.00'
LOT 47
LOT 46
POOL
CONCRETE WALL
80.00'
BOUNDARY SURVEY
TARGET
SURVEYING, LLC
SERVING ALL FLORIDA COUNTIES
Clyde O.
McNeal

Survey # 2 - Transaction

- Purchase Transaction - $180,000 owner's policy and $144,000 loan policy
- Home built 10 years ago and is in a seasoned neighborhood
- Lender requires unaltered Form 9-06

Survey # 2 - Observations

- Asphalt drives encroach into the right of way along the westerly boundary
- Carport encroaches into a utility easement along the northerly boundary
- Concrete pad encroaches into a utility easement along the northerly boundary
- A wood fence, that has been determined to belong to the seller, along the northerly boundary encroaches into the adjoining property and utility easement
- A wood fence along the easterly boundary encroaches into the property

Survey # 2 Exceptions

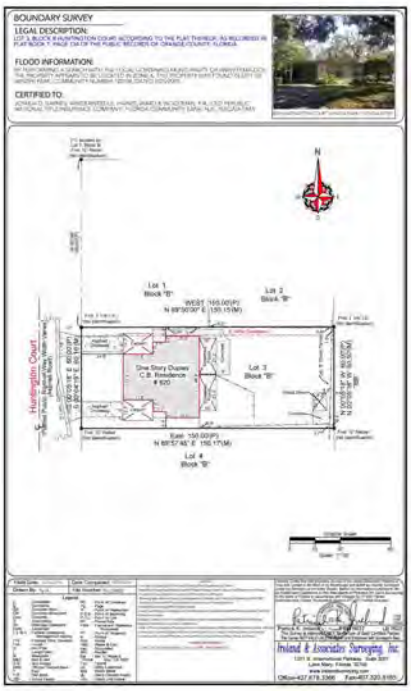
1. Encroachment of asphalt drives into the right of way.
2. Encroachment of Carport into utility easement.
3. Encroachment of Concrete pad into utility easement.
4. Encroachment of wood fence into adjoining property along the northerly boundary.
5. Encroachment of wood fence into utility easement.
6. Encroachment of a wood fence into the insured parcel along the easterly boundary.

Survey # 2 – Form 9 Series Endorsements

- Nominal encroachments such as shown in this example allow for the issuance of unaltered Form 9-06 for affirmative coverage for the lender.
- The most material encroachment is the carport (which may not be that significant)
- The equity present in this case, is not large
- However, the encroachments are relatively minor and have been located on the property for several years

Survey # 2 – Form 9 Series Endorsements

- Form 9.1-06 is not applicable
- Unaltered Form 9.2-06 might be issued. The encroachment of the concrete pad and carport are considered to represent a risk
- Consideration should be given to the potential location of utilities under the improvements
- If the utility easement is needed for existing services and there is a risk the encroachment would need to be removed to get to the cables, pipes, etc, the Owner's Form 9 should not be issued without altering the coverage


BOUNDARY SURVEY
LEGAL DESCRIPTION:
FLOOD INFORMATION:
CERTIFIED TO:
N
Lot 1
Block "B"
Lot 2
Block "B"
Lot 3
Block "B"
Lot 4
Block "B"
Huntington Court
One Story Chaney
C.B. Residence
920
Inland & Associates Surveying, Inc.

Survey # 3 - Transaction

- Refinance Transaction - $750,000 loan policy
- Value of property - $1,000,000
- Home built 3 years ago
- Very good customer of lender
- Lender requires Form 9-06 and wants as much affirmative coverage as it can obtain

Survey # 3 - Observations

- Drive way encroaches into the Right of Way along the easterly boundary
- Structure of the house is located within easement along the southerly perimeter
- Note that the surveyor has included not only Lot 5, but also parts of Lot 4 on the north and Lot 6 on the south
- Member should confirm that the parts of the Lots on the north and south are included in the description examined
- If the part of Lots 4 and 5 surveyed are not included in the description to be insured, the structure of the home encroaches into the adjoining property

Survey # 3 Exceptions and Form 9

1. Encroachment of marble drive into the right of way.
2. Encroachment of House into utility easement near the southerly boundary. *Element of coverage No. 3.(a) of the ALTA Endorsement 9-06 (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.*
3. Encroachment of House into utility easement near the southerly boundary. *Element of coverage No. 2.(a) of the ALTA Endorsement 9.2-06 (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.*
4. If the legal description does not include parts of the adjacent lots as surveyed, additional exceptions should be made and Form 9 coverage altered for the encroachment into the adjoining parcel.

CURVE TABLE
LINE DATA
REMAINDER OF LOT 4 BLOCK 4
(NOT INCLUDED)
(NON-RADIAL)
S75°12'25"E(C) 95.14'(D) 95.49'(C)
P.O.B.
1 STORY C.B.S.
RESIDENCE
#1220
LOT 5
BLOCK 4
S.E. 13th TERRACE
N73°19'50"W(C) 95.97'(D) 99.39'(C)
(NON-RADIAL)
P.O.B.
REMAINDER OF LOT 6 BLOCK 4
(NOT INCLUDED)
LOT 27 BLOCK 4
LOT 26 BLOCK 4
LOT 25 BLOCK 4
LOT 24 BLOCK 4

Survey # 4 - Transaction

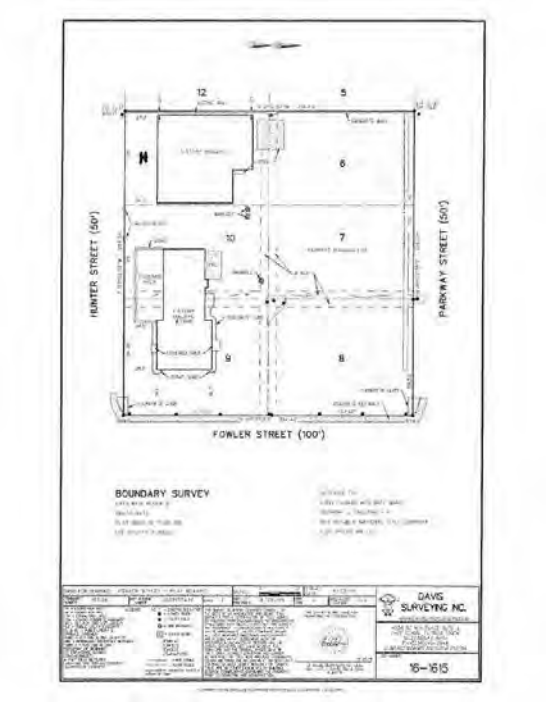
- Purchase and Sale Transaction
- Owner's Policy - $700,000 loan policy
- Loan Policy - $490,000
- Structures built 25 years ago
- Lender wants exception for easement and encroachment therein removed from policy
- Lender requires unaltered Form 9-06

Survey # 4 - Observations

- Concrete side walk and concrete curb encroaches into the property on the southerly boundary and corners
- Concrete curb encroaching into the property along the easterly boundary
- Utility poles encroach into southerly boundary and man hole covers and water meters outside of utility easements
- Concrete wall just inside the northerly boundary and fence inside the easterly boundary that Member has determined belongs to owner
- Multiple structures encroaching into utility easements bisecting the property

Survey # 4 Observations

- Example of a transaction with very serious, harsh encroachments
- Lender's demand to remove encroachment exceptions is likely an objection to the collateral with such severe encroachments
- Exceptions should remain until resolved
- Unaltered Form 9-06 and 9.2-06 would be authorized after resolved
- Likely would require curative action to close the transaction


HUNTER STREET (50')
PARKWAY STREET (50')
FOWLER STREET (100')
BOUNDARY SURVEY
DAVIS SURVEYING INC.
16-1615

Survey # 5 - Transaction

- Recent Construction
- Very important bank customer paid cash for the purchase and construction
- Owner now wants to take a small loan and mortgage the property - $300,000 loan policy
- Land without improvements valued at $800,000 and as built $2.3 million
- Lender requires “clean” policy and an unaltered Form 9-06

Survey # 5 - Observations

- Surveyor's Notes show that easements and plat set backs exist, however, not depicted
- Southern most corner of house may encroach into side set back
- Northern most corner of house and pool deck may encroach into a rear set back if the northerly boundary is considered the rear
- Wood privacy fence coming from the side of the house to the northerly boundary encroaches into adjoining property where it attaches to fence outside the boundary and at a gate
- Ornamental block wall encroaches into adjoining vacant property
- Fence belonging to owner on the southerly boundary is located on the property line and is considered an encroachment

Survey # 5 Observations – Cont'd

- There is a well worn trail/drive that runs north and south, with a gate on the north and leading to the cul de sac on the south
- Along the well worn trail/drive there are fiber optic risers marked
- The house structure appears to be built on top of a utility easement and a possible access easement/prescriptive rights
- The dock and boat house on the east, may be owned by the borrower
- Member should confirm ownership of the dock and boathouse

Survey # 5 Observations – Cont'd

- If dock and boat house owned by neighbor (vacant lot) – the dock appears to infringe upon the borrower's riparian rights
- If dock and boat house owned by borrower (note the fence along the mutual boundary ends before the dock) – the structure encroaches into the adjoining property and the Little Econlockhatchee River
- Assume the Member determines the dock and boat house are owned by the borrower (constructed along with the home)

Survey # 5 Exceptions

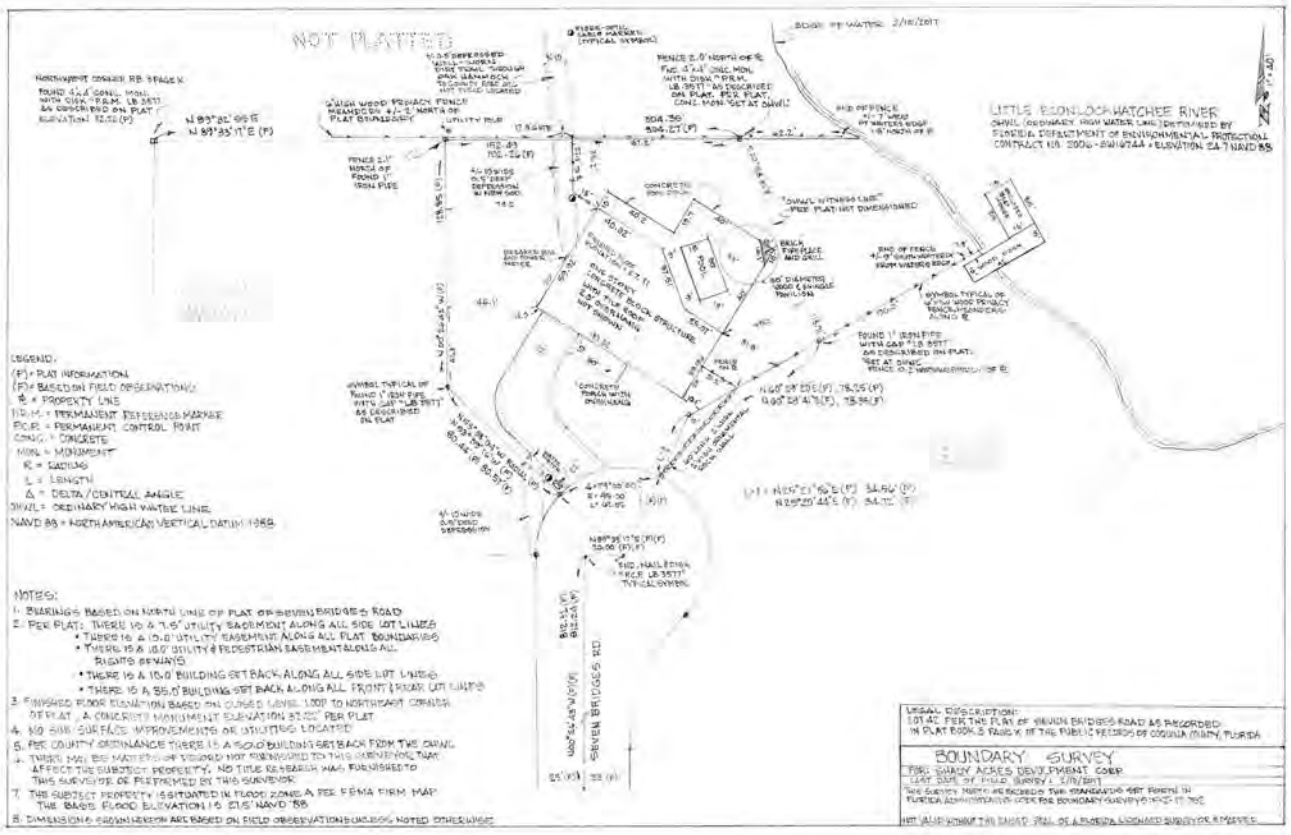
1. Encroachment of southern most corner of house into side set back.
2. Encroachment of northern most corner of house and pool deck into rear set back.
3. Encroachment of wood privacy fence into set back and adjoining property on the north.
4. Encroachment of ornamental block wall and wood fence into set back and adjoining vacant property along the southerly boundary.
5. Rights of others to use the property for ingress/egress along well worn trail/drive.
6. Unrecorded utility easement as evidenced by fiber optic markers along well worn trail/drive.

Survey # 5 Exceptions - Continued

7. Encroachment of house into well worn trail/drive and unrecorded utility easement.
8. Encroachment of dock and boat house into adjoining property to the south and into the Econlockhatchee River

Survey # 5 – Form 9 Series Endorsements

- As is obvious, there are severe encroachment issues
- If asked to issue an Owner's Policy, an unaltered Form 9.2-06 would not be authorized.
- As for the lender's request –
  - Keep in mind, the demand for a "clean" policy, may mean the lender wishes to have the problems resolved
  - Exceptions should not be removed from the commitment or policy unless resolved
  - It is possible that an unaltered Form 9-06 may be issued due to the significant equity and the loan being less than the value of the land before improvement
  - Contact Underwriting to discuss


NOT PLATTED
LITTLE ECONLOCKHATCHEE RIVER
SEVEN BRIDGES RD
LEGEND:
NOTES:
BOUNDARY SURVEY

ALTA ENDORSEMENT 9-06 RESTRICTIONS, ENCROACHMENTS, MINERALS - LOAN POLICY
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. Any incorrectness in the assurance that, at Date of Policy:
   (a) There are no covenants, conditions or restrictions under which the lien of the Mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.
   (b) Unless expressly excepted in Schedule B:

   (1) There are no present violations on the Land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the Land violate building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

   (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the Land does not, in addition, (i) establish an easement on the Land; (ii) provide a lien for liquidated damages; (iii) provide for a private charge or assessment; (iv) provide for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.

   (3) There is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.

   (4) There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.

   (5) There are no notices of violation of covenants, conditions and restrictions relating to environmental protection recorded in the Public Records.

2. Any future violation on the Land of an existing covenant, condition or restriction occurring prior to the acquisition of title to the estate or interest in the Land, provided the violation results in:
   (a) invalidity, loss of priority or unenforceability of the lien of the Insured Mortgage; or
   (b) loss of Title to the estate or interest in the Land if the Insured shall acquire Title in satisfaction of the Indebtedness secured by the Insured Mortgage.

3. Damage to existing improvements (excluding lawns, shrubbery or trees):
   (a) which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or
   (b) which results from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.

4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.

5. Any final court order or judgment denying the right to maintain any existing improvement on the Land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

As used in paragraph 1(b)(1) and 5, the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or restrictions relating to environmental protection.

The failure to expressly except any matter delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) of this endorsement constitutes the Company's agreement to indemnify against loss or damage resulting from any matters delineated in paragraphs 1(b)(1), 1(b)(2) or 1(b)(5) only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.

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

_____ _____
Name of Agent Agent No.

_____
Agent's Signature

Old Republic National Title Insurance Company

By **Mark A. Bilbrey**
President

ALTA 9-06 Endorsement - Restrictions, Encroachments, Minerals (Florida Modified) (rev. 05/14)

ALTA ENDORSEMENT FORM 9.1-06
RESTRICTIONS, ENCROACHMENTS, MINERALS - OWNER'S POLICY - UNIMPROVED LAND
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

The Company insures the insured against loss or damage sustained by reason of:

1. The existence, at Date of Policy, of any of the following unless expressly excepted in Schedule B.
   (a) Present violations on the land of any enforceable covenants, conditions or restrictions.
   (b) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land which, in addition, (i) establishes an easement on the land; (ii) provides for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant; or (iii) provides a right of reentry, possibility of reverter or right of forfeiture because of violations on the land of any enforceable covenants, conditions or restrictions.
   (c) Any encroachment onto the land of existing improvements located on adjoining land.
   (d) Any notices of violation of covenants, conditions and restrictions relating to environmental protection recorded or filed in the public records.
2. Damage to buildings constructed on the land after Date of Policy resulting from the future exercise of any right existing at Date of Policy to use the surface of the land for the extraction or development of minerals excepted from the description of the land or excepted in Schedule B.

Wherever in this endorsement the words "covenants, conditions or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions or limitations contained in an instrument creating a lease.

As used in paragraph 1(a) the words "covenants, conditions or restrictions" shall not be deemed to refer to or include any covenants, conditions or limitations relating to environmental protection.

The failure to expressly except any matter delineated in paragraphs 1(a), (b) or (d) of this endorsement constitutes the Company's agreement to indemnify against loss or damage resulting from any matters delineated in paragraphs 1(a), (b) or (d) only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

_____ _____
Name of Agent Agent No.

_____
Agent's Signature

Old Republic National Title Insurance Company
By Mark A. Bilbrey
President

ALTA 9.1-06 Endorsement - Restrictions, Encroachments, Minerals - Unimproved Land - Owner's Policy (Florida Modified) (rev. 05/14)

ALTA ENDORSEMENT 9.2-06 RESTRICTIONS, ENCROACHMENTS, MINERALS
OWNER'S POLICY - IMPROVED LAND
(With Florida Modifications)

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

Endorsement No. _____ To Policy No. _____

The insurance provided by this endorsement is subject to the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

The Company insures the Insured against loss or damage sustained by reason of:

1. The existence, at Date of Policy, of any of the following unless expressly excepted in Schedule B:
   (a) Present violations on the Land of any enforceable covenants, conditions, or restrictions, or any existing improvements on the Land which violate any building setback lines shown on a plat of subdivision recorded or filed in the Public Records.
   (b) Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land which, in addition, (i) establishes an easement on the Land; (ii) provides for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant; or (iii) provides a right of re-entry, possibility of reverter, or right of forfeiture because of violations on the Land of any enforceable covenants, conditions, or restrictions.
   (c) Any encroachment of existing improvements located on the Land onto adjoining land, or any encroachment onto the Land of existing improvements located on adjoining land.
   (d) Any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.
   (e) Any notices of violation of covenants, conditions, or restrictions relating to environmental protection recorded or filed in the Public Records.
2. Damage to existing buildings at Date of Policy:
   (a) Which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved;
   (b) Resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.
3. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment, other than fences, landscaping, or driveways, excepted in Schedule B.
4. Any final court order or judgment denying the right to maintain any existing building on the Land because of any violation of covenants, conditions, or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the Public Records at Date of Policy.

Wherever in this endorsement the words "covenants, conditions, or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1(a) and 4, the words "covenants, conditions, or restrictions" shall not be deemed to refer to or include any covenants, conditions or limitations relating to environmental protection.

The failure to expressly except any matter delineated in paragraphs 1(a), (b) or (e) of this endorsement constitutes the Company's agreement to indemnify against actual monetary loss or damage resulting from any matters delineated in paragraphs 1(a), (b) or (e) only and provides no coverage for any other matters set forth in the covenants, conditions and restrictions.

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

_____ _____
Name of Agent Agent No.

_____ **Old Republic National Title Insurance Company**
Agent's Signature **By** **Mark A. Bilbrey**

ALTA 9.2-06 Endorsement - Restrictions, Encroachments, Minerals - Owner's Policy - Improved Land (Florida Modified) (rev. 05/14)

ALTA Form 9-06

- For Loan Policies
- Requires an additional premium
- Not automatically given
- Disclosure – the top portion of the form
- Affirmative Coverage – the bottom portion of the form

ALTA Form 9-06

Disclosure

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. Any incorrectness in the assurance that, at Date of Policy:

(b) Unless expressly excepted in Schedule B:

(1) There are no present violations on the Land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the Land violate building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

(3) There is no encroachment of existing improvements located on the Land onto adjoining land, nor any encroachment onto the Land of existing improvements located on adjoining land.

(4) There is no encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.

ALTA Form 9-06

Affirmative Coverage

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

3. Damage to existing improvements (excluding lawns, shrubbery or trees):
   (a) which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or

4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.

5. Any final court order or judgment denying the right to maintain any existing improvement on the Land because of any violation of covenants, conditions or restrictions or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

ALTA Form 9.1-06

- For Owner's Policies
- Unimproved Property
- Requires additional premium
- Less frequently issued/Less frequently authorized
- Disclosure Section
- Does not have similar Affirmative Coverage Section

ALTA Form 9.1-06

The Company insures the insured against loss or damage sustained by reason of:

1. The existence, at Date of Policy, of any of the following unless expressly excepted in Schedule B.

(b) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land which, in addition, (i) establishes an easement on the land

(c) Any encroachment onto the land of existing improvements located on adjoining land.

ALTA Form 9.2-06

- For Owner's Policies
- Improved Property
- Requires additional premium
- Less frequently issued/Less frequently authorized
- Disclosure Section
- Affirmative Coverage Section

ALTA Form 9.2-06

Disclosure

The Company insures the Insured against loss or damage sustained by reason of:

1. The existence, at Date of Policy, of any of the following unless expressly excepted in Schedule B:
   (a) Present violations on the Land of any enforceable covenants, conditions, or restrictions, or any existing improvements on the Land which violate any building setback lines shown on a plat of subdivision recorded or filed in the Public Records.
   (b) Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land which, in addition, (i) establishes an easement on the Land;
   (c) Any encroachment of existing improvements located on the Land onto adjoining land, or any encroachment onto the Land of existing improvements located on adjoining land.
   (d) Any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.

ALTA Form 9.2-06

Affirmative Coverage

The Company insures the Insured against loss or damage sustained by reason of:

2. Damage to existing buildings at Date of Policy:
   (a) Which are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved;
3. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment, other than fences, landscaping, or driveways, excepted in Schedule B.
4. Any final court order or judgment denying the right to maintain any existing building on the Land because of any violation of covenants, conditions, or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the Public Records at Date of Policy.

Back to Speaker Topics

What does Form 9 Cover

Disclosure - “The Top” of the Form 9

- One of the purposes of a Title policy is to disclose matters that effect title
- The top of the Form 9 (Element 1(b)) takes this concept further
- Element 1 (b) provides coverage for loss due to the incorrectness of the assurance that certain matters do not exist
- Element 1.(b)(1) Violations of platted setback lines
- Element 1.(b)(3) Encroachments of our improvements/neighbor’s improvements
- Element 1.(b)(4) Encroachments of improvements onto easements for which you have made an exception.

Disclosure - Continued

Viewed in a somewhat simplistic manner, Form 9-06 assures the insured that, unless an exception was made for:

the violation of the platted set back;

the encroachment into the easement for which an exception was made;

“In-croachments” and “ex-croachments” involving neighbors

They don’t exist.

A Word on Survey/Title Slang

- Title Attorneys will sometimes use a word or phrase out of habit or because the word or phrase is descriptive
- A Form 9-06 = a “Form 9” or a “Lender’s Form 9”
- A Form 9.1-06 or Form 9.2-06 = an “Owner’s Form 9”
- “In-croachment” and “Ex-croachments” are not real legal terms
- “Ex-croachment” = An encroachment of “our” improvements in someone else’s rights
- “In-croachment” = Neighbor’s improvements encroaching into “our” property
- RTI = Right, title and interest

Affirmative Coverage - “Bottom” of Form 9

- Element 3 - The forced removal of improvements which are located in an easement for which exception is made in the policy
- Element 4 - The forced removal of improvements belonging to the borrower which encroach into the neighbor’s property for which exception was made
- Element 5 - Coverage for a judicial denial of the right to maintain improvements due to a violation of the restrictive covenants or building setback lines shown on the plat

Affirmative Coverage - Continued

- All of the Affirmative Coverages pertain to “Ex-Croachments
- Form 9.1-06 does not contain the Affirmative Coverages
- Form 9.2-06 contains similar Affirmative Coverages

Back to Speaker Topics

What Does the Form 9 Series Not Cover

Form 9 Does not Cover - Zoning

- Zoning set backs depicted on a survey do not need to be shown as an exception
- Violations of (encroachments into) zoning set backs depicted on the survey do not need to be shown as an exception
- Form 9 Series endorsements do not provide coverage for zoning set back violations
- When a zoning encroachment exists, Form 9 Series endorsements do not need to be altered
- Regulatory exclusion in the jacket - regulatory matters are not considered covered unless evidence of the violation appears of record

Form 9 Does Not Cover “In-croachments”

- Members should show exceptions for encroachments of the neighbor’s improvements into the insured parcel
- Depending on the severity of the encroachment, it may be important to make an additional exception – RTI of neighbor
- Form 9-06 Element 1.(b)(3) provides coverage to the extent that the “in-croachment” is not disclosed as an exception
- The Form 9-06 provides coverage for “ex-croachments” for which an exception has been made but not for “in-croachments”

Back to Speaker Topics

Showing Exceptions on Schedule B

Showing Exceptions

- A careful evaluation of your survey is an integral part of the process for deleting and replacing the standard survey exception with exceptions for the matters you have found
- The evaluation of the survey should include both the surveyor's notations and the sketch itself
- The title examination should be considered and, if the surveyor has not included items such as easements in the survey, the surveyor should be asked to include them and show encroachments, if any

Showing Exceptions

- Analysis of the survey and consideration of more tailored exceptions and potential Form 9 issues as part of your pre-closing process is critical
- Upon receipt and analysis of survey just before or at closing, the more tailored exceptions should be added and Form 9 issues must also be considered to determine insurability
- Analysis of the survey for Form 9 issues after the closing may result in insurability problems (where unaltered Form 9 coverage not authorized)

Showing Exceptions

- Exceptions for each encroachment/violation can be made separately.
- Exceptions should be simple descriptive statements rather than an attempt to describe the precise measurements of the encroachments (e.g. Encroachment of chain link fence into adjoining property along the easterly boundary).
- A suggested format for survey exceptions can be found in the Standard Commitment Clause Book, SCC E-3.2

Showing Exceptions E-3.2

- This policy does not insure against loss or damage by reason of the following exceptions:

  Encroachments, encumbrances, violations, variations, or adverse circumstances, if any, actually shown on the survey prepared by_____ dated _____, bearing Job # :

  a. [itemize specific survey matter];

  b. [itemize other specific survey matter];

  c. [itemize other specific survey matter].

Showing Exceptions

- Reminder:
  - No need to show an exception for a zoning set back or a violation thereof unless evidence of same appears of record
  - “Ex-croachments” AND “In-croachments” should be shown as exceptions
  - “In-croachments” may trigger the need for an additional exception due to the neighbor’s possession of part of the property.

Back to Speaker Topics

Form 9 Series Analysis

Form 9 Series Analysis

- The Fund Procedures Handbook, Chapter “Preparing the Forms” - detailed discussions of the Form 9 Series Endorsements
- The determination of whether to provide Form 9 coverage with respect to a particular encroachment or violation relates to Elements 3.a., 4., and 5. (Elements 2.a., 3. and 4 for Form 9.2-06)
- Survey matters to evaluate:
  - “Our” improvements encroaching into easements
  - Encroachments of “our” improvements into adjoining property
  - Encroachments/Violations of restrictive covenants or plat set back lines

Form 9 Series Analysis

- Things to consider
  - How much equity is in the property
  - How valuable/material is the improvement that encroaches
  - Severity/Magnitude
  - How long has the encroachment existed in its current state
  - Form 9.2-06, equity is not a factor

Back to Speaker Topics

“Clean” Form 9 vs Altered

More Definitions - Clean vs Altered

- Clean = Unmodified = Unaltered
  - The issuance of a Form 9 Series endorsement without removing elements of coverage. Just note the encroachment on Schedule BII or the Commitment and Schedule B of the policy.
- Altered = Modified = "Dirty"
  - The issuance of a Form 9 Series endorsement but removing element(s) of coverage
  - Example where No Survey Obtained –

ALTA Endorsement 9-06 (Restrictions, Encroachments, Minerals - Loan Policy) is attached to this Policy as Endorsement No.____. Element of coverage 1(b)(1) thereof is hereby modified to read as follows: "There are no present violations on the land of any enforceable covenants, conditions, or restrictions. Elements of coverage 1(b)(3), 1(b)(4), 3, 4, and 5 are hereby deleted from the Endorsement in their entirety."

“Clean” Form 9-06

- Generally “Minor Encroachments” for the purpose of providing unaltered Form 9-06 Coverage
  - Air Conditioner Pad
  - Side walks, Drives, Mail box
  - Fences
  - Soffit overhangs
  - Unfixed sheds
  - Pool decks, screen enclosures
  - Docks

“Clean” Form 9-06?

- “Not so minor”
  - Swimming pool shell
  - Ornate Perimeter Wall
  - Expensive Dock with Gazebo
  - Separate fixed structure
  - A wall of the home or even a more involved part of the main structure

“Clean” Form 9-06

- Reminder
  - The decision to give unaltered Form 9-06 coverage is dependent in part of what rights does the improvement encroach into and how long the improvement has been there.
  - E.g. An encroachment of the home into a utility easement that has been there for only 2 years may be treated differently than that same material encroachment that represents the violation of a platted set back and has been located there for 20 years

How to provide “Clean” Form 9-06

- How do you provide “Clean” Form 9?
  - Make the appropriate exceptions for each of the encroachments/violations
  - Affix the Form 9-06 (check the box for lenders that prefer not to have the physical endorsement)
  - Collect the Premium

Altered Form 9-06

- Members routinely encounter more material encroachments/violations
- Lenders sometimes will accept an altered Form 9-06
- It is possible to provide Form 9 Series coverage for some encroachments/violations found but carve out the coverage for one of them
- Depending on the severity of the issue, a lender's objection may not only be to the presence of the exception but the presence of the violation/encroachment itself

How to Alter Form 9-06

- Make exceptions for each of the encroachments/violations found
- For encroachments that you have made exception for which Form 9-06 coverage can be provided, do nothing more
- For more material/severe encroachments for which Form 9-06 coverage is not extended, add the following language as a second sentence to the applicable exception:
  - Element of coverage No.4 (or 3.a. or 5 as applicable) of the ALTA 9.06 endorsement (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.

Altering Form 9.1-06 and 9.2-06

- Owner's Form 9 coverage is less often authorized because equity is not factored in
- The same encroachments/violations are evaluated for the Form 9.2-06
- Form 9.1-06 does not contain the affirmative coverage section relating to present encroachments
- If the Owner's Form 9 is issued, it is altered in the same manner as the Lender's Form 9.

Back to Speaker Topics

Survey Examples

Survey Examples

- Rear pocket of your binder
- Survey # 1
- Survey # 2
- Survey # 3
- Survey # 4
- Survey # 5

Survey # 1 - Transaction

- Refinance Transaction
- Mortgagee policy for $300,000
- Value of property $350,000
- Lender requested unaltered Form 9-06
- Home currently situated has existed for more than 20 years; however, pool and deck were installed 5 years ago.

Survey # 1 - Observations

- Asphalt Drive encroaches in front and both side set backs and ROW
- Carport encroaches in to front set back
- Non-descript concrete pad encroaches into rear and side set back on the east
- Swimming pool shell and wood deck encroaches into rear set back
- Concrete wall encroaches into the property
- Note that the sketch does not identify if the set backs are zoning or plat set backs

Survey # 1 Exceptions

1. Encroachment of asphalt drive into the right of way along the northerly boundary.
2. Encroachment of asphalt drive into the front and side set back lines.
3. Encroachment of carport in front set back line.
4. Encroachment of concrete pad in side and rear set back line.
5. Encroachment of swimming pool deck and swimming pool shell into rear set back.
6. Encroachment of concrete wall along the southerly boundary.

Survey # 1 - BSL

- The reference to the building set back line on this survey does not disclose whether it is a zoning set back or a plat or restrictive covenant set back
- If you find that no such set back appears in the official records, you should confirm with the surveyor these are zoning set backs
- If zoning set backs, exceptions 1 and 6 remain and the other exceptions are not necessary.

Survey # 1 – Form 9 Series Endorsements

- If zoning set backs and only exceptions 1 and 6 are included:
  - Form 9-06 may be issued without alteration
  - Form 9.1-06 is not applicable
  - Form 9.2-06 may be issued
- If set backs are plat set backs or imposed by recorded restrictions:
  - Form 9-06 may be issued without alteration
  - A modified Form 9.2-06 may be issued

Survey # 1

- For the Form 9.2-06 exception # 5:
- 5. Encroachment of swimming pool deck and swimming pool shell into rear set back. *Element of coverage No. 4 of the Florida Endorsement Form 9.2-06 (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.*

Survey # 2 - Transaction

- Purchase Transaction - $180,000 owner's policy and $144,000 loan policy
- Home built 10 years ago and is in a seasoned neighborhood
- Lender requires unaltered Form 9-06

Survey # 2 - Observations

- Asphalt drives encroach into the right of way along the westerly boundary
- Carport encroaches into a utility easement along the northerly boundary
- Concrete pad encroaches into a utility easement along the northerly boundary
- A wood fence, that has been determined to belong to the seller, along the northerly boundary encroaches into the adjoining property and utility easement
- A wood fence along the easterly boundary encroaches into the property

Survey # 2 Exceptions

1. Encroachment of asphalt drives into the right of way.
2. Encroachment of Carport into utility easement.
3. Encroachment of Concrete pad into utility easement.
4. Encroachment of wood fence into adjoining property along the northerly boundary.
5. Encroachment of wood fence into utility easement.
6. Encroachment of a wood fence into the insured parcel along the easterly boundary.

Survey # 2 – Form 9 Series Endorsements

- Nominal encroachments such as shown in this example allow for the issuance of unaltered Form 9-06 for affirmative coverage for the lender.
- The most material encroachment is the carport (which may not be that significant)
- The equity present in this case, is not large
- However, the encroachments are relatively minor and have been located on the property for several years

Survey # 2 – Form 9 Series Endorsements

- Form 9.1-06 is not applicable
- Unaltered Form 9.2-06 might be issued. The encroachment of the concrete pad and carport are considered to represent a risk
- Consideration should be given to the potential location of utilities under the improvements
- If the utility easement is needed for existing services and there is a risk the encroachment would need to be removed to get to the cables, pipes, etc, the Owner's Form 9 should not be issued without altering the coverage

Survey # 3 - Transaction

- Refinance Transaction - $750,000 loan policy
- Value of property - $1,000,000
- Home built 3 years ago
- Very good customer of lender
- Lender requires Form 9-06 and wants as much affirmative coverage as it can obtain

Survey # 3 - Observations

- Drive way encroaches into the Right of Way along the easterly boundary
- Structure of the house is located within easement along the southerly perimeter
- Note that the surveyor has included not only Lot 5, but also parts of Lot 4 on the north and Lot 6 on the south
- Member should confirm that the parts of the Lots on the north and south are included in the description examined
- If the part of Lots 4 and 5 surveyed are not included in the description to be insured, the structure of the home encroaches into the adjoining property

Survey # 3 Exceptions and Form 9

1. Encroachment of marble drive into the right of way.
2. Encroachment of House into utility easement near the southerly boundary. *Element of coverage No. 3.(a) of the ALTA Endorsement 9-06 (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.*
3. Encroachment of House into utility easement near the southerly boundary. *Element of coverage No. 2.(a) of the ALTA Endorsement 9.2-06 (Restrictions, Encroachments, Minerals) shall not apply with respect to the aforesaid encroachment.*
4. If the legal description does not include parts of the adjacent lots as surveyed, additional exceptions should be made and Form 9 coverage altered for the encroachment into the adjoining parcel.

Survey # 4 - Transaction

- Purchase and Sale Transaction
- Owner's Policy - $700,000 loan policy
- Loan Policy - $490,000
- Structures built 25 years ago
- Lender wants exception for easement and encroachment therein removed from policy
- Lender requires unaltered Form 9-06

Survey # 4 - Observations

- Concrete side walk and concrete curb encroaches into the property on the southerly boundary and corners
- Concrete curb encroaching into the property along the easterly boundary
- Utility poles encroach into southerly boundary and man hole covers and water meters outside of utility easements
- Concrete wall just inside the northerly boundary and fence inside the easterly boundary that Member has determined belongs to owner
- Multiple structures encroaching into utility easements bisecting the property

Survey # 4 Observations

- Example of a transaction with very serious, harsh encroachments
- Lender's demand to remove encroachment exceptions is likely an objection to the collateral with such severe encroachments
- Exceptions should remain until resolved
- Unaltered Form 9-06 and 9.2-06 would be authorized after resolved
- Likely would require curative action to close the transaction

Survey # 5 - Transaction

- Recent Construction
- Very important bank customer paid cash for the purchase and construction
- Owner now wants to take a small loan and mortgage the property - $300,000 loan policy
- Land without improvements valued at $800,000 and as built $2.3 million
- Lender requires “clean” policy and an unaltered Form 9-06

Survey # 5 - Observations

- Surveyor's Notes show that easements and plat set backs exist, however, not depicted
- Southern most corner of house may encroach into side set back
- Northern most corner of house and pool deck may encroach into a rear set back if the northerly boundary is considered the rear
- Wood privacy fence coming from the side of the house to the northerly boundary encroaches into adjoining property where it attaches to fence outside the boundary and at a gate
- Ornamental block wall encroaches into adjoining vacant property
- Fence belonging to owner on the southerly boundary is located on the property line and is considered an encroachment

Survey # 5 Observations – Cont'd

- There is a well worn trail/drive that runs north and south, with a gate on the north and leading to the cul de sac on the south
- Along the well worn trail/drive there are fiber optic risers marked
- The house structure appears to be built on top of a utility easement and a possible access easement/prescriptive rights
- The dock and boat house on the east, may be owned by the borrower
- Member should confirm ownership of the dock and boathouse

Survey # 5 Observations – Cont'd

- If dock and boat house owned by neighbor (vacant lot) – the dock appears to infringe upon the borrower's riparian rights
- If dock and boat house owned by borrower (note the fence along the mutual boundary ends before the dock) – the structure encroaches into the adjoining property and the Little Econlockhatchee River
- Assume the Member determines the dock and boat house are owned by the borrower (constructed along with the home)

Survey # 5 Exceptions

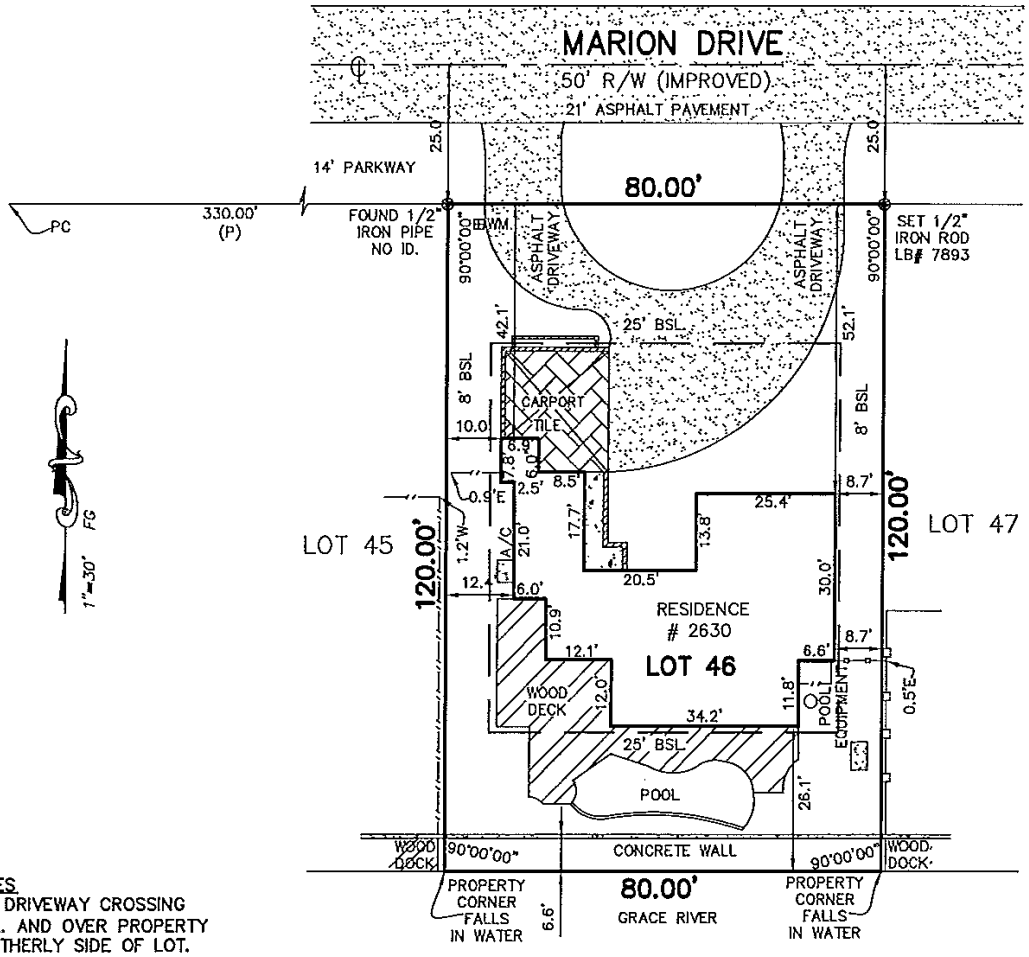
1. Encroachment of southern most corner of house into side set back.
2. Encroachment of northern most corner of house and pool deck into rear set back.
3. Encroachment of wood privacy fence into set back and adjoining property on the north.
4. Encroachment of ornamental block wall and wood fence into set back and adjoining vacant property along the southerly boundary.
5. Rights of others to use the property for ingress/egress along well worn trail/drive.
6. Unrecorded utility easement as evidenced by fiber optic markers along well worn trail/drive.

Survey # 5 Exceptions - Continued

7. Encroachment of house into well worn trail/drive and unrecorded utility easement.
8. Encroachment of dock and boat house into adjoining property to the south and into the Econlockhatchee River

Survey # 5 – Form 9 Series Endorsements

- As is obvious, there are severe encroachment issues
- If asked to issue an Owner's Policy, an unaltered Form 9.2-06 would not be authorized.
- As for the lender's request –
  - Keep in mind, the demand for a "clean" policy, may mean the lender wishes to have the problems resolved
  - Exceptions should not be removed from the commitment or policy unless resolved
  - It is possible that an unaltered Form 9-06 may be issued due to the significant equity and the loan being less than the value of the land before improvement
  - Contact Underwriting to discuss



SURVEY NOTES

1– ASPHALT DRIVEWAY CROSSING INTO 25' BSL. AND OVER PROPERTY LINE ON NORTHERLY SIDE OF LOT.

2– THERE ARE FENCES NEAR THE BOUNDARY OF THE PROPERTY AND CROSS INTO THE 8' BSL ON BOTH SIDES OF PROPERTY

3– WOOD POOL DECK AND CONCRETE WALL CROSSING INTO 25' BSL. AT REAR OF PROPERTY.

4– BSL DENOTES BUILDING SET BACK LINE

PAGE 2 OF 2 PAGES

BOUNDARY SURVEY

LB #7893

CLYDE O McNEAL CERTIFICATE No. 2883 STATE OF FLORIDA PROFESSIONAL SURVEYOR & MAPPER

SURVEYORS CERTIFICATE

I HEREBY CERTIFY THAT THIS BOUNDARY SURVEY IS A TRUE AND CORRECT REPRESENTATION OF A SURVEY PREPARED UNDER MY DIRECTION. NOT VALID WITHOUT AN AUTHENTICATED ELECTRONIC SIGNATURE AND AUTHENTICATED ELECTRONIC SEAL, OR A RAISED EMBOSSED SEAL AND SIGNATURE.

(SIGNED) Clyde O. McNeal

Digitally signed by Clyde O. McNeal
DN: CN = Clyde O. McNeal, C = US
Date: 2014.09.25 10:49:57 -04'00'

CLYDE O. McNEAL, PROFESSIONAL SURVEYOR AND MAPPER #2883

TARGET SURVEYING, LLC

SERVING ALL FLORIDA COUNTIES

6250 N. MILITARY TRAIL, SUITE 102
WEST PALM BEACH, FL 33407
PHONE (561) 640-4800
FACSIMILE (561) 640-0576
STATEWIDE PHONE (800) 226-4807
STATEWIDE FACSIMILE (800) 741-0576

BOUNDARY SURVEY

LEGAL DESCRIPTION:

LOT 3, BLOCK B HUNTINGTON COURT ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK T, PAGE 134 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA.

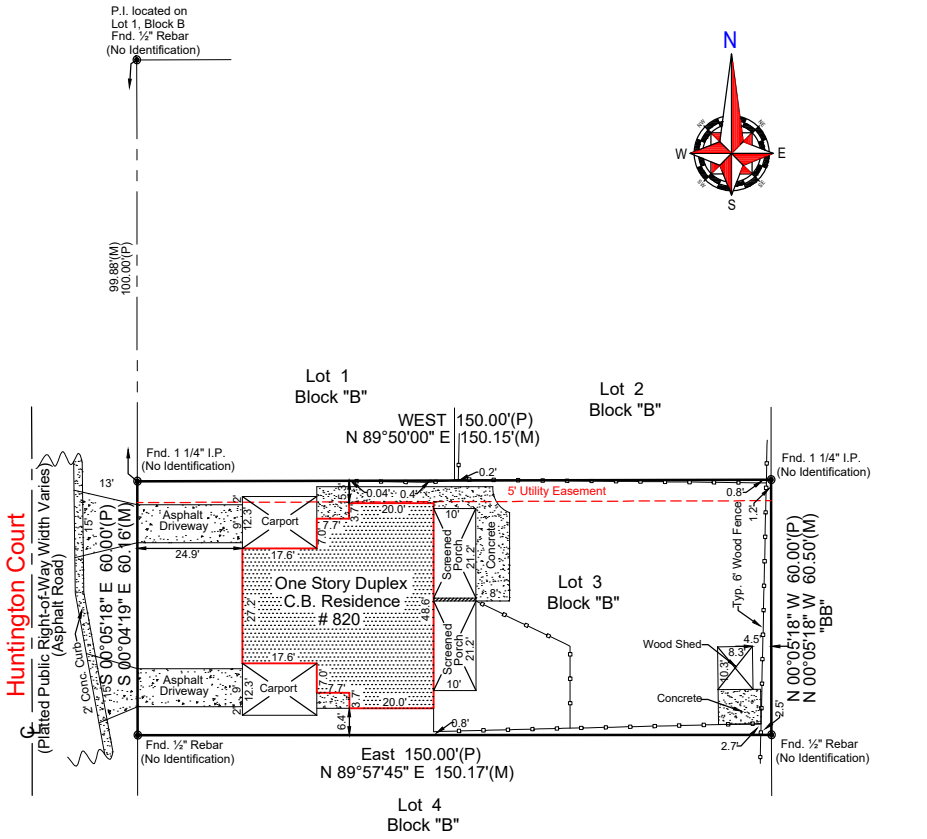
FLOOD INFORMATION:

BY PERFORMING A SEARCH WITH THE LOCAL GOVERNING MUNICIPALITY OR WWW.FEMA.GOV, THE PROPERTY APPEARS TO BE LOCATED IN ZONE X. THIS PROPERTY WAS FOUND IN CITY OF WINTER PARK, COMMUNITY NUMBER 120188, DATED 9/25/2009.

CERTIFIED TO:

JOSHUA D. BARNES; WINDERWEEDLE, HAINES, WARD & WOODMAN, P.A.; OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY; FLORIDA COMMUNITY BANK, N.A., ISAOA/ATIMA

820 HUNTINGTON COURT WINTER PARK, FLORIDA 32789



Field Date: 10/26/2016 | Date Completed: 10/28/2016

Drawn By: N.A. | File Number: IS-32488

-Legend-

C	- Calculated	PC	- Point of Curvature
℄	- Centerline	Pg.	- Page
CB	- Concrete Block	PI	- Point of Intersection
CM	- Concrete Monument	P.O.B.	- Point of Beginning
Conc.	- Concrete	P.O.L.	- Point on Line
D	- Description	PP	- Power Pole
DE	- Drainage Easement	PRM	- Permanent Reference Monument
Esmt.	- Easement	PT	- Point of Tangency
F.E.M.A.	- Federal Emergency Management Agency	R	- Radius
FFE	- Finished Floor Elevation	Rad.	- Radial
Fnd.	- Found	R&C	- Rebar & Cap
IP	- Iron Pipe	Rec.	- Recovered
L	- Length (Arc)	Rfd.	- Roofed
M	- Measured	Set	- Set ½" Rebar & Cap "LB 7623"
N&D	- Nail & Disk	Typ.	- Typical
N.R.	- Non-Radial	UE	- Utility Easement
ORB	- Official Records Book	WM	- Water Meter
P	- Plat	Δ	- Delta (Central Angle)
P.B.	- Plat Book	—o—	- Chain Link Fence
—□—	- Wood Fence		

-NOTES-

>Survey is Based upon the Legal Description Supplied by Client.
>Abutting Properties Deeds have NOT been Researched for Gaps, Overlaps and/or Hiatus.
>Subject to any Easements and/or Restrictions of Record.
>Bearing basis shown hereon, is Assumed and Based upon the Line Denoted with a "BB".
>Building Ties are NOT to be used to reconstruct Property Lines.
>Fence Ownership is NOT determined.
>Roof Overhangs, Underground Utilities and/or Footers have NOT been located UNLESS otherwise noted.
>Septic Tanks and/or Drainfield locations are approximate and MUST be verified by appropriate Utility Location Companies.
>Use of This Survey for Purposes other than Intended, Without Written Verification, Will be at the User's Sole Risk and Without Liability to the Surveyor. Nothing Hereon shall be Construed to give ANY Rights or Benefits to Anyone Other than those Certified.

-POINTS OF INTEREST-

CONCRETE SIDEWALK OVERLAPS EASEMENTS.

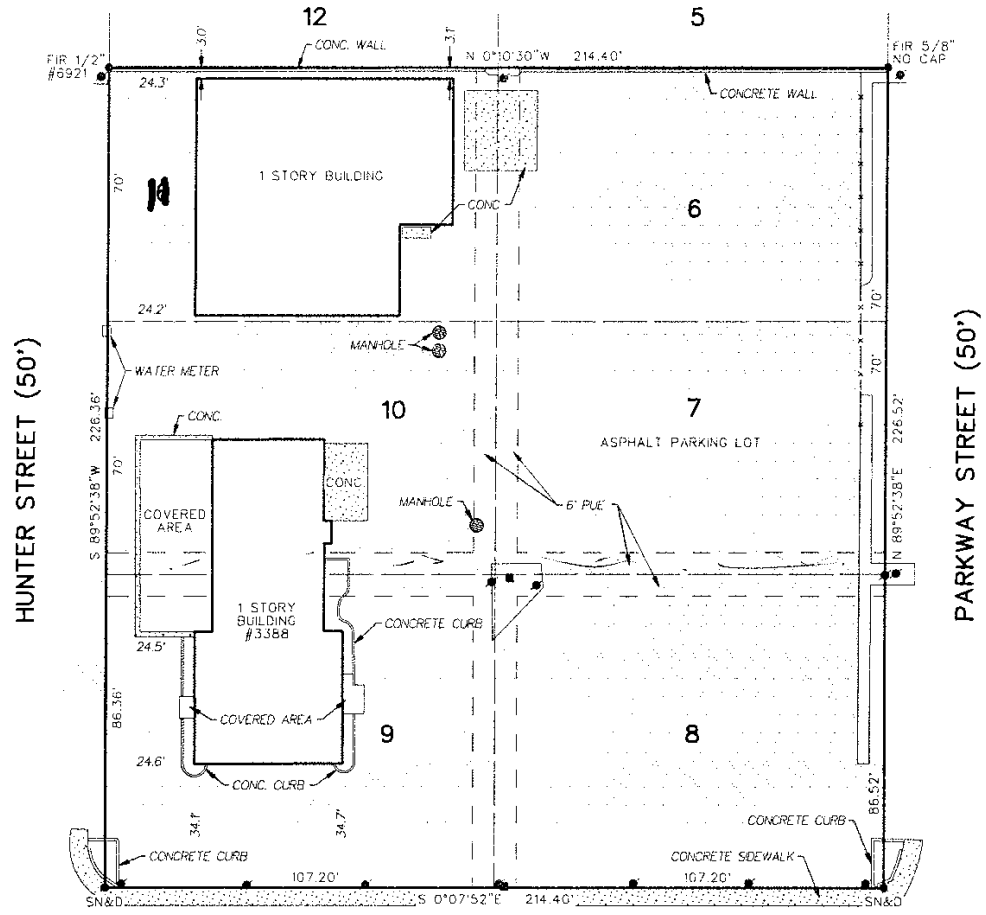
I hereby Certify that this Boundary Survey of the above Described Property is True and Correct to the Best of my Knowledge and Belief as recently Surveyed under my Direction on the Date Shown, Based on Information furnished to Me as Noted and Conforms to the Standards of Practice for Land Surveying in the State of Florida in accordance with Chapter 5J-17.052 Florida Administrative Codes, Pursuant to Section 472.027 Florida Statutes.

Patrick K. Ireland PSM 6637 FOR THE FIRM LB 7623

This Survey is Intended ONLY for the use of Said Certified Parties.
This Survey NOT VALID UNLESS Signed and Embossed with Surveyor's Seal.

Ireland & Associates Surveying, Inc.
1301 S. International Parkway Suite 2001
Lake Mary, Florida 32746
www.irelandsurveying.com
Office-407.678.3366 Fax-407.320.8165

CURVE	RADIUS	DELTA	ARC	CHORD BEARING
C1	659.83'	02°57'19"(C)	34.03'(C)	S11°40'05"E(C)
C2	659.83'	05°49'50"(C)	67.14'(C)	S16°03'39"W(C)
C3	659.83'	03°28'25"(C)	40.00'(C)	S20°42'47"W(C)



BOUNDARY SURVEY

LOTS 6-11, BLOCK 2

SOUTH GATE

PLAT BOOK 10, PAGE 106

LEE COUNTY, FLORIDA

CERTIFIED TO:

FIRST FLORIDA INTEGRITY BANK

ANTHONY J. GARGANO, P.A.

OLD REPUBLIC NATIONAL TITLE COMPANY

FORT MYERS MM, LLC

BASIS FOR BEARINGS: FOWLER STREET - PLAT BEARING | SCALE: 0 30 | SURVEY DATE: 8/23/16

COMMUNITY NUMBER 125106 | MAP & PANEL NUMBER 12071C0426 | SUFFIX F | DATE OF FIRM INDEX 8/28/08 | FIRM ZONE X | BASE FLOOD ELEVATION N/A

LEGEND

FR = FOUND IRON ROD
FIP = FOUND IRON PIPE
FDH = FOUND DRILL HOLE
FCM = FOUND CONCRETE MONUMENT
SIR = SET IRON ROD 1/2" LB#7075
PUE = PUBLIC UTILITY EASEMENT
PU & DE = PUBLIC UTILITY & DRAINAGE EASEMENT
SN&D = SET NAIL & DISK LB #7075
PRM = PERMANENT REFERENCE MONUMENT
FN&D = FOUND NAIL & DISK
POB=POINT OF BEGINNING
FE. COR.=FENCE CORNER
CONC.=CONCRETE
#=NOT FIELD MEASURED
L&E=LAKE MAINTENANCE EASEMENT
DE=DRAINAGE EASEMENT

+0.0 = EXISTING ELEVATION
= UTILITY RISER
= UTILITY POLE
= FIRE HYDRANT
= CATCH BASIN
(F)=PLAT
(F)=FIELD
(D)=DEED
(C)=COMPUTED
-x- =WIRE FENCE
-o-o- =WOOD FENCE
NAVD=NORTH AMERICAN VERTICAL DATUM OF 1988

THIS SURVEY IS HEREBY CERTIFIED CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. THIS SURVEY IS NOT A CERTIFICATION OF TITLE, ZONING OR FREEDOM FROM ENCUMBRANCES. NO UNDERGROUND STRUCTURES HAVE BEEN LOCATED BY THIS SURVEY. ANY REFERENCE TO UNDERGROUND STRUCTURES IF ANY IS APPROXIMATE UNLESS OTHERWISE SHOWN. ALL FIELD MEASURED DIRECTIONS AND DISTANCES ARE IN SUBSTANTIAL AGREEMENT WITH THE DIRECTIONS & DISTANCES OF RECORD FOR THE PARCEL SURVEYED, NOT VALID WITHOUT THE SIGNATURE AND THE ORIGINAL RAISED SEAL OF THE FLORIDA LICENSED SURVEYOR AND MAPPER. NO ABSTRACT OF TITLE WAS PROVIDED. EASEMENTS SHOWN ARE FROM THE RECORD PLAT OR DEED ONLY. CONTRACTOR MUST VERIFY WITH CITY OF COUNTY THERE ARE NO OTHER EASEMENTS OR BUILDING SETBACK REQUIREMENTS AFFECTING THE PROPERTY PRIOR TO PERMITTING AND CONSTRUCTION.

THIS SURVEY IS NOT VALID FOR PERMITTING OR CONSTRUCTION.

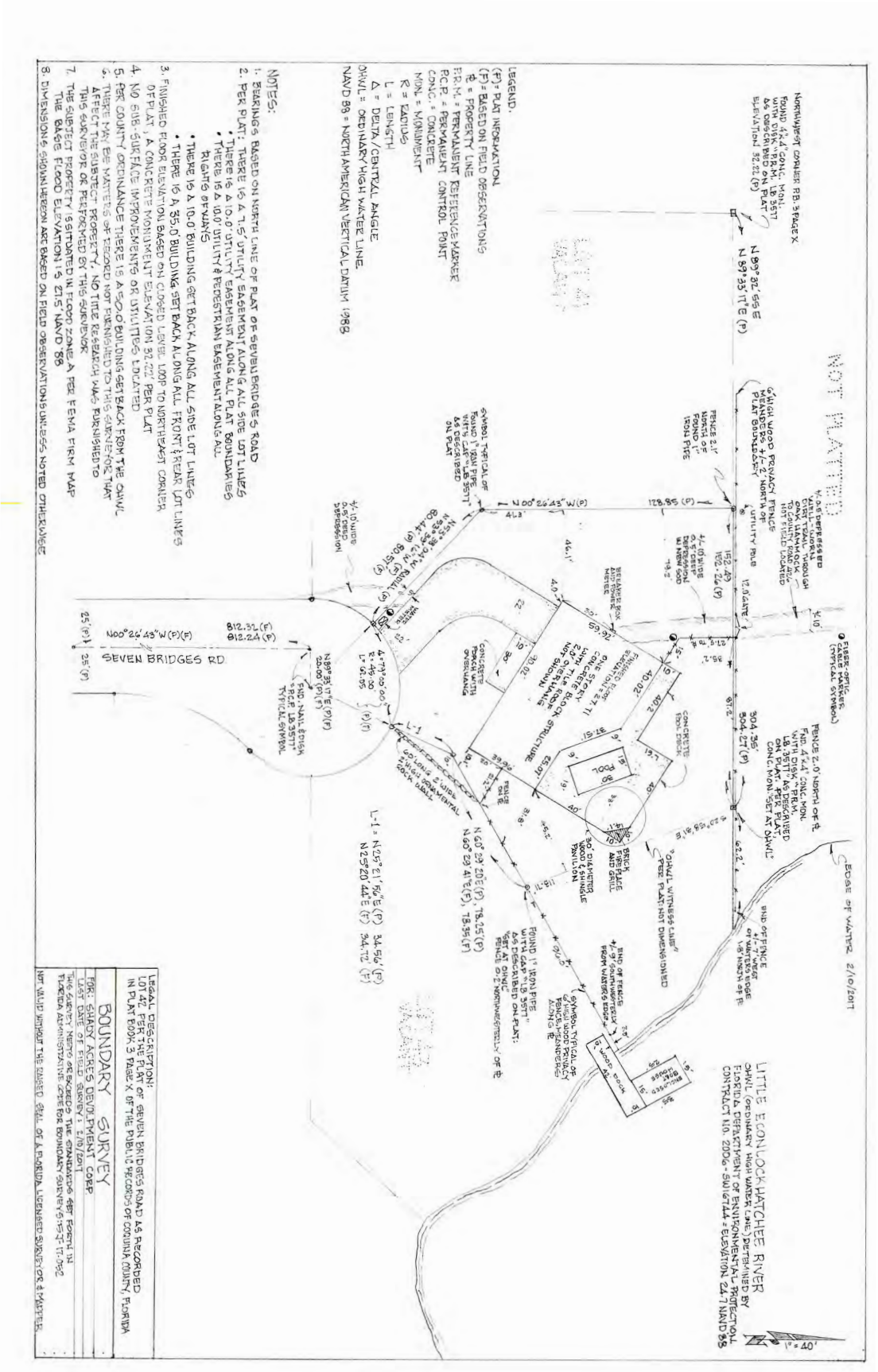
8/24/16

C.E. DAVIS, CERTIFICATE NO. 4639
-OR- ERIC C. DAVIS, PSM # 5544
LB #7075

DAVIS SURVEYING INC.
WWW.DAVISLANDSURVEYS.COM
4536 SE 16th PLACE SUITE 3
CAPE CORAL, FLORIDA 33904
TEL(239)549-6454
FAX(239)549-2548
CONTACT@DAVISLANDSURVEYS.COM

JOB NUMBER:
16-1615

C:\Dropbox (Davis Surveying Inc)\Files\2016\16-1615.dwg -- 08/25/2016 -- 07:23 AM -


NOT PLATTED
SEVEN BRIDGES RD
SEVEN BRIDGES ROAD
LITTLE ECONLOCKHATCHEE RIVER
EDGE OF WATER 2/10/2017
BOUNDARY SURVEY
LEGAL DESCRIPTION:
LOT 42 PER THE PLAT OF SEVEN BRIDGES ROAD AS RECORDED IN PLAT BOOK 3 PAGE X OF THE PUBLIC RECORDS OF COLUMBIA COUNTY, FLORIDA
NOTES:
LEGEND:
1" = 40'

Back to Speaker Topics

Fund Assembly

Making the Project Work

Robert D'Amore, *Sr. Commercial Services Underwriting Counsel, The Fund*
Jacqueline Marzan, *Sr. Commercial Services Underwriting Counsel, The Fund*
Mishele Schutz, *Sr. Commercial Services Underwriting Counsel, The Fund*
John Brown, *Sr. Commercial Services Underwriting Counsel, The Fund*

Back to Speaker Topics

Fund Assembly

Developer's Perspective

Robert D'Amore,
Sr. Commercial Services Underwriting Counsel, The Fund

Robert D'Amore earned his J.D. from Rutgers University and his B.A., with honors, from Montclair State University in New Jersey. He is currently licensed to practice law in New Jersey and Florida. Prior to joining The Fund, Mr. D'Amore served as in-house counsel to commercial real estate developers and institutional investors. In between in-house positions, he was a senior attorney with regional law firms representing commercial real estate clients locally and nationally.

Mr. D'Amore has more than 30 years' experience in the commercial real estate industry, including development, asset management, and finance for malls and shopping centers, office and industrial centers, condominiums and hotel/condominiums, multi-family, and mixed-use projects. He is a member of The Florida Bar's Real Property, Probate and Trust Law Section, the International Council of Shopping Centers, NAIOP, the Urban Land Institute, and the Association of Corporate Counsel.

Making Commercial Real Estate Mixed-Use Projects 'Work' from a Developer's Point Of View

by
Robert D'Amore, Esquire
Senior Underwriting Counsel - Commercial Services

Making the project 'work' from the Developer's perspective is all about turning "Projects into Profits". This is as true in good times as it is in bad. The Developer wants maximum control and minimum risk, as well as a sizable return on its investment…"*Show me the Money*".
It is the experienced professionals, both commercial real estate specialists and attorneys, who help make this happen through financial, legal, business, and title solutions that are creative yet practical.

All commercial projects start out with high expectations. Both when considering new projects, as well as re-reviewing troubled projects, there is no substitute for detailed, fundamental in-depth Risk Reward Analysis, Market Research, and thorough Due Diligence Inspection and Review, to arrive at Proforma Budget forecasts to provide value and appropriate price parameters leading into contract negotiations and execution.

Risk-Reward" analysis:
The Developer formulates a basic "Risk-Reward analysis" factoring in the cost of the land, the cost of development, the cost of carry, and the projected ultimate return on his investment, either through cash flow or disposition. Based upon this evaluation, they determine the type of commercial real estate project they are interested in developing, purchasing, re-developing, or marketing, for example proposed office, hotel/hospitality, shopping center/retail, restaurant, condominium, multifamily, industrial, warehouse, or a combination of them in a mixed use project. The goal is to utilize to the highest and best use of the property to maximize return on investment, and if prudent, with contingencies to minimize losses if the project gets into trouble. An important factor for the success of a project is the appropriate mix of products, for example, retail and/or condominium, and/or office, and/or hospitality…etc., dependent upon the market demographics. In a troubled project, any shift in market conditions must be carefully considered.

Market Research and Site Selection:

Developers research the market and consider the econometrics of the various demographics such as income, age, standard of living, etc. Based upon such factors, developers then conduct targeted site selection for the best location, access and visibility, as well as preliminarily consider the taxes, utilities, zoning and other land use restrictions, environmental issues, and title issues (subject to further in-depth scrutiny during the due diligence investigation), to identify potential properties or projects. In dealing with a troubled project the current market should be revisited.

Budget and Price Determination:

Developers then determine a "price" for the property based upon an estimate of the probable cost of the project, with a provision for adjustment dependent upon the results of the due diligence investigations, in a purchase or repositioning, and a similar evaluation of "value" if in distress.

Negotiating the terms of the transaction:

The negotiation of the terms of the transaction takes place thereafter. Once the terms are agreed upon by the parties, they are memorialized either by letter of intent or a purchase contract. The terms of the contract include, for example, purchase price and terms of payment, closing date, conditions to closing, representations and warranties, environmental provisions, zoning and land use, issues regarding rights to inspection, title related matters, liability insurance requirements, indemnification and hold harmless provisions, remedies for breaches, rights to amend and modify, the term and termination, rights to assignment, attorneys' fees, arbitration rights, and the governing laws, as well as certain conditions and contingencies.

For either a purchase or disposition, once the terms of the transaction are agreed to by the parties, with input from their attorneys, the purchase contract is drafted and ready to be executed. The process to satisfy any contract conditions and contingencies then moves forward. Getting from contract to closing can be tedious, depending upon the complexities of the transaction and the number of properties and parties. However, for the purposes of this writing, we will concentrate on three of the main conditions and contingencies to the closing and funding (1) the Due Diligence Review Inspections, (2) the Financing contingency, and (3) the Title review and approval contingency.

Due Diligence Review Inspection Period;

In general, when negotiating the length of the due diligence period, consider it as a function of risk and price. An “as is” purchase without an inspection period, for example, would correspond to a lower price since the Purchaser is taking on greater risk. Having a due diligence review period as a contingency would correspond to the Purchaser offering a higher price for that opportunity to inspect the property and to object to anything of concern. If nothing of material concern is found during the due diligence inspection, the Purchaser will proceed to ‘close’ versus seeking to renegotiate the price and other terms or terminate the contract if there are issues of concern.

Also, with regard to the Due Diligence Inspection Period, both the timing and the scope are important. For example, the longer the due diligence period is from the Purchaser’s perspective, the better, whereas the opposite is true for the Seller. The Purchaser desires the scope of the due diligence investigation to be as broad as possible, to have an opportunity to make a thorough inspection of the subject property. This includes not just analyzing its physical condition, but also reviewing taxes, utilities, zoning and other land use restrictions, environmental and title issues…etc. As aforementioned, the closing will be contingent upon the Purchaser’s acceptance of the results of the due diligence inspection or rejection of what is found resulting in either a renegotiation of the price and terms or termination of the transaction.

A similar due diligence process would be appropriate to re-evaluate a troubled project to determine what the current physical condition and positioning of the property is from both an operational and legal standpoint. Based thereon, a developer may consider repositioning or disposing of the property, for example, if the mixed-use configuration does not meet the market as projected or conditions have changed, and therefore, the highest and best use of the property is different.

The Financing Contingency:

Another key provision in a purchaser or sale agreement is the financing contingency. In other than cash deals, this provision makes the transaction contingent upon securing an appropriate "Financing Commitment" from a lender during the financing period, usually within the due diligence period, and if unattainable, the Purchaser has the right to terminate the contract.

The lender will normally require and review a development budget, the purchaser organization's financial statements, an operating budget showing how the loan would be repaid, and, typically, guarantees. The lender will also want to see other committed sources of funds for the project. The lender's review requirements with respect to the property will also mirror the details of the due diligence inspection, for example, typically requiring the following items before funding:

(a) Appraisal: An "appraisal" is a written analysis of the estimated value of real estate prepared by a licensed appraiser. If obtaining a loan, most lenders will require an appraisal to determine the value of the property, as collateral for their loan, with a viable margin of equity included in the evaluation from the Developer.

(b) Survey: A survey, commonly based upon ALTA (American Land Title Association) industry standards, is a drawing of the precise legal boundaries of the real estate (land lines), as well as the location of improvements, easements, rights of way, and encroachments, etc. The lender will require a recent survey of the property to indicate items which correspond to the title insurance commitment exceptions.

(c) Condition of Title: The condition of title is memorialized in a title insurance commitment based upon a thorough examination of title to the subject property including a search of public records of all recorded interests in and/or encumbrances on the property. Also of concern to the Developer are the "Restrictive Covenants". These are private agreements that limit the use and occupancy of the real estate (such as the purpose of the structure being built, architectural requirements, setbacks, size of structure and aesthetics, all may be governed by restrictive covenants). They also include "Easements", which are rights or privileges one party has to the "use of another's land" for a special purpose consistent with the general use of the land (for example, easements are commonly given to utility companies to erect poles and run lines on the property). The condition of title to the property is an important determinate in the initial development, but also is a significant consideration in re-reviewing a troubled asset, in particular if a title defect or issue has harmed the project.

Contingencies met, the contract "Goes Hard", and it is time to "Close and Fund":

Once the Due Diligence Inspection Review Period, the Financing Contingency, and any price re-negotiations are completed (and in effect the purchase agreement "goes hard"), it is time to concentrate on the "closing process". Now is the time the requirements of the title commitment and the financing commitment are to be satisfied, closing and finance documents are to be negotiated and drafted, culminating in their execution and the closing of the financing and purchase, and the funding occurs. The pertinent transfer and loan documents are recorded and a title insurance policy is issued. The Developer has gained ownership and control, and in-part through the Due Diligence process has mitigated risk, and looks forward to the positive progress of the project and also a positive financial return from a successful project.

But what happens if the project runs into difficulties, is it time to reposition or cut your losses …"it's back to the drawing board":

The Developer facing a troubled project will, as aforementioned, begin again with a similar fundamental in-depth Risk Reward Analysis, additional Market Research, and thorough Due Diligence Re-Review, to arrive at either: (1) a revised Proforma Budget and Development Plan to in effect "try again" repositioning the project to address the failings (physical defects, construction issues, product type, marketing, sales, economics, legal and financial hardships…etc.), or (2) a revised plan to cut their losses and dispose of the project, avoiding as much risk as possible, for example, through fire sale, mediation, bankruptcy or other exit strategies to reduce liabilities and deal with the project's lenders and investors.
Under this scenario, again experienced professionals, for example, both commercial real estate specialists and attorneys, are called upon to help address the concerns, in particular involving financial, legal and title issues and assist with practical and yet creative business solutions.

Even the best projects sometime falter. The experienced developer, recognizing the cyclical and imperfect nature of real estate investment, often negotiate at the outset contract terms to assure the developer has the "maximum control and minimum risk" in going forward with the project from the beginning, and as a contingency, if the project was to deteriorate.

No better example of this was carried out here in Florida on the west coast not too long ago by whom some might call the consummate "Developer", our current President Donald Trump and the Trump Organization, in his former life as a commercial real estate developer.

Some of you might be familiar with the failed Trump Tower that was supposed to be built in Tampa, Florida. As indicated in the court records (in a current case regarding in-part the return of deposit monies for unit purchasers - cited below*) in this transaction all the financial and management control was to be retained by the Trump Organization, however none, or very little downside investment risk or liability. This is facilitated by an optimistic strategy for the positive development, with contingencies for the negative and the unknown built into the deal.

In conclusion, commercial developers, investors and institutional lenders rely on their attorneys and in turn their title insurer.

In conclusion, commercial developers, investors and institutional lenders dealing with the complexities of commercial real estate projects have countless development, planning, and financial issues to deal with when working through the intricacies of a mixed-use commercial real estate project. This is true both for successful projects and troubled projects alike, and this can involve similar due diligence considerations, budgeting, finance, title and related legal issues.

However, with the aid of creative professionals, experienced real estate business persons, accountants and attorneys upfront in a transaction and thereafter, when problems subsequently arise, such matters can be dealt with to address problems and find practical solutions for troubled projects.

Remember, from our perspective at The Fund, our members can rely on their title insurer to work with them to resolve any title issues, and assist with the closing and funding of transactions in a professional and timely manner. We will bring creative solutions to title problems, no matter how complex, through the Fund's Commercial Services, assisting our members with their commercial real estate transactions to provide appropriate title insurance

coverage and successfully close and fund their transactions to achieve a “win-win” result for all concerned.

*[United States District Court, M.D. Florida, Tampa Division. Steve AARON, et al., Plaintiffs, v. The TRUMP ORGANIZATION, INC., and Donald Trump, Defendants. No. 8:09–cv–2493–T–23AEP. July 15, 2011. Only the Westlaw citation is currently available. 2011 WL 2784151;]

Making Commercial Real Estate Mixed-Use Projects 'Work' from a Developer's Point of View

Robert A. D'Amore, Esquire
Senior Underwriting Counsel,
Commercial Services
Attorneys' Title Fund Services, LLC

Show me the Money

- Developers want to turn "projects into profits"
- Maintain maximum control in good times
- Minimize risk in bad times
- Risk-Reward analysis
- Market research, budget, and value
- Both purchase and exit strategies

Critical Due Diligence

- Review Inspection
- Financing Contingency
  - Appraisal and
    ALTA Survey (American Land Title Association)
- Title contingency
- Complexities of a commercial transaction can be "overwhelming"

Troubled Projects Revisited

- Re-review their assumptions
- Prepare a revised proforma budget and development plan
- Redirect project to address failings
- Devise an exit strategy

Minimize Potential Risk

- Developers are inherently risk adverse
- With the aid of attorneys and business people
  - Plan ahead to maintain maximum control
  - Avoid potential liability
  - Minimize prospective risk

Proactive Problem Solving

- Development process is not an exact science, experience counts
- Commercial real estate developers plan for success but must have contingencies
- Success often includes the insight to plan for the unexpected and adapt
- Commercial Services assists members to achieve a “win-win” result

Back to Speaker Topics

Fund Assembly

Starts with a B: Benefits and Burdens of the Project's Existing Covenants and How to Manage Them

Jacqueline Marzan,
Sr. Commercial Services Underwriting Counsel, The Fund

Jacqueline Marzan earned her Bachelor of Science and Juris Doctor from St. John's University School of Law (New York). Ms. Marzan is an experienced transactional attorney licensed to practice law in the states of New York and Florida.

Prior to joining The Fund, Ms. Marzan practiced in the areas of finance and real estate, having worked on numerous commercial transactions throughout Florida. She gained multi-jurisdictional experience while working with a prestigious national law firm.

While in private practice, Ms. Marzan advised numerous property owners' associations as general in-house counsel. She is also licensed by the State of Florida to provide community association certification courses as well as continuing education to community association managers.

Checklist for Use in Reviewing Covenants in a Stalled Mixed-Use Project

By: Jacqueline C. Marzan, Esq., Senior Underwriting Counsel – Commercial Services

Attorneys' Title Fund Services, LLC

It is critical to understand covenants which affect a property to understand the nature and intent of an existing project. The purpose of this checklist is to assist the practitioner in this endeavor. This checklist is not intended to cover every possible scenario. Instead, this checklist is useful as a general guide to consider possible issues which could impact a purchaser's overall project goals.

Pre-Acquisition / Due Diligence Considerations

Purchaser objectives and actions:

Develop a project goal beyond price

Identify any high risk activities which have or may cause covenant violations

It is advisable to develop project goals in light of existing covenants

Covenants need to be flexible to support the goal

Develop a list of covenant provisions that may need to be added or amended in furtherance of the project goal

Collect instruments of record of which you are immediately aware

Order a commitment in order to assess documents of record which affect the property; obtain copies of same

Questions to Consider:

□ Is a prior owner's or loan policy available?

□Will the existing covenants support flexibility and changing market demands?

Examples of mixed-use developments or medley thereof (not an exhaustive list):

Office

Retail

Industrial

Condominium

Residential Rental Community

Resort / Hotel

Warehouse Space

Urban housing / Shared Living

Office/Home Space

Origination and Importance

Purchaser takes note of the following:

Covenants can be found in Schedule B-II of the commitment

Prior policies will list covenants of record at the time the prior policies were issued

Covenants can be found in the following instruments (not an exhaustive list):

Declaration of Restrictions

Covenants, Conditions and Restrictions

Development Agreement

Reciprocal Easement Agreement

Tri-Party Agreement

Leases

Easements

Types of Provisions May Include:

Use Clauses

Exclusive Use

Prohibited Uses and Activities

Architectural controls

Membership may be required in an association

Obligation to convey [master] properties post turnover or declarant control

Note: Mixed-use property may have multiple associations and multi-level structure; consider laws applicable to the particular structure/ association (i.e., condominium)

Sharing of Expenses

Note: There may not be an association but there may still be provisions requiring the sharing of expenses

Lien Rights

Questions to Consider:

□ Are the covenants in alignment with the project goal?

□ If there is an association, who controls the Board of Directors?

□ If there is more than one association, what is the interplay between or among associations?

□ What are the voting rights of members?

□ Are the association records available for review (inspection)?

Records include, but are not limited to, member and board meeting minutes, respectively, as well as budgets, financials, among other items. Note: Chapter 718, F.S. (Condominium) and Chapter 720, F.S. (Homeowners' Associations) contain a listing of required official records of each.

Covenant Analysis

Subjective review – This analysis involves the process of whether the covenants in place are beneficial and/or flexible.

Consider the following in determining whether the covenant is a benefit or burden: Matter, Manner and Money

Matter: What is the provision? Who does it affect?

Manner: How is it implemented?

Money: Is there a cost or expense involved?

Questions to Consider:

□ What property is affected?

□ How do the definitions influence key covenant provisions?

Note: Definitions are key to understanding when obligations commence and to whom it applies.

□ Are there any other agreements and/or entities intertwined with the covenants (either by relationship or requirement)?

□ Will the purchaser obtain an assignment of all or some of developer rights?

Note: Counsel should be aware of statutory responsibilities which may apply in certain instances (such as in a condominium regime).

□ How are commercial spaces used and/or assigned? Is the assignment, lease or sale of such spaces allowable for consideration? Examples of these spaces are storage and parking.

□ What are the monetary obligations ? When are those obligations triggered?

Amend or Terminate

Flexible covenants are key in changing real estate markets

Consider amending to:

Provide for flexibility

Provide for rights not contained in the covenants such as the right to grant licenses and easements

Address negative press, if any, associated with the project or sales issues/limitations as to the covenants

Address enforcement history concerns and/or to ascertain viability of covenants going forward

Address lender concerns

Questions to Consider:

□ What parties are necessary to amend or terminate?

□ Were the covenants required by another party?

□ What ownership interest is necessary to control the Association? Board?

□Is it advisable to amend the amendment section of the instrument in order to accomplish amendments in the future more easily?

□ What cooperation of other parties, if any, will be necessary to amend covenants?

Management

Management of the property is important in ensuring compliance with covenants in a comprehensive and timely manner

Management personnel as well as any entity or professional responsible for timely delivering information or complying with covenant restrictions should be aware of covenants and related requirements

Obtain and evaluate management contract(s), together with schedule of services to be provided thereunder, as well as any related proof of insurance

Consider necessary licenses

Questions to Consider:

□ Is professional management in place? If so, will it be retained or replaced?

□ Are the covenants capable of being followed by management in a timely manner, without ambiguity?

Starts with a B: Benefits and Burdens of a Project's Existing Covenants and How to Manage Them

Jacqueline C. Marzan, Esquire
Senior Underwriting Counsel
Commercial Services
Attorneys' Title Fund Services, LLC

Pre-Acquisition Considerations

- Purchaser Objectives
- Market Demands

Origination and Importance

- Covenants are found in:
  - Various instruments
  - May contain memberships
- Goal Alignment

Benefits and Burdens

- **Benefits**
  - Subjective
  - Beneficial
  - Consider the 3 M's: Matter, Manner and Money
- **Burdens**
  - Property Affected
  - Consider Definitions
  - Assignment of Rights

Amendments or Terminations

- Necessity
  - Amending
  - Termination or Release
- Authority and Control
  - Planning for the Future

Making It Work

- Management of the Property
  - Implementation
  - Ability to Timely Deliver

Peripheral View

- Peripheral Practice of Law
  - Preliminary Information
  - Independent Research
  - Ask Questions

Back to Speaker Topics

Fund Assembly

Choice of Entity - What Works Best for My Project?

Mishele Schutz,
Sr. Commercial Services Underwriting Counsel, The Fund

Mishele Schutz has engaged in the practice of law in Florida for over thirty years. She graduated from the University of Massachusetts-Amherst with a Bachelor of Science in Legal Studies, and received her law degree from the Antioch School of Law in Washington, DC.

Prior to joining The Fund, Ms. Schutz owned and managed her own title insurance agency where she conducted closings and provided title agency services for commercial, residential, and utility power line easement transactions throughout Florida. She is experienced in issues involving commercial real estate, bankruptcy, 1031 exchanges, and lien resolution.

CHOICE OF ENTITY – WHAT WORKS BEST FOR MY PROJECT?

Mishele Schutz, Senior Underwriting Counsel,
Commercial Services, Attorneys' Title Fund Services, LLC

Available Entities:

- Sole Proprietorship
- General Partnership
- Limited Liability Partnership: LLP
- Limited Partnership: LP
- Limited Liability Limited Partnership: LLLP
- Corporation: C Corp/S Corp
- Limited Liability Company: LLC
    - Member-Managed
    - Manager-Managed
- Business Trusts

Questions:

- Is there a lender? What are the lender's requirements?
- Are there equity investors?
- What control do investors want?
- Taxation issues?
- Liability protection for management versus investors?
- Are there concerns about protecting investors and lenders from insolvency of other investors and affiliates?

Will There Be A Family of Entities?

- The Fund's title commitment requirement of Family of Entities is for the purpose of determining whether related entities are in bankruptcy for evaluation of transfers, issues with authority to bind, validity of Instruments, and related bankruptcy issues.
- *In Re General Growth Properties,* 409 B.R. 43 (Bkrtcy S.D.N.Y. 2009) discusses the Corporate Family Doctrine. The Court considered individual debtors as part of family and took account of the interests of parent and parent's creditors in subsidiary bankruptcy.
- *Union Sav. Bank v. Augie/Restivo Banking Co., Ltd.,* 860 F.2d 515 (2nd Cir. 1988)- Landmark case discussing how affiliated entities can be substantively consolidated, including when entities function as one unit, entanglement of operations, and related considerations.

Structuring to insulate from insolvency of family:

- Attempt to insulate from insolvency of related entities through adding requirements to governing documents, including bylaws and operating agreements:
    - Requirement to maintain separate identity, separate books, assets, Employees, no Inter-corporate guarantees, allocating shared overhead, inter-company transfers for fair value.
    - Requirement of "independent" directors.
    - Requirement of decision baking in best interest of entity not affiliates.
- Regardless of insulating mechanisms, the bankruptcy court may still consolidate affiliate entities.

Investor Issues- Fiduciary Duty:

- Consider a member's fiduciary duty when deciding on member managed or manager managed LLC.
- § 605.04091, F.S. – No statutory fiduciary duty of members in manager managed LLC (Common law fiduciary duty still may be imputed particularly for entity controlling a majority of membership interest).
- § 605.0407 (3), F.S. - Members in manager managed LLCs do not have management authority – Company affairs decided "exclusively by manager"
- Do not unintentionally create fiduciary exposure of members by making LLC member managed for no reason.

Consider the Corporation:

- Venture funds and pension funds may require corporate borrower.
- Future public offering? Consider starting with a corporation.
- Diversity jurisdiction for removal of litigation to federal court has different rules for LLCs and corporations.
- Corporations: residency is state of incorporation and principal place of business - not residency of residencies of shareholders.
- LLCs: Residency is residency of any member. *Rolling Greens v. Comcast,* 374 F.3d 1022 (11th Cir. 2004).

- Where a Delaware Corporation with principal place of business outside of Florida with a Florida shareholder is sued by Florida plaintiff the case is removable.
- A Delaware LLC with a Florida member that is sued by Florida plaintiff is not removable.

Limited Liability Company:

- Recognized in all 50 states.
- Flexibility of adopting different taxation models.
- Distributions do not have to be based on LLC ownership percentages.
- Florida limits creditors of members of multi-member LLCs to charging orders that creates protection from disruption of LLC and other LLC Members from judgment creditors of one member. Sole member LLCs are still at risk of liquidation by member's creditors. § 605.0503 F.S.

Benefit of Out of State LLC:

- Are out of state creditor rights limited to charging orders?
- § 605.0503, F.S., allows foreclosure of the membership interest of a single member LLC.
- Some states limit creditors to charging orders even for single member LLCs- Popular ones are Wyoming, Nevada, and South Dakota.
- "In Florida, the law of the situs of the property controls," *Wells Fargo Bank, N.A. v. Barber*, 85 F. Supp. 3d 1308, 1316 (M.D. Fla. 2015) (allowing foreclosure of Nevis LLC membership interest owned by Florida resident even though charging order was sole remedy under Nevis law based on determination that the location of the membership interest was based on the Florida residency of the member.)

Additional Considerations:

- Ease of execution of documents
- Florida Statement of Authority
    - Easy method for complying with title commitment confirmation of Closing authority – Normally eliminates need to review operating

agreements, partnership agreements, or other verification – Statement of Authority available for:

- § 605.0302, F.S. - Limited Liability Company
- § 620.8303, F.S. – Partnerships and Limited Liability Partnerships

Corporations:

- Oldest Form of Legal Entity – "A corporation created by a state . . seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state. *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844)
- Investor Flexibility – Preferred shares, public offering, formal statutory management organization.
- May be more prone to veil piercing because of statutory management requirements that may not be strictly followed, but LLCs are also subject to veil piercing applying law of piercing corporate veil, *17315 Collins Ave., LLC v. Fortune Dev. Sales Corp.,* 34 So. 3d 166 (Fla. 3d DCA 2010).

Sole Proprietorship:

- By definition, a sole proprietorship has a single owner and is characterized by "the complete identity of the business entity with the individual doing business." *Morgan Wightman Supply Co. v. Smith*, 764 S.W.2d 485, 492 (Mo. Ct. App. 1989).
- "A sole proprietorship has no existence separate and apart from its owner," *Glidden Co. v. Dep't of Labor & Indus.*, 700 A.2d 555, 558 (Pa. Commw. Ct. 1997).
- Cannot be sued separately. *Cashco Oil Co. v. Moses*, 605 F. Supp. 70, 71 (N.D. Ill. 1985) (dismissing sole proprietorship from action because it had no separate legal existence apart from owner and could not be sued along with owner under the relevant applicable law).

General Partnership and Limited Liability Partnership

- § 620.8202, F.S. – Formation – "the association of two or more persons to carry on as co owners a business for profit".
- § 620.8201, F.S. – Partnership is distinct entity from partners.
- § 620.8201, F.S. – LLP is same entity as GP that existed before filing statement of qualification to be LLP.
- § 620.8306, F.S. – Partners jointly and severally liable for partnership debts unless qualified as LLP.
- § 620.9001, F.S. – Convert GP to LLP by filing statement of qualification
- § 620.9003 (4) Failure to file annual reports terminates LLP status and reverts back to GP – does not dissolve partnership.

Limited Partnership and Limited Liability Limited Partnership:

- § 620.1201, F.S. – Formation requires filing of certificate.
- § 620.1305, F.S. – Limited partners do not have statutory fiduciary duties unless vested with management powers.
- § 620.1404, F.S. – General partners jointly and severally liable for debts of Limited Partnership unless qualified as Limited Liability Limited Partnership.
- § 620.1102, F.S. – Limited Liability Limited Partnership created by identifying as LLLP in its Certificate.
- § 620.1104, F.S. – Entity is distinct from partners, LP is same entity regardless of whether certificate states LP or LLLP.

Chapter 609 Business Trusts:

- § 609.01, F.S. Two or more persons may organize themselves to do business under a Declaration of Trust.
- Declaration of Trust may be filed with Secretary of State.
- § 609.03, § 609.04, F.S. Can sell units, shares, bonds but must obtain permit from the Office of Financial Regulation to offer securities for sale.
- "[B]usiness trusts are created for the purpose of carrying on some kind of business or commercial activity for profit," *In Re Treasure Island Land Trust,* 2 B.R. 332, 334 (M.D. Fla. 1980).

Questions?

Mishele Schutz, Esq.
Senior Underwriting Counsel, Commercial Services
The Fund - Sarasota

- Email: mschutz@thefund.com
- Call: 800-432-9594 Ex. 7703

CHOICE OF ENTITY – WHAT WORKS BEST FOR MY PROJECT?

Mishele Schutz, Esquire
Senior Underwriting Counsel
Commercial Services
Attorneys' Title Fund Services, LLC

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Questions?

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- Call: 800-432-9594 Ex. 7703

Back to Speaker Topics

Fund Assembly

Construction Lien Considerations

John Brown,
Sr. Commercial Services Underwriting Counsel, The Fund

John Brown is a Florida attorney board certified in real estate and a member of both the Florida and Kentucky Bars. He earned his J.D. from Salmon P. Chase College of Law in 1981. Prior to his position with The Fund, Mr. Brown represented national retailers in purchase contract negotiations, leasing, site evaluation, permitting, land use, environmental evaluation and compliance, survey and title.

He has represented private and public companies regarding operational and construction financing, and was involved in the issuance of municipal bonds for utility financing. His practice included structuring and consummating 1031 exchanges, joint development projects, cellular tower site evaluation and closings, and hotel project development. Mr. Brown is a member of The Florida Bar's Real Property Probate and Trust Law Section, NAIOP, the International Council of Shopping Centers and the Urban Land Institute.

Anatomy of a Stalled/Revived Commercial Mixed-Use Project- Construction Lien Considerations

By John E. Brown Esquire
Senior Underwriting Counsel
Attorneys' Title Fund Services, LLC

Assessment of the Project

Evaluation of Title

Future Plans for the Project

Tools for Addressing Title Issues

Appendix of Materials

Owner's Affidavit- Restoration of Priority
Subcontractor's Final Payment Affidavit & Lien Release
Contractor's Final Payment Affidavit & Lien Release
"Florida Construction Lien Law and its Implications to Title Insurance", 48 *Fund Concept* 49, (Jun. 2016)

Anatomy of a Stalled/Revived Commercial Mixed-Use Project – Construction Lien Considerations

John E. Brown, Esquire
Senior Underwriting Counsel
Commercial Services
Attorneys' Title Fund Services, LLC

Assessment of the Project

- Why did project fail or stall?
  - Developer funding, market conditions or lender cut off funding.
- Evaluate status of work.
  - Near beginning, middle or close to completion.
- Determine status of payments made or due contractors and subcontractors.

Evaluate the Condition of Title

- How many notice of commencements (NOC) are filed?
- What is nature and scope of work defined in each NOC?
- Are there any bonds posted with each NOC?
- Are there claims of liens filed against property?
- Are there sufficient funds to address these claims?

What is Plan Moving Forward?

- Completion of project with new owner or lender?
- Using existing contractor or new one?
- Can they pay contractor and subcontractors current?
- Will there be a new loan or other title transaction before construction resumes?

Addressing Title Issues

- Pay off claims of lien and record releases.
- Transfer lien to bond or security using Sec. 713.23 & 713.24.
- Serve contractor with notice of contest, Sec. 713.22.
- File suit to show cause, Sec. 713.21.
- Restore priority of title transfer or new loan, TN 21.03.03.
- Terminate notice of commencement, Sec. 713.132.

Materials in Booklet

- Owner's Affidavit.
- Subcontractor's Final Payment Affidavit and Lien Release.
- Contractor's Final Payment Affidavit and Lien Release.
- "Florida Construction Lien Law and its Implications to Title Insurance," 48 *Fund Concept* 49 (Jun. 2016).

Owner's Affidavit

(Restoration of Priority)

STATE OF FLORIDA
COUNTY OF _____

BEFORE ME, the undersigned authority, personally appeared _____ who, after being sworn, depose(s) and says:

1. I am the owner of the property described in Exhibit A attached to this affidavit. This affidavit is made regarding the Notice of Commencement recorded _____ in O.R. _____, Page_____, and/or Instrument No. _____, of the Official Records of _____County, Florida.

2. Construction under the Notice of Commencement ceased on _____ (**Instructions:** *state date construction ceased in space provided in this paragraph).*

3. **All** parties who have established privity with me (as set forth in Florida Statute 713.05) relating to the construction described in the Notice of Commencement are **paid in full.**

4. Regarding construction under the Notice of Commencement, I have obtained a list of **all** subcontractors and suppliers (pursuant to Florida Statute 713.165) from each person who has established privity (as set forth in Florida Statute 713.05) with me. **All** of those subcontractors and suppliers are listed in this paragraph. (**Instructions:** *list the names next to the numbered lines in this paragraph, if additional space is needed continue list on the rear of this page, if the answer is "none" write "none" in any space provided in this paragraph.)*

1)_____ 6)_____
2)_____ 7)_____
3)_____ 8)_____
4)_____ 9)_____
5) _____ 10)_____

5. Regarding construction described in the Notice of Commencement, **all** parties who have served notice to owner on me (as set forth in Florida Statute 713.06) or posted notice to owner on the subject property are listed in this paragraph. (**Instructions:** list the names next to the numbered lines in this paragraph, if additional space is needed continue list on the rear of this page, if the answer is "none" write "none" in any space provided in this paragraph.)

1)_____ 6)_____
2)_____ 7)_____
3)_____ 8)_____
4)_____ 9)_____
5) _____ 10)_____

6. **All** parties listed in paragraph 4 and 5 above are **paid in full** up to and including the date of cessation of construction stated in paragraph 2.

7. This affidavit is given to induce **Old Republic National Title Insurance Company**, to insure title to the subject property. Affiant agrees to indemnify them for any loss or damages resulting from their reliance on this affidavit.

_____
(Affiant)
Print Name: _____

Sworn to, affirmed, and subscribed before me this ___ day of _____, 201__, by _____, who is/are personally known to me or who has/have produced _____ as identification.

Notary Signature: _____
Print Name: _____
Notary Public, State of _____
My Commission Expires: _____

[PLACE NOTARIAL SEAL]

Subcontractor's Payment Affidavit And Lien Release

(Restoration of Priority)

KNOW ALL MEN BY THESE PRESENTS that the undersigned, _____, who is _____of_____, having furnished labor, material or services under a direct contract with _____, for consideration, the receipt of which is hereby acknowledged, hereby releases and waives any lien or right to lien the undersigned now has under the Notice of Commencement recorded _____ in O.R. _____, Page_____, Public Records of _____ County, Florida, and against the property owned by _____, and situate in _____County, Florida, legally described as follows:

SEE ATTACHED EXHIBIT "A"

The undersigned acknowledges and certifies that:

1. This is a final waiver of lien rights which the undersigned has against the property described herein for all labor, material, and service furnished including all extras and change orders through the date work ceased. All laborers employed by the undersigned have been **PAID IN FULL** through the date work ceased, and the undersigned has the right and authority to execute this Waiver of Lien.

2. All suppliers and sub-contractors to the undersigned who have furnished labor, material, and services for the undersigned in connection with the construction of improvements upon the aforesaid property have been **PAID IN FULL** through the date work ceased, or, if not, attached are the name(s) of the party or parties and the amount(s) to be paid:

3. All parties who have filed a Notice to Owner as a Vendor to the undersigned are **PAID IN FULL** through the date the work ceased and their Waivers of Lien are attached.

4. The lienor recognizes that the Notice of Commencement recorded _____ in O.R. _____, Page_____, became null and void as of the date construction under the Notice of Commencement ceased and that any further labor, services or material provided to the property shall be under a newly recorded notice of commencement.

The undersigned acknowledges that under Florida Statutes, Contractor, Owner, and **Old Republic National Title Insurance Company** have a right to rely on this Subcontractor's Payment Affidavit and Waiver of Lien and that making any false statement shall constitute perjury.

IN WITNESS WHEREOF, I have set my hand and seal unto this instrument this ___day of _____, 201_.

COMPANY:_____
BY:_____
TITLE:_____

STATE OF FLORIDA

COUNTY OF_____

The foregoing instrument was acknowledged before me this ___ day of _____, by _____ of _____, a _____ corporation, on behalf of the corporation. He/She is personally known to me or who has produced_____, as identification and did take an oath.

Notary Signature: _____
Print Name: _____
Notary Public, State of _____
My Commission Expires: _____

[PLACE NOTARIAL SEAL]

Contractor's Final Payment Affidavit and Lien Release

STATE OF FLORIDA
COUNTY OF _____

BEFORE ME, the undersigned authority, duly authorized to administer oaths and take acknowledgements, personally appeared _____, who after being duly sworn, deposes and says:

I am the _____ of _____, a _____, ("Contractor") and as such am authorized to make this affidavit on behalf of the company and have personal knowledge of the matters described herein.

At all times material hereto, Contractor has been doing business in _____ County, Florida.

This Affidavit is made pursuant to Florida Statutes, for the purpose of acknowledging full payment to the Contractor from the Owner at the property described as:

See Exhibit "A" attached hereto

That all lienors engaged by the Contractor to perform or provide labor, services and/or materials under the contract, including all extras and change orders, between Contractor and_____, a _____ ("Owner"), and pursuant to that certain Notice of Commencement recorded in Official Records Book _____, Page _____, or Instrument No. _____ of the Public Records of _____ County, Florida, have been **PAID IN FULL** and signed lien waivers have been provided to Contractor and Owner by each of said lienors, except as follows:

See Exhibit "B" attached hereto (OR NONE)

For and in consideration of the contract amount paid by Owner the undersigned hereby acknowledges and does hereby waive, release, remise and relinquish any and all right to claim any lien or liens for work done or material furnished, or any kind of class of lien whatsoever on the property described above.

The undersigned certifies that all labor, services and/or materials described herein have been provided prior to execution and delivery of this document and that all construction on the property described above was completed or ceased on or before _____, ___, 201_.

Contractor agree to hold harmless Owner, (TITLE AGENT) and Old Republic National Title Insurance Company (the "Title Company") free from any and all loss, costs, damage and expense of every kind, including attorney's fees, which it shall or may suffer, including, as to the Title Company, under its said policy or policies now to be issued, or any reissue, renewal or extension thereof, or new policy at any time issued upon said real estate, part hereof or interest herein; arising, directly or indirectly, out of or on account of any such mechanics' or materialmen's liens.

FURTHER AFFIANT SAYETH NOT.

_____
Print Name: _____

SWORN TO AND SUBSCRIBED before me this _____ day of ____, 201_, by _____ _____, who [___] is personally known to me or [___] who produced _____ as identification.

_____
NOTARY PUBLIC
[Place Notary Seal]
Print Name: _____
My Commission Number: _____
My Commission Expires: _____

The Fund® CONCEPT
JUNE 2016 | VOL 48

FLORIDA CONSTRUCTION LIEN LAW AND ITS IMPLICATIONS TO TITLE INSURANCE

BY JOHN E. BROWN, FUND SR. UNDERWRITING COUNSEL, COMMERCIAL SERVICES

Florida is once again experiencing an increase in new construction and the modernization of existing homes and buildings. With this comes an increased pressure to close deals before, during and after construction activities. When the title examination reveals evidence of construction activities, the question arises why the seller's agreement with the contractor is a concern for the buyer and lender.

The answer is found in Florida's Construction Lien Law, Ch. 713, Part I, F.S. This chapter is the current source for statutes governing the perfection of liens on real property by parties performing labor or services or furnishing materials constituting an improvement to property. This chapter also provides the statutes parties must follow to earn the right to enforce payment for such labor or materials against the property being improved.

This article outlines several common instances where these regulations affect the issuance of title insurance.

What is the effect of a notice of commencement in the chain of title?

An owner or its authorized agent must, with few exceptions, file a notice of commencement (NOC) in accordance with Sec. 713.13, F.S., prior to commencing improvements to real property or upon recommencing any improvement after default or abandonment.

The NOC is not a lien, cloud or encumbrance on the property. Sec. 713.13(3), F.S. The NOC merely establishes a point of reference to which valid claims of lien filed against the project relate back for the purpose of establishing lien priority. Sec. 713.07, F.S. The NOC is valid for a period of one year (or longer if specified.) Sec. 713.13(6), F.S. There is no statutory authority for an owner to shorten the one-year duration of an NOC except by the use of a notice of termination. An NOC is void if the defined work is not commenced within 90 days from its recording. Sec. 713.13(2), F.S.

The presence of a recorded NOC in the chain of title cannot be ignored because it establishes the time for the priority of a valid claim of lien filed by a lienor arising out of the work defined in the NOC. Thus, the priority of an insured event, such as a conveyance or a new mortgage, may become inferior to a later filed claim of lien that relates back to the date established by the recorded NOC.

In order to assess the significance of the recorded NOC, consider the following: (1) has the NOC expired; (2) did work commence within 90 days of the recording of the NOC; or (3) has the work de-

(Continues on page 52)

IN THIS ISSUE

- Case Reviews.....50
- Can You Really Insure That Sheriff's Deed?..54
- Fund Assembly Audio CDs 2016.....56
- Legislative Update.....57

CONSTRUCTION LIEN LAW ...continued from page 49

fined in the NOC been completed for a period of time greater than 90 days? If the NOC is expired, absent credible information to the contrary, it can be ignored. The NOC is void if work did not start in a timely manner and upon the filing of an affidavit from a reliable source to that effect, the NOC can be ignored. Lastly, if the work is complete and the time for filing valid claims of lien expired, then an affidavit from the owner is sufficient to insure against such potential lienors. However, if the construction of improvements is ongoing or the completion of construction is less than 90 days prior to the insured event, additional steps are required to address the priority of potential liens filed pursuant to the recorded NOC.

If the construction of improvements is complete, but the 90-day time frame to file valid claims of lien has not expired, an affidavit signed by the owner containing the names and addresses of all persons serving notice to owner pursuant to Sec. 713.06(2), F.S., must be secured. If no notices to owner were received, the affidavit must so state. The affidavit also must include a statement that the owner made a personal inspection of the property to determine whether persons posted a notice to owner on the property; the name and addresses of all persons having privity of contract with the owner under Sec. 713.05, F.S.; that all improvements described in the NOC are complete; and a statement that all persons serving notice to owner and all persons in privity of contract have been paid in full.

An affidavit signed by the contractor in compliance with Secs. 713.06(3)(d)1 and 713.20(5), F.S., evidencing the contractor's receipt of final payment and lien waiver must also be secured. The affidavit must also state all improvements described in the NOC are complete, all persons providing labor, services or materials have been paid in full and the lien of the contractor is unconditionally waived. In large projects, proof of payment and signed lien waivers from all lienors in accordance with Sec. 713.20(5), F.S., are required. A certified list of the parties supplying labor, services and materials to the contractor pursuant to Sec. 713.165, F.S., also is required. In the event the contractor's final payment affidavit and lien waiver evidences sums due to third parties, proof of payment and signed unconditional lien waivers in accordance with Sec. 713.20(5), F.S., from all such parties are required. The owner or its principals may be required to sign and deliver an indemnity to Old Republic for any claim filed pursuant to the recorded NOC. The filing of a notice of termination in accordance with Sec. 713.132, F.S., is required unless waived by Fund underwriting counsel. See TN 21.03.01.

In the event the requirements discussed above cannot be met, an exception in the policy must be included as discussed in TN 21.03.02.

How is the superior priority of a deed or mortgage established when there is an open Notice of Commencement?

Deeds and mortgages recorded subsequent to an NOC, but before the completion of work, must have their superior priority established in order to insure without exception for potential claims of lien. This can be accomplished by terminating the outstanding NOC. The owner may then refile another NOC and establish a new point in time for the priority of future liens filed by lienors providing labor, services or materials to improve the property. Fund Members may rely on the process prescribed in Sec. 713.07(4), F.S., relating to payment to the lienors pursuant to the procedures in Sec. 713.06(4), F.S. Additionally, the Fund requires:

(1) all construction on the project must cease;

(2) the owner must make diligent inquiry to obtain the identity of the persons who have provided labor, services or materials for the construction described in the NOC;

(3) the owner must pay each party described in paragraph (2) above in full for services rendered up to the time construction ceased, and obtain subcontractor's final affidavit and waiver of lien certificates from each. Each subcontractor's affidavit must also state that the lienor recognizes that the recorded NOC became null and void as of the date construction ceased and that any further labor, services, or material provided to the property shall be under a newly recorded NOC;

(4) the owner must provide an affidavit reciting the facts that establish of record the date the construction ceased and that the contractor and all parties described in paragraph (2) above have been paid in full through the date construction ceased;

(5) before construction resumes, the mortgage, mortgage modification, deed, or other instrument to be insured must be recorded. The owner may be required to record a notice of termination in accordance with Sec. 713.132, F.S., and if so, then it too must be recorded prior to the insured instrument;

(6) the original NOC posted on the property must be removed and replaced at the appropriate time by the newly recorded NOC for the recommenced construction; and

(7) the owner is required to execute and deliver an indemnity agreement in favor of Old Republic. Sufficient evidence of the owner's solvency may be required. See TN 21.03.03.

How is a recorded claim of lien eliminated?

Unlike an NOC, claims of lien affect the marketability of title. A valid claim of lien must be recorded in the official records of the county in which the improvements are located, the contractor must be licensed by the state, and the form mandated in Sec. 713.08, F.S., must be completed correctly and filed within 90 days after final furnishing of labor, services, or material. Further, the claim of lien must be served on the owner either before recording or within 15 days of filing. However, for insuring purposes, all claims of lien are treated as valid because the coverage under a title policy includes the duty to defend.

Sec. 713.22, F.S., states the claim of lien continues for one year from the date it is recorded or one year after the recording of an amended claim of lien that shows a later date of final furnishing of labor, services, or materials. The owner can shorten the duration of the lien by recording a notice of contest of lien. The clerk then serves the notice of contest of lien on the lienor who must initiate suit to enforce the lien within 60 days from service or the lien is extinguished automatically. The Fund will generally recognize this method to shorten the duration of the lien provided the procedural requirements of the statute are followed and no action was initiated as provided in Fla.R.Civ.P. 1.050 to enforce the lien within 60 days after the date of mailing shown on the clerk's certificate.

A claim of lien can be discharged by the parties by recording a satisfaction or release of lien. Also, any interested party may file a complaint in accordance with Sec. 713.21, F.S., and the clerk will issue a summons to the lienor to show cause within 20 days why the lien should not be enforced by action or vacated and canceled. The failure of the lienor to respond or show cause results in the court entering the cancellation of the lien. The lien can be discharged by recording a final judgment or decree showing a final determination of the action. Finally, the failure to bring an action to enforce the lien within the one-year period results in automatic discharge of the lien.

The use of private bonds to discharge a lien on property has numerous shortcomings. See TN 21.02.03 for a detailed discussion on the use of these payment bonds.

Transfer of liens to security as authorized by Sec. 713.24, F.S., provides the best method of eliminating liens from the property. Any interested person may transfer a lien from the property to other security by either depositing a sum of money or filing a bond in an amount specified in the statute. The clerk must record a certificate showing the transfer of the lien from the property to the security and must send a certificate to the lienor with a copy of the bond. Upon filing of the certificate, the real property is released from the claimed lien. See TN 21.02.01.

Title insurance coverage applies to construction liens under the Construction Lien Law. Construction liens impacting title to property can be addressed by the use of a termination of the NOC and the use of the restoration of priority procedure. Outstanding claims of lien can be addressed to some extent with surety bonds and more completely with the use of the transfer to security process. □

Back to Speaker Topics

Fund Assembly

Key Contract Drafting Considerations and Land Use Considerations in Acquiring a Mixed-Use Project

Miranda Fitzgerald, *Shareholder, Co-Chair Government, Approvals/Land Use Group, Lowndes, Drosdick, Doster, Kantor & Reed*
Eddie Francis, *Shareholder, Lowndes, Drosdick, Doster, Kantor & Reed*

Back to Speaker Topics

Speaker Information

Commercial Contracts: Key Contract Drafting Considerations and Land Use Considerations in Acquiring a Mixed-Use Project

Miranda Fitzgerald,
Shareholder, Co-Chair Government, Approvals/Land Use Group, Lowndes, Drosdick, Doster, Kantor & Reed

Randi Fitzgerald is co-chair of the firm's Government Approvals/Land Use Group, and focuses her practice on land use, zoning, environmental matters and real estate development, including comprehensive planning, Developments of Regional Impact (DRI's), DRI rescission, annexation, concurrency, vested rights and property rights issues.

She has served as lead counsel for more than 35 DRI's and has represented both property owners and local governments. She represents clients in all phases of development for commercial, residential and mixed-use projects, including site selection, due diligence, establishment of community development districts, and procurement of land use approvals and entitlements.

Ms. Fitzgerald is a Florida Supreme Court Certified Circuit Court and Appellate Mediator, concentrating in intergovernmental disputes and private and public disputes affecting real property.

Eddie Francis,
Shareholder, Lowndes, Drosdick, Doster, Kantor & Reed

Eddie Francis is a member of the firm's real estate practice, focusing on real estate transactions, development and finance, land use and zoning, commercial leasing, and representing clients before local government.

Mr. Francis has extensive experience representing developers in all aspects - acquisition, due diligence, entitlements and zoning approvals, master planning and development, and finance- of large office, retail, residential, hotel, and mixed-use projects. He also represents clients in the areas of cell tower leasing and zoning, and multi-state/portfolio real estate transactions.

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MAIN NUMBER: 407-843-4600
FAX NUMBER: 407-843-4444
WWW.LOWNDES-LAW.COM

MERITAS LAW FIRMS WORLDWIDE

Due Diligence Checklist

Date:
Name of Project:

Resp. Party	Checklist Item Description	Yes	No	N/A
	1. PLANNING & PLAT STATUS			
	a. Existing zoning densities?			
	b. Pertinent Zoning and Subdivision Regulations, FLU requirements reviewed?			
	c. Traffic Analysis done?			
	d. Vested Rights obtained for project?			
	e. Concurrency study complete (traffic, utilities, schools, etc.)?			
	f. DRI or DRC comments addressed?			
	g. Deed Restrictions or Planned Development Ordinance reviewed?			
	h. Existing Developers Agreements or Development Orders, DRI reviewed and issues addressed?			
	i. Covenants reviewed and approved?			
	j. Preliminary Plat approved?			
	k. Final Plat approved?			
	l. Does intended product fit on the proposed lots?			
	m. Impact fees (park, school, roads) listed?			
	n. Utility Impact fees listed?			
	o. Any portion in 100-year floodplain?			
	p. Flood Map Amendment approved?			
	q. Any political situations that may materially affect our project?			
	r. Growth management or moratorium issues threatened or pending?			
	s. Any affordable housing requirements applicable to the project?			
	t. Design Guideline existing? Reviewed?			
	u. Jurisdiction's approval process and timeline defined?			
	v. PD Zoning Map and BCC approval of PD Zoning reviewed?			
	w. PSP, DP, FSP reviewed and issues addressed?			
	EXPLANATIONS/SIGNIFICANT ISSUES			

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Due Diligence Checklist

Date:	
Name of Project:	

Resp. Party	Checklist Item Description	Yes	No	N/A
	2. TOPOGRAPHY / SOIL SURVEY / ENVIRONMENTAL			
	a. Aerial photographs reviewed?			
	b. Phase I Environmental complete/reviewed?			
	c. Phase II Environmental required/reviewed?			
	d. Soil borings done/reviewed?			
	e. Muck probes complete/reviewed?			
	f. Significant topographical constraints?			
	g. Overall ecologic description?			
	h. Vegetation/wetlands survey done? Conservative and Aggressive lines/acres shown?			
	i. Protected species review (occurrence, restrictions)? Mitigation required? Conservative and Aggressive?			
	j. Permit review?			
	k. Cultural resources (screening, Phase 1)?			
	l. Special land use or other designations?			
	m. Endangered species issues? Conservative and Aggressive analysis done?			
	n. Wetland jurisdiction (federal, state, local)?			
	o. Wetland permitting/mitigation requirements?			
	p. Fill requirement estimate?			
	q. Grading plan complete?			
	r. Dirt okay for fill?			
	s. Pad compaction tests done?			
	t. Geotechnical Evaluation Report completed?			
	u. Local tree ordinances checked?			
	EXPLANATIONS/SIGNIFICANT ISSUES			
	3. UTILITIES (Water, Sewer, Gas, Telephone and Electricity)			
	a. Utility availability letters from all utility providers?			
	b. Existing utilities on site or adjacent to site and adequate?			
	c. Are improvements we install going to benefit other properties?			
	d. Development Agreement or Service Agreement required?			
	e. Off-site improvements required?			
	f. Off-site easements required?			
	g. Utility master plan reviewed?			
	h. Reclaimed water reviewed?			
	i. Connection and impact fees?			
	EXPLANATIONS/SIGNIFICANT ISSUES			

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Due Diligence Checklist

Date:
Name of Project:

Resp. Party	Checklist Item Description	Yes	No	N/A
	4. ACCESS ROAD CONSTRUCTION			
	a. Existing public access to site?			
	b. Additional points of access required?			
	c. Future county/state roads planned (through or adjacent to property?			
	d. Off-site construction required?			
	e. Off-site right-of-way or easements required?			
	f. Access upgrade/improvements needed?			
	g. Mass transit?			
	EXPLANATIONS/SIGNIFICANT ISSUES			
	5. DRAINAGE			
	a. Preliminary drainage engineering complete?			
	b. Final drainage engineering plans approved?			
	c. Off-site improvements required?			
	d. Off-site easements required?			
	EXPLANATIONS/SIGNIFICANT ISSUES			

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Due Diligence Checklist

Date:
Name of Project:

Resp. Party	Checklist Item Description	Yes	No	N/A
	6. TITLE EXAMINATION/EASEMENTS/RIGHT-OF-WAY			
	a. Title Commitment and Survey reviewed by attorney?			
	b. Objections made?			
	c. Objections resolved?			
	d. Existing easements/right-of-way and purpose?			
	e. Possible future dedications (city, county or state)?			
	f. Mass transit to access road available/needed?			
	g. Bike paths/trails available/needed?			
	EXPLANATIONS/SIGNIFICANT ISSUES			
	7. OTHER			
	a. Schools			
	Elementary School			
	• Name?			
	• Location?			
	• Walking distance?			
	• School Grade per State?			
	• Capacity and enrollment?			
	• Any future schools planned in close proximity?			
	Middle School			
	• Name?			
	• Location?			
	• Walking distance?			
	• School Grade per State?			
	• Capacity and enrollment?			
	• Any future schools planned in close proximity?			
	High School			
	• Name?			
	• Location?			
	• Walking distance?			
	• School Grade per State?			
	• Capacity and enrollment?			
	• Any future schools planned in close proximity?			
	b. All permits necessary for land development acquired?			

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Due Diligence Checklist

Date:
Name of Project:

Resp. Party	Checklist Item Description	Yes	No	N/A
	c. Existing master or HOA documents prepared and approved by all necessary parties?			
	d. Any unusual disclosures required to homebuyer?			
	e. Any prepaid fees or credits?			
	f. Noise abatement required (sound level reduction), airport noise zone map?			
	g. Any onerous special requirements set forth in the land development rules, codes, zoning, etc.?			
	h. Hazardous or offensive land uses in the vicinity (such as landfills, junk yards, airports, wells, power lines, etc.)?			
	i. Evaluated project for possible CDD or other available public improvement district?			
	j. US Postal Service confirmation of mailing address and whether project requires cluster mailboxes or individual SF mailboxes?			
	EXPLANATIONS/SIGNIFICANT ISSUES			

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REWORKING MIXED-USE PROJECTS
POTENTIAL PITFALLS AND NOT-SO-OBVIOUS ISSUES

FUND ASSEMBLY

MAY 13, 2017

DISCLAIMER:

The assignment provided in these materials contains only examples of provisions and language that may be used in an assignment form. They are not appropriate for every situation or any particular situation. This form reflects a fully-negotiated assignment form between two parties. These provisions should be used only with full consideration of the facts and circumstances applicable to the transaction, the terms of the transaction, the intent of the parties and the client represented by the particular attorney. In addition, the views and opinions expressed by the speaker are the views and opinions of the speaker only and are not to be construed or interpreted as opinions of law.

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ATTORNEYS AT LAW

REWORKING MIXED-USE PROJECTS
POTENTIAL PITFALLS AND NOT-SO-OBVIOUS ISSUES

Many mixed-use projects that were planned in the 1980's and 1990's stagnated in the recent economic recession, often leaving a patchwork of developed and undeveloped parcels. Now that the economic picture is brighter, the undeveloped parcels within these projects are getting renewed attention from potential purchasers. Often the prior approvals need modification to satisfy current market trends and demands. We will explore some of the hidden pitfalls that may be found when proposing changes to vacant parcels in partially developed mixed-use projects.

I. Potential Changes. The necessary changes may include a DRI amendment, Comprehensive Plan amendment, PD zoning amendment, and possible changes to existing development agreements and plats. Even a minor proposed change may open the door to a wide-ranging discussion on whether the proposed change is appropriate or desirable.

II. Likely Opposition. Circumstances have changed in the time period that the project was stagnant. Often, the single family residential parcels within the project are now nearly fully because of the housing boom Florida experienced from 2001 to 2007, and the residents have become used to have the vacant "open space" parcels in or adjacent to their neighborhoods. Any change to the vacant parcel will be perceived as disrupting their residential life style.

III. Prior Applications and Results. Always research all prior land use applications that have been filed on the particular parcel you are dealing with. There is often a wealth of information in the local government's files on sensitive or controversial issues and the opponents' positions.

IV. Apartment Phobia. It seems to be a universal truth that apartments are the most disliked land use in any project that has developed single family parcels. There is often palpable anger generated by apartment proposals. This anger generally results from fear that the increased density will bring increased traffic, adverse impact on school capacity, drugs, crime and lower property values.

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IV. Control of Entitlements. Be certain that the master developer adequately controlled and restricted the assignment of the project entitlements so that the parcel being redeveloped is assured of having a specific land use designation, amount of square footage and the associated trip allocation. If the master developer did not adequately control the allocation of entitlements, the parcel being purchased may have less square footage and fewer trips than needed for the proposed development. *Howard v. Murray*, 184 So.3d 1155, 1164 (Fla. 1st DCA 2015) *reh'g. denied* (February 26, 2016). Do not assume entitlements are divided prorate based on acreage in a particular land use category within a project.

V. Know Local Interpretations and Practices. Local Land Development Regulations are often interpreted by the staff differently than a plain reading of the language would suggest. Local procedures and practices can delay approvals for the uninformed practitioner. Even though hotels are a permitted use in a City's commercial zoning district, a proposed extended stay hotel that offered 30 to 40 percent of its hotel rooms with an "unfurnished" option and full hotel amenities for corporate relocation business was determined to be more of an apartment use than a hotel use and was not allowed to proceed with a site plan application.

VI. Concurrency Issues. Do not assume that all local governments have eliminated transportation and school concurrency in response to the 2011 legislation that made these optional comprehensive plan elements. Many local governments still enforce some form of transportation and school concurrency programs that include often expensive proportionate share mitigation requirements or impose de facto moratoria that delay applications or approvals.

VII. Prior Developer Obligations. Ensure that all obligations imposed on the master developer have been fulfilled. If the parcel proposed for development is part of a DRI, ensure that the DRI reporting obligations have been satisfied. If the DRI reports are not up to date, and the developer has received not less than 30-days' notice of the delinquency, the local government must halt the issuance of building permits within the DRI until the delinquency has been cured.

VIII. Political Issues. Local knowledge of potential political issues is crucial. Staff members sometimes take positions that they know will be viewed favorably by the elected official or County / City Manager (read "their bosses") even if there is no Code provision on the particular issue. One recent example is a City Commissioner having the personal view that there is an imbalance in the desired ratio between single family homes and apartments in his District and refusing to support voluntary annexation of properties that propose apartment uses. Staff delayed the annexation applications to appease the District Commissioner. Be cautious of presenting controversial applications in an election year. The closer to the election the hearing is scheduled, the more difficult approval over vocal opposition will be.

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SAMPLE PURCHASE AND SALE AGREEMENT FOR MIXED-USE PROJECT

FUND ASSEMBLY

MAY 13, 2017

DISCLAIMER:

The contract provisions included in this document are only examples of provisions and language that may be used in a purchase and sale agreement. They are not appropriate for every situation or any particular situation. This form reflects a fully-negotiated purchase and sale agreement between two parties. These provisions should be used only with full consideration of the facts and circumstances applicable to the transaction, the terms of the transaction, the intent of the parties and the client represented by the particular attorney. In addition, the views and opinions expressed by the speaker are the views and opinions of the speaker only and are not to be construed or interpreted as opinions of law.

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PURCHASE AND SALE AGREEMENT

BETWEEN

_____

AS SELLER

AND

_____

AS PURCHASER

DATED AS OF _____

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TABLE OF CONTENTS

Page

ARTICLE I DEFINITIONS 1

1.1 Definitions 1

ARTICLE II PURCHASE AND SALE, ASSETS AND LIABILITIES 8

2.1 Purchase and Sale 8
2.2 Description of the Assets 8

ARTICLE III PURCHASE PRICE 9

3.1 Purchase Price 9
3.2 Earnest Money Deposit 9
3.3 Agreement Related to the Deposit 9
3.4 Method of Payment 9
3.5 Allocation of Purchase Price 9

ARTICLE IV DUE DILIGENCE AND INSPECTION 9

4.1 Right to Inspect 9
4.2 Matters Relating to Title. 10
4.3 Owner Agreement 12
4.4 Temporary Access Easement 13
4.5 Due Diligence Materials 13
4.6 Purchaser's Election Whether to Proceed 13
4.7 Corporate Investment Committee Approval 13

ARTICLE V REPRESENTATIONS AND WARRANTIES 13

5.1 Seller's Representations and Warranties 13
5.2 Purchaser's Representations and Warranties 15
5.3 Survival 15

ARTICLE VI COVENANTS 15

6.1 Confidentiality 15
6.2 Licenses and Permits 16
6.3 Notices and Filings 16
6.4 Further Assurances 16

ARTICLE VII CLOSING CONDITIONS 17

7.1 Purchaser's Closing Conditions 17
7.2 Failure of any Purchaser's Closing Condition 17
7.3 Seller's Closing Conditions 17
7.4 Failure of the Seller's Closing Conditions 17

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ARTICLE VIII CLOSING 17

8.1 Closing Date 17
8.2 Closing Escrow 18
8.3 Seller's Closing Deliveries 18
8.4 Purchaser's Closing Deliveries 19
8.5 Possession 19

ARTICLE IX PRORATIONS AND EXPENSES 19

9.1 Closing Statement 19
9.2 Prorations, Taxes and Assessments 19
9.3 Purchaser's Transaction Costs 20
9.4 Seller's Transaction Costs 20

ARTICLE X DEFAULT AND REMEDIES 20

10.1 Seller's Default 20
10.2 Purchaser's Default 20
10.3 No Punitive or Consequential Damages 20

ARTICLE XI RISK OF LOSS 20

11.1 Casualty 20
11.2 Condemnation 20

ARTICLE XII INTENTIONALLY DELETED 20

ARTICLE XIII MISCELLANEOUS PROVISIONS 20

13.1 Notices. 20
13.2 Time is of the Essence 20
13.3 Assignment 20
13.4 Successors and Assigns 21
13.5 Third Party Beneficiaries 21
13.6 Rules of Construction 21
13.7 Severability 21
13.8 Governing Law 21
13.9 Waiver of Trial by Jury 21
13.10 Attorneys' Fees; Prevailing Party 21
13.11 Incorporation of Recitals, Exhibits and Schedules 21
13.12 Independent Entity 21
13.13 Entire Agreement 21
13.14 Amendments, Waivers and Termination of Agreement 21
13.15 Execution of Agreement 21
13.16 Not Binding Until Executed 21
13.17 Tax Disclosures 21
13.18 Effective Date 21
13.19 Radon Gas. 21

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LIST OF EXHIBITS AND SCHEDULES

List of Exhibits

Exhibit A – Legal Description of the Land
Exhibit A-1 – Closing Certificate
Exhibit B – Seller's Due Diligence Materials
Exhibit C – Title Commitment
Exhibit D – Deed
Exhibit E – Assignment of Intangible Assets
Exhibit F – Assignment of Leases
Exhibit G – Assignment and Allocation of Entitlements and Development Rights

List of Schedules

Schedule 2.2.4 – Contracts
Schedule 2.2.5 – Licenses and Permits
Schedule 4.2.1 – Known Exceptions

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PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT (this "**Agreement**") is made as of _____, by and between _____ ("**Seller**"), and _____ ("**Purchaser**"). Seller and Purchaser are sometimes, as applicable, individually or collectively referenced herein as a "**Party**" or the "**Parties**."

R E C I T A L S

A. Seller is the owner of that certain real property located in Orlando, Orange County, Florida commonly known as _____ and more particularly described on Exhibit A attached hereto and by this reference incorporated herein (the "**Land**").

B. Purchaser desires to purchase the Land and the other Assets (hereinafter defined) from Seller, and Seller desires to sell the Assets to Purchaser, on the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the respective provisions contained in this Agreement, Seller and Purchaser agree as follows:

ARTICLE I
DEFINITIONS

1.1 Definitions. The following terms will have the following meanings in this Agreement:

"Affiliate" has the following meaning: _____.

"Agreement" has the meaning set forth in the first paragraph of this document.

"Applicable Laws" means (i) all statutes, laws, common law, rules, regulations, ordinances, codes or other legal requirements of any Governmental Authority, board of fire underwriters, and similar quasi-governmental authority, and (ii) any judgment, injunction, order, or other similar requirement of any court or other adjudicatory authority, in effect at the time in question.

"Assets" has the meaning set forth in Section 2.2.

"Assignment and Assumption of Leases" has the meaning set forth in Section 8.3.4.

"Assignment of Entitlements and Allocation of Development Rights" has the meaning set forth in Section 8.3.5.

"Assignment of Intangible Assets" has the meaning set forth in Section 8.3.3.

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"Associations" means the Commercial Association and the Residential Association.

"Bankruptcy Code" has the meaning set forth in Section 5.1.5.

"Broker" means _____.

"Business Day" means any day other than a Saturday, Sunday, or any United States federal legal holiday.

"Capacity Enhancement Agreement" means the Capacity Enhancement Agreement by and between The School Board of Orange County, Florida, _____, and School Financing Consortium, LLC, dated _____, and recorded _____ in Official Records Book _____, Page ____ of the Public Records of Orange County, Florida.

"Casualty" has the meaning set forth in Section 11.1.

"Closing" has the meaning set forth in Section 8.1.

"Closing Conditions" means the Purchaser's Closing Conditions and the Seller's Closing Conditions.

"Closing Date" has the meaning set forth in Section 8.1.

"Closing Escrow" has the meaning set forth in Section 8.2.

"Closing Statement" has the meaning set forth in Section 9.1.

"Code" has the meaning set forth in Section 5.1.7.

"Commercial Association" means the _____ Property Owner's Association, Inc., a Florida not-for-profit corporation.

"Commercial Declaration" means the Declaration of Master Covenants, Conditions and Restrictions of _____, dated _____ and recorded on _____ in Official Records Book _____, Page ____ of the Public Records of Orange County, Florida, as amended.

"Condemnation" has the meaning set forth in Section 11.2.

"Contracts" has the meaning set forth in Section 2.2.4.

"Control" means _____.

"Declarations" means the Commercial Declaration and the Residential Declaration.

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"DRI Development Order" means, collectively, the current development of regional impact development order for the _____ DRI, being that certain Development Order for _____ Development of Regional Impact recorded in Official Records Book _____, Pages ____; as amended and restated by that certain First Amended and Restated Development Order for _____ Development of Regional Impact recorded in Official Records Book ____, Page ____; as amended by that certain Amendment to First Amended and Restated Development Order for _____ Development of Regional Impact recorded in Official Records Book ____, Page ____; and as will be further amended by that certain Second Amendment to First Amended and Restated Development Order for _____ Development of Regional Impact approved by Orange County, Florida Board of County Commissioners on _____, all among the Public Records of Orange County, Florida.

"Deed" means the Special Warranty Deed to be executed delivered by Seller pursuant to Section 8.3.2.

"Deposit" has the meaning set forth in Section 3.2. For the purposes of this Agreement, the term "Deposit" shall include any interest earned thereon.

"Deposit Refund Event" has the meaning set forth in Section 3.2.

"Due Diligence Period" means the period from the Effective Date until 5:00 p.m. Eastern Time on _____.

"Effective Date" has the meaning set forth in Section 13.18.

"Entitlements" means the approved but un-built improvements and uses applicable to the Land under the DRI Development Order, the PD Zoning, the Road Agreement, the Owner Agreement, the Impact Fee Credits, the Capacity Enhancement Agreement, the School Agreement, and Licenses and Permits.

"Estoppels" has the meaning set forth in Section 8.3.6.

"Environmental Claims" means all claims for reimbursement, remediation, abatement, removal, clean up, contribution, personal injury, property damage, or damage to natural resources made by any Governmental Authority or other Person arising from or in connection with the (i) presence or actual or potential spill, leak, emission, discharge, or release of any Hazardous Substances over, on, in, under, or from the Real Property, or (ii) violation of any Environmental Laws with respect to the Real Property or any portion thereof.

"Environmental Laws" means any Applicable Laws which regulate the manufacture, generation, formulation, processing, use, treatment, handling, storage, disposal, distribution, or transportation, or an actual or potential spill, leak, emission, discharge, or release of any Hazardous Substances, pollution, contamination, or radiation into any water, soil, sediment, air,

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or other environmental media, including, without limitation: (i) the Comprehensive Environmental Response, Compensation and Liability Act; (ii) the Resource Conservation and Recovery Act; (i) the Federal Water Pollution Control Act; (iv) the Toxic Substances Control Act; (v) the Clean Water Act; (vi) the Clean Air Act; and (v) the Hazardous Materials Transportation Act, and similar state and local laws, as amended as of the time in question.

"Environmental Liabilities" means all Liabilities under any Environmental Laws arising from or in connection with the Real Property, including, without limitation, any obligations to manage, control, contain, remove, remedy, respond to, clean up, or abate any actual or potential spill, leak, emission, discharge, or release of any Hazardous Substances, pollution, contamination, or radiation into any water, soil, sediment, air, or other environmental media.

"Environmental Reports" means those certain environmental reports obtained by Purchaser in connection with the transactions contemplated herein with respect to the Real Property or any portion thereof.

"Escrow Agent" means Lowndes, Drosdick, Doster, Kantor & Reed, P.A., 215 N. Eola Drive, Orlando, Florida 32801, agent for the Title Company.

"Governmental Authority" means any federal, state or local government or other political subdivision thereof, including, without limitation, any Person exercising executive, legislative, judicial, regulatory, or administrative governmental powers or functions, in each case to the extent the same has jurisdiction over the Person or Real Property in question.

"Hazardous Substances" means any hazardous or toxic substances, chemicals, materials or waste, whether in solid, semisolid, liquid, or gaseous form, including, without limitation, asbestos, petroleum or petroleum by-products, polychlorinated biphenyls, mold, or other biological contaminants that are regulated by any Environmental Laws.

"Known Exceptions" has the meaning set forth in Section 4.2.

"Impact Fee Credits" means the transportation, water, sewer, school and other impact fee credits owned by the Seller and associated with the Assets, if any.

"Improvements" has the meaning set forth in Section 2.2.2.

"Indemnification Loss" means _____.

"Inspections" means any inspections, examinations, tests, investigations, or studies of the Real Property conducted by or on behalf of Purchaser (or any Affiliate thereof).

"Intangible Assets" has the meaning set forth in Section 2.2.3.

"Land" has the meaning set forth in Recital A hereof.

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"Leases" means, collectively, the Lease Agreement by and between _____, as lessor, and _____, as lessee, dated _____, the Lease Agreement by and between _____, as lessor, and _____, as lessee, dated _____, and the Lease Agreement by and between _____, as lessor, and _____, as lessee, dated _____ .

"Liability" means _____.

"Licenses and Permits" has the meaning set forth in Section 2.2.5.

"Notice" has the meaning set forth in Section 13.1.

"Owner Agreement" means the DRI Owner Agreement to be entered into by and between Seller, _____, and _____, and to be recorded among the Public Records of Orange County, Florida.

"Party" or "Parties" has the meaning set forth in the first paragraph of this Agreement.

"PD Zoning" means the planned development zoning of the Land, described as the "_____ Planned Development Land Use Plan and Design Guidelines dated Received _____" and approved by Orange County, Florida on _____ pursuant to the Decision of the Board of County Commissioners, Orange County, Florida, filed with the Deputy Clerk on _____, as amended.

"Permitted Exceptions" has the meaning set forth in Section 4.2.1.

"Person" means _____.

"Prorations" has the meaning set forth in Section 9.2.

"Purchase Price" has the meaning set forth in Section 3.1.

"Purchaser" has the meaning set forth in the first paragraph of this document.

"Purchaser's Closing Deliveries" has the meaning set forth in Section 8.4.

"Purchaser's Closing Conditions" has the meaning set forth in Section 7.1.

"Purchaser's Closing Condition Failure" has the meaning set forth in Section 7.2.

"Purchaser's Default" has the meaning set forth in Section 10.2.

"Purchaser's Documents" has the meaning set forth in Section 5.2.2.

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"Purchaser's Due Diligence Reports" means all studies, reports, and assessments prepared by any Person for or on behalf of Purchaser (other than any internal studies, reports, and assessments prepared by any of the Purchaser's employees, attorneys, or accountants) in connection with the Inspections.

"Purchaser's Indemnitees" means _____.

"Purchaser's Inspectors" means any Person that conducts any Inspections for or on behalf of Purchaser or any Affiliate thereof.

"Real Property" has the meaning set forth in Section 2.2.2.

"Residential Association" means the _____ Master Homeowner's Association, Inc., a Florida not-for-profit corporation.

"Residential Declaration" means the Declaration of Master Covenants, Conditions and Restrictions of _____ Community (Residential Properties) dated _____ and recorded _____ in Official Records Book _____, Page ____ of the Public Records of Orange County, Florida, as amended.

"Road Agreement" means the _____ Transportation and Proportionate Share Agreement approved by Orange County, Florida Board of County Commissioners on _____ and entered into by and between Orange County, Florida; _____; _____; recorded on _____ in Official Records Book _____, Page _____, Public Records of Orange County, Florida.

"School Agreement" means the Memorandum of Agreement Southeast Regional Schools Plan by and between The School Board of Orange County, Florida, _____, and _____ dated _____ and recorded _____ in Official Records Book _____, Page ____ of the Public Records of Orange County, Florida.

"Seller's Closing Conditions" has the meaning set forth in Section 7.3.

"Seller's Closing Condition Failure" has the meaning set forth in Section 7.4.

"Seller's Closing Deliveries" has the meaning set forth in Section 8.3.

"Seller's Default" has the meaning set forth in Section 10.1.

"Seller's Documents" has the meaning set forth in Section 5.1.2.

"Seller's Due Diligence Materials" includes (i) all Contracts; (ii) soil reports concerning the Real Property; (i) all Licenses and Permits; (iv) draft copies of the Second Amendment to First Amended and Restated Development Order for _____ Development of Regional Impact, the Owner Agreement, and the Road Agreement; and (v) all other documents,

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studies, reports and other written materials in Seller's possession more particularly described on Exhibit B attached hereto and by this reference incorporated herein, copies of all of which will be delivered by Seller to Purchaser within three (3) Business Days after receipt by Escrow Agent of the Deposit.

"Seller's Indemnitees" means _____.

"Seller's Knowledge" means the actual, conscious knowledge (but not implied or constructive knowledge) of _____, Development Manager, and _____, Project Director, each in their capacity as employees of _____, and shall not be construed to impose or have imposed upon the _____ or _____ any duty to investigate the matters to which such knowledge, or the absence thereof, pertains, including, but not limited to, the contents of the files, documents and materials made available to or disclosed to Purchaser or the contents of files maintained by Seller. There shall be no personal liability on the part of _____ or _____ arising out of any of the Seller's representations and warranties contained in this Agreement.

"Seller's Notice" has the meaning set forth in Section 4.2.1.

"Subsidiary" means, in respect of any Person: _____.

"Survey Defects" has the meaning set forth in Section 4.2.1.

"Survey" has the meaning set forth in Section 4.2.4.

"Taxes" means any federal, state, local, or foreign, real property, personal property, sales, use, excise, room, occupancy, ad valorem, or similar taxes, assessments, levies, charges, or fees imposed by any Governmental Authority on Seller with respect to the Assets, including, without limitation, any interest, penalty, or fine with respect thereto, but expressly excluding any (i) federal, state, local, or foreign income, capital gain, gross receipts, capital stock, franchise, profits, estate, gift, or generation skipping tax, or (ii) transfer, documentary stamp, recording, or similar tax, levy, charge, or fee incurred with respect to the transactions described in this Agreement.

"Termination Notice" has the meaning set forth in Section 4.6.

"Third-Party Claim" means _____.

"Title and Survey Issues" has the meaning set forth in Section 4.2.1.

"Title Commitment" means the commitment for title insurance attached hereto as Exhibit "C".

"Title Company" means _____.

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"Title Exceptions" has the meaning set forth in Section 4.2.1.

"Title Notice" has the meaning set forth in Section 4.2.1.

"Title Policy" has the meaning set forth in Section 4.2.3.

"Unpermitted Exceptions" has the meaning set forth in Section 4.2.1.

"Waivers" has the meaning set forth in Section 8.3.7.

Any and all documents and agreements mentioned herein above are hereby incorporated by this reference as though fully set forth herein at length.

ARTICLE II
PURCHASE AND SALE, ASSETS AND LIABILITIES

2.1 Purchase and Sale. Subject to the terms, provisions and conditions set forth herein:

2.1.1 Seller agrees to sell to Purchaser all of Seller's right, title, and interest in and to the Assets.

2.1.2 Purchaser agrees to buy from Seller all of Seller's right, title, and interest in and to the Assets.

2.2 Description of the Assets. In this Agreement, the "**Assets**" means all of the following:

2.2.1 Land. The Land.

2.2.2 Improvements. All buildings, structures, and improvements located on or affixed to the Land, if any, and all fixtures on the Land, if any, which constitute real property under Applicable Law (collectively referred to as the "**Improvements**"; the Land and the Improvements are collectively referred to as the "**Real Property**").

2.2.3 Intangible Assets. To the extent assignable or transferable, any and all building plans, specifications and drawings, surveys, environmental and soil reports, use and occupancy permits, and governmental permits and approvals relating to the Assets (collectively with the Licenses and Permits, hereinafter referred to as the "**Intangible Assets**").

2.2.4 Contracts. All of Seller's right, title, interest, and obligations under all maintenance, service and supply contracts and all other similar agreements affecting the Assets to the extent that such contracts are transferable, including without limitation, those contracts, if any, set forth in Schedule 2.2.4 (the "**Contracts**") together with all

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deposits made or held by Seller thereunder, all to the extent that such deposits are transferable.

2.2.5 Licenses and Permits. To the extent assignable or transferable under Applicable Laws, all of Seller's right, title, interest and obligations, if any, in and to any licenses and permits, including, but not limited to the permits, consents, authorizations, approvals, and certificates issued by any Governmental Authority which are held by Seller with respect to the Real Property, including, without limitation, those listed on the attached Schedule 2.2.5 (the "**Licenses and Permits**").

2.2.6 Entitlements. To the extent assignable or transferrable under Applicable Laws, all of Seller's right, title, interest and obligations, if any, in and to the Entitlements (including, without limitation, the Proportionate Share Contribution obligation under the Road Agreement and the Owner Agreement).

ARTICLE III
PURCHASE PRICE

3.1 Purchase Price. The purchase price for the Assets is _____ (the "**Purchase Price**"), as adjusted at Closing for the Prorations expressly provided in this Agreement.

3.2 Earnest Money Deposit. _____

3.3 Agreement Related to the Deposit. _____

3.4 Method of Payment. _____

3.5 Allocation of Purchase Price. The Purchase Price shall be reasonably allocated among the Real Property by Seller prior to closing for federal, state, and local tax purposes. The Parties shall file all federal, state, and local tax returns and related tax documents consistent with such allocation, as the same may be adjusted pursuant to Article IX or any other provision in this Agreement.

ARTICLE IV
DUE DILIGENCE AND INSPECTION

4.1 Right to Inspect. Purchaser and Purchaser's Inspectors shall have the right to enter upon the Real Property, at the risk of Purchaser, and to perform, at Purchaser's expense, such inspections of and concerning the Real Property and other tests, studies, reviews, and investigations as Purchaser may reasonably deem appropriate, including an environmental site assessment. In connection with such inspections, Purchaser shall not materially disturb the Real Property, and Purchaser shall exercise such inspection rights in the least intrusive manner as reasonably possible so as to minimize the impact on the Real Property. Purchaser shall give

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Seller reasonable advance notice of its intent to conduct any such inspections or environmental site assessments, which shall in any event be at least twenty-four (24) hours in advance. Prior to any entry onto the Real Property for the performance of any such inspections, Purchaser shall deliver to Seller a certificate evidencing that Purchaser maintains a policy of Comprehensive general liability insurance in an amount not less than $2,000,000.00 with a Company licensed to do business in the State of Florida, with contractual liability coverage, that names Seller as an additional insured. Any invasive testing (such as, without limitation, soil borings) shall require Seller's prior written consent, which shall not be unreasonably withheld, conditioned or delayed. Purchaser hereby agrees to indemnify, save, insure, pay, defend, and hold harmless Seller from and against any and all damage or loss sustained or incurred and arising out of or in connection with Purchaser's due diligence activities, including any environmental site assessment and any other inspections, tests, or work conducted by any other party (other than Seller) working with or on behalf of Purchaser. Purchaser's indemnification obligations under this Section 4.1 shall not apply to, and Purchaser shall have no liability or responsibility for: (i) any negligent action or omission of Seller; (ii) any adverse condition or defect on or affecting the Real Property not caused by Purchaser, Purchaser's Inspectors, or their agents, employees, or consultants but discovered during their Inspection or investigation; or (i) results or findings of any Inspection or investigation. The indemnity obligation under this Section 4.1 shall survive Closing and/or the termination of this Agreement, including termination pursuant to Section 4.7 below.

4.2 Matters Relating to Title.

4.2.1 Status of Title. No later than thirty-five (35) days after the Effective Date, Purchaser shall have the right to submit to Seller a written Notice (the "**Title Notice**") specifying any defects in, or objections to, the title shown in the Title Commitment and the Survey which, in Purchaser's judgment, adversely affect the Real Property, including, but not limited to, any and all: (i) liens, encumbrances, tenancies, and other exceptions to title; (ii) encroachments by improvements on adjoining properties onto or over the Land; (iii) encroachments of the Improvements onto or over adjoining properties, setback lines, or easements (to the extent in violation thereof); (iv) any other title matter or Survey matter listed by the Title Company as an exception to title insurance coverage which, in Purchaser's judgment, adversely affects the Real Property ((i), (ii), (iii), and (iv) are collectively referred to herein as the "**Title Exceptions**"); and (v) survey defects which adversely affect title to the Real Property (the "**Survey Defects**") (the Title Exceptions, Survey Defects, and all other title defects and objections are hereinafter referred to individually and collectively as "**Title and Survey Issues**"). Notwithstanding the foregoing or anything herein to the contrary, however, those matters and exceptions described in Schedule 4.2.1 (the "**Known Exceptions**") shall not constitute Title and Survey Issues. Anything herein to the contrary notwithstanding, Seller shall have no obligation to cure any Title and Survey Issues unless it otherwise expressly assumes such an obligation; provided, however, that as to any mortgage or lien on the Land or any judgment recorded against Seller, Seller shall be obligated in all events to cause such lien to be released or satisfied of record or bonded at Seller's expense prior to Closing such

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that the Title Company will issue the Title Policy without exception for such monetary lien or encumbrance. Seller shall notify Purchaser in writing within five (5) days following receipt of the Title Notice whether Seller elects to cure any of the Title and Survey Issues ("**Seller's Notice**"). The Title and Survey Issues which Seller expressly agrees to cure shall be hereinafter referred to as "**Unpermitted Exceptions.**" If Seller fails to provide a Seller's Notice within said five (5)-day period or if Seller does not address all Title and Survey issues with said Seller's Notice, then all other Title and Survey Issues not so addressed, including those to which Seller has not responded, shall be hereinafter referred to as "**Permitted Exceptions**." The Permitted Exceptions include the Known Exceptions. With respect to Permitted Exceptions, Purchaser may elect, prior to the end of the Due Diligence Period, to either (a) accept such title to the Real Property subject to said Permitted Exceptions, with no abatement of the Purchase Price, or (b) to terminate this Agreement in accordance with Section 4.6 hereof. If Purchaser has not so advised Seller in writing of Purchaser's election under the immediately preceding sentence prior to the end of the Due Diligence Period, Purchaser shall be deemed to have elected to terminate in accordance with clause (b) of the immediately preceding sentence. Seller shall cure any Unpermitted Exceptions at its own expense on or before Closing. If Seller, despite its good faith efforts, is unable to cure Unpermitted Exceptions by Closing, Seller may, in accordance with Seller's rights under Section 7.2 of this Agreement, extend the Closing Date for a period of up to sixty (60) days and attempt to cure such Unpermitted Exceptions. Notwithstanding anything herein to the contrary, if any supplement or amendment to the Title Commitment or the Survey is issued after the expiration of the Due Diligence Period, and shows any additional exceptions to title not shown on the Title Commitment or any matters not previously shown on the Survey, the existence of which was not otherwise known by Purchaser, then Purchaser shall have until the date that is five (5) days after Purchaser's receipt of any such supplement or amendment to the Title Commitment or Survey within which to give Seller a Title Notice of its approval or disapproval of such additional matters (and the Closing Date will be extended as reasonably necessary to accommodate such period). In the event Purchaser timely delivers to Seller a Title Notice of Purchaser's disapproval of any new matters shown on such supplement or amendment to the Title Commitment or the Survey, then Seller and Purchaser shall have the same rights and obligations set forth above in this Section 4.2.

4.2.2 Failure of Title. If, on the Closing Date or the conclusion of any extension period taken by Seller pursuant to Section 4.2.1 hereof, title to the Real Property is not insurable because of, or is subject to, any Unpermitted Exception that Purchaser has not otherwise waived pursuant to Section 4.2.1 hereof or otherwise, Purchaser may elect, as its sole right and remedy, to either (i) accept such title to the Real Property subject to said Unpermitted Exception, with no abatement of the Purchase Price, or (ii) to terminate this Agreement and receive a refund of the Deposit.

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4.2.3 Title Policy. Within thirty (30) days after Closing, Escrow Agent, as agent for the Title Company, shall issue to Purchaser, at Purchaser's sole cost and expense, an ALTA Form B Owner's Policy of Title Insurance (the "**Title Policy**") in the amount of the Purchase Price, insuring that title to the Real Property is vested in Purchaser subject only to the Permitted Exceptions and any Unpermitted Exceptions which Purchaser has waived as more fully set forth in the marked up Title Commitment delivered at Closing. Purchaser shall further pay the cost of and any additional premium required for (i) issuance of any endorsement to the Title Policy requested by Purchaser and (ii) any title insurance issued to a lender providing acquisition financing to Purchaser.

4.2.4 Survey. Purchaser, at Purchaser's expense, shall be entitled to obtain a current survey of the Real Property (the "**Survey**"). Purchaser shall have the right to review the Survey and to object to any items indicated thereon in accordance with Section 4.2.1 above. The Survey: (i) shall meet or exceed the minimum technical standards for surveys as promulgated by the State of Florida; (ii) shall be certified to Seller, Purchaser, Title Company and Escrow Agent; (iii) shall be in form and content which shall enable the Title Company to delete the standard survey exception and to issue a Survey Endorsement to the Purchaser's Owner's Policy; and (iv) if the Real Property is benefited by any appurtenant easements, shall certify the contiguity of the Real Property with the appurtenant easements, so as to enable the Title Company to issue a Contiguity Endorsement to Purchaser's Owner's Policy.

4.3 Owner Agreement. The Owner Agreement is currently in draft form and remains subject to the review and comment of the various parties thereto. Seller has disclosed Purchaser as contract Purchaser of the Assets to the various parties thereto. Seller shall use good faith efforts to further negotiation of the Owner Agreement and to keep Purchaser informed of Seller's efforts with respect to the Owner Agreement and shall furnish Purchaser with a written notice of the proposed final version of the Owner Agreement no later than five (5) Business Days prior to expiration of the Due Diligence Period, which notice shall contain information that Seller, in its sole discretion, believes is reasonably necessary to enable Purchaser to make informed decisions with respect to the advisability of the proposed final version of the Owner Agreement. If Purchaser fails to object in writing to the terms set forth in Seller's notice within five (5) Business Days after receipt thereof, Purchaser shall be deemed to have approved the proposed draft of the Owner Agreement. If Purchaser notifies Seller that the final version of the Owner Agreement is acceptable to Seller (or if Purchaser is deemed to have approved the same as set forth in the immediately preceding sentence), Seller shall proceed with the execution of the Owner Agreement by each of the other various parties to thereto, presenting a fully executed original (in form and substance approved by Purchaser prior to the end of the Due Diligence Period) to Purchaser on or before the Closing Date. If the final version of the Owner Agreement is not presented to Purchaser on or before five (5) Business Days before the expiration of the Due Diligence Period, then the Due Diligence Period shall be extended for the period of time necessary for Purchaser to have five (5) Business Days from Purchaser's receipt of the final draft of the Owner Agreement to notify Seller whether the same is acceptable to Purchaser (as noted

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above, Purchaser's failure to object to the same within such five (5) Business Day period shall be deemed an approval of the proposed draft of the Owner Agreement). If the Due Diligence Period is extended in this matter, such extensions thereof shall be for the sole purpose of providing Purchaser with an opportunity to review and approve (or reject) the proposed draft of the Owner Agreement. If the final version of the Owner Agreement is revised in any material manner following Purchaser's review of same and the expiration of the Due Diligence Period, then Purchaser shall have the right to terminate this Agreement, which right shall be exercisable until the earlier of (i) the date that is ten (10) days following Purchaser's receipt of the substantively revised this Agreement, or (ii) the Closing Date. In the event that Purchaser terminates this Agreement as provided in the immediately preceding sentence, the Deposit shall be returned to Purchaser, and Purchaser shall be reimbursed for its actual costs incurred in connection with the transaction described in this Agreement, such amount not to exceed ONE HUNDRED THOUSAND AND NO/100 DOLLARS ($100,000.00), and neither Party shall have any further obligation to the other except those that expressly survive termination of this Agreement.

4.4 **Temporary Access Easement**. Seller may, if necessary, reserve and/or grant to third parties, certain temporary access easements across portions of the Real Property for the purpose of serving land located in the vicinity of the Land (collectively, the "**Temporary Access Easement**"), only in such locations and for such periods of time which do not interfere with Purchaser's development of the Real Property. The exact location and form of the Temporary Access Easement, if any, shall be subject to mutual agreement by Seller and Purchaser during the Due Diligence Period. If the Parties are unable to agree on the terms of the temporary access easement during the Due Diligence Period, then no such easement shall be granted. Such Temporary Access Easement shall be considered among the Known Exceptions.

4.5 **Due Diligence Materials**. _____.

4.6 **Purchaser's Election Whether to Proceed**. _____.

4.7 **Corporate Investment Committee Approval**. _____.

ARTICLE V
REPRESENTATIONS AND WARRANTIES

5.1 **Seller's Representations and Warranties**. Seller hereby represents and warrants as follows, all of which shall remain true and correct as of the Closing Date:

5.1.1 Organization and Power. _____.

5.1.2 Authority and Binding Obligation. _____.

5.1.3 Title. (AS-IS).

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5.1.4 Consents and Approvals; No Conflicts. (i) no filing with, and no permit, authorization, consent, or approval of, any Governmental Authority or other Person is necessary for execution or delivery by Seller of any of the Seller's Documents, or the performance by Seller of any of its obligations under this Agreement or any of the Seller's Documents or the consummation by Seller of the transactions described in this Agreement, except to the extent such permit, authorization, consent, or approval has been or will be obtained by Seller or Purchaser prior to Closing, and (ii) neither the execution and delivery by Seller of this Agreement or any of the Seller's Documents, nor the performance by Seller of any of its obligations under this Agreement or any of the Seller's Documents, nor the consummation by Seller of the transactions described in this Agreement, will: (a) violate any provision of Seller's organizational or governing documents; (b) violate any Applicable Law to which Seller is subject; (c) result in a violation or breach of, constitute a default under, result in the acceleration of, or create in any Person the right to accelerate, terminate, modify, or cancel, any of the Contracts; or (d) result in the creation or imposition of any lien or encumbrance on any of the Assets or any portion thereof.

5.1.5 Bankruptcy. _____.

5.1.6 Brokers. _____.

5.1.7 Foreign Person. _____.

5.1.8 OFAC. _____.

5.1.9 No Actions. _____.

5.1.10 No Violations. _____.

5.1.11 No Defaults. _____.

5.1.12 No Other Agreements. Other than the School Agreement and this Agreement, Seller has not entered into any other contracts or agreements providing for the sale, exchange, or transfer of the Assets or any part thereof.

5.1.13 Licenses and Permits. To Seller's Knowledge, all Licenses and Permits are in full force and effect, and no suspension, revocation, non-renewal or cancellation of any of such items are pending or threatened.

5.1.14 Possession. _____.

5.1.15 Contracts. Schedule 2.2.4 sets forth a list of the Contracts, and is true, correct and complete with respect to all Contracts. With respect to each such Contract, to Seller's Knowledge: (i) the Contract is legal, valid, binding, enforceable, and in full force and effect; and (ii) no party is in breach or default, and no event has occurred which

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with notice or lapse of time would constitute a breach or default, or permit termination, modification, or acceleration, under the Contract. The consent of all Persons whose consent for any assignment of a Contract is required has been or will be secured by Seller on or prior to the Closing Date.

5.1.16 Hazardous Substances. _____.

5.1.17 No Tax Protest. _____.

5.1.18 Disclaimers. (AS IS PROVISION).

5.2 Purchaser's Representations and Warranties. Purchaser hereby represents and warrants as follows:

5.2.1 Organization and Power. _____

5.2.2 Authority and Binding Obligation. _____.

5.2.3 Consents and Approvals; No Conflicts. _____.

5.2.4 Brokers. _____.

5.2.5 OFAC. _____.

5.3 Survival. The representations and warranties of Seller and Purchaser under this Agreement shall survive termination or Closing for a period of one (1) year.

ARTICLE VI
COVENANTS

6.1 Confidentiality.

6.1.1 Disclosure of Confidential Information. Except to the extent required by the Securities and Exchange Commission or other Governmental Authority, prior to Closing, the existence of this Agreement, the terms of this Agreement, and any other information disclosed in the Seller's Due Diligence Materials, the Purchaser's Due Diligence Reports, or any other documents, materials, data, or other information with respect to the Assets which is not generally known to the public or which is not otherwise set forth in any public records shall be kept confidential, and the Parties shall not disclose such information to any person or entity, other than to their respective counsel, shareholders, directors, lenders, advisors, consultants, or employees, or otherwise as required by Applicable Laws or already in the public domain. Nothing herein shall restrict Purchaser from contacting Seller's Company officials, property engineers and architects, and other third party consultants assisting Purchaser in its investigation of the

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Real Property, or from contacting Governmental Authorities regarding zoning, land use or code compliance matters.

6.1.2 Public Announcements. No Party shall make a public announcement or disclosure regarding the transactions described in this Agreement without the prior approval of the other Party. Seller and Purchaser shall approve the timing, form, and substance of any such public announcement or disclosure, which approval shall not be unreasonably withheld, conditioned, or delayed, except if a Party is required to make a public announcement or disclosure under Applicable Law, in which case no such approval by the other Party shall be required.

6.2 Licenses and Permits. Purchaser shall be responsible for obtaining the transfer of all Licenses and Permits (to the extent transferable) that Purchaser may require Seller to transfer to Purchaser or such other party as Purchaser directs. Purchaser shall, as promptly as possible after the expiration of the Due Diligence Period, submit all necessary applications and other materials to the appropriate Governmental Authority and take such other actions to effect the transfer of Licenses and Permits or issuance of new licenses and permits as of the Closing, and Seller shall reasonably cooperate with Purchaser to cause the Licenses and Permits to be transferred, or new licenses and permits to be issued to Purchaser at Purchaser's sole cost and expense. In connection with the transfer of the Licenses and Permits from Seller to Purchaser, Purchaser shall exercise good faith efforts and take commercially reasonable steps and actions to secure the Seller's release by the applicable Governmental Authority from continuing liability under the assigned License or Permit arising after the date of assignment. Notwithstanding the foregoing, in the event that the appropriate Governmental Authority will not release Seller from continuing liability in connection with the assignment of a License or Permit hereunder, Seller shall assign such License or Permit to Purchaser and Purchaser shall indemnify and hold harmless Seller from any Indemnification Loss caused by Purchaser's action or inaction and incurred by Seller for matters or conditions with respect to such License or Permit arising after the date of the assignment, except if such loss is related to Seller's actions or negligence.

6.3 Notices and Filings. Seller and Purchaser shall use commercially reasonable efforts to cooperate with each other (at no cost or expense to the Party whose cooperation is requested, other than any *de minimis* cost or expense or any cost or expense which the requesting Party agrees in writing to reimburse) to provide written notice to any Person under any Contracts or Licenses and Permits, and to effect any required registrations or filings with any Governmental Authority or other Person, regarding the change in ownership of the Real Property or the other Assets.

6.4 Further Assurances. From the date of this Agreement until the Closing or earlier termination of this Agreement, Seller and Purchaser shall use commercially reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper, or advisable to consummate the transactions described in this Agreement, including, without limitation, (i) obtaining all necessary consents, approvals, and authorizations required to be obtained from any Governmental Authority or other Person under this Agreement or Applicable

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Laws, and (ii) effecting all registrations and filings required under this Agreement or Applicable Laws. After the Closing, Seller and Purchaser shall use commercially reasonable efforts (at no cost or expense to such Party, other than any *de minimis* cost or expense or any cost or expense which the requesting Party agrees in writing to reimburse) to further effect the transactions contemplated in this Agreement as may be necessary.

ARTICLE VII
CLOSING CONDITIONS

7.1 Purchaser's Closing Conditions. Purchaser's obligations to close the transaction contemplated in this Agreement are subject to the satisfaction at or prior to Closing of the following conditions precedent (the "**Purchaser's Closing Conditions**"):

7.1.1 Seller's Deliveries. _____.

7.1.2 Representations and Warranties. _____.

7.1.3 Covenants and Obligations. _____.

7.1.4 Adverse Proceedings. _____.

7.1.5 Adverse Law. _____.

7.1.6 Title Policy. _____.

7.2 Failure of any Purchaser's Closing Condition. _____.

7.3 Seller's Closing Conditions. Seller's obligations to close the transaction contemplated in this Agreement are subject to the satisfaction at or prior to Closing of the following conditions precedent (the "**Seller's Closing Conditions**"):

7.3.1 Receipt of the Purchase Price. _____.

7.3.2 Purchaser's Deliveries. _____.

7.3.3 Representations and Warranties. _____.

7.3.4 Covenants and Obligations. _____.

7.4 Failure of the Seller's Closing Conditions. _____.

ARTICLE VIII
CLOSING

8.1 Closing Date. _____.

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8.2 Closing Escrow. _____.

8.3 Seller's Closing Deliveries. At Closing, Seller shall deliver or cause to be delivered Escrow Agent all of the following documents, each of which shall have been duly executed by Seller and acknowledged (if required) (the "**Seller's Closing Deliveries**"):

8.3.1 Closing Certificate. A closing certificate substantially in the form of Exhibit A-1 attached hereto and by this reference incorporated herein, together with a copy of all appropriate resolutions, consents, and approvals.

8.3.2 Deed. A Special Warranty Deed substantially in the form of Exhibit D attached hereto and by this reference incorporated herein (the "**Deed**").

8.3.3 Assignments and Assumption of Intangible Assets. An assignment and assumption of Intangible Assets in the form of Exhibit E attached hereto and by this reference incorporated herein (the "**Assignment of Intangible Assets**").

8.3.4 Assignment and Assumption of Leases. An assignment and assumption of Leases in the form of Exhibit F attached hereto and by this reference incorporated herein (the "**Assignment of Leases**").

8.3.5 Assignment and Assumption of Entitlements and Allocation of Development Rights. An assignment and assumption of the Entitlements in the form of Exhibit G attached hereto and by this reference incorporated herein ("**Assignment and Allocation of Entitlements and Development Rights**").

8.3.6 Estoppels. (*Include requirements for various estoppels, including estoppels for any declarations, estoppels for leases being assumed by Purchaser, etc.*.)

8.3.7 Waivers. (*Include requirements for any waivers of rights-of-first-refusal, rights-of-first-offer, etc.*)

8.3.8 Title Requirements. Such agreements, affidavits, or other documents as may be reasonably required by the Title Company from Seller to issue the Title Policy.

8.3.9 FIRPTA Certificates and Title Affidavits. _____

8.3.10 Closing Statement. The Closing Statement prepared pursuant to Section 9.1 hereof.

8.3.11 Associations Documents.

(i) Resignation letters executed by all representatives of the Seller serving as officers and directors of the Associations;

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(ii) An assignment executed by Seller assigning and transferring its status as "Declarant" under the Declarations to Purchaser. In this regard, Seller shall be obligated to cause and obtain any required approvals for such transfer or assignment pursuant to Article ____, Section ____ of each of the Commercial Declaration and the Residential Declaration; and

(iii) The originals (or copies, if originals are not available) of all records, record books, plans, warranties, reports, budgets, bank account statements, and other documents in Seller's possession, custody or control pertaining to the Associations, together with the corporate seals of the Associations and any personal property (tangible or intangible) of the Associations in Seller's possession, if any, as well as any other documents and materials which are required by Applicable Laws to be turned over by the Seller, as "Declarant" under the Declarations to owners other than the "Declarant," as if such turnover were required by the Applicable Laws to occur as of the Closing.

8.3.12 Other Documents. Such other documents and instruments as may be reasonably requested by Purchaser or the Title Company in order to consummate the transactions described in this Agreement.

8.4 Purchaser's Closing Deliveries. At Closing, Purchaser shall deliver or cause to be delivered to Escrow Agent all of the following documents, each of which shall have been duly executed by Purchaser and acknowledged (if required) (the "**Purchaser's Closing Deliveries**"):

8.4.1 Purchase Price. _____.

8.4.2 Disbursement Letter. _____.

8.4.3 Counterpart Execution Documents. _____.

8.4.4 Other Documents. _____.

8.5 Possession. _____.

ARTICLE IX
PRORATIONS AND EXPENSES

9.1 Closing Statement. _____.

9.2 Prorations, Taxes and Assessments. As of the Closing Date, the Purchase Price will be adjusted by an amount that takes into account at least the following prorations (the "**Prorations**"):

9.2.1 Taxes and Assessments. Seller shall be responsible for payment of all Taxes arising prior to the Closing Date based on the actual current tax bill. If the Closing takes place before the real estate taxes are fixed for the tax year in which the Closing

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Date occurs, the apportionment of real estate taxes will be made on the basis of the real estate taxes for the immediately preceding tax year based upon the maximum discount allowed. There shall be no re-proration of taxes after Closing. All delinquent taxes and all delinquent assessments, if any, on the Assets will be paid at Closing from funds accruing to Seller.

9.2.2 Contracts. Any amounts prepaid, accrued or due and payable under the Contracts, if any, shall be prorated as of the Closing Date between Seller and Purchaser.

9.2.3 Other Adjustments and Prorations. All other items of income and expense as are customarily adjusted or prorated upon the sale and purchase of assets similar to the Assets shall be adjusted and prorated between Seller and Purchaser accordingly.

9.3 Purchaser's Transaction Costs. _____.

9.4 Seller's Transaction Costs. _____.

ARTICLE X
DEFAULT AND REMEDIES

10.1 Seller's Default. _____.

10.2 Purchaser's Default. _____.

10.3 No Punitive or Consequential Damages. _____.

ARTICLE XI
RISK OF LOSS

11.1 Casualty. _____.

11.2 Condemnation. _____.

ARTICLE XII
INTENTIONALLY DELETED

ARTICLE XIII
MISCELLANEOUS PROVISIONS

13.1 Notices. _____

13.2 Time is of the Essence. _____.

13.3 Assignment. _____.

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13.4 Successors and Assigns. _____.

13.5 Third Party Beneficiaries. _____.

13.6 Rules of Construction. _____.

13.7 Severability. _____.

13.8 Governing Law. _____.

13.9 Waiver of Trial by Jury. _____.

13.10 Attorneys' Fees; Prevailing Party. _____

13.11 Incorporation of Recitals, Exhibits and Schedules. _____.

13.12 Independent Entity. _____.

13.13 Entire Agreement. _____.

13.14 Amendments, Waivers and Termination of Agreement. _____.

13.15 Execution of Agreement. _____.

13.16 Not Binding Until Executed. _____.

13.17 Tax Disclosures. _____.

13.18 Effective Date. _____.

13.19 Radon Gas. _____.

[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK]

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IN WITNESS WHEREOF, each Party has caused this Agreement to be executed and delivered in its name by a duly authorized officer as of the date first set forth above.

SELLER:

_____,
a _____

By:_____
Name: _____
Title: _____

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PURCHASER:

_____,
a _____

By:_____
Name: _____
Title: _____

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ACCEPTANCE OF ESCROW AGENT

The undersigned agent for the Title Company hereby: (i) accepts the Escrow created by the foregoing Agreement; (ii) agrees to act in accordance with the terms of this Agreement both as Title Company and as escrow agent; (i) agrees to be the person responsible for closing the transaction within the meaning of Section 6045(e)(2)(A) of the Internal Revenue Code.

ESCROW AGENT:

_____

By:_____
Name: _____
Title: _____

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EXHIBIT A

Legal Description of the Land

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EXHIBIT A-1

Closing Certificate

THIS CLOSING CERTIFICATE (this "Certificate"), is made as of the ____ day of _____, 20___ by ("Seller"), to and in favor of _____, a ____ _____ ("Purchaser"), pursuant to Section 8.3.1 of that certain Purchase and Sale Agreement, dated as of _____, by and between Sellers and _____ _____, a _____, as assigned to Purchaser pursuant to those certain Assignment and Assumption Agreement of even date herewith (as assigned, and as amended, the "Agreement"), with respect to the purchase and sale of the Assets, as defined in the Agreement.

Seller hereby certifies to Purchaser that, as of the date hereof, the representations and warranties of Seller set forth in Section 5.1 of the Agreement are true and correct in all material respects as though made at and as of the date hereof; provided, however, that if any portion of any such representation or warranty is already qualified by materiality, that portion of such representation or warranty as so qualified is true and correct in all respects.

[Signatures Appear on the Following Page]

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SELLER:

_____,

By:_____
Name: _____
Title: _____

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EXHIBIT B

Seller's Due Diligence Materials

Date of contents	Description
	Agreements
01/25/00	_____Access Agreement between _____ and _____
05/02/02	Amendment to Agreement - _____ and _____
04/20/06	Orange County - Use Agreement
12/12/05	State of Florida Dept. of Transportation Executed Stipulation of Parties
	Easements
07/01/05	Amendment of Conservation Easement
02/04/02	Declaration of Master Easement and Joint Use Agreement
01/16/04	Deed of Conservation Easement
01/16/04	Deed of Conservation Easement
11/21/03	Drainage Easement Agreement
11/21/03	Drainage Easement Agreement
11/20/03	Drainage Easement
11/18/05	Distribution Easement / Progress Energy
07/31/01	Distribution Easement / Florida Power
02/09/05	Access and Utilities Easement
09/22/03	Temporary Utility Easement
02/07/05	Easement / Bellsouth
10/14/03	Utility Easement
06/13/01	Conservation Easement for Tracts _____
06/13/01	Deed of Conservation Easement from _____
12/14/00	Environmental Resource Permit Modification No. _____
06/06/01	South Florida Water Management District - Letter stating modification is in compliance: Letter re: Modification to Conceptual/Construction Permit with Survey attached
07/21/00	Development Engineering Department: Application for Project Review by the Development Review Committee
02/25/02	Florida Power - Distribution Easements
06/06/01	Conservation surveys large set signed & sealed
	Permits
	Orange County
	Army Corp of Engineers
	State of Florida
	SFWMD

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Date of contents	Description
	FDEP
	FDOT
DRI Documents	
09/22/08	NOPC Filed
	Design Guidelines - Community
11/14/00	Development Order for _____ DRI
01/28/02	Declaration of Master Easement and Joint Use Agreement
01/28/02	Joinder and Consent to Dec of Master Easement
06/11/02	Use Agreement - R/W Use Permit, etc.
12/17/03	First Amended & Reinstated DO for _____ DRI
05/24/06	Use Agreement Recorded copy
05/01/03	Notice of Proposed Change DRI
10/01/03	PD Reclaimed Water Distribution Report
09/01/01	Comm Water, Waste & Reuse Plan
04/01/03	PD App for Modification to Environmental Resource Permit
09/01/01	DRI Stormwater Master Plan
Parcel C	
01/14/02	Preliminary Geotech Study
Parcel J	
2002	School Agreements
12/20/01	Site Study
Parcel M	
07/17/07	Design Level Geotch Report 2007
11/16/07	Cattle Dip VAT Liner Installation
09/01/00	Sub Region School Plan 2000
Parcel N/O	
02/01/07	PD Conceptual Drainage Report
02/07/07	General Environmental Resource Permit Modification Application 2007
11/03/06	Concept Individual Environmental Resource Permit Modification Application 2006
02/19/07	Surface Water Mgmt Permit

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EXHIBIT C

Title Commitment

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EXHIBIT D

Deed

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EXHIBIT E

Assignment of Intangible Assets

ASSIGNMENT OF INTANGIBLE ASSETS

THIS ASSIGNMENT OF INTANGIBLE ASSETS (this "Assignment"), is made as of the ____ day of _____, 20___ (the "Effective Date"), by and between _____ ("Assignor"), whose address is _____, and _____, a _____ ("Assignee"), whose address is _____.

W I T N E S S E T H:

WHEREAS, pursuant to the terms of that certain Purchase and Sale Agreement, dated as of _____, 20___, by and between Assignor and Assignee (as the same may be amended or modified, the "Agreement"), Assignor agreed to sell to Assignee, inter alia, certain real property, as more particularly described on **Exhibit A** attached hereto (the "Real Property"). Initially capitalized terms not otherwise defined herein shall have the respective meanings ascribed to such terms in the Agreement; and

WHEREAS, the Agreement provides, *inter alia*, that Assignor shall assign to Assignee rights to certain intangible property and that Assignor and Assignee shall enter into this Assignment.

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the parties hereto hereby agree as follows:

1. Assignment. Assignor hereby assigns, sets over and transfers to Assignee all of Assignor's right, title and interest in, to and under the following:

A. all contracts, subcontracts and agreements relating to the Real Property that are described in **Exhibit B** attached hereto and incorporated herein by this reference (herein collectively called the "Contracts"); and

B. to the extent that the same are in effect as of the Effective Date hereof, any licenses, permits and other written authorizations necessary for the use, operation or ownership of the Real Property (herein collectively called the "Licenses and Permits"); and

C. any guaranties and warranties in effect with respect to any portion of the Real Property as of the Effective Date hereof.

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Assignee hereby accepts the foregoing assignment of the interests described in this Section 1 (collectively, the "Intangible Property").

2. Miscellaneous. This Assignment and the obligations of the parties hereunder shall survive the closing of the transaction referred to in the Agreement and shall not be merged therein, shall be binding upon and inure to the benefit of the parties hereto, their respective legal representatives, successors and assigns, shall be governed by and construed in accordance with the laws of the State of Florida and may not be modified or amended in any manner other than by a written agreement signed by the party to be charged therewith.

3. Severability. If any term or provision of this Assignment or the application thereof to any persons or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Assignment or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each term and provision of this Assignment shall be valid and enforced to the fullest extent permitted by law.

4. Counterparts. This Assignment may be executed in multiple counterparts, each of which shall be an original and all of which counterparts taken together shall constitute one and the same agreement.

[Signatures Appear on the Following Pages]

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IN WITNESS WHEREOF, the undersigned have executed this Assignment to be effective as of the Effective Date set forth hereinabove.

ASSIGNOR:

_____,

By:_____
Name:_____
Title:_____

ASSIGNEE:

_____,
a_____

By: _____
Name: _____
Title: _____

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EXHIBIT A to Assignment of Intangible Assets

Legal Description

[TO BE INSERTED]

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EXHIBIT B to Assignment of Intangible Assets

List of the Contracts

[TO BE INSERTED]

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EXHIBIT F

Assignment of Leases

ASSIGNMENT AND ASSUMPTION OF LEASES

THIS ASSIGNMENT AND ASSUMPTION OF LEASES (this "Assignment"), is made as of the ____ day of _____, 20___ (the "Effective Date"), by and between _____ ("Assignor"), whose address is _____, and _____, a _____ ("Assignee"), whose address is _____.

W I T N E S S E T H:

WHEREAS, pursuant to the terms of that certain Purchase and Sale Agreement, dated as of _____, 20___, by and between Assignor and Assignee (as the same may be amended or modified, the "Agreement"), Assignor agreed to sell to Assignee, *inter alia*, certain real property, as more particularly described on **Exhibit A** attached hereto (the "Real Property"). Initially capitalized terms not otherwise defined herein shall have the respective meanings ascribed to such terms in the Agreement; and

WHEREAS, by deed of even date herewith, Assignor conveyed the Real Property to Assignee; and

WHEREAS, Assignor has entered into those certain leases or rental agreements for the use or occupancy of the Real Property (the "Leases") listed and described on the rent roll attached as **Exhibit B** hereto and made a part hereof (the "Rent Roll"), and Assignor is the present owner of all rights, title, and interest of the landlord under the Leases.

WHEREAS, Assignor desires to transfer and assign all of Assignor's right, title, interest and obligations as the landlord in and to the Leases to Assignee, and Assignee desires to accept and assume same.

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the parties hereto hereby agree as follows:

1. Assignment. Assignor does hereby ASSIGN, TRANSFER, and DELIVER unto Assignee all of Assignor's right, title and interest and obligations as landlord under the Leases.

2. Indemnity by Assignor. Assignor shall indemnify and hold Assignee harmless from any claim, liability, cost or expense (including without limitation reasonable attorneys' fees and costs) arising out of any obligations or liability of landlord or lessor under the Leases arising before the Effective Date hereof. This indemnity does not include any obligation or liability of Assignor with respect to the construction or condition of any improvements on the Property or

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any defect or defects therein, all liability with respect to which being released or assumed by Assignee under and by the Sale Agreement.

3. Assumption. Assignee hereby assumes and agrees to perform all of the terms, covenants, conditions and obligations required to be performed on the part of the landlord or lessor accruing under the Leases on and after the Effective Date hereof in accordance with the terms thereof.

4. Indemnity by Assignee. Assignee shall indemnify and hold Assignor harmless from any claim, liability, cost or expense (including without limitation reasonable attorneys' fees and costs) arising out of any obligations or liability of the landlord or lessor under the Leases arising on or after the Effective Date hereof.

5. Representations and Warranties. Assignor hereby represents and warrants to Assignee (a) that it has full power and authority to assign the Leases to Assignee, (b) that the Leases are in full force and effect and have not been modified or amended in any manner whatsoever except as otherwise set forth in the Rent Roll, and (c) all right, title and interest of Assignor in and to the Leases are free and clear of any and all claims, liens and encumbrances other than the Permitted Exceptions (as defined in the Sale Agreement) and as reflected in such Leases.

6. Further Assurances. Assignor covenants with Assignee and Assignee covenants with Assignor that each will execute or procure any additional documents necessary to establish the rights of the other hereunder.

7. Counterparts. This Assignment may be executed in multiple counterparts, each of which shall be deemed an original, and both of which together shall constitute one and the same instrument.

8. Binding Effect. This Assignment shall be binding upon and inure to the benefit of the parties hereto and their respective transferees, successors and assigns. Assignor and Assignee each agree to execute and deliver such other and further documents as may be necessary to transfer, assign, convey and deliver the Leases and to otherwise accomplish the purposes and intent of this Assignment.

[Signatures Appear on the Following Pages]

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IN WITNESS WHEREOF, the undersigned have executed this Assignment to be effective as of the Effective Date set forth hereinabove.

ASSIGNOR:

_____,

By:_____
Name:_____
Title:_____

ASSIGNEE:

_____,
a_____

By: _____
Name: _____
Title: _____

EXHIBIT A to Assignment and Assumption of Leases

Legal Description

[TO BE INSERTED]

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EXHIBIT B to Assignment and Assumption of Leases

Rent Roll

[TO BE INSERTED]

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EXHIBIT G

Assignment and Allocation of Entitlements and Development Rights

THIS INSTRUMENT WAS PREPARED BY
AND SHOULD BE RETURNED TO:

Thomas E. Francis, Esquire
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
215 North Eola Drive
Post Office Box 2809
Orlando, FL 32802-2809
(407) 843-4600

ASSIGNMENT AND ALLOCATION OF
ENTITLEMENTS AND DEVELOPMENT RIGHTS

THIS ASSIGNMENT AND ALLOCATION OF ENTITLEMENTS AND DEVELOPMENT RIGHTS (the "Assignment") made and entered into as of this _____ day of _____, 2013, by and between _____ ("Seller"), and _____ ("Purchaser").

WITNESSETH:

WHEREAS, _____ is the owner and developer of certain property located in Orange County, Florida more particularly described on **Exhibit A** attached hereto (the "Property"), which Property is subject to the _____ Development of Regional Impact (the "DRI"); and

WHEREAS, the DRI is being developed subject and pursuant to the current development of regional impact development order for the _____ DRI, being that certain Development Order for _____ Development of Regional Impact recorded in Official Records Book _____, Page ____; as amended and restated by that certain First Amended and Restated Development Order for _____ Development of Regional Impact recorded in Official Records Book ____, Page ____; as amended by that certain Amendment to First Amended and Restated Development Order for _____ Development of Regional Impact recorded in Official Records Book ____, Page ____; and as further amended by that certain Second Amendment to First Amended and Restated Development Order for _____ Development of Regional Impact; approved by Orange County, Florida Board of County Commissioners on _____; all among or to be among the Public Records of Orange County, Florida (the "DRI Development Order");

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WHEREAS, simultaneously with this Assignment, Purchaser has purchased the Property from Seller; and

WHEREAS, the Property also is subject to those other approvals and agreements more particularly described on **Exhibit C** attached hereto (collectively, the "Entitlements"); and

WHEREAS, as part of the conveyance of the Property from Seller to Purchaser, Seller has agreed to assign and allocate to Purchaser all of the entitlements, approvals and development rights and obligations under the DRI Development Order and the Entitlements, as more particularly described below.

NOW THEREFORE, in consideration of the premises and the conveyance of the Property from Seller to Purchaser, the parties hereby agree as follows:

1. Incorporation of Recitals. The foregoing recitals are true and correct and are hereby incorporated by reference.

2. Assignment and Allocation of Entitlements and Development Rights. Seller hereby assigns and allocates to Purchaser, in accordance with the DRI Development Order and Entitlements applicable to the Property, the right to develop on the Property all of those uses and intensities as described in and approved pursuant to the DRI Development Order and the Entitlements (the "Entitlements"), together with such further development rights and privileges as are necessary and appropriate under the DRI Development Order and the Entitlements to accommodate the development of the Entitlements.

3. Entitlements Obligations. Purchaser hereby agrees to perform those obligations and duties required under the DRI Development Order and the Entitlements that (i) apply to or are the responsibility of Seller, and (ii) by their nature, are applicable to the Property or can be satisfied only at the time of development of individual parcels. Purchaser hereby indemnifies and holds the Seller harmless from and against any cost, damage, liability or claim arising from its failure to perform such obligations and duties.

4. Notices. All notices, requests, demands, and other communications required to be provided by any party under this Agreement (each, a "Notice") shall be in writing and delivered, at the sending party's cost and expense, by: (i) personal delivery; (ii) certified U.S. mail, with postage prepaid and return receipt requested; (i) overnight courier service; or (iv) facsimile transmission, with a verification copy sent on the same day by any of the methods set forth in clauses (i), (ii) or (i), to the recipient party at the following address or facsimile number:

If to Purchaser:

_____

_____

_____

Attn:_____

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Fax:_____
Phone:_____

With a copy to:

_____
_____
_____
Attn:_____
Fax:_____
Phone:_____

If to Seller:

_____
_____
_____
Attn:_____
Fax:_____
Phone:_____

With a copy to:

_____
_____
_____
Attn:_____
Fax:_____
Phone:_____

5. General Matters.

A. This Assignment shall be construed in accordance with the laws of the State of Florida and may not be amended other than by written agreement executed by the parties hereto, their successors or assigns.

B. The provisions of this Assignment shall constitute restrictive covenants and personal servitudes encumbering the Property and shall run with the title to the Property. This Assignment shall be binding upon and inure to the benefit of Seller and Purchaser, their successors and assigns.

C. In the event of litigation arising from the effort of either Seller or Purchaser to enforce the provisions of this Assignment, the prevailing party shall be

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entitled to recover its reasonable attorneys' fees and paralegals' fees and costs, both at trial and on appeal.

D. Each party shall have all remedies available at law or in equity, including the right of specific performance and/or injunctive relief, to enforce their respective rights under this Assignment.

WHEREFORE, Seller and Purchaser have executed this Assignment effective as of the day and year first above written.

[This space intentionally left blank.]

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Witnesses:

SELLER:

_____
Signature of Witness

_____
Printed Name of Witness

_____,

By:_____
Name:_____
Title:_____

_____
Signature of Witness

_____
Printed Name of Witness

STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this ___ day of _____, 20___ by _____, as _____ of _____, as _____ of _____. She/He is personally known to me or has produced _____ as identification.

(NOTARY SEAL)

_____
Notary Public Signature

_____
Typed or Printed Notary Name
Notary Public-State of_____
Commission No.:_____
My Commission Expires:_____

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STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this ___ day of _____, 20___ by _____, as _____ of _____, Inc., a Florida corporation, as General Partner of _____, a Florida limited partnership. S/He is personally known to me or has produced _____ as identification.

(NOTARY SEAL)

_____
Notary Public Signature

_____
Typed or Printed Notary Name
Notary Public-State of_____
Commission No.:_____
My Commission Expires:_____

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Witnesses:

PURCHASER:

_____
Signature of Witness

_____
Printed Name of Witness

_____,
a_____

By:_____
Name: _____
Title: _____

_____
Signature of Witness

_____
Printed Name of Witness

STATE OF_____
COUNTY OF_____

The foregoing instrument was acknowledged before me this ___ day of _____, 20___ by _____, as _____ of _____, a _____. S/He is personally known to me or has produced _____ as identification.

(NOTARY SEAL)

_____
Notary Public Signature

_____
Typed or Printed Notary Name
Notary Public-State of_____
Commission No.:_____
My Commission Expires:_____

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EXHIBIT A to Assignment and Allocation of Entitlements and Development Rights

PROPERTY

[TO BE INSERTED]

EXHIBIT C to Assignment and Allocation of Entitlements and Development Rights

ENTITLEMENTS

[THESE ITEMS REMAIN SUBJECT TO CHANGE]

1. _____ DRI Owner Agreement to be entered into by and between _____ and _____; and to be recorded among the Public Records of Orange County, Florida.

2. _____ Planned Development approved by Orange County, Florida on _____, pursuant to the _____, as amended.

3. _____ Transportation and Proportionate Share Agreement (_____ DRI/Innovation Way South) to be entered into by and between Orange County, Florida; _____; and _____; and to be recorded among the Public Records of Orange County, Florida.

4. Capacity Enhancement Agreement _____.

5. Southeast Regional School Agreement _____.

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SCHEDULE 2.2.4

Contracts

[TO BE INSERTED]

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SCHEDULE 2.2.5

Licenses and Permits

[TO BE INSERTED]

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SCHEDULE 4.2.1

Known Exceptions

[TO BE INSERTED]

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Lowndes Drosdick Doster & Kantor Reed, P.A.
ATTORNEYS AT LAW

SAMPLE ALLOCATION AND ASSIGNMENT OF LAND USE AND DEVELOPMENT RIGHTS

FUND ASSEMBLY

MAY 13, 2017

DISCLAIMER:

The assignment provided in these materials contains only examples of provisions and language that may be used in an assignment form. They are not appropriate for every situation or any particular situation. This form reflects a fully-negotiated assignment form between two parties. These provisions should be used only with full consideration of the facts and circumstances applicable to the transaction, the terms of the transaction, the intent of the parties and the client represented by the particular attorney. In addition, the views and opinions expressed by the speaker are the views and opinions of the speaker only and are not to be construed or interpreted as opinions of law.

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ALLOCATION AND ASSIGNMENT OF LAND USE AND DEVELOPMENT RIGHTS

THIS ALLOCATION AND ASSIGNMENT OF LAND USE AND DEVELOPMENT RIGHTS (the "Assignment") is made and entered into this ___ day of _____, by and between _____ ("Assignor"), whose address for purposes of this Assignment is _____, and _____ ("Assignee"), whose address for purposes of this Assignment is _____.

RECITALS:

A. Assignor is the developer of approximately ____ acres, more or less, of land located at _____ in unincorporated Orange County, Florida (the "County") commonly known and referred to as _____ (the "Project")

B. The Project is a Planned Development ("PD") under applicable zoning ordinances and regulations of the County and is also a Development of Regional Impact ("DRI") as defined in Florida Statutes Chapter 380.

C. The lands comprising the Project are subject to, benefitted by and accorded certain land use approvals and development rights and capacities pursuant to and under, and are subject to, burdened by and imposed with certain conditions and obligations by, under and pursuant to the following documents and instruments (collectively, the "Land Use Documents"):

1. The _____ Planned Development approval issued by the Board of County Commissioners of the County approved on _____, and the Orange County Comprehensive Plan Amendment for _____ also adopted on _____, together with all amendments thereto (collectively, the "PD Approval"); and

2. The Development Order for _____ Development of Regional Impact adopted on _____ and recorded on _____ in Official Records Book ____, Page ____ of the Public Records of Orange County, Florida, together with all amendments thereto (collectively, the "Development Order").

D. The lands comprising the Project are also benefitted by and accorded with certain development rights and approvals pursuant to and under, and are subject to, burdened by and imposed with certain conditions and obligations by, under and pursuant to the following development permits and approvals (collectively, the "Development Permits"):

1. South Florida Water Management District ("SFWMD") Conceptual Approval of Surface Water Management Plan No. _____ dated _____, including all General Conditions and Specific Conditions attached thereto and incorporated therein.

2. SFWMD Conceptual Approval of Surface Water Management Plan No. _____ dated _____, including all Special Conditions and Limiting Conditions attached thereto and incorporated therein.

3. SFWMD General Permit and Stormwater Discharge Certification No. _____ dated _____, including all Special Conditions, Limiting Conditions and Exhibits attached thereto.

4. SFWMD Surface Water Management Permit No. _____ dated _____, including all Special Conditions and Limiting Conditions attached thereto.

5. SFWMD Surface Water Management Permit No. _____ dated _____, including all Special Conditions and Limiting Conditions attached thereto.

6. Florida Department of Environmental Protection Wetland Resource Permit No. _____ dated _____ and expiring on _____, including all General Conditions and Specific Conditions attached thereto and incorporated therein.

7. Florida Department of Environmental Protection Permit No. _____ dated _____, including all Specific Conditions and Exhibits attached thereto.

8. Department of the Army (U.S. Army Corp of Engineers) Permit No. _____ dated _____, including the General Conditions and Special Conditions attached thereto and incorporated therein.

9. Florida Game and Fresh Water Fish Commission ("FGFWFC") Permit For Taking Of Gopher Tortoises And Their Burrows No. _____ dated _____, including all provisions/conditions thereof.

10. FGFWFC Permit For Taking Gopher Frog, Florida Pine Snake, Florida Mouse and Sherman's Fox Squirrel And Their Nests No. _____ dated _____, including all provisions/conditions thereof.

11. FGFWFC Permit for Relocation of Indigo Snake, Short Tailed Snake and Sand Skink No. _____ dated _____, including all provisions/conditions thereof.

E. Simultaneously with the execution and delivery of this Assignment, Assignor has sold and delivered to Assignee and Assignee has purchased and received from Assignor a deed to and conveyance of that portion of the lands comprising the Project which is more particularly described on **Exhibit A** attached hereto and by reference made a part hereof (the "Land").

F. Assignor has sold and conveyed the Land to Assignee and Assignee has purchased and accepted a deed to and conveyance of the Land from Assignor solely and exclusively for purposes of Assignee's future development, improvement, occupation, use and operation of the Land as and for, and only as and for a mixed use project containing (i) up to _____ restaurants containing, in the aggregate, not more than _____ square feet of the _____ square feet of the commercial/retail (retail and service) development, together with _____ retail parking spaces of the _____ retail parking spaces, and (ii) no more than _____ hotel rooms of the _____ hotel rooms (together with ancillary and support retail and restaurant uses), currently authorized and approved for the Project under and pursuant to the Land Use Documents, all subject to certain recorded instruments otherwise restricting the use of the Land (collectively, the "Improvements"). Assignee hereby acknowledges and agrees that the development, improvement, occupation, use and operation of the Land and the Improvements also shall be and are subject to both the Declaration of Restrictions and the Declaration of Covenants, Conditions, Restrictions and Obligations by and between the parties hereto (together, the "Declarations"), of even date herewith and recorded among the Public Records of the County contemporaneously with the recording of this Assignment (the "Permitted Use").

G. This instrument is intended by Assignor and Assignee:

(i) to describe, define, allocate and assign to Assignee and/or the Land those of the land use approvals, development rights and capacities, and the rights and benefits under and pursuant to the Land Use Documents and the Development Permits as are necessary for Assignee's development, improvement, occupation, use and operation of the Land to the extent required for, and only to the extent required for, the Permitted Use, as and to the extent expressly provided in this Assignment; and

(ii) to describe, define, allocate and assign to Assignee and/or the Land those conditions, duties and compliance obligations imposed upon the Project pursuant to the Land Use Documents and Development Permits as are properly applicable to Assignee and/or the Land and its development, improvement, occupation, use and operation to the extent required for, and only to the extent required for, the Permitted Use, as and to the extent expressly provided in this Assignment.

NOW THEREFORE, for and in consideration of the premises hereof and for other good and valuable considerations, including, without limitation, the sum of Ten Dollars ($10.00) in hand paid by Assignee to Assignor upon the execution and delivery of this Assignment by Assignor, the receipt and sufficiency of all of which are hereby acknowledged, Assignor and Assignee do hereby covenant, stipulate and agree as follows:

1. **Recitals**. The Recitals hereinabove set forth are true and correct in all respects and are by this reference thereto incorporated in this Assignment as fully as if set forth herein verbatim.

2. **Allocation and Assignment of Land Use Approvals and Development Rights and Capacities to the Land**. Of the land use approvals, development rights and capacities accorded to the Project by and pursuant to the Land Use Documents, Assignor hereby allocates and assigns to Assignee and/or the Land the following land use approvals, development rights and capacities:

(a) **Land Use Rights**. The right to develop and construct the Improvements upon the Land for use and operation in accordance with the Permitted Use. The Improvements shall be developed in compliance with this Assignment and the Project development program currently authorized and approved under and pursuant to the Land Use Documents.

(b) **Trip Generation Rights**. The right to generate from and by the Permitted Use _____ external peak hour trip ends ("Peak Hour Trips") of the total _____ Peak Hour Trips allocated to the _____ DRI, and _____ average daily external trip ends ("Average Daily Trips") of the total of _____ Average Daily Trips allocated to the _____ DRI, all by and pursuant to the terms of the Development Order, as such Peak Hour Trips and Average Daily Trips are determined in accordance with the terms and conditions of the Land Use Documents. The Peak Hour Trips and Average Daily Trips hereinabove allocated and assigned to the Land shall be treated by Assignor and its successors and assigns as existing Peak Hour Trips and Average Daily Trips in and for purposes of phasing and all future traffic monitoring and modeling studies (and for purposes of the future sale of other lands in the Project) required to be conducted pursuant to the terms of the Land use Documents. The specific intent of the parties hereto is that the Peak Hour Trips and the Average Daily Trips are allocated from, and reserved by Assignor for the benefit of Assignee as part of, the peak hour trips and average daily trips allocated to and approved for of the _____ DRI pursuant to the Land Use Documents.

Notwithstanding anything set forth in this Section 2, the foregoing allocations and assignments of land use approvals, development rights and capacities are not intended to be, and shall not constitute, a representation or warranty by Assignor to Assignee that (i) the Land meets applicable "concurrency" capacity requirements for its development and improvement for the Improvements, or for the future use as and for the Permitted Use, or (ii) building permits and/or any other governmental or quasi-governmental permits and/or approvals required for the development and improvement for the Improvements, or for the occupancy, use and/or operation of the Land for the Permitted Use are or will be obtainable by Assignee.

3. **All Other Land Use and Development Rights Reserved**. Except as expressly provided in Section 2 above, no other land use approvals and/or development rights and/or capacities have been or are hereby allocated and/or assigned by Assignor to Assignee and/or the Land pursuant to this Assignment. All land use approvals and/or development rights and/or capacities which are not hereinabove specifically allocated and assigned to Assignee and/or the Land (and which have not previously been allocated and assigned by Assignor to other lands

within the Project) shall be and are hereby reserved and retained by Assignor for the benefit of those other lands within the Project or elsewhere which are otherwise intended or permitted to be benefitted by such land use approvals, development rights and capacities as, when and in such quantities as Assignor shall hereafter elect, in its sole and absolute discretion.

4. **Allocation and Assignment of Development Duties and Obligations to the Land**. Of the development duties and obligations imposed upon the Project by, under and pursuant to the Land Use Documents, there is hereby allocated and assigned to the Land, and Assignee hereby agrees that the Land and the record owner(s) thereof from time to time, including Assignee and its successors in interest and title to the Land, shall hereafter assume, bear and be responsible for, the following development duties and obligations:

(a) **Payment of Impact Fees and Other Impositions**. The duty and obligation to pay any and all impact fees and other governmental or quasi-governmental impositions, by whatever name described, for and with respect to the development, improvement, occupation, use and/or operation of the Land.

(b) **Payment of Utility Fees and Charges**. The duty and obligation to pay any and all utility capacity reservation fees or payments, tap-in and meter fees, service charges and other fees and charges of any kind, nature or description, and by whatever name described, which are required to purchase and/or reserve and/or provide sanitary sewage collection, treated/reclaimed wastewater/effluent irrigation, potable water treatment and distribution, electric power, natural gas, cable television, telecommunications, telephone and any and all other utility services to the Land and all buildings, structures and other improvements which are intended to be or which are actually constructed upon the Land.

(c) **Compliance with Land Use Documents**. The duty and obligation to perform and comply with all terms, provisions, covenants, conditions, requirements and restrictions of the Land Use Documents affecting or relating to the development, improvement, occupation, use and/or operation of the Land and any buildings, structures and other improvements from time to time located thereon, save and except for those duties and obligations the performance of which and compliance with which are hereinafter specifically allocated to and retained by Assignor and any successor(s) in interest or title to Assignor as the "Developer," "Successor Developer" and/or "Applicant" under the Land Use Documents (as hereinafter provided in Section 5 of this Assignment).

(d) **Compliance with Development Permits**. The duty and obligation to comply with and abide by all terms, provisions, conditions and requirements of the Development Permits affecting or relating to the development, improvement, occupation, use and/or operation of the Land and any buildings, structures and improvements from time to time located thereon, specifically including, without limitation, those of the Development Permits listed and described the Recitals to this Assignment which regulate the management of surface water(s) on and the discharge of stormwater(s) from the Land.

5. **Other Development Duties and Obligations Specifically Reserved to and Retained by Assignor**. Nothing contained in this Assignment is intended or shall be deemed to

release Assignor (or any successor(s) in interest or title to Assignor as the "Developer," "Successor Developer" and/or "Applicant" under the Land Use Documents) of or from the development duties and obligations imposed upon Assignor (or any successor(s) in interest or title to Assignor as the "Developer," "Successor Developer" and/or "Applicant" under the Land Use Documents). Unless specifically assigned to and assumed by Assignee pursuant to the terms of this Assignment, Assignee shall have no obligation or responsibility for any of the development duties and obligations imposed upon the Assignor (or any successor(s) in interest or title to Assignor as the "Developer," "Successor Developer" and/or "Applicant" under the Land Use Documents) by and pursuant to the Land Use Documents. By way of example and not limitation, Assignor shall be responsible for the performance of and compliance with those duties and obligations of the Developer set forth in Paragraphs 16 (monitoring and modeling), 17 (monitoring and modeling/mitigation), 19 (transit systems), 20 (transit service) and 21 (roadway improvements) of Article IV of the Development Order until such enumerated duties and obligations under the Development Order are fully satisfied and performed. For the purposes of this Assignment, the term "Assignor" shall also mean and be deemed to include any successor(s) in interest or title to Assignor as the "Developer," "Successor Developer" and/or "Applicant" under the Land Use Documents.

6. **Future Allocation and Assignment of Reserved Duties and Obligations**. Notwithstanding the foregoing provisions of Section 5 of this Assignment, Assignor shall have and hereby reserves and retains the right, in its sole and absolute discretion, to allocate, delegate and/or assign those duties and obligations hereinabove reserved to and retained by Assignor pursuant to the provisions of Section 5 to any third party(ies) including, without limitation, the Association (hereinafter defined) or any successor in interest or title to Assignor as the "Developer," "Successor Developer" and/or "Applicant" under the Land Use Documents; provided, however, and Assignor hereby agrees, that Assignor shall not itself delegate and/or assign, or permit any such successor in interest or title to Assignor to delegate and/or assign, any of those duties and obligations imposed upon the Developer under and pursuant to the provisions of Paragraphs 16 (monitoring and modeling methodology), 17 (monitoring and modeling/mitigation), 20 (transit service) and 21 (roadway improvements) of Article IV of the Development Order to _____ Property Owner's Association, Inc. or any successor(s) thereto (the "Association"), such that the initial capital costs incurred in and other ongoing expenses of compliance with and the performance of such enumerated obligations and conditions are not passed on to and/or otherwise borne by the members of the Association, including Assignee, whether in the form of dues, assessments or any other form of contribution or funding device, by whatever name described, imposed or charged by the Association; it being understood, agreed and intended by the parties that Assignee's contribution to such initial capital costs and other ongoing expenses of compliance with such enumerated conditions and requirements of the Development Order have been paid by Assignee in the forms of (i) the purchase price paid by Assignee to Assignor for the Land and (ii) the impact fee payments required to be made by Assignee and its successors in interest and title to the Land pursuant to the provisions of Section 4(a) of this Assignment. Assignor shall indemnify, defend and save and hold Assignee and its successors in interest and in title to the Land harmless from and against the payment of any such initial capital costs and other ongoing expenses of compliance with such enumerated conditions and requirements of the Development Order.

Notwithstanding the foregoing provisions of this Section 6, Assignor shall have the right to assign to the Association the ongoing expenses of the maintenance, repair, replacement and/or operation (but not the capital cost incurred in the initial construction) of any transit shelters and/or parking bays and related improvements required pursuant to the provisions of Paragraph 20 of Article IV of the Development Order.

7. **Annual Reporting Requirements; Cooperation**. Notwithstanding Assignor's reservation of the duty and obligation to comply with the annual reporting requirements set forth in Article VIII of the Development Order, Assignee hereby agrees that within thirty (30) days following Assignor's request therefor, Assignee shall provide to Assignor or, at Assignor's direction, to the Association, such information and/or data with respect to the Land as is reasonably required by Assignor and/or the Association in order to comply with such annual reporting requirements and to otherwise cooperate with Assignor and/or the Association in connection with such annual reporting requirements.

8. **Partial Assignment of Development Permits and Approvals By Assignor.** To the extent that the same relate to and/or are necessary for the development and improvement of the Land with Improvements and/or for the occupation, use and operation of the Land for the Permitted Use, and only to the extent permitted by applicable law and/or the applicable permit or approval, Assignor hereby transfers and assigns to Assignee and/or the Land the benefits of and rights under the Development Permits.

9. **All Other Benefits of and Rights Under Development Permits and Approvals Reserved**. The partial assignment of development permits and approvals pursuant to the provisions of Section 8 of this Assignment is not intended as a transfer or assignment of, and does not, in fact, transfer and assign to Assignee and/or its successors in interest and title to the Land and/or to the Land itself, any other benefits or rights which Assignor or any other party may have as the holder(s) of and/or permittee(s) under such development permits and approvals, and/or as the owner of any property benefitted or intended to be benefitted thereby or otherwise, to the extent that the same relate and/or apply to any real property other than the Land, including without limitation the balance of the Project (i.e., other than the Land) and/or any other lands intended to be accorded benefits and rights by and under such development permits and approvals.

Accordingly, there is hereby reserved to and retained by Assignor and any other party as is (are) the holder(s) and permittee(s) under such developments and approvals, and/or the owner of any property benefitted or intended to be benefitted thereby, and allocated to the balance of the lands comprising the Project (i.e. other than the Land) and all such other lands benefitted thereby, any and all other benefits of and rights under the aforesaid development permits and approvals as are not hereinabove expressly assigned by Assignor to Assignee and/or the Land. Assignor and any other party as is (are) the holder(s), permittee(s) and/or beneficiaries of and/or under the development permits and approvals assigned herein, shall have and retain, and Assignor, on its own behalf and their behalf, hereby reserves the absolute right, in its (and their) sole discretion(s), to allocate and/or partially allocate and/or to assign or partially assign such reserved and retained benefits and rights to any other lands and/or any third party or third parties including, without limitation, the Association; provided, however, that, no such assignment(s) or

partial assignment(s) of such development permits and approvals shall result in or have the effect of (i) reducing or diminishing those benefits and rights hereinabove transferred and assigned to Assignee and/or the Land pursuant to this Assignment, or (ii) otherwise precluding, impeding, adversely impacting, delaying or interfering with the development, improvement, occupation, use and/or operation of the Land by Assignee for the Permitted Use.

10. **Modification of Land Use Documents and Development Permits**. In consideration of the within and foregoing allocation and assignment of land use approvals, development rights, capacities and development duties and obligations to Assignee and/or the Land, Assignee shall neither seek, nor have any right or authority to seek, to change, amend or modify, in any manner, the Land Use Documents and/or the Development Permits or any of the individual terms, provisions, covenants, conditions or restrictions set forth in either, without first receiving the express prior written consent of Assignor (or any successor to Assignor as the "Developer" and/or as the "Applicant" under the same), which consent shall be granted or withheld in accordance with the terms and conditions of the Declarations. Notwithstanding the foregoing, Assignor hereby agrees that Assignor's consent to any such change, amendment or modification will not be unreasonably withheld or delayed so long as any proposed change, amendment or modification to the Land Use Documents and the Development Permits would not result in or have the effect of either: (i) reducing, diminishing or adversely impacting any of the land use approvals, development rights and capacities accorded to the Project under and pursuant to the Land Use Documents or the Development Permits, or (ii) violating the Declarations.

However, Assignor shall have full right and authority to make any application as Assignor, in its reasonable discretion, shall determine to change, amend or modify the Land Use Documents or the Development Permits or any of the individual terms, provisions, covenants, conditions or restrictions set forth in either, without, in any case, the consent of Assignee; provided, however, that Assignor shall not make any application for or otherwise seek to bring about any change, amendment or modification to the Land Use Documents or the Development Permits which would result in or have the effect of either: (a) reducing, diminishing or adversely impacting any of the land use approvals, development rights and capacities accorded to the Project under and pursuant to the Land Use Documents or the Development Permits which are specifically allocated and assigned to Assignee and/or the Land by, under and pursuant to this Assignment, or (b) otherwise precluding, impeding, adversely impacting, delaying or interfering with the development, improvement, occupation, use and operation of the Land for the Permitted Use.

11. **Obligations of Assignee Under Assigned Development Permits and Approvals**. The partial assignment of development permits and approvals to Assignee and/or the Land made by Assignor in and pursuant to the provisions of Section 8 of this Assignment is expressly made by Assignor on the condition that, in the exercise of the rights and benefits conferred and accorded by such development permits and approvals, Assignee shall, with respect to and only with respect to the Land, discharge, perform and comply with each and every duty and obligation under such development permits and approvals which is a prerequisite to the exercise of such rights and benefits for and with respect to the development, improvement, occupation, use and operation of the Land and any improvements from time to time constructed, installed and located thereon. However, the partial assignment of development permits and

approvals is not intended to impose, and shall not be deemed to impose, upon Assignee any of the duties and obligations of Assignor or any other party which is the holder of and permittee under such assigned development permits and approvals as, and to the extent that, the same relate to any real property other than the Land. Subject to the provisions of Section 10 above, Assignee shall not, by virtue of this Assignment, be entitled to apply for or otherwise seek any modification of any of those development permits and approvals partially transferred and assigned pursuant to this Assignment without first obtaining the prior written consent of Assignor and the party which is the holder of and/or permittee under such development permit and approval.

12. **Representations and Warranties of Assignor**. Assignor hereby represents and warrants to Assignee, with respect to the land use approvals, development rights, capacities and the rights and benefits under the development permits and approvals allocated and assigned by Assignor to Assignee and/or the Land pursuant to the provisions of this Assignment, as follows:

(a) Assignor has full right, power and authority to allocate, transfer and assign to Assignee and/or the Land those land use approvals, development rights, capacities and other rights and benefits under the development permits and approvals hereinabove allocated, transferred and assigned by Assignor to Assignee and/or the Land;

(b) To the best of Assignor's knowledge, all of the Land Use Documents and Development Permits are currently in full force and effect, and Assignor has received no notice that either or both of Assignor and the Land are not in compliance with or have violated any terms, provisions, conditions or requirements of the same. For purposes of this subparagraph (b), the phrase "to the best of Assignor's knowledge" shall mean actually known by or within the knowledge of any one (1) or more of the following representatives of and/or attorneys for Assignor: _____, _____ and _____, respectively;

(c) The respective benefits of and rights under each of the development permits and approvals hereinabove allocated and assigned by Assignor to Assignee and/or the Land pursuant to the provisions of this Assignment either (x) run with title to the Land or (y) are (by virtue of pre-existing assignments or partial assignments of the same to Assignor from, or through contracts with, those affiliates of Assignor which are the holder(s) thereof and permittee(s) thereunder, including, without limitation, _____, _____, _____, and/or any other affiliates of Assignor), assignable (or partially assignable) by Assignor to Assignee and/or the Land without the consent of the respective issuers thereof; and

(d) With respect or as the same relate to the Land, Assignor has not made any prior assignment, pledge or hypothecation of any of the development permits and approvals hereinabove allocated and assigned by Assignor to Assignee and/or the Land.

Assignor's liabilities and Assignee's remedies for any breach by Assignor of the within and foregoing representations and warranties of Assignor shall be and are hereby expressly limited, respectively, to those liabilities and remedies hereinafter provided in Section 13 of this Assignment.

13. **Loss of Rights and Benefits Allocated and Assigned**.

(a) **Definitions**. As used in this Section 13, the following terms shall have the following definitions:

(i) "Affiliates of Assignor" shall mean those legal entities related to or affiliated with Assignor by reason of their common ownership by or being under the common control of Assignor's parent corporation and/or any of its subsidiaries, including, without limitation, _____, _____, _____, and/or any other entities related to and/or affiliated with any of them, which are the holder(s) of and/or permittee(s) under any of the Land Use Documents and/or the Development Permits, together with their respective officers, employees and agents.

(ii) "Covered Causes" shall mean any one or more of the following:

(x) any breach by Assignor of the representations and warranties of Assignor set forth in Section 12 of this Assignment (other than any such breach of which Assignee had actual notice or knowledge on or prior to the date of this Assignment), or

(y) any loss of or unavailability to Assignee and/or the Land itself of those rights and benefits under the Land Use Documents and Development Permits which are allocated and assigned by Assignor to Assignee and/or the Land pursuant this Assignment solely by reason, on account or as a result of any act(s) or omission(s) of Assignor or any Affiliates of Assignor, including, without limitation, the violation, termination, revocation or modification of, or non-compliance with, any of the terms, provisions, covenants, conditions requirements or restrictions of or contained in any of the Land Use Documents and/or Development Permits.

The singular of Covered Causes is Covered Cause.

(iii) "Covered Events" shall mean either: (x) the inability of Assignee, after the reasonable efforts of Assignee to do so, to acquire and/or obtain the issuance of any building or other governmental permit or approval which is required for the development or improvement of the Land, or any portion thereof with the Improvements, or the use and operation thereof, for the Permitted Use; or (y), following the issuance and/or the acquisition by Assignee of all building and other governmental permits and/or approvals required therefor, any stoppage, interruption, delay, impediment or preclusion of, interference with, or other adverse impact upon the development or improvement or use of the Land, or any portion thereof with the Improvements, or the use and operation thereof, for the Permitted Use, which, in the case of either of (x) or (y) above, shall result

solely from the occurrence of any one or more of the Covered Causes. The singular of Covered Events is Covered Event.

(iv) "Covered Period" shall mean the period commencing on the date of this Assignment and expiring _____ after the date of this Assignment.

(v) "Cure" or "Cured" shall mean the cure, correction, removal, elimination or cessation of a Covered Event.

(vi) "Damages" shall mean and include any and all damages and/or losses, including, without limitation, any and all claims, demands, charges, costs, expenses (including, without limitation, the reasonable fees and disbursements of attorneys, paralegals and other professionals and consultants), debts, obligations, liabilities, suits, judgments, injunctions, investigations, proceedings, penalties, fines and other types of damages and/or losses of any kind, nature or description, suffered or incurred by, imposed upon or asserted against Assignee and/or the Land, or the adversely affected portion thereof, by reason, on account or as a consequence or result of the occurrence of a Covered Event.

(vii) "Extended Cure Period" shall mean the ninety (90) day period commencing upon the expiration of the Initial Cure Period and expiring at 5:00 o'clock p.m. on the ninetieth (90th) day thereafter.

(viii) "Initial Cure Period" shall mean the thirty (30) day period commencing on the date of Assignor's receipt of written notice from Assignee of the occurrence of a Covered Event and expiring at 5:00 o'clock p.m. on the thirtieth (30th) day thereafter.

(b) **Notice of Occurrence of Covered Event/Other Supplemental Information**. If, at any time during the Covered Period, a Covered Event shall occur, Assignee shall, with reasonable promptness thereafter, provide to Assignor written notice of: (i) the occurrence and a general description of such Covered Event; (ii) the nature of the adverse impact(s) of such Covered Event upon the contemplated development, improvement or use of the Land, or portion thereof, adversely affected by and resulting from the occurrence of such Covered Event; and (iii) to the extent possible and/or known by Assignee, if at all, Assignee's understanding of the particular facts and circumstances which have created, caused or resulted in the occurrence of such Covered Event. In addition, within the twenty (20) day period immediately following Assignee's delivery to Assignor of the aforesaid written notice of the occurrence of such Covered Event, Assignee shall, if and to the extent possible and/or known by Assignee, also advise Assignor in writing of: (a) Assignee's reasonable best, but non-binding, estimate of the nature and amount of the Damages which will likely be suffered or incurred by Assignee by reason, on account, as a consequence or as a result of the occurrence of such Covered Event, both on a monthly and on an aggregate basis over the Extended Cure Period, if such Covered Event is not Cured by Assignor within the Initial Cure Period; and (b) the purchase price which Assignee will accept from Assignor for the Land or portion thereof adversely affected by such Covered Event during the Extended Cure Period should Assignor elect to repurchase the same during the Extended Cure Period with respect to such Covered Event. In

addition, on a monthly basis thereafter during the Extended Cure Period, Assignee shall use its reasonable efforts to update its non-binding estimate of the nature and amount of Damages which have already been suffered or incurred by Assignee and which will likely continue to be suffered or incurred by Assignee during the Extended Cure Period provided for such Covered Event by reason, on account, as a consequence or as a result of the failure of Assignor to Cure or bring about the Cure of such Covered Event within the Extended Cure Period for such Covered Event.

(c) **Assignor's Reasonable Efforts to Cure Covered Event**. Following Assignor's receipt of written notice from Assignee of the occurrence of a Covered Event, as aforesaid, Assignor shall have the Initial Cure Period during which, and Assignor hereby agrees to use reasonable efforts, to Cure or bring about the Cure of the Covered Event. Assignee shall cooperate with Assignor in Assignor's reasonable efforts to Cure or bring about the Cure of such Covered Event.

(d) **Cure of Covered Event During Initial Cure Period**. If Assignor shall Cure a particular Covered Event within the Initial Cure Period, Assignor shall have no further liability to Assignee on account of the particular Covered Event so Cured by Assignor, but Assignor shall nevertheless remain liable and obligated to Assignee (in accordance with the following paragraph) for any future occurrence of the same or a similar Covered Event and for any other Covered Event occurring during the Covered Period.

(e) **Failure to Cure Covered Event During Initial Cure Period**. If Assignor, notwithstanding its reasonable efforts to do so as aforesaid, shall fail or be unable to Cure or bring about the Cure of any Covered Event of which it receives notice from Assignee during the Covered Period, as aforesaid, within the Initial Cure Period provided therefor, Assignor shall: (x) have the continuing right during the Extended Cure Period to use its reasonable efforts to Cure or bring about the Cure of such Covered Event; and (y) be liable and obligated to Assignee for, and Assignor shall, and hereby agrees to, indemnify, defend and save and hold Assignee harmless from and against any and all Damages suffered or incurred by, imposed upon or asserted against Assignee and/or the Land, or the adversely affected portion thereof, by reason, on account, as a consequence or as a result of the occurrence of such Covered Event for such period of time after the expiration of the Initial Cure Period that such Covered Event shall continue and remain uncured during the Extended Cure Period and thereafter, unless and until Assignor shall elect to repurchase the Land or the adversely affected portion thereof, together with all improvements located thereon, as hereinafter provided in subparagraph (f) of this Section 13. Assignor's indemnification of Assignee for Damages incurred during the Extended Cure Period and thereafter, as aforesaid, shall be made by Assignor to Assignee from time to time, but, in any event not later than thirty (30) days following Assignee's written demand therefor, which shall be accompanied by Assignee's detailed statement of and accounting for such Damages.

(f) **Failure to Cure Covered Event During Extended Cure Period**. If Assignor, notwithstanding its reasonable efforts to do so, as aforesaid, shall fail or be unable to Cure or bring about the Cure of any Covered Event of which it receives written notice from Assignee during the Covered Period, as aforesaid, within the Extended Cure Period provided therefor, Assignor shall, and hereby covenants and agrees to, indemnify, defend and save and

hold Assignee harmless from and against any and all Damages suffered or incurred by Assignee by reason, on account, as a consequence or as a result of the occurrence of such Covered Event for such period of time after the expiration of the Extended Cure Period that such Covered Event shall continue and remain uncured. Assignor's indemnification of Assignee for such Damages shall be made by Assignor to Assignee from time to time not later than thirty (30) days following Assignee's written demand therefor which shall be accompanied by Assignee's detailed statement of and accounting for such Damages. It is expressly provided, however, that, as an alternative to such indemnification of Assignee by Assignor for Damages, Assignor, at its option, may, by providing written notice to that effect prior to, and not later than, the expiration of the Extended Cure Period provided for such Covered Event, elect to repurchase the Land, or portion thereof adversely affected by such Covered Event, together with all improvements then located thereon at a purchase price (the "Repurchase Price") calculated and determined pursuant to and in accordance with the provisions of subparagraph (g) below and within the time provided in and otherwise in accordance with the provisions of subparagraph (h) below.

(g) **Calculation and Determination of Repurchase Price**. The Repurchase Price of the Land, or portion thereof, to be repurchased by Assignor from Assignee, as provided in subparagraph (f) above, shall be the aggregate sum of the following:

(i) $_____ per acre for each acre (including each fraction of an acre) of the Land or portion thereof to be repurchased by Assignor from Assignee;

(ii) a sum equal to an allocable/pro rata share (based upon the ratio of the total acreage of the Land to the total acreage, including fractions of acres, of the Land or the portion thereof adversely affected by such Covered Event) of all costs and expenses incurred by Assignee which may be properly characterized as project-wide (i.e., applicable to all of the Land) costs and expenses incurred by Assignee for or in connection with Assignee's overall purchase, financing (including, without limitation, applicable prepayment fees and penalties), design, development, construction, improvement and leasing of the entirety of the Land and the contemplated development and improvement thereof; and

(iii) if applicable (i.e., if the repurchase is with respect to less than all of the Land), the aggregate cost of all site-specific (i.e., applicable only to the portion of the Land to be repurchased by Assignor from Assignee) costs and expenses incurred by Assignor only for or in connection with the purchase, financing (including, without limitation, applicable prepayment fees and penalties), design, development, construction, improvement and leasing of the portion of the Land to be repurchased by Assignor from Assignee;

less, however, the aggregate sum of the following:

(iv) the aggregate amount of any and all mortgage(s), mechanic's lien(s), judgment lien(s) and other monetary encumbrance(s) in a liquidated amount of record as of the date on which Assignor closes and consummates the repurchase of and reacquires

title to the Land, or the portion thereof to be repurchased by Assignor from Assignee, which is (are) not previously or simultaneously satisfied and released of record;

(v) the aggregate amount of any other monetary obligation(s) of Assignee to which the Land or the portion thereof to be repurchased by Assignor from Assignee is (are) subject or for which Assignor will otherwise become liable and obligated as the purchaser of the Land or the portion thereof to be repurchased by Assignor from Assignee;

(vi) if the Land, or portion thereof to be repurchased by Assignor from Assignee, and/or any of the improvements located thereon, are contaminated by any hazardous substances or materials which were not present on the Land at the time of Assignee's initial purchase of the Land from Assignor, the estimated cost to remediate, remove, treat and/or dispose of, as applicable, such contamination and comply with all applicable laws relating to the remediation, removal, treatment and/or disposal of such contamination; and

(vii) any Damages paid by Assignor to Assignee which, if not deducted from the Repurchase Price, would constitute a duplicate payment, in whole or in part, of any amount(s) payable by Assignor to Assignee under and pursuant to this subparagraph (g).

(h) **Closing of Repurchase Transaction**. Assignor's repurchase of the Land or portion thereof to be repurchased by Assignor from Assignee, as aforesaid, shall be closed and consummated (the "Closing") at a place and time mutually agreed upon by Assignor and Assignee, but in no event later than thirty (30) days following the expiration of the Extended Cure Period provided for the particular Covered Event not Cured by Assignor. The Repurchase Price, together with all closing costs (other than the fees and disbursements of Assignee's counsel) and all Damages due from Assignor to Assignee through the date of Closing shall be paid by Assignor to Assignee in full and in immediately available funds (i.e., by locally drawn cashier's check or Federal Reserve Bank wire transfer) at the time of Closing. At the Closing, Assignee shall execute and deliver to Assignor or Assignor's designee a Special Warranty Deed to the Land, or the portion thereof to be repurchased by Assignor from Assignee, together with such other documents and instruments as may be reasonably necessary and/or appropriate to transfer title to the Land, or the portion thereof to be repurchased by Assignor from Assignee, together with all of Assignee's right, title and interest in and to the improvements located thereon, to Assignor or Assignor's designee, with all such documents and instruments being in form and content reasonably satisfactory to both Assignor and Assignee and their respective counsel.

(i) **Assignor's Payment of Mortgages**. Notwithstanding anything to the contrary contained in this Section 13, Assignor's option to repurchase the Land or the portion thereof shall be subject to the requirement that, at the time of the Closing of such repurchase transaction, Assignor or Assignor's designee shall pay to the holder(s) of any and all mortgages of record encumbering the Land or such adversely affected portion thereof at the time of the occurrence of the Covered Event not Cured by Assignor all amounts, including, without limitation, prepayment premiums or penalties, if any, then secured by, and remaining unpaid

under, its (their) respective mortgage(s) on the Land or such adversely affected portion thereof; provided, however, that the holder(s) of such mortgage(s) shall, simultaneously with the payment of such amounts by Assignor or Assignor's designee, at Assignor's election, either: (i) assign to Assignor or Assignor's designee, without recourse, all of such holders' rights in, to and under its (their) respective mortgage(s) and related documents, or (ii) provide Assignor or Assignor's designee with a satisfaction and release of such mortgage(s) and related documents in recordable form. Payments made to the holder(s) of any such mortgage(s) on the Land or such adversely affected portion thereof shall be deemed to be, and treated as, a credit against the aggregate amount of the Repurchase Price and Damages due from Assignor to Assignee at Closing. For the purposes of this subparagraph (i), the amounts secured by and remaining unpaid under any such mortgage(s) shall include the then outstanding principal amount of, and accrued and unpaid interest due under, the promissory note(s) secured by such mortgage(s) and any applicable prepayment premiums and penalties, if any, and any reasonable out-of-pocket costs incurred by the holder(s) of such mortgage(s).

(j) **Assignor Not Liable for Acts or Omissions of Third Parties**. Assignor shall not be liable or obligated to Assignee for any acts or omissions of any person(s) or entity(ies) other than Assignor, Assignor's Affiliates and/or their respective officers, employees and/or agents (including, without limitation, the acts or omissions of Assignee or its officers, employees and/or agents or the acts or omissions of any other owner(s) of any other real property included within or comprising a portion of the Project or its or their respective officers, employees and/or agents) including, without limitation, for any Damages suffered or incurred by Assignee, by reason, on account or as a result of Assignee's inability to obtain any building or other governmental permit(s) or approval(s) required for the contemplated development and improvement of the Land or any portion thereof for the Permitted Use, or by reason, on account or as a result of any stoppage, interruption, delay, impediment or preclusion of, interference with or other adverse impact upon the contemplated development and improvement of the Land, or a portion thereof, for the Permitted Use following the issuance of all building and other governmental permits and approvals required therefor, resulting from any act or omission of any such third party or third parties in violation or breach of, or non-compliance with, any of the terms, provisions, covenants, conditions, requirements or restrictions of any of the Land Use Documents and/or any of the Development Permits. Notwithstanding the foregoing provisions of this subparagraph (j), Assignor agrees to use its reasonable efforts, to (i) compel all other owners of real property within the Project to perform, comply with and abide by all of the terms, provisions, covenants, conditions, and restrictions set forth in the Land Use Documents and the Development Permits, including, without limitation, the enforcement against such other owners of real property within the Project of all contracts, agreements, declarations, restrictions and other documents or instruments under which Assignor shall have rights and remedies (including the remedy of specific enforcement) against them, and/or (ii) convince or persuade the issuer(s) of any of the Land Use Documents and/or Development Permits violated, breached or not complied with by any such third party or third parties, as aforesaid, to suffer, permit or allow Assignee to proceed with its contemplated development and improvement of the Land, or portion thereof adversely affected by such violation, breach or non-compliance by such third party or third parties notwithstanding such violation, breach or non-compliance by such third party or parties.

14. **Preemptive Purchase of Impact Fee Credits from Assignor**. Assignee hereby agrees that, before the payment of any impact fees by Assignee to Orange County or any other governmental entity or agency imposing such impact fees (an "Imposing Government") as a condition precedent to the acquisition of building permits for improvements to be constructed by Assignee upon the Land for the Permitted Use, Assignee shall and hereby agrees to first purchase from Assignor, at rates charged by Orange County or any other governmental entity or agency imposing the same at the time the same are purchased from Assignor, any transferable like-kind impact fee credits ("Impact Fee Credits"), to the extent that Assignor has and wishes to make the same available for sale to and purchase by Assignee. At the time of the purchase of such Impact Fee Credits by Assignee from Assignor, Assignor shall deliver to Assignee such documentation as may be required by the Imposing Government as proof or evidence that such Impact Fee Credits have, in fact, been sold and transferred and assigned by Assignor to Assignee, including, without limitation, any prior written notice of transfer or assignment which may be required by Orange County. In no event shall Assignee pay any impact fees or other impositions directly to an Imposing Government or purchase Impact Fee Credits from any other source unless Assignee shall have first made a written offer to purchase available Impact Fee Credits from Assignor and Assignor, not later than twenty (20) days following its receipt of such offer to purchase, has confirmed in writing to Assignee that Assignor has no, or less than the required amount of, Impact Fee Credits available for sale to and purchase by Assignee. The failure of Assignor to respond to such written offer within said twenty (20) day period shall be deemed to be conclusive evidence that Assignor has no such Impact Fee Credits available for sale to Assignee. Only then shall Assignee be entitled to pay the impact fees or impositions of an Imposing Government or purchase Impact Fee Credits from another source, and only then, in those required amounts which are in excess of the Impact Fee Credits which may be made available for sale by Assignor to Assignee pursuant to the foregoing provisions of this Section 14.

15. **Covenants Running with the Land**. The terms, provisions, covenants, conditions and restrictions set forth in this Assignment and the rights, privileges and benefits and duties, obligations and burdens assigned, granted, imposed and created pursuant to this Assignment shall and are hereby declared to be covenants running with the title to the Land, as the same is defined and described herein. Nothing contained in this Assignment, however, is intended to create, shall be deemed to create or shall be construed as creating any lien, charge, encumbrance, restriction or other exception to title to any other lands within the Project (i.e. other than the Land as the same is defined and described on Exhibit A attached to this Assignment).

16. **Enforcement and Remedies**. If either of Assignor or Assignee shall violate or attempt to violate or breach or attempt to breach any of the terms, provisions, covenants, conditions or restrictions set forth in this Assignment, Assignor and Assignee shall be entitled to: (i) subject to the other terms and conditions of this Assignment, institute and prosecute proceedings for the recovery of damages against the party violating or attempting to violate, or breaching or attempting to breach, the terms, provisions, covenants, conditions and restrictions set forth in this Assignment or (ii) institute and prosecute proceedings for the purpose of preventing or enjoining any or all such violations or attempted violations, or breaches or attempted breaches, of the terms, provisions, covenants, conditions and restrictions set forth in this Assignment. Such remedies shall be cumulative of any and all other remedies which may

now or hereafter be provided by law. The failure of any party to enforce any of the terms, provisions, covenants, conditions or restrictions set forth in this Assignment, however long continued, shall in no event be deemed to be or constitute a waiver by such party of the right to enforce the same thereafter as to the same violation or breach or attempted violation or breach or as to any other violation or breach or attempted violation or breach of the same term, provisions, covenant, condition or restriction, whether occurring prior or subsequent thereto.

17. **Limitation of Damages**. Except as expressly provided in Section 13 of this Assignment, in no event shall either party to this Assignment be liable to the other party for any lost or expected profits or revenues or any speculative, expectancy, remote, punitive or exemplary damages with respect to any default under or breach of the terms and provisions of this Assignment.

18. **Legal Proceedings, Attorneys' Fees**. In the event that either of Assignor or Assignee shall institute litigation or other legal proceedings against the other to interpret or enforce any term, provision, covenant or condition set forth in this Assignment, the prevailing party in such litigation or other legal proceedings following all appeals therefrom, if any, shall be entitled to recover from the non-prevailing party in such litigation or other legal proceedings reasonable attorneys' and paralegals' fees and expenses and court costs incidental thereto, including those incurred on any appeal of a lower court decision. Any and all costs (imputed or actual) incurred by the prevailing party in such litigation or other legal proceedings, including appeals as a result of its utilization of the services of in-house legal counsel and paralegals in lieu of (and/or in addition to, but not in duplication of) the services of outside counsel shall (to the extent that such costs do not exceed reasonable attorneys' and paralegals' fees and expenses which would have otherwise been incurred if outside counsel had provided the same services), for all purposes under this Assignment, be deemed to be reasonable attorneys' and paralegals' fees and expenses and shall be recoverable in all instances where the prevailing party would be entitled to recover attorneys' and paralegals' fees and expenses incurred as a result of the utilization of outside counsel.

19. **Notices**. Any notice, request, demand, consent or other communication contemplated, permitted or required to be given under or pursuant to this Assignment by one party to the other shall be personally delivered or sent by United States Registered or Certified Mail, postage prepaid, return receipt requested, or sent by Federal Express or other similar nationally-recognized overnight courier service, postage prepaid, to the party entitled or required to receive the same at the address specified below or at such other address as may be hereafter designated in writing by any such party, to wit:

If to Assignor to: _____
_____
_____
_____

If to Assignee to: _____
_____
_____
_____

Any such notice shall be deemed given when actually so personally delivered or, if mailed, as aforesaid, five (5) days after the date of mailing, or, if sent by Federal Express or other similar nationally-recognized overnight courier service, as aforesaid, two (2) days after delivery of the same to such courier service for overnight delivery. Notwithstanding the direction hereinabove set forth in this Section 19 that copies of any notice or other communication are to be sent to certain persons or entities hereinabove designated to receive copies of such notices or other communications, Assignor and Assignee agree that such copies are to be sent for informational purposes only and that a failure on the part of a party to send, or of any such designated person or entity to receive, copies of any notice or other communication to those persons or entities hereinabove designated to receive such copies of any notice or other communication shall not be considered or deemed to be a failure to give such notice or other communication so long as the original of such notice or other communication is actually given to the primary party to whom such notice or communication is to be sent.

20. **Miscellaneous Provisions**.

(a) **Terms "Assignor" and "Assignee"**. As used in this Assignment:

(i) The term "Assignor" shall include _____ and all of its successors in interest and title and permitted assigns as "Developer," "Successor Developer" and/or "Applicant" under the Land Use Documents other than Assignee, and

(ii) The term "Assignee" shall include _____ and its successors in interest and in title to the Land or any portion thereof.

(b) **Entire Agreement**. Except as provided in the Declarations, this Assignment constitutes the complete and entire understanding and agreement between Assignor and Assignee concerning or with respect to the allocation and assignment of land use and development rights and duties and partial assignment of permits made in and pursuant to this Assignment and supersedes any and all prior or contemporaneous covenants, agreements, undertakings, statements, representations or warranties, whether written or oral, of any party hereto concerning or with respect thereto.

(c) **Captions and Paragraph Headings**. Captions and paragraph headings contained in this Assignment are for convenience of reference only and are in no way intended, and shall in no way be deemed, to define, describe, extend or limit the scope, content or intent of this Assignment or of any particular term, provision or paragraph hereof.

(d) **References**. Whenever references are made in this Assignment to any paragraph or subparagraph, such reference shall be deemed to apply only to the specific paragraph or subparagraph of this Assignment to which such reference is made.

(e) **Modification, Amendment or Termination**. This Assignment may not be changed, modified, amended or terminated except as expressly set forth in a separate writing signed by both of the parties to this Assignment or their respective successors in interest or title.

(f) **Governing Law Binding Effect**. This Assignment and the construction, interpretation and enforcement thereof shall be construed in accordance with and governed by the laws of the State of Florida and shall be binding upon, inure to the benefit of and be enforceable by the parties hereto and their respective successors in interest or title.

(g) **Construction of Assignment**. The fact that any one of the parties to this Assignment shall have drafted or structured or shall be deemed to have drafted or structured this Assignment or any particular term or provision of this Assignment shall not be considered by any court or other tribunal in the construction or interpretation of this Assignment or any particular term or provision of this Assignment, either in favor or to the disadvantage of such party.

(h) **Severability**. If any of the terms, provisions, covenants or conditions set forth in this Assignment or the application thereof to any particular circumstance shall be held by any Court having jurisdiction to be illegal, invalid or unenforceable under applicable law, the remainder of this Assignment shall not be affected thereby and each provision of this Assignment shall be valid and enforceable to the fullest extent otherwise permitted by law.

(i) **Certificates of Compliance**. Each of Assignor and Assignee and their respective successors in interest or title shall, upon the written request made by the other of them or by the holder of any mortgage upon the Land or any part thereof, certify in writing in recordable form to the requesting party the status of such party's and the other party's compliance with the terms, provisions, covenants, conditions and restrictions set forth in this Assignment, to the extent then known and that no default is then known to exist or, if any default is then known to exist, the nature and extent of such default. Any such written certification shall be delivered to the requesting party within fifteen (15) business days after the receipt of the written request of a party entitled to make such request. The provisions of this subparagraph (h) may be specifically enforced by any party entitled to the benefits thereof in the Circuit Court of Orange County, Florida.

[SIGNATURE PAGES FOLLOW]

IN WITNESS WHEREOF, Assignor and Assignee have caused this Assignment to be duly executed in form and manner sufficient to bind them as of the respective dates indicated immediately below their undersigned signatures.

Signed, sealed and delivered in the presence of the following witnesses:

_____

Signature of Witness

_____

Name of Witness (Print or Type)

_____

Signature of Witness

_____

Name of Witness (Print or Type)

_____

By: _____

Name: _____

Its: _____

(CORPORATE SEAL)

"ASSIGNOR"

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____day of _____, by _____, as _____ of _____, on behalf of said _____. He/She [ ] is personally known to me or [ ] has produced _____(insert type of identification) as identification and did not take an oath.

_____

Notary Public

Name: _____

Commission No.: _____

My Commission Expires: _____

Signed, sealed and delivered in the presence of the following witnesses:

_____
Signature of Witness

_____
Name of Witness (Print or Type)

_____
Signature of Witness

_____
Name of Witness (Print or Type)

_____

By: _____
Name: _____
Its: _____

(CORPORATE SEAL)

"ASSIGNEE"

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____day of _____, by _____, as _____ of _____, on behalf of said _____. He/She [ ] is personally known to me or [ ] has produced _____(insert type of identification) as identification and did not take an oath.

_____
Notary Public
Name: _____
Commission No.: _____
My Commission Expires: _____

EXHIBIT A

LEGAL DESCRIPTION OF THE LAND

Back to Speaker Topics

Fund Assembly

Commercial Surveys, 'General' & ALTA: The New NSPS Standards, What to Order, How to Examine and What is Objectionable

Jim Kearn, *Associate Commercial Transactions Manager, The Fund*

Back to Speaker Topics

Speaker Information

Commercial Surveys, 'General' & ALTA: The New NSPS Standards, What to Order, How to Examine and What is Objectionable

Jim Kearn,

Associate Commercial Transactions Manager, The Fund

Jim Kearn is a Florida board certified attorney in real estate and a member of both the Florida and Pennsylvania Bars. He received his B.A. degree from Georgetown University and his J.D. degree from the Cornell University Law School. He has represented national lenders in a wide range of commercial projects, including regional malls; apartment complexes; industrial development bond projects; hotels, marinas, golf courses; community development districts; and joint public-private ventures.

Mr. Kearn has considerable experience in government financed projects, including HUD projects, planned developments, construction and real estate litigation. He is a member of The Florida Bar's Real Property, Probate and Trust Law Section and the Commercial Real Estate Committee. He is also a member of NAIOP, International Council of Shopping Centers and the Urban Land Institute.

Surveys – General & ALTA

The New NSPS Standards

What to Order, How to Examine &

What is Objectionable

James J. Kearn, Esquire
Assistant Vice President
Associate Manager Commercial Transactions
Attorneys' Title Fund Services, LLC

Table of Contents -i-

Powerpoint Slides for "*Commercial Surveys - 'General' & ALTA The New NSPS Standards, What to Order, How to Examine and What is Objectionable*" 1

Florida Administrative Code Chapter 5J-17.050-063 36

"The 2016 ALTA/NSPS Survey Standards Redux: What A Commercial Practitioner Must Know And Do To Avoid Material Omissions" by Jim Kearn, 49 Fund Concept 29 (March, 2017). 51

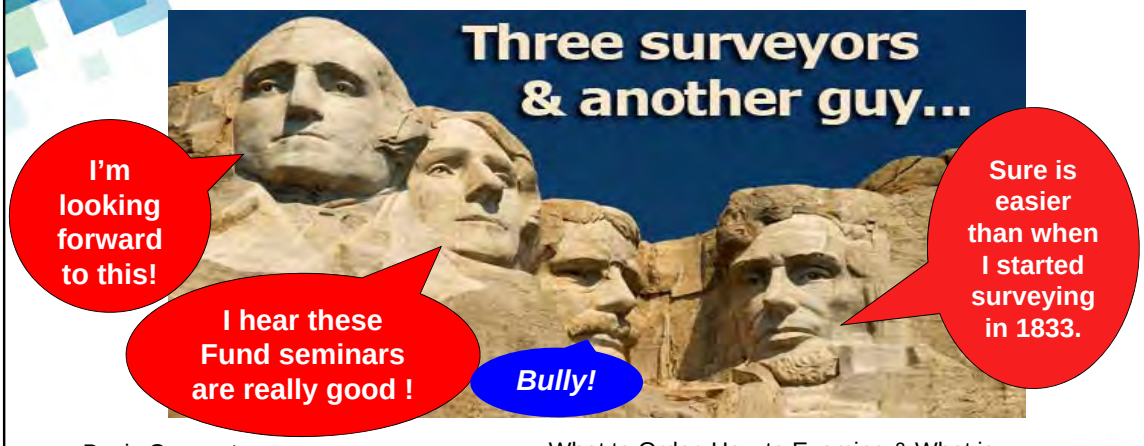
Minimum Standard Detail Requirements For ALTA/NSPS Land Title Surveys (Effective February 23, 2016) 56

What Every Real Estate Lawyer Should Know About Surveys (Part 1 & 2) by Ross E. Payne, Florida Bar Journal (July, October, 1996) 63

Surveys – General & ALTA
The New NSPS Standards
What to Order, How to Examine & What is Objectionable

James J. Kearn, Esquire
Assistant Vice President
Associate Manager Commercial Transactions
Attorneys' Title Fund Services, LLC

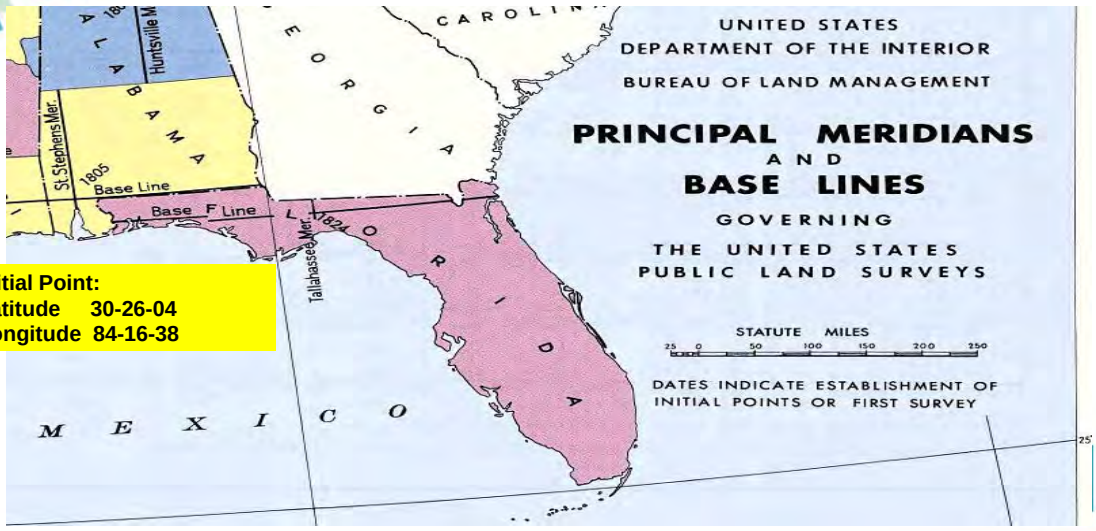
Overview *(Pun intended)*



- Basic Concepts
- 'General' FL Surveys & Minimum Standards
- ALTA surveys & New NSPS Standards
- What to Order, How to Examine & What is Objectionable
- Mixed Uses & Special Situations

2

The Tallahassee Meridian



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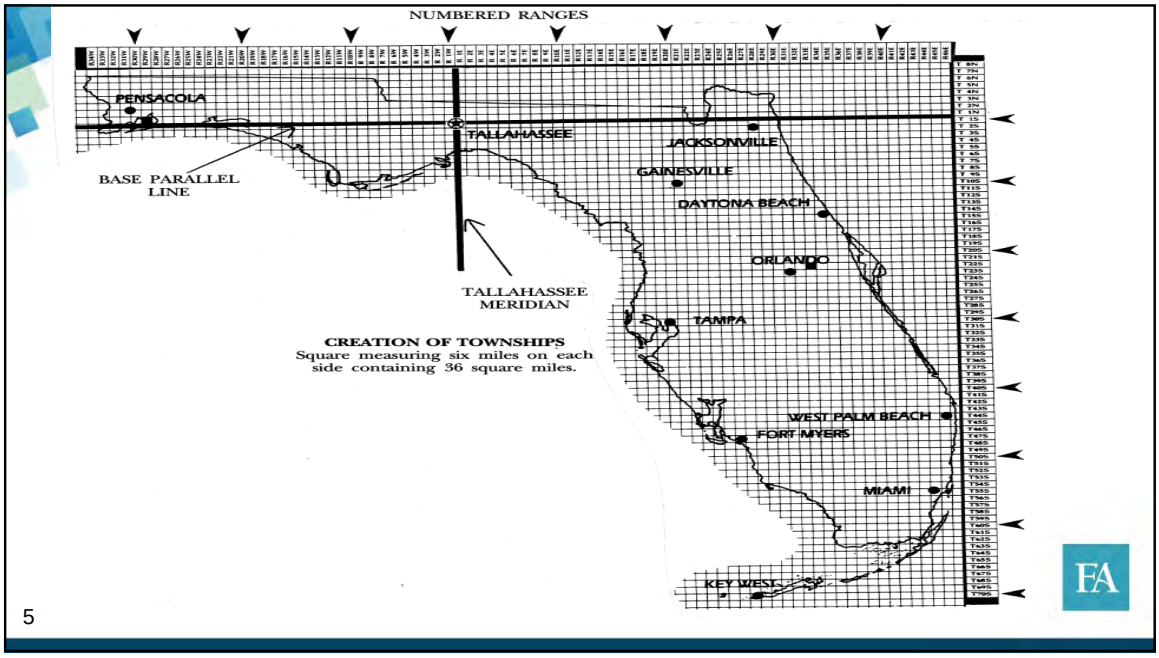
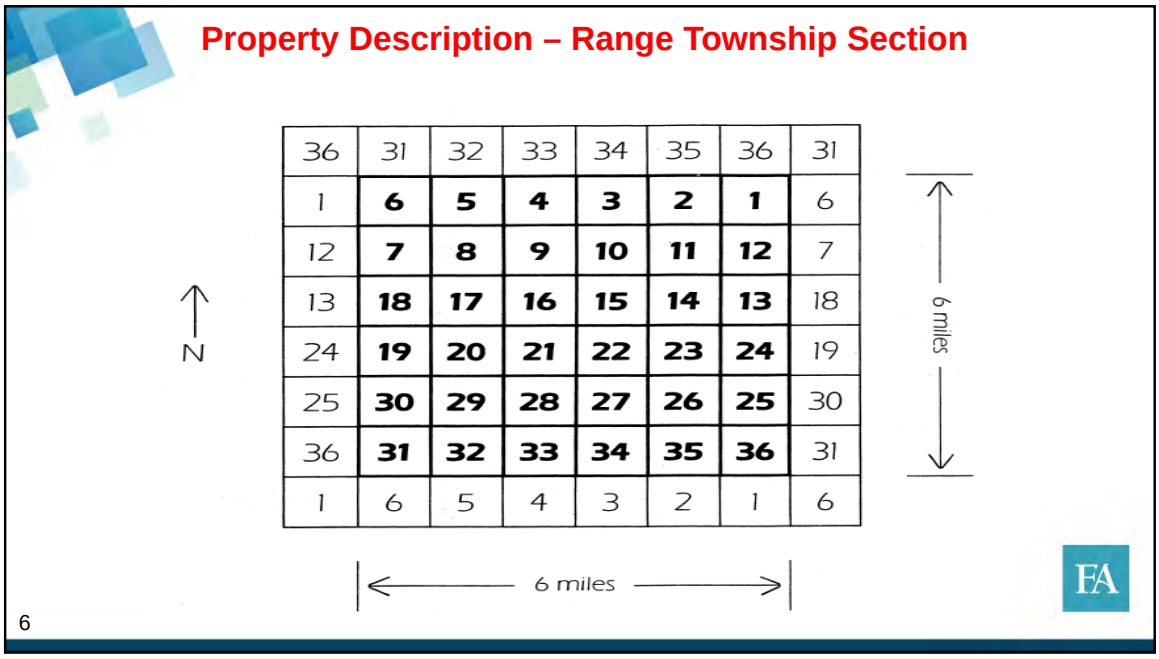
Longitude 84-16-38

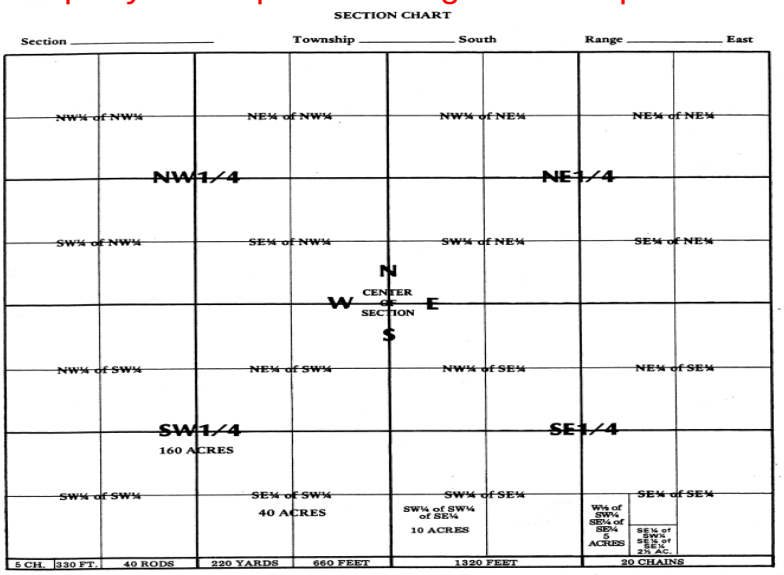
3

4


NUMBERED RANGES
PENSACOLA
TALLAHASSEE
JACKSONVILLE
GAINESVILLE
DAYTONA BEACH
ORLANDO
TAMPA
WEST PALM BEACH
FORT MYERS
MIAMI
KEY WEST
BASE PARALLEL LINE
TALLAHASSEE MERIDIAN
CREATION OF TOWNSHIPS
Square measuring six miles on each side containing 36 square miles.
5


Property Description – Range Township Section
36 31 32 33 34 35 36 31
1 6 5 4 3 2 1 6
12 7 8 9 10 11 12 7
13 18 17 16 15 14 13 18
24 19 20 21 22 23 24 19
25 30 29 28 27 26 25 30
36 31 32 33 34 35 36 31
1 6 5 4 3 2 1 6
N
6 miles
6 miles
6

Property Description – Range Township Section



Standards / Measurements

SCALE — 8 Inches Equals 1 M.

1 Inch Equals 10 Chains, 660 Feet, 40 Rods or 220 Yards

One Link = 7.92 Inches.
One Rod = 16½ Feet, ¼ Chain or 25 Links.
All Measurements in Government Surveys are Indicated by Links and Chains.

One Chain = 66 Feet, 4 Rods or 100 Links.
One Mile = 5,280 Feet, 320 Rods or 80 Chains.

One Square Rod Contains 272¼ Square Feet.
One Acre is about 208¾ Feet Square.
One Acre Contains 43,560 Square Feet or 160 Square Rods.
⅛ Acre (Homestead within City Limits) Contains 21,780 Sq. Ft.
Ten Square Chains = One Acre.

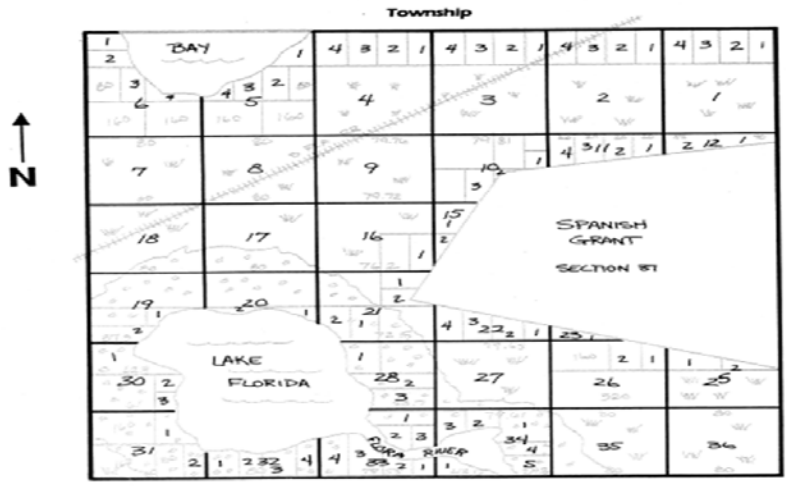
A Section of Land is One Square Mile and Contains 640 Acres.
¼ Section Contains 160 Acres.
A Township Area is 36 Square Miles and Contains 23,040 Acres.

EQUIVALENTS																														
	FEET	66	132	198	264	330	396	462	528	594	660	726	792	838	924	990	1056	1122	1188	1254	1320
	YARDS	22	44	66	88	110	132	154	176	198	220	242	264	286	308	330	352	374	396	418	440	1320
	RODS	4	8	12	16	20	24	28	32	36	40	44	48	52	56	60	64	68	72	76	80	
	CHAINS	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	

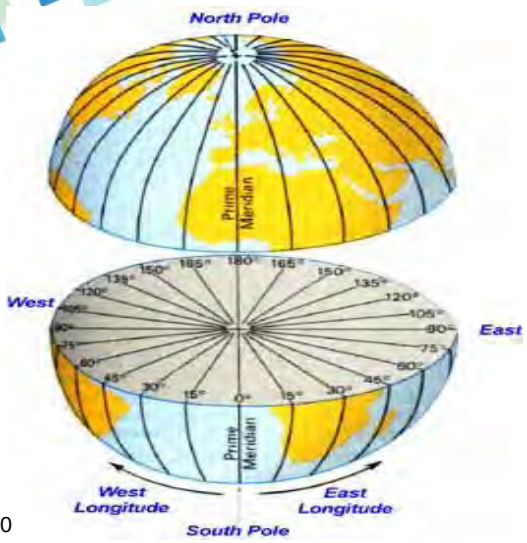
Sectional Map of a Township With Adjoining Sections

36	31	32	33	34	35	36	31
1	6	5	4	3	2	1	6
12	7	8	9	10	11	12	7
13	18	17	16	15	14	13	18
24	19	20	21	22	23	24	19
25	30	29	28	27	26	25	30
36	31	32	33	34	35	36	31
1	6	5	4	3	2	1	6

Standards / Measurements



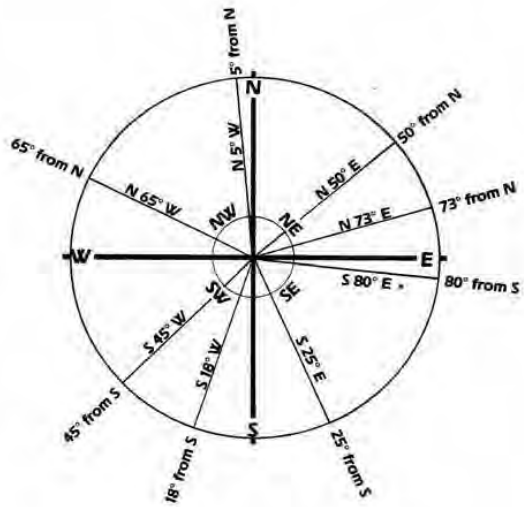
Property Description – Metes & Bounds



- 1 degree = 60 minutes
- 1 minute = 60 seconds
- 1 minute = 1 nautical mile at the Equator
- 1 nautical mile =
  - 6,076 feet.
  - 1.1508 miles
- Earth at Equator = 21,600 nautical miles or 24,857 miles

10

Property Description – Metes & Bounds



1
1

'General' Florida Surveys & Minimum Technical Standards

Fla. Admin. Code ch. 5J-17.051 Standards of Practice: General Survey, Map, and Report Content Requirements

§ (3)(b) "State the type of survey it depicts consistent with the types of surveys defined in paragraphs 5J-17.050(10)(a)-(k), F.A.C.

F.A.C. ch. 5J-17.050(10)(a) Definitions …

(a) As-Built Survey
(b) Boundary Survey
(c) Condominium Survey
(d) Construction Layout Survey
(e) Control Survey
(f) Hydrographic Survey
(g) Mean High Water Line Survey
(h) Quantity Survey
(i) Record Survey
(j) Specific or Special Purpose Survey
(k) Topographic Survey

12

‘General’ Florida Surveys & Minimum Technical Standards

Why Should You Care?

13

Minimum Technical Standards - Genuineness

'General' Florida Surveys & Minimum Technical Standards

F.A.C. ch. 5J-17.051 (3)(b)…

2. All survey maps and reports must bear the name, certificate of authorization number, and street and mailing address of the business entity issuing the map and report, along with the name and license number of the surveyor and mapper in responsible charge. The name, license number, and street and mailing address of a surveyor and mapper practicing independent of any business entity must be shown on each survey map and report.

3. All survey maps must reflect a survey date, which is the date of data acquisition. When the graphics of a map are revised, but the survey date stays the same, the map must list dates for all revisions.

15

'General' Florida Surveys & Minimum Technical Standards

F.A.C. ch. 5J-17.051 (3)(b)…

4. The survey map and report and the copies of the survey map and report, except those with electronic signature and electronic seal, *must* contain a statement indicating that the survey map and report or the copies thereof are not valid without the signature and the original raised seal of a Florida licensed surveyor and mapper.

16

‘General’ Florida Surveys & Minimum Technical Standards

F. S. §472.015

(12) A licensee or business entity that meets the requirements of this section or s. 472.021 must carry professional liability insurance or provide notice to any person or entity to which surveying and mapping services are offered that the licensee or business entity does not carry professional liability insurance. The notice must consist of a sign prominently displayed in the reception area and written statements provided in a form and frequency as required by rule of the Board of Professional Surveyors and Mappers.

17

‘General’ Florida Surveys & Minimum Technical Standards

Bubba’s Surveying Services

Yesterday’s Technology at Tomorrow’s Prices!

F.A.C. ch. 5J-17.051 (3)(b)…

5. If either the business entity or the individual licensee does *not* possess professional liability insurance, then the map, report, and/or survey **must** contain the following printed statement in letters at least 1/4" high:

“The survey depicted here is not covered by professional liability insurance”

18

General' Florida Surveys & Minimum Technical Standards

Moral:

- "Some astute buyers' attorneys require the surveyor to furnish a copy of the declarations page for the surveyor's professional liability insurance policy."
- Make sure it is occurrence not claims made coverage, and limits appropriate to the transaction!

19

NSPS & 2016 Standards

- ALTA Surveys
- ACSM – American Congress on Surveying
- NSPS - National Society of Professional Surveyors, Inc.
  - New Standards effective February 23, 2016
  - Reflects impact of Great Recession
  - Scales back a surveyor's duties, *generally speaking*, unless the parties agree otherwise

NSPS

20

NSPS & 2016 Standards

Surveying Defined:

2011 Prepare the "*plat or map showing the results of the fieldwork and its relationship to record documents….*"

2016 Prepare the "plat or map pursuant to Section 6 showing the results of the fieldwork and its relationship to documents provided to or obtained by the surveyor…."

21

NSPS & 2016 Standards

Surveying Defined (cont.):

If documents *not* provided to the surveyor, "*the surveyor shall be required to conduct only that research which is required pursuant to the statutory or administrative requirements of the jurisdiction where the property is located....*"

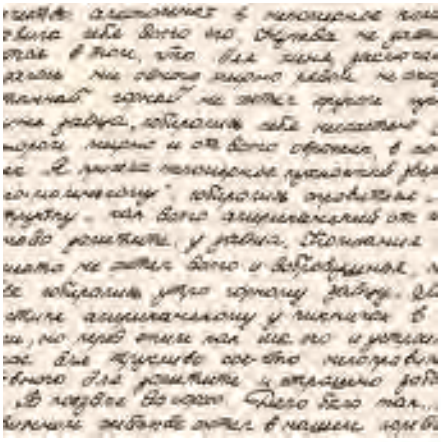
In Florida, that entails simply tying the description to Section corners, and reflecting what is on a plat.

22

NSPS & 2016 Standards – Sec. 4 - Records Research

If the above are not furnished (or if other non-public or quasi-public documents are required to complete the survey) ***the surveyor doesn't have to independently find and show them***. He or she only has to furnish the minimum required by Florida law.

Information furnished to the surveyor must be legible. If it isn't, such information or interests do *not* have to be shown so long as there is a related note to that effect on the survey. [See Section 6 C(ii)(f)]



23

NSPS & 2016 Standards – Sec. 4 - Records Research

2011 Surveyor to "be provided with *appropriate data* which can be relied upon in the preparation of the survey."

2016 *Surveyor must be provided with complete copies of the most recent title commitment* or other title evidence satisfactory to the title insurer if a commitment is not available."

Must also furnish…
"*current record descriptions of any adjoiners* to the property to be surveyed",

"*any recorded easements, servitudes or covenants burdening the property*… (and) any *unrecorded* documents affecting the property being surveyed and containing information to which the survey shall make reference, if desired by the client."

24

ALTA/NSPS & 2016 Standards – Sec. 5 - Fieldwork

- 2011 – Do what's required by state law
- 2016 - Same 'default' standard, but *new subjective standard introduced.* Surveyor to include matters detailed in Section 5 (Fieldwork) "located to what is, *in the surveyor's professional opinion, the appropriate degree of precision* based on the planned use of the property, if reported in writing to the surveyor by the client, lender, or insurer…."
- NSPS or state law:
  - 11 different types of surveys
  - Metropolitan vs. rural

25

ALTA/NSPS & 2016 Standards – Sec. 5 "Fieldwork" & Rights of Way

- 2011 Survey to show the *width and location* of an abutting street or right of way.
- 2016 "If the documents provided to or obtained by the surveyor… indicate no access from the surveyed property to the abutting street or highway, *the width and location of the travelled way need not be located.*"
- If documentation regarding the location of any street, road, or highway right of way "*crossing* the property" not disclosed in documents provided to surveyor, and if "not otherwise available", surveyor just has to locate the parcel corners on the same side of the street as the surveyed property.

26

ALTA/NSPS & 2016 Standards – Sec. 5 - Fieldwork

2016 - Character and location of all walls, buildings, fences, and other improvements within five feet of each side of the boundary lines, observed in the process of conducting the fieldwork must be shown "*unless physical access is restricted".* (Surveyor must add a Note to the survey if that's the case.)

2011 – *Show evidence "of use"* by someone other than the occupant on the property being surveyed.

2016 - Surveyor only to show evidence "on or above the surface" which "*may* indicate *utilities* located on, over or beneath the surveyed property." Gouges, etc, that may evidence surface entry for mining?

2016 – Just show water bodies that are "within 5 feet of the perimeter of the property" surveyed.

27

ALTA/NSPS & 2016 Standards –

- If a new description is prepared, surveyor shall state the new description describes the same real estate as the record description or, if it does not, how the new description differs from the record description.
- May eliminate the need for a separate "same-as" affidavit from the surveyor when descriptions differ. Check with UW.

Gaps:

- 2011 - Where gaps or overlaps are identified, the surveyor to disclose that "to the insurer and client for determination of a course of action concerning junior/senior rights…" prior to the preparation of the final plat or map.
- 2016 - Surveyor must disclose the gaps upon the delivery of the survey.

28

Table A

- Parking Requirements as option to be shown; simply refer to the date, source of letter for such requirements.
- Zoning: Letter or report to be provided to the surveyor, to be noted.
- Waste dump, sump or sanitary landfill – No longer identify; optional.
- Wetlands eliminated.
- Insurance – Surveyor will maintain Professional Liability Insurance policy in minimum amount agreed to, but no longer shall be addressed on the face of the plat or map. *Contravention of FL law?*

29

What to Order

- Furnish the title commitment with legible copies of all instruments shown thereon, and unrecorded instruments to be shown.
- Confirm that if the surveyor finds or considers anything to be illegible, to contact the practitioner to address that issue before completion, rather than simply inserting a Note on the final product that something you wanted shown, is illegible.
- Confirm that the surveyor will not deviate from the objective standards set forth in the Florida Administrative Code, but instead perform the survey in accordance therewith.
- Confirm the survey will show the width and location of any and all "travelled ways" including those which abut or cross the land surveyed.
- Confirm physical access to all areas of the land and improvements to be surveyed were not restricted, so that the survey accurately and completely depicts all improvements on the property.

30

What to Order

- Show all structures, activities, and 'scars' on land, and not just evidence of activities on or above the surface which may be evidence of utilities.
- Identify water bodies within 25' of the perimeter of the surveyed land.
- Ask the surveyor to furnish whatever information available regarding the age of monuments or structures on the ground if there are gaps or overlaps among the parcels in a large tract, to facilitate determining junior/senior rights.
- Confirm that the surveyor carries professional liability insurance with limits appropriate to the transaction; that it is in place when the survey is being done and is occurrence based; and otherwise complies with the requirements of the Code.

31

How to Examine – Genuineness

Jacques Replogle & Punjab Relief Surveys
LB #9999
123 Main Street, Anytown, FL 33333-0000
(800) 555-5555

03/29/2017

MARIO MAPPER *DATE*

PROFESSIONAL SURVEYOR AND MAPPER # 3333

STATE OF FLORIDA

9. THIS SURVEY MAP OR THE COPIES THEREOF ARE NOT VALID WITHOUT THE SIGNATURE AND THE ELECTRONIC OR ORIGINAL RAISED SEAL OF A FLORIDA LICENSED SURVEYOR AND MAPPER.

32

How to Examine – "Survey Notes"

BASED UPON TITLE COMMITMENT NO.
OF OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY
BEARING AN EFFECTIVE DATE OF JANUARY 11, 2017 @ 11:00 P.M.

SURVEYOR'S CERTIFICATION

TO:

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT;
OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY;

THIS IS TO CERTIFY THAT THIS MAP OR PLAT AND THE SURVEY ON WHICH IT IS BASED WERE MADE IN ACCORDANCE WITH THE 2016 MINIMUM STANDARD DETAIL REQUIREMENTS FOR ALTA/NSPS LAND TITLE SURVEYS, JOINTLY ESTABLISHED AND ADOPTED BY ALTA AND NSPS, AND INCLUDES ITEMS 1, 2, 3, 4, 6A, 6B, 7A, 7B1, 7C, 8, 9, 10A, 10B, 11, 12, 13, 14, 16, 17, 18, 19 AND 20 OF TABLE A THEREOF. THE FIELD WORK WAS COMPLETED ON 01/30/2017.

33

ALTA/NSPS - Survey Notes

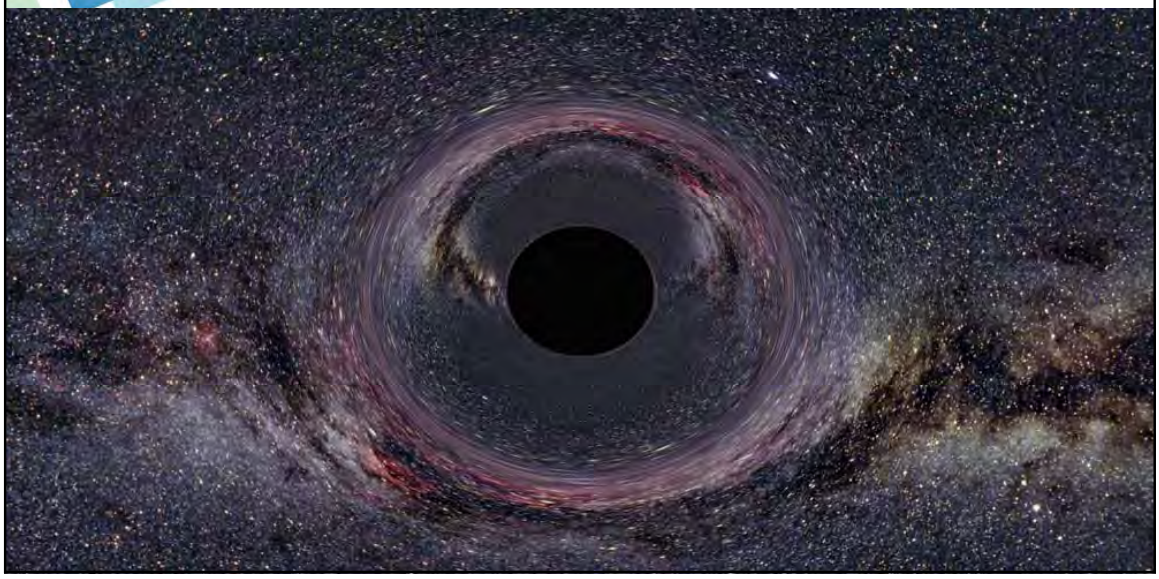
SCHEDULE B II EXCEPTIONS:

(PER OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY COMMITMENT FILE NO. WITH AN EFFECTIVE DATE OF AUGUST 25, 2016)

1–5	NOT A SURVEY MATTER
6	Unimproved Trail Access Road described in Deed recorded in O.R. Book (DOES NOT AFFECT SURVEYED PROPERTY. NOT PLOTTED.)(THE EXISTING UNIMPROVED TRAIL ACCESS ROAD WAS FOUND TO BE LYING EAST OF PARCEL "A" AT THE TIME OF SURVEY.)
7	Easement to the contained in Instrument recorded August 8, 1985, Public Records of County, Florida. (AFFECTS SURVEYED PROPERTY. BLANKET PUBLIC UTILITIES GRANT OF EASEMENT OVER PARCEL "1A" PLOTTED HEREON ON SHEET 1.)(A METES AND BOUNDS DESCRIPTION WAS NOT FURNISHED WITH THE TITLE COMMITMENT AT THE TIME OF SURVEY, THEREFORE THE BLANKET GRANT IS STILL IN EFFECT TO THE BEST OF MY BELIEF.)
8	Easement to Southern Bell Telephone and Telegraphy Company, contained in instrument recorded , Page (AFFECTS SURVEYED PROPERTY. PLOTTED HEREON ON SHEET 2.)

34

ALTA/NSPS Survey Notes

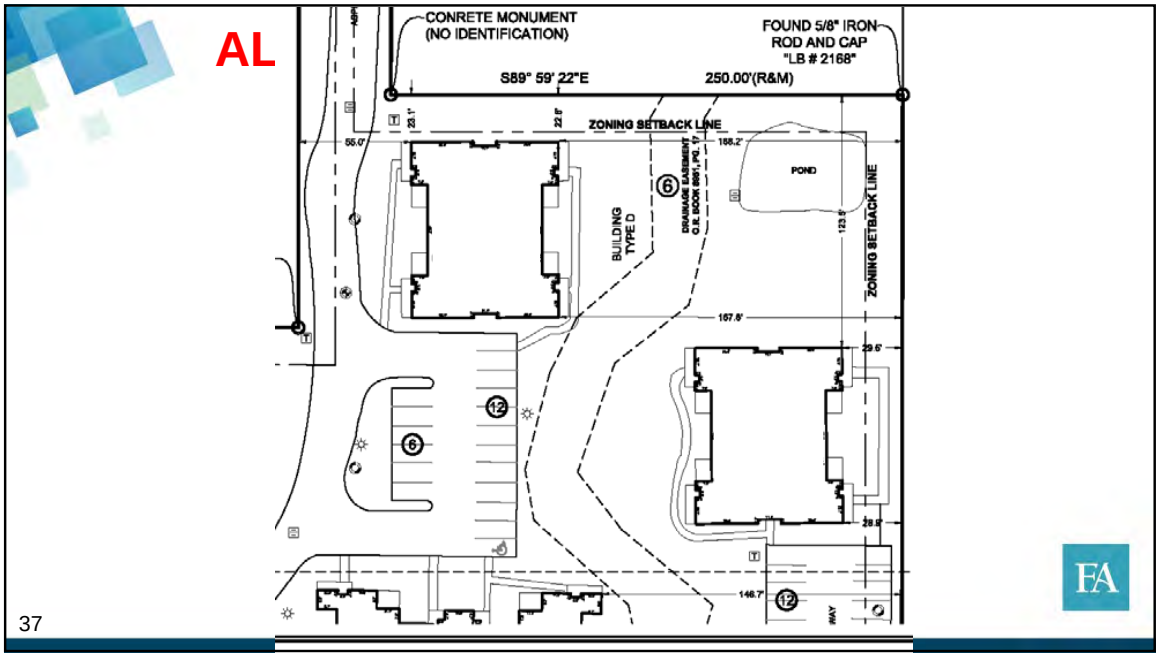


ALTA/NSPS Survey Notes

SURVEYORS NOTES

1. THIS SURVEY DOES NOT DETERMINE OR INDICATE LAND OWNERSHIP.
2. THE SURVEYOR DID NOT RESEARCH OR ABSTRACT THE LAND RECORDS FOR RIGHTS-OF-WAY, EASEMENTS, RESERVATIONS, DEED RESTRICTIONS, ZONING REGULATIONS, SETBACKS, LAND USE PLAN DESIGNATIONS, ADJOINING DEEDS, LIENS, MURPHY ACT RIGHTS-OF-WAY, AREAS OF LOCAL CONCERN, OR OTHER SIMILAR JURISDICTIONAL DETERMINATIONS. TO THE EXTENT THAT THIS TYPE OF INFORMATION IS SHOWN, IT IS SHOWN SOLELY ON THE BASIS OF INFORMATION PROVIDED BY THE CLIENT OR INFORMATION OTHERWISE KNOWN TO THE SURVEYOR AND MAY NOT BE COMPLETE.
3. UNDERGROUND UTILITIES, BUILDING FOUNDATIONS, AND OTHER UNDERGROUND FIXED IMPROVEMENTS WERE NOT LOCATED, UNLESS OTHERWISE INDICATED. TO THE EXTENT THAT THIS TYPE OF INFORMATION IS SHOWN, IT IS SHOWN SOLELY ON THE BASIS OF SURFACE INDICATIONS OBSERVED BY THE SURVEYOR AND MAY NOT BE COMPLETE.
4. JURISDICTIONAL WETLANDS AND ENDANGERED OR THREATENED SPECIES HABITAT, IF ANY, THAT MAY EXIST ON OR AROUND THE SURVEY SITE WERE NOT DETERMINED OR LOCATED. THE SURVEYOR DID NOT OBSERVE ANY EVIDENCE OF WETLAND MARKERS AT THE TIME OF THIS SURVEY.

36


AL
CONRETE MONUMENT
(NO IDENTIFICATION)
FOUND 5/8" IRON
ROD AND CAP
"LB # 2168"
S89° 59' 22"E
250.00'(R&M)
ZONING SETBACK LINE
POND
BUILDING
TYPE D
ZONING SETBACK LINE
FA
37

POISON
ANTIDOTE
FA
38

ALTA/NSPS Survey Notes

10. FENCES SHOWN ON SURVEY ARE FOR ILLUSTRATIVE PURPOSES ONLY. FENCE TIES SHOWN ARE RELATIVE TO THE CENTER OF SAID FENCE. THE SURVEYOR WILL NOT BE RESPONSIBLE FOR DAMAGES RESULTING FROM THE REMOVAL AND/OR CHANGES TO ANY FENCES UNLESS THE SURVEY WAS PROVIDED SPECIFICALLY FOR FENCE LOCATION PURPOSES.

11. AT THE TIME OF OUR VISIT, THE CLIENT/OWNER DID NOT DEFINE WHICH PARTY/DIVISION WALLS WERE TO BE SURVEYED. NO PARTY/DIVISION WALLS WERE OBSERVED IN THE FIELD AT THE TIME OF THIS SURVEY.

39

Survey Dates

Jacques Replogle & Punjab Relief Surveys
LB #9999
123 Main Street, Anytown, FL 33333-0000
(800) 555-5555

03/29/2017

MARIO MAPPER *DATE*

PROFESSIONAL SURVEYOR AND MAPPER # 3333
STATE OF FLORIDA

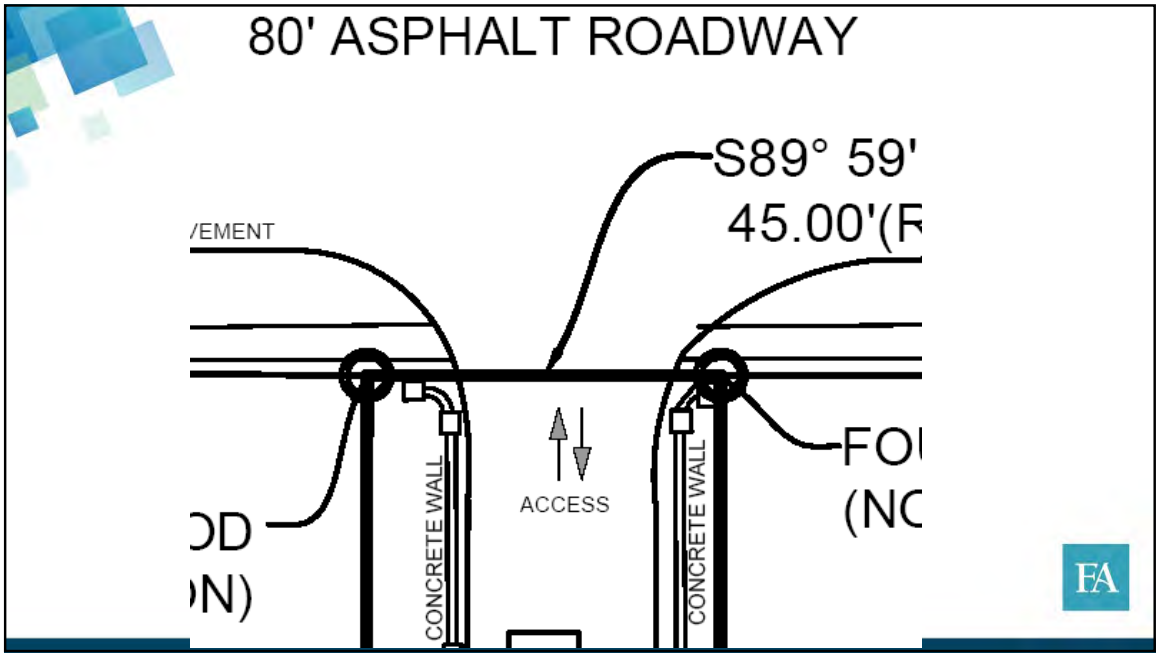
NOT VALID WITHOUT THE SIGNATURE AND ORIGINAL RAISED SEAL OR ELECTRONIC SEAL OF THE FLORIDA LICENSED SURVEYOR ABOVE. THE SURVEYOR HEREBY CERTIFIES THAT THE ELECTRONIC SIGNATURE AND SEAL HEREON MEETS PROCEDURES SET FORTH IN CHAPTER 5J-17.062 OF THE FLORIDA ADMINISTATIVE CODE, PURSUANT TO SECTION 472.025, FLORIDA STATUTES.

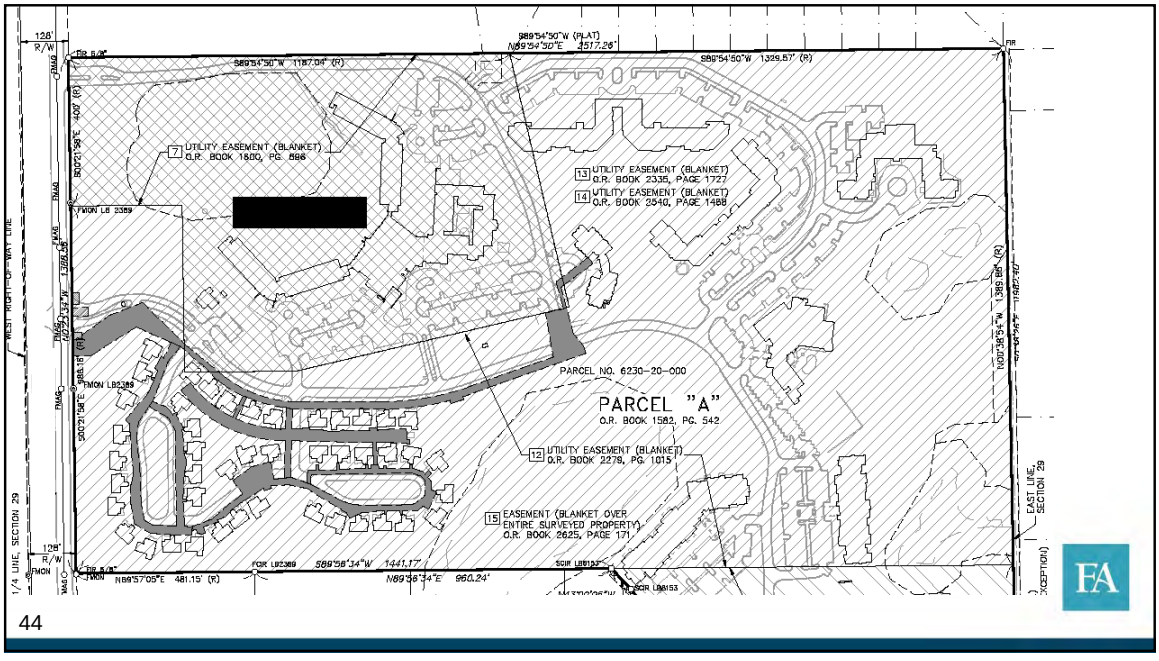
Survey Dates

8. THE SURVEY DATE IS THE FIELD DATE SHOWN IN THE TITLE BLOCK, NOT THE SIGNATURE DATE.

DATE	DESCRIPTION	DATE	DESCRIPTION
02/06/2017	FIRST DRAFT	03/29/2017	NETWORK COMMENTS
02/08/2017	NETWORK COMMENTS		
02/21/2017	NETWORK COMMENTS		
03/16/2017	NETWORK COMMENTS		
03/25/2017	NETWORK COMMENTS		
03/28/2017	NETWORK COMMENTS		

22. LATEST FIELD SURVEY DATE - 03/08/2017


80' ASPHALT ROADWAY
S89° 59'
45.00'(R
/EMENT
ACCESS
CONCRETE WALL
CONCRETE WALL
FA


PARCEL "A"
O.R. BOOK 1582, PG. 542
PARCEL NO. 6230-20-000
UTILITY EASEMENT (BLANKET)
O.R. BOOK 1600, PG. 898
UTILITY EASEMENT (BLANKET)
O.R. BOOK 2335, PAGE 1727
UTILITY EASEMENT (BLANKET)
O.R. BOOK 2540, PAGE 1488
UTILITY EASEMENT (BLANKET)
O.R. BOOK 2278, PG. 1015
EASEMENT (BLANKET OVER ENTIRE SURVEYED PROPERTY)
O.R. BOOK 2625, PAGE 171
EAST LINE, SECTION 29
FA
44

ALTA/NSPS Survey Notes

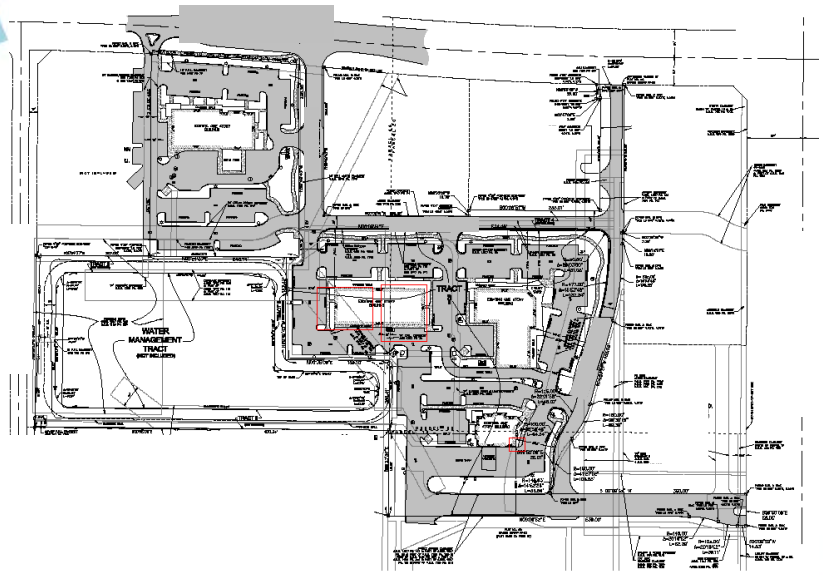
ITEMS CORRESPONDING TO SCHEDULE B-II

5 EASEMENT IN FAVOR OF AS MODIFIED IN BOOK PAGE **THIS IS LOCATED ON ALL OF THE SURVEYED PROPERTY, AND IS BLANKET IN NATURE AND NOT SHOWN HEREON.**

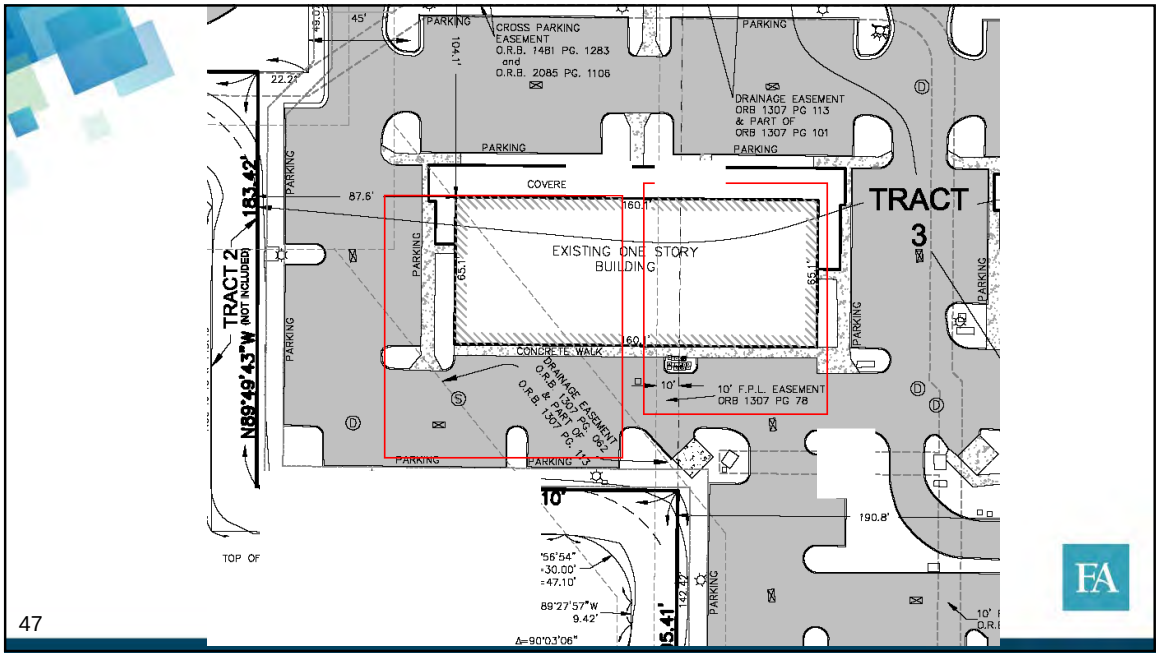
6 DRAINAGE EASEMENT IN FAVOR OF **THIS IS LOCATED ON A PORTION OF THE SURVEYED PROPERTY AND IS SHOWN HEREON.**

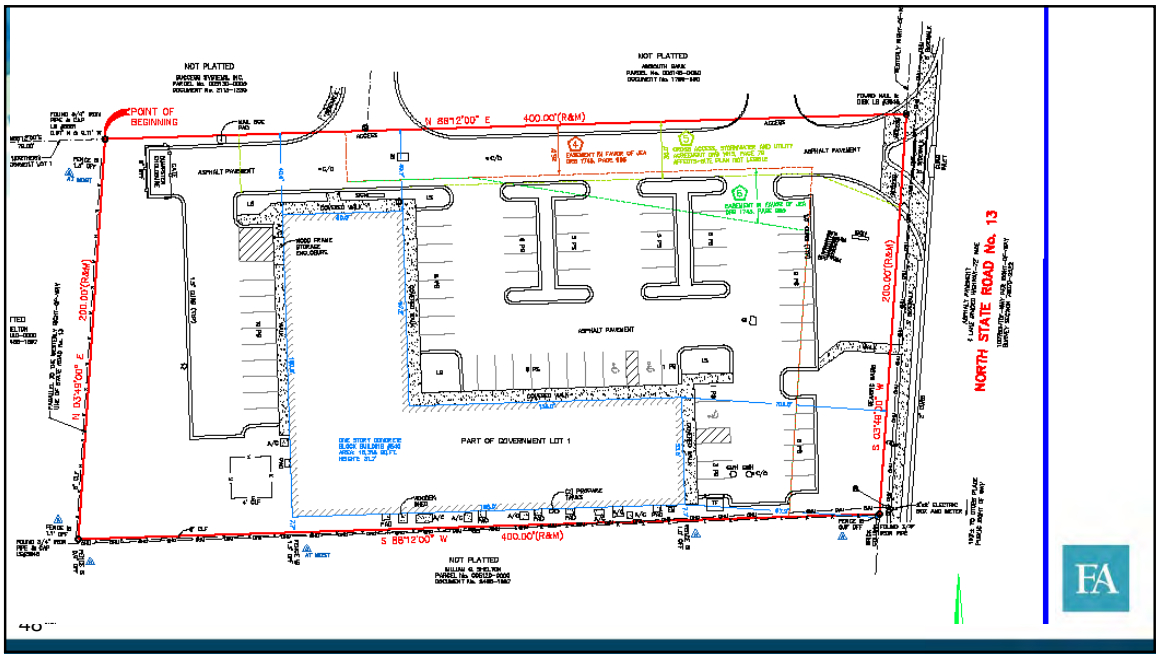
7 MEMORANDUM OF AGREEMENT BY AND BETWEEN **THIS IS LOCATED ON ALL OF THE SURVEYED PROPERTY, AND IS BLANKET IN NATURE AND NOT SHOWN HEREON.**

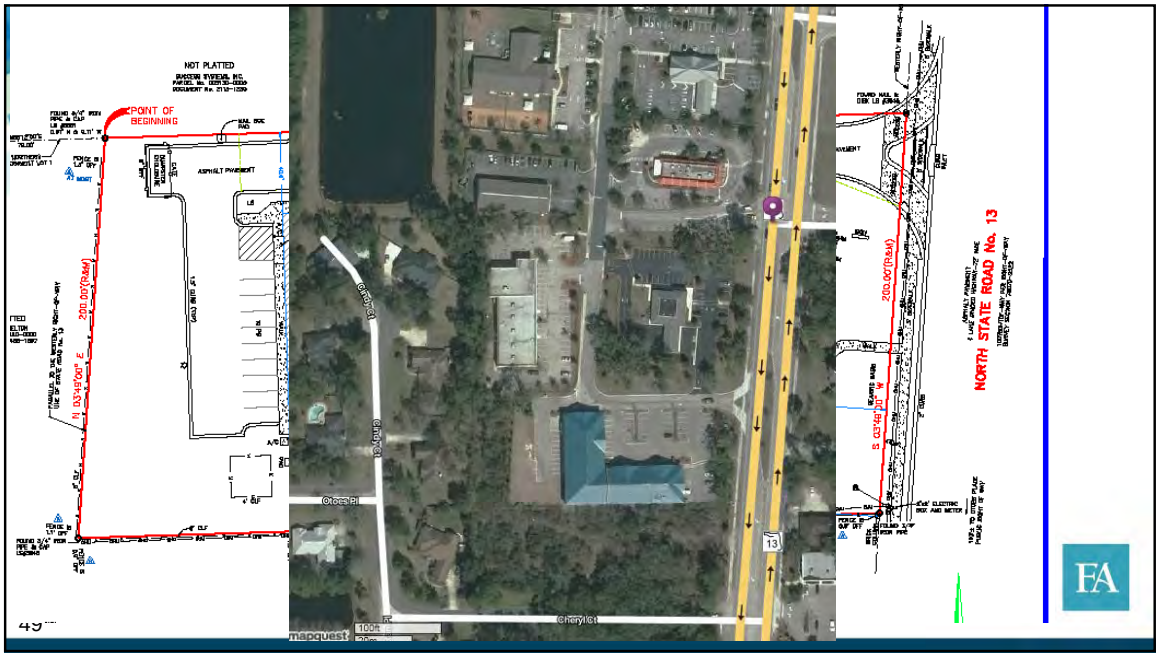
45

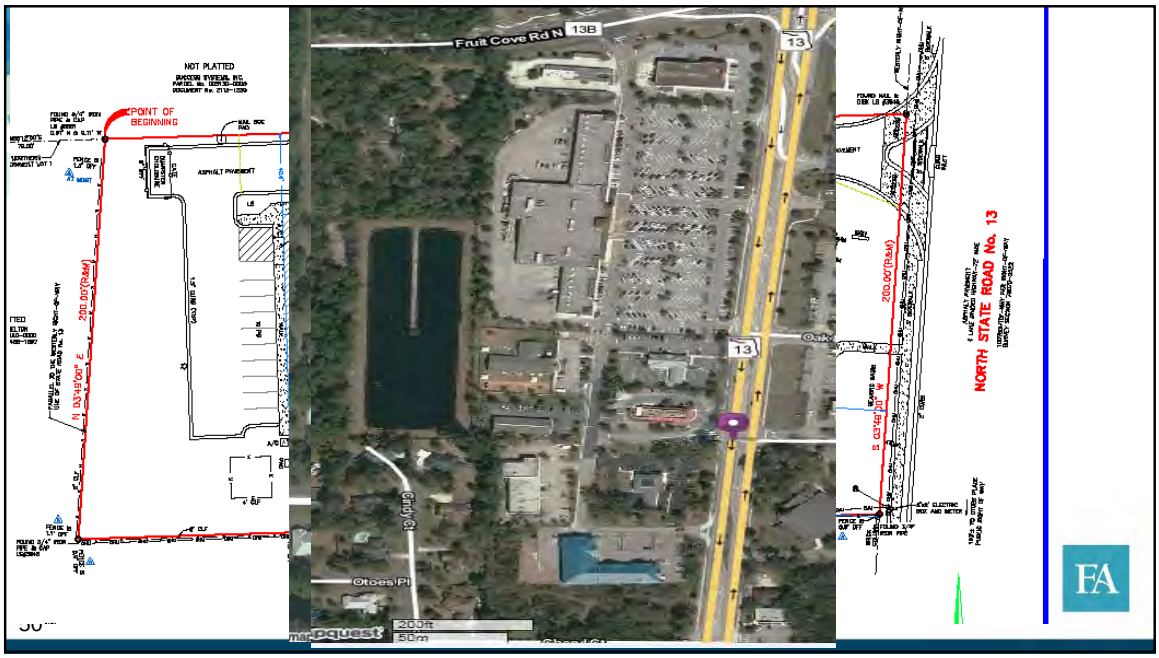


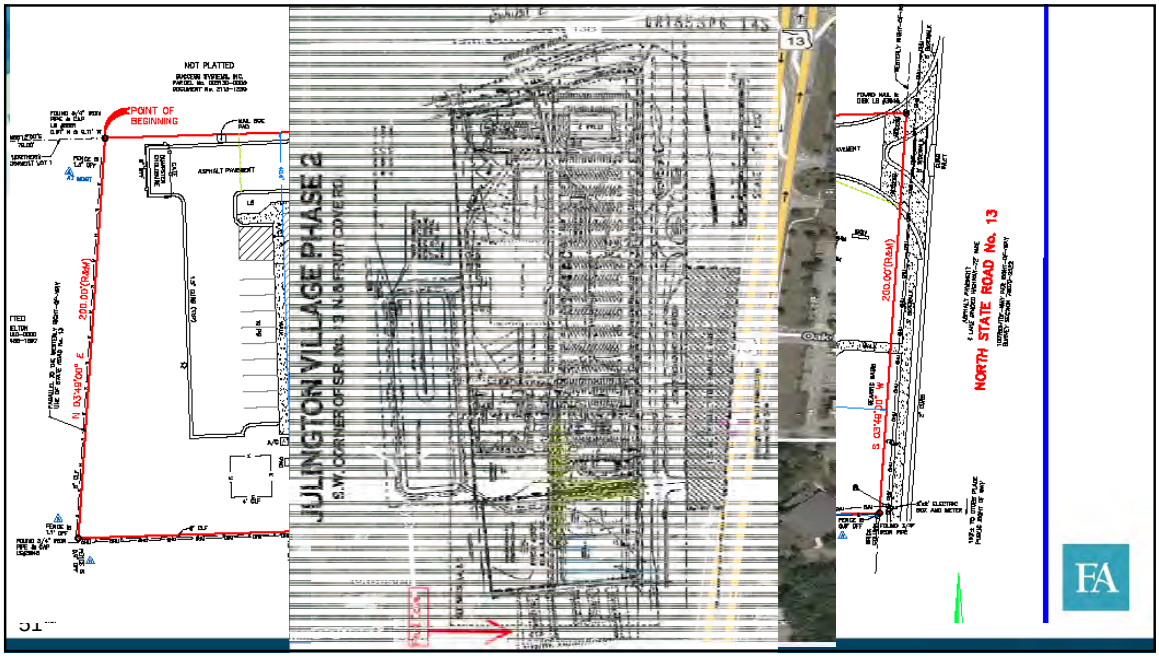
46

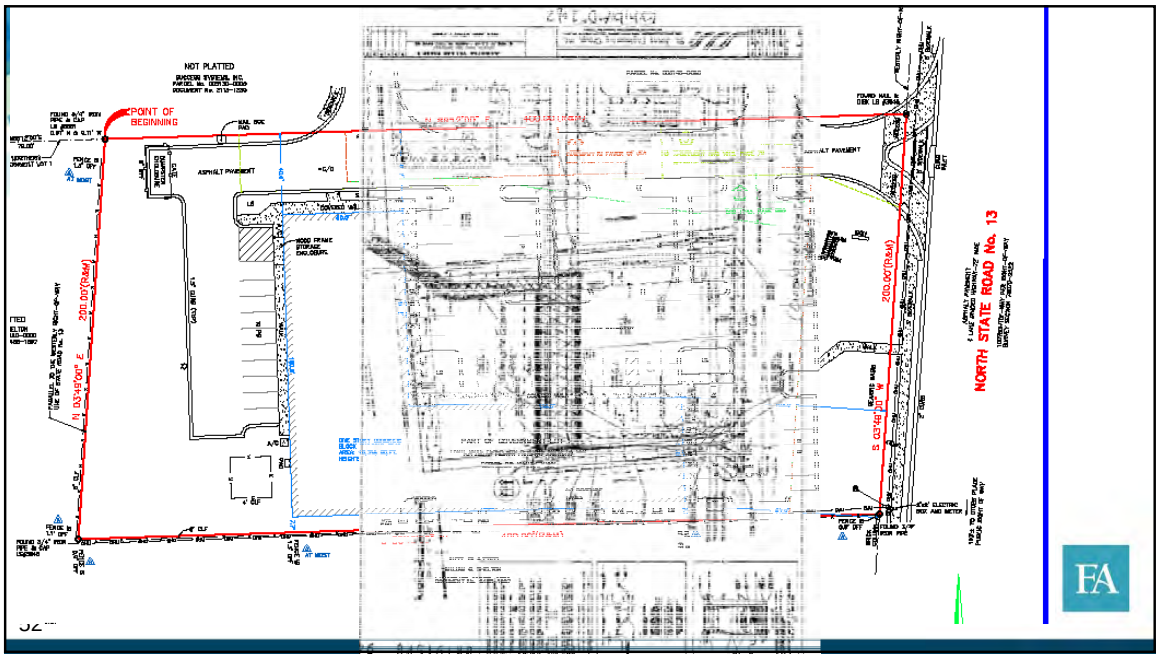

PARKING
CROSS PARKING EASEMENT O.R.B. 1481 PG. 1283 and O.R.B. 2085 PG. 1106
DRAINAGE EASEMENT ORB 1307 PG 113 & PART OF ORB 1307 PG 101
COVERE
TRACT 3
EXISTING ONE STORY BUILDING
TRACT 2 (NOT INCLUDED)
N89°49'43"W 183.42'
87.6'
160.1'
65.1'
CONCRETE WALK
10' F.P.L. EASEMENT ORB 1307 PG 78
DRAINAGE EASEMENT O.R.B. 1307 PG. 113 & PART OF O.R.B. 1307 PG. 063
190.8'
TOP OF
89°27'57"W 9.42'
Δ=90°03'06"
47

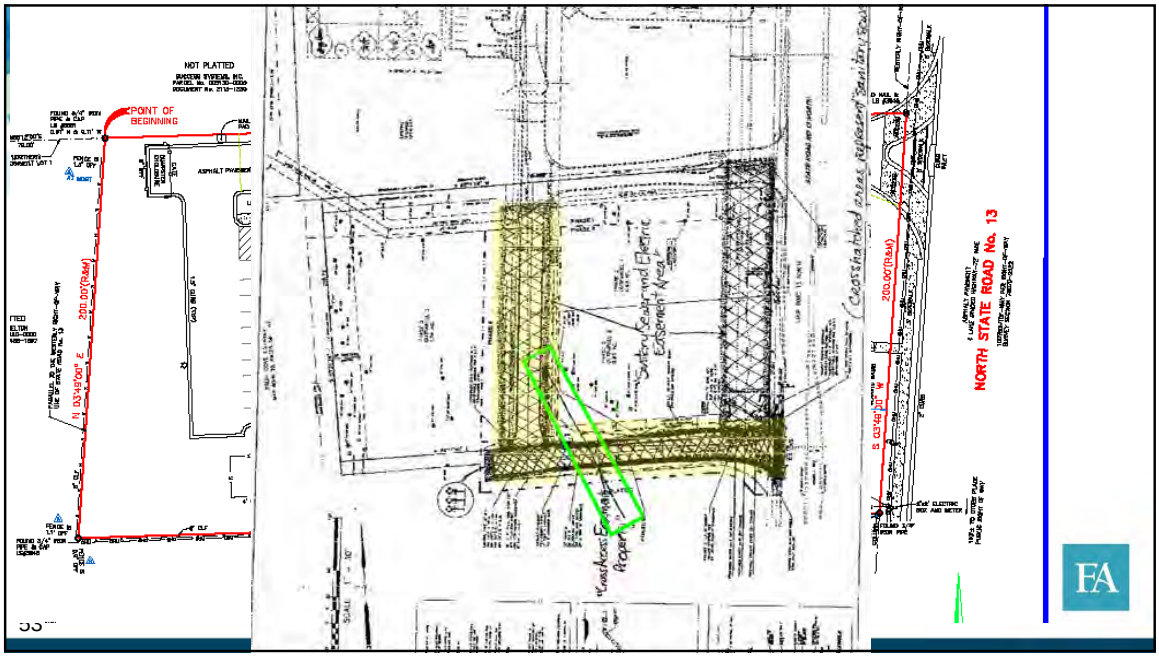

NOT PLATTED
POINT OF BEGINNING
N 88°12'00" E 400.00'(R&M)
ASPHALT PAVEMENT
200.00'(R&M)
N 03°48'00" E
PART OF GOVERNMENT LOT 1
S 88°12'00" W 400.00'(R&M)
NORTH STATE ROAD No. 13
S 03°48'00" W
46

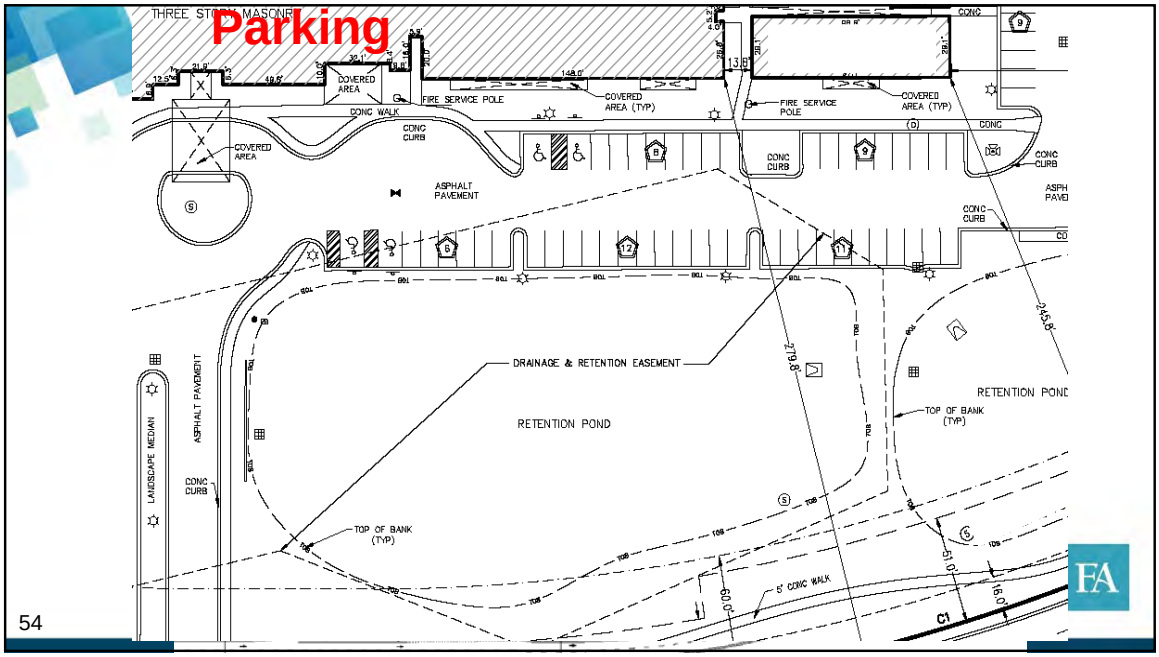

NOT PLATTED
POINT OF BEGINNING
NORTH STATE ROAD No. 13
Otoes Pl
Cheryl Ct
13
marquest


NOT PLATTED
POINT OF BEGINNING
Fruit Cove Rd N
13B
NORTH STATE ROAD No. 13
Otoes Pl
13
marquest


JULINGTON VILLAGE PHASE 2
S.W. CORNER OF SR No. 13 & FRUITVILLE
NOT PLATTED
POINT OF BEGINNING
ASPHALT PAVEMENT
200.00'(R&M)
N 03°49'00" E
NORTH STATE ROAD No. 13
FA


NOT PLATTED
POINT OF BEGINNING
ASPHALT PAVEMENT
200.00'(R&M)
N 03°49'00" E
NORTH STATE ROAD No. 13
FA


POINT OF BEGINNING
NOT PLATTED
ASPHALT PAVEMENT
NORTH STATE ROAD No. 13
FA

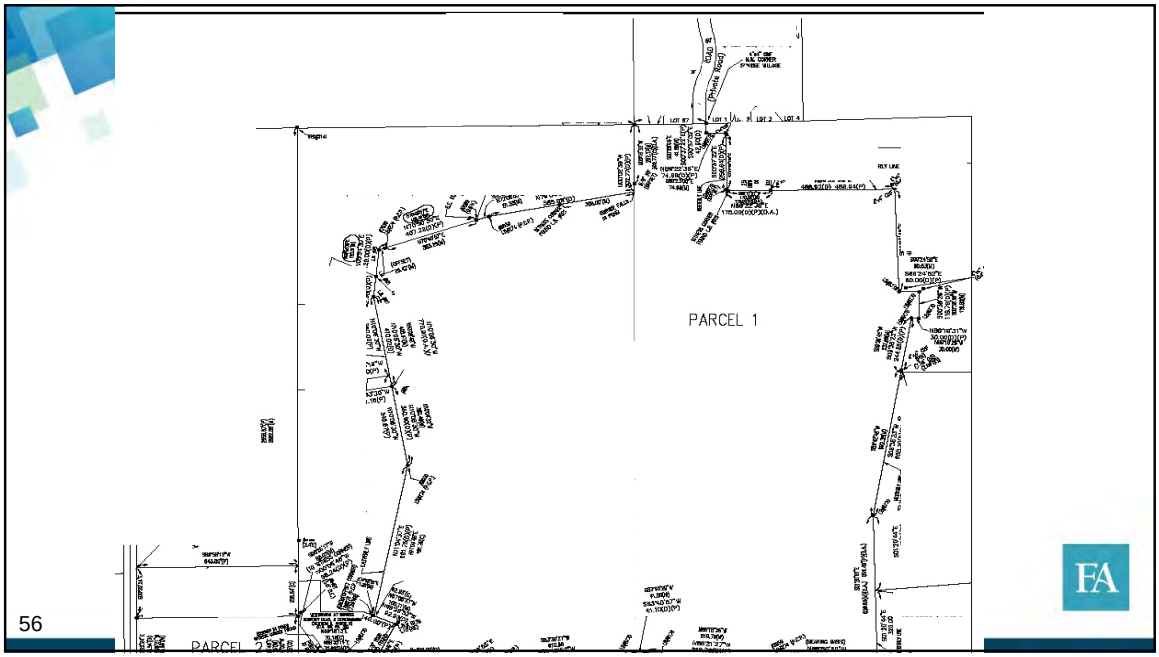

Parking
THREE STORY MASONRY
COVERED AREA
CONC WALK
CONC CURB
FIRE SERVICE POLE
COVERED AREA (TYP)
ASPHALT PAVEMENT
DRAINAGE & RETENTION EASEMENT
RETENTION POND
TOP OF BANK (TYP)
LANDSCAPE MEDIAN
5' CONC WALK
FA
54

Access – "301"

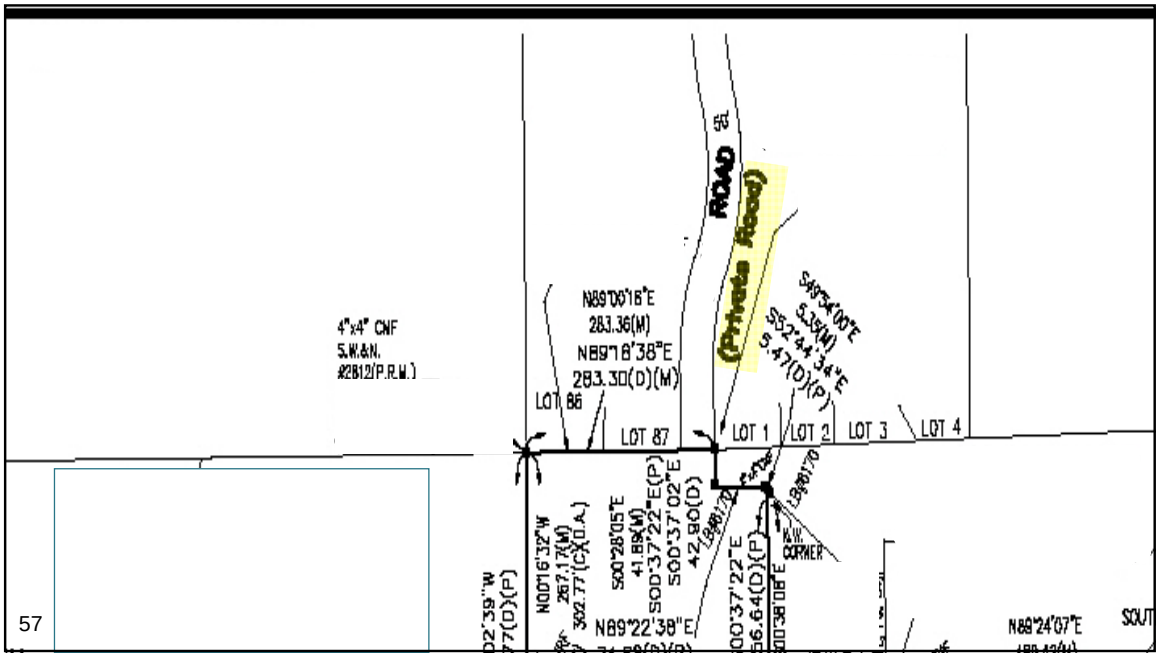
Not just legal access, but sufficient for the client's particular use

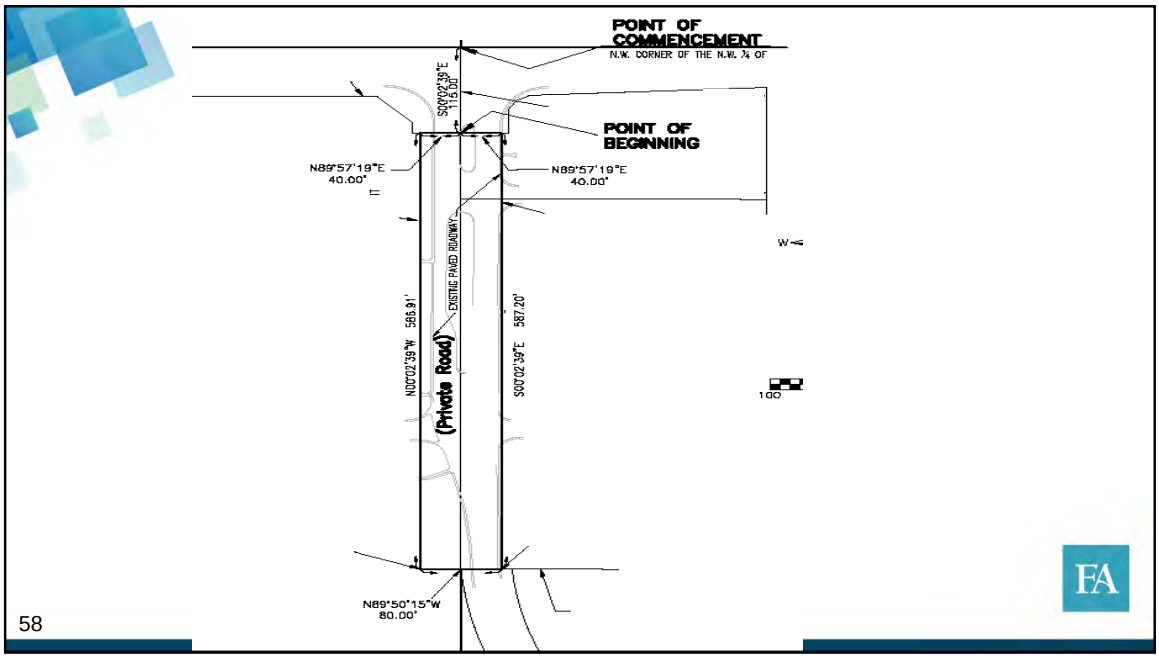
- Professional Offices vs. Retail
  - Number of curb cuts, sufficient linear feet, type of road
  - Parking
- Multiple Uses – Original to Now
  - Shopping Center vs. Charter School
  - Shipping and the New Economy, 110' vs. 180'
- The Changed Use – Golf Course communities

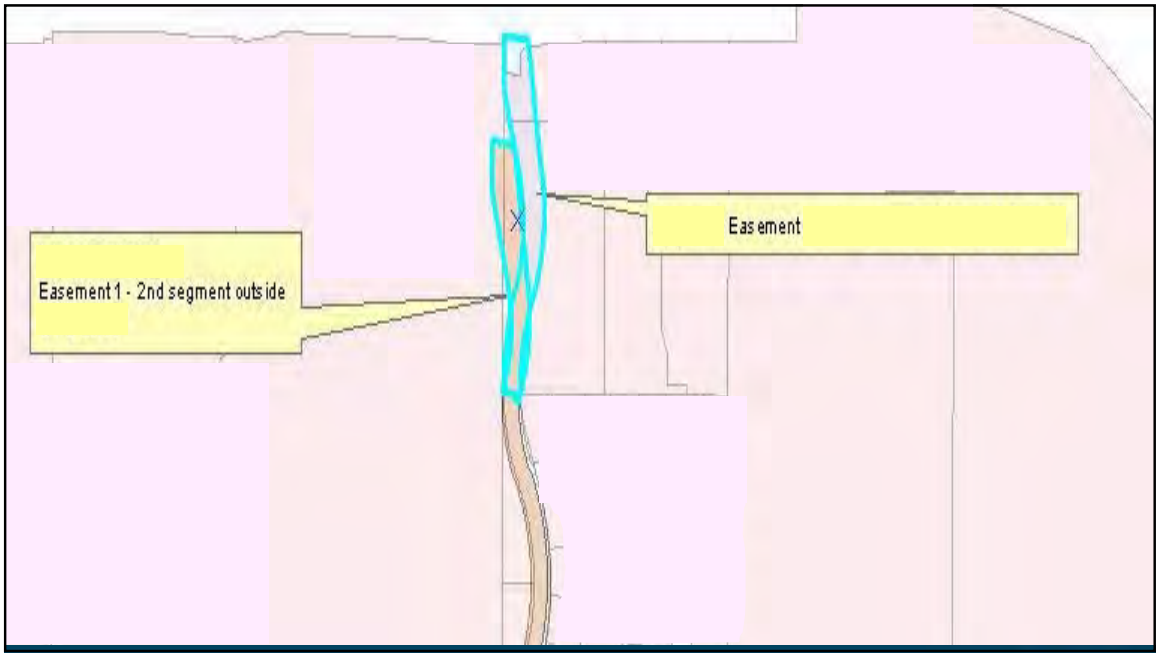
55

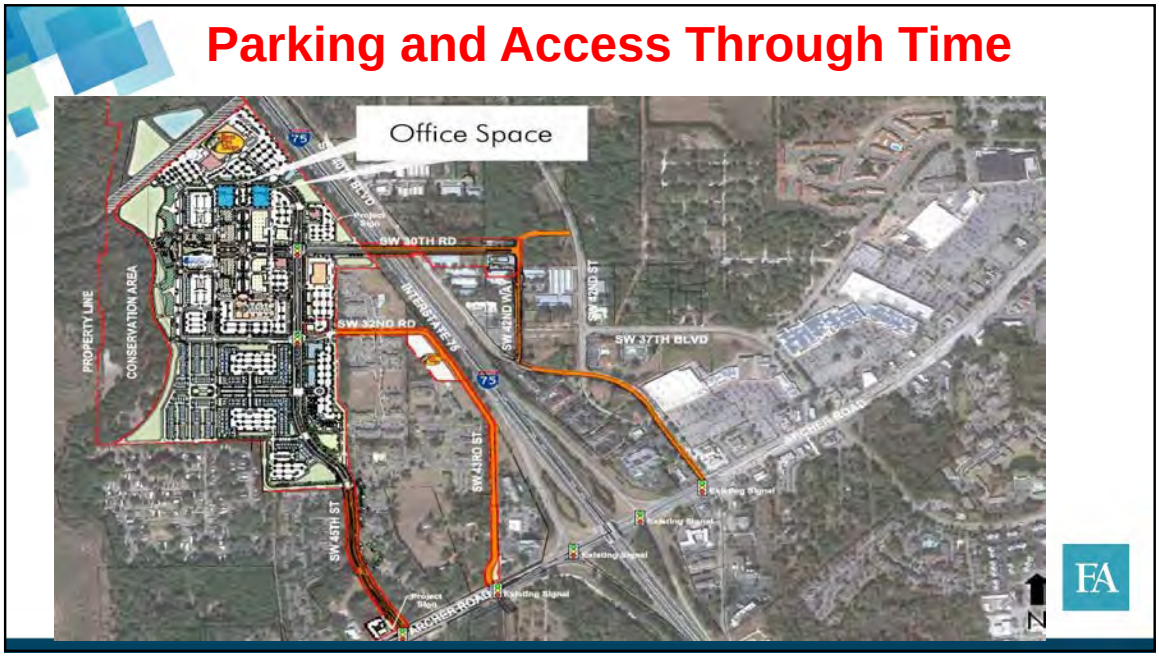


56

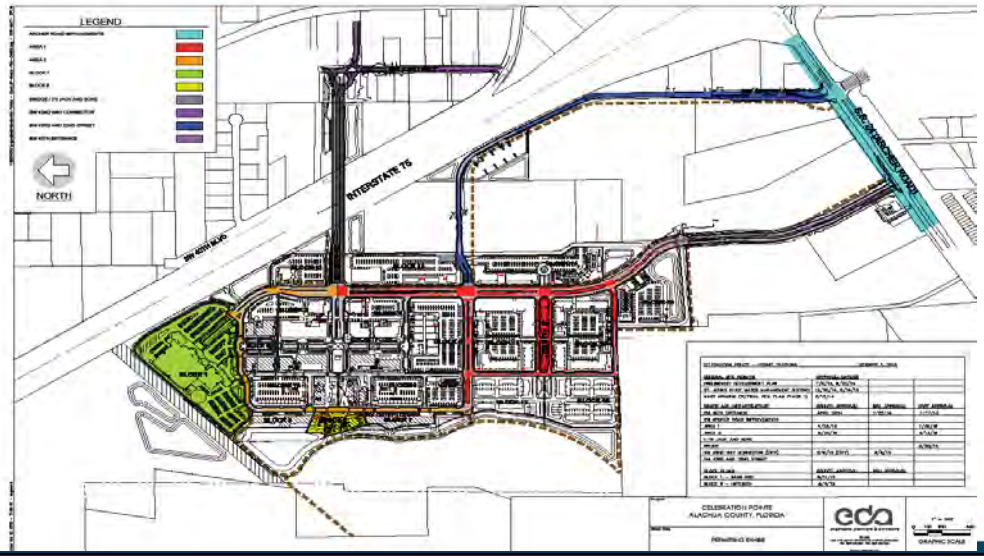

4"x4" CNF
S.W.&N.
#2812(P.R.M.)
N89°06'16"E
283.36(M)
N89°18'38"E
283.30(D)(M)
ROAD
(Private Road)
LOT 86
LOT 87
LOT 1
LOT 2
LOT 3
LOT 4
N89°22'38"E
N89°24'07"E
57


POINT OF COMMENCEMENT
N.W. CORNER OF THE N.W. ¼ OF
POINT OF BEGINNING
N89°57'19"E
40.00'
N89°57'19"E
40.00'
(Private Road)
EXISTING PAVED ROADWAY
N89°50'15"W
80.00'
100'
58


Easement
Easement 1 - 2nd segment outside


Parking and Access Through Time
Office Space
SW 30TH RD
SW 32ND RD
SW 37TH BLVD
SW 45TH ST
SW 43RD ST
SW 42ND ST
SW 42ND WAY
INTERSTATE 75
ARCHER ROAD
PROPERTY LINE
CONSERVATION AREA
N

Parking and Access Through Time



61

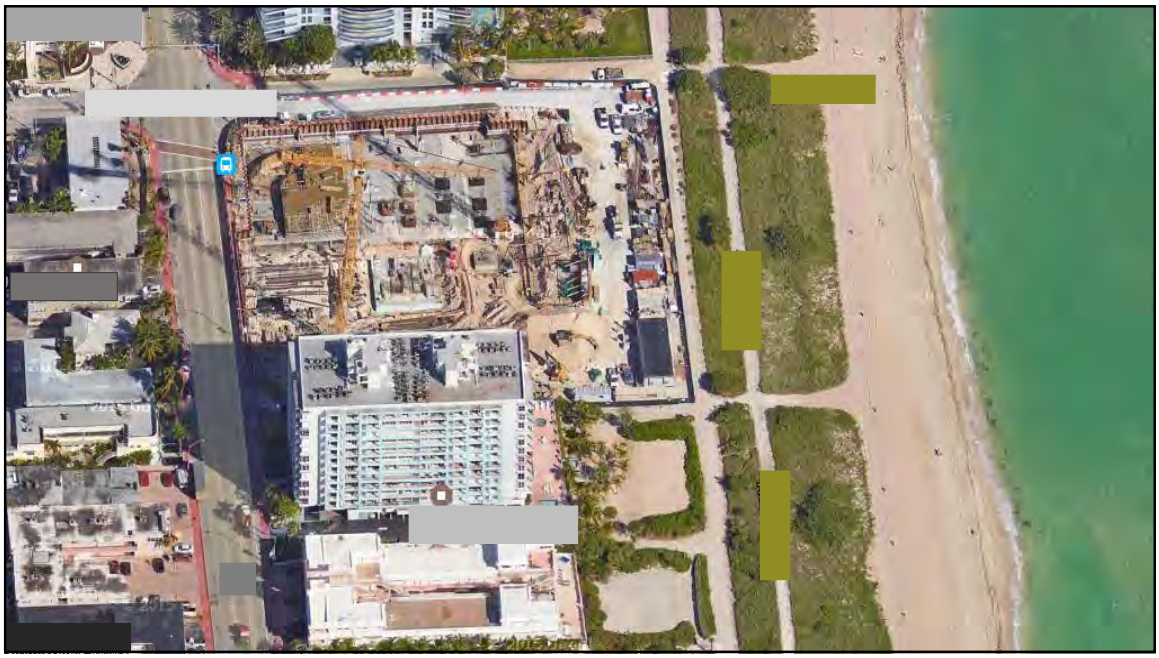
Viewer Discretion Advised!!!

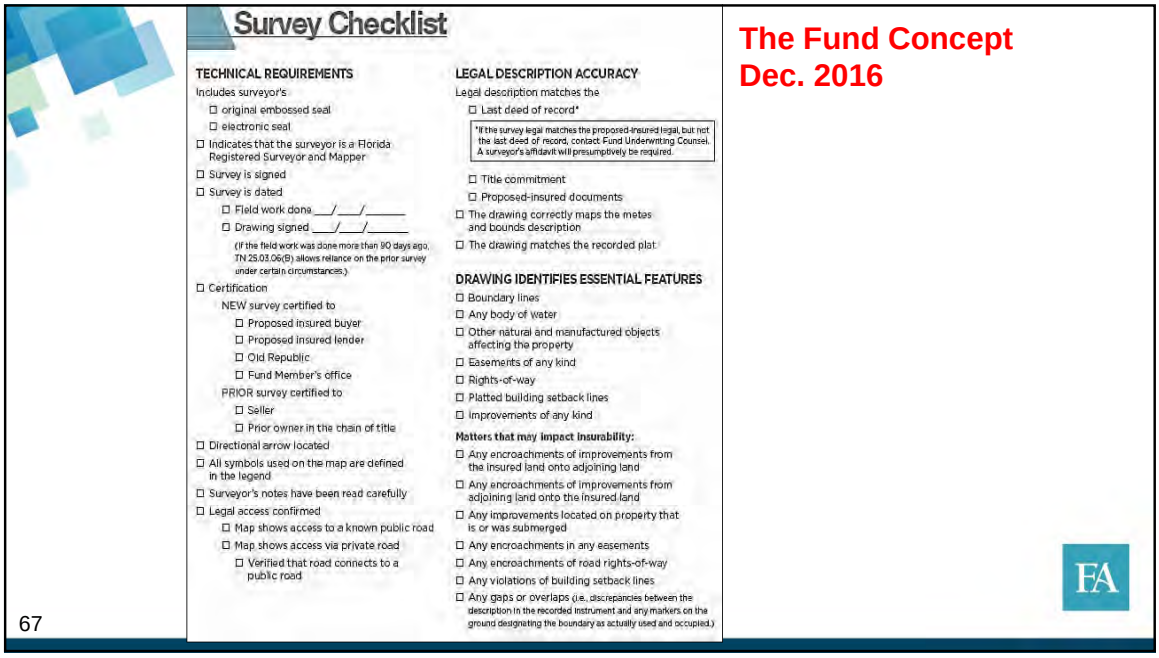
62

It's June in Miami!
63

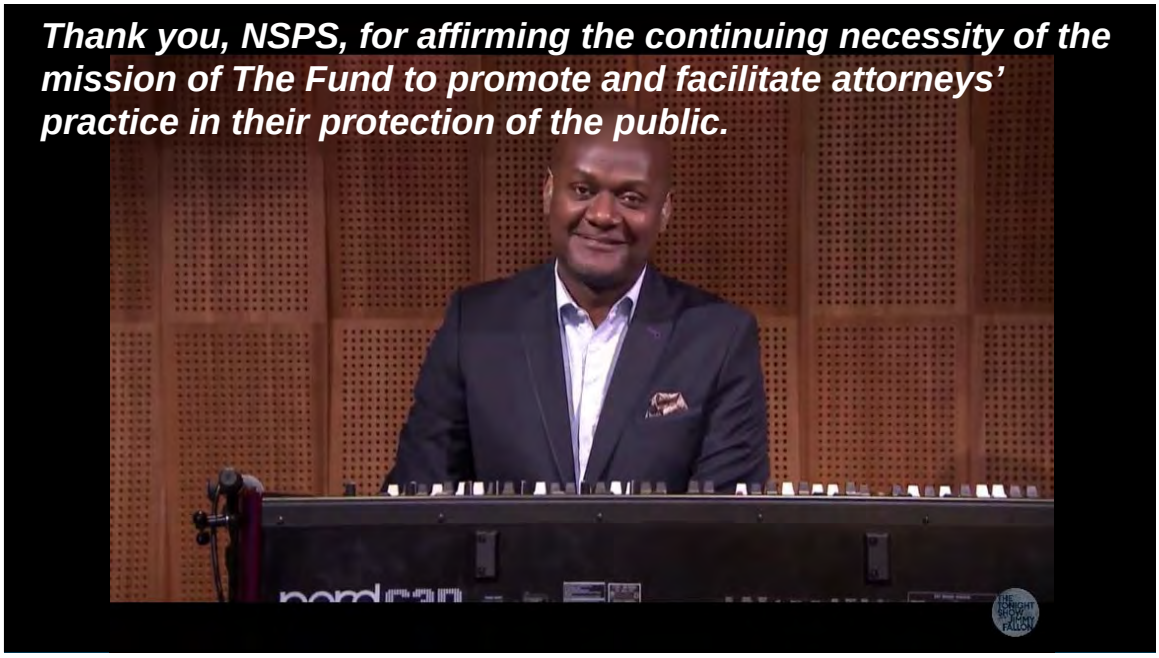
OCEAN FRONT
RIPARIAN RIGHTS
PROTECTIVE RESTRICTIONS
50 FOOT LOTS HERE
ALTOS DEL MAR
$745.00 AND UP.
Easy Terms.
TATUM BROS. COMPANY
OWNERS & DEVELOPERS
150-154 E. FLAGLER ST. Miami.
GEO. A. RANDEL SALES DIRECTOR.
PURE WATER
ELECTRIC LIGHTS
PAVED STREETS
64

1
2
3
65




Survey Checklist
TECHNICAL REQUIREMENTS
Includes surveyor's
☐ original embossed seal
☐ electronic seal
☐ Indicates that the surveyor is a Florida Registered Surveyor and Mapper
☐ Survey is signed
☐ Survey is dated
☐ Field work done ___/___/_____
☐ Drawing signed ___/___/_____
(If the field work was done more than 90 days ago, TN 25.03.06(B) allows reliance on the prior survey under certain circumstances.)
☐ Certification
NEW survey certified to
☐ Proposed insured buyer
☐ Proposed insured lender
☐ Old Republic
☐ Fund Member's office
PRIOR survey certified to
☐ Seller
☐ Prior owner in the chain of title
☐ Directional arrow located
☐ All symbols used on the map are defined in the legend
☐ Surveyor's notes have been read carefully
☐ Legal access confirmed
☐ Map shows access to a known public road
☐ Map shows access via private road
☐ Verified that road connects to a public road
LEGAL DESCRIPTION ACCURACY
Legal description matches the
☐ Last deed of record*
*If the survey legal matches the proposed-insured legal, but not the last deed of record, contact Fund Underwriting Counsel. A surveyor's affidavit will presumptively be required.
☐ Title commitment
☐ Proposed-insured documents
☐ The drawing correctly maps the metes and bounds description
☐ The drawing matches the recorded plat
DRAWING IDENTIFIES ESSENTIAL FEATURES
☐ Boundary lines
☐ Any body of water
☐ Other natural and manufactured objects affecting the property
☐ Easements of any kind
☐ Rights-of-way
☐ Platted building setback lines
☐ Improvements of any kind
Matters that may impact insurability:
☐ Any encroachments of improvements from the insured land onto adjoining land
☐ Any encroachments of improvements from adjoining land onto the insured land
☐ Any improvements located on property that is or was submerged
☐ Any encroachments in any easements
☐ Any encroachments of road rights-of-way
☐ Any violations of building setback lines
☐ Any gaps or overlaps (i.e., discrepancies between the description in the recorded instrument and any markers on the ground designating the boundary as actually used and occupied.)
The Fund Concept
Dec. 2016
67

Thank you, NSPS, for protecting surveyors more, while making practice for attorneys more difficult.



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Cell (904) 607-3277
Fax (407) 563-1903

JKearn@TheFund.com

CHAPTER 5J-17
BOARD OF PROFESSIONAL SURVEYORS AND MAPPERS

5J-17.050 Definitions
5J-17.051 Standards of Practice: General Survey, Map, and Report Content Requirements
5J-17.052 Standards of Practice: Specific Survey, Map, and Report Requirements
5J-17.053 Standards of Practice – Professional Matters in Surveying and Mapping
5J-17.060 Seals Acceptable to the Board
5J-17.061 Seal and Signature
5J-17.062 Procedures for Signing and Sealing Electronically Transmitted Plans, Specifications, Reports or Other Documents
5J-17.063 Certificates of Authorization

5J-17.050 Definitions.

As used in this chapter, the following terms have the following meanings:

(1) Benchmark: a relatively permanent material object, natural or artificial, bearing a marked point whose elevation above or below an adopted datum plane is known.

(2) Corner: a point on a land boundary that designates a change in direction, for example: points of curvature, points of tangency, points of compound curvature and so forth.

(3) Geodetic: a survey or mapping process that takes into account the curvature of the earth and astronomic observations, and which results in positions expressed on a recognized datum.

(4) Map of Survey (or Survey Map): a graphical or digital depiction of the facts of size, shape, identity, geodetic location, or legal location determined by a survey. The term "Map of Survey" (Survey Map) includes the terms: Sketch of Survey, Plat of Survey, or other similar titles. "Map of Survey" or "Survey Map" may also be referred to as "a map" or "the map."

(5) Monument: an artificial or natural object that is permanent or semi-permanent, and used or presumed to occupy any real property corner, point on a boundary line, or reference point.

(6) Ortho-Images/Photos: a synthetically produced image in which positions of features are properly located in the specific map projection. Generally, this involves correction of a perspective image for relief displacement and scale variation so that the resulting scale is uniform throughout.

(7) Photogrammetric Methods: a means of surveying and mapping that involves: making precise measurements from a combination of ground control, photographs and other sources of imagery, to document, within pre-ordained accuracies, the existence, the identity, the location and the size of selected features.

(8) Raster Images: a two-dimensional matrix of digital picture elements whose values represent levels of energy reflected or emitted by the surface being photographed, scanned, or otherwise sensed.

(9) Reference Point: any defined position that is or can be established in relation to another defined position.

(10) Survey: the orderly process of determining facts of size, shape, identity, geodetic location, or legal location by viewing and applying direct measurement of features on or near the earth's surface using field or image methods; defined as follows according to the type of data obtained, the methods used, and the purpose(s) to be served:

(a) As-Built Survey: a survey performed to obtain horizontal and/or vertical dimensional data so that constructed improvements may be located and delineated; also known as a Record Survey.

(b) Boundary Survey: a survey, the primary purpose of which is to document the perimeters, or any one of them, of a parcel or tract of land by establishing or re-establishing corners, monuments, and boundary lines for the purposes of describing the parcel, locating fixed improvements on the parcel, dividing the parcel, or platting.

(c) Condominium Survey: a survey performed pursuant to Chapter 718, F.S.; includes a Boundary Survey.

(d) Construction Layout Survey: the measurements made, prior to or while construction is in progress, to control elevation, configuration, and horizontal position and dimensions.

(e) Control Survey: a survey which provides horizontal or vertical position data for the support or control of subordinate surveys or for mapping.

(f) Hydrographic Survey: a survey having as its principal purpose the determination of data relating to bodies of water, and which may consist of the determination of one or several of the following classes of data: depth of water and configuration of bottom; directions and force of current; heights and times of water stages; and location of fixed objects for survey and navigation

purposes.

(g) Mean High Water Line Survey: a survey to document the mean high water line as defined in Chapter 177, Part II, F.S.

(h) Quantity Survey: a survey to obtain measurements of quantity.

(i) Record Survey: a survey performed to obtain horizontal and/or vertical dimensional data so that constructed improvements may be located and delineated; also known as an As-Built Survey.

(j) Specific or Special Purpose Survey: a survey performed for a purpose other than the purposes detailed in paragraphs (10)(a)-(i) or (k) of this rule.

(k) Topographic Survey: a survey of selected natural and artificial features of a part of the earth's surface to determine horizontal and vertical spatial relations.

(11) Survey and Map Report: a written document, sometimes referred to as "a report" or "the report," detailing methods used, measurements and computations made, accuracies obtained, and information obtained or developed by surveying and mapping techniques.

(12) Surveying and Mapping: a process of direct measurement and analysis specifically designed to document the existence, the identity, the location, and the dimension or size of natural or artificial features on land or in the air, space or water for the purpose of producing accurate and reliable maps, suitable for visualization if needed, of such documentation.

(13) Product: the final drawings, plans, specifications, plats or reports of the professional surveyor and mapper in responsible charge.

(14) Work Product: the final drawings, plans, specifications, plats, reports, and all related calculations and field notes of the professional surveyor and mapper in responsible charge or made under his/her supervision.

(15) Licensee: any person or business entity that has been issued, pursuant to this chapter, a registration, certificate, or license by the Department.

(16) Faithful Agent: a licensee acting in professional surveying matters who safeguards as confidential any information obtained by the licensee as to the business affairs, technical methods or processes of a client or employer, and who avoids or discloses a conflict of interest that might influence the licensee's actions or judgment.

(17) Conflict of Interest: a conflict between one's duty to act for the benefit of the public or a specific individual or entity, and the interests of self or others; which conflict has the potential of influencing, or the appearance of influencing, the exercise of one's professional judgment in carrying out that duty.

Rulemaking Authority 472.008, 472.027 FS. Law Implemented 472.027 FS. History–New 9-1-81, Formerly 21HH-6.02, Amended 12-18-88, Formerly 21HH-6.002, Amended 12-25-95, 5-25-99, 3-25-01, 3-13-03, 4-4-06, Formerly 61G17-6.002, Amended 5-11-15.

5J-17.051 Standards of Practice: General Survey, Map, and Report Content Requirements.

(1) Nothing in these rules shall preclude a surveyor and mapper from entering into a contract with a client which requires more stringent surveying and mapping standards than those set forth in this rule.

(2) Survey Data:

(a) Regulatory objective: The public must be able to rely on the accuracy of measurements and maps produced by a surveyor and mapper.

(b) Surveyors and mappers must achieve the following minimum standards of accuracy, completeness, and quality:

1. The accuracy of the survey measurements shall be premised upon the type of survey and the expected use of the survey and map. All measurements must be in accordance with the United States standard, using either feet or meters.

2. Records of these measurements shall be maintained for each survey by either the individual surveyor and mapper or the surveying and mapping business entity.

3. Measurement and computation records must be dated and must contain sufficient data to substantiate the survey map and insure that the accuracy portion of these standards has been met.

(3) Surveys, Maps, and/or Survey Products Content.

(a) Regulatory objective: In order to avoid misuse of a survey and map, the surveyor and mapper must adequately communicate the survey results to the public through a map, report, or report with an attached map. Any survey map or report must identify the responsible surveyor and mapper and contain standard content.

(b) Surveyors and mappers must meet the following minimum standards of accuracy, completeness, and quality:

1. Each survey map and report shall state the type of survey it depicts consistent with the types of surveys defined in paragraphs

5J-17.050(10)(a)-(k), F.A.C. The purpose of a survey, as set out in paragraphs 5J-17.050(10)(a)-(k), F.A.C., dictates the type of survey to be performed and depicted, and a licensee may not avoid the minimum standards required by rule of a particular survey type merely by changing the name of the survey type to conform with what standards or lack of them the licensee chooses to follow.

2. All survey maps and reports must bear the name, certificate of authorization number, and street and mailing address of the business entity issuing the map and report, along with the name and license number of the surveyor and mapper in responsible charge. The name, license number, and street and mailing address of a surveyor and mapper practicing independent of any business entity must be shown on each survey map and report.

3. All survey maps must reflect a survey date, which is the date of data acquisition. When the graphics of a map are revised, but the survey date stays the same, the map must list dates for all revisions.

4. The survey map and report and the copies of the survey map and report, except those with electronic signature and electronic seal, must contain a statement indicating that the survey map and report or the copies thereof are not valid without the signature and the original raised seal of a Florida licensed surveyor and mapper.

5. If either the business entity or the individual licensee does not possess professional liability insurance, then the map, report, and/or survey must contain the following printed statement in letters at least 1/4" high: The survey depicted here is not covered by professional liability insurance.

6. Additions or deletions to survey maps or reports by other than the signing party or parties is prohibited without written consent of the signing party or parties.

7. All computed data or plotted features shown on survey maps must be supported by accurate survey measurements unless clearly stated otherwise.

8. Bearings, distances, coordinates, and elevations shown on a survey map shall be substantiated by survey measurements unless clearly stated otherwise.

9. A reference to all bearings shown on a survey map or report must be clearly stated, i.e., whether to “True North”; “Grid North as established by the NOS”; “Assumed North based on a bearing for a well defined line, such as the center line of a road or right of way, etc.”; “a Deed Call for a particular line”; or “the bearing of a particular line shown upon a plat.” References to Magnetic North should be avoided except in the cases where a comparison is necessitated by a Deed Call. In all cases, the bearings used shall be referenced to some well-established and monumented line.

10. A designated “north arrow” and either a stated scale or graphic scale of the map shall be prominently shown upon the survey map.

11. Abbreviations generally used by the public or in proper names that do not relate to matters of survey are excluded from the legend requirement.

a. Acceptable abbreviations on the face of survey maps are:

N = North
S = South
E = East
W = West
or any combination such as NE, SW, etc.
º = Degrees
' = Minutes when used in a bearing
" = Seconds when used in a bearing
' = Feet when used in a distance
" = Inches when used in a distance
AC = Acres
+/- = More or less (or Plus or Minus)
metric notation

b. Any other abbreviations relating to survey matters must be clearly shown within a legend or notes appearing on the face of the map or report.

12. When special conditions exist that effectively prevent the survey from meeting these minimum standards, the special conditions and any necessary deviation from the standards shall be noted upon the map or report.

13. The responsibility for all mapped features must be clearly stated on any map or report signed by a Florida licensed surveyor

and mapper. When mapped features surveyed by the signing surveyor and mapper have been integrated with mapped features surveyed by others, then the map or report shall clearly state the individual primarily responsible for the map or report.

14. Report Items:

a. Report items are information, as required by other parts of this rule, such as: abbreviations, legends, accuracy statements, feature lists, datums used, and things done or not done as part of the survey and mapping process. In addition, the map or report shall contain other items necessary for an adequate communication of survey methods and results as judged by the surveyor and mapper such as: data sources, measurement methods, history and lineage of data, and limitations pertaining to the information presented.

b. Text Report items shall be displayed either through notes on the map, report, or in a text report delivered with the map. When the report is produced as a text document and a map is attached, the report shall be signed and sealed. When the map is delivered in digital form only, then a report is required. An attached map must clearly reference the report by title, date and subject; and the report must likewise clearly refer to the map by title, date, and subject. Statements must be made on the map and in the report that neither is full and complete without the other.

15. Map Accuracy.

a. Vertical Feature Accuracy:

Vertical Control: Field-measured control for elevation information shown upon survey maps or reports shall be based on a level loop or closure to a second benchmark. Closure in feet must be accurate to a standard of plus or minus .05' ft. times the square root of the distance in miles. All surveys and maps or reports with elevation data shall indicate the datum and a description of the benchmark(s) upon which the survey is based. Minor elevation data may be obtained on an assumed datum provided the base elevation of the datum is obviously different than the established datum.

b. Horizontal Feature Accuracy:

(I) Horizontal Control: All surveys and maps or reports expressing or displaying features in a publicly published coordinate system shall indicate the coordinate datum and a description of the control points upon which the survey is based. Minor coordinate data may be obtained and used on an assumed datum provided the numerical basis of the datum is obviously different than a publicly published datum.

(II) The accuracy of control survey data shall be verified by redundant measurements or traverse closures. All control measurements shall achieve the following closures:

Commercial/High Risk Linear: 1' foot in 10,000' feet;

Suburban: Linear: 1 foot in 7,500' feet;

Rural: Linear: 1 foot in 5,000' feet;

(III) When statistical procedures are used to calculate survey accuracies, the maximum acceptable positional tolerance, based on the 95% confidence level, should meet the same equivalent relative distance standards as set forth in sub-sub-subparagraph 5J-17.051(3)(b)15.b.ii., F.A.C.

(IV) Intended Display Scale: All maps or reports of surveys produced and delivered with digital coordinate files must contain a statement to the effect of: “This map is intended to be displayed at a scale of 1/__ or smaller”.

Rulemaking Authority 472.008, 472.027 FS. Law Implemented 472.025, 472.027 FS. History–New 9-1-81, Amended 7-29-85, Formerly 21HH-6.03, Amended 12-18-88, 11-27-89, 5-26-91, Formerly 21HH-6.003, Amended 12-25-95, 5-13-96, 11-3-97, 5-25-99, 4-4-06, 8-31-06, 8-18-08, Formerly 61G17-6.003, Amended 5-11-15.

5J-17.052 Standards of Practice: Specific Survey, Map, and Report Requirements.

(1) As-Built/Record Survey:

(a) When performing as-built or record surveys, the surveyor and mapper shall obtain field measurements of vertical or horizontal dimensions of constructed improvements so that the constructed facility can be delineated in such a way that the location of the construction may be compared with the construction plans.

(b) When the surveyor and mapper prepare as-built maps they will clearly show by symbols, notations, or delineations, those constructed improvements located by the survey.

(c) All maps prepared shall meet applicable Standards of Practice.

(d) The vertical and horizontal accuracy of the measurements made shall be such that it may be determined whether the improvements were constructed consistent with planned locations.

(2) Boundary Survey, Map, and Report:

(a) Boundaries of Real Property:

1. The surveyor and mapper shall make a determination of the position of the boundary of real property in complete accord with the real property description shown on or attached to the survey map or report.

2. All boundary surveys shall result in a map.

3. Any discrepancies between the survey map and the real property description must be shown.

4. All changes in direction, including curves, shall be shown on the survey map by angles, bearings or azimuths, and will be in the same form as the description or other recorded document referenced on the map.

5. Curved lines with circular curves shall show the radii, arc distances and central angles, or radii, arc distances, chord distances and chord bearings.

6. When intersecting lines are non-radial to a curve, sufficient angular data shall be shown to relate the line to the curve.

7. Surveys of all or part of a lot(s) which is part of a recorded subdivision shall show the following upon the map:

a. The lot(s) and block numbers or other designations, including those of adjoining lots.

b. A comparison between recorded directions and distances with field measured directions and distances when they vary.

c. A comparison between the recorded directions and distances with field measured directions and distances to the nearest street intersection, right of way intersection or other identifiable reference point.

d. The dimensioned remaining portion of a lot(s) when part of a lot is included within the description.

8. Surveys of parcels described by metes and bounds shall show the following upon the map:

a. The relationship of the parcel(s) to at least one established identifiable real property corner;

b. All information called for in the property description, such as point of commencement, course bearings and distances, and point of beginning;

c. A comparison between recorded directions and distances and field measured directions and distances on the boundary when they vary;

d. The most current abutting recorded instrument or recorded plat either known by the surveyor and mapper or furnished to the surveyor and mapper.

(b) Boundary Monuments:

1. The surveyor and mapper shall set monuments as defined herein, unless monuments already exist or cannot be set due to physical obstructions at such corners or unless a water boundary has been located in approximate position. The survey map shall clearly label all approximate water boundaries with notes and these shall be mapped in a distinctly different graphic fashion from water boundaries located to full survey accuracy.

2. Every boundary monument set shall:

a. Be composed of a durable material;

b. Have a minimal length of 18 inches;

c. Have a minimum cross-section area of material of 0.2 square inches;

d. Be identified with a durable marker or cap bearing either the Florida license number of the surveyor and mapper in responsible charge, the certificate of authorization number of the business entity; or name of the business entity;

e. Be detectable with conventional instruments for finding ferrous or magnetic objects.

f. When a corner falls in a hard surface such as asphalt or concrete, alternate monumentation may be used that is durable and identifiable.

3. All monuments, found or placed, must be described on the survey map. The corner descriptions shall state the size, material, and cap identification of the monument as well as whether the monument was found or set.

4. When a parcel has an irregular roadway as a boundary, such as a dirt road or a common law road, then a monumented meander or survey line shall be established along or near the feature.

5. For other irregular boundaries such as a river, lake, beach, marsh or stream, not identified as in subparagraph 5J-17.052(2)(a)1., F.A.C., a dimensioned meander or survey line may be used. When a meander or survey line is used, monuments shall be set at the meander or survey line's terminus points on real property boundary lines and dimensions shall be shown between a meander or survey line and the boundary line sufficient to show the relationship between the two.

6. A boundary survey updating a previous survey made by the same surveyor and mapper or business entity, and which is performed for the purpose of locating non-completed new improvements by measurements to the property lines or related offset lines placed on the property since the previous survey, need not have the property corners reset.

7. Side ties to locate or set monuments shall be substantiated by a redundancy of measurements.

(c) Boundary Inconsistencies:

1. Potential boundary inconsistencies that the survey process did not attempt to detect shall be clearly indicated and explained on the survey map or in the report. Where evidence of inconsistency is found, the nature of the inconsistency shall be shown upon the survey map, such as:

a. Overlapping descriptions or hiatuses;

b. Excess or deficiency;

c. Conflicting boundary lines or monuments; or

d. Doubt as to the location on the ground of survey lines or property rights.

2. Open and notorious evidence of boundary lines, such as fences, walls, buildings, monuments or otherwise, shall be shown upon the map, together with dimensions sufficient to show their relationship to the boundary line(s).

3. All apparent physical use onto or from adjoining property must be indicated, with the extent of such use shown or noted upon the map.

4. In all cases where foundations may violate deed or easement lines and are beneath the surface, failure to determine their location shall be noted upon the map or report.

(d) Rights-of-Way, Easements, and Other Real Property Concerns:

1. All recorded public and private rights-of-way shown on applicable recorded plats adjoining or across the land being surveyed shall be located and shown upon the map.

2. Easements shown on applicable record plats or open and notorious evidence of easements or rights-of-way on or across the land being surveyed shall be located and shown upon the map.

3. When streets or street rights-of-way abutting the land surveyed are physically closed to travel, a note to this effect shall be shown upon the map.

4. When location of easements or rights-of-way of record, other than those on record plats, is required, this information must be furnished to the surveyor and mapper.

5. Human cemeteries and burial grounds located within the premises shall be located and shown upon the map when open and notorious, or when knowledge of their existence and location is furnished to the surveyor and mapper.

(e) Real Property Improvements:

1. Location of fixed improvements pertinent to the survey shall be graphically shown upon the map and their positions shall be dimensioned in reference to the boundaries, either directly or by offset lines.

2. When fixed improvements are not located or do not exist, a note to this effect shall be shown upon the map.

3. Building corners are acceptable as monumentation so long as use of building corners as monumentation is clearly noted on survey drawing.

4. When a boundary survey updating a previous boundary survey is made by the same surveyor or survey firm for purpose of locating non-completed new improvements, then property corners need not be reset; however, when a boundary survey is updating a previous survey made by the same surveyor or survey firm and is performed for purpose of locating completed new improvements then property corners must be recovered or reset. When a boundary survey updates a previous boundary survey made by a different surveyor or survey firm for the purpose of locating either non-completed or completed new improvements, then property corners must be recovered or reset.

(3) Construction Layout Survey:

(a) When the surveyor and mapper provides construction staking, these stakes must be based on controls established using the survey standards set out in Rules 5J-17.051 and 5J-17.052, F.A.C., of this chapter. The stakes provided should be adequate in number and position so that the physical items can be constructed from the plans as designed.

(b) Horizontal and Vertical Controls for Public and Private Construction Layout:

1. Section 472.003(3), F.S., provides an exemption from licensing for certain classes of individuals performing construction layout from boundary, horizontal and vertical controls that have been established by a licensed professional surveyor and mapper. This rule is designed to set out what constitutes horizontal and vertical controls.

a. Horizontal control monumentation for the purpose of this rule includes:

(I) Points of Curve, Points of Tangency, Points of Tangent Intersections, Points on Line and Points on Curve.

(II) Points of Intersection of other streets or roads.

(III) Angle points or changes in direction.

b. Horizontal control monumentation for road center-lines, right-of-way lines, reference lines or base lines shall be at least a minimum of two (2) points placed so that no point on the line being monumented is more than 700 feet from a control monument.

c. Horizontal control monumentation for main utility lines (such as water, sewer, storm drainage, electric, telephone, television, gas, etc.) when not constructed within or along a road right-of-way control in accordance with sub-subparagraph 5J-17.052(3)(b)1.b., F.A.C., shall be at least a minimum of two (2) points placed so that no point on the line being monumented is more than 700 feet from a control monument.

d. Horizontal control monumentation for buildings and/or primary constructions shall be at least:

(I) Boundaries, or

(II) Control or base lines (minimum of 2 points), or

(III) A minimum of a four-corner envelope for non-residential construction improvement layout.

e. Horizontal control monumentation required by plans as a control for horizontal location not included in sub-sub-subparagraphs 5J-17.052(3)(b)1.b., c., or d., F.A.C., shall meet the requirements of subparagraph 5J-17.052(3)(b)2., F.A.C.

(c) All construction requiring benchmarks shall have a minimum of two (2) existent or established benchmarks for vertical control.

(d) Vertical control for linear type construction sites such as roads and sewer lines shall have a maximum of 1,100' feet between existent or established benchmarks.

(e) Vertical control for acreage construction sites shall have two (2) existent or established benchmarks on the first ten (10) acres plus an additional benchmark for each additional ten (10) acres.

(f) The only required documentation for this type of survey product shall be field notes.

(4) Control Survey:

(a) Geodetic Control Surveys: When applicable, all geodetic control surveys, both vertical and horizontal, shall conform to the Standards and Specifications for Geodetic Control Networks (1984) as set forth by the Federal Geodetic Control Committee (FGCC), which Standards and Specifications are incorporated herein by reference, effective 5-13-96, and the Geospatial Positioning Accuracy Standards Parts 1, 2, and 3, FGDC-STD-007.1-1998, entitled “Geospatial Positioning Accuracy Standards Part 2: Standards for Geodetic Networks”, and FGDC-STD-007.3-1998, entitled “Geospatial Positioning Accuracy Standards Part 3: National Standard for Spatial Data Accuracy”, which are hereby incorporated by reference, effective 5-18-00, copies of which may be obtained via the internet web site (http://fgdc.gov/standards_publications/). No use of the terminology of these standards may be made without completely adopting and following all the standards in their entirety. When these standards are not employed, then a survey, map, or report shall explain applicable standards used in the geodetic control survey. All geodetic control survey maps or reports shall show the horizontal and vertical datum used and shall contain adequate graphical or written descriptions of the locations, construction and marking of all marks used or set and shall explain methods employed in the survey and adjustment.

(b) Other Control Surveys: Any control survey map or report shall detail the datum used and control stations used in a manner consistent with the general survey and map provisions of subsection 5J-17.051, F.A.C.

(5) Descriptions/Sketch to Accompany Description:

(a) Descriptions written by a surveyor and mapper to describe land boundaries by metes and bounds shall provide definitive identification of boundary lines.

(b) When a sketch accompanies the property description, it shall show all information referenced in the description and shall state that such sketch is not a survey. The initial point in the description shall be tied to either a government corner, a recorded corner, or some other well-established survey point.

(6) Digital Data:

(a) When survey information is provided in digital form only, the surveyor and mapper shall provide a signed and sealed report as set forth in sub-subparagraph 5J-17.051(3)(b)14.b., F.A.C.

(b) The digital file will reference the report and that the digital file is not full and complete without the report.

(7) Ortho-Images/Photos:

(a) The survey, map, and/or report must contain a list of control points employed in geo-referencing the image along with the source of control positions used.

(b) Positional Accuracy: Feature accuracies shall be stated.

(c) The Ortho-Image/Photo shall comply with the December 1996 US Department of the Interior, US Geological Survey

National Mapping Divisions, "National Mapping Program Technical Instructions Part 2 Specifications Standards for Digital Orthophotos," which are incorporated herein by reference.

(8) Quantity Survey: The surveyor and mapper shall obtain horizontal and vertical measurements adequate to delineate graphically geometric configurations and/or dimensions that can be mathematically computed.

(9) Raster Imagery:

(a) The survey and report must contain a list of control points employed in geo-referencing the image along with the source of control positions used. The survey and report must contain a statement clearly stating that "This is not an ortho-image or ortho-photo."

(b) Feature accuracies shall be stated.

(10) Subdivision Record Plat: This rule shall not apply to plats being prepared for filing and recording pursuant to Chapter 177, F.S.; however, this rule shall apply to any boundary survey performed during the preparation of the plat.

(11) Specific Purpose Survey:

(a) Surveys which are performed for a purpose other than the purposes encompassed by the definitions in paragraphs 5J-17.050(10)(a)-(i) or (k), F.A.C., shall be permitted only where unusual conditions make impracticable or impossible the performance of one of the types of surveys defined in paragraphs 5J-17.050(10)(a)-(i) or (k), F.A.C.

(b) Such purpose and conditions shall be clearly shown upon the survey map or in the survey report.

(c) Surveys performed for purposes of monumenting, referencing, describing, and mapping centerline or baseline may be performed as Specific Purpose Surveys. Additionally, surveys performed for the purpose of monumenting official right-of-way lines may be performed as Specific Purpose Surveys.

(12) Topographic Survey:

(a) Topographic surveying and mapping by field methods shall meet general provisions applicable to all surveys and maps as set out in Rule 5J-17.051, F.A.C. A minimum of two site benchmarks on or near the survey shall be indicated upon the survey map.

(b) Topographic Features.

1. Intended Features. The surveyor and mapper shall devise a method of reporting which topographic features were intended to be surveyed and mapped, the style of cartographic representation employed for each, and the degree of intended completeness in the surveying and mapping of each feature. As with abbreviations, any symbols, line types, etc. shown on the survey map shall be explained and/or defined in a legend.

2. Obscured Areas. Features in obscured areas where the desired points or surfaces being mapped are not clearly visible on source images shall be clearly labeled on the map as "interpolated" or "estimated" through the use of notes and shall be depicted graphically clearly different from other surveyed features.

3. Scale of Map. The scale of the map that is selected when provided in hard copy shall be sufficient to accurately and clearly show the results of the survey.

4. Property Lines. Any depiction of property lines on a topographic map shall be accompanied with a statement as to the source of the property lines shown.

Rulemaking Authority 472.008, 472.027 FS. Law Implemented 472.027 FS. History–New 9-1-81, Formerly 21HH-6.04, Amended 12-18-88, Formerly 21HH-6.004, Amended 12-25-95, 5-13-96, 5-25-99, 4-4-06, 8-31-06, 8-18-08, Formerly 61G17-6.004, Amended 5-11-15.

5J-17.053 Standards of Practice – Professional Matters in Surveying and Mapping.

In order to safeguard the health, safety and welfare of the public and to maintain integrity and high standards of skill and practice in the surveying and mapping profession, the rules of professional conduct provided in this section shall be binding upon every licensee and on all firms which offer or perform surveying and mapping services in Florida. Licensees shall at all times be cognizant of the public that they serve and shall govern themselves accordingly in the following professional matters:

(1) Fair Dealing in Professional Relationships.

(a) Licensees shall act as faithful agents of their clients in all professional matters.

(b) Licensees, whether or not under oath, shall not be untruthful, deceptive, or misleading, including by omission, in any professional report, oral or written statement, or testimony.

1. A professional report, statement or testimony is false, fraudulent, deceptive or misleading if it: contains a material misrepresentation of fact; omits the statement of any material fact that is necessary to form a complete and accurate understanding of the communication; or is intended or is likely to create an unjustified expectation.

2. Examples of false, fraudulent, deceptive or misleading statements include: a statement that a licensee is a certified specialist in any area outside the licensee's field of expertise; a statement that the licensee's education or experience in surveying and mapping is greater than it actually is; a statement that the licensee's involvement with a surveying and mapping project will be greater than it actually will be.

(c) The licensee shall not make, publish or cause to be made or published, any representation or statement concerning the professional qualifications of the licensee, or those of any partner, associate, firm or organization of the licensee, which is in any way misleading, or which tends to mislead the recipient thereof, or the public, concerning education, experience, specializations or other surveying and mapping qualifications.

(d) A licensee shall not, in the practice of surveying and mapping or in any professional dealings, make, publish, or cause to be made or published, any representation or statement about any competitor or any other licensee which the licensee knows or should know is false and which has or is intended to have the effect of injuring the reputation or business of such other licensee.

(e) A licensee shall not express a professional opinion that is factually insupportable or that is not based on accepted surveying and mapping principles, or that misrepresents data and/or its relative significance in any professional report, oral or written statement, or testimony.

(f) A licensee shall not violate any provisions of state or federal statutes requiring qualifications-based selection of professional surveying and mapping services; shall not knowingly aid or abet any other licensee in violating such statutes; shall not participate in a qualifications-based selection process that the licensee knows is not in compliance with federal or state statutes; and shall not respond to or solicit requests that the licensee knows are in violation of state or federal statutes.

(g) A licensee shall not knowingly permit the publication or use of the licensee's data, reports, maps, or other professional documents for unlawful purposes.

(h) Licensees may not use their surveying and mapping expertise or their professional surveying and mapping status to commit a crime.

(i) Licensees may not knowingly associate with or permit the use of their names in a business venture with any person or business entity which the licensee knows or should know is engaging in unlawful, fraudulent or dishonest business or professional practices.

(2) Conflicts of Interest: Licensees shall avoid any professional conflicts of interest.

(a) When conflicts cannot be avoided, licensees shall disclose to their employers and clients all known or potential conflicts of interest or other circumstances that could influence or appear to influence their professional judgment or the quality of their professional services provided.

(b) Unless the circumstances are fully disclosed and agreed to in writing by all interested parties, a licensee shall not accept compensation, financial or otherwise, from more than one party for services pertaining to the same project.

(c) Examples of professional conflicts of interest include, but are not limited to:

1. A county employee engaging in the private practice of surveying and mapping on a project over which that person, as a county employee, has approval authority.

2. A licensee soliciting or accepting a professional contract from a governmental body on which that licensee or a principal or officer of his/her business organization serves as a member.

3. A licensee, serving as a member, advisor, or employee of a governmental entity, who participates in its decision to contract for professional services from a private business in which that licensee is a principal or employee.

(d) Licensees may not offer any bribe, commission or gift, either directly or indirectly, to obtain selection or preferment for surveying and mapping employment.

1. An example of prohibited activity under this subsection is a practice known as the "washout" survey, wherein a licensee agrees to accept payment for a surveying and mapping service only upon the contingency of a future event other than the completion of the survey and map.

2. The activity prohibited by this subsection does not pertain to the payment of a fee to a licensed employment agency for securing salaried employment as a surveyor and mapper.

(e) Licensees may not solicit or accept gifts or gratuities directly or indirectly from contractors, their agents or other parties dealing with the licensee's client or employer in connection with work for which the licensee is responsible.

(3) Confidentiality: Whether or not a licensee and a client establish requirements of confidentiality contractually, the licensee shall safeguard and preserve the confidences and private information of the client and shall exercise reasonable care to prevent unauthorized disclosure or use thereof by the licensee's employees and associates, except:

(a) When disclosure is made as a necessary part of performing the services for which the client is employing or engaging the licensee.

(b) When licensee has obtained the consent of the affected client or clients, employer or employers, current or former, but only after full disclosure to them;

(c) When required by law or court order;

(d) When necessary to establish legal proof of licensee's relationship with such client or employer, current or former, in a court action to recover salaries, fees or other compensation due to the licensee as a result of the licensee's employment or association with the client or employer, current or former;

(e) When necessary to defend the licensee or the licensee's employees or associates in a legal action alleging wrongful conduct;

(f) When there is potential danger to the public's safety and well being and disclosure is reasonably necessary to prevent harm to the public;

(g) When the disclosures were made to the Board regarding other licensees or unlicensed individuals who may have violated laws or rules relating to the practice of surveying and mapping;

(h) When the disclosures relate to illegal conduct.

(4) Use of Another Licensee's Product.

(a) Work completed by one licensee (original licensee) cannot be adopted or reused by a different licensee (successor licensee), except under the following circumstances:

1. With written consent of the original licensee, or;

2. When the graphics or data depicted on the survey are attributed to the licensee that was in responsible charge of its production, or;

3. When the original licensee's field notes, supporting documents and/or final product(s) are rightfully in the possession of the successor licensee.

(b) Use of another licensee's work under any circumstances does not exempt the user from compliance with the survey requirements in Chapter 5J-17, F.A.C.

(5) Retention of Work Products.

(a) For each survey produced, all licensees, except for those who do not have an ownership right to the work product, shall maintain for a minimum of six years from the date of creation at least one copy of all signed and sealed final drawings, plans, specifications, plats, and reports as well as one copy of all related calculations and field notes. These records may be kept in hard copy or electronic or digital format.

(b) Upon the discontinuance of the practice of surveying and mapping, licensees shall ensure the safe storage and reasonable accessibility to clients of all files and file materials for a period of three years in accordance with subparagraph 5J-17.051(2)(b)2., F.A.C. The failure to do so shall constitute cause for discipline.

1. If an individual voluntarily relinquishes his/her professional surveyor and mapper license, the transfer and storage of files is not required.

(6) Signing and Sealing.

(a) Licensees shall sign, date and seal those final drawings, plans, specifications, plats or reports that have been prepared or issued by the licensee and conform to the Standards of Practice for professional surveyors and mappers as outlined in Chapter 5J-17, F.A.C.

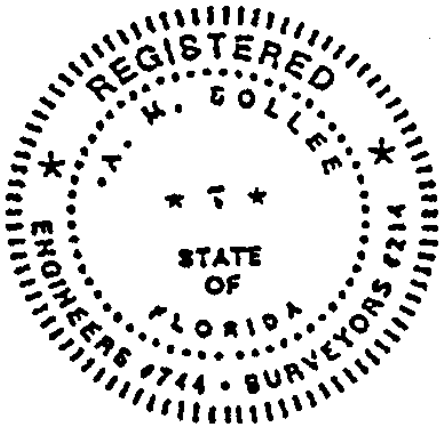
(b) Licensees shall not affix their signatures or seals to any final drawings, plans, specifications, plats or reports not prepared under their responsible charge.

(c) Licensees may not affix a signature and seal to any document depicting an area over which the licensee has insufficient knowledge, education, experience, or familiarity.

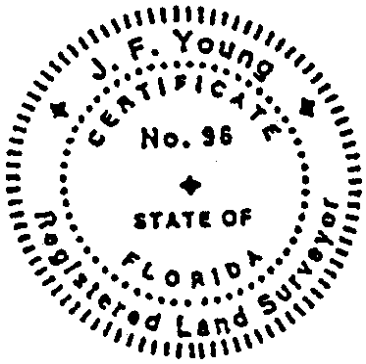
Rulemaking Authority 472.027 FS. Law Implemented 472.027 FS. History–New 5-11-15.

5J-17.060 Seals Acceptable to the Board.
(1) The Board hereby establishes the acceptable forms of metal-type impression seals:

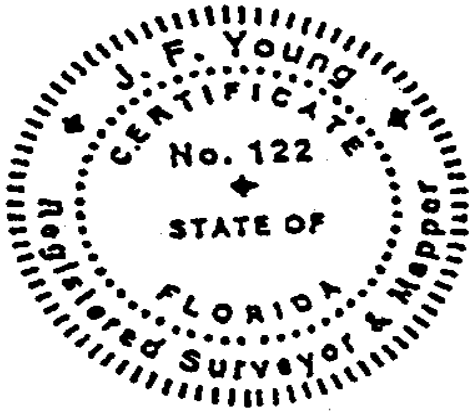
I



II



III


J. F. Young
CERTIFICATE
No. 122
STATE OF
FLORIDA
Registered Surveyor & Mapper

IV

(2) Seal I may be used only by registrants who are registrants in good standing under both Chapters 471 and 472, F.S., as of June 30, 1995.

(3) Seal II may be used only by registrants who are licensed as of June 30, 1995.

(4) Seal III shall be used only by registrants who are initially licensed on or after July 1, 1995, and before October 1, 2002.

(5) Registrants who are initially licensed on or after June 30, 2002 shall use only Seal IV.

(6) All registrants may use Seal IV.

(7) Surveyors and mappers who wish to sign and seal electronically transmitted plats, reports, or other documents shall follow the procedures set forth in Rule 5J-17.062, F.A.C.

Rulemaking Authority 472.008, 472.025 FS. Law Implemented 472.025 FS. History–New 1-3-80, Amended 6-9-80, Formerly 21HH-7.01, 21HH-7.001, Amended 5-30-95, 10-25-95, 12-13-99, 11-18-01, 10-23-02, Formerly 61G17-7.001.

5J-17.061 Seal and Signature.

(1) All maps, except those with electronic signature and electronic seal, must contain a statement indicating that the map is not valid without the signature and the original raised seal of a Florida licensed surveyor and mapper.

(2) A licensee who allows another person to sign a map prepared or issued by or under the supervision of the licensee is guilty of misconduct.

(3) A licensee who signs another licensee's name on a map is guilty of misconduct.

(4) For the purpose of this rule, the word "map" shall also mean drawing, sketch or plat.

Rulemaking Authority 472.025 FS. Law Implemented 472.025 FS. History–New 1-3-80, Amended 9-13-83, Formerly 21HH-7.02, 21HH-7.002, Amended 5-30-95, 5-13-96, 11-3-97, Formerly 61G17-7.002.

5J-17.062 Procedures for Signing and Sealing Electronically Transmitted Plans, Specifications, Reports or Other Documents.

(1) Information stored in electronic files representing plans, specifications, plats, reports, or other documents which must be sealed under the provisions of Chapter 472, F.S., shall be signed, dated and sealed by the professional surveyor and mapper in responsible charge.

(2) A license holder may use a computer generated representation of his or her seal on electronically conveyed work; however, the final hard copy documents of such surveying or mapping work must contain an original signature and raised seal of the license holder and date or the documents must be accompanied by an electronic signature as described in this section. A scanned image of an original signature shall not be used in lieu of an original signature and raised seal or electronic signature. Surveying or mapping work that contains a computer generated seal shall be accompanied by the following text or similar wording: "The seal appearing on this document was authorized by [Example: Leslie H. Doe, P.E. 0112 on (date)]" unless accompanied by an electronic signature as described in this section.

(3) An electronic signature is a digital authentication process attached to or logically associated with an electronic document and shall carry the same weight, authority, and effect as an original signature and raised seal. The electronic signature, which can be generated by using either public key infrastructure or signature dynamics technology, must be as follows:

(a) Unique to the person using it;

(b) Capable of verification;

(c) Under the sole control of the person using it;

(d) Linked to a document in such manner that the electronic signature is invalidated if any data in the document are changed.

(4) Alternatively, electronic files may be signed and sealed by creating a "signature" file that contains the surveyor and mapper's name and PSM number, a brief overall description of the surveying and mapping documents, and a list of the electronic files to be sealed. Each file in the list shall be identified by its file name utilizing relative Uniform Resource Locators (URL) syntax described in the Internet Architecture Board's Request for Comments (RFC) 1738, December 1994, which is hereby adopted and incorporated by reference by the Board and can be obtained from the Internet Website: ftp://ftp.isi.edu/in-notes/rfc1738.txt. Each file shall have an authentication code defined as an SHA-1 message digest described in Federal Information Processing Standard Publication 180-1 "Secure Hash Standard," 1995 April 17, which is hereby adopted and incorporated by reference by the Board and can be obtained from the Internet Website: http://www.itl.nist.gov/fipspubs/fip180-1.htm. A report shall be created that contains the surveyor and mapper's name and PSM number, a brief overall description of the surveyor and mapper documents in question and the authentication code of the signature file. This report shall be printed and manually signed, dated, and sealed by the professional surveyor and mapper in responsible charge. The signature file is defined as sealed if its authentication code matches the authentication code on the printed, manually signed, dated and sealed report. Each electronic file listed in a sealed signature file is defined as sealed if the listed authentication code matches the file's computed authentication code.

Rulemaking Authority 472.008, 472.025 FS. Law Implemented 472.025 FS. History–New 2-1-00, Amended 12-16-07, Formerly 61G17-7.0025.

5J-17.063 Certificates of Authorization.

(1) Except as provided in subsection (10) of this rule, certificates of authorization are required of all corporations, partnerships, professional associations, firms, or persons practicing under a fictitious name, who provide surveying and mapping services to the public. For the purpose of this rule, those corporations, partnerships, associations, firms, and persons shall be referred to as "business entities."

(2) Individuals practicing surveying and mapping under their given name are not required to obtain a certificate of authorization. For the purposes of this rule, "given name" is defined as the individual's name as it appears on the individual's birth certificate, state issued driver's license, or Florida surveyor and mapper license.

(3) Individuals practicing surveying and mapping under the first initials of their first and/or middle names and their entire last name are not required to obtain a certificate of authorization.

(4) Individuals practicing surveying and mapping under their given name or the first initials of their first and/or middle names and their entire last name are permitted to use the following titles and abbreviations in their surveying and mapping business name without being required to obtain a certificate of authorization: licensed surveyor and mapper, registered surveyor and mapper, registered land surveyor, professional land surveyor, professional surveyor and mapper, professional surveyor, RLS, PLS, PSM, or PS.

(5) Individuals practicing surveying and mapping pursuant to subsections (2), (3) and (4) of this rule must obtain a certificate of authorization once the individual adds Incorporated, Inc., Limited Liability Company, LLC, Partnership Association, P.A., or any other business association or business entity name, title or abbreviation to the individual's name or business name.

(6) Individuals operating a surveying and mapping business, which is incorporated, is a limited liability corporation, is a partnership association, or is operating as any other business entity, but does not include the business entity title or abbreviation in the surveying and mapping business's name, must obtain a certificate of authorization.

(7) Upon application to the Board, certificates of authorization shall be issued only to those business entities which:

(a) List the street address of each of its Florida offices from which surveying and mapping services are provided;

(b) Specify the name or names of its principals who are licensed surveyors and mappers as the term "principal" is defined in paragraph 5J-17.013(1)(b), F.A.C.;

(c) Provide proof to show that the applicant is a partnership, corporation, or person practicing under a fictitious name at the time of application and that the person identified pursuant to paragraph (7)(b) of this rule is a principal of the business entity.

(8) The Board shall penalize, deny, suspend or revoke the certificate of authorization of any business entity which fails to meet the requirements of laws or rules pertaining to the practice of surveying and mapping.

(9) Business entities shall notify the Board within one (1) month of any changes in the business entity's location of offices, its licensed surveyors and mappers in residence, and the names of its principals, along with proof to demonstrate the change in principals.

(10) Paragraphs (7)(a) and (b) of this rule do not apply to construction offices or temporary field offices set up to serve a specific survey site.

Rulemaking Authority 472.021 FS. Law Implemented 472.021 FS. History–New 3-22-84, Formerly 21HH-7.03, Amended 3-12-92, Formerly 21HH-7.003, Amended 5-30-95, 5-21-00, 3-25-01, 5-24-06, Formerly 61G17-7.003.

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The Fund® CONCEPT
MARCH 2017 | VOL 49

THE 2016 ALTA/NSPS SURVEY STANDARDS REDUX: WHAT A COMMERCIAL PRACTITIONER MUST KNOW AND DO TO AVOID MATERIAL OMISSIONS

BY JIM KEARN, FUND ASSISTANT VICE PRESIDENT, ASSOCIATE COMMERCIAL SERVICES TRANSACTION MANAGER, AND SR. UNDERWRITING COUNSEL

The American Land Title Association (ALTA) and the National Society of Professional Surveyors (NSPS), legal successor to the American Congress on Surveying and Mapping (ACSM) issued revised "Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys" which became effective Feb. 23, 2016 (ALTA/NSPS Standards). The article "2016 ALTA/NSPS Minimum Standard Detail Requirements for Land Title Surveys," 48 *Fund Concept* 115 (Nov. 2016) catalogued the notable differences between the previous 2011 standards and the latest ALTA/NSPS Standards.

This article considers, in more detail, the revisions from the perspective of the commercial practitioner since such surveys are used or required primarily in commercial projects. It analyzes the ramifications and impact of the ALTA/NSPS Standards, and suggests what the commercial practitioner must do to ensure receipt of a survey with the information expected. Stated otherwise, the commercial practitioner cannot assume receipt of the same material information as under the 2011 standards, and that could prove detrimental to the due-diligence process, the deal, and the practitioner. Fund Members are advised that a survey relied upon for insuring must comply with the standards of practice provided in Rule 5J-17.051, F.A.C. TN 25.03.06.

Background

Though actual development of real estate is inherently local; development, in general, became more interstate in nature in the 1950s and 1960s as larger deals often required joint ventures with multiple parties. Also, the financing needs of large commercial developments often led to a local lender taking the lead, but then sharing part of the loan with other, often out-of-state, lenders to spread the risk of a major default. Once "seasoned," commercial loans were then frequently sold in interstate commerce to other interests. This burgeoning national market created the need for uniformity in survey standards among the states to assure quality and consistency of product upon which lenders and underwriters could rely. This led to the first ALTA/ACSM Minimum Standard Detail Requirements which became effective in 1962. Since then, the standards were revised several more times, in 1986, 1988, 1992, 1997, and 2005. They were completely reformatted and rewritten in 2011.

(Continues on page 32)

IN THIS ISSUE

- Case Reviews.....30
- Title Q & As.....35
- Title Examination Fundamentals 101 Offered...37
- The Fund's Basic Affiliate Training.....38

2016 ALTA/NSPS...*continued from page 29*

Impetus for the 2016 Changes

Many of the latest revisions are better understood when viewed through the lens of the Great Recession and the avalanche of mortgage defaults and foreclosures it triggered. Parties entangled in foreclosures and suffering losses sought to join others to shift liability and offset losses for failed deals, and surveyors increasingly became targets. Surveyors found themselves sued for omitting matters that customers thought should have been shown, or for including collateral off-site matters for information only that others heavily relied upon to their detriment.

To rectify this, the ALTA/NSPS Standards generally scale back a surveyor's duties, unless the parties agree otherwise. This increases the onus on practitioners to tell and to give to the surveyor exactly what the practitioner wants shown.

Select ALTA/NSPS Standards

There are several areas in the ALTA/NSPS Standards which have been significantly revised and which impact the commercial practitioner.

Purpose. The definition of the act of surveying and what is depicted on the survey has been revised. The 2011 definition required the surveyor to, among other things, prepare the "plat or map showing the results of the fieldwork *and its relationship to record documents....*" (emphasis added). The ALTA/NSPS Standards instead require the surveyor to prepare the "plat or map pursuant to Section 6 showing the results of the fieldwork *and its relationship to documents provided to or obtained by the surveyor....*" (emphasis added). If documents are not provided to the surveyor, the ALTA/NSPS Standards provide that "the surveyor shall be required to conduct only that research which is required pursuant to the statutory or administrative requirements of the jurisdiction where the property is located...." In Florida, that entails simply tying the description to section corners and reflecting what is on a plat.

Records Research. The revisions to Sec. 4, "Records Research" clarify and narrow the surveyor's tasks, and place more duties on the practitioner when ordering the survey. The 2011 version required the surveyor, for example, to "be provided with appropriate data which can be relied upon in the preparation of the survey." The ALTA/NSPS Standards instead mandate that "[i]n order to complete an ALTA/NSPS Land Title Survey, the surveyor must be provided with complete copies of the most recent title commitment or other title evidence satisfactory to the title insurer if a commitment is not available." The practitioner must also furnish "current record descriptions of any adjoiners to the property to be surveyed," except where adjoiners are lots in platted subdivisions. Sec. 4(i)(a). The practitioner must also furnish "[a]ny recorded easements, servitudes, or covenants burdening the property... [and a]ny unrecorded documents affecting the property being surveyed and containing information to which the survey shall make reference, if desired by the client." Secs. 4(i)(c) and (ii). If the above are not furnished, or if other non-public or quasi-public documents are required to complete the survey, the surveyor does not have to independently find and show them. Only the minimum required by Florida law must be furnished.

Furthermore, all such information furnished to the surveyor must be legible. If it is not, such information or interests do not have to be shown, so long as there is a related note to that effect on the survey. Sec. 6(C)(ii)(f).

Fieldwork. The standards governing a surveyor's fieldwork in Sec. 5 have also been lessened. The 2011 standards required the surveyor to do that which is required by state law. Though the ALTA/NSPS Standards retain this as the default standard when required information is not furnished by the customer, it introduces a new subjective standard. Specifically, it adds that the fieldwork shall include those matters detailed in Sec. 5 "located to what is, in the surveyor's professional opinion, the appropriate degree of precision based on...the planned use of the property, if reported in writing to the surveyor by the client, lender, or insurer...."

This constitutes a significant change for several reasons. First, this requirement seems to create an ambiguity within the ALTA/NSPS Standards themselves. Specifically, does a surveyor have to perform to the standards required by Florida Statutes and the Florida Administrative Code (Code) or may the surveyor work instead to what that surveyor believes is the "appropriate degree of precision," based on the project? Second, this seems to conflict with Rule 5J-17.051(15), F.A.C., which sets objective standards for mapping accuracy regarding the 11 different types

of surveys in Florida defined therein, and whether the land surveyed is within a city or a rural area. Nowhere in the relevant Florida Statutes or Code does there appear to be license for a Florida surveyor to substitute his or her professional opinion as to the appropriate degree of precision in contravention of what is required by the Code. Arguably, this could lead to a surveyor *not* showing something that may in fact be an encroachment that needs to be shown and listed as an exception on Schedule B in a final policy if ALTA 9 series coverage is sought.

The revisions to the fieldwork standards for showing "Rights of Way and Access" (Sec. 5(B)) are now arguably ambiguous. The 2011 standards required that the survey show the width and location of an abutting street or right-of-way. The ALTA/NSPS Standards essentially retain this requirement, but add that "[i]f the documents provided to or obtained by the surveyor... indicate no access from the surveyed property to the abutting street or highway, *the width and location of the travelled way need not be located*" (emphasis added). This creates concern for the practitioner for a number of reasons.

First, this statement seems to create a contradiction. If the property abuts a street or highway, presumably there is legal access to that highway by virtue of abutting it, unless the highway is a limited access highway, such as an interstate. Second, which "travelled way" is being referred to? Assuming the "travelled way" is the abutting street, the width and location of the travelled way seems material to determining if it extends onto the property surveyed, or if improvements on the property extend into the travelled way. It also seems important to locate the travelled way for purposes of deleting the survey exception and to note such exceptions on Schedule B in lieu of the general survey exception. It is not clear how this could be done if the travelled way is not accurately and completely shown on the survey. Third, if the travelled way is a path on or across the surveyed property which is evidence of some type of use or easement, it would need to be shown.

Furthermore, Sec. 5(B)(vi) provides, in pertinent part, that if documentation regarding the location of any street, road, or highway right-of-way crossing the property was not disclosed in documents provided to or obtained by the surveyor; and, if they are "not otherwise available," all the surveyor is required to do is locate the parcel corners on the same side of the street as the surveyed property. Then, the surveyor *may* indicate the location of such right-of-way lines, but does not have to show their width.

The new Sec. 5(C)(ii) provides that the character and location of all walls, buildings, fences, and other improvements within five feet of each side of the boundary lines, observed in the process of conducting the fieldwork, must be shown "[u]nless physical access is restricted." By deduction, this seems to allow walls, buildings, fences, and other improvements not to be shown if physical access is restricted. On the one hand, this seems reasonable from the perspective of a surveyor who may not be able to gain access to certain areas of a large luxury hotel or a sprawling shopping complex. On the other hand, it increases the burden on the practitioner to confirm that the surveyor did, in fact, have access to *all* of the areas of the project, and that the survey accurately and completely depicts *all* of the improvements. Otherwise, the survey may omit something material to which the attorney representing the buyer needs to object.

In such case, Sec. 6(B)(xi) was revised to require the surveyor to add a note to the survey to highlight that the surveyor did *not* have access to certain areas noted. Such a note on the survey may be an unwelcome surprise to an attorney who receives that survey near the end of the due-diligence period or deadline to object, when there may be insufficient time for the surveyor to go back and survey what the survey notes was "inaccessible."

Sec. 5(E)(iv) previously required evidence "of use" by someone other than the occupant on the property being surveyed. This occasionally led to evidence of a third party exercising a surface right of entry to extract subsurface minerals in order to keep that right alive. New Sec. 5(B)(iv) now requires the surveyor to only show evidence "on or above the surface" which "may indicate *utilities* located on, over or beneath the surveyed property" (emphasis added). Arguably, this revision could lead the surveyor to *not* have to show activities, gouges, etc., that evidences surface entry for mining, as that would not be evidence of a "utility" under the ALTA/NSPS Standards.

Sec. 5(G)(i) now limits showing water bodies to those that are "within five feet of the perimeter" of the property surveyed. The regulations of water management districts routinely require a 25-foot easement or buffer adjacent to retention ponds to maintain their prescribed slope and required plant-

ings around them to prevent subsidence. If no water body beyond five feet is shown, the practitioner would not have reason to know that there may be a related 25-foot buffer or conservation or embankment easement which encroaches upon the property surveyed.

Plat or Map. Sec. 6 mimics the subjective "in the surveyor's professional opinion" standard detailed in Sec. 5 above.

Sec. 6(B)(ii) is the one revision where more is furnished to the practitioner. It provides that if a new description is prepared, the surveyor shall state that the new description describes the same real estate as the record description or, if it does not, how the new description differs from the record description. Depending upon what is stated, this may eliminate the need for a separate "same-as" affidavit from the surveyor when descriptions differ. For a determination of whether a "same-as" affidavit may be waived in reliance upon a statement of this nature within a survey in a particular transaction contact Fund Underwriting Counsel.

Less needs to be done now by the surveyor regarding gaps where there are multiple properties. Under the 2011 standards, where gaps or overlaps are identified, the surveyor had to disclose that "to the insurer and client for determination of a course of action concerning junior/senior rights..." prior to the preparation of the final plat or map. The revised Sec. 6(B)(vii) simply provides that the surveyor must disclose the gaps upon the delivery of the survey.

Table A. Table A now provides that the optional services itemized therein "may" rather than "must" be negotiated. Parking requirements have been added to the list of options of features to be shown, as well as reference to the date and source of the letter that was the basis for such requirements. This is consistent with the thrust of the revisions to identify the source of the surveyor's information rather than to simply have the surveyor state and essentially certify what those requirements are. A zoning letter or report must be provided to the surveyor who may then simply reference that independent report or letter upon which they are based.

Item 18 from the 2011 standards, the identification of site use as a solid waste dump, sump, or sanitary landfill, has been removed from Table A as an optional responsibility for the surveyor. This is a result of the widespread use of phase I environmental assessments to identify these uses. Instead, Table A only has as an optional service the identification of substantial areas of refuse. Identification of wetlands has also been eliminated from that list because the use of the term for informational purposes only conflicted with the use of the term in the Code, leading to much misunderstanding and litigation.

Item 20 on Table A now states the surveyor will maintain a professional liability insurance policy in the minimum amount agreed to by the parties for the contract term, but that insurance coverage shall no longer be addressed on the face of the plat or map. This change contravenes Rule 5J-17.015, F.A.C., which requires the surveyor to state in letters at least one-quarter inch high that the survey depicted is not covered by professional liability insurance, if that is the case. It is advisable to confirm that the surveyor has professional liability insurance at least in the amount of the property or interest being surveyed or the amount of the title insurance, and that it is occurrence based and not when claims are made. Requesting a copy of the declarations page for the surveyor's professional liability insurance policy is a reasonable request on commercial projects.

Conclusion and Recommendations

Fund Members should not assume receipt of the same information as in the past on ALTA/NSPS surveys under the ALTA/NSPS Standards unless they are proactive and furnish all that is required by the ALTA/NSPS Standards. For the reasons detailed above, it is also advisable for practitioners to confirm at the outset what items should be shown on the survey and what actions should be performed by the surveyor. Below is a helpful checklist to get Fund Members started:

- Furnish the title commitment to the surveyor with legible copies of all instruments shown thereon, and unrecorded instruments to be shown.
- Confirm that if the surveyor finds or considers anything to be illegible, the surveyor should contact the practitioner to address that issue before completion, rather than simply inserting a note on the final product that a document is illegible.
- Confirm that the surveyor will not deviate from the objective standards set forth in the Code, but instead will perform the survey in accordance therewith.

- Confirm the survey will show the width and location of any and all "travelled ways" including those which abut or cross the land surveyed.
- Confirm physical access to all areas of the land and improvements to be surveyed were not restricted, so that the survey accurately and completely depicts all improvements on the property.
- Show all structures, activities, and "scars" on land, and not just evidence of activities on or above the surface which may be evidence of utilities.
- Identify water bodies within 25 feet of the perimeter of the surveyed land.
- Ask the surveyor to furnish whatever information is available regarding the age of monuments or structures on the ground if there are gaps or overlaps among the parcels in a large tract, to facilitate determining priority of rights.
- Confirm that the surveyor carries professional liability insurance with limits appropriate to the transaction; that it is in place when the survey is performed and is occurrence based; and otherwise complies with the requirements of the Code.
- Verify for insuring purposes that the survey complies with the standards of practice set forth in Rule 5J-17.051, F.A.C.

A "red-lined" copy of the 2016 ALTA/NSPS Standards can be found at: *http://www.alta.org/forms*. □

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TITLE Q&As

11. Sale by Foreign Entity

Q. *The seller in the transaction is a non-United States entity. The commitment includes four requirements associated with proof of authority of the entity formed in a foreign jurisdiction. The seller has provided some documentation translated into English, and a letter from an attorney licensed in the foreign jurisdiction stating her opinion that the documents provided prove the authority of the entity. Are these documents sufficient for purposes of insuring title?*

A. Yes. The Fund authorizes reliance on an opinion letter from an attorney licensed in a foreign jurisdiction on the presumption that such an attorney is in the best position to know the foreign jurisdiction's laws and evaluate compliance.

12. Small Lien Foreclosure

Q. *Happy Homeowners' Association (HOA) filed a lien against Lucky Landowner. Lucky was not married and the property was not encumbered by a mortgage. The value of the property was approximately $95,000. The HOA's lien was for $2,500. The HOA initiated foreclosure proceedings. Lucky did not reside on the property and was not personally served, so the HOA performed a diligent search and then affected service of process by publication. A default was entered along with summary judgment in favor of the HOA in the amount of $3,250. A third party purchased the property at the foreclosure sale. Two years has passed and the third-party purchaser now wishes to sell the property to a bona fide purchaser for the current market value. May a title insurance policy be issued?*

A. In order to insure "small lien foreclosures," which include HOA lien foreclosures, the equity in the subject property must be less than the amount of the final judgment of foreclosure. In addition, either personal service must be obtained against the owner or the affidavit of diligent search must be reviewed for compliance with Sec. 49.041, F.S. See TN 22.02.12. In this instance, the equity in the property exceeds the value of the HOA's foreclosure judgment. In addition, it is not clear whether service was properly affected through publication. Fund Members should contact Fund Underwriting Counsel when considering insuring a small lien foreclosure.

Florida Bar Journal
July, 1996

Column

Real Property, Probate and Trust Law

*65 WHAT EVERY REAL ESTATE LAWYER SHOULD KNOW ABOUT **SURVEYS** PART 1

Ross E. **Payne**

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In common usage, the term " **survey**" refers to a drawing of a parcel of real property depicting the results of the surveyor's [FNa1] measurements made in the field and his or her interpretation of evidence relating to the location of the boundaries of the property based on a legal description furnished to the surveyor. F.A.C. Rule 61G17-6.002(8) defines " **survey**" as "the orderly process of determining facts of size, shape, identity, geodetic location, or legal location by viewing and applying direct measurement of features on or near the earth's surface using field or image methods." A "map of **survey**" is defined under F.A.C. Rule 61G17-6.002(4), as "a graphical or digital depiction of the facts of size, shape, identity, geodetic location, or legal location as determined by a **survey**." Finally, the term "surveying and mapping" is defined under F.A.C. Rule 61G17-6.002(10) as "a process of direct measurement and analysis specifically designed to document the existence, the identity, the location, and the dimension or size of natural or artificial features on land or in the air, space or water for the purpose of producing accurate and reliable maps, suitable for visualization if needed, of such documentation."

There are numerous types of **surveys**, as described in F.A.C. Rule 61G17-6.002(8). They are as-built (also called record), boundary, condominium, construction layout, control, hydrographic, mean high water line, quantity, right-of-way, special purpose, and topographic. The most commonly encountered type is the boundary **survey**, which determines "the perimeters of a parcel or tract of land by establishing or re-establishing corners, monuments, and boundary lines for the purposes of describing the parcel, locating fixed improvements on the parcel, dividing the parcel, or platting." F.A.C. Rule 61G17-6.002(8)(b). A **survey** normally yields either a map of **survey** or a **survey** and map report. The report sets forth the methods used by the surveyor, the measurements and computations made, the accuracies obtained, and other information secured or developed through surveying and mapping techniques. F.A.C. Rule 61G17-6.002(9).

Minimum Technical Standards

Former F.A.C. Rule 61G17-6.001 set forth the purpose of the minimum technical standards for **surveys** as the achievement of "no less than minimum standard degrees of accuracy, completeness, and quality so as to assure adequate and defensible real property boundary locations and other pertinent information which are provided by land surveyors to the public…." This rule was eliminated as part of a recent overhaul of the minim-

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um technical standards and replaced with a number of "regulational objectives" located throughout F.A.C. Ch. 61G17-6, which are more specific statements of purposes and policies. Real estate lawyers should have a basic familiarity with the minimum technical standards.

A summary of some of the key aspects of the minimum technical standards:

1) F.A.C. Rule 61G17-6.003(2)(b) states that the **survey** map and report must "state the type of **survey** it depicts."

2) The **survey** map and report must show the name, address (street and mailing), and certificate of authorization number of the surveying firm, the surveyor's name and license number, the date of the field **survey**, and the date(s) of any revisions. F.A.C. Rule 61G17-6.003(2)(c) and (d).

3) The **survey** map and report must contain the phrase, "Not valid without the signature and the original raised seal of a Florida licensed surveyor and mapper." F.A.C. Rule 61G17-6.003(2)(e). There is no longer an express requirement that the **survey** contain a certification.

4) Report items (*i.e.*, text statements such as feature lists and datums used) can be shown by notes on the map or in a report delivered with the map. If a report and map are furnished, only the report is signed and sealed. F.A.C. Rule 61G17-6.003(2)(k).

5) Unless clearly stated otherwise, plotted features or computed data ***66** shown on **survey** maps must be supported by accurate **survey** measurements. F.A.C. Rule 61G17-6.003(2)(f).

6) All bearings shown must be clearly referenced. For example, the **survey** map or the report might indicate:

Bearings are referenced to the North right-of-way line of State Road 60, which bears S89°05'50"E as shown on the right-of-way maps for State Road 60, Section 88060-2502.

In any event, the bearings used by the surveyor must be referenced to a well-established and monumented line. F.A.C. Rule 61G17-6.003(2)(g).

7) A designated "north arrow" and a stated or graphic scale of the map must be shown on the **survey**. F.A.C. Rule 61G17-6.003(2)(h).

8) Surveyors must determine the location of the boundary in accord with the legal description shown on the map. F.A.C. Rule 61G17-6.0031(1)(b). Discrepancies between the description and the map must be shown. Rule 61G17-6.0031(1)(c).

9) Changes in direction must be shown on the **survey** by angles, bearings, or azimuths, in the same form as the description or other recorded document referenced on the map. F.A.C. Rule 61G17-6.0031(1)(d).

10) **Surveys** of a lot or lots in a recorded subdivision must show: i) the lot and block numbers and those of adjoining lots; ii) a comparison between the field measured directions and distances and the recorded directions and distances; iii) a comparison between the field measured directions and distances and the recorded "directions and distances to the nearest street intersection, right-of-way intersection or other identifiable refer-

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ence point"; and iv) the "dimensioned remaining portion of a lot(s) when part of a lot is included within the description." F.A.C. Rule 61G17-6.0031(1)(f).

11) When a **survey** is made of a parcel described by metes and bounds, it must show:

a) the relationship of the parcel "to at least one established identifiable real property corner";

b) all information called for in the description, such as the point of beginning;

c) "a comparison between recorded directions and distances and field measured directions and distances on the boundary when they vary";

d) the most recent abutting recorded instrument or plat either known by or furnished to the surveyor; and

e) "[t]he dimensioned remainder of a metes and bounds parent tract."

F.A.C. Rule 61G17-6.0031(1)(g).

12) The **survey** map must describe all monuments, whether found or placed. F.A.C. Rule 61G17-6.0031(2)(e).

13) Potential boundary inconsistencies which the **survey** did not attempt to disclose must be indicated and explained in the map or report. When the surveyor finds evidence of an inconsistency, it must be set forth on the map. Examples of inconsistencies include overlapping descriptions, conflicting monuments, and doubt as to the location on the ground of **survey** lines. F.A.C. Rule 61G17-6.0031(3)(b).

14) Fences, walls, and other open, notorious evidence of boundary lines must be shown on the map, along with dimensions adequate to demonstrate their relationship to the boundary lines. F.A.C. Rule 61G17-6.0031(3)(c).

15) The surveyor must indicate on the map apparent physical use from or onto neighboring property or adjacent streets. F.A.C. Rule 61G17-6.0031(3)(d). (Before the recent changes to the minimum technical standards, the term "encroachments" was used instead of "apparent physical use.")

16) The **survey** map must locate and show recorded private and public rights-of-way shown on recorded plats and "[e]asements shown on applicable record plats or open and notorious evidence of easements or rights-of-way…." F.A.C. Rule 61G17-6.0031(5)(b) and (c). The **survey** must contain a special note if streets or rights-of-way adjoining the land are not open. F.A.C. Rule 61G17-6.0031(5)(d). If the person who will receive the **survey** wants it to show easements or rights-of-way of record that exist but are not shown on recorded plats, this information must be provided to the surveyor. F.A.C. Rule 61G17-6.0031(5)(e).

17) The location of fixed improvements on the property must be shown on the map in reference to the boundaries either directly or by offset lines. F.A.C. Rule 61G17-6.0031(6)(b). If there are no fixed improvements, or if the surveyor did not locate them, the **survey** must contain a note to this effect. F.A.C. Rule 61G17-6.0031(6)(c).

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18) Under F.A.C. Rule 61G17-6.0031(5)(f) open and notorious human burial grounds and cemeteries located on the property must be located and shown on the **survey**. Even if not open and notorious, they must be located and shown if the surveyor is told about them. (For a discussion of how gravesites can affect title to real property, see "Private and Family Burial Grounds and Cemeteries," 21 *Fund Concept* 89 (Nov. 1989)).

19) A surveyor may write a metes and bound legal description providing definitive identification of the boundary lines. A sketch must accompany the description, with a statement that the sketch is not a **survey**. F.A.C. Rule 61G17-6.006(1).

ALTA Surveys

The Minimum Standard Detail Requirements for ALTA/ACSM Land Title **Surveys** were adopted by the American Land Title Association (ALTA) and the American Congress on Surveying & Mapping (ACSM). The most recent revision occurred in December 1992. Many out-of-state attorneys and lenders, because of their familiarity with these standards, and possibly their lack of familiarity with the minimum technical standards set forth in F.A.C. Ch. 61G17-6, often request that the **survey** meet the ALTA/ACSM standards. There is some overlap between the two sets of standards, but they are by no means identical. The Florida minimum technical standards contain some requirements not found in the ALTA/ACSM standards, and the ALTA/ACSM contain some requirements not found in the Florida minimum technical standards. But the ALTA/ACSM standards require more work on the part of the surveyor, and thus a **survey** meeting those standards is more expensive. It is becoming increasingly common for attorneys to require that **surveys** meet both sets of standards.

Surveys in Real Estate Contracts

• *Reasons for Obtaining a **Survey***

Surveys are part of nearly all modern real estate transactions. Most institutional lenders require a **survey** as a condition precedent to making a loan secured by a mortgage encumbering real estate. An accurate **survey**, coupled with a physical inspection of the property, is by far the best way to determine the location of the boundaries of the property and the location of improvements on the property. It will also show ***67** whether the location of the property on the ground is the same as the written legal description. In addition, the **survey** will form the basis for the title insurance company's deletion of the exception for matters of **survey** in the title insurance policy.

A wise buyer will always obtain a **survey** to be certain that, among other things, the property is in fact located where the buyer thinks it is located. A seller will generally be less concerned about a **survey** than will a buyer, unless of course the **survey** reveals problems or defects which the seller is obligated to remedy or unless the purchase price is based on the quantity of property (normally in terms of acreage or square feet) as determined by a **survey**.

• *Value of Existing **Surveys***

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You may have an older **survey** in your possession, especially if you represent the seller. If the **survey** reveals problems, such as evidence of unrecorded easements or encroachments, the time to face those problems and deal with them is before the contract is signed. Even if your seller client does not have a **survey**, he or she might know about **survey** problems. For example, a neighbor may have built a fence or other structure that appears to cross over the boundary line.

What if you are aware of **survey** problems in the precontract stage of the transaction? If you represent the seller, a good option would be to provide in the contract that the particular **survey** problems do not constitute title defects, but rather are deemed permitted exceptions. If you represent the buyer, a good option would be to provide in the contract that the particular **survey** problems must be cured or eliminated by the seller within a specified time period. In any event, the nature and extent of the **survey** problems will dictate what the parties decide to do (or not do) about them.

• *Drafting the **Survey** Provisions*

*Furnishing of Existing **Surveys***--If you represent the buyer, begin by requiring that the seller, within a specified timeframe, furnish to the buyer all existing **surveys** of the property in his or her possession. Keep that timeframe short--five days, say--since existing **surveys** are helpful to have on hand when ordering the new **survey**. Even though the current status of the property may not be reflected on an existing **survey**, it will tell you and your client a great deal about the property. When representing the seller, require the buyer to return the existing **surveys** to the seller if the transaction does not close.

*Procurement of **Survey***--Most contracts provide that the buyer may obtain a **survey** within a specified timeframe, although in rare cases the seller is required by the terms of the contract to obtain a **survey**. If the seller is required to procure the **survey**, and you represent the buyer, provide in the contract for a remedy in favor of the buyer if the seller fails to timely deliver the **survey** to the buyer. That remedy might be an extension of the inspection period, an extension of the closing date, or a reduction in the purchase price.

If you represent the seller, provide that the last day for obtaining the **survey** is no later than the last day for delivery of the title insurance commitment; the delivery of the **survey** is generally what triggers the commencement of the time period in which the buyer must make objections. Some attorneys, especially those representing buyers, prefer to require that the title insurance commitment be delivered at least 10 days before the last day for obtaining the **survey**; then, the surveyor may be given a copy of the title insurance commitment in order to locate on the **survey** easements and other matters listed on Schedule B of the title insurance commitment.

If you represent a buyer who has the option of procuring a **survey**, you may wish to incorporate some flexibility into the contract so that your client does not have to obtain (and hence pay) for the **survey** until say, 10 days before the closing. The risk of such a delayed procurement of the **survey**, however, may be the forfeiture of the opportunity to object to defects revealed by the **survey**. When representing the buyer, it is generally preferable to obtain and review the **survey** before the end of the inspection period during which the buyer may usually terminate the contract for any reason. Once the inspection period expires, the seller's obligation to cure **survey** defects may be limited under other provisions of the contract.

Regardless of which party you represent, be sure that the deadline dates with respect to the delivery of the

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title insurance commitment, the time period for objections to the title insurance commitment, the procurement of the **survey**, the time period for objections to the **survey**, the applicable curative periods as to title insurance commitment objections and **survey** objections, the closing date, and other key contract dates are internally consistent.

State which party pays for the **survey**. Although the buyer normally pays for the **survey**, this term is negotiable (as are virtually all terms of any real estate contract).

***Survey** Requirements*--You can list the requirements for the **survey** in the contract. Many attorneys, however, prefer to leave the **survey** requirements out of the contract, and instead deal directly with the surveyor as to such requirements. If you represent the buyer and the seller is providing the **survey**, then you should list in the contract all of the **survey** requirements in detail.

Provide that problems or defects revealed by the **survey** (that are not permitted exceptions under the contract) will be treated as title defects under the paragraph of the contract concerning title matters. Some examples of problems and defects that a **survey** might reveal:

• Easements that are not permitted exceptions under the contract.

• Rights of way that are not permitted exceptions under the contract.

• Violations of any building, zoning, land use, or other laws, ordinances, rules, or regulations imposed by governmental authority.

• Encroachments of improvements onto the lands of others, or encroachments of others' improvements onto the property.

• Overlaps or missing slivers of property.

•***68** Lack of legal access for either ingress and egress or utilities.

The **survey** might reveal variations between the legal description in the contract and the actual measurements on the ground. Such variations are often minuscule, and arise in large part because of the sophisticated surveying equipment in use today. Most title insurance companies will issue the **Survey** Endorsement when the variations are slight, and the surveyor certifies that the legal description refers to the same property shown on the **survey** notwithstanding the variations. That endorsement is an acknowledgment by the title insurance company that the property described in the title insurance policy is the same as that depicted on the **survey**.

If you represent the buyer, include a provision to the effect that **survey** defects include all matters that would, in the buyer's sole opinion, interfere with the buyer's intended use of the property. If you represent the seller, provide that notwithstanding anything to the contrary contained in the contract, **survey** matters shall not be treated as title defects if the title insurance company agrees to remove the standard exception for matters of **survey** and does not insert in its place a specific exception relating to the particular potential title defects or to matters appearing on the **survey** in general.

Seller's Inability to Cure Defects--Some aggressive buyers' attorneys propose (or insist) on a provision in the

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contract to the effect that if the transaction does not close because the seller is unable to cure or eliminate problems or defects revealed by the **survey**, or other title defects shown on the title insurance commitment, that the seller must reimburse the buyer for all of the buyer's costs associated with the transaction, including the cost of the **survey**, inspection fees, appraisal fees, and attorneys' fees. Most sellers are understandably reluctant to agree to such a provision, especially if there is no limit on the potential liability. Instead of insisting on such a provision when you represent the buyer, you might compromise and provide that if the transaction does not close because the seller is unable to cure or eliminate problems or defects (revealed by the title insurance commitment or the **survey**), that the seller must reimburse the buyer for the cost of the **survey**.

Multiple Legal Descriptions--The property might be described in the instrument by which the seller acquired title and in the **survey** by reference to several separate legal descriptions. If you represent the buyer, provide that if the surveyor writes a combined or aggregate legal description and certifies that the new legal description describes the same property as the combined old legal descriptions, the seller will convey the property using the new legal description. The seller might ask that the instrument of conveyance set forth, after the new legal description, the phrase “also described as” followed by the old legal descriptions; this should be acceptable to you as counsel for the buyer. Request that the title insurance company issue, with the title insurance policy, the Contiguity Endorsement. That endorsement ensures that the parcels in question are contiguous to each other and that, taken as a tract, constitute one parcel of land. As a condition to issuing it, the title insurance company might require a certification by the surveyor that the parcels are in fact contiguous.

FNNote 1. *Part 2 of this article, which will appear in the October issue of The Florida Bar* Journal, *discusses how and when to order the* ***survey****. It also covers surveyor's professional liability insurance, and includes a comprehensive list of requirements for* ***surveys*** *as well as an explanation of how to review the* ***survey****.*

[FNa1]. The individual who performs the **survey** and creates the **survey** map and report is referred to in F.S. Ch. 472 and in F.A.C. Ch. 61G17-6 as a “surveyor and mapper.” In this article, that term and the term “surveyor” will be used interchangeably.
70-AUG Fla. B.J. 65

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Westlaw

70-OCT FLBJ 80
70-OCT Fla. B.J. 80

Florida Bar Journal
October, 1996

Column

Real Property Probate and Trust Law

*80 WHAT EVERY REAL ESTATE LAWYER SHOULD KNOW ABOUT **SURVEYS** (PART 2)

Ross E. **Payne**

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Part 1 of this article, which appeared in the July/August issue of The Florida Bar *Journal*, discussed the definition of a **survey**, the types of **surveys**, the minimum technical standards, and ALTA **surveys**. It also addressed the drafting of the **survey** provisions of a contract for the sale and purchase of real estate.

Who Orders the Survey?

Your client may be a sophisticated real estate buyer familiar with **surveys**, especially if he or she also develops real estate, in which case your client may directly order the **survey**. Some clients may want to order the **survey** themselves to avoid paying you to do something that they can do. Other clients will want you to order the **survey**. If you are not the one who orders the **survey**, always confirm that it has in fact been timely ordered. In residential transactions, the broker or the title insurance agent often orders the **survey**. In commercial transactions, the attorney rather than the client should normally order the **survey**. That way, all of the requirements will be timely and properly communicated to the surveyor and delays avoided. Even if you do not place the initial order for the **survey**, at some point you will communicate with the surveyor as to the form and content of the **survey**.

Surveyor's Professional Liability Insurance

F.S. §472.015(5) states that if a surveyor does not carry professional liability insurance, he or she must provide notice to that effect "to any person or entity to which surveying and mapping services are offered." Such notice must consist of a sign at the surveyor's office and, as required by Rule 61G17-2.005 of the Florida Administrative Code, a statement on the map and the report (if there is a report) indicating that the **survey** is not covered by professional liability insurance. Some astute buyers' attorneys require the surveyor to furnish a copy of the declarations page for the surveyor's professional liability insurance policy. Without such insurance coverage, there may be no way to recover damages from the surveyor in the event of professional malpractice.

How and When to Order Survey

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Your client may instruct you to use a particular surveyor. If not so instructed, choose an experienced, reputable, dependable, local surveyor; such a surveyor may not be the least expensive one. If you are not familiar with the surveyors in your area, ask for recommendations from other real estate attorneys, real estate brokers, and mortgage lenders.

As soon as the contract is signed, call the surveyor and inquire about how much time it will take, at most, to receive the **survey** once it is ordered. Then, the date by which you must order the **survey** will be known. It is wise, though, to give yourself a cushion of at least a few days to allow for ubiquitous delays, especially since surveyors may get backlogged on account of bad weather. To give an accurate estimate of the time and cost, the surveyor will need to know what the basic requirements for the **survey** will be. Tell the surveyor that you will, at the appropriate time, send (or fax) the legal description, specific instructions, and a proposed form of surveyor's certificate.

Ask the surveyor for a fee quotation, and then be sure this is acceptable to the client. If it is not acceptable, choose another surveyor. At some point, your client will have to accept the surveyor's fee if the client wants the **survey**. When ordering the **survey** directly, as opposed to your client placing the order, make sure that the surveyor understands that your client-not you-is responsible for payment, unless you have the money in your trust account and your client's authorization to use it to pay the surveyor's bill. The surveyor might be willing to wait until closing to receive payment. In any event, it is a good idea for you, your client, and the surveyor to have a clear understanding of the fee arrangement beforehand. Under Fla. Admin. Code r. 61G17-2.001(6)(e), a surveyor may not make payment contingent on some future event, such as the closing of the transaction.

Send (or fax) a letter to the surveyor confirming that the **survey** will be delivered***81** to you by the date promised. Enclose the legal description, your specific instructions and requirements (including the title insurance company's requirements for deletion of the **survey** exception), a list of the contract's permitted exceptions, a copy of the title insurance commitment (with copies of all Schedule B exceptions), and also a proposed surveyor's certificate. You should also confirm the fee and the payment arrangement. Inform the surveyor as to the buyer's planned use of the property, in order to assist the surveyor in defining the scope of the **survey**. It is also a good idea to alert the surveyor about any boundary problems of which you are aware. Indicate the number of copies needed, factoring in the copies required for you, your client, the seller and his or her attorney, the title insurance company, and the lender. Call the surveyor two or three days later to be sure the order has been received.

The contents of the surveyor's certificate may have to be negotiated with the surveyor. In negotiating the form of the surveyor's certificate, do not ask the surveyor to certify to matters that are not appropriate for the surveyor to certify to, either because they are prohibited by the statutes and rules that bind surveyors or because they are beyond the scope of the surveyor's function. *See* F.S. §472.005(4).

There is a difference of opinion among some attorneys and some surveyors as to whether a "boundary **survey**" must show improvements such as buildings. Never rely on a boundary **survey** alone, unless all you are interested in is the perimeter of the property. Instead, ask for a **survey** that shows all improvements. Using the descriptive names "boundary and improvements **survey**" or "boundary and location **survey**" alleviate much of the confusion, even though those types of **surveys** are not expressly defined in the Florida Administrative Code.

The lender will sometimes impose requirements for the **survey** that are more onerous than (or at least differ-

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ent than) those you have imposed on behalf of your buyer client. This is more likely to be the case in a large commercial transaction. The best approach in that situation is to initiate a conference among yourself, the surveyor, and the lender's attorney, preferably long before the closing. As a buyer's counsel, you should, as best you can, anticipate the lender's requirements as to the **survey**, even before a lender is involved. For that matter, a buyer should anticipate the lender's requirements in all aspects of the transaction, unless of course it is a cash deal.

When you represent the buyer, or in the rare case the seller who is required under the contract to procure the **survey**, place an appropriate notation on your calendar or in your tickler system to be sure you receive the **survey** by the deadline. If you receive the **survey** after the deadline, the contract may have been breached, plus your time for reviewing it and making objections as to defects on behalf of the buyer has been shortened or eliminated. If you know that there will be a delay-that the surveyor will not deliver the **survey** until after the deadline provided for in the contract-contact the seller's attorney right away. Ask for a modification of the contract extending the deadline.

If the **survey** delivered to you does not meet the contract's requirements, or those which were furnished the surveyor, request that a revised **survey** be delivered to you as soon as possible. Some surveyors will provide a preliminary **survey**, a draft of sorts, for your review and comment prior to finalizing the **survey**.

Contents of Survey

As a general guide, you should request that the **survey**:

1) Be prepared by a professional surveyor and mapper, duly licensed in Florida.

2) Show the boundaries of the property and the location and dimensions of all improvements located thereon.

3) Contain a certification indicating that it meets (or exceeds) the minimum technical standards set forth in Fla. Admin. Code Ch. 61G17-6 (or any replacement or successor rule or regulation).

4) Be signed by the surveyor, dated, and sealed with the surveyor's official seal.

5) Show a prominent north directional arrow and scale of the drawing.

6) Contain a metes and bounds or platted legal description which is identical to that set forth in the contract. This will enable one reviewing the **survey** to trace the legal description of the property by following the bearings and distances around the boundaries as shown on the **survey**.

7) Show, if known, the street address of any improvements located on the property.

8) Show interior lot lines, if applicable.

9) Show the location of walkways, paved areas, driveways, and curb cuts, both on the property and adjacent to the property's boundary lines.

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10) Tie into a legally established point of beginning such as a section or quarter section corner or a block corner in a platted subdivision.

11) Fix all corners with appropriate monuments unless sufficient monumentation already is in place.

12) Show the 100-year flood plain contour line, if applicable to the property.

13) Indicate the flood zone in which the property is located on the applicable FEMA flood insurance rate map, also indicating the map number.

14) Indicate the gross area of the property, in acres (rounded to the nearest 1/1000) and in square feet (rounded to the nearest 1/100). This is especially important if the purchase price is based on the acreage or square footage of the property.

15) Depict any easements that affect the property. Easements that benefit the property, as well as those that burden it, should be shown. All easements should be referenced by recording data (*i.e.*, official records book and page).

16) Contain a statement that the means of access to and from the property is by a specified public roadway, and that such roadway is maintained by the applicable governmental body.

17) Show any roadways or alleys that abut the property, whether public or private. Names of the roadways, along with their widths and distances from the property, should be shown too. If the property is not abutted by a public roadway, the **survey** should show the location of the nearest public roadway and its distance from the property.

18) Show the:

• Location and dimensions of all visible utility connections and service lines;

• Location of setback lines, whether mandated by restrictive covenants, any applicable plat, or by building, zoning, land use, or other laws, ordinances, rules, or regulations imposed by governmental authority;

• Location and dimensions of natural and manufactured objects affecting ***82** the property;

• Location of ditches, creeks, canals, and other like objects; and

• All of the contract's permitted exceptions and all exceptions in the title insurance commitment, to the extent that the same are locatable on a **survey**.

19) Show any encroachments or discrepancies between the legal description of the property as set forth in the contract and any markers or monuments on the ground designating the boundaries of the property as actually used and occupied.

20) If the property is bounded in any manner by a water body, locate the existing water line (*i.e.*, the approximate position of the water boundary) and any visible evidence of the location of the ordinary high water mark (in the case of a freshwater body) or the mean high water line (in the case of a saltwater body). As to the defini-

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tions of ordinary high water mark and mean high water line and for a discussion of waterfront property law generally, *see* Bill Tompkins, "Beware of Florida's Rights in Title to Waterfront Property," The Florida Bar *Journal*, April 1994, p. 47. *See also* F.S. Ch. 177, Part II, and Fla. Admin. Code Ch. 18-5. Depending upon the intended use of the property, you might ask the surveyor to actually locate the ordinary high water mark or the mean high water line, the meander line as shown on the original government **survey** (if the water body in question was in fact meandered in the original government **survey**), the coastal construction control line (as defined in F.S. § 161.053), if any portion of the property is located seaward thereof, and any improvements (such as docks and seawalls) located waterward of the ordinary high water mark or the mean high water line, as the case may be.

a. Surveyors can locate the mean high water line (in the case of a saltwater body such as the Atlantic Ocean or Lake Worth) based on a specific elevation supplied by the Florida Department of Environmental Protection, if available, and if not the surveyor can perform a tide study to determine the proper elevation to use. The department's elevations are based on other **surveys** that have been performed in the area in question or on tide studies performed by the department.

b. The location of the ordinary high water mark (in the case of a freshwater body such as the St. Johns River or Lake Conway) is much more problematic, however. The surveyor may need to retain another professional, such as a biologist, to conduct soil studies.

c. Because of the complexities of locating the mean high water line and the ordinary high water mark, the **survey** will be more expensive if these lines are located, especially in the case of an ordinary high water mark.

d. All approximate water boundaries must be clearly labeled on the **survey** map in a graphic fashion distinctly different from the graphic fashion used to show water boundaries located to full **survey** accuracy. Fla. Admin. Code r. 61G17-6.003(2)(b).

e. Under F.S. §161.57(2), the seller of property located fully or partly seaward of the coastal construction control line must furnish the buyer with an affidavit or a **survey** showing the location of the coastal construction control line, unless, before closing, the buyer waives such requirement in writing.

21) Be certified to the buyer, the seller, the title insurance company, the agent for the title insurance company, and any lending institution being granted a mortgage encumbering the property as part of the transaction.

Unless you specifically request that the **survey** cover the items listed above, the **survey** might not show them, since many of these items are not part of the minimum technical standards. Items from the above list can be incorporated into your instructions to the surveyor, but be sure to delete any that are not pertinent to your transaction and to add any that are pertinent.

Reviewing the Survey

Whether you represent the buyer, the seller, or the lender, you must be able to review, analyze, and understand the **survey**, although your skill in reviewing **surveys** is more important when representing buyers and lenders. In reviewing **surveys**, you should be familiar enough with **surveys** and legal descriptions to spot any

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significant errors the surveyor may have made.

In seller representation, your review of an existing (*i.e.*, older) **survey** might occur before the contract is signed, in which case you will need to spot any problems that the seller should address before signing a contract or which should be addressed in the contract. Your review of the new **survey** (*i.e.*, the one normally obtained by the buyer under the contract) when representing the seller will probably be limited to determining whether objections made by the buyer are valid. If the purchase price is based on the quantity of property, you will need to glean this information from the **survey** as well. As counsel for the seller, you might also be acting as an agent for a title insurance company, in which case you will have to examine the **survey** to determine whether the standard exception for matters of **survey** may be deleted from the title insurance policy. This requires reviewing the **survey** more thoroughly than you normally would on behalf of a seller, creating the awkward possibility of your noticing problems that the buyer's attorney may have overlooked.

In buyer representation, the entire **survey** must be reviewed carefully, and discussed with your client, informing him or her of any problems or issues raised by the **survey**. In general, on behalf of a buyer, you want to ensure that the **survey** meets the contract's requirements and the requirements set forth in your instructions to the surveyor, that the surveyor's certificate is acceptable, and that the **survey** reveals no problems that were not already known. In representing the buyer, make any objections to **survey** defects within the time period and in the manner provided for in the contract. Objections to **survey** defects are usually made in the same manner as objections to title defects.

In any event, review the **survey** as soon as you receive it. Be sure your client***83** has a copy of the **survey**, and that he or she reviews it. Because of your client's familiarity with the property, the **survey** might alert your client to problems that you might not be aware of. For example, the client might suddenly realize that the property is smaller or configured differently than he or she thought.

To review the **survey**, start by comparing the legal description in the **survey** to the legal description in the title insurance commitment. There should be no variations. If variations are found, object to them. Follow the calls on the drawing around the boundaries of the property, looking for discrepancies, encroachments, and other problems. The drawing should conform to the legal description shown on the **survey**. Carefully examine the **survey** for any matters defined as **survey** defects under the contract such as encroachments, easements, setback violations, and other matters that are not within the permitted exceptions under the contract.

Read the entire **survey** and any accompanying report. Once you become familiar with **surveys**, this task will not seem as daunting. If you only read part of the **survey**, or if you give it only a cursory reading, you run the risk of missing something important.

Some title insurers will permit the deletion from the title insurance policy of the standard exception for matters of **survey** based on an older **survey** coupled with an affidavit of the current owner establishing that there have been no material changes. This is much more common in residential refinancing transactions than in commercial transactions of any type. If you represent a buyer in a situation where a title insurer has agreed to accept an old **survey** with an affidavit as the basis for deletion of the **survey** exception, you may wish to have the **survey** certified to your client and the current title insurance company; whether the surveyor is willing to do this is another matter. Be sure to inform your client of the risk involved in such a procedure; that is, the old **survey** may no longer be accurate and the owner may fail (intentionally or not) to disclose material changes. The money

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that the buyer will save by not getting a new **survey** is sometimes enough to raise the buyer's tolerance for risk.

Conclusion

Lawyers and surveyors best serve their clients by cooperating with one another and by working together effectively. There are instances when a lawyer should defer preparation of a legal description to a surveyor, and there are instances when a surveyor should not prepare a legal description without consulting a lawyer. If you are in doubt about whether to consult with a surveyor, err on the side of doing so.

FNNote 1. ***Ross** E. **Payne** is a sole practitioner in Orlando.*

This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Robert W. Goldman, chair, and David H. Simmons and Brian Felcoski, editors.
70-OCT Fla. B.J. 80

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Back to Speaker Topics

Fund Assembly

Counsel Beware - How Far Can and Should You Go in Your Counsel Opinion Letter

David Brittain, *Shareholder, Trenam Kemker Scharf Barkin*

Back to Speaker Topics

Speaker Information

Counsel Beware - How Far Can and Should You Go in Your Counsel Opinion Letter

David Brittain,

Shareholder, Trenam Kemker Scharf Barkin

David Brittain is a Shareholder in the firm of Trenam Kemker Scharf Barkin. His practice is focused on commercial, resort and residential development including complex condominium, mixed-use, and Planned Unit Development projects, transactions and finance, commercial real estate leasing, construction contracting, commercial real estate lease negotiation and documentation, zoning, land use, and environmental due diligence and counseling, loan workouts, restructurings, and complex real estate litigation representation.

He is Co-Chair of the Legal Opinions Committee of the Real Property, Probate, and Trust Law Section of the Florida Bar, and has authored portions of the "Report on Standards for Third-Party Legal Opinions of Florida Counsel" issued by the Legal Opinion Standards Committee of the Business Law Section and the Legal Opinions Committee of the Real Property, Probate and Trust Law Section of The Florida Bar.

Counsel Beware - How Far Can and Should You Go in your Counsel Opinion?

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May, 2017
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Major Topic Overview

- Introduction
- Applicable Standards; Model Opinions
- Organization, Power and Authority Opinions
- No Conflict and No Breach or Default Opinions
- The Remedies Opinion
- No Litigation Confirmations
- Specialty Mixed-Use Project Opinions

What is a "Third Party Legal Opinion?"

- Letter expressing an opinion on an issue or issues of law;
- Delivered in a commercial transaction;
- By counsel to a transaction party;
- To and for reliance of another transaction party not the client of the opinion-giver ;
- Subject to qualifications and assumptions allowable under "customary practice."

What is "Customary Practice"

- From The Restatement of the Law (Third) of the Law Governing Lawyers §§51, 52, 95, 98
- The professional standard determining whether an opinion satisfies the lawyer's obligation of competence and diligence.
- Customary practice of lawyers similarly situated is a key factor in determining lawyer professional liability.

What a Legal Opinion is Not

- A guarantee of the conclusion; only a professionally educated prediction.
- A policy of insurance or indemnity.
- An assumption of risk on a casualty basis;
- A low-risk proposition to the lawyer or law firm: see Fortress Credit Corp. vs. Dechert LLP, 89 A.D.3d 615 (N.Y. 2011)."

Standards: Florida Practice

- Establishing standards for customary practice is a theme of modern opinion literature.
- The "Report on Third-Party Legal Opinion Customary Practice in Florida," December 3, 2011.
- The Florida Report states that is recognizes customary practice of Florida opinion givers.

Emerging "National Standards"

- Continuing efforts by several lawyer professional groups to establish "nation opinion standards":
  - ABA Business Law Section
  - ABA Real Property, Probate and Trust Law Section
  - Working Group on Legal Opinions Foundation
  - ACREL Legal Opinions Committee
- Statements of Opinion Practices and Core Opinion Principles, approved by joint committee of ABA Bus.L. Section and WGLO (3/28/17)

Publications: Keeping Current

- Website: Florida Legal Opinions Report
- Website: ABA RPPTL Legal Opinions Committee
- Website: ABA Bus. L. Section Legal Opinions Committee
- Website: Florida Bar Business Law Section
  - Full Report on Legal Opinions by BLS and RPPTL
  - Unannotated, editable MS Word forms A through E

http://www.flabizlaw.org/committees-task-force/substantive-committees/opinion-standards-committee/

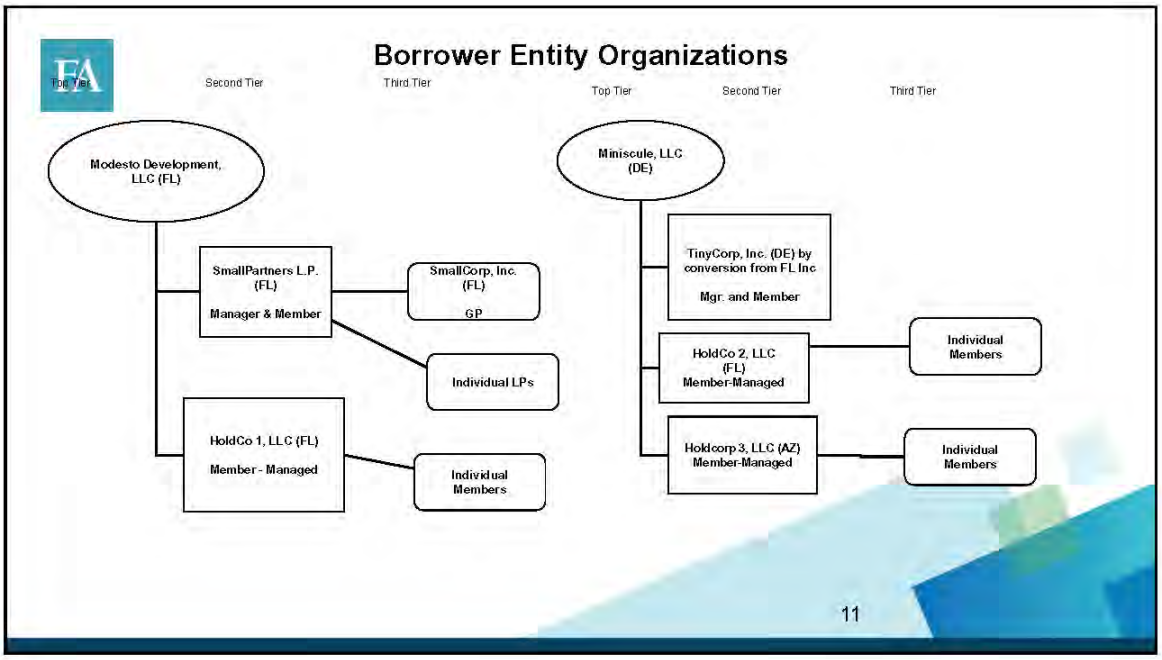
Hypothetical: Giant Towers

- Loan: $100,000,000 D&C Loan
- Borrower: Modesto Development, LLC (FL LLC)
- Borrower Mgr: Small Partners, Ltd. (FL LP)
- General Partner: SmallCorp, Inc. (FL Corp)
- Carve-Out Guarantor: Miniscule, LLC (DEL LLC)
- COG Mgr.: TinyCorp, Inc. (DEL LLC)

The "Building Block" Opinions

- Entity Status and Organization
- Authority to Transact Business
- Entity Power (and Authority)
- Authorization of the Transaction
- Execution and Delivery

  2011 Florida Report, at pg. 88


Borrower Entity Organizations
Top Tier
Second Tier
Third Tier
Modesto Development, LLC (FL)
SmallPartners L.P. (FL)
Manager & Member
SmallCorp, Inc. (FL)
GP
Individual LPs
HoldCo 1, LLC (FL)
Member - Managed
Individual Members
Top Tier
Second Tier
Third Tier
Miniscule, LLC (DE)
TinyCorp, Inc. (DE) by conversion from FL Inc
Mgr. and Member
HoldCo 2, LLC (FL)
Member-Managed
Individual Members
Holdcorp 3, LLC (AZ)
Member-Managed
Individual Members
11

Organization/Power/Authority
• Modesto Dev – FL LLC
Organization:
• FL Certificate of Formation/Certified Articles
• Active Status Certificate
• Copy of Operating Agreement
Power/Authority:
• Read Articles and Operating Agreement carefully
• Obtain written Consent of Members and Manager
• Affidavit of Manager or Member as necessary

Organization/Power/Authority

Modesto Dev – FL LLC: Opinions (Sample Letter, pg. 5)

1. Borrower is a limited liability company organized under Florida law and its limited liability company status in Florida is active.

2. Borrower has the limited liability company power to execute and deliver the Loan Documents to which it is a party and to perform its obligations thereunder.

3. Borrower has authorized the execution, delivery and performance of the Loan Documents to which it is a party by all necessary limited liability company action.

Organization/Power/Authority

- SmallPartners – FL LP

  Organization:
  - FL Certificate of Formation/Certified Articles
  - Active Status Certificate
  - Agreement of Limited Partnership (LPA)

  Power and Authority:
  - Based on Review of LPA
  - Written Consent of General/Limited Partners
  - Unless no action by LPs required under LPA, caveat "majors decisions" sections of LPA

  (Sample Letter, pp. 5-6)

Organization/Power/Authority

- SmallCorp – FL INC (Sample Letter, pg. 6)

  Organization
  - Certificate of Formation
  - Active Status Certificate
  - FL Articles of Incorporation
  - Bylaws
  - Shareholder Agreements (establish existence)

  Power and Authority
  - Review Articles/Bylaws and any SH Agrs.
  - Resolutions of Board and Stockholders as necessary

Organization/Power/Authority

- Opining Counsel is not licensed to practice in Delaware.
- Can he or she render the necessary organization/power/authority opinions for Miniscule, LLC?
- Yes, if "familiar with Delaware corporate law (including court decisions interpreting that law)" and
- Believes himself or herself competent to render the opinions. Florida Report, pg. 24

Organization/Power/Authority

"Opining Counsel should carefully evaluate its familiarity with the laws of jurisdictions where Opining Counsel is not licensed to practice before rendering an opinion based upon legal principles applicable in such jurisdictions. Even if carefully researched and prepared, an opinion letter covering the laws of a jurisdiction in which Opining Counsel is not admitted to practice could expose Opining Counsel to liability if Opining Counsel fails to meet the standards of a competent local lawyer."

Florida Report, pg. 24, and see Sample Opinion, pg. 11

Organization/Power/Authority

- Miniscule, LLC – DE LLC (Sample Letter, pg. 6)
  - Organization:
    - DE Certificate of Formation
    - Good Standing Certificate for DE
    - DEL LLC Agreement
    - FL Qualification Certificate (?)
  - Power and Authority:
    - Read LLC Agreement carefully
    - Written Consent of Members and Manager

Organization/Power/Authority

- TinyCorp. Inc., – DE INC (Sample Letter, pg. 6)
  - Organization:
    - FL Articles of Inc. and By-Laws
    - FL Certificate of Conversion to DE
    - DE Certificate of Conversion
    - DE Good Standing Certificate
    - Do the FL By-Laws comply with DE Law?
    - Shareholder Agreements (establish existence or not)
    - FL Qualification Certificate (?)
  - Power and Authority:
    - Review Articles/Bylaws and any SH Agrs.
    - Resolution of Board and Shareholders

Organization/Power/Authority

- HoldCo. 2 – FL LLC
  - Organization and Authority analysis same as Modesto Dev (FL LLC)
  - Based on LLC Agreement for Miniscule, LLC, HoldCo 2 consent to loan?
- HoldCo. 3 – AZ LLC
  - Local counsel opinion, unless lead opining counsel is qualified to make the determination
  - Based on LLC Agreement for Miniscule, LLC, must HoldCo 3 consent to loan?

Organization/Power/Authority

- HoldCo. 2 – FL LLC
  - Organization and Authority analysis same as Modesto Dev (FL LLC)
  - Based on LLC Agreement for Miniscule, LLC, must HoldCo 2 consent to to the Loan?
- HoldCo. 3 – AZ LLC
  - Local counsel opinion, unless lead opining counsel is qualified to make the determination
  - Based on LLC Agreement for Miniscule, LLC, must HoldCo 3 consent to the Loan?

No Violation/No Breach or Default

Does the execution, delivery and performance of the Transaction Documents:

- Violate the Client's organizational documents;
- Breach covenants or create liens on Client property under existing Client agreements;
- Violate judgments, decrees or orders of judicial or other governmental authority applicable to the Client; or
- Violate "Applicable Law" (as defined in the opinion)?
- What do we "know" for purposes of a legal opinion?
- Common pitfalls: what about the submerged land lease?
- See Florida Report, at pg. 109; Sample Letter, pg. 7

The Remedies Opinion

- Also known as the "enforceability opinion."
- Disarmingly simple language:

  "Each of the Loan Documents to which Borrower is a party is a valid and binding obligation of Borrower, enforceable against Borrower in accordance with its terms." Sample Opinion, pp. 7
- Must be hedged with proper assumptions, qualifications, and cautions. See Sample Opinion, pp. 10-11
- Common pitfalls
- See Florida Report, pg. 109

The No Litigation Confirmation

- A factual confirmation, not an opinion.
- Almost always based on "Knowledge" of counsel.
- Scope of the confirmation: matters relating (a) to Client or (b) to the transaction.
- Never an opinion about anticipated outcomes or merits of pending or threatened litigation or governmental proceedings
- Common Pitfalls: See *Dean Foods Company v. Pappathanasi*, 18 Mass.L.Rptr. 598 (Mass. Sup. 2004)
- See Sample Opinion, pg. 8; Florida Report, pg. 118

Special Project Opinions

- Certain opinions may be requested in connection with specialty commercial projects not contemplated by the Florida Report. Can these be rendered?
- Specialty zoning and land use opinions, see Florida Report, pg. 161; Sample Opinion, pg. 8
- Condominium filing opinions, see Sample Opinion pg. 8

Special Project Opinions

- Condominium filing opinion:
- "Based solely upon a letter received by Borrower from the Division of Condominiums, Timeshares and Mobile Homes of the State of Florida (the "Division"), dated March 17, 2017, a prospectus for the project known as Giant Towers on the Channel, A Condominium, has been registered with the Division in accordance with the provisions of the Florida Condominium Act, Fla. Stat. Chapter 718 (2016)."

Special Project Opinions

- What about this opinion, also requested by Big Bank?
- "The rights and interests in any portion of the Project of all persons who have heretofore executed the applicable form of purchase agreement contained in the Prospectus filed with the Division are and shall be subordinate to the lien of the Mortgage on the Project."

Special Project Opinions

- And what about this opinion, also requested by Big Bank?
- "Upon recording of the Declaration in the Local Recording Office with the certificate of substantial completion required by Section 718.104(4)(e), F.S., all requirements of the Florida Condominium Act regarding the establishment of a condominium project will have been complied with."

Counsel Beware - How Far Can and Should You Go in your Counsel Opinion?
Table of Attachments

1. *Fortress Credit Corp. v. Dechert,* 89 A.D. 3d 615, 934 N.Y.S. 2d 119, 2011 N.Y. Slip Op. 08626 (Supreme Ct. N.Y. 2011)

2. Cover Page – "Report on Third-Party Legal Opinion Customary Practice in Florida," December 3, 2011

3. "Statement of Opinion Practices" of the Joint Committee on Statement of Opinion Practices, March 28, 2017

4. "Core Opinion Principles," statement of the Joint Committee on Statement of Opinion Practices, March 28, 2017

5. Class Hypothetical: Giant Towers on the Channel, A Condominium

6. Sample Opinion Letter for Hypothetical

7. Excerpt from Florida Report: Entity Status and Organization Opinions (for LLCs)

8. Excerpt from Florida Report: Qualification to Do Business in Florida Opinions (for LLCs)

9. Excerpt from Florida Report: Entity Power (for LLCs)

10. Excerpt from Florida Report: The Remedies Opinion

11. Excerpt from Florida Report: The No Litigation Confirmation

12. *Dean Foods Company v. Pappathanasi*, 18 Mass.L.Rptr. 598 (Mass. Sup. 2004)

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Kosterich v. Frank Ciotta & Associates, N.Y.Sup., August 8, 2014

89 A.D.3d 615
Supreme Court, Appellate Division, First Department, New York.

FORTRESS CREDIT CORP., et al.,
Plaintiffs–Respondents,
v.
DECHERT LLP, Defendant–Appellant.

Nov. 29, 2011.

Synopsis
Background: Lender brought action alleging fraud, legal malpractice, and negligent misrepresentation against law firm that rendered legal opinion that loan documents were duly executed and that loan was valid and binding obligation on putative borrower and guarantor. Law firm moved to dismiss for failure to state cause of action. The Supreme Court, New York County, Charles E. Ramos, J., denied motion. Lender appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] lender failed to sufficiently allege the scienter required to state fraud claim against law firm;

[2] firm had no attorney-client relationship with lender;

[3] lender sufficiently alleged relationship of near privity with law firm, as required to state negligent misrepresentation claim; but

[4] lender failed to allege that firm breached duty of care to lender; and

[5] statements in firm's legal opinion letter were not misrepresentations.

Reversed.

West Headnotes (5)

[1] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Lender's allegation that law firm, which ostensibly represented purported borrower, acted recklessly in failing to confirm that purported borrower was in fact involved in loan transaction, did not sufficiently allege the scienter required to state fraud claim against law firm; law firm was not alleged to have made a knowingly false statement or to have knowingly participated in the fraud.

Cases that cite this headnote

[2] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Law firm, which ostensibly represented purported borrower in loan transaction, had no attorney-client relationship with lender, and thus had no legal malpractice liability to lender for failing to confirm that purported borrower was in fact involved in loan transaction, although lender was meant to benefit from law firm's legal opinion that loan documents were duly executed and delivered and that the loan was a valid and binding obligation on purported borrower.

4 Cases that cite this headnote

[3] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Lender sufficiently alleged relationship of near privity with law firm, which ostensibly represented purported borrower in loan transaction, as required to state negligent misrepresentation claim against law firm for providing legal opinion letter, which stated that

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loan documents were duly executed and that loan was valid obligation on purported borrower, without confirming that purported borrower was in fact involved in loan transaction; particular purpose of opinion letter allegedly was to aid lender in deciding whether to enter into transaction, and firm allegedly evinced its awareness of lender's reliance on opinion letter by addressing letter to lender.

2 Cases that cite this headnote

[4] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Lender failed to allege that law firm, with whom lender was in near privity, breached duty of care to lender, as required to state negligent misrepresentation claim against firm for providing legal opinion letter, which stated that loan documents were duly executed and that loan was valid obligation on purported borrower, whom firm ostensibly represented, without confirming that purported borrower was in fact involved in loan transaction; lender never allegedly informed firm that its obligations were not limited solely to review of specified loan documents or that firm was to investigate, verify, and report on legitimacy of transaction.

1 Cases that cite this headnote

[5] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Statements in legal opinion letter provided by law firm, with whom lender was in near privity, were not misrepresentations, but only legal conclusions, and thus could not support lender's negligent misrepresentation claim against firm for providing letter, which stated that loan documents were duly executed and that loan was valid obligation on purported borrower, whom firm ostensibly represented, without confirming that purported borrower was in fact involved in loan transaction; statements in letter were clearly and unequivocally circumscribed by firm's qualifications that it assumed the genuineness of all signatures and authenticity of loan documents, made no independent inquiry into accuracy of factual representations or certificates, and undertook no independent investigation in ascertaining facts.

1 Cases that cite this headnote

Attorneys and Law Firms

****121** Miller & Wrubel P.C., New York (Joel M. Miller of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Marc E. Kasowitz of counsel), for respondents.

SAXE, J.P., SWEENY, CATTERSON, FREEDMAN, ROMÁN, JJ.

Opinion

***615** Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 4, 2010, which denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously reversed, on the law, and the motion granted, with costs. The Clerk is directed to enter judgment accordingly.

In 2005, Marc Dreier, who was then an attorney, proposed to plaintiffs that they participate in a short-term note program to finance the purchase of foreign real estate assets. The designated borrower would be Dreier's clients, Solow Realty & Development Company, LLC, and affiliated companies controlled by real estate developer Sheldon Solow (collectively Solow Realty), and Dreier would be the guarantor. The parties executed two loans totaling $60 million in 2006, and, in 2008, Dreier proposed another ***616** $50 million loan transaction. For this last loan transaction, plaintiffs required Solow Realty and Dreier to retain independent counsel to issue a legal opinion as to whether Solow Realty and Dreier had carried out the necessary formalities to render the loan documents valid and binding on them. Ostensibly, Solow Realty and Dreier retained defendant for this purpose. Dreier furnished the necessary documents and information to defendant for the preparation of the opinion. All the documents to which Solow Realty was a signatory appeared to have been

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signed by Solow Realty, and some bore "what appeared to be" the signatures of Sheldon Solow and Solow Realty's CEO.

Plaintiffs contend that they relied on defendant's legal opinion that the loan documents were duly executed and delivered and that the loan was a valid and binding obligation on Solow Realty and Dreier. Plaintiffs wired $50 million to an attorney trust account set up at Dreier's firm. Several months later, Dreier was arrested in connection with another fraud scheme, and plaintiffs discovered that Solow Realty had no knowledge of and was never a party to the loan transactions and that Dreier had falsified the documents and forged the Solow Realty signatures.

[1] The allegation that defendant acted recklessly in failing to confirm that Solow Realty was in fact involved in the loan transaction is not a sufficient allegation of scienter, an element of the cause of action for fraud, especially since the factual allegations of this complaint do not establish that defendant made a knowingly false statement or that defendant was a knowing participant in the fraud (*see LaSalle Nat. Bank v. Ernst & Young*, 285 A.D.2d 101, 110, 729 N.Y.S.2d 671 [2001]).

[2] The legal malpractice cause of action fails because the parties had no attorney-client relationship (*see Denenberg v. Rosen*, 71 A.D.3d 187, 195–196, 897 N.Y.S.2d 391 [2010], *lv. dismissed* 14 N.Y.3d 910, 904 N.Y.S.2d 688, 930 N.E.2d 762 [2010]). While plaintiffs were meant to benefit by defendant's actions on behalf of Solow Realty, "that circumstance does not give rise to a duty [to plaintiffs] on the part of the attorney" (*Federal Ins. Co. v. North Am. Specialty Ins. Co.*, 47 A.D.3d 52, 60, 847 N.Y.S.2d 7 [2007]).

**122 [3] [4] Although there is no contractual privity between the parties, the complaint sufficiently alleges a relationship of "near privity" for the purpose of stating a cause of action for negligent misrepresentation or negligence (*see Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377, 384–385, 590 N.Y.S.2d 831, 605 N.E.2d 318 [1992]). Plaintiffs allege that the particular purpose of the opinion letter was to aid them in deciding whether to enter into the loan transaction, that defendant was aware that they were relying on the opinion in making that decision, and that *617 defendant evinced its understanding of that reliance by addressing the legal opinion to them. However, the complaint fails to allege (a) that plaintiffs informed defendant that its obligations were not limited solely to a review of relevant and specified documents or (b) that plaintiffs informed defendant that it was to investigate, verify and report on the legitimacy of the transaction. Absent such factual allegations, plaintiffs cannot establish that defendant breached a duty of care. As Dreier was Solow Realty's attorney and the guarantor of the loan, defendant had no reason to suspect that Solow Realty was not in fact a party to the loan transaction or that Dreier forged the signatures of its principal and CEO. We note that plaintiffs had previously made two large loans to Dreier, while represented by international firms that specialized in financial transactions. Prior to Dreier's arrest, plaintiffs never suspected fraud.

[5] Moreover, the opinion, by its very terms, provided only legal conclusions upon which plaintiffs could rely. The opinion was clearly and unequivocally circumscribed by the qualifications that defendant assumed the genuineness of all signatures and the authenticity of the documents, made no independent inquiry into the accuracy of the factual representations or certificates, and undertook no independent investigation in ascertaining those facts. Thus, defendant's statements as contained in the opinion, were not misrepresentations (*see Prudential Ins. Co.*, 80 N.Y.2d at 386–387, 590 N.Y.S.2d 831, 605 N.E.2d 318). Finally, in accordance with the loan agreement, the opinion was reviewed by plaintiffs' counsel before plaintiffs accepted it.

For the reasons discussed above, we also find that the complaint fails to state a cause of action for breach of fiduciary duty.

All Citations

89 A.D.3d 615, 934 N.Y.S.2d 119, 2011 N.Y. Slip Op. 08626

End of Document

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REPORT ON THIRD-PARTY LEGAL OPINION CUSTOMARY PRACTICE IN FLORIDA

BY THE

LEGAL OPINION STANDARDS COMMITTEE OF THE FLORIDA BAR BUSINESS LAW SECTION

AND THE

LEGAL OPINIONS COMMITTEE OF THE REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR

DECEMBER 3, 2011

[As approved by the Joint Committee on Statement of Opinion Practices on March 28, 2017, subject to approval by the Legal Opinions Committee of the American Bar Association's Business Law Section and the Board of Directors of the Working Group on Legal Opinions Foundation]

STATEMENT OF OPINION PRACTICES[1]

1 INTRODUCTION

Third-party legal opinion letters ("closing opinions")[2] are delivered at the closing of a business transaction by counsel for one party (the "opinion giver") to another party (the "opinion recipient") to satisfy a condition to the opinion recipient's obligation to close. A closing opinion includes opinions on specific legal matters ("opinions") and, in so doing, serves as a part of the diligence of the opinion recipient.[3]

This Statement of Opinion Practices (this "*Statement*")[4] describes selected aspects of customary practice and other practices generally followed throughout the United States in the giving and receiving of closing opinions.

2 CUSTOMARY PRACTICE

Closing opinions are prepared and understood in accordance with the customary practice of lawyers who regularly give them and lawyers who regu-

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[1] This *Statement* has been published in *The Business Lawyer* [cite]. At the time of its publication, this *Statement* was approved by the bar associations and other lawyer groups identified in **Schedule 1** (the "Schedule of Approving Organizations"). A current Schedule of Approving Organizations can be found at [URL]. Approval by a bar association or other lawyer group does not necessarily mean approval by individual members of that association or group.

[2] The terms "opinion letters" and "closing opinions" are commonly used to refer to third-party legal opinion letters, defined in this *Statement* as "closing opinions."

[3] References in this *Statement* to an opinion recipient mean the addressee of a closing opinion and any other person expressly authorized to rely on the closing opinion.

[4] This *Statement* is drawn principally from: Comm. on Legal Op. of the Section of Bus. Law of the Am. Bar Ass'n, *Legal Opinions Principles*, 53 BUS. LAW. 831 (May 1998), and Comm. on Legal Op., *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (Feb. 2002). It updates the *Principles* in its entirety and selected provisions of the *Guidelines*. The other provisions of the *Guidelines* are unaffected, and no inference should be drawn from their omission from this *Statement*. Each of the provisions of this *Statement* should be read and understood together with the other provisions of this *Statement*.

larly review them for opinion recipients. The phrase "customary practice" refers principally to the work lawyers are expected to perform to give opinions (customary diligence) and the way certain words and phrases commonly used in closing opinions are understood (customary usage).[5] Customary practice applies to a closing opinion whether or not the closing opinion refers to it or to this *Statement*.[6]

3 LEGAL OBLIGATIONS AND RULES OF PROFESSIONAL CONDUCT

When they give closing opinions, lawyers are subject to generally applicable legal obligations and to the rules governing the professional conduct of lawyers.[7]

4 GENERAL

4.1 Expression of Professional Judgment

An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.

4.2 Bankruptcy Exception and Equitable Principles Limitation

The bankruptcy exception and equitable principles limitation apply to opinions even if they are not expressly stated.

4.3 Cost and Benefit

The benefit to the recipient of a closing opinion and of any particular opinion should warrant the time and expense required to give them.

4.4 Golden Rule

Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat closing opinions as if they were part of a business negotiation. An opinion giver should not be expected to give an opinion that counsel for the opinion recipient would not give in similar circumstances if that counsel were the opinion giver and had the requisite competence to give the opinion. Correspondingly, before declining to give

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[5] *See Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (Aug. 2008) attached as **Appendix A,** which has been approved by the bar associations and other lawyer groups listed at the end of that Statement.

[6] *See infra* Section 10 (*Varying Customary Practice*).

[7] These include rules relating to the duties of an opinion giver to its own client. Counsel for an opinion recipient also has duties to its client, including duties relating to a closing opinion.

an opinion it is competent to give, an opinion giver should consider whether a lawyer in similar circumstances would ordinarily give the opinion.

4.5 Reliance by Recipients

In accepting a closing opinion, an opinion recipient ordinarily need not take any action to verify the opinions it contains. However, an opinion recipient is not entitled to rely on an opinion if it knows[8] the opinion to be incorrect or if its reliance on the opinion is otherwise unreasonable under the circumstances.

4.6 Good Faith

An opinion giver and an opinion recipient and its counsel are each entitled to expect that the other is acting in good faith with respect to a closing opinion.

5 FACTS AND ASSUMPTIONS

5.1 Reliance on Factual Information and Use of Assumptions

Because the lawyers preparing a closing opinion (the "opinion preparers") typically will not have personal knowledge of all of the facts they need to support the opinions being given, they ordinarily are entitled to base those opinions on factual information provided by others, including their client, and on factual assumptions.

5.2 Reliance on Facts Provided by Third Parties

Opinion givers are entitled to rely on factual information provided by others unless the opinion preparers know that information to be false or unreliable. Information may be unreliable, for example, if it is irregular on its face or has been provided by an inappropriate source.

5.3 Scope of Inquiry

Opinion preparers are not expected to conduct a factual inquiry of the other lawyers in their law firm or a review of the firm's records, except to the extent they recognize[9] that a particular lawyer is reasonably likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to give an opinion.[10]

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[8] "Knows" refers to "actual knowledge."

[9] "Recognize" refers to perceiving the relevance of information actually known.

[10] References in this *Statement* to a law firm also include a law department of an organization.

5.4 Opinions Should Not Be Based on Representations of Law

An opinion should not be based on a representation that is tantamount to the legal conclusions it expresses. An opinion may, however, be based on legal conclusions in a certificate of an appropriate government official.

5.5 Factual Assumptions

Some factual assumptions on which opinions are based need to be stated expressly; others do not. Examples of factual assumptions that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. These include, for example, assumptions that copies of documents are identical to the originals, signatures are genuine, the parties to the transaction other than the opinion giver's client[11] have the power and have taken the necessary action to enter into the transaction, and the agreements those parties have entered into with the opinion giver's client are enforceable against them. An opinion should not be based on an unstated assumption the opinion preparers know to be incorrect or otherwise unreliable.[12]

5.6 Presumption of Regularity

Opinions may be based on a presumption of regularity for matters relating to the client (for example, actions taken at meetings during the period covered by a missing minute book) that are not verifiable from the client's records, if that presumption is not inconsistent with those records and reliance on it is not otherwise inappropriate under the circumstances. Opinion givers may rely on the presumption without stating that reliance in the closing opinion unless the opinion preparers consider a reference to the presumption to be necessary because of the significance of the matters being presumed.

5.7 Limited Factual Confirmations and Negative Assurance

An opinion giver ordinarily should not be asked to confirm factual matters, even if the confirmation is limited to the knowledge of the opinion preparers. A confirmation of factual matters, for example, the accuracy of the rep-

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[11] This unstated assumption also may not be relied on for a non-client whose obligations are covered by the opinion.

[12] This is in contrast to a stated assumption, which may be relied on in giving an opinion even if incorrect or unreliable unless the opinion preparers recognize that their reliance on that assumption will mislead the opinion recipient with regard to a matter the opinion addresses. *See infra* Section 12 (*No Opinion That Will Mislead Recipient*).

resentations and warranties in an agreement or the information in a disclosure document (except as indicated below), does not involve the exercise of professional judgment by lawyers and therefore is not a proper subject for an opinion even when limited by a broadly-worded disclaimer. An exception is the confirmation sometimes requested regarding particular legal proceedings to which the client is a party.[13] Negative assurance regarding the adequacy of disclosures in a prospectus or other disclosure documents may be provided in limited circumstances in connection with a sale of securities to assist the opinion recipient to establish a due diligence or similar defense.

6 LAW

6.1 Covered Law

When a closing opinion states that an opinion covers the law of a specific jurisdiction or particular laws, the opinion covers no other law or laws.

6.2 Applicable Law

An opinion on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary professional diligence in similar circumstances, would reasonably recognize as being applicable to the client or transaction that is the subject of the opinion. A closing opinion does not cover some laws (for example, securities, tax and insolvency laws) that are otherwise applicable to the matters it addresses. A closing opinion also does not cover municipal and other local law. An opinion may, however, cover law that would not otherwise be covered if the closing opinion so states or the opinion does so expressly. [14]

7 SCOPE

7.1 Matters Addressed

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters of law that involve the exercise of professional judgment. A closing opinion covers only those matters it specifically addresses.

7.2 Matters Beyond the Expertise of Lawyers

Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analy-

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[13] This *Statement* also applies, when appropriate in the context, to confirmations.

[14] *See infra* Section 10 *(Varying Customary Practice).*

sis, economic forecasting and valuation). When an opinion depends on a matter not within the expertise of lawyers, an opinion giver is entitled to rely on a certificate from an appropriate source or an express assumption with regard to the matter.

7.3 Relevance

Opinion requests should be limited to matters that are reasonably related to the opinion giver's client and the transaction that is the subject of the closing opinion. Depending on the circumstances, limiting assumptions, exceptions and qualifications to those reasonably related to the client, the transaction and the opinions given can facilitate the opinion process by making the closing opinion more informative.

8 PROCESS

8.1 Opinion Recipient and Customary Practice

An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver.

8.2 Other Counsel's Opinion

An opinion giver should not be expected to express its concurrence in the substance of an opinion of other counsel.

8.3 Financial Interest in or Other Relationship with Client

Opinion preparers ordinarily do not attempt to determine whether others in their law firm have a financial interest in, or other relationship with, the client. Nor do they ordinarily disclose any such financial interest or other relationship that they or others in their firm have. If the opinion preparers recognize that such a financial interest or relationship exists, they should consider whether, even if disclosed, it will compromise their professional judgment with respect to the opinions being given.

8.4 Client Consent and Disclosure of Information

When the client's consent to the delivery of a closing opinion is required by the rules of professional conduct, that consent can be inferred from the circumstances of the transaction and ordinarily is inferred from a provision in the agreement making the delivery of a closing opinion a condition to closing. If an opinion would require disclosure of information that the opinion preparers recognize the client would wish to keep confidential, the opinion

should not be given unless, after discussion with the client, the client consents.

9 DATE

A closing opinion speaks as of its date. An opinion giver has no obligation to update a closing opinion for subsequent events or legal developments.

10 VARYING CUSTOMARY PRACTICE

The application of customary practice, including those aspects of customary practice described in this *Statement*, to a closing opinion or a particular opinion may be varied by a statement in the closing opinion or opinion or by an understanding with the opinion recipient or its counsel.

11 RELIANCE

A closing opinion may be relied on only by its addressee and any other person expressly authorized to rely.[15]

12 NO OPINIONS THAT WILL MISLEAD RECIPIENT

An opinion giver should not give an opinion that the opinion preparers recognize will mislead the opinion recipient with regard to the matters it addresses.[16]

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[15] This section does not address the circumstances in which reliance by others may be permitted as a matter of law. *See also supra* note 3.

[16] For a general discussion of this subject, including the role of disclosure, *see* TriBar Op. Comm., *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591, 602-03 (§1.4(d)) (Feb. 1998) (noting that, in determining whether an opinion will mislead the opinion recipient," [t]he question the opinion preparers must consider is whether under the circumstances the opinion will cause the opinion recipient to misevaluate the specific opinion given.") An opinion giver is not precluded from limiting the matters addressed by an opinion through the use of specific language (including a specific assumption, exception or qualification) so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient. *See supra* Section 10 (*Varying Opinion Practices*).

[As approved by the Joint Committee on Statement of Opinion Practices on March 28, 2017, subject to approval by the Legal Opinions Committee of the American Bar Association's Business Law Section and the Board of Directors of the Working Group on Legal Opinions Foundation]

CORE OPINION PRINCIPLES

The following *Core Opinion Principles* are drawn from the *Statement of Opinion Practices*, ___ BUS. LAW. ___ ( ) (the "*Statement*"), and are intended to have the same meaning as the provisions of the *Statement* from which they are drawn. The *Statement*, which has been approved by the bar associations and other lawyer groups identified in Schedule I to the *Statement*, describes selected aspects of customary practice and other practices followed throughout the United States in the giving and receiving of closing opinions. In doing so, it amplifies the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (Aug. 2008). The *Core Opinion Principles* are designed for use by opinion givers (both law firms and law departments of organizations) who wish to incorporate or attach to their opinion letters a more concise statement of some of the opinion principles included in the *Statement*.

AM 58683759.15

CORE OPINION PRINCIPLES

1. General

1.1 *Customary Practice.* Third-party legal opinion letters given at the closing of a business transaction ("closing opinions") by counsel for one party (the "opinion giver") to another party (the "opinion recipient," which term includes any other person expressly authorized to rely on the closing opinion) are prepared and understood in accordance with the customary practice of lawyers who regularly give them and lawyers who regularly review them for opinion recipients. The phrase "customary practice" refers principally to the work lawyers are expected to perform to give the opinions included in a closing opinion and the way certain words and phrases commonly used in closing opinions are understood.

1.2 *Varying Customary Practice.* The application of customary practice to a closing opinion or a particular opinion may be varied by a statement in the closing opinion or the opinion or by an understanding with the opinion recipient or its counsel.

1.3 *Expression of Professional Judgment.* An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.

1.4 *Reliance by Recipients.* In accepting a closing opinion, an opinion recipient ordinarily need not take any action to verify the opinions it contains. However, an opinion recipient is not entitled to rely on an opinion if it knows the opinion to be incorrect or if its reliance on the opinion is otherwise unreasonable under the circumstances.

1.5 *Good Faith.* An opinion giver and an opinion recipient and its counsel are each entitled to expect that the other is acting in good faith with respect to a closing opinion.

1.6 *Opinion Recipient and Customary Practice.* An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver.

1.7 *Only Matters Specifically Addressed.* A closing opinion covers only those matters it specifically addresses.

AM 58683759.15

1.8 *Matters Beyond the Expertise of Lawyers.* Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analysis, economic forecasting and valuation). When an opinion depends on a matter not within the expertise of lawyers, an opinion giver is entitled to rely on a certificate from an appropriate source or an express assumption with regard to the matter.

2. Facts and Assumptions

2.1 *Reliance on Factual Information and Use of Assumptions.* Because the lawyers preparing a closing opinion (the "opinion preparers") typically will not have personal knowledge of all of the facts they need to support the opinions being given, they ordinarily are entitled to base those opinions on factual information provided by others, including their client, and on factual assumptions.

2.2 *Reliance on Facts Provided by Third Parties.* Opinion givers are entitled to rely on factual information provided by others unless the opinion preparers know that information to be false or unreliable. Information may be unreliable, for example, if it is irregular on its face or has been provided by an inappropriate source.

2.3 *Scope of Inquiry.* Opinion preparers are not expected to conduct a factual inquiry of the other lawyers in their law firm or a review of the firm's records, except to the extent they recognize that a particular lawyer is reasonably likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to give an opinion.

2.4 *Opinions Should Not Be Based on Representations of Law.* An opinion should not be based on a representation that is tantamount to the legal conclusions it expresses. An opinion may, however, be based on legal conclusions in a certificate of an appropriate government official.

2.5 *Factual Assumptions.* Some factual assumptions on which opinions are based need to be stated expressly; others do not. Examples of factual assumptions that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. These include, for example, assumptions that copies of documents are identical to the originals, signatures are genuine, and the parties other than the opinion giver's client have the power and have taken the necessary action to enter into the transaction, and the agreements those parties have entered into with the opinion giver's client are enforceable against them.

3. Law

3.1 *Covered Law.* When a closing opinion states that an opinion covers the law of a specific jurisdiction or particular laws, the opinion covers no other law or laws.

3.2 *Applicable Law.* An opinion on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary professional diligence in similar circumstances, would reasonably recognize as being applicable to the client or transaction that is the subject of the opinion. A closing opinion does not cover some laws (for example, securities, tax and insolvency laws) that are otherwise applicable to the matters it addresses. A closing opinion also does not cover municipal and other local law. An opinion may, however, cover law that would not otherwise be covered if the closing opinion so states or the opinion does so expressly.

4. Miscellaneous

4.1 *Date.* A closing opinion speaks as of its date. An opinion giver has no obligation to update a closing opinion for subsequent events or legal developments.

4.2 *Reliance.* A closing opinion may be relied on only by its addressee and any other person expressly authorized to rely.

Hypothetical

Jack Counsel represents Modesto Development, LLC, a Florida limited liability company, in connection with its development of Giant Towers on the Channel, A Condominium. Giant Towers on the Channel will be a high rise mixed-use condominium that will include a parking garage, retail shops, and restaurants on the first two floors, 275 residential condominium units above the commercial floors, and an adjacent marina facility with 50 wet boat slips and a harbormaster/store facility (the "Project"). Modesto Development's manager is SmallPartners, L.P.., a Florida limited partnership, whose sole general partner is SmallCorp, a Florida corporation. The Project wet slips are to be built on submerged Gulf lands owned by the Trustees of the Internal Improvement Fund of the State of Florida and leased to Modesto Development under a submerged land lease with a term of five years.

Modesto, as the developer of Giant Towers, has received a commitment letter for a $100,000,000 limited recourse development and construction loan from Big Bank, NA. The construction loan promissory note will be secured by a Mortgage, Assignment of Rents, Security Agreement, and Fixture Filing encumbering the Project. As a requirement of the commitment, the limited recourse carve-outs under the Note and Mortgage will be unconditionally guaranteed by Miniscule, LLC., a Delaware limited liability company, whose manager is TinyCorp. Inc., a Delaware corporation.

One of the closing conditions listed in the commitment letter is the delivery of a legal opinion by Jack Counsel's firm, opining as to the organization, power and authority of the Borrower and Guarantor to execute and deliver their respective loan documents, enforceability of the loan documents, and, as the commitment letter states, "other opinions customary in Florida practice for similar loans as required by the Bank."

Jack prepares an initial draft of the opinion in the form attached.

_____, 2017

Big Bank, NA
515 Grandiose Ave., 12th Floor
Big City, Florida 33600
Attention: Jack LeGrande, Senior Vice President

Re: $100,000,000 Development and Construction Loan ("Loan") from Big Bank, NA ("Lender") to Modesto Development, LLC, a Florida limited liability company ("Borrower"), in connection with the construction of Giant Towers on the Channel, A Condominium, located in Generica County, Florida ("Project").

Dear Sir:

We have acted as special Florida counsel to (a) the Borrower, (b) SmallPartners, Ltd., a Florida limited partnership, the manager and a member of Borrower ("Borrower Manager"), (c) SmallCorp,Inc., a Florida corporation, the corporate general partner of Manager ("Borrower Manager GP"), (d) Miniscule, LLC., a Delaware limited liability company, the limited recourse guarantor of the Loan ("Carve-Out Guarantor"), and (e) TinyCorp., Inc., a Delaware corporation, the manager of Carve-Out Guarantor ("Carve-Out Guarantor Manager"), in connection with the Loan, which was closed this date. This opinion letter is furnished to you pursuant to Section 6.5 of the Loan Agreement and at the request and with the consent of the Borrower. Capitalized terms used but not otherwise defined herein shall have the definitions set forth in the Loan Agreement.

This opinion letter is limited to the matters expressly stated herein. No opinions are to be inferred or implied beyond the opinions expressly so stated.

In connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following documents, all dated the same date as this letter unless otherwise stated:

(i) The Construction Loan Agreement between Borrower and Lender ("Loan Agreement');

(ii) The Construction Loan Promissory Note, in the original principal amount of $100,000,000.00, from Borrower to Lender (the "Note");

(iii) Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing, from Borrower to Lender (the "Mortgage"), for recording in the office of the Clerk of the Circuit Court of Generic County, Florida ("Local Recording Office");

(iv) Completion Guaranty Agreement, from Borrower to Lender;

(v) Limited Recourse Guaranty, from Carve-Out Guarantor to Lender;

(vi) Hazardous Materials Indemnity Agreement between Borrower and Lender;

(vii) Collateral Assignment of Developer Rights between Borrower and Lender, for recording in the Local Recording Office;

(viii) Assignment of Construction Agreements from Borrower to Lender;

(ix) Assignment of Architectural Agreements and Plans and Specifications from Borrower to Lender; and

(x) A Financing Statement, Form UCC-1 (the "State UCC-1"), naming the Borrower, as debtor, in favor of the Lender, as secured party, to be filed with the Florida Secured Transaction Registry (the "State Filing Office") under the Florida Uniform Commercial Code (the "Florida UCC").

The documents listed above as items (i) through (x) are collectively referred to herein as the "Loan Documents."

Further, in connection with rendering the opinions set forth in this opinion letter, we have reviewed originals or copies of the following authorization documents:

Borrower

(i) the Certificate of Active Status in Florida with respect to Borrower, issued by the Florida Department of State, dated May 30, 2017;

(ii) certified copy of the Articles of Organization of Borrower, issued by the Florida Department of State on May 30, 2017;

(iii) copy of the Operating Agreement of Borrower, certified by Borrower Manager to be true, complete, and correct by Officer's Certificate, dated May 30, 2017; and

(iv) written Certificate and Consent of the Manager and Members of Borrower, dated May 30, 2017

Borrower Manager

(i) the Certificate of Active Status in Florida with respect to Borrower Manager, issued by the Florida Department of State on May 30, 2017;

(ii) certified copy of the Certificate of Limited Partnership of Borrower Manager, filed in Florida on February 2, 2017, issued by the Florida Department of State on May 30, 2017;

(iii) Agreement of Limited Partnership of Borrower Manager, dated February 1, 2017, certified by Borrower Manager GP to be true, complete, and correct by Officer's Certificate of its President, dated May 30, 2017; and

(iv) written Certificate and Consent of the General and Limited Partners of Borrower Manager, dated May 30, 2017

(v)

Borrower Manager GP

(i) the Certificate of Active Status in Florida with respect to Borrower Manager GP, issued by the Florida Department of State on May 30, 2017;

(ii) certified copy of the Articles of Incorporation of Borrower Manager GP, filed in Florida on February 2, 2017, issued by the Florida Department of State on May 30, 2017;

(iii) By-Laws of Borrower Manager GP, certified to be true, complete, and correct by Officer's Certificate of the President of Borrower Manager GP, dated May 30, 2017; and

(iv) Incumbency Certificate and Written Action of the Board of the Directors and Stockholders of Borrower Manager GP, dated May 30, 2017

Carve-Out Guarantor

(i) the Certificate of Formation and Good Standing Certificate issued by the Office of the Secretary of State of the State of Delaware, dated May 29, 2017, stating that Carve-Out Guarantor is duly formed, in good standing and validly existing on the records of that office as of such date;

(ii) Certificate of Authority to Transact Business in Florida, issued by the Florida Department of State on May 30, 2017;

(iii) certified copy of the Articles of Organization of Carve-Out Guarantor, filed in Delaware on February 3, 2017, issued by the Office of the Secretary of State of the State of Delaware on May 29, 2017;

(iv) the Operating Agreement of Carve-Out Guarantor dated February 2, 2017, certified by Carve-Out Guarantor Manager to be true, complete, and correct by Officer's Certificate, dated May 30, 2017; and

(v) written Certificate and Consent of the Manager and Members of Carve-Out Guarantor, dated May 30, 2017

Carve-Out Guarantor Manager

(i) the Certificate of Formation and Good Standing Certificate issued by the Office of the Secretary of State of the State of Delaware, dated May 29, 2017, stating that Carve-Out Guarantor Manager is duly formed, in good standing and validly existing on the records of that office as of such date;

(ii) Certificate of Authority to Transact Business in Florida, issued by the Florida Department of State on May 30, 2017;

(iii) certified copy of the Articles of Incorporation of Carve-Out Guarantor Manager, filed in Delaware on February 2, 2017, issued by the Office of the Secretary of State of the State of Delaware on May 29, 2017;

(iv) By-Laws of Carve-Out Guarantor Manager, certified to be true, complete, and correct by Officer's Certificate of the President of Carve-Out Guarantor Manager, dated May 30, 2017; and

(v) Incumbency Certificate and Written Action of the Board of Directors and Stockholders of Carve-Out Guarantor Manager, dated May 30, 2017

The documents referenced immediately above may sometimes hereinafter be collectively referred to as the "Entity Documents."

We have also reviewed and relied upon, in connection with the issuance of this opinion letter, (1) a Borrower Certificate to Counsel to the firm from Borrower and (2) a Carve-Out Guarantor Certificate to Counsel to the firm from Carve-Out Guarantor, both dated May 30, 2017 (collective, the "Certificates to Counsel").

For purposes of rendering the opinions contained in this opinion letter, we have not reviewed any documents other than the documents listed above. We have also not reviewed any documents that may be referred to in or incorporated by reference into any of the documents listed above.

With your consent, we have relied upon, and assumed the accuracy of, the representations and warranties contained in the Loan Documents and in the Certificates to Counsel supplied to us by the Borrower with respect to the factual matters set forth therein. However, no opinion is rendered hereunder as to the accuracy of the representations and warranties contained in the Loan Documents or in the Certificates to Counsel. Further, the factual matters set forth in the Certificates to Counsel have been provided to us solely for our benefit in issuing this opinion, and no party, other than this firm, is entitled to rely upon them.

We have, with your consent, assumed that certificates of public officials dated earlier than the date of this opinion letter remain accurate from such earlier dates through and including the date of this opinion letter.

In rendering the opinions set forth herein, we have relied, without investigation, on each of the following assumptions: (a) the legal capacity of each natural person to take all actions required of each such person in connection with the Loan; (b) the legal existence of each party to the Loan other than the Borrower, Borrower Manager, Borrower Manager GP, Carve-Out Guarantor, and Carve-Out Guarantor Manager (collectively, the "Loan Parties"); (c) the power of each party to the Loan, other than the Loan Parties, to execute, deliver and perform all Loan Documents executed and delivered by such party and to do each other act done or to be done by such party; (d) the authorization, execution and delivery by each party, other than the Loan Parties, of each Loan Documents executed and delivered or to be executed and delivered by such party; (e) the validity, binding effect and enforceability as to each party, other than the Loan Parties, of each Loan Document executed and delivered by such party or to be executed and delivered and of each other act done or to be done by such party; (f) there have been no undisclosed modifications of any provision of any document reviewed by us in connection with the rendering of this opinion letter and no undisclosed prior waiver of any right or remedy contained in any of the Loan Documents; (g) the genuineness of each signature, the completeness of each document submitted to us, the authenticity of each document reviewed by us as an original, the conformity to the original of each document reviewed by us as a copy and the authenticity of the original of each document received by us as a copy; (h) the truthfulness of each statement as to all factual matters otherwise not known to us to be

untruthful or unreliable contained in any document encompassed within the diligence review undertaken by us; (i) each certificate or other document issued by a public authority is accurate, complete and authentic as of the date of the opinion letter, and all official public records (including their proper indexing and filing) are accurate and complete; (j) each recipient of the opinion letter has acted in good faith, without notice of any defense against enforcement of rights created by, or adverse claim to any property or security interest transferred or created as part of, the Loan, and has complied with all laws applicable to it that affect the Loan; (k) the Loan and the conduct of the parties to the Loan comply with any requirement of good faith, fair dealing and conscionability; (l) routine procedural matters such as service of process or qualification to do business in the relevant jurisdiction(s) will be satisfied by the parties seeking to enforce the Loan Documents; (m) agreements (other than the Loan Documents as to which opinions are being given) and judgments, decrees and orders reviewed in connection with rendering the opinions will be enforced as written; (n) no discretionary action (including a decision not to act) that is permitted in the Loan Documents will be taken by or on behalf of the Borrower that might result in a violation of law or constitute a breach of or default under any of the Borrower's other agreements or under any applicable court order; (o) there are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, modify or qualify the terms of the Loan Documents or the rights of the parties thereunder; (p) except to the extent expressly addressed herein, the payment of all required documentary stamp taxes, intangible taxes and other taxes and fees imposed upon the execution, filing or recording of documents; and (q) with respect to the Loan and the Loan Documents, including the inducement of the parties to enter into and perform their respective obligations thereunder, there has been no mutual mistake of fact or undue influence and there exists no fraud or duress.

When used in this opinion letter, the phrases "to our knowledge," "known to us" or the like means the conscious awareness of the lawyers in the "primary lawyer group" of factual matters such lawyers recognize as being relevant to the opinion or confirmation so qualified. Such phrases do not imply that we have undertaken any independent investigation within our firm, with the Borrower, or with any third party to determine the existence or absence of any facts or circumstances, and no inference should be drawn merely from our past or current representation of the Borrower. Where any opinion or confirmation is qualified by the phrase "to our knowledge," "known to us" or the like, it means that the lawyers in the "primary lawyer group" are without any actual knowledge or conscious awareness that the opinion or confirmation is untrue in any respect material to the opinion or confirmation. For purposes of this opinion letter, "primary lawyer group" means: (i) the lawyer who signs his or her name or the name of the firm to this opinion letter, (ii) the lawyers currently in the firm who are actively involved in preparing or negotiating this opinion letter, and (iii) the lawyers currently in the firm who are actively involved in negotiating or documenting the Loan or the Loan Documents.

Based upon and subject to the foregoing, and subject to the assumptions, limitations and qualifications contained herein, we are of the opinion that:

1. Borrower is a limited liability company organized under Florida law and its limited liability company status in Florida is active.

2. Borrower has the limited liability company power to execute and deliver the Loan Documents to which it is a party and to perform its obligations thereunder.

3. Borrower has authorized the execution, delivery and performance of the Loan Documents to which it is a party by all necessary limited liability company action.

4. Borrower Manager is a limited partnership organized under Florida law and its limited partnership status in Florida is active.

5. Borrower Manager has the limited partnership power to execute and deliver the Loan Documents to which it is a party and to perform its obligations thereunder.

6. Borrower Manager has authorized the execution, delivery and performance of the Loan Documents to which it is a party by all necessary action of its general and limited partners.

7. Borrower Manager GP is a corporation organized under Florida law and its corporate status in Florida is active.

8. Borrower Manager GP has the corporate power to execute and deliver the Loan Documents to which it is a party and to perform its obligations thereunder.

9. Borrower Manager GP has authorized the execution, delivery and performance of the Loan Documents to which it is a party by all necessary corporate action.

10. Carve-Out Guarantor is a limited liability company organized under Delaware law and its limited liability company status in Delaware is active.

11. Carve-Out Guarantor has the limited liability company power to execute and deliver the Loan Documents to which it is a party and to perform its obligations thereunder.

12. Carve-Out Guarantor has authorized the execution, delivery and performance of the Loan Documents to which it is a party by all necessary limited liability company action.

13. Based solely on a certificate of status from the Florida Department of State dated May 30, 2017, Carve-Out Guarantor is authorized to transact business as a foreign limited liability company in the State of Florida, and its limited liability status in Florida is active.'

14. Carve-Out Guarantor Manager is a corporation organized under Delaware law, by conversion from a Florida corporation, and its corporate status in Delaware is active.

15. Carve-Out Guarantor Manager has the corporate power to execute and deliver the Loan Documents to which it is a party and to perform its obligations thereunder.

16. Carve-Out Guarantor Manager has authorized the execution, delivery and performance of the Loan Documents to which it is a party by all necessary corporate action.

17. Based solely on a certificate of status from the Florida Department of State, dated May 30, 2017, Carve-Out Guarantor is authorized to transact business as a foreign limited liability company in the State of Florida, and its limited liability company status in Florida is active.

18. Based solely on a certificate of status from the Florida Department of State, dated May 30, 2017, Carve-Out Guarantor Manager is authorized to transact business as a foreign corporation in the State of Florida, and its corporate status in Florida is active.

19. Each of the Loan Documents to which the Borrower is a party has been executed and delivered by the Borrower.

20. Each of the Loan Documents to which the Borrower is a party is a valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with its terms.

21. Each of the Loan Documents to which the Borrower Manager is a party is a valid and binding obligation of the Borrower Manager, enforceable against the Borrower Manager in accordance with its terms.

22. Each of the Loan Documents to which the Borrower Manager GP is a party is a valid and binding obligation of the Borrower Manager GP, enforceable against the Borrower Manager GP in accordance with its terms.

23. The Carve-Out Guaranty is a valid and binding obligation of the Carve-Out Guarantor, enforceable against Carve-Out Guarantor in accordance with its terms.

24. The Carve-Out Guaranty is a valid and binding obligation of the Carve-Out Guarantor Manager, enforceable against Carve-Out Guarantor Manager in accordance with its terms.

25. The execution and delivery by Borrower, Borrower Manager, and Borrower Manager GP of the Loan Documents and the performance by them of their obligations under the Loan Documents do not: (i) violate the Organizational Documents of Borrower, Borrower Manager, or Borrower Manager GP; (ii) constitute a breach of or a default under, or result in the creation of a security interest or a lien on the assets of the Borrower, Borrower Manager, or Borrower Manager GP under, any of the agreements listed on attached **Addendum B**, (iii) violate any judgment, decree or order of any court or administrative tribunal applicable to the Client that is listed on attached **Addendum B**, or (iv) violate any of the Applicable Laws.

26. The execution and delivery by Carve-Out Guarantor and Carve-Out Guarantor Manager of the Carve-Out Guaranty and the performance by them of their obligations under the Carve-Out Guaranty do not: (i) violate the Organizational Documents of Carve-Out Guarantor or Carve-Out Guarantor Manager; (ii) constitute a breach of or a default under, or result in the creation of a security interest or a lien on the assets of the Carve-Out Guarantor or Carve-Out Guarantor Manager under any of the agreements listed on attached **Addendum B**, (iii) violate any judgment, decree or order of any court or administrative tribunal applicable to Carve-Out Guarantor or Carve-Out Guarantor Manager that is listed on attached **Addendum B**, or (iv) violate any of the Applicable Laws.

27. To our knowledge, no consent, approval, authorization or other action by, or filing or registration with the United States or the State of Florida is required by or on behalf of

the Loan Parties to execute and deliver the Loan Documents and to close the Loan contemplated by the Loan Documents.

28. The Mortgage to be recorded or filed is in a form suitable for recordation or filing in the Local Recording Office.

29. The Mortgage is effective to create a valid lien in favor of the Lender in the fee estate of Borrower in the real property, fixtures, improvements, and other collateral described therein ("Mortgage Property"). Upon the proper recording of the Mortgage in the Local Recording Office, with all fees and charges relating thereto having been paid, the Mortgage will provide constructive notice of a mortgage lien in favor of Lender against the Mortgaged Property.

30. The Mortgage is effective to create in favor of the Lender a security interest in such portion of the Mortgaged Property (the "Article 9 Collateral") in which a security interest may be created under Article 9 of the Uniform Commercial Code in effect in the State of Florida as of the date of this opinion letter (the "Florida UCC").

31. The Loan Agreement, Note, and Mortgage do not violate applicable Florida usury laws, provided that the Lender has not and does not reserve, charge, take or receive, directly or indirectly, at any time, interest or other sums deemed to be in the nature of interest (however labeled) in an amount exceeding the equivalent of the rate of 25% per annum, simple interest, calculated on the basis of a year of 365 days (or 366 days as applicable) and the actual number of days elapsed.

32. Based solely upon a letter received by Borrower from the Division of Condominiums, Timeshares and Mobile Homes of the State of Florida (the "Division"), dated March 17, 2017, a prospectus for the project known as Giant Towers on the Channel, A Condominium, has been registered with the Division in accordance with the provisions of the Florida Condominium Act, Fla. Stat. Chapter 718 (2016) (the "Florida Condominium Act").

33. The land use classification of the Project, as set forth in the comprehensive plan of Generic County, Florida is "HDMU" (High Density Mixed Use). The present zoning classification of the [Real Property] is "PD" under the Land Development Code of Generic County, Florida. The uses presently allowed under such classifications include those set for in Generic County Ordinance #2016-475 applicable to the Project. In rendering the foregoing opinions, we have relied solely upon our review of a nonbinding letter issued by the zoning administrator of Generic County, Florida , dated May 2, 2017, a copy of which is attached.

34. To our knowledge, and in reliance upon the Certificates to Counsel, there is no action, suit or proceeding, at law or in equity, or by or before any governmental agency, now pending or overtly threatened in writing against the Borrower that challenges the validity or enforceability of, or that seeks to enjoin the performance of, or seeks damages with respect to, the Project or the Loan. For avoidance of doubt, please be advised that in rendering this confirmation we have made no independent investigation, including, without limitation, any search of court records, the files of our firm or the files of the Borrower.

When used in this opinion letter, the term "Applicable Laws" means the federal and Florida laws, rules and regulations that a Florida counsel exercising customary professional diligence would reasonably

be expected to recognize as being applicable to the Borrower, the Loan Documents or the Loan, but excluding the laws, rules and regulations set forth below.

The following federal and Florida laws, rules and regulations are expressly excluded from the scope of this opinion letter: (a) federal or state securities laws, blue sky laws, banking laws or banking regulations, income tax laws or regulations, laws pertaining to securitization or Lender's secondary market activities or similar laws (whether State or Federal) regulating Lender or its business (including, without limitation, the Securities Act of 1933, as amended, the Securities Exchange Act of 1934, as amended, the Trust Indenture Act of 1939, as amended, the Investment Company Act of 1940, as amended, or the Dodd-Frank Wall Street Reform and Consumer Protection Act, as amended), or any rules or regulations thereunder; (b) Federal Reserve Board margin regulations; (c) laws, rules and regulations regulating banks and other financial institutions, insurance companies and investment companies; (d) pension and employee benefit laws, rules and regulations, such as the Employee Retirement Income Security Act (ERISA); (e) labor laws, rules and regulations, including laws on occupational safety and health (OSHA); (f) antitrust and unfair competition laws, rules and regulations; (g) laws, rules and regulations concerning compliance with fiduciary requirements; (h) laws, rules and regulations concerning the creation, attachment, perfection or priority of any lien or security interest, except to the extent expressly set forth in this opinion letter; (i) laws, rules and regulations relating to taxation; (j) bankruptcy, fraudulent conveyance, fraudulent transfer and other insolvency laws; (k) environmental laws, rules and regulations; (l) laws, rules and regulations relating to patents, copyrights, trademarks, trade secrets and other intellectual property; (m) local laws, administrative decisions, ordinances, rules or regulations, including any zoning, planning, building, occupancy or other similar approval or permit or any other ordinance or regulation of any county, municipality, township or other political subdivision of the State of Florida; (n) criminal and state forfeiture laws and any racketeering laws, rules and regulations; (o) other statutes of general application to the extent that they provide for criminal prosecution; (p) laws relating to terrorism or money laundering; (q) laws, regulations and policies concerning national and local emergency and possible judicial deference to acts of sovereign states; (r) filing or consent requirements under any of the foregoing excluded laws; (s) usury laws; and (t) judicial and administrative decisions to the extent they deal with any of the foregoing excluded laws.

The foregoing opinions are subject to the following exceptions, qualifications and limitations:

We did not physically witness the execution and delivery of the Loan Documents, and our opinions herein regarding the execution and delivery of the Loan Documents by the Borrower are based, in part, on our review of the Certificates to Counsel in which the Borrower confirmed certain facts to us with respect to the execution and delivery of the Loan Documents.

We express no opinion as to any consent, approval, authorization or other action or filing necessary for the ongoing operation of the business of the Borrower.

The opinions regarding enforceability of the Loan Documents that are contained in paragraph 5 above are limited by: (i) bankruptcy, insolvency, reorganization, moratorium, fraudulent conveyance and transfer, and similar law affecting the rights and remedies of creditors generally (the "Bankruptcy Exception"); and (ii) general principles of equity, regardless of whether such enforceability is considered in a proceeding at law or in equity (the "Equitable Principles Limitation"). In addition, certain remedies, waivers and other provisions of the Loan Documents might not be enforceable; nevertheless, subject to the Bankruptcy Exception and the Equitable Principles Limitation, such unenforceability will not render the Loan Documents invalid as a whole or preclude: (i) the judicial enforcement of the obligation of the

Borrower to repay the principal, together with the interest thereon (to the extent not deemed a penalty), as provided in the Note, (ii) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower of the payment of such principal or interest or upon a material default by the Borrower in any other material provisions of the Loan Documents, or (iii) the foreclosure in accordance with Applicable Laws of the lien on and security interest in the Mortgage Property and Article 9 Collateral created by the Mortgage upon maturity or upon acceleration pursuant to (ii) above.

No opinion is expressed herein with respect to any provision of the Loan Documents that: (a) purports to excuse a party from liability for the party's own acts; (b) purports to make void any act done in contravention thereof; (c) purports to authorize a party to act in the party's sole discretion or purports to provide that determination by a party is conclusive; (d) requires waivers or amendments to be made only in writing; (e) purports to effect waivers of: (i) constitutional, statutory or equitable rights, (ii) the effect of applicable laws, (iii) any statute of limitations, (iv) broadly or vaguely stated rights, (v) unknown future defenses, or (vi) rights to damages; (f) imposes or permits: (i) liquidated damages, (ii) the appointment of a receiver, (iii) penalties, (iv) indemnification for gross negligence, willful misconduct or other wrongdoing, (v) confessions of judgment, or (vi) rights of self-help or forfeiture; (g) purports to limit or alter laws requiring mitigation of damages; (h) concerns choice of forum, consent or submission to the personal or subject matter jurisdiction of courts, venue of actions, means of service of process, waivers of rights to jury trials, and agreements regarding arbitration; (i) purports to reconstitute the terms thereof as necessary to avoid a claim or defense of usury; (j) purports to require a party thereto to pay or reimburse attorneys' fees incurred by another party, or to indemnify another party therefor, which provisions may be limited by applicable statutes and decisions relating to the collection and award of attorneys' fees; (k) relates to the evidentiary standards or other standards by which the Loan Documents are to be construed, including, but not limited to, provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof to be applied in litigation or similar proceedings; (l) prohibits or unreasonably restricts: (i) competition, (ii) the solicitation or acceptance of customers, business relationships or employees, (iii) the use or disclosure of information, or (iv) activities in restraint of trade; (m) enumerates that remedies are not exclusive or that a party has the right to pursue multiple remedies without regard to other remedies elected or that all remedies are cumulative; (n) constitutes severability provisions; (o) permits the exercise, under certain circumstances, of rights without notice or without providing opportunity to cure failures to perform; (p) purports to create rights to setoff otherwise than in accordance with applicable law; (q) contains a blanket prohibition on assignments or a specific prohibition on assignment of payments due or to come due; or (r) purports to entitle any party to specific performance of any provision thereof.

Our opinions regarding the Security Agreement that are set forth in paragraph 30 above are limited to Article 9 of the Florida UCC. We express no opinion with respect to: (a) the right, title or interest of the Borrower in or to any of the Article 9 Collateral or any other property; (b) except as expressly set forth in paragraph 30 above, the creation, attachment or perfection of any security interest or lien; (c) the priority of any security interest or lien; (d) under Article 9 of the Florida UCC, what other Florida law or law of another state governs the perfection or effect of perfection or non-perfection of the security interest of the Lender in any particular item or items of the Article 9 Collateral; and (e) any collateral not subject to Article 9 of the Florida UCC.

For purposes of this opinion letter, we assume that: (i) "value" has been given to the Borrower in connection with the Loan, and (ii) the Borrower has rights in the Collateral.

For purposes of this opinion letter, we assume that the respective descriptions of the Collateral contained in the Security Agreement and the Financing Statements sufficiently identify the Collateral intended to be covered thereby and that the information regarding the secured party contained in the Financing Statements is correct and complete.

The foregoing opinions concerning Delaware law are based solely upon our review of: (i) the Certificate of Formation and the Good Standing Certificate of Carve-Out Guarantor and Carve-Out Guarantor Manager, in each case obtained by us from the Delaware Secretary of State, and (ii) the limited liability company statutory law of the State of Delaware ("Delaware Law") as set forth in the LEXIS™ online research services in the Delaware Code on the State of Delaware Official Web Site and not in the text of the Delaware Law or in any other source material, any legislative history, the decisions of any federal or state courts, including federal or state courts in the State of Delaware, or any rules, regulations, guidelines, releases, interpretations or other secondary source material, relating to the Delaware Law, and we have assumed that such online research services accurately set forth the provisions of the Delaware Law as in effect on the date hereof. Except as described above, we have not examined nor have we expressly opined with respect to Delaware Law.

The scope of our opinions regarding the security interests created by the Security Agreement is further limited by the Bankruptcy Exception and the Equitable Principles Limitation.

Our opinions concerning creation, attachment and/or perfection of security interests and liens are further subject to the following:

- We call to your attention the fact that the attachment and perfection of a security interest in "proceeds" (as defined in the Florida UCC) of collateral is governed and restricted by Section 679.3151 of the Florida UCC;

- Section 552 of the Federal Bankruptcy Code limits the extent to which property acquired by a debtor after the commencement of a case under the Federal Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case;

- We express no opinion with respect to any goods which are accessions to, or commingled or processed with, other goods to the extent that the security interest is limited by Sections 679.355 or 679.336 of the Florida UCC;

- The security interest in certain kinds of collateral, such as rights under contracts and agreements, may be subject to and limited by the terms of any agreements under which the collateral exists and by the terms of the agreements and contracts themselves (except as expressly provided by Sections 679.4061, 679.4071, 679.4081 and 679.409 of the Florida UCC); and

- The filing of the Financing Statements with the State Filing Office will not or may not be effective to perfect the security interest in as-extracted oil, gas, and other minerals and related receivables generated by sale of the minerals at the wellhead or minehead, where the debtor has a real estate interest in the minerals before extraction, or in timber to be cut.

We do not express any opinion as to the laws of any jurisdiction other than the State of Florida, the United States of America and Delaware Law (as defined herein).

This opinion letter is furnished to you solely for your benefit in connection with the Loan and may not be relied upon by any other party without our prior written consent in each instance. Further, copies of this opinion letter may not be furnished to any other party, nor may any portion of this opinion letter be quoted, circulated or referred to in any other document without our prior written consent in each instance.

This opinion letter speaks only as of the date hereof. We assume no obligation to update or supplement this opinion letter if any applicable laws change after the date of this opinion letter or if we become aware after the date of this opinion letter of any facts or other developments, whether existing before or first arising after the date hereof, that might change the opinions expressed above.

Very truly yours,

COUNSEL & COUNSEL, P.A.

By:_____
Jack Counsel, Esq.

Addendum A
Financing Statements

Addendum B
List of judgments, decrees or orders of any court or administrative tribunal applicable to the Borrower

NONE

E. Limited Liability Company

Recommended opinion:
The Client is a [limited liability company] organized under Florida law, and its [limited liability company] status is active.

1. *Basic Meaning of this Opinion.* A Florida limited liability company ("**LLC**") is governed by Chapter 608 of the Florida Statutes, which is called the Florida Limited Liability Company Act ("**FLLCA**"). The opinion that a company "is a limited liability company organized under Florida law, and its limited liability company status is active" (or "its status is active") means that: (i) the company has complied in all material respects with the requirements for the formation of an LLC under the FLLCA, (ii) governmental officials have taken all steps required by law to form the company as an LLC, (iii) the company's existence began prior to the effective date and time of the opinion letter, (iv) the company is currently in existence and its status is active, and (v) the company has not been converted into a different form of entity. Under Section 608.409 of the FLLCA, a Florida LLC is formed at the time when the articles of organization are filed with the Department (or on such earlier date as specified in the articles of organization, if such date is within five business days prior to the date of filing, or at any later date specified in the articles of organization). Section 608.409(3) of the FLLCA provides that the Department's filing of an LLC's articles of organization "is conclusive proof that all conditions precedent to organization have been satisfied except in a proceeding by the state to cancel or revoke the organization or to administratively dissolve the organization."

2. *Organized.* An opinion that an LLC is properly organized is usually part of the LLC status opinion. This opinion means that Opining Counsel has verified that: (i) the LLC has articles of organization executed by at least one member (or an authorized representative of the member), (ii) the articles of organization comply with the requirements set forth in Section 608.407 of the FLLCA, (iii) the articles of organization have been filed with the Department, (iv) the Client has at least one member, (v) a written operating agreement has been adopted by the member(s) of the LLC, (vi) if the articles of organization or operating agreement provide that the LLC is a manager-managed company, then one or more managers have been appointed by the members, and (vii) the LLC has active status.

   Sometimes the word "duly" is added before the word "organized." However, the addition of the word "duly" to the opinion does not change the meaning of this opinion or change the diligence recommended in order to render this opinion.

   Generally speaking, the articles of organization for a Florida LLC rarely contain more than the minimum information required under the FLLCA, although its filing constitutes notice of all facts that are set forth in the articles of organization. The operating agreement of the LLC is generally more substantive and by definition sets forth the provisions adopted for the management and regulation of the affairs of the LLC and sets forth the relationships of the members, managers (if the LLC is manager-managed) and the LLC. The statute provides that an operating agreement may be oral, but, as in the case of an oral partnership agreement, in the view of the Committees Opining Counsel should not opine that an LLC is "organized" if the LLC has not adopted a written operating agreement.

3. *Active Status vs. Good Standing.* The opinion that an LLC's status is "active" means that as of the date of the opinion letter the company is a limited liability company and is current with all filings and fees then due to the State of Florida. This opinion should be based on a certificate of active status issued by the Department. Unlike the FBCA and FRULPA, the FLLCA does not specify the contents of a certificate of status for an LLC or state that its issuance may be relied upon as conclusive evidence of the existence of the LLC. Section 608.702 of the FLLCA does provide, however, that "[a] certificate under the seal of the Department, as to the existence or nonexistence of the facts relating to a limited liability company or foreign limited liability company, shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the existence or nonexistence of the facts therein stated."

This opinion uses the term "its status is active" or "its limited liability company status is active" since the "active status" language is used in the certificate provided by the Department. However, Opining Counsel in Florida are often asked to render an opinion that an LLC is in "good standing," particularly if the Opinion Recipient is represented by out-of-state counsel. Under customary practice in Florida, the use of the phrase "good standing" in an opinion as to the active status of an LLC has the same meaning as "its limited liability company status is active" or "its status is active."

4. *General Exclusions for Opinion*. Unless otherwise expressly stated in the opinion letter, an opinion that an LLC's status is "active" does not mean that: (i) the LLC has established any tax, accounting or other records required to commence operating its business, (ii) the LLC maintains at its registered office any of the information required to be maintained under Section 608.4101 of the FLLCA, (iii) the members of the LLC will not have personal liability, or (iv) the LLC will be treated as a partnership for tax purposes.

5. *Involuntary Dissolution*. An opinion that an LLC's "status is active" merely indicates that the LLC exists and has not been dissolved as of the date of the certificate of status issued by the Department. Because it would be impossible or extremely difficult for Opining Counsel to establish that there are no grounds existing under the statute for involuntary dissolution of the LLC, this opinion does not mean or imply that there are no grounds existing under the statute for involuntary dissolution of the LLC. The circumstances under which an LLC may be administratively dissolved by the Department are set forth in Section 608.448 of the FLLCA and the grounds for judicial dissolution are specified in Section 608.449 of the FLLCA. Opining Counsel may opine that the LLC exists on the date of the opinion in reliance on a certificate of status from the Department, even if circumstances exist that could result in involuntary dissolution with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel knows (or ought to reasonably know based on the facts (red flags) in such counsel's possession) that such circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the LLC will generally constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve an LLC under Section 608.448(1)(b) of the FLLCA if the company is without a registered agent for 30 days or more, and, under Section 608.416(2) of the FLLCA, the resignation of a registered agent becomes effective 31 days after the registered agent files a statement of resignation with the Department.

6. *Foreign Entity*. If Opining Counsel determines that Opining Counsel is competent to deliver an opinion regarding the organization, existence and status of an LLC organized under the laws of a jurisdiction other than Florida, and agrees to render such opinion, then with respect to the subject opinion such Opining Counsel will likely be held to the standard of care of a competent lawyer in the jurisdiction of organization of the entity that is the subject of the opinion. See "Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction." The diligence involved in giving an opinion regarding the organization, existence and status of a foreign limited liability company, and the form of such opinion, are beyond the scope of this Report.

Diligence Checklist – Limited Liability Company. In order to render an entity status and organization opinion with respect to a Florida LLC, Opining Counsel should take the following actions:

- Obtain a copy of the LLC's articles of organization (preferably a certified copy obtained from the Department) and review the articles of organization to ensure that they substantially comply with the requirements of Section 608.407 of the FLLCA.
- Obtain an "active status" certificate for the LLC from the Department. If the certificate of status indicates that the LLC has not filed its annual report or paid its annual fee for the current year, then the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an "active status" opinion regarding the LLC.

- Obtain and examine a copy of the LLC's operating agreement, certified by a manager of the LLC (if manager-managed), by a member of the LLC (if member-managed), or by an officer of the LLC (if officers have been appointed by the members or the managers, as applicable, under the LLC's operating agreement), as being a true and complete copy, including all amendments. In the view of the Committees, if there is no written LLC operating agreement, Opining Counsel should not render an opinion with respect to the LLC and should counsel the Client to reduce its operating agreement to writing.
- Determine from reviewing the operating agreement and the articles of organization whether the LLC is a member-managed company or a manager-managed company; if the latter, determine whether a manager or managers have been appointed in accordance with the requirements of those documents (generally through obtaining a written certificate from the Client).
- Obtain a current factual certificate from a manager of the LLC (if manager-managed), from a member of the LLC (if member-managed), or from an officer (if officers have been appointed) certifying that there is at least one member, that no circumstances exist which would trigger dissolution under the articles of organization or operating agreement, and that no proceedings have commenced for dissolution of the LLC.

F. Trusts

1. In General.

Opining Counsel may be asked to render an opinion concerning the status of a Florida trust. Unlike Florida corporations, partnerships or LLCs, a Florida trust is not a separate statutory entity under Florida law. Rather, a Florida trust is a fiduciary relationship with respect to property (whether real property, personal property or both) subjecting the person or persons by whom the title to the property is held (known as the "trustee" or "trustees") to equitable duties to deal with the property for the benefit of another person or persons (known as the beneficiary or beneficiaries), all of which arises as a result of a manifestation of an intention to create a trust arrangement. Thus, for purposes of rendering an opinion regarding a Florida trust, the Client is really not the trust itself, but rather the person or persons serving as the trustee or trustees of the trust for the benefit of the beneficiaries. As such, the proper status inquiry in the context of a trust should be based on whether the trustee or trustees is or are properly organized and existing and has or have active status.

Thus, if Florida counsel is asked to render an opinion concerning the status of a Florida trust, the Opinion Recipient should want to know whether the Client(s) is or are the trustee(s) of the trust. For this reason, the recommended forms of opinion state that the Client(s) is or are the trustee(s) of the trust and go on to specify the legal basis for such designation.

2. Trusts Other than Florida Land Trusts.

(a) *Trusts with Written Trust Agreements.*

In the context of most Florida trusts, with the possible exception of Florida land trusts arising strictly by operation of Section 689.071, Florida Statutes (referred to as a "**Florida Land Trust**"), the designation of the trustee occurs pursuant to the provisions of a written trust agreement.

In this context, the recommended opinion is as follows:

The Client(s) [is/are] the trustee(s) of a trust pursuant to the provisions of that certain trust agreement dated _____.

When the foregoing recommended form of opinion is to be rendered, Opining Counsel should obtain a copy of the current trust agreement governing the trust. The trust agreement needs to be reviewed by Opining Counsel in order for Opining Counsel to render any opinions with respect to the trust and, in particular, in order to determine who is designated as the trustee(s) of the trust.

AUTHORITY TO TRANSACT BUSINESS IN FLORIDA

A. Qualification of a Foreign Entity to Transact Business in Florida

Opining Counsel representing a foreign corporation, a foreign limited partnership, a foreign general partnership, a foreign limited liability partnership or a foreign limited liability company with respect to a Florida Transaction may be requested to render a legal opinion as to whether the foreign entity Client is required to apply for and obtain a certificate of authority from the Department to transact business in Florida. In addressing this legal issue, Opining Counsel will need to determine whether the Client's activities in Florida are substantial enough to require that such foreign entity file an application with the Department seeking to obtain a certificate of authority to transact business in Florida.

If the foreign entity Client merely owns or mortgages real property or personal property located in Florida, without more, the "safe-harbor" provisions of each of Florida's business entity statutes provide that the Client entity will not be required to obtain a certificate of authority to transact business in Florida. On the other hand, the widely held view is that if the Client foreign entity's activities in Florida are more regular, systematic or extensive than the listed "safe-harbor" activities, including the ownership of income-producing real or tangible personal property in Florida, the foreign entity will be required to obtain a certificate of authority to transact business in Florida.

Opinion Recipients sometimes request an opinion that the Client is authorized to transact business as a foreign entity in every jurisdiction in which the Client's property or activities requires qualification or where the failure to qualify would have a material adverse effect on the Client. This is an inappropriate opinion to request. See "Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions." However, it is common practice in Florida for an Opinion Recipient to request an opinion from a Florida Opining Counsel as to whether Opining Counsel's foreign entity Client is authorized to transact business in Florida, either together with or separate from an opinion as to whether Opining Counsel's foreign entity Client is required to obtain such authorization. An opinion that a particular foreign entity client is authorized to transact business in Florida may be rendered based solely on the receipt of a certificate of status issued by the Department. In particular, under Florida customary practice, in rendering this opinion Opining Counsel need not review the information provided by the Client to the Department in its application to obtain a certificate of authority to transact business in Florida.

An opinion that the Client is authorized to transact business in Florida is premised on the foreign entity Client being properly organized and in good standing as an entity under the laws of its jurisdiction of organization. Accordingly, unless Opining Counsel is rendering an opinion as to the Client foreign entity's organization and status in its jurisdiction of organization, the foreign entity's status under the laws of such foreign jurisdiction will be implicitly assumed into the opinion letter under Florida customary practice, even if such assumption is not expressly stated in the opinion letter. However, since the active status or good standing of the foreign entity Client in its jurisdiction of organization will always be required in connection with the Transaction, it is strongly recommended that Opining Counsel take appropriate steps to confirm that its foreign entity Client has active status or good standing in its jurisdiction of organization.

Sometimes an opinion regarding "authority to transact business" in Florida will use the words "qualified to do business" instead of "authorized to transact business." The words "authorized to transact business" are recommended because they are contained in the statutes governing foreign entities transacting business in Florida (the FBCA, the FLLCA, FRULPA and FRUPA). However, whichever words are used, they are deemed to have the same meaning under Florida customary practice.

In circumstances where Florida counsel is consulted concerning authorization of a foreign entity to transact business in Florida and gives advice that such authorization may be required, but such foreign entity nevertheless has not obtained a certificate of authority, Florida counsel to the foreign entity should consider advising its Client about the consequences of failing to obtain a certificate of authority to transact business in Florida. Such consequences include fees that may be due to the Department for failure to obtain a certificate of authority and the inability of the Client to prosecute litigation in Florida if the Client does not hold a certificate of authority. However, the foreign entity Client will be permitted to defend litigation brought against the Client in Florida whether or not the Client has obtained a certificate of authority to transact business in Florida. The applicable

sections of Florida's entity statutes that reflect the administrative penalties for failing to obtain a certificate of authority to transact business in Florida are contained in Section 607.1502 of the FBCA, Section 620.1907 of FRULPA, Section 620.9103 of FRUPA and Section 608.5135 of the FLLCA. At the same time, Opining Counsel should consider advising its foreign entity Client as to the ancillary consequences of obtaining a certificate of authority to transact business in Florida, such as the application of the Florida corporate income tax under Chapter 220 of the Florida Statutes to a foreign corporation that obtains a certificate of authority to transact business in Florida.

1. Foreign Corporation

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20___, the Client is authorized to transact business as a [foreign corporation] in the State of Florida, and its [corporate] status in Florida is active.

If a foreign corporation has obtained a certificate of authority to transact business in the State of Florida, then the diligence required to render the recommended opinion is simple. In such circumstances, Opining Counsel should obtain an "active status" certificate from the Department and under customary practice in Florida, may rely on such certificate in issuing an opinion that the Client foreign corporation is authorized to transact business in Florida and has active status in Florida. Section 607.0128(3) of the FBCA provides that, "[s]ubject to any qualification stated in the certificate, a certificate of status or authority issued by the department may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this state."

To obtain a certificate of authority, a foreign corporation must comply with the requirements of Section 607.1503 of the FBCA. Further, the name of the foreign corporation must comply with the requirements of Section 607.1506 of the FBCA.

If Opining Counsel is asked to opine as to whether or not a certificate of authority must be obtained for a foreign corporation, Opining Counsel must evaluate whether such authorization is required. In carrying out the evaluation, Opining Counsel should obtain a factual certificate from a responsible officer of the Client describing fully the scope of the foreign corporation's business activities in Florida. Opining Counsel should then review Section 607.1501(2) of the FBCA, which lists certain "safe harbor" activities in Florida that do not require a foreign corporation to obtain a certificate of authority to transact business. If the safe harbor exemptions do not expressly apply, it is the widely held view among Florida lawyers that under such circumstances, the foreign corporation will need to obtain a certificate of authority from the Department. If such qualification appears to be required, Opining Counsel should not render a legal opinion regarding the foreign corporation's authority to transact business in Florida unless a certificate of authority has been obtained and the foreign entity has active status in Florida.

The circumstances under which a foreign corporation's certificate of authority may be administratively revoked by the Department are set forth in Section 607.1530 of the FBCA, such as the foreign corporation's failure for 30 days or more to maintain a registered agent in Florida, or its failure to file the required annual report or pay the required fees. Even if circumstances exist that could result in administrative revocation of the foreign corporation's certificate of authority with the passage of time, Opining Counsel may opine that a foreign corporation Client is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has knowledge that circumstances for the future revocation of the Client's certificate of authority exist at the time the opinion is rendered (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client's certificate of authority will generally constitute a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceedings in a Florida court.

partnership to maintain a list of partners, in lieu of naming all the partners in the registration statement) must be organized in Florida or otherwise hold a certificate of authority from the Department to transact business in Florida.

After the foreign LLP has registered with the Department under Section 620.8105 of FRUPA and has obtained its certificate of authority under Section 620.9102 of FRUPA, Opining Counsel can then obtain a certificate of active status for the LLP from the Department. Unlike the FBCA and FRULPA, the LLP provisions of FRUPA do not contain a provision expressly stating that a certificate of status issued by the Department is "conclusive evidence" of the foreign LLP's qualification. However, as a diligence matter a certificate of status obtained from the Department with respect to a foreign LLP is the functional equivalent of the conclusive certificates issued by the Department with respect to foreign corporations and foreign limited partnerships, and under Florida customary practice, Opining Counsel may rely solely on such certificate of status when rendering the recommended opinion.

A foreign LLP is required under Section 620.9003 of FRUPA to file an annual report and to pay an annual filing fee to the Department. Failure to file the annual report or to pay the required fee may result in administrative revocation of the partnership's status as a LLP, but revocation is generally not an event of dissolution for the LLP unless the partnership agreement so provides. The statute does not provide for revocation of LLP status if the partnership fails to maintain a registered agent for service of process, although the annual LLP report must identify the name and address of the current registered agent. Neither the opinion that the foreign LLP is "authorized to transact business" or the opinion that "its status is active" means or implies that there are no grounds existing under the statute for administrative revocation of such foreign LLP's limited liability status. However, if Opining Counsel has knowledge that circumstances for future revocation of the Client's certificate of authority exists at the time the opinion is rendered (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client's certificate of authority will generally cause a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceeding in a Florida court.

Even if a foreign LLP is not deemed to be transacting business in Florida requiring that such entity obtain a certificate of authority from the Department, such entity may still be required to have a registered office and appoint a registered agent for service of process if it owns an interest in Florida real property or a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a "financial institution"). Although FRUPA does not contain RICO agent provisions similar to those contained in Section 607.0505 of the FBCA, the broad language of Section 607.0505 of the FBCA (covering alien business organizations as well as foreign corporations) may bring other entities such as foreign LLPs under the requirements of that statute. See "Foreign Corporation" above.

5. Foreign Limited Liability Company

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20___, the Client is authorized to transact business as a [foreign limited liability company] in the State of Florida, and its [limited liability company] status in Florida is active.

Section 608.501(1) of the FLLCA requires a foreign limited liability company to obtain a certificate of authority from the Department prior to transacting business in Florida. Section 608.501(2) of the FLLCA provides a "safe harbor" list of activities in Florida by a foreign LLC that do not constitute transacting business, which list is substantially the same as the lists contained in Section 607.1501(2) of the FBCA and Section 620.1903(1) of FRULPA.

If a foreign LLC has obtained a certificate of authority to transact business in the State of Florida, Opining Counsel should obtain an "active status" certificate from the Department. Unlike the FBCA and FRULPA, the FLLCA does not contain a provision expressly stating that a certificate of status issued by the Department is "conclusive evidence" of the LLC's existence or authorization to transact business. The

closest analogous provision is Section 608.505(1) of the FLLCA, which provides that "[a] certificate of authority authorizes the foreign limited liability company to which it is issued to transact business in this state subject, however, to the right of the Department to suspend or revoke the certificate as provided in this chapter." However, a certificate of status obtained from the Department with respect to a foreign LLC is the functional equivalent of the conclusive certificates issued by the Department with respect to foreign corporations and foreign limited partnerships, and under Florida customary practice Opining Counsel may rely solely upon such certificate of status when rendering an opinion that a foreign LLC is authorized to transact business in Florida.

If Opining Counsel is asked to opine as to whether or not a foreign LLC must obtain a certificate of authority in Florida, Opining Counsel must evaluate whether such authorization is required. In carrying out that evaluation, Opining Counsel should obtain a factual certificate from a manager of the Client (if manager-managed), from a member of the Client (if member-managed), or from an officer of the Client (if officers have been appointed under the LLC's operating agreement) describing fully the scope of the foreign LLC's business activities in Florida. Opining Counsel should then determine whether those activities fall within the safe harbor provisions of Section 608.501(2) of the FLLCA. It is the widely held view of Florida lawyers that if the safe harbor exemptions do not expressly apply, the foreign LLC will need to obtain a certificate of authority from the Department.

A foreign LLC may not obtain a certificate of authority to transact business in Florida unless its name satisfies the same requirements applicable to domestic limited liability companies under Section 608.406 of the FLLCA (i.e., its name must end with the words "limited liability company" or "limited company" or the abbreviations "L.L.C." or "L.C." or the designations "LLC" or "LC").

The circumstances under which a foreign LLC's certificate of authority may be administratively revoked by the Department are set forth in Section 608.512 of the FLLCA, such as the foreign LLC's failure for 30 days or more to maintain a registered agent, or its failure to file the required annual report or to pay the required fees. Even if circumstances exist that could result in administrative revocation of the LLC's certificate of authority with the passage of time, Opining Counsel may opine that a foreign LLC is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has knowledge that circumstances for future revocation of the Client's certificate of authority exist at the time the opinion is rendered (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client's certificate of authority will generally constitute a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceeding in a Florida court.

Even if a foreign LLC is not deemed to be transacting business in Florida requiring that such LLC obtain a certificate of authority from the Department, such entity may still be required to have a registered office and appoint a registered agent for service of process if it owns an interest in Florida real property or a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a "financial institution"). Although the FLLCA does not contain RICO agent provisions similar to those contained in Section 607.0505 of the FBCA, the broad language of Section 607.0505 of the FBCA (covering alien business organizations as well as foreign corporations) may bring other entities such as foreign LLCs under the requirements of that statute. See "Foreign Corporation" above.

6. Trust with a Foreign Trustee

There is no statutory requirement that an individual non-resident of Florida serving as the trustee of a trust owning Florida real property obtain a certificate of authority to transact business in Florida prior to transacting business in Florida. This is true whether or not the trustee is entitled to the benefits of Section 689.071, Florida Statutes (the Florida Land Trust Act). Additionally, there is no statutory requirement that a foreign corporation or other foreign business entity serving as the trustee of a trust owning Florida real property obtain a certificate of authority to transact business in Florida merely because of such entity's status as a trustee. Opining Counsel should be aware, however, that the Florida statutes

C. General Partnership

> ***Recommended opinion:***
>
> **The Client has the partnership power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.**

A general partnership derives its power to transact business from the governing statute (FRUPA) and its partnership agreement. Opining Counsel should obtain a copy of the partnership agreement from a partner (certified as true and correct by a partner) and should review the partnership agreement to determine whether the proposed Transaction is permitted (or not prohibited) by its terms. If the Client general partnership does not have a written partnership agreement, the Committees believe that Opining Counsel should not issue an entity power opinion with respect to such partnership.

In many cases, the general partnership agreement will state that the partnership may engage in any lawful business. However, in some cases, such as a joint venture or a general partnership for a particular undertaking, the partnership agreement may expressly limit the scope of permissible business activities to one particular enterprise or project, thereby restricting both the power of the partnership to enter into the proposed Transaction and the authority of the partners to bind the partnership to the Transaction Documents. In addition to reviewing the partnership agreement for such limitations, Opining Counsel should review any partnership statements that have been filed with the Department under Sections 620.8105, 620.8303 or 620.8304 of FRUPA which might also set forth limitations on the activities of the partnership and the authority of the partners.

D. Limited Liability Company

> ***Recommended opinion:***
>
> **The Client has the limited liability company power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.**

A Florida limited liability company derives its entity power from the governing statute (FLLCA), from its articles of organization, and from the operating agreement adopted by the members of the LLC. Opining Counsel should obtain copies of the LLC's Organizational Documents together with a certificate pursuant to which such documents are certified as true and correct by a manager of the LLC (if manager-managed), by a managing member or other member of the LLC (if member-managed), or by an officer of the LLC (if officers have been appointed by the LLC pursuant to the LLC's operating agreement). If the Client does not have a written operating agreement, the Committees believe that Opining Counsel should not issue an entity power opinion with respect to the Client. Unless the Client's articles of organization or operating agreement provide otherwise, each Florida limited liability company has the requisite entity power to engage in any lawful activity, and Section 608.404 of the FLLCA provides than an LLC has the same powers as an individual to do all things necessary to carry out its business and affairs, including a non-exclusive list of permitted actions enumerated in such section.

In most cases, an LLC's operating agreement (and sometimes the LLC's articles of organization) empowers the LLC to engage in any legal activity. However, Opining Counsel should carefully examine the LLC's Organizational Documents to determine whether they contain provisions limiting the power of the LLC to engage in certain types of transactions or include any SPE provisions. If any such limitations are included in the LLC's Organizational Documents, Opining Counsel will need to determine whether any such provisions preclude or otherwise limit the LLC from having the power to enter into the Transaction or perform its obligations under the Transaction Documents. See "Limitations on Power and Special Purpose Entities" below.

OLD REPUBLIC TITLE

FLORIDA REPORT:
Entity Authorization of the Transaction

The authorization opinion in compliance with their respective fiduciary duties s.

D. Limited Liability Compa

Recommended opinion:

The Client has autho [Transaction Documents] by all neces

To render an authorization lient has authorized the Transaction in accordance e LLC's articles of organization and the LLC's o ficer executing the Transaction Documents on beh on Documents. The Committees believe that no third-party legal opinion with respect to the authorization of a transaction by a Florida LLC should be rendered unless the LLC has a written operating agreement.

In most cases, the operating agreement of the LLC provides that the LLC is empowered to engage in any lawful activity. Sometimes, however, the operating agreement will include provisions that expressly limit the power and capacity of the LLC to authorize a particular transaction or a particular type of transaction or will include SPE provisions. See "Limitations on Power and Special Purpose Entities" below.

The threshold question for Opining Counsel in determining which persons have authority to bind the LLC is whether the LLC is a member-managed company or a manager-managed company. Sections 608.402(22) and 608.422 of the FLLCA both provide that a Florida LLC is a member-managed company by default unless the articles of organization or the operating agreement provide that it is a manager-managed company (before its amendment in 2002, under Section 608.407(1) of the FLLCA this manager-managed designation needed to be set forth in the articles of organization to avoid the application of the default rule). The distinction between the two management models with respect to the authority of members and managers of an LLC is discussed below. However, in both cases, Opining Counsel must review the articles of organization and operating agreement of the LLC in order to opine with respect to the authorization of actions to be taken by the LLC.

Section 608.407(4) of the FLLCA permits the articles of organization to include an optional statement that the LLC is to be a manager-managed company, and Section 608.407(6) of the FLLCA permits the articles of organization to include a notice of any limitations on the authority of a manager or managing member. If either of these provisions are added or changed by an amendment or restatement of the articles of organization, then Section 608.407(5) of the FLLCA provides that the amended and restated articles of organization do not constitute notice of the addition or change until 90 days after the effective date of the amendment or restatement. Further, as amended in 2005, Section 608.407(6) of the FLLCA provides that a provision in an LLC's articles of organization limiting the authority of a manager or managing member to transfer real property held in the name of the LLC is not notice of the limitation to any person (except to a member or manager) unless such limitation appears in an affidavit, certificate or other instrument that bears the name of the LLC and is recorded in the public records of the county where the real property is located.

In rendering an opinion regarding approval of the Transaction and the Transaction Documents, Opining Counsel should rely on an affirmative act of the LLC, its members and/or managers, as applicable, as the basis for the opinion and not on principles of estoppel, apparent authority, waiver and the like. In particular, although certificates and affidavits of authority are estoppel devices upon which third parties without contrary knowledge may rely, they are generally not sufficient support (standing alone) under Florida customary practice for an opinion regarding authorization of a Transaction or Transaction Documents.

The following sections reflect certain matters to consider in determining whether an LLC has properly authorized a Transaction.

1. Member-Managed. Under Section 608.422(2) of the FLLCA, unless otherwise provided in the articles of organization or operating agreement, the management of a member-managed LLC is vested in its members in proportion to the then-current percentage or other interest of members in the profits of the LLC owned by all of the members. Except as otherwise provided in the articles of organization or operating agreement, in a member-managed LLC the decision of a majority-in-interest of the members is controlling. Under Section 608.4231 of the FLLCA, the articles of organization or operating agreement may provide for classes or groups of members having such relative rights, powers, and duties as the articles of organization or operating agreement may provide. The articles of organization or operating agreement may also provide for the taking of an action, including the amendment of the articles of organization or operating agreement, without the vote or approval of any member or class or group of members. Further, the articles of organization or operating agreement may provide that any member or class or group of members shall have no voting rights, may grant to all or certain identified members or a specified class or group of the members the right to vote separately or with all or any class or group of the members or manager on any matter. Similarly, voting by members may be on a per capita, number, financial interest, class, group, or any other basis. Unless otherwise provided in the articles of organization or operating agreement, on any matter that is to be voted on by members, the members may take such action without a meeting, without prior notice, and without a vote if a consent or consents in writing, setting forth the action so taken, are signed by the members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting, but in no event by a vote of less than a majority-in-interest of the members that would be necessary to authorize or take such action at a meeting. However, within 10 days after obtaining such authorization by written consent, notice must be given to those members who have not consented in writing or who are not entitled to vote on the action.

   With respect to the agency authority of members, Section 608.4235(1) of the FLLCA provides that, in a member-managed LLC, each member is an agent of the LLC for the purpose of its business, and an act of a member, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company, binds the company unless the member had no authority to act for the company in the particular matter and the person with whom the member was dealing knew or had notice that the member lacks authority. An act of a member which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized by appropriate vote of the other members. As noted in (3) below, however, the real estate rule set forth in Section 608.4235(3) of the FLLCA overrides these agency and authority rules for member-managed companies.

   To render an opinion that a member-managed LLC has approved a Transaction and the Transaction Documents by all necessary action, Opining Counsel should review the articles of organization and operating agreement of the LLC (which documents should be certified to the Opining Counsel as being a true and correct copy by a member or an officer (if officers have been appointed) of the LLC). Opining Counsel should then obtain evidence as to the approval by the requisite members required to approve the Transaction and the Transaction Documents (which approval should be documented in writing). Opining Counsel should also review the FLLCA to determine whether authorization of the members is required with respect to the particular Transaction even if not otherwise required in the LLC's articles of organization or operating agreement.

2. Manager-Managed. Under Section 608.422(4) of the FLLCA, in a manager-managed LLC, the management of the company is vested in a manager or managers, and each manager has equal rights in the management and conduct of the company's business. Except as otherwise provided in FLLCA, in a manager-managed LLC any matter relating to the business of the company may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers. Similarly, Section 608.4231(6) of the FLLCA provides that, except as otherwise provided in the articles of

organization or the operating agreement, if the members have appointed more than one manager to manage the business of the LLC, then decisions of the managers shall be made by majority vote of the managers at a meeting or by unanimous written consent. Section 608.422(4)(c) of the FLLCA provides that, in a manager-managed LLC, a manager: (i) must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority-in-interest of the members; and (ii) holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed. The manager or managers may also hold the offices and have such other responsibilities accorded to them by the members and set out in the articles of organization or the operating agreement of the LLC.

With respect to the agency authority of members in a manager-managed LLC, Section 608.4235(2) of the FLLCA provides that in a manager-managed LLC, a member is not an agent of the company for the purpose of its business solely by reason of being a member. In a manager-managed LLC, each manager is an agent of the company for the purpose of its business, and an act of a manager, including the signing of an instrument in the company's name, for apparently carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company, unless the manager had no authority to act for the company in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacks authority. An act of a manager which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized under Section 608.422 of the FLLCA. As noted in (3) below, however, the real estate rule set forth in Section 608.4235(3) of the FLLCA overrides these agency and authority rules for manager-managed companies.

To render an opinion that a manager-managed LLC has approved a Transaction, Opining Counsel should review the articles of organization and the operating agreement of the LLC, determine the requisite vote of managers (and, if applicable, the requisite vote of members) to approve the Transaction and then obtain evidence as to the approval by such requisite vote of managers (and, if applicable, members). Each requisite vote should be documented in writing. Additionally, Opining Counsel should review the FLLCA to determine whether the action to be taken by the manager-managed LLC nevertheless requires the LLC to obtain member approval for the particular Transaction even if not otherwise required by the operating agreement.

3. General Real Estate Rule. As an overriding rule applicable to real property held by an LLC, Section 608.4235(3) of the FLLCA provides that, unless the articles of organization or operating agreement limit the authority of a member or manager, any member of a member-managed LLC or manager of a manager-managed LLC may sign and deliver any instrument transferring or affecting the LLC's interest in its real property. The transfer instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument. This provision in Section 608.4235(3) of the FLLCA expressly trumps the agency rules in other parts of Section 608.4235 of the FLLCA that are discussed above. However, the Committees recommend that, for opinion purposes, Opining Counsel should obtain and review the documents set forth in (1) above (for a member-managed LLC) or in (2) above (for a manager-managed LLC) before issuing an opinion regarding authorization of the Transaction by an LLC.

4. Authority. An opinion with respect to the authorization of a Transaction by an LLC reflects Opining Counsel's judgment that the persons or entities signing for the LLC have authority to execute the Transaction Documents. Although apparent authority may protect third parties who rely on the signature of a member or manager of the LLC, the Committees believe that it should not be the sole support relied upon by Opining Counsel in rendering an opinion on the authorization of a Transaction.

5. Other Entities. An opinion given with respect to an LLC may require Opining Counsel to look at the authorization of the Transaction by entities other than the LLC that is a party to the Transaction and the Transaction Documents. Opining Counsel should examine the structure of the LLC to determine what members or managers who have to approve the Transaction are entities. In reviewing authorization by the

LLC, Opining Counsel should also review the authorization by these other entities to a level where such Opining Counsel is comfortable, based on the particular facts and circumstances, that the requisite approval of the LLC entering into the Transaction and the Transaction Documents has, in fact, been obtained.

Opining Counsel should recognize that it is Opining Counsel's responsibility to become comfortable, based on the particular facts and circumstances, that the requisite approval of the other entities that are members and/or or managers of the LLC entering into the Transaction and the Transaction Documents has been obtained. If Opining Counsel cannot satisfy themselves in that regard, Opining Counsel should expressly set forth in the opinion letter any limitations on the scope of Opining Counsel's opinion as a result of not having been able to satisfy themselves regarding necessary approvals by other entities that are members and/or managers of the LLC.

6. Fiduciary Duties. The authorization opinion does not mean that the managers or the managing members, as applicable, of the LLC are in compliance with their fiduciary duties with respect to the Transaction and the Transaction Documents.

E. Trusts

Recommended opinion:

The Client, as trustee of the trust, has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary action.

1. General

In the context of a trust, because it is not a separate statutory entity but rather a fiduciary relationship with respect to property, the authorization of the execution, delivery and performance of the Transaction Documents by the trustee on behalf of the trust requires not only basic diligence with respect to actions taken by the trustee but also certain additional diligence similar to the diligence required to determine entity power with respect to the trustee on behalf of the trust. Accordingly, there are likely to be two separate key inquiries required for Opining Counsel to render the recommended opinion.

A. Entity as Trustee. If the trustee is a corporation, partnership or LLC, Opining Counsel should first inquire as to what authorizations are required by that entity in order for that entity to have been authorized to serve as trustee and to take the actions necessary, in its capacity as trustee, to authorize the execution, delivery and performance of the Transaction Documents. In most cases, this analysis will be exactly the same as the analysis set forth above concerning steps that need to be taken for that type of entity, in its own capacity, to authorize such actions. This may involve, for example, adoption of resolutions at meetings of governing bodies of the entity or written consents in lieu of such meetings.

B. Trust Authorization. The second inquiry overlaps with the required inquiries described in the entity power discussion. The extent of the required inquiry is dependent upon: (i) whether the trust relationship is a Florida Land Trust that satisfies the requirements of Section 689.071, Florida Statutes, (ii) whether a separate written trust document or other agreement governing the trust relationship exists, and (iii) whether the beneficiaries of the trust need to consent to the execution, delivery and performance of the Transaction Documents in order for the trustee to have proper authorization to take such actions. If a trust document or other agreement governing the trust relationship is in existence, then even if the trust relationship is created pursuant to Section 689.071, Florida Statutes, a review of the trust document or other agreement governing the trust relationship should be made by Opining Counsel in order to render the opinion.

2. Florida Land Trust

(a) *Florida Land Trusts Without Written Trust Agreements*

If the trust satisfies the requirements of Section 689.071, Florida Statutes, it is possible for Opining Counsel to render the opinion even if there is no separate trust agreement governing the trust relationship. However,

THE REMEDIES OPINION

A. Overview of the Remedies Opinion

The "remedies opinion" addresses the enforceability of the Transaction Documents against the Client. Broadly speaking, enforceability with respect to a document means the ability to obtain relief from a court of competent jurisdiction in accordance with the terms of such document and with the law. Therefore, the remedies opinion requires Opining Counsel to determine whether a court, applying the law of the jurisdiction covered by the opinion letter (which may or may not be the same as the law governing the Transaction Documents), should give effect to the Client's obligations under the Transaction Documents. See "Introductory Matters – Purpose of Third-Party Legal Opinions." Although this opinion is sometimes referred to as the "enforceability opinion" rather than the "remedies opinion," the terms refer to the same type of opinion.

1. *The Standard Formulation of the Remedies Opinion*

The standard formulation of the remedies opinion, before setting forth any applicable qualifications, is as follows:

> **The [Transaction Documents] are valid and binding obligations of the Client, enforceable against the Client in accordance with their terms.**

The remedies opinion is understood to have the same meaning so long as it contains one or both of the operative words, "binding" and "enforceable." Although this Report recommends the specific language above, verbatim recitation is not required. For instance, some formulations of the remedies opinion include the word "legal" (usually before the word "valid"). Others omit one or both of the words "valid" or "binding." However, neither the inclusion of the word "legal" nor any of these omissions expands or limits the generally understood meaning of the remedies opinion. Even where Opining Counsel omits the phrase "enforceable against the Client in accordance with its terms," substitutes the phrase "enforceable against the Client under the laws of Florida," or simply states that the "Transaction Documents are enforceable against the Client" or that the Transaction Documents are "binding on the Client," the opinion is understood to have the same meaning as an opinion using the language provided above.

Consistent with customary practice, the remedies opinion must be expressly stated in an opinion letter. It may not be implied from the issuance of building block or other related opinions or the inclusion of qualifications in the opinion letter (regardless of whether such qualifications address matters that would typically apply only to a remedies opinion). However, there are circumstances in which an Opining Counsel rendering an opinion in the context of a mortgage on real property or a security interest in personal property may imply within such opinion an enforceable contract and thereby implicitly provide a remedies opinion. See "Opinions with Respect to Collateral Under the Uniform Commercial Code – Scope of UCC Opinions; Limitations" and "Opinions Particular to Real Estate Transactions – Creation of a Mortgage Lien."

Conversely, however, the issuance of a remedies opinion does imply the issuance of the building block opinions described below, and, if Opining Counsel does not intend to render each of these opinions, then Opining Counsel should expressly assume the particular opinion(s) that Opining Counsel is not rendering (and/or expressly specify the opinion(s) of another Opining Counsel on which Opining Counsel is relying). The following paragraphs describe the relationship between the remedies opinion and certain other opinions.

2. *Related Opinions that are Building Blocks For or Necessary to Render the Remedies Opinion*

An opinion on the enforceability of an agreement is predicated on contract law principles. Opining Counsel must be confident before giving a remedies opinion that all of the requisite elements of contract formation (including entity status, entity power, the taking of requisite entity action to approve entry into the contract, offer

and acceptance, consideration, execution, delivery and mutuality) exist. As a result, the following related opinions that are addressed elsewhere in this Report are building blocks for and are necessary prerequisites to rendering the remedies opinion: (i) opinions regarding the Client's existence and organization, entity power, authorization of the Transaction, and execution and delivery of the Transaction Documents, and (ii) opinions that there are no violations of law resulting from the Client entering into and performing its obligations under the Transaction Documents that would make the Transaction Documents invalid. These opinions are vital in their own right because if, for example, the Transaction Documents have not been properly authorized, executed or delivered, then a contract may not have been formed. Similarly, if the contract violates a law that renders it invalid, it may not be enforceable. However, even though certain building block and other opinions may relate to similar issues, and even though, as a practical matter, all of these building block opinions are often included in the same opinion letter that includes a remedies opinion, they are nonetheless separate opinions from the remedies opinion.

Where the building block opinions are *not* specifically included in an opinion letter that includes a remedies opinion, Opining Counsel will be deemed to have given the building block opinions (unless such building block opinions are not otherwise expressly assumed away in the opinion letter). Therefore, it is essential that Opining Counsel perform the necessary diligence associated with each building block opinion or expressly assume in the opinion that the building block opinions have otherwise been satisfactorily addressed. For instance, where the existence of a corporation is determined by laws other than the laws of the State of Florida and no opinion is being rendered on entity status, Opining Counsel must expressly assume in its opinion the existence and active status of such entity to avoid implicitly giving that opinion as part of Opining Counsel's remedies opinion.

However, not every related opinion is assumed to be implicit in a remedies opinion. Only the building block opinions listed above should be implied from the issuance of a remedies opinion. Further, as set forth above, the remedies opinion does not include an opinion relating to the non-Client party or parties to the contract or to matters under the UCC or other applicable law as to the validity, creation, attachment, perfection, or priority of any security interests, mortgage liens or other liens that may be the subject of the Transaction Documents. If such opinions are required, they must be separately stated in the opinion letter. Notwithstanding the foregoing, it is important to remember that the inverse connection may exist; an opinion on these other issues may implicitly include a remedies opinion.

3. *The Meaning of the Remedies Opinion; Two Sides of a National Debate on Customary Practice; Florida's View*

Like other opinions described in this Report, the meaning of the remedies opinion and the diligence that Opining Counsel should undertake to support it are based on Florida customary practice. Except in the case of real estate transactions that generally follow a nationally-prescribed format, the Committees believe that, in non-real estate commercial transactions, the meaning of the remedies opinion is determined on a state-by-state basis, rather than at a national level, and that the meaning of the remedies opinion as described in this Report reflects Florida's view on these issues. That is not to say that Florida's view is significantly different than the view taken in many other states, but rather that the view taken in other states does not necessarily represent Florida's view or Florida customary practice. Further, the meaning of the remedies opinion is impacted by the qualifications to the remedies opinion that are included in the opinion letter, either expressly or implicitly. These qualifications exclude from the coverage of the remedies opinion certain of the rights, remedies and undertakings contained in the Transaction Documents (or otherwise limit the scope of the remedies opinion).

There are, however, at a national level two highly influential and, at least on a cursory level, contradictory views regarding the appropriate scope of the remedies opinion. One is generally known as the "TriBar view" and the second is generally known as the "California view." Each is described in more detail below.

The "TriBar view" is the position adopted by the TriBar Opinion Committee in the TriBar Report. The Tri-Bar view construes the remedies opinion to address the enforceability of "each and every" right, remedy and

NO LITIGATION

A. Nature and Purpose of the "No Litigation" Confirmation

The statement of "no litigation" is a factual confirmation that is in the nature of a negative assurance statement. It is not a legal opinion requiring legal analysis and legal conclusions. For this reason, the statement is often set forth in a separate, unnumbered paragraph in an opinion letter, although its placement as part of the "opinions" section of an opinion letter does not change its meaning or the fact that it is a factual confirmation and not a legal opinion. See "Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions." The statement of "no litigation" is not intended, nor should it be ever be construed, as reflecting the anticipated results that are likely to be obtained in any of the Client's litigation matters.

Customary practice regarding the "no litigation" confirmation is in a state of flux. For many years, the "no litigation" confirmation was requested and given as a matter of course in virtually all third-party legal opinions. Generally, its use was based on the assumption that Opining Counsel regularly represented the Client and had knowledge about the Client's legal affairs. The "no litigation" confirmation historically provided comfort to the Opinion Recipient that there was no material pending or threatened litigation or proceedings against the Client or affecting the Transaction except as disclosed.

In the Prior Florida Reports, the scope of the "no litigation" confirmation was limited in several important respects. First, it was limited to the "knowledge" of the "primary lawyer group." See "Common Elements of Opinions – Knowledge." Second, the determination of whether pending or threatened litigation was "material" was deemed in the Prior Florida Reports to be a subject for determination by the Client and the Opinion Recipient (and not the Opining Counsel), and the confirmation provided was that, to the knowledge of the Opining Counsel, there were no litigation matters pending or threatened that met objective criteria as to materiality other than those identified (such as those listed in a schedule to one of the Transaction Documents or in a certificate to counsel). See "No Violation and No Breach or Default" for a discussion on determining an appropriate standard as to materiality. Third, with respect to "overtly" threatened litigation (where the potential claimant has manifested an awareness of and a present intention to assert a claim), the "no litigation" confirmation was limited to overtly threatened litigation that was threatened in writing.

In December 2004, the Business Law Session of the Massachusetts Superior Court, following a bench trial, found a Boston law firm liable to the recipient of a closing opinion (the acquiring company in an acquisition) for more than $9 million in damages and costs. Dean Foods v. Pappathanasi, 18 Mass.L.Rptr. 598, 2004 WL 3019442 (Mass. Super. December 3, 2004). The basis of liability was negligent misrepresentation stemming from the firm's giving a no litigation confirmation without disclosing in the opinion letter a matter that the court found the firm should have disclosed. The Dean Foods case received widespread attention from lawyers around the country and has been the subject of extensive commentary. See Glazer and Field, *"No Litigation Opinions Can Be Risky Business,"* Vol. 14, No. 6. Business Law Today, July/August 2005 and the discussion of the Dean Foods case below in "Selected Issues."

Following the decision in the Dean Foods case, several bar associations (or sections of bar associations) took positions regarding the "no litigation" confirmation to try to limit its scope. Some argued that the "no litigation" confirmation should be eliminated from third-party closing opinions altogether. Others sought to modify the confirmation by limiting its coverage. From this dialogue, three additional versions of the "no litigation" confirmation have emerged:

- a "no litigation" confirmation that is limited only to pending litigation or governmental proceedings or to litigation or governmental proceedings that have been overtly threatened in writing affecting the Transaction;
- a "no litigation" confirmation that is limited to disclosure of matters that the firm giving the opinion is handling; and
- a "no litigation" confirmation that combines both of these more limited versions of the "no litigation" confirmation.

B. The "No Litigation" Confirmation

The Committees believe that rendering a "no litigation" confirmation remains a common practice in Florida. Consequently, in the view of the Committees, it would be appropriate for an Opinion Recipient to request a "no litigation" confirmation except in those cases where Opining Counsel does not regularly represent the Client or is acting as local counsel or is otherwise only engaged with respect to a limited aspect of the Transaction.

The Committees also believe that the traditional form of the "no litigation" confirmation contained in the Prior Florida Reports is no longer the "no litigation" confirmation that Florida counsel usually provide. In fact, opinion practice today embodies a cost/benefit analysis that will often suggest that a more limited version of the "no litigation" confirmation will be more reasonable and appropriate under the circumstances (and each of the illustrative forms of opinion letters that accompany this Report include one of these more limited versions).

Below are three versions of the "no litigation" confirmation that are often seen in Florida opinion practice. Opining Counsel and Opinion Recipients should negotiate the appropriate scope of the "no litigation" confirmation based on the circumstances of the particular Transaction (including the size of the Transaction) and the relationship of Opining Counsel to the Client.

If the "no litigation" confirmation is to be limited to disclosure regarding pending or overtly threatened litigation or governmental proceedings affecting the Transaction that are known to the Opining Counsel, the following form is appropriate:

> **To our knowledge, there is no action, suit or proceeding, at law or in equity, or by or before any governmental agency, now pending or overtly threatened in writing against the Client that challenges the validity or enforceability of, seeks to enjoin the performance of, or seeks damages with respect to, the Transaction Documents or the Transaction, except: [_____ / as listed in _____ (for example, in a schedule to one of the Transaction Documents or in a certificate to counsel)]. For avoidance of doubt, please be advised that in rendering this confirmation we have made no independent investigation, including, without limitation, any search of court records, the files of our firm or the files of our Client.**

Opining Counsel rendering this confirmation should generally obtain a certificate from the Client confirming the accuracy of this factual statement to the knowledge of the Client (see discussion below in that regard). Further, in light of the holding in the Dean Foods case and notwithstanding the view that customary practice in Florida does not require any search of the firm's files, prudence suggests that Opining Counsel in Florida might want to consider conducting some level of diligence within Opining Counsel's firm before rendering this confirmation. See "Selected Issues – Knowledge" below.

The above version of the "no litigation" confirmation is the version included in each of the illustrative forms of opinion letters that accompany this Report that contain a "no litigation" confirmation. The Committees believe that this version of the "no litigation" confirmation is the version that should be appropriate in most circumstances.

If the "no litigation" confirmation is to be limited only to disclosure of matters as to which Opining Counsel represents the Client, the following form is appropriate.

> **We do not represent the Client in any action, suit or proceeding, now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, or overtly threatened in writing against the Client, except: [_____ / as listed in _____ (for example, in a schedule to one of the Transaction Documents or in a certificate to counsel)].**

This is the only version of the "no litigation" confirmation that is not given to the knowledge of Opining Counsel, since it reflects a recitation of matters as to which the firm rendering the opinion is representing the Client. An even more limited form of this version of the "no litigation" confirmation narrows the scope of the disclosed litigation matters and governmental proceedings to only those litigation matters and governmental proceedings being handled by Opining Counsel's firm that are pending or have been overtly threatened in writing and that challenge the validity or enforceability of, or seek to enjoin the performance of, or to obtain damages with respect to, the Transaction or the Transaction Documents.

Finally, if Opining Counsel agrees to provide the form of "no litigation" confirmation that is consistent with historic Florida practice as articulated in the Prior Florida Reports, the following form is appropriate:

> **To our knowledge, there are no [material (as that term is defined in _____)] actions, suits or proceedings, now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, or overtly threatened in writing against the Client, except: [_____ / as listed in _____ (for example, in a schedule to one of the Transaction Documents or in a certificate to counsel). For avoidance of doubt, please be advised that in rendering this confirmation we have made no independent investigation, including, without limitation, any search of court records, the files of our firm or the files of our Client.**

If this traditional version of the "no litigation" confirmation is rendered, Opining Counsel should undertake all of the diligence steps described below. This version of the "no litigation" confirmation requires more diligence and involves greater risk than the other versions of the "no litigation" confirmation that are described above.

This broader formulation of the "no litigation" confirmation usually references a disclosure schedule or an officer's certificate to identify the relevant pending or overtly threatened litigation matters or governmental proceedings. By referencing all such proceedings in this manner, Opining Counsel avoids the necessity of determining the materiality of any particular proceeding. The disadvantage of the disclosure schedule or the officer's certificate is that it may become cumbersome. If this occurs, then the Opinion Recipient and the Opining Counsel should agree on objective criteria for materiality. If that cannot be done (for example, with regard to equitable proceedings), then generally the scope of the required "no litigation" confirmation should be more limited.

Under Florida customary practice, the rendering of a no litigation confirmation does not require an inquiry into court or other third-party records, unless the parties agree otherwise and unless such searches are expressly referenced in the opinion letter.

Apart from obtaining an officer's certificate, the Opining Counsel should not be required to inquire of the Client about pending or overtly threatened litigation or governmental proceedings regardless of the version of the "no litigation" confirmation rendered by Opining Counsel. Opining Counsel is not an auditor and Opining Counsel should not be required to speculate as to who within the Client organization has personal knowledge about litigation and governmental proceedings to which the Client is a party. Therefore, Opining Counsel should be permitted to rely on information provided in the Transaction Documents or in a certificate to counsel absent information known to Opining Counsel (or unless Opining Counsel is aware of facts (red flags) that make such information unreliable to a reasonable Opining Counsel) that would prevent Opining Counsel from justifiably relying on such information.

Notwithstanding the foregoing, in circumstances where Opining Counsel is working on the Transaction (as is regularly the case), Opining Counsel may be separately called upon to make a broader investigation and inquire of the appropriate Client representatives such as for the purpose of determining what is to be included in the disclosure schedules to the representations and warranties contained in the Transaction Documents. In such a case, the scope of Opining Counsel's knowledge with respect to pending or threatened claims or governmental proceedings may actually be greater than that which might ordinarily be provided in a certificate to counsel delivered by the Client to Opining Counsel to support an opinion letter.

As mentioned above, the proper scope of diligence for a "no litigation" confirmation will depend on the form of "no litigation" confirmation that is to be delivered. However, Opining Counsel should be mindful that a "no litigation" confirmation (even though not an opinion) is nevertheless subject to the general prohibition against rendering misleading opinions. See "Introductory Matters – Ethical and Professional Issues – Candor."

C. Selected Issues

The following issues should be considered in issuing a "no litigation" confirmation:

1. *No Action, Suit or Proceeding at Law or in Equity*. The phrase "no action, suit or proceeding at law or in equity" encompasses all legal proceedings regardless of whether the requested relief is of an equitable or legal nature. The language of the confirmation, regardless of the version of the "no litigation" confirmation rendered by Opining Counsel, is limited to legal proceedings before bodies that can render binding results on the parties to such legal proceedings. As a result, a dispute that is the subject of non-binding arbitration or mediation would not be required to be disclosed.

2. *Pending or Overtly Threatened Litigation or Governmental Procedures*. The phrase "overtly threatened" in the recommended form of no litigation confirmation is intended only to include claims in which the potential claimant has manifested an awareness of and a present intention to assert a claim. This phrase is not intended to include unasserted claims that might arise from existing facts known to the Client or to Opining Counsel. However, if Opining Counsel is aware of unasserted claims as to which litigation has not been overtly threatened as of the date of the opinion letter, Opining Counsel should consider discussing with the Client whether the Client should make disclosure of such unasserted claims to the other party to the Transaction in order to avoid potentially misleading the Opinion Recipient (thereby potentially exposing Opining Counsel to a claim for negligent misrepresentation). If the Client refuses to allow such disclosure, Opining Counsel should also consider its ethical obligations under the circumstances. See "Introductory Matters – Ethical and Professional Issues."

   The recommended form of no litigation confirmation also further limits the overtly threatened claims that must be reported in the "no litigation" confirmation to those that have been "overtly threatened in writing." For the same reasons that are described above with respect to unasserted claims, Opining Counsel should consider its ethical obligations if the Client is unwilling to disclose a threatened claim that has been overly threatened, but has not yet been asserted in writing.

3. *Diligence*. Opining Counsel often obtains a certificate from an officer of the Client to support the "no litigation" confirmation. Unless expressly agreed otherwise and expressly set forth in the opinion letter, no searches of public records are required or expected to be performed to render this factual confirmation regardless of which version of the "no litigation" confirmation is given by Opining Counsel. The purpose of requesting the confirmation is to confirm Opining Counsel's understanding of the facts regarding pending or overly threatened litigation already known to Opining Counsel and not to elicit factual information that might be uncovered by outside research. It is unnecessary to include an express statement in the opinion letter that makes clear that no investigation has been undertaken. However, many counsel include an express statement in the opinion letter that no investigation has been undertaken by Opining Counsel, and each of the illustrative forms of opinion letters that accompany this Report and that contain a "no litigation" confirmation expressly include such a statement.

4. *Knowledge*. Except in the limited circumstances noted above, a "no litigation" confirmation is always given to the knowledge of Opining Counsel. The Committees believe that the knowledge qualifier emphasizes that the statement is fact-based and establishes the scope of the inquiry necessary to meet the diligence obligations of the Opining Counsel. In this context, "knowledge" means the "knowledge" of the "primary lawyer group." See "Common Elements of Opinions – Knowledge." In many cases, the Opinion Recipient may request that Opining Counsel expand the group within the Opining Counsel's law firm whose knowledge is to be considered. Any such agreed-upon expansion of the knowledge

group should be expressly described in the opinion letter. Nevertheless, even if the group as to whose knowledge this confirmation is given is expressly limited to the "primary lawyer group," in light of the holding in the Dean Foods case, prudence may dictate that Opining Counsel in some manner poll the lawyers in the Opining Counsel's firm who are known to be providing legal services to the Client (i.e., by reviewing recent time records) to determine if any of these other lawyers know about any litigation matters or governmental proceedings with respect to the Client. Although Dean Foods has no precedential value in Florida, it illustrates a potential approach that a Florida court might take when considering this particular issue.

5. *Limitations on Evaluation of Merits*. A "no litigation" confirmation does not provide an assessment of the merits of any particular pending or overtly threatened litigation matter or governmental proceeding. The Committees believe that it is inappropriate to request such an evaluation from Opining Counsel. Similarly, except in the context of a response to an auditors' request for information where counsel has concluded that the outcome of a particular matter is either "probable" or "remote," the Committees believe that it is inappropriate for a third-party Opinion Recipient to request an evaluation of the possible outcome of a pending or threatened litigation matter or government proceeding. See ABA Statement of Policy Regarding Lawyer's Responses to Auditor Requests for Information, 31 Bus. Law. 1709 (1976) for guidance regarding attorney responses to auditors' requests for information. Such assessments are better left to the Opinion Recipient and its counsel in connection with the diligence they are performing with respect to the Client in connection with the Transaction.

   Disclosure of information about pending or overtly threatened litigation or governmental proceedings may cause a waiver of the attorney-client privilege or work product privilege and may require disclosure of confidential information. See "Introductory Matters – Ethical and Professional Issues."

18 Mass.L.Rptr. 598
Massachusetts Superior Court, County..
DEAN FOODS COMPANY[1] & others[2]
v.
Arthur J. PAPPATHANASI & others.[3]
No. Civ.A. 01-2595 BLS.
|
Dec. 3, 2004.

FINDINGS OF FACT, RULINGS OF LAW AND ORDER FOR JUDGMENT

VANGESTEL, J.

*1 This matter is before the Court after a jury-waived trial on the merits. The Court's findings of fact, rulings of law and an order for judgment follow. Mass. R. Civ. P. Rule 52(a). *Nessralla v. Peck*, 403 Mass. 757, 760, 532 N.E.2d 685 (1989).

The plaintiffs Dean Foods Company; Suiza GTL, LLC; Dean Northeast, LLC; and West Lynn Creamery, Inc. are all now corporately related in a manner that has no substantive effect on this case. Unless greater specificity is needed, they hereafter collectively will be called "WLC." However, since much of what is involved in this case relates specifically to West Lynn Creamery, Inc., it will hereafter be called "West Lynn Creamery."

There has been a resolution before trial of all claims against the following: Arthur J. Pappathanasi ("Pappathanasi"), individually and as Trustee; Nicholas Scangas, individually and as Trustee; Christopher Scangas, individually and as Trustee; and 330 Scangas Nominee Trust. The defendants that remain and are the subject of these findings and rulings are the law firm of Rubin and Rudman LLP ("Rubin and Rudman") and three men who at material times were partners of that firm: Michael L. Altman ("Mr.Altman"), Gene T. Barton ("Mr.Barton"), and Charles J. Speleotis ("Mr.Speleotis").

FINDINGS OF FACT

West Lynn Creamery was a long-time client of Rubin and Rudman. Mr. Speleotis was the originating partner on the West Lynn Creamery account. As such, Mr. Speleotis reviewed essentially all of the Rubin and Rudman invoices to West Lynn Creamery before the bills were sent out.

In early October 1997, West Lynn Creamery received a federal grand jury subpoena seeking any and all records relating to payments made by West Lynn Creamery to Michael Gavriel and Cathy Gavriel (the "Gavriels") or to any entities owned by, operated by or affiliated with the Gavriels. The Gavriels and their entities ran certain Dunkin' Donuts franchises and as such were customers of West Lynn Creamery. The subpoena called upon West Lynn Creamery to produce:

> Any and all records of West Lynn Creamery, Inc. for payments made to Michael Gavriel, Cathy Gavriel, Bostonian Bakery and Café Corporation of America, Inc., Federal Foods, Inc., Gavriel Foods, Inc., Gav-Stra Donuts, Inc., K.A.C.Y. Corp., Lampy Corporation and Mica Corporation and any other business owned by, operated by or affiliated with Michael Gavriel or Cathy Gavriel for the period January 1, 1990 to the present to include the documents listed on Attachment A.

Attachment A to the subpoena also required West Lynn Creamery to produce the following documents related to the Gavriels or their entities: (1) records of any contracts, agreements and meetings; (2) all invoices, sales journals, accounts receivable journals, cash receipt journals, accounts payable journals, cash disbursement journals, summaries, original cancelled checks, and any other form of payment; (3) work papers (including accountants work papers); and (4) all correspondence, notes and memoranda.

*2 On October 16, 1997, Rubin and Rudman was retained by West Lynn Creamery to represent it in connection with the grand jury subpoena. Mr. Altman was the Rubin and Rudman partner responsible for the legal services provided to West Lynn Creamery in connection with the grand jury subpoena.

Rubin and Rudman opened a new billing matter for West Lynn Creamery. It was numbered 01869-048 and was entitled "Criminal-Rebate Investigation."[4] Mr. Altman

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then set about to learn what he could about the rebate program. His efforts and actions follow.

By letter dated October 30, 1997, Mr. Altman delivered certain documents responsive to the grand jury subpoena to Assistant United States Attorney John M. Hodgens, Jr. ("AUSA Hodgens").

By letter dated November 2, 1997, AUSA Hodgens informed Mr. Altman that West Lynn Creamery's response to the grand jury subpoena did not appear to be complete, and that West Lynn Creamery was expected to produce a keeper of records, together with the remainder of the records called for in the subpoena, before the grand jury on November 6, 1997. AUSA Hodgens also asked Mr. Altman to clarify, in writing, the names of the individuals and entities that he represented.

On November 7, 1997, Mr. Altman wrote a memorandum to the file summarizing a November 3, 1997, interview of Ed Beaulieu, a West Lynn Creamery employee. This memorandum states:

> On November 3, 1997, I spoke with Ed Beaulieu about West Lynn's rebate programs. He said that he had no particular conversations that he could remember with anyone at West Lynn about the rebate program. He said the program had been in effect since 1981 when he first began working for West Lynn. He said that he thought the person who set up the program was Bob Walsh.
>
> I asked Ed what he knew about the Dunkin Donuts rebate program. He said he didn't know a lot except that the salesmen delivered the rebate checks at some point during the month, and that the program was a pain in the neck. He said that the rebate program was established to serve a legitimate purpose. He said that when the salesmen delivered their checks each month, it was an excuse to visit the customer location, to see whether everything was in order, and whether the customer's needs were being met. One of West Lynn's concerns for the past four or five years was that its customers use the coolers for proper purposes. West Lynn did not want other vendors putting their products in West Lynn coolers. Therefore, by visiting the site on a monthly basis, the salesmen would be able to confirm the proper use of the cooler. In addition, the salesmen would be able to chat up the customer to determine whether they had any other needs or problems. Ed felt that the program was nonetheless a pain in the neck because it was another step in the process that invited possibilities of issues arising. If, for example, there is a question about the amount of a rebate check or whether the rebate check was delivered, that is a source of difficulties. He said that West Lynn is moving away from the rebate program.
>
> *3 Ed said that he had no-knowledge of any funny business by any customers with respect to the rebate checks, and he didn't know the Gavriels. He asked me what was going on, and I told him that I didn't want to tell him. He also asked what I meant by "funny business" and I said that I also wasn't going to fill in the details for his imagination on that subject.

On November 6, 1997, Jim Walsh, Sales Development Manager at West Lynn Creamery, told Mr. Altman that rebates were sometimes paid to customers in cash. According to Mr. Altman's interview memorandum with Walsh:

> Jim cashed checks for about 10 owners. They never gave their reasons for cashing checks.
>
> Jim has mentioned to Nick [Scangas] about cashing checks. For example, an irate owner called about 7 or 8 years ago looking for his rebate. Nick wanted to know what was going on. Jim told Nick that the other owner received the rebate in cash. Nick said nothing.
>
> Some customers cashed their checks every month; some once in a while. Jim never knew why customers wanted cash....

According to another of Mr. Altman's interview memoranda, Nicholas Scangas, West Lynn Creamery's Executive Vice President of Sales, said the following:

> Originally, Dunkin' Donuts owners were entrepreneurs with only a little money. They would come to West Lynn Creamery and ask for a loan. West Lynn could then arrange for a loan with the Credit Union [the Community Credit Union of Lynn] but the Credit Union wanted a guarantee. West Lynn was willing to provide the guarantee only because it could insure payment through rebates.
>
> * * * * *
>
> *Cash*-Jim Walsh mentioned a long time ago that a customer asked him to cash checks. He told Nick because Nick is his boss. Nick had no knowledge of why customer [sic] would want cash. He said he didn't like the idea but Jim said that the customer (Carlos Andre) insisted. Nick doesn't like cashing checks because that can lead to disputes about whether the cash was received, etc.

On November 19, 1997, Mr. Altman had a telephone conversation with James M. Merberg ("Mr.Merberg"), a

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criminal defense lawyer representing Michael and Cathy Gavriel the Dunkin' Donuts franchisees identified in the grand jury subpoena. During the conversation with Mr. Merberg, Mr. Altman suggested that their conversation would be subject to a joint defense agreement. Mr. Altman's November 20, 1997, memorandum to the file reads:

> The Gavriels are represented by an attorney named James Merberg. His address is 66 Long Wharf, Boston 02110. His telephone number is 723-1990. He called me on November 19, 1997. I assume he called me after Brenda spoke with the Gavriels.
>
> Merberg was mildly hostile. He basically felt that West Lynn and his clients had committed various crimes, including income tax evasion and commercial bribery. Merberg understood that West Lynn Creamery controlled the Credit Union, and its president was also president of West Lynn. He suggested that it was West Lynn's decision to have the Gavriels obtain the loan. He thought the entire transaction smelled, and he was suggesting that West Lynn was bribing the Gavriels in order to retain the business of their Dunkin Donuts.
>
> *4 I told Merberg that he had a distorted view of the situation. I said that it was only West Lynn's goal to help its customers. I said that I had no knowledge of why the Gavriels wanted a loan, but I am sure that if they did, because of the longstanding family relationship between the Gavriels/Karas and West Lynn, that West Lynn would be as helpful as possible so that the Gavriels could obtain a loan for their Dunkin Donuts. Merberg resisted this scenario, and wouldn't share with me all of the details that he had. He realizes that his clients, particularly Mrs. Gavriel, had committed tax evasion, and it is a difficult situation.
>
> It should be noted that Merberg said that he represented both Gavriels "for now." I asked him what he meant by that and he said that for now there was no conflict, but he didn't know how that would play out in the context of this case. He said he might end up only representing Mrs. Gavriel.
>
> Merberg said that he could not see any legitimate reason for West Lynn to be paying rebates. I told him a little bit about the history and the present rationale, and he conveyed that he thought that was a crock.
>
> Merberg and I talked with the agreement that that conversation would be subject to a joint defense agreement. He said that he expected that we would have to part company soon. That may mean that he is going to try to get his clients to testify against West Lynn in exchange for a deal. I told him that this case looked to me as follows:
>
> First, it looks as if the government may have a tax evasion case against the Gavriels. I said that West Lynn had no role to play in that case, but if anyone was going after anyone else for commercial bribery, then the alleged payer and payee of the bribe had a mutual interest in cooperation. I said that furthermore, it seemed to be in neither party's interest to get roped in on a false statement charge, based upon what one says that the other does. Merberg was very skeptical about whether we could work out any kind of joint defense agreement or that he could share any information from his client. He said that he would be in a better position to know at the end of the week.
>
> Merberg said several times that he believed that West Lynn took out loans for its customers. He made it sound as if West Lynn was the initiator of the loan. He wouldn't tell me his basis for that belief. He also said that West Lynn was paying a fixed amount each month of principal and interest on the loan. I told him that I believed we were only paying the rebate amount each month and that I believed that the rebate amount varied each month depending upon the amount of product that was purchased.
>
> Merberg told me that subpoenas had been issued to each of the entities owned by the Gavriels to produce documents. I told him that West Lynn had received a document subpoena as well. Merberg said that the name of the investigator that was snooping around was named George Neal.
>
> At this stage, Merberg is not terribly well versed in the facts. My goal is to try to persuade him that this was a transaction that was done because the customer wanted it done that way. I think I softened him up a little bit but I also believe that he thinks that West Lynn may have been receiving a kickback out of the "supposed" loan from the Lynn Credit Union. I put the word "supposed" in quotes because Merberg doesn't think that there was a real loan here to the customer, but rather that there was a kickback scheme in which, in order to do business with West Lynn, West Lynn told the customer to take out a loan from the Credit Union, gave the customer all of the documents to execute, walked the loan through the Credit Union, which was easy to do because West Lynn controlled the Credit Union, obtained the loan, and split it with the customer. Then, according to the allegation, West Lynn simply paid off the loan.
>
> *5 In November or December 1997, Mr. Altman told his

partner, Mr. Speleotis, that he had spoken with Mr. Merberg. Mr. Speleotis recalls that Mr. Altman told him that Mr. Merberg was trying to blame West Lynn Creamery.

Mr. Altman directed a Rubin and Rudman lawyer, Kevin Geaney ("Mr.Geaney"), to conduct legal research. Rubin and Rudman's billing records reflect that Mr. Geaney conducted the following legal research: 1.4 hours on November 18, 1997, on research regarding cases dealing with corporate and individual liability for tax evasion/conspiracy; 1.5 hours on November 19, 1997, on research regarding tax evasion/conspiracy regarding rebates; 2.3 hours on November 20, 1997, on research regarding tax evasion/conspiracy; and 1.7 hours on November 24, 1997, on research regarding "conspiracy/taxes as corporation or individual."

Mr. Geaney also provided Mr. Altman with a folder entitled "Bribery-Commercial" containing copies of G.L. c. 271, sec. 39, entitled "Illegal Gratuities, etc. and Penalty" and 18 U.S.C. sec.1952 entitled "Interstate and foreign travel or transportation in aid of racketeering enterprises."

On November 20, 1997, a West Lynn Creamery employee named Paul Paulsen ("Paulsen") testified before the federal grand jury. After the grand jury appearance, Mr. Altman prepared a memorandum to the file summarizing the areas covered by AUSA Hodgens in his questions to Paulsen before the grand jury. The memorandum states in part: "Hodgens asked about where the original checks were. Paulsen said that the original checks were still in existence, and Hodgens said that he wanted them." Despite this request, the checks were not produced to AUSA Hodgens, and he never again asked for them.

On November 26, 1997, Mr. Altman again spoke with Mr. Merberg by telephone. Mr. Altman prepared another memorandum memorializing this conversation, which states in its entirety as follows:

> I spoke with Jim Merberg on Wednesday, November 26, 1977[sic]. He said that he had had an additional conversation with his client. He said that his client was aware of other loans that West Lynn engineered with the Credit Union. He also said that the loan was not for the purpose for which it appeared to be made. He insisted that the Gavriels' interest and West Lynn's interest diverge and therefore he doubted that he could cooperate. Finally, he said that it was his view that the U.S. Attorney's Office was also looking at West Lynn. I said it was my understanding that the Gavriels were a target and because the loan arrangement appeared to be so weird that the U.S. Attorney's Office was taking a side trip to take a look at what that meant.

On December 5, 1997, Mr. Altman wrote another memorandum to the file summarizing a conversation with Attorney Milton Schwartz. The memorandum states:

> On December 4, 1997, Greg Demakis telephoned me and told me to call Milton Schwartz. I did so. His telephone number is 227-0508. He said that he represented the Gavriels in the lawsuit that the Stratises brought against them. He said that on four separate occasions the Gavriels received $10,000 in loans from the Credit Union-a total of $40,000. He said that the Gavriels testified that they split the checks with the Stratises. The Stratises denied that and the jury believed the Stratises and not the Gavriels. Schwartz said that Stratis is a very sleazy guy. Apparently, he was having sex with his employees and stealing money from the till of the Dunkin Donuts. Schwartz said that he brought in a young woman who worked in one of the Dunkin Donuts shops who testified how Stratis came on to her and how he was taking money out of the till. Schwartz said that she was the only witness that was totally believable in the case and the Judge rejected it. During the course of my conversation with Schwartz, he continued to refer to the payments received by the Gavriels from the Credit Union as kickbacks. I asked him why he called them kickbacks and he said "because that's what they are." I said, "Well, where are you getting that from?" He said, "Well, because those are kickbacks," I said, "Well, West Lynn calls them rebates." He said, "Well, I'm not must of a businessman; okay, they're rebates."

*6 Schwartz is a nice guy who was pretty talkative. He may be the reason that Merberg, the Gavriels' criminal attorney, has a skewed version of what went on here. Schwartz says that the Gavriels have been longtime friends of West Lynn, and have not pointed the finger at anyone at West Lynn. He said that the Gavriels never told him that West Lynn did anything wrong. Schwartz says that there were a lot of issues in the lawsuit between the Gavriels and Stratis. He said that he would send me all of the non-privileged documents pertaining to the checks and the loans and so forth. He said that he

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wouldn't send stuff relating to other issues, such as the boat and the car and whether Stratis could force the Gavriels to give up their 50 percent ownership of the Dunkin Donuts shop to Stratis. Schwartz conceded that the Gavriels did not pay taxes on the monies received from the Credit Union. He mentioned Merberg's name, and I didn't want to press that point until I got his full story and the documents.

In December of 1997, Mr. Altman "was aware that there were issues outstanding that could go in any direction."

After early December of 1997, Mr. Altman heard nothing further from AUSA Hodgens until September of 1998. Mr. Altman did no more work on this matter after December 12, 1997. until September of 1998.

There were negotiations in the late fall of 1997 and winter of 1998 between Scangas Bros. Holding, Inc. ("SBHI") and Garelick Farms Inc. ("Garclick") concerning the sale of the stock of SBHI to Garelick, SBHI was a holding company that held all of the capital stock of West Lynn Creamery. The negotiations, however, were terminated in a letter from Garelick's president, Alan J. Bernon ("Bernon"), dated February 4, 1998. Bernon's letter stated:

> In light of that certain demand letter dated January 29, 1998 from Anthony M. Doniger, counsel to Katherine M. Diamond, to you, that we received yesterday from your counsel, Michael Altman, and the apparent ongoing disputes among the stockholders of SBHI, we believe that continuing discussions between SBHI and Garelick under the above referenced Memorandum of Intent regarding the proposed acquisition of SBHI by Garelick would no longer be productive. Therefore, we hereby request the termination of the Memorandum of Intent, which by its terms will expire on February 16, 1998. As we indicated before. Garelick is not prepared to move forward with the threat and uncertainty of stockholder litigation against SBHI and its directors and officers.

The history of the second-generation ownership of West Lynn Creamery through SBHI has been very litigious. It has been the nature of the dissident cousins who held minority interests in SBHI to oppose nearly every proposal made by Pappathanasi. Janice Scangas and Katherine Diamond have been the most combative.

Later, after the issues among the SBHI stockholders were resolved, negotiations for the purchase of SBHI resumed. Ultimately, on June 30, 1998, Suiza Foods Corporation ("Suiza"), through its wholly-owned subsidiary Garelick Farms, Inc., purchased all outstanding stock in SBHI, the parent company of West Lynn Creamery. Rubin and Rudman represented SBHI. West Lynn Creamery and the selling shareholders in connection with the sale. In the Stock Purchase Agreement, the West Lynn Creamery sellers made the following representations to Suiza:

> *7 *Absence of Litigation.* Except as set forth in *Schedule 2.10* of the Company Disclosure Schedule, there is no claim, action, suit, litigation, proceeding, arbitration or investigation of any kind, at law or in equity (including actions or proceedings seeking injunctive relief), pending or, to the Company's knowledge, threatened against the Company or any of its subsidiaries, and neither the Company or any of its subsidiaries is subject to any continuing order of, consent decree, settlement agreement or other similar written agreement with, or continuing investigation by, any Governmental Entity, or any judgment, order, writ, injunction, decree or award of any Governmental Entity or arbitrator, including, without limitation, cease-and-desist or other orders.

The Stock Purchase Agreement also required the West Lynn Creamery sellers to deliver an opinion of counsel to Garelick/Suiza. Thus, on June 30, 1998, Rubin and Rudman issued an Opinion Letter to Garelick. Paragraph 9 of the Opinion Letter-the particular paragraph of greatest significance to this case-stated:

> 9. To our knowledge, except as set forth in *Schedule 2.10* of the Company Disclosure Schedule, there is no claim, action, suit, litigation, proceeding, arbitration or, [sic] investigation of any kind, at law or in equity (including actions or proceedings seeking injunctive relief), pending or threatened against the Company or any of its subsidiaries and neither the Company nor any of its subsidiaries is subject to any continuing order of, consent decree, settlement agreement or other similar written agreement with, or continuing investigation by, any

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> Governmental Entity, or any judgment, order, writ, injunction, decree or award of any Governmental Entity or arbitrator, including, without limitation, cease-and-desist or other orders.

The Opinion Letter also stated that, for the purposes of the foregoing opinion, Rubin and Rudman "have relied upon the representations of factual matters contained in the Purchase Agreement and have made no independent investigation of such factual matters; however, nothing has come to our attention which causes us to doubt the accuracy thereof." The Opinion Letter stated that "[i]n rendering our opinions we have examined such materials as we have deemed relevant to those opinions...."

There also is a separate paragraph in the Opinion Letter that reads as follows:

> With respect to matters stated to be "to our knowledge," we call your attention to the fact that we have not made any independent review or investigation of agreements (other than those expressly referred to herein), instruments, orders, writs, judgments, rules, regulations or decrees by which our clients or any of their properties may be bound, nor have we made any investigations as to the existence of actions, suits, investigations or proceedings, if any, pending or threatened against our clients, except to the extent that any of the above is disclosed in any exhibit or schedule to the Purchase Agreement. However, nothing has come to our attention which causes us to doubt the accuracy of such exhibits or schedules.

***8** The Opinion Letter closes with the following:

> This opinion letter is rendered solely to you and for your benefit in connection with the transaction described herein and may not be relied upon in any manner or for any other purpose by, or circulated or delivered to, [sic] other person or entity, except your successors and assigns, without our prior written consent.

Mr. Barton was the corporate lawyer at Rubin and Rudman in charge of the stock transaction.

In early June 1998, during a brief discussion about the disclosures to be made in *Schedule 2.10* to the Stock Purchase Agreement, Mr. Altman told Mr. Barton that West Lynn Creamery had received a grand jury subpoena in October 1997. Mr. Barton told Mr. Altman that they should discuss the matter with the clients.

Later, at a meeting on June 16, 1998 (the "June 1998 meeting"), Mr. Barton, Mr. Altman, Mr. Speleotis and Pappathanasi, a selling shareholder, discussed whether the October 1997 grand jury subpoena was required to be included in *Schedule 2.10*. Another selling shareholder, Nicholas Scangas, also was present at the June 1998 meeting.

Also, at the June 1998 meeting, when discussing whether to include the matter on *Schedule 2.10* as a prudent course to avoid future claims, Mr. Altman, in responding to a question from Mr. Barton, said that he had not heard from AUSA Hodgens for nearly six months and that it was his "guesstimate" that the Gavriel matter had probably gone away, with Gavriel paying a civil fine with heavy penalties for tax evasion. This "guesstimate" was consistent with Mr. Altman's experience in representing clients in tax evasion cases.

At the June 1998 meeting, both Mr. Barton and Mr. Speleotis advised Pappathansi that it would be wise to include the grand jury subpoena/investigation in *Schedule 2.10*. However, Pappathanasi professed fear that such a disclosure would incite family members who frequently disagreed with him to interfere with the sale, and for that reason he did not want the matter included on *Schedule 2.10*. The closing of the transaction took place on June 30, 1998, with the Opinion Letter as part of the closing documents, and the grand jury subpoena/rebate investigation was not disclosed in *Schedule 2.10*.

In June 1998, Rubin and Rudman had a written policy concerning the issuance and preparation of opinion letters. The policy stated in part (with emphasis in the original):

> 3. *Approval of Opinions.* Our Firm's policy is that certain partners must approve opinion letters covered by this policy.
>
> The person who proposes to issue the opinion letter must bring the draft opinion to a partner authorized to approve opinion letters in the particular area, *with the completed back-up file or binder.* It is the responsibility

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of the reviewing partner (the "countersigning partner") to review the opinion letter, satisfy himself or herself as to its propriety and also the existence and completeness of the contents of the opinion file or binder. If there is no such back-up, the opinion cannot be approved or issued.

***9** If the countersigning partner reviews the opinion and back-up and finds it in order, he or she should approve it. This may be signified by both signing the opinion letter itself or, if two signatures on a letter seems odd or out of place, the countersigning partner may merely sign the copy of the opinion in our back-up file. Only partners may sign opinion letters. Obviously, if the countersigning partner does not agree with the substance of the opinion, the Practice Area Leader, the Managing Partner, the Assistant Managing Partner or the Firm Chairman ought to be consulted immediately to resolve the disagreement.

The countersigning partner should keep a copy of the opinion he has approved for his or her own file.

As of June 30, 1998, Jason A. Sokolov ("Mr.Sokolov"), a partner at Rubin and Rudman, was asked by Mr. Barton to countersign the Opinion Letter. In actuality, however, the Opinion Letter was not signed by any individual lawyer. Rather, it was signed:

Very truly yours,

/s/ Rubin and Rudman LLP

Rubin and Rudman LLP

Mr. Sokolov, at that time, was the countersigning partner for Rubin and Rudman opinion letters. Ordinarily, before he would countersign a Rubin and Rudman opinion letter, he would generally inquire of the person who handled litigation for the client/company as to whether there was anything else they had to discuss relative to the opinion. He did not do so in this matter.

Mr. Sokolov had participated extensively in drafting the Opinion Letter. Among other things, Mr. Sokolov was responsible for adding the nothing-has-come-to-our-attention-which causes-us-to-doubt-the-accuracy-thereof language in the two places that it appears in the Opinion Letter.

When Mr. Sokolov reviewed and approved the Opinion Letter, he was totally unaware of any grand jury investigation. He had not been told about it by Mr. Altman, Mr. Barton or Mr. Speleotis. Nor was he told about Mr. Altman's conversations with Mr. Merberg, nor did he see any of Mr. Altman's memoranda.

Mr. Sokolov said he "would have sat down with [Mr. Altman] and ... would have reviewed the entire situation from the beginning and discussed what the potential was for a real issue developing" if he had been told about Mr. Altman's conversations with Mr. Merberg.

At trial, Mr. Altman testified that he was not familiar with corporate transactions like that involved in the sale of West Lynn Creamery. He further claimed that at the June 1998 meeting, he was unaware that the information asked of him about the 1997 grand jury subpoena and matters related to it was going to be considered in connection with a Rubin and Rudman opinion letter. He apparently thought that he was only being asked about matters to be included in *Schedule 2.10* that was to be a part of the Stock Purchase Agreement. Indeed, he said that he never knew about or even saw the Opinion Letter in issue until the time that this lawsuit was filed.

At the June 1998 meeting, what Mr. Altman reported was accurate, as far as it went. However, his report did not include the following facts: there was another grand jury subpoena to the Community Credit Union of Lynn, which was the credit union that made the loans to the Gavriels and others, that sought, among other things, bank records of Pappathanasi, and Paul Spiliotis and Robert G. Walsh, two other West Lynn Creamery employees; AUSA Hodgens had told him in the fall of 1997 that it was too early to say whether West Lynn Creamery was a target or a subject of the investigation; AUSA Hodgens had suggested that West Lynn Creamery enter into a proffer practice that would enable West Lynn Creamery to provide information about its rebate program and not be charged as a result of what was revealed; the Gavriels' attorney, Mr. Merberg, had indicated that Michael Gavriel was going to cooperate with the AUSA and implicate West Lynn Creamery in the matter; while some of the rebate payments were made in cash, most others were made by checks that did not reveal that West Lynn Creamery was the payor; or the results of any of the legal research on criminal issues performed by Mr. Geaney.

***10** On September 10, 1998, Mr. Altman received a letter from AUSA Hodgens, (Exhibit 58), advising him that a Criminal Information was filed that day charging Michael Gavriel "in a conspiracy to defraud the Internal Revenue Service, in violation of Title 18, United States Code, Section 371."

The Criminal Information, which was enclosed, made reference to a certain "Vendor X." AUSA Hodgens's letter to Mr. Altman "advised that the unnamed Vendor

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'X' in the Information is West Lynn Creamery ." He further "advised that West Lynn Creamery is a *target* of a Federal grand jury investigation." (Emphasis in original.)

The Criminal Information describes the manner and means by which the conspiracy charged was carried out. It included "cash infusions to operate" the Gavriels' donut shops with Vendor X "act[ing] as a conduit for obtaining loans through a North Shore credit union," and included arrangements to have Vendor X "repay the credit union loans by generating a stream of income through an invoicing and commercial kickback scheme set up by Vendor X, which is commonly referred to as a 'Rebate Program." '

The Criminal Information further recited that Gavriel "ordered certain quantities of products from Vendor X, which, in turn, generated materially false and inflated sales invoices and caused those invoices to be sent to" Gavriel through the U.S. mails.

Bernon, president of Garelick, made clear that he would not have done the deal to buy West Lynn Creamery if he had known about the Gavriel grand jury subpoena/rebate investigation. Before the closing, he had examined *Schedule 2.10* and was satisfied with the lack of impact of any of the matters included thereon on Garelick's purchase of West Lynn Creamery.

On March 26, 2001, West Lynn Creamery entered into an agreement to plead guilty to a Criminal Information charging it with a conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the lawful government functions of the Internal Revenue Service, in violation of 18 U.S.C. sec. 371. This was the same charge as brought against Michael Gavriel in September 1998. The plea agreement came after extensive negotiations with the U.S. Department of Justice, acting through the U.S. Attorney's Office in Boston. It resulted in West Lynn Creamery paying a fine of $7,200,000 and a special assessment of $400.

The amount of the fine came about as a result of the application of the U.S. Sentencing Guidelines to the crime charged. The Guideline Fine Range produced a minimum fine of $7,200,000 and a maximum fine of $14,400,000. Consequently, West Lynn Creamery was assessed the minimum fine permitted under the Guidelines. The agreement was approved by Judge Saris on June 5, 2001.

In addition to the fine and special assessment, West Lynn Creamery received from the U.S. Attorney's Office a commitment to write a letter on West Lynn Creamery's behalf that would state that these actions took place under prior ownership and that the current ownership had cooperated fully, and that the government did not have any issues or concerns with existing management. This letter then could be taken to the U.S. Department of Agriculture and help insure that the WLC did not get debarred and would be able to keep its government business. At that time the WLC group was doing about $330,000,000 annually in government business.

***11** The plaintiffs presented expert testimony from Attorney Jeffrey E. Stone ("Mr.Stone"), an experienced "white-collar" criminal defense attorney and a former federal prosecutor, to the effect that the plea agreement and the amount of the fine were reasonable under the circumstances. The grounds for that opinion took into consideration the strength of the government's case; the weakness of the defense; the good result in the bargain over the amount of the fine; and the favorable collateral issues, particularly the avoidance and assistance on the potential for debarment on government business. The Court finds Mr. Stone's opinions to be credible.

Attorneys' fees in the amount of $2,021,400.75 and costs of $149,953.86, aggregating $2,171,354.50, are said to have been incurred by the WLC group in responding to and resolving the criminal charges against West Lynn Creamery. This information was presented at the trial in summary form and marked as Exhibit 93.[8]

RULINGS OF LAW

The plaintiffs' three claims against the defendants are:[9] negligent misrepresentation, common law negligence, and violations of G.L. c. 93A. The claims for negligent misrepresentation and for common law negligence, in the context of this case, are essentially overlapping. Thus, the Court will focus primarily on the negligent misrepresentation claim.

"In order to recover for negligent misrepresentation[,] a plaintiff must prove that the defendant (1) in the course of his business, (2) supplie[d] false information for the guidance of others (3) in their business transactions, (4) causing and resulting in pecuniary loss to those others (5) by their justifiable reliance upon the information, and (6) with failure to exercise reasonable care or competence in obtaining or communicating the information." *Nota Constr. Corp. v. Keyes Assocs., Inc.*, 45 Mass.App.Ct. 15, 19-20, 694 N.E.2d 401 (1998). *Golber v. BayBank Valley Trust Co.*, 46 Mass.App.Ct. 256, 257, 704 N.E.2d 1191 (1999).

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Savers Property & Casualty Insurance Company v. Admiral Insurance Agency, Inc., 61 Mass.App.Ct. 158, 169, 807 N.E.2d 842 (2004).

Because this is a business transaction, it is Section 11 of G.L. c. 93A that applies. That section creates a cause of action for

> [a]ny person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice....

This is the general framework in which the Court must assay the acts of the parties to this litigation.

The specific context in which this case must be examined is the rendering of an opinion or report by a law firm to an entity that is not its client. The particular kind of opinion involved here is often referred to as a "no litigation" opinion.

In this situation, the Restatement (Third) of the Law Governing Lawyers ("Restatement") provides guidance. "In furtherance of the objectives of a client in representation, a lawyer may provide to a nonclient the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter." Restatement, sec. 95(1). "In providing the information, evaluation, or opinion under Subsection (1), the lawyer must exercise care with respect to the nonclient ... and not make any false statements prohibited under sec. 98." Restatement, sec. 95(3).

***12** To prevail, the plaintiffs here must demonstrate that the Rubin and Rudman defendants failed to conform to customary practice. "Custom and practice determining the scope of diligence in represented situations is articulated in bar-association reports, treatises, and articles." Restatement, sec. 95, Comment a. This leads the Court to an extensive report of several bar association experts on the customs and practices surrounding the rendering of "no litigation" and other types of opinions by lawyers to third parties in the context of a sale or other transfer of a business client. The report is entitled "Third-Party 'Closing Opinions' * * * A Report of the TriBar Opinion Committee,"[1] (referred to hereafter as the "TriBar Report"). The TriBar Report may be found at 53 Bus. Law 591-679 (1998). All parties in this case agree that the TriBar Report is the appropriate reference for the situation at issue. Indeed, experts presented on each side in this trial were leading participants and contributors to the TriBar Report.

The opinion recipient has a right to rely upon the opinion. This "means that a professional duty is owed by the third-party opinion giver to the opinion recipient. As a result ... if the opinion is negligently given and results in damage to the opinion recipient, the opinion recipient has a claim against the opinion giver." TriBar Report, p. 604, n. 29. See, e.g., *Nycal Corp. v. KPMG Peat Marwick LLP*, 426 Mass. 491, 493-499, 688 N.E.2d 1368 (1998).

Sec. 552 of the Restatement (Second) of Torts describes the tort of negligent misrepresentation committed in the process of supplying information for the guidance of others as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

That liability is limited to

> loss suffered (a) by a person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

The SJC in *Nycal, supra*, 426 Mass. at 497, 688 N.E.2d 1368, particularly adopted Comment h to Sec. 552 of the Restatement, which reads as follows:

> [I]t is not required that the person who is to become the plaintiff be identified or known to the

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> defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeability to take some action in reliance upon it.... It is sufficient, in other words, insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given. It is not enough that the maker merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon it, on the part of anyone to whom it may be repeated.

***13** "An opinion is not a guaranty of an outcome, but rather an expression of professional judgment. That professional judgment is necessarily limited by a variety of factors discussed in [the TriBar] Report." TriBar report, p. 596.

"Factual information that is the subject of an opinion (*e.g.*, no litigation) ... must be established in a way that meets the needs of the parties to the transaction." TriBar Report, p. 598. In actuality, what Rubin and Rudman provided was not so much an opinion as it was a confirmation of facts relating to its knowledge of what litigation and investigations may have been pending or threatened against its client, West Lynn Creamery.[9]

"Opinion givers must of necessity use their own judgment as to their conformity with customary practice in the circumstances they face." TriBar Report, p. 600. Both "the Restatement (Second) of Torts and the Restatement (Third) of the Law Governing Lawyers indicate that the customary practices of lawyers similarly situated is a key factor in determining liability." *Id.*

It is equally important that the opinion giver (Rubin and Rudman here) avoid misleading the opinion recipient (the plaintiffs here). "When considering if an opinion to be given will mislead the opinion recipient, opinion preparers must think not only about the opinion itself but also about areas excluded from the opinion." TriBar Report, p. 602.

"Inclusion of the phrase 'to our knowledge' in an opinion does not by itself ... state a limitation on the investigation required by customary diligence." TriBar Report, p. 619.

> An opinion letter is usually written on a law firm's letterhead and signed in the name of the firm. It thus purports to express the opinion of the firm, not merely that of the opinion preparers. The fact that an opinion letter is signed in the name of a law firm has given rise to confusion over the obligations of a law firm in preparing an opinion letter. A law firm practices only through the lawyers who work on its behalf. The opinion preparers determine the content of the opinion letter and are responsible to perform the work required to support the opinions being expressed. The law firm fulfills its obligations to the opinion recipient through the performance by the opinion preparers of customary diligence in preparing and delivering the opinion letter.

TriBar Report, p. 605.

> Opinion preparers ... may have occasion to make ... inquiries directed to specific issues raised by the opinion, particularly when they are aware that a lawyer in the firm who is not involved in the preparation of the opinion has information obtained through representation of the client in other matters that is likely to have a material bearing on the opinion issue. The timing and content of these inquiries will vary; they will usually be informal. The opinion preparers must take into account the responses to these inquiries in determining the reliability of the information being used to support

the opinion.

*14 TriBar Report, p. 614.

> The no litigation opinion is intended to elicit information regarding the *existence* of pending and threatened actions and proceedings ... that might be of concern to the opinion recipient.... The presence or absence of the phrase "to our knowledge" does not change the meaning of the opinion. With or without "to our knowledge." the opinion does nothing more than provide comfort to the opinion recipient that the opinion preparers do not know the list of litigation referred to in the opinion letter to be incomplete or unreliable.

TriBar Report, p. 664.

The Rubin and Rudman defendants presented as one of their expert witnesses Boston attorney Donald Glazer ("Mr.Glazer"). Mr. Glazer is highly qualified to speak on the subject of opinion writing. He is, among other things, one of two Co-Reporters of the TriBar Report. The other Co-Reporter was one of WLC's experts, New York attorney Arthur Field ("Mr.Field").

When discussing the no litigation opinion, Mr. Glazer agreed with the following statement; in fact it is included in a book that he wrote on the subject:

> The no-litigation opinion is based on the assumption that the opinion giver has a special awareness of pending or threatened actions, a special ability to verify their existence or nonexistence through client records, or special ability to ask the right questions of the appropriate people to determine that the certificate provided by the officers of the company includes and appropriately describes all pending actions.

Transcript, Vol. 7, p. 62, II. 12-21.

The Court next considers in more detail the teachings of *Nycal.* That case involved the duties of accountants to third parties for audit reports of financial statements of their clients. The situation, however, is similar in many respects to when lawyers render opinions or confirmations about facts relating to their clients to third parties. "[T]here is no reason to arbitrarily limit the potentially liable defendants to that class [-accountants-] of professionals." *Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood,* 80 N.Y.2d 377, 381, 590 N.Y.S.2d 831, 833, 605 N.E.2d 318 (1992).

In *Nycal,* the Supreme Judicial Court addressed, for the first time. "the scope of liability of an accountant to persons with whom the accountant is not in privity." 426 Mass. at 493, 688 N.E.2d 1368. In doing so, it adopted the test taken from Sec. 552 of the Restatement (Second) of Torts. *Id.,* at 497-498, 688 N.E.2d 1368.

Also, in *Nycal,* the SJC concurred with the California Supreme Court's holding in *Bily v. Arthur Young & Co.,* 3 Cal. 4th 370, 394, 3 Cal.4th 370, 11 Cal.Rptr.2d 51, 834 P.2d 745, 769 (1992), that Sec. 552 appropriately recognizes the commercial realities in play. *Nycal, supra,* 426 Mass. at 497, 688 N.E.2d 1368. In *Bily,* the California court spoke of both negligent misrepresentations and intentional fraud in the preparation and dissemination of an audit report. *Bily, supra,* 11 Cal.Rptr.2d 51, 834 P.2d at 747.

*15 As noted above, the purpose of the "no litigation" opinion is to do nothing more than provide comfort to the opinion recipient, the plaintiffs here, that the opinion preparers, Mr. Barton, with some help from Messrs. Altman, Speleotis and Sokolov, all acting for Rubin and Rudman, did not know the list of pending or threatened litigation and investigations "set forth in *Section 2.10* of the Company Disclosure Schedule" to be incomplete or unreliable. Further, that comfort was reinforced by Rubin and Rudman's statement that "nothing has come to [its] attention which causes [it] to doubt the accuracy thereof."

Thus, an initial question here is whether what Rubin and Rudman knew about the Gavriels' grand jury subpoena and the rebate investigation as of June 30, 1998, constituted an investigation threatened against West Lynn Creamery or constituted a "continuing investigation by[ ] any Governmental Entity."

A further question is whether Rubin and Rudman misled the plaintiffs by rendering its opinion without disclosing the Gavriel grand jury subpoena and the rebate investigation. In other words, given Rubin and Rudman's collective knowledge, could it so unequivocally avoid reference to the grand jury subpoena/rebate investigation?

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The Court will assess the first question at two times. First the Court will examine what Rubin and Rudman, mostly through Mr. Altman, knew in December 1997. Then the Court will consider whether the passage of five or six months in the run-up to the June 30, 1998, closing without any communication from AUSA Hodgens made any difference. In this process, the Court is not looking to see if Rubin and Rudman correctly predicted the future, but rather whether what it knew, in and of itself, should have been disclosed.

The Court begins by observing what occurred on September 10, 1998, over two months after the June 30, 1998, closing. It was then that the Criminal Information filed against Michael Gavriel, and the included charges therein relating to him and to "Vendor X," known to be West Lynn Creamery, became known to Mr. Altman. Of course, neither Mr. Altman nor anyone else at Rubin and Rudman knew of this Criminal Information at any time prior to September 10, 1998. Thus, in and of itself, the Criminal Information was not a reportable piece of information in the June 30, 1998, Opinion Letter. At the same time, however, the charges laid out in the Criminal Information are precisely what Mr. Altman became aware of in his representation of West Lynn Creamery when responding to the grand jury subpoena in 1997. Those charges are set forth in the "Manner and Means" section of the Criminal Information, (Exhibit 58), and include the following:

> 6. GAVRIEL periodically needed cash infusions to operate his donut shops and learned that Vendor X would act as a conduit for obtaining loans through a North Shore credit union ("Credit Union A"), whose identity is known to the United States Attorney.
>
> ***16** 7. GAVRIEL arranged with Vendor X to repay the Credit Union A loans by generating a stream of income through an invoicing and commercial kickback scheme set up by Vendor X, which was commonly referred to as a "Rebate Program."
>
> 8. As part of the scheme, GAVRIEL ordered certain quantities of products from Vendor X, which, in turn, generated materially false and inflated sales invoices and caused those invoices to be sent to GAVRIEL through the United States Mails.
>
> 9. GAVRIEL, in turn, caused the various entities that he controlled to issue checks made payable to Vendor X in satisfaction of the materially false and inflated invoices.
>
> 10. Thereafter, as part of the scheme, Vendor X remitted and caused to be remitted to Gavriel and/or to Credit Union A, on behalf of Gavriel and/or the foregoing entities controlled by Gavriel, certain monies and funds through "rebate" checks, which represented the difference between the actual prices of products, as reflected on the materially false invoices, in the approximate amounts, as follows: [here was an aggregated listing showing a grand total of $431,401].
>
> 11. GAVRIEL and Vendor X caused these remitted monies and funds to be applied to the GAVRIEL Credit Union A loans. At various times, after the loans were paid off, GAVRIEL and Vendor X caused the remitted monies and funds to be made payable to the foregoing entities controlled by GAVRIEL.
>
> 12. GAVRIEL caused the remitted monies and funds to be diverted from the foregoing entities that he controlled to himself and others, whose identities are know to the United States Attorney.
>
> 13. For the years 1992 through 1996, GAVRIEL caused the foregoing entities that he controlled to file materially false U.S. Corporation Income Tax returns (Forms 1120S) in that approximately $431,401 of the remitted monies and funds was not reported as receipts of the businesses.

Expert testimony from Mr. Stone, an attorney with substantial experience in handling white-collar criminal defense work, whose testimony this Court credits, concludes that Mr. Altman should clearly have been alerted that West Lynn Creamery was in serious trouble with the rebate investigation. Further, Mr. Stone opined that it was not within the standard of care for a white-collar criminal defense lawyer to conclude as early as June of 1998 that the investigation had gone away.

On the latter point about whether the investigation had gone away, the defendants' expert, Mr. Glazer, was asked to assume that Mr. Altman said to Mr. Barton that it was his "guesstimate" that the investigation had gone away. Mr. Gazer responded:

> I think if Altman sa[id] it was his guesstimate, it's a much tougher issue, and I think Barton said as much.
>
> In Barton's testimony he indicated, too, that he thought that would have been a much tougher issue, which led me to conclude that is not what he heard Mr. Altman say.

Transcript, Vol. 7, pp. 83-83, II. 23-24, 1-5.

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But on this point, Mr. Glazer was mistaken in his conclusion about what Mr. Altman said to Mr. Barton. Mr. Altman twice told this Court that he told Mr. Barton that his best "guesstimate" was that the entire investigation had gone away. Transcript, Vol. 2, p. 143, II. 11-12, and Vol. 3, p. 139, II. 2-8.

***17** This Court concludes and rules that the information that Mr. Altman provided to Mr. Barton at the June 16, 1998, meeting regarding the status of the Gavriel grand jury subpoena and the rebate investigation as it related to West Lynn Creamery, had Altman known that the information was for the purpose of an opinion stating that Rubin and Rudman knew of no threatened governmental investigation of West Lynn Creamery, would have fallen below the standard of a reasonably competent white-collar criminal defense lawyer.

It does not excuse the situation for Mr. Altman to say he did not understand corporate transactions or for Mr. Barton to say he relied solely on Mr. Altman's expertise regarding the handling of the grand jury subpoena and its significance for purposes of the opinion being rendered. A see-no-evil, hear-no-evil, speak-no-evil approach cannot be what the TriBar Report is teaching the opinion-writing bar.[9] Both sides' experts were in agreement on this point.

The plaintiffs' expert, Mr. Field, said:

> Now, it would make no sense to me if we are going to run a fair system, and that's what we intend to do, to ignore these facts. Now, if somebody ... coming in off the street were to say: "Oh, somebody is going to sue you," you have no reason to believe them, perhaps that's different. But we need to look at the nature of the facts, the credibility of what comes before you.
>
> There is no license here to avert your eyes, to ignore the realities.

Transcript, Vol. 5, pp. 65-66, II. 21-24 and 1-6.

The Rubin and Rudman defendants' expert, Mr. Glazer, said essentially the same:

> I said a lawyer can't simply close his or her eyes and cover his or her ears and ignore things that are right there that they know about.
>
> They can't do that. They have to make a responsible-they have to make a good-faith judgment as to that. They can't be-in the securities law, we have the context of scienter. It can't be reckless. That's another way ...

Transcript, Vol. 7, p. 112, ll. 7-16.

Mr. Altman, however, was not the opinion preparer. Indeed, he testified that he did not even know that what he was being asked about at the June 16, 1998, meeting was to be considered for inclusion in a Rubin and Rudman opinion letter. He claims not to have known about the opinion letter until the commencement of this lawsuit. This surprised the Court, but it accepts the testimony as given. This testimony suggests not so much a failure on Mr. Altman's part, but rather a significant breakdown in the careful process established at Rubin and Rudman regarding opinion letters. Mr. Barton did not carry his investigation far enough; and Mr. Sokolov seems to have overlooked the firm's policy on opinion letters.

There is a dramatic difference in asking a lawyer in Mr. Altman's position whether he thinks a grand jury investigation has gone away, and asking him whether his law firm can decline to reveal the grand jury investigation in an opinion letter that confirms the absence of pending or threatened investigations, while being embroidered with the nothing-has-come-to-ourattention-which-causes-us-to-doubt-the-accuracy-thereof language.

***18** It cannot be consistent with the customary practice relating to opinion letters, so elaborately expressed in the TriBar Report, to permit the opinion preparer to avoid his obligations to the opinion recipient by the simple artifice of blindly adopting the report of a fellow attorney's handling of a criminal grand jury subpoena for the client in question when that fellow attorney does not even know that he is providing grist for an opinion letter mill.[10]

Gavriel's March 25, 1998, plea agreement makes clear that there did *exist* an ongoing investigation. See footnote 10 below. Rubin and Rudman, however, professed not to know about it. In its Opinion Letter, however, Rubin and Rudman not only failed to list in *Schedule 2.10* the Gavriel grand jury subpoena/rebate investigation, it went a significant step further when it affirmatively said: "nothing has come to our attention which causes us to doubt the accuracy thereof." These words-"nothing has come to our attention which causes us to doubt the accuracy thereof"-appear in the Opinion Letter not just once, but twice.

The Court repeats the words of the TriBar Report, p. 602, stated above. "When considering if an opinion to be given will mislead the opinion recipient, opinion preparers must think not only about the opinion itself but also about areas *excluded* from the opinion." (Emphasis added.)

The Court agrees with Mr. Field when he said:

> Mr. Barton should have either decided that he could not give the opinion because he had some bad facts and chose not to dispel them or he should have disclosed these facts to the purchaser. Opinion Letters, after all, are communication; and the question is: Are you communicating the facts as they have been requested in a fair and objective way?

Transcript, Vol. 5, pp. 67-68, ll. 20-24 and 1-3.

Another relatively recent case, albeit dealing with a different kind of attorney's opinion, sheds some light on the situation presented here. In *Williams v. Ely*, 423 Mass. 467, 668 N.E.2d 799 (1996), Justice Wilkins made the following comments at p. 476, 668 N.E.2d 799:

> It does not matter that the opinion that the disclaimers would generate no adverse gift tax consequences was a reasonable view of the law in 1975. The problem is not that Gaston Snow gave reasonable advice that in time proved to be wrong. The problem is that the apparent certainty of the opinion given, at a time when the issue was not conclusively resolved, denied the plaintiffs the opportunity to assess the risk and to elect to follow alternative estate planning options. If, as the judge found, attorneys in the estate planning and tax field would have advised clients of the risk, the failure of Gaston Snow to advise the plaintiffs of the risk was negligent.

Here, even more so than in *Williams*, the problem is that the apparent certainty of the confirmation given by Rubin and Rudman-that there was no threatened investigation involving West Lynn Creamery-came in an affirmative statement; it was not an oversight. And the confirmation was made at a time when it was not correct, thereby denying the plaintiffs the opportunity to assess the risk and to elect to follow alternative options with regard to the purchase of West Lynn Creamery.

***19** In making the foregoing ruling, the Court has applied an objective standard to the actions of Rubin and Rudman. It is not basing its conclusions on, or finding liability because of, mere errors of judgment.

The Rubin and Rudman defendants did not conduct the inquiry that they were required to make by customary practice. The confirmation they gave, grounded as it was as on errors of fact, created for the recipients the comfort that an ongoing investigation did not exist *and* that nothing had come to the attention of Rubin and Rudman that cast doubt about the accuracy of that report.

The Court turns now to the subjects of whether the plaintiffs were (a) persons or one of a limited group of persons for whose benefit and guidance Rubin and Rudman intended to supply the information; and (b) through reliance upon it in a transaction, that Rubin and Rudman intended the information to influence the recipients. Restatement (Second) of Torts, Sec. 552.

The plaintiffs were definitely "one of a limited group of persons for whose benefit and guidance Rubin and Rudman intended to supply ... information."

What remains is whether Rubin and Rudman intended the plaintiffs to rely upon the Opinion Letter in the West Lynn Creamery acquisition and whether Rubin and Rudman intended the information therein to influence the plaintiffs in the matter. Two things confirm this: (1) Rubin and Rudman's own words; and (2) the June 30, 1998, closing.

The last sentence of the Rubin and Rudman Opinion Letter contains Rubin and Rudman's intent: "This opinion letter is rendered solely to you and for your benefit in connection with the transaction described herein and may not be relied upon in any manner or for any other purpose by, or circulated or delivered to, [sic] other person or entity, except your successors and assigns, without our prior written consent."

Further, the Opinion Letter was a condition of the closing; it was present at the closing; and the closing was accomplished.[11] See *Prudential Ins. Co., supra*, 80 N.Y.2d at 384-385, 590 N.Y.S.2d at 834-835, 605 N.E.2d 318.

> [I]n *Yorke v. Taylor*, 332 Mass. 368, 374, 124 N.E.2d 912 (1955), [the Supreme Judicial Court] adopted the rule of the Restatement of Torts sec. 540 (1938), which states: "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation...." The Restatement (Second) of Torts

sec. 540 states: "The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." Restatement (Second) of Torts sec. 541 states: "The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." There is thus a distinction between a falsity that could only be uncovered by way of "investigation" and a falsity that was readily apparent or "obvious." Comment a to Restatement (Second) of Torts sec. 540, *supra,* states that, "if a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious under the rule stated in sec. 541."

***20** *Kuwaiti Danish Computer Co. v. Digital Equipment Corporation,* 438 Mass. 459, 467-468, 781 N.E.2d 787 (2003).

In the matter before the Court, the Rubin and Rudman defendants assert that they had no knowledge of the continuing nature of any investigation resulting from the Gavriel grand jury subpoena or that West Lynn Creamery might be involved as a target or subject thereof. Accepting that as true,[11] the Court notes that the same defendants cannot successfully argue that any falsity in their Opinion Letter was readily apparent or obvious. The plaintiffs were justified in relying on the Opinion Letter and the recitation contained in *Schedule 2.10* made a part thereof.

The Court finds the amount of the fine and special assessment-$7,200,400-to be an appropriate amount for assessment as an element of damages as a direct consequence of the Opinion Letter's misleading failure to warn of the grand jury subpoena/rebate investigation. The amount of the fine came, after all, from the mandatory application of the U.S. Sentencing Guidelines, not from some vague opinion of an economic expert. Further, the amount of the fine was at the low end of the Guideline Fine Range.

The Court also agrees that those reasonable attorneys' fees and expenses that were incurred after the June 30, 1998, closing and were responsive to the matter as it became known on September 10, 1998, are the only other element of damages. As noted above, the amount and reasonableness of those fees and expenses remains for further proceedings.

The defendants argue that there was a failure on the part of the plaintiffs to mitigate their damages. In pressing this argument, they point to the provision of the Stock Purchase Agreement that makes their former clients, Pappathanasi and the two Scangas brothers, indemnitors with regard to any representations and warranties contained in the agreement, particularly *Schedule 2.10.* No claim for indemnification was made by the WLC group within the time limits provided in the Stock Purchase Agreement and the plaintiffs, before that time expired, had more than enough knowledge to proceed with an indemnification claim.

The plaintiffs did not just ignore Pappathanasi and the Scangas brothers, however. They were named as defendants in this law suit. Nine of the eleven counts in the Second Amended Complaint are directed at Pappathanasi and the Scangas brothers. These counts are as follows: Count I and Count III for fraud/misrepresentations; Count IV for civil conspiracy; Count V for unjust enrichment; Count VI for negligent misrepresentation; Count VII for violation of G.L. c. 93A; Count IX for reimbursement of indemnification advances; Count X for rescission; and Count XI for breach of contract.

On July 20, 2004, all parties to this action entered into a stipulation, pursuant to Mass. R. Civ. P. Rule 41(a)(ii), dismissing, with prejudice, all of the plaintiffs' claims against Arthur Pappathanasi, Nicholas Scangas and Christopher Scangas, and the dismissal, with prejudice, of all of the Scangas defendants' counterclaims against the plaintiffs. See Paper # 108. The stipulation of dismissal was signed by counsel for all parties, including counsel for the Rubin and Rudman defendants.

***21** The stipulation of dismissal does not describe in any way what was involved in the resolution of these claims, e.g., whether anything of value was paid or delivered by the Scangases or Pappathanasi to any of the WLC entities. The signatories to the stipulation are presumed to know what was involved and the significance of what was being signed, and they are fully bound by the stipulation.

The defendants here presented no evidence at the trial of this case suggesting in any way that anything about the resolution of the claims with Pappathanasi and the Scangases needs to be considered with regard to the proper measure of damages due against the Rubin and Rudman defendants; and it will not be. See, e.g., *Wadsworth v. Boston Gas Co.,* 352 Mass. 86, 94, 223 N.E.2d 807 (1967); *Anti v. Boston Elevated Ry. Co.,* 247 Mass. 1, 6, 141 N.E. 598 (1923). The Court rules that there was no failure to mitigate damages by the plaintiffs.

Next, the Court focuses specifically on the count seeking relief against the Rubin and Rudman defendants for alleged violation of G.L. c. 93A, sec. 11.

There is no question but that the conduct in issue here occurred primarily and substantially in Massachusetts. The "center of gravity of the circumstances that give rise to the claim" is clearly in the Commonwealth. *Kuwaiti Danish Computer Co., supra,* 438 Mass. at 473, 781 N.E.2d 787. Nor is there any doubt that the plaintiffs suffered a loss of money resulting from the actions of the Rubin and Rudman defendants. See, e.g., *Baldassari v. Pub. Fin. Trust,* 369 Mass. 33, 45, 337 N.E.2d 701 (1975).

There is, however, at least some question as to whether the actions by the Rubin and Rudman defendants met the "trade or commerce" requirement of c. 93A. See, e.g., *First Enters., Ltd. v. Cooper,* 425 Mass. 344, 347, 680 N.E.2d 1163 (1997). Were this a legal malpractice case the answer seems clear. See *Brown v. Gerstein,* 17 Mass.App.Ct. 558, 569-571, 460 N.E.2d 1043 (1984). The WLC group, however, were not Rubin and Rudman's clients and Rubin and Rudman's obligations or duties to the WLC group arise only from those factors that are required by custom and practice in issuing opinion letters to nonclients.

The "trade or commerce" issue notwithstanding, a further and more significant issue on the c. 93A claim is whether the plaintiffs have met the greater burden that the appellate courts have instructed must apply to claims-like that here-filed under sec. 11. See, e.g., *Madan v. Royal Indemn. Co.,* 26 Mass.App.Ct. 756, 763 n. 7, 532 N.E.2d 1214 (1989). "One can easily imagine cases where an act might be unfair if practiced upon a commercial innocent yet would be common practice between two people engaged in business." *Spence v. Boston Edison Co.,* 390 Mass. 604, 616, 459 N.E.2d 80 (1983).

It has been said that in determining whether the conduct of the Rubin and Rudman defendants was unfair, this Court "should ... focus on the nature of the challenged conduct and on the purpose and effect of that conduct." *Stagecoach Transp., Inc. v. Shuttle, Inc. .,* 50 Mass.App.Ct. 812, 817, 741 N.E.2d 862 (2001). See also *Mass. Employers Ins. Exch. v. Propac-Mass, Inc.,* 420 Mass. 39, 42-43, 648 N.E.2d 435 (1995). More recently, however, the SJC appears to have reverted back to a more objective standard:

> ***22** We have stated that "a practice or act will be unfair under G.L. c. 93A, sec. 2, if it is (1) within the penumbra of a common law, statutory, or other established concept of unfairness; (2) immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to competitors or other business people." *Heller Fin. v. Insurance Co. of N. Am.,* 410 Mass. 400, 408, 573 N.E.2d 8 (1991).... We have stated that "[t]he purpose of G.L. c. 93A is to improve the commercial relationship between consumers and business persons and to encourage more equitable behavior in the marketplace." *Poznik v. Massachusetts Med. Professional Ins. Ass'n,* 471 Mass. 48, 53 (1994).

Morrison v. Toys "R" Us, Inc., Massachusetts, 441 Mass. 451, 457-458, 806 N.E.2d 388 (2004).

Here, the Court rules that the actions of the Rubin and Rudman defendants clearly were not "immoral, unethical, oppressive, or unscrupulous." *PMP Assocs. v. Globe Newspaper Co.,* 366 Mass. 593, 596, 321 N.E.2d 915 (1975). Further, the connection between Rubin and Rudman and the plaintiffs is not clearly a "commercial relationship between consumers and business persons," nor did the situation occur in "the marketplace."

Also, the plaintiffs are hardly lacking in sophistication about the matter in issue. The WLC parties, on a regular basis, made acquisitions countrywide of milk and other dairy product producers, and were represented throughout the transaction in issue by sophisticated Texas counsel. "[N]ot every negligent act is unfair or deceptive and thus unlawful under G.L. c. 93A, sec. 2." *Swanson v. Bankers Life Co.,* 389 Mass. 345, 349, 450 N.E.2d 577 (1983).

Given all of the foregoing, this Court rules that the greater burden to show a c. 93A, sec. 11 claim has not been met.

Finally, the Court observes, as it did in its findings, that the Opinion Letter is that of Rubin and Rudman LLP as a firm, not that of the individual attorneys who may have played a role in its creation. Based solely on the inclusion of the letters "LLP" in the firm's name, and not upon any evidence presented, this Court presumes that Rubin and Rudman is a limited liability partnership. See G.L. c. 108A, sec. 46; S.J.C Rule 3:06(2)(c). Nothing presented indicates that any of Messrs. Altman, Barton or Speleotis were themselves individually practicing in some entity form. See, e.g., S .J.C. Rule 3:06(2)(a), last sentence. Thus, the Court further assumes that defendants Messrs. Altman, Barton and Speleotis, at all material times, were among the "owners" of Rubin and Rudman, having been designated as partners thereof.

"Each owner of the entity shall be personally liable for the damages which arise out of the performance of legal services on behalf of the entity and which are caused by his or her own negligent or wrongful act, error, or omission." S.J.C. Rule 3:06(3)(a). Here, although the Court finds the entity Rubin and Rudman LLP liable pursuant to Count VI for negligent misrepresentation and Count VIII for common law negligence, it does not find any of the three individual Rubin and Rudman defendants

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separately liable therefor. The misrepresentations and the negligence was the collective act or failure to act of the entity. No individual act or failure to act of any of the individual owners, standing alone, was directed at the plaintiffs or caused the plaintiffs harm. As to Messrs. Altman, Barton or Speleotis, none individually made any representations to any of the plaintiffs, nor did any of them individually commit any negligent acts toward any of the plaintiffs. It was the firm itself that had the duty and acted collectively with regard to the WLC group.

ORDER FOR JUDGMENT

***23** The plaintiffs are directed, within 20 business days from the date hereof, to serve upon the Rubin and Rudman defendants an appropriately supported request for assessment of reasonable attorneys' fees and reasonable costs consistent with the foregoing findings and rulings. Upon such service, the Rubin and Rudman defendants, within 20 business days from the date of such service, shall serve their response upon the plaintiffs. Thereafter, plaintiffs' counsel shall file the total package, much like a Superior Court Rule 9A motion filing, with the Court for action.

After resolution of the attorneys' fees and costs issues, final judgment against Rubin and Rudman LLP only shall enter for the plaintiffs on Count VI and Count VIII of the Second Amended Complaint. The Second Amended Complaint shall be dismissed on Count VII and as against Michael L. Altman, Gene T. Barton and Charles J. Speleotis.

All Citations

Not Reported in N.E.2d, 18 Mass.L.Rptr. 598, 2004 WL 3019442

Footnotes

1 Dean Foods Company was formerly known as Suiza Foods Corporation. Thus the docket lists the initial plaintiff as Suiza Foods Corporation.

2 Suiza GTL, LLC; Dean Northeast, LLC; and West Lynn Creamery, Inc.

3 Arthur J. Pappathanasi, Trustee; Nicholas Scangas, individually and as Trustee; Christopher Scangas, individually and as Trustee; 330 Scangas Nominee Trust; Rubin and Rudman LLP; Michael L. Altman; Gene T. Barton; and Charles J. Speleotis.

4 The number "01869" is the general number for West Lynn Creamery as a client. The number "048" stands for the particular matter, e.g., here, "Criminal-Rebate Investigation."

5 At the time of the entry of Exhibit 93, the defendants' attorneys reserved their rights to check the mathematical accuracy of the summary and to challenge the reasonableness of the fees and expenses. Because Exhibit 93 is merely in gross summary form, the Court, post trial, will permit the plaintiffs to support their fee claims and the defendants to challenge them in the usual fashion with affidavits and other supporting and opposing documentation and, if necessary, a hearing. At that time, the Court will have in mind the testimony of the plaintiffs' expert, Mr. Stone, to the effect that the fees and expenses were reasonable. It is, however, the Court that must make the ultimate decision on this issue.

6 In addition to the earlier resolution of the claims against Pappathanasi and the two Scangas brothers, on October 6, 2004, the remaining parties stipulated to the dismissal, with prejudice, of Count II, Count IV, and any claim for willful or knowing conduct or trebling damages under Count VII. What remained thereafter to be tried were: Count VI against the Rubin and Rudman defendants for negligent misrepresentation; Count VII against the Rubin and Rudman defendants for violation of G.L. c. 93A for single damages, attorneys' fees and costs; and Count VIII against the Rubin and Rudman defendants for negligence.

7 The TriBar Opinion Committee now consists of designees of the following organizations functioning as a single Committee: Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; Corporation Law Committee, The Association of the Bar of the City of New York; and Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association. Members of the Allegheny County (Pa.), Atlanta, Boston, Chicago, Delaware and Ontario Bar Associations and of the State Bar of Texas are also members of the Committee.

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8 "Some opinion givers believe that statements dealing with factual matters should be referred to as 'confirmations' rather than opinions." TriBar Report, p. 598, n. 16.

9 This Court particularly does not accept Rubin and Rudman's expert's view-apparently strongly held, and certainly strongly stated-that trial lawyers are unable to comprehend the elegant nuances of corporate opinion letters or that matters relating to grand jury subpoenas are too "arcane" for corporate lawyers to be expected to divine.

10 All that either Mr. Altman or Mr. Barton had to do was place a telephone call to Mr. Merberg. If either of them had done so, they would have learned that the rebate investigation had not gone away. Rather, Gavriel, on March 25, 1998, had entered a plea agreement that included a provision that he would cooperate fully with law enforcement and government attorneys in an ongoing investigation. See Exhibit 41.

11 The Court does not accept the implication in the closing argument for the Rubin and Rudman defendants that the Opinion Letter was just an extraneous, perhaps redundant, piece of paper lying unnoticed and uncared for in a rack of documents at the closing, or that its existence as a requirement of closing was somehow-no evidence showed how-waived by the plaintiffs.

12 In doing so, the Court is not ignoring the significant fact that something certainly should have come to Rubin and Rudman's collective attention that would have caused doubt about the accuracy of such a confirmation.

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Name of Course: 53rd Annual Fund Assembly

Thursday, May 11

- ☐ 1:00pm - 1:50pm Tales from the Claims Files
- ☐ 4:15pm - 5:30pm Title Teasers

Friday, May 12

BREAKOUT ONE *(attend either)*

- ☐ 8:50am - 9:40am OMG! Oil, Mineral and Gas Rights in Florida: A Guide for Real Estate Attorneys
- ☐ 8:50am - 9:40am Title Policy Endorsements: An Examination of Florida Approved Forms ♦

BREAKOUT TWO

- ☐ 9:55am - 10:45am Protecting Your and Your Clients' Most Precious Asset, Their Private Information

BREAKOUT THREE *(attend either)*

- ☐ 11:00am - 11:50am A Practical Guide to Reading Surveys
- ☐ 11:00am - 11:50am Title Policy Endorsements: An Examination of Florida Approved Forms ♦

GENERAL SESSION

- ☐ 1:20pm - 2:10pm Business Email Compromise: A White Collar Crime Perspective
- ☐ 2:10pm - 3:00pm Lien On Me, But Not Forever: Perfecting, Duration and Extension of Judgments, Federal Tax,Municipal and Code Enforcement Liens
- ☐ 3:45pm - 4:35pm Quiz on Real Property Cases

Saturday, May 13

RESIDENTIAL TRACK

- ☐ 9:00am - 9:50am Learn to Love the FR/BAR Contracts
- ☐ 11:00am - 11:50am Residential Survey Problems and Form 9 Endorsements

COMMERCIAL TRACK: NO CREDIT

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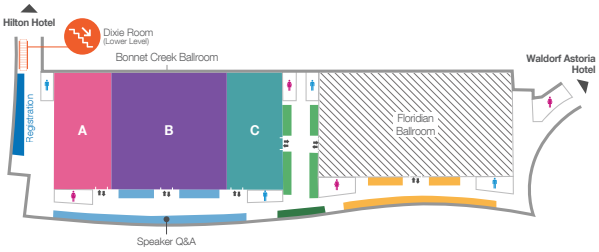
Ethics Credits Approved

Friday, May 12 - Breakouts



8:50am - 9:40am BREAKOUT ONE

A	Communicating the Benefits of Owner's Title Insurance
B	OMG! Oil, Mineral and Gas Rights in Florida: A Guide for Real Estate Attorneys
C	Title Policy Endorsements: An Examination of Florida Approved Forms
DIXIE	Using Fund Resources to Maximize Your Closing Practice

9:40am - 9:55am Refreshment Break

9:55am - 10:45am BREAKOUT TWO

A	Protecting Your and Your Clients' Most Precious Asset, Their Private Information
B	Condominium Terminator: Land Vulture or Urban Rehabilitator? Arnold Schwarzenegger or Dr. Albert Schweitzer?
C	Practice of Law: Run it like a Business

10:45am - 11:00am Refreshment Break

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CE9908	CE 9908 - Ethics (Agents)	2

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- ☐ **8:50am - 9:40am** Title Policy Endorsements: An Examination of Florida Approved Forms ♦

BREAKOUT TWO

- ☐ **9:55am - 10:45am** Protecting Your and Your Clients' Most Precious Asset, Their Private Information

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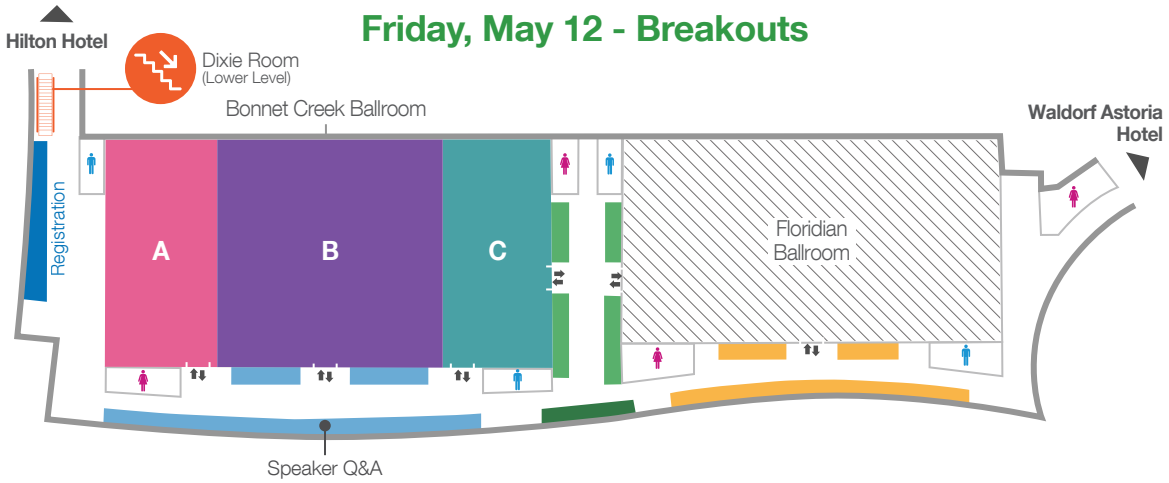

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Category (Specialty practice area):

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Date: May 11, 12 and 13, 2017

Location: Hilton Bonnet Creek Hotel

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12.0 hours Including 3.0 hours Ethics	Refer to attached program for the 53rd Annual Fund Assembly	CJL

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NALA Account Number (if known)	Location Hilton Bonnet Creek Hotel