

Real Estate 101

A Continuing Legal Education Program

NEW HAMPSHIRE
BAR ASSOCIATION
CONTINUING LEGAL EDUCATION

Equal Justice Under Law



Monday, May 15, 2023

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Real Estate 101

Monday, May 15, 2023
NH Bar Association Seminar Room, Concord

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Faculty

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Real Estate 101

NH Bar Association Seminar Room, Concord, NH
May 15, 2023

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Attorney Amy Manzelli

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Overview of NH Practice and Introduction to the NH Title Standards

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I. RESOURCES IN DEALING WITH TITLE ISSUES INCLUDING THE NEW HAMPSHIRE TITLE EXAMINATION STANDARDS

A. Getting Familiar with the New Hampshire Title Examination Standards

Before conducting a title search or reviewing a title abstract, one should become familiar with the most valuable New Hampshire resource available relating to titles - the New Hampshire Title Examination Standards. The New Hampshire Bar Association's Real Property Section promulgates these standards. The first edition of the Title Standards was created in February of 1954 and was only six pages in length. The Title Standards have undergone extensive revisions and additions over the years. The Standards are designed to be a guide for conveyancers and serve many purposes. The Title Standards highlight many real estate conveyancing principles and provide valuable guidance, but also lead the examiner to other valuable reference sources, such as relevant statutes and applicable case law. The Title Standards also serve to document areas of conveyancing where specific customs and practices in the past have been adopted by New Hampshire conveyancers and provide guidance as to what is generally considered reasonable and marketable in New Hampshire.

A full copy of the most recent version of the New Hampshire Title Examination Standards may be accessed on the New Hampshire Bar Association's website under Resources "Helpful Links for NH Attorneys":

[2014 Title Standards -- Clean Version \(.doc\) \(C1218898.DOC;1\) \(nhba.s3.amazonaws.com\)](https://www.nhba.s3.amazonaws.com/2014%20Title%20Standards%20--%20Clean%20Version%20(.doc).doc)

The Standards are particularly valuable, since it is virtually impossible for any title to be free from any defect, irregularity, or issue. While the Title Standards are not law, they assist practitioners in assessing those irregularities or issues to determine which pose a substantial likelihood of loss, versus those that are merely technical objections or minor blemishes and do not affect marketability. It is helpful to have a written set of guidelines that one can point to when challenged on a particular title judgment made.

The Title Standards cover many different useful areas. Some of the Standards that continue to be particularly helpful include the following areas:

Attachments, Duration	See Title Standards 9-24 through 9-25
Corporate and Entity Authority	See Title Standards 8-1 through 8-6
Period of the Search	See Title Standard 2-1 through 2-4
Estates	See Title Standards 7-1 through 7-25
Plans	See Title Standard 10-1 through 10-5
Mortgage Discharges, Incorrect Info	See Title Standard 6-19
Trusts	See Title Standards 5-16 through 5-21

B. Statutes

Aside from the Title Standards, which provide practical pointers and guidelines, a crucial source of information to conveyancers is the New Hampshire statutes. Full copies of the statutes are available online on the State of New Hampshire's website at

www.gencourt.state.nh.us.

Of particular interest to anyone conducting or reviewing a title search are the following statutes:

New Hampshire Statutes

Chapter 78-B	Transfer Tax
Chapter 79-A	Current Use
Chapter 80	Collection of Taxes
Chapter 86	Legacy and Succession Tax
Chapter 87	Estate Tax
Chapter 147-B	Environmental Liens
Chapter 167	Old Age, Blind, and Disabled Assistance Liens
Chapter 356-A	Land Sales Full Disclosure Act
Chapter 356-B	Condominium Act
Chapter 447	Liens for Labor and Materials
Chapters 456-B	Uniform Law on Notarial Acts
Chapter 472	Boundary Line Agreements
Chapter 477	Conveyances and Interests (includes Deed formalities)
Chapter 479	Mortgages of Realty (includes Foreclosure requirements)
Chapter 479-A	Unit Ownership (created prior to Condominium Statute)
Chapter 480	Homestead Right
Chapter 511, 511-A, 527 & 529	Attachments & Executions
Chapters 552-564	Estates and Descent & Distribution
Chapter 564-A & 564-B	Trusts
Chapter 672 through Chapter 679	Planning/Zoning/Subdivision

Internal Revenue Code

Section 6322 & Section 6324	Estate Tax and Gift Tax Liens
Section 6502	Federal Tax Liens

C. Case Law

The New Hampshire Bar Association has now provided access through its website to New Hampshire case law. Access is available to all New Hampshire Bar Members with use of a login and password. The service provides full text of the New Hampshire case law with a search engine. Cases also contain a notation in the upper right hand corner as to subsequent cases that have cited the particular case being viewed. Convenient links are provided to move directly to later related case cites. Case law plays an important part in the examination of title. Many principles applicable to interpretation of property rights are not derived from the statutes but rather from the case law.

D. Some Other Resources

There are many other resources available for conveyancers in New Hampshire. Many state agencies have posted their Administrative Rules (regulations) at www.gencourt.state.nh.us. Additionally, many New Hampshire cities and towns provide useful information online such as GIS maps, zoning regulations, and assessment information. For tracking financial institutions that no longer exist or have merged into other institutions, the FDIC website and the National Information Center website (www.ffiec.gov) are extremely helpful. Valuable resources may be found locally in the State Archives and State Law Library, as well as through other conveyancers and through the underwriting support personnel of your title insurance underwriter. Many times, an issue has already been visited by another conveyancer, and enormous light can be shed by that party on an otherwise daunting issue. Title Examination Standard 1-2 recommends contacting previous examiners for assistance and/or discussion. Many times, talking out an issue with another conveyancer can go a long way toward resolution.

E. List Serves

The List Serve of the New Hampshire Bar Association's Real Property Section can be another valuable source of information and feedback regarding title issues. List Serves are generally a mechanism by which persons are allowed to post messages and responses similar to a bulletin board service. It is important to always keep in mind the ethical issues raised by participation in list serves for attorneys. Attorneys should take care to verify independently all existing law or precedents received via an e-mail response on a list serve.

Practical Tips to consider in participating on List Serves

- Remember that e-mail discussion lists create a recorded, searchable conversation.
- Remember that even closed list groups are not completely private.
- Remember that counsel for the opposition may be a recipient of the list serve postings.

Real Estate Contract

Original Materials by:

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I. PURCHASE AND SALE AGREEMENT

A. STATUTE OF FRAUDS

The New Hampshire Statute of Frauds is found in RSA 506:1. The statute states “No action shall be maintained upon a contract for the sale of land unless the agreement upon which it is brought or some other memorandum thereof is in writing and signed by the party to be charged or by some person authorized by him in writing”.

The New Hampshire Court has held that RSA 506:1 is intended to promote certainty and to protect against frauds and perjuries in land transactions. Halstead v. Murray, 130 NH 360 (1988).

The Court has also recognized certain exceptions to the strict language of the statute, which requires a writing stating the terms of the transaction, where part performance or other equitable considerations are present.

1. Exceptions – Oral Contracts and Part Performance

In the instance of an oral contract, where a prospective purchaser has taken possession of the property with the consent or knowledge of the Seller and has made valuable improvements on the property in anticipation of the sale, the statute will not be enforced. The resulting unjust enrichment to the Seller is viewed as inequitable and the buyer is entitled to a completion of the transfer of title. However, the oral contract must contain the requisites of a real estate contract, including an ascertainable purchase price, and the identity of the parties. See Weale v. Massachusetts Housing Corp., 117 NH 428; Samin v. Carr, 114 NH 462 (1974); White v. Poole, 79 NH 71 (1906).

In one case the Court granted relief where services had been performed on the subject real estate in reliance on the Testator’s inter vivos oral promise to devise the property to his children when he died, if they maintained the property during his lifetime. Tsiatsios v. Tsiatsios, 140 NH 173 (1995) The Court noted that ordinarily an oral contract to devise real property as compensation for personal services contravenes the Statute of Frauds. An exception is warranted where the facts support fraud, part performance, or equitable consideration, such as justifiable reliance coupled with satisfaction of the owner’s demand for maintenance services on the property.

2. Writings

Writings which satisfy the statute of frauds must meet the test of a memorandum which contains the elements of price, description of the property and identification of the parties. See Briand v. Wild, 110 NH 373 (1970) If the Memorandum is sufficient as to contents and signature, any writing, formal or informal will suffice. Huot v. Janelle, 95 NH 10 (1948). A letter, receipt, telegram, advertisement, municipal record, defective form of deed can satisfy the statute. If the agreement is contained in several writings they will all be construed as constituting one document.

Often introductory or preliminary letters or documents are used to evidence the parties having entered into an agreement. In Estate of George V. Huyames, 127 NH 461, oral conversations between the parties were followed by a letter from the Seller to the purchaser accepting the offered price with a recitation that a Purchase and Sale Agreement would follow. A deposit check was sent and held by the Seller. The Court held that the statute of frauds had been satisfied and that the forthcoming Purchase and Sale Agreement would simply supplement the terms of the previous written exchange and did not introduce ambiguity to the extent that a contract could not be found. See also LaPierre v. Cabral, 122 NH 301 (1992)

Where the evidence established that the party claiming ownership of land had used the land for many years, paid taxes and had paid initial consideration, the fact that the deed had been lost did not violate the statute of frauds. Brooks v. Toperzer, 122 NH 139 (1982). The acts of the purported owners were seen as consistent with ownership under title, particularly in light of the lack of any contest until the descendant of the original seller refused to sign a substitute deed and sought to claim title.

A memorandum that sufficiently describes the land intended to be conveyed will satisfy the statute.

The descriptive language need not be as exacting with respect to the boundaries, geographical location or other formalities normally used in deeds. Jessemen v. Aurelio, 106 NH 529 (1965). So long as the designation is clear and denotes the parcel to be transferred, parol evidence will be admitted to correct the description to the parcel.

Where a client orally authorizes his legal counsel to settle outstanding litigation which involves a sale of real estate, the question of the applicability of the statute of frauds arises. On the face of the statute, either the parties must sign the agreement or have given written authorization to their attorneys to enter into the contractual settlement. Noting that the rule in New Hampshire regarding the power of an attorney to bind his client by settlement is quite liberal, the Court has seen fit to carve authorized attorney settlements out of the statute. Halstead v. Murray, 130 NH 560 (1988). The Court's ruling, based on its holding that there exists a special relationship between the attorney and his client, is limited to instances in which the client has authorized the attorney to settle a pending case involving land by the sale of land which is the subject of the suit. Moreover, some form of written agreement that satisfies the statute must be present. Thus, an oral settlement agreement not evidenced by a written memorandum will not pass muster under the statute. ByBlos Corp v. Salem Farm Realty Trust, 141 NH 226 (1997).

B. STANDARD FORM OF THE NEW HAMPSHIRE ASSOCIATION OF REALTORS

(The "Agreement" - see form attached)

This form is used by most New Hampshire real estate brokers for residential and simple commercial sales, although there may be variations in the form among the several local boards of realtors. It is generally prepared by the broker.

The following discussion will cover the Agreement and be limited generally to single family, detached residential sales.

1. Date of Agreement

This should coincide with the date of the last signature, although a discrepancy is not too important, unless there is some period to be measured from the date of the agreement.

2. Names of Parties

a. Sellers

The seller's name should be the same as that in which title is held and all parties required to convey full title should execute the agreement.

(1) Individual

If the seller is an individual, his or her spouse should also execute the agreement in order to convey the homestead interest.

(2) Corporation

A corporate seller should show proof, such as a corporate vote, of its agent's authority to bind the corporation.

(3) Partnership

(a) General Partnership

RSA 304-A:10 (The Uniform Partnership Act) provides the detailed rules for conveyance of partnership property, whether in the name of the partnership or one or more partners. Each provision dealing with conveyance by less than all the partners is contingent upon the grantor's authority as outlined in RSA 304-A:9 (I). Therefore, the buyer should inspect the partnership agreement and should also include in the purchase and sale agreement warranties by the seller that the partnership agreement is unchanged and in effect (see RSA 304-A:33) and that they are authorized to bind the partnership. It is recommended to obtain a certificate of Trade Name (see RSA 349) The better approach is simply to require all partners to sign, together with warranties that they are all the partners.

(b) Limited Partnership

A general partner in a limited partnership has the same rights and powers and is subject to the restrictions and liabilities of a partner in a general partnership concerning conveyancing of real property. See RSA 304-B:24. The current partnership agreement and the certificate of Limited Partnership on file with the Secretary of State should be reviewed and warranties included that the signers are all the general partners (although the signature of any general partner may bind the limited partnership in the same manner as a general partnership).

(c) Limited Liability Partnership

In New Hampshire, a domestic registered limited liability partnership is a partnership that has complied with the registration requirements of RSA 304-A:44 and is governed by the same rules of conveyancing as a general partnership. Foreign registered limited liability partnerships, however, may be governed by a statement of authority. The statement of authority will specify the names of partners authorized to execute instruments affecting an interest in the partnership's realty, and may be exclusive and conclusive on the issue of authority.

(4) Limited Liability Company

Check the Certificate of Formation filed with the Secretary of State and the Operating Agreement to determine (1) whether the company has the power to enter into the transaction, (2) whether the transaction must be authorized by consent or vote or approval of specified members and managers (if any), and (3) who has authority among members and managers to execute the documents for the transaction. Require a recent certificate signed by the person duly authorized by the Operating Agreement to render the Certificate, or alternatively, by all managers or all members if there are no managers which (a) identifies all current members and managers (if any), (b) certifies that the transaction has been duly authorized by written consent signed by the required members or managers, or by vote, (c) empowers (if necessary) the signatories to sign and deliver instruments to effect the transaction, (d) indicates the consent has not been modified or rescinded and is still effective, and (e) states that no event has occurred which would cause a "dissolution" of the company and that no member or manager has requested a judicial decree of dissolution. If the Company is a foreign limited liability company, check to see that it is in good standing with its home jurisdiction, and that all statutory requirements of the home jurisdiction regarding its organization and internal affairs have been satisfied. Foreign limited liability companies may be governed by a statement of authority specifying the identity of members or managers authorized to execute documents affecting an interest in the company's real estate.

(5) Trusts

The Statute of Uses is no longer in effect in New Hampshire. RSA 477:25, effective May 26, 1986, states that a conveyance of real estate to a grantee in trust or as trustee vests legal power in the grantee as trustee to convey real estate in accordance with the terms of the trust. Therefore, trust instruments need not be examined to determine that the trust is a dry or passive trust, i.e. a trust where the trustee(s) have little authority except when directed by the beneficiaries. Prior to RSA 477:25, the beneficiaries of a dry or passive trust were deemed to have held title to the realty. Also note that the trustee's certificate under RSA 564-A may not necessarily be appropriate for all trusts (see Title Standards 5-15 through 5-21).

(6) Agents

Proof of written authorization must exist. .

(7) Estates

A license to sell or written consent of the spouse and all heirs and legatees should be produced. RSA 559:18. The Will may give the executor the power to sell the real estate, Rawlins v. Rice, 59 N.H. 493 (1880). However, you should require further authorization, particularly prior to the end of the period for creditors to file claims against the estate, as well as in those instances where the executor is not directed to sell the realty in question. Note: Once the Notice to Towns and Cities has been filed with the municipality where the property is located, title passes to the legatees.

b. Buyers

It is preferable to use the names in which title will be held, unless the agreement is specifically assignable. The same consideration for signatures by corporations, partnerships, and trusts discussed above apply.

3. Description of the Property

The purchase and sale form agreement has space for recitation of Book and Page, but even if this is filled in, the buyer is not necessarily charged with all the information so recorded. It is good practice to list all appurtenant rights. Although RSA 477:26 provides that appurtenant rights pass by deed unless specifically excluded, a seller is not obliged to agree to sell them. All exceptions to the title should be specifically noted. It is poor practice to use blanket language as "excepting all encumbrances of record".

A prudent buyer may desire a survey and the parties should determine who bears the responsibility for payment of the survey costs.

4. Selling Price

The Agreement form is set up for a deposit (or “earnest money”), a possible second deposit and the balance in cash. No provisions are made for owner financing, assumption of debt or installment sales, which would have to be incorporated in an addendum to the purchase and sale agreement.

The Agreement designates the broker as escrowee, which is potentially troublesome since the broker (except a “buyer’s agent” or “disclosed dual agent”) represents the seller and holds the buyer’s money. A neutral party is preferable but not always practical. If an attorney acts as escrowee he/she should clearly inform his/her client that he/she is bound by the agreement and his/her own judgment (including the possibility of interpleader) and not by the wishes or dictates of his/her client. A written escrow agreement is definitely recommended where the deposit(s) is sizeable, a provision for an interest bearing account is advisable with the interest to follow the deposit.

5. Deed

A warranty deed is usually intended here although one sees imaginative variations such as “marketable warranty”, “marketable title”, etc. Quitclaim deeds are often used in other states, but are not widely used in New Hampshire, except in cases of special exchanges, other related party transactions or tax deeds. Mortgage foreclosure deeds operate as quitclaim instruments. A quitclaim deed only conveys the interest of the Grantor, and there are no warranties with regard to back title. Although it is New Hampshire practice for the seller to pay for the preparation of the deed and the buyer to pay all recording costs, these arrangements should be spelled out. See also RSA 78-B:4 - transfer tax stamps are required to be paid by both the seller and the buyer (unless the parties agree to the contrary). Be aware of out-of-state agreements from jurisdictions where a different rule is in force.

Careful attention should be paid to the small print here which allows no exceptions other than utility easements and restrictive covenants. It is important to obtain and review any restrictive covenants prior to signing.

RSA 478:4-a, amended in 1989, requires the following appear in the deed: the mailing address of the grantees; the names of all municipalities in which the property is located in the first sentence of the description; and the typed or printed name of each person signing the deed under their signature.

Notaries must affix their seals (prior to October 1, 1988, the absence of a seal did not render an acknowledgment defective) and inscribe the expiration dates of their commissions. See RSA 455:3 and 456:9. See also Standards 5-8 through 5-12, New Hampshire Bar Association Title Examination Standards. Effective January 1, 2000,

justices of the peace must type, print or stamp their names and commission dates below their signatures on any acknowledgment or jurat. Chapter 153 of the Laws of 1999.

6. Transfer of Title – Time of the Essence

The closing date specified in the Purchase and Sale Agreement is not necessarily controlling in terms of time for performance. When the time for performance is not made “of the essence” in the Purchase And Sale Agreement but rather is simply expressed as the closing date, strict adherence to that date will not be imposed. Equity will treat the time limitation as formal rather than essential. Johnson v. Korsak, Inc., 120 NH 412 (1980). But See C & M Realty Trust v. Wiedenkeller, 133 NH 470 (1990). The party seeking a delay beyond the stated closing date will be granted a reasonable period of time after that date in which to perform his obligation, if the delay is not willful or will cause harm to the other party. Leavitt v. Fowler, 118 NH 541 (1978)

Time becomes of the essence in a real estate contract only when the parties have manifested that intent. Rogers v. Cardinal Realty, Inc., 115 NH 285 (1975). The language of the Agreement is not completely dispositive and intent is determined not only in light of the instrument itself but also in view of all the surrounding circumstances.

The wording “Time is of the Essence” is not mandated in order for the Court to find that the time for closing was crucial.

In Mailloux v. Dickey, 129 NH 66 the Agreement contained a clause indicating the agreement would terminate upon the failure of the parties to close by a date certain. The buyer’s failure to arrange to close by the deadline was ruled a breach, and entitled the seller to sell the property to another purchaser.

Often, the original closing date is extended. Where a party consents to a postponement of the time for performance and induces the other party to act upon the consent he cannot claim default and assert that the contract has lapsed, even where time was made of the essence in the original agreement. Bower v. Davis & Symonds Lumber Co. 119 NH 605. However, if the extension explicitly incorporates a time of the essence proviso, it will continue to apply to the extended date. Realco Equities v. John Hancock Mutual Life Insurance Company, 13 NH 345.

What looks to the layman like a deadline for closing is no such thing. Unless the parties manifest such an intent, time is not of the essence. Rogers v. Cardinal Realty, Inc., 115 N.H. 285 (1975). If time periods are critical, it should be clearly stated and the phrase “time is of the essence” should be used (although such language may still not be dispositive of the matter).

7. Possession

Under the agreement possession is given upon transfer of title. In the case where post-closing occupancy arrangements are made it is recommended an occupancy and indemnity agreement is entered into. Post-closing tenancies are generally discouraged as the occupant becomes a tenant and is protected by the terms of NH RSA 540.

8. Realtor

It is advisable to add a provision that each party represents that no other broker (or no broker if that is the case) was involved in the sale or in any way entitled to a commission and to make explicit who will pay for any such commissions coming due. See DiMarzio v. Read, 118 N.H. 925 (1979).

Many brokers on large deals are willing to negotiate their commission and if the parties are close to agreeing on a price, but cannot agree, the broker may sometimes be induced to give up part of his/her commission in order that the seller may net his/her desired amount.

9. Insurance

New Hampshire takes the position that in the absence of agreement otherwise, the risk of loss under an executory contract for the sale of real estate falls upon the vendor. Lampesis v. Travelers Insurance Co., 101 N.H. 323 (1958). Therefore, the seller will want to maintain insurance coverage pending the closing. The Agreement reflects this by requiring the seller to maintain coverage. Unfortunately brokers usually fill in the amount with “as is” or “sufficient”. The amount should be made certain.

The buyer should be given the option of rescinding when loss exceeds some percentage. Some agreements set this at 20%, but this can be a matter of negotiation. The use of a fixed dollar amount may be preferable. Although the Agreement provides that all sums recoverable shall be paid or assigned to the buyer, most sellers cannot do this because they carry a mortgage and their insurance includes a mortgage loss payable clause. Therefore, unless the mortgagee is willing to work out an arrangement to facilitate the sale, the buyer will have the option of backing out of the deal in virtually any case of loss.

Condemnation presents the same problem as casualty loss and similar provisions should be made for it.

10. Title

Paragraph 9 of the Realtors form provides for a process where the Buyer performs the title search (through his attorney or mortgage financing company), and the seller has an opportunity to correct any defects or the agreement is cancelled. Instead of “good and marketable title” the concept of “insurable title” is often used which is not that dissimilar. The standards for insurable title may include risks that the title company is willing to accept.

Since marketable title does not necessarily include compliance with zoning or other regulatory schemes, the buyer should insist on warranties with respect to such compliance. The buyer might go further and request warranties that the seller has no knowledge or notice of any pending or proposed governmental actions (such as street improvements, sewer or water lines, or zoning changes) which may give rise to assessments against the property.

The buyer should insist on a warranty that no debt is owed by the seller for materials or labor supplied to the premises within 120 days of the closing. See RSA 447:9.

11. Prorations

See the discussion at V., C., 1. in “Closing a Real Estate Transaction.” If occupancy does not coincide with the closing, the date of proration should be adjusted.

12. Property Included

This section generally includes personal property such as appliances. The seller will generally not want to warrant any more than that items like appliances are functioning and adequate on the date of closing, while the buyer may want a longer time period for warranty liability on the part of the seller.

13. Liquidated Damages

A common provision in real estate contracts provides that if the purchaser fails to perform, the deposit is forfeited and retained by the seller as liquidated damages. With the price of real estate constantly escalating, the level of initial deposit has changed from a minimal amount to more substantial sums. This is particularly the case in contracts where the closing is not to occur for an extended period, and the seller wants assurances that if he takes the property off the market for that period and the buyer defaults, adequate compensation can be realized.

The enforcement of a liquidated damages provision is not automatic. Three criteria must be met:

- (1) the damages to be anticipated as resulting from the breach are uncertain in amount or difficult to prove; (2) there was an intent on the part of the parties to liquidate them in advance; and (3) the amount stipulated was a reasonable one, that is to say, not greatly disproportionate to the presumed loss or injury. Shallow Brock Associates v. Duke, 135 NH 40.

The first two prongs of the list are not usually in contest. Proof of the seller's loss depends on market valuation which cannot be easily predicted at the time of the agreement. Secondly, the language of the contract or the surrounding circumstances will evidence the parties' intention to stipulate in advance to liquidated damages.

However, where additional deposits are added to the initial deposit the question of whether those later amounts also become part of the liquidated damages package can give rise to a dispute requiring a fact based analysis.

The third prong involves the reasonableness and proportionality determined in relation to the loss or injury presumed at the time of the contract formation. The court has looked to a party's actual loss as well as the presumable loss to resolve the question of reasonableness. Shallow Brook, supra The technique employed is to first determine whether the liquidated damages provision was a reasonable estimate of the "difficult to ascertain" damage at the time the parties agreed to it. If such is the case then a reassessment of the statement of liquidated damages is conducted. If the actual damages turn out to be easily ascertainable the Court must consider whether the stipulated sum is unreasonable and grossly disproportionate as against the actual damages. Shallow Brook, supra. Those damages are measured in terms of the seller's loss of bargain, the difference between the contract price and the actual value of the real estate at the time of the breach, Zareas v. Smith, 119 NH 534. The burden falls on the party claiming that the liquidated damages provisions is unreasonable to prove that assertion. The use of the percentage that the deposit bears to the purchase price is sometimes offered as a measure of reasonableness. The New Hampshire Court has refused to be pinned to an exact percentage.

14. Prior Statements

This merger clause is often ignored by buyers who rely on promises by the seller or broker that the basement never leaks, the well is bountiful, the septic system is fine, etc. While the parol evidence rule may have some vitality left, reliance should not be placed on this boilerplate as one's only defense against an irate homeowner, who may be suing in warranty, negligent misrepresentation, etc., in addition to assumpit. For an excellent discussion of the use of parol evidence to prove fraud or misrepresentation, see Ingaharro v. Blanchette, 122 N.H. 54 (1982).

The safest way to give meaning to this clause is to refrain from making unfounded representations, to allow the buyer an opportunity to inspect the premises and then have him/her initial the clause. There is law to the effect that the delivery of a deed discharges all the seller's warranties in the agreement. See 38 A.L.R. 2d 1310. While this may not be entirely true in New Hampshire (see Claveau v. Ploutier, 102 N.H. 437; Sargent Lake Association v. Dane, 116 N.H. 19) it would certainly be prudent of the buyer to provide that the seller's warranties survive the closing.

15. Financing

A reality of many real estate transactions is the necessity that the Buyer obtain institutional financing in order to produce the funds required to satisfy the purchase price. As a consequence to, the so-called mortgage contingency provision has become a routine part of real estate contracts. Difficulties appear where the language is not specific as to the amount and terms of the financing, the Buyer claims inability to obtain the financing and demands the return of his deposit. In such cases, language such as “subject to Bank financing” or “subject to the Buyer’s obtaining a mortgage” has result in a rule of “reasonable amount”. Grayson v. LaBranche, 107 NH 504. The Court has looked to the circumstances at the time of the formation of the contract and the expectations of the parties and attempted to ascertain whether the financing activity sought by the buyer (but refused by the bank) was reasonable. Makris v. Nolan, 115 NH 135.

The inability of the buyer to place reasonable financing means that the condition of the contract was not met, but without breach by the buyer. Whether or not the mortgage contingency contains all of the specifics, the purposes of mortgage contingency provisions is to:

“protect prospective purchasers from committing a technical breach of contract due to their inability, based on the facts and circumstances present at the time of the signing of the Purchase and Sale Agreement or due to some fortuitous intervening event, to secure funds necessary to complete the purchase”. Bruyere v. Jade Realty, 117 N H 564

In other words, the parties may expect that the buyer will have no difficulty in qualifying for the stated financing but those expectations may be proven unfounded by reason of unanticipated events such as loss of a job, a sharp increase in the mortgage rates or a low appraisal. Thus, the contingency protects the buyer from an involuntarily default.

The mortgage contingency does not excuse the buyer from his obligation to produce the buyer’s equity contribution to the purchase price. The difference between the purchase price and the mortgage amount is the responsibility of the buyer. The failure of the buyer to support the financing with the necessary down payment cannot be said to cause the financing to fail and the buyer will be held in default for failing to produce the equity amount. Cowern v. Morris, 137 NH 719

Current practice is to require the Buyer to obtain a commitment for financing by a certain date. This may not be an absolute satisfaction of the “financing contingency” provision since the commitment itself has loan closing conditions, such as an appraisal, environmental inspections or other conditions.

16. Radon Gas, Lead Paint, Water Supply and Sewage Disposal Notifications

The Seller or Seller's agent is obligated to provide notifications regarding radon gas, lead paint, water supply and sewage disposal prior to the execution of a purchase and sales agreement for any interest in real property improved by a building. The form of such notifications is specified by statute. See RSA 477:4-a.

17. Sewage Disposal System, Assessment of Waterfront Property

Prior to offering for sale any developed waterfront property having a private sewage disposal or treatment system, i.e. septic system, the seller is required to obtain an assessment study undertaken by a licensed sewage disposal system designer. The site assessment study shall become part of the listing agreement and shall be provided to the buyer who must acknowledge receipt of same in writing. See RSA 485-A:39.

18. Additional Provisions - not in the Agreement

This section is for listing such other matters, which the seller and buyer have agreed upon and which are not covered in the printed form. It is better practice to prepare and type an addendum to the agreement rather than to try to condense the agreement of the parties into a few lines. There are numerous issues that should be covered that are not referred to in the printed form. A typical but by no means exhaustive addendum is included in the attachments.

19. Confirmation

This means "acceptance". The buyer makes an offer by tendering the Agreement signed by him/her and may place a time limit for acceptance.

20. Specific Performance

It has long been held that specific performance is ordinarily granted to enforce a valid real estate contract unless the circumstances make it inequitable or impossible to do so. Estate of Younge v. Huysmans, 127 NH 461. It is within the discretion of the trial Court whether to issue a decree to Specific Performance based on the circumstances of the case. Shakra v. Benedictine Sisters, 131 NH 417. If the circumstances are that the party claiming the right to performance is guilty of laches, equity will not support the granting of the decree. The question of whether or not laches bars a particular claim is determined not only by the length of time involved, but also by the inequity of permitting a cause of action because of a change in the conditions of the property or the parties involved.

Where performance is sought by a buyer who fails to abide by a time is of the essence provision in a contract, specific performance will not be awarded since the responsibility of the failure to close on the appointed date was attributable to the buyer's failure to close. Thus, the party asserting the right to the specific performance

remedy, must be in a position of being ready, willing and able to complete performance of the agreement.

21. Inspections

The standard agreement contains a section relating to inspections to be completed by the Buyer. The agreement requires the Buyer to check the boxes for the type of inspection they want from a list. The list includes the customary types of inspections including general building, sewer, water, radon and pests. There is room to add a specific type of test if not included in the list. The Buyer also must provide a time period in which results will be reported to the Seller. It is important to understand objections must be provided within this time period or the contingency is waived. If the defects are significant the Buyer has the option of backing out of the deal or other arrangements can be made with the Seller. It is in Buyer's best interest to have the inspection period times set for a longer period and Seller's interest will be to keep the period short.

22. Property Disclosure

In all situations when residential property is listed with a real estate broker the Seller will complete a Property Disclosure containing information about the property and its systems. The standard disclosure is attached as Appendix B. The Buyer should review this carefully when deciding the types of inspections to be completed on the property.

C. AGREEMENT WITH BUILDER FOR NEW HOME.

The Agreement as discussed above can be used (although it is not recommended), and special care must be taken to incorporate by reference all plans, specifications, etc., to be used. There should be a provision for an inspection just prior to closing and the drawing of a "punchlist" which includes all unfinished items. A provision for a holdback of money might be inserted to allow closing and occupancy prior to final completion of all the punchlist items. The seller should be required to obtain all governmental approvals, including occupancy permits, approval of the septic system by the New Hampshire Water Supply and Pollution Control Division (NH Department of Environmental Services) and subdivision approval. Special care must be taken with respect to potential mechanic's liens. See *Chagnon Lumber Co. v. Stone Mill Construction Corp.*, 124 N.H. 820 (1984). See also, *Thomas v. Finger*, 141 N.H. 134 (1996). If the seller's warranties with respect to all bills being paid do not satisfy the buyer, the only alternative is to delay closing until at least 121 days after the last work or delivery. (N.B. The foregoing discussion does not apply to a contract with a builder to build a house on land already owned by the buyer. A good starting point is to get a copy of the various American Institute of Architects (A.I.A) forms, particularly A.I.A Document A107, "Standard Form of Agreement Between Owner and Contractor for Small Construction Contracts". Write to A.I.A., 1735 New York Avenue N.W., Washington, DC 20006.)

APPENDIX A

PURCHASE AND SALES AGREEMENT New Hampshire Association of REALTORS® Standard Form



_____, _____ ("EFFECTIVE DATE")
EFFECTIVE DATE is defined in Section 21 of this Agreement.

1. **THIS AGREEMENT** made this _____ day of _____, _____ between

_____, _____ ("SELLER") of _____,
City/Town _____, State _____ Zip _____
and _____

_____, _____ ("BUYER") of _____,
City/Town _____, State _____ Zip _____

2. **WITNESSETH:** That SELLER agrees to sell and convey, and BUYER agrees to buy certain real estate situated in City/Town
of _____ located at _____

County _____ Book _____ Page _____ Date _____ ("PROPERTY").

3. The **SELLING PRICE** is _____ Dollars \$ _____.
A DEPOSIT in the form of _____, is to be held in an escrow account by _____
("ESCROW AGENT"). BUYER ☐ has delivered, or ☐ will deliver to the ESCROW
AGENT's FIRM within _____ days of the EFFECTIVE DATE, a deposit of earnest money in the amount of \$ _____.
BUYER agrees that an additional deposit of earnest money in the amount of \$ _____ will be delivered on or before
_____. If BUYER fails to deliver the initial or additional deposit in compliance with the above
terms, SELLER may terminate this Agreement. The remainder of the purchase price shall be paid by wire, certified, cashier's
or trust account check, in the amount of \$ _____.

4. **DEED:** Marketable title shall be conveyed by a _____ deed, and shall be free
and clear of all encumbrances except usual public utilities serving the PROPERTY.

5. **TRANSFER OF TITLE:** On or before _____ at _____
_____ or some other place of mutual consent as agreed to in writing.

6. **POSSESSION:** Full possession and occupancy of the premises with all keys shall be given upon the transfer of title free of
all tenants and occupant's personal property and encumbrances except as herein stated. Said premises to be then in the
same condition in which they now are, reasonable wear and tear excepted. SELLER agrees that the premises will be
delivered to BUYER free of all debris and in "broom clean" condition. Exceptions: _____

Buyer reserves the right to conduct a walk through inspection upon reasonable notice to SELLER's real estate FIRM within
_____ hours prior to time of closing to ensure compliance with the terms of this Agreement.

7. **REPRESENTATION:** The undersigned SELLER(S) and BUYER(S) acknowledge the roles of the agents as follows:

_____ of _____
is a ☐ seller agent ☐ buyer agent ☐ facilitator ☐ disclosed dual agent*
_____ of _____

is a ☐ seller agent ☐ buyer agent ☐ facilitator ☐ disclosed dual agent*

*If agent(s) are acting as disclosed dual agents, SELLER and BUYER acknowledge prior receipt and signing of a Dual
Agency Informed Consent Agreement.

☐ **NOTICE OF DESIGNATED AGENCY:** If checked, notice is hereby given that BUYER is represented by a
designated buyer's agent and SELLER is represented by a designated seller's agent in the same firm.

8. **INSURANCE:** The buildings on said premises shall, until full performance of this Agreement, be kept insured against fire, with
extended coverage by SELLER. In case of loss, all sums recoverable from said insurance shall be paid or assigned, on delivery
of deed, to BUYER, unless the premises shall previously have been restored to their former condition by SELLER; or, at the
option of BUYER, this Agreement may be rescinded and the DEPOSIT refunded if any such loss exceeds \$ _____.

SELLER(S) INITIALS _____ / _____ BUYER(S) INITIALS _____ / _____

PURCHASE AND SALES AGREEMENT
New Hampshire Association of REALTORS® Standard Form



9. **TITLE:** If upon examination of title it is found that the title is not marketable, SELLER shall have a reasonable time, not to exceed thirty (30) days from the date of notification of defect (unless otherwise agreed to in writing), to remedy such defect. Should SELLER be unable to provide marketable title within said thirty (30) days, BUYER may rescind this Agreement at BUYER'S sole option, with full deposit being refunded to BUYER and all parties being released from any further obligations hereunder. SELLER hereby agrees to make a good faith effort to correct the title defect within the thirty (30) day period above prescribed once notification of such defect is received. The cost of examination of the title shall be borne by BUYER.

10. **TAXES,** condo fees, special assessments, rents, water and sewage bills shall be prorated as of time and date of closing. Fuel remaining in tank(s) shall be paid by Buyer at cash price as of date of closing from company that last delivered the fuel.

11. **PROPERTY INCLUDED:** All Fixtures _____

12. In compliance with the requirements of RSA 477:4-a, the following information is provided to BUYER relative to Radon Gas and Lead Paint:

RADON GAS: Radon gas, the product of decay of radioactive materials in rock may be found in some areas of New Hampshire. This gas may pass into a structure through the ground or through water from a deep well. Testing can establish its presence and equipment is available to remove it from the air or water.

LEAD PAINT: Before 1978, paint containing lead may have been used in structures. The presence of flaking lead paint can present a serious health hazard, especially to young children and pregnant women. Tests are available to determine whether lead is present.

Disclosure Required ☐ YES ☐ NO

13. **BUYER ACKNOWLEDGES PRIOR RECEIPT OF SELLER'S PROPERTY DISCLOSURE FORM AND SIGNIFIES BY INITIALING HERE:** _____

14. **INSPECTIONS:** The BUYER is encouraged to seek information from licensed home inspectors and other professionals normally engaged in the business regarding any specific issue of concern. SELLER'S real estate FIRM makes no warranties or representations regarding the condition, permitted use or value of the SELLER'S real or personal property. This Agreement is contingent upon the following inspections, with results being satisfactory to the BUYER:

TYPE OF INSPECTION:	YES	NO	RESULTS TO SELLER	TYPE OF INSPECTION:	YES	NO	RESULTS TO SELLER
a. General Building	☐	☐	within _____ days	f. Lead Paint	☐	☐	within _____ days
b. Sewage Disposal	☐	☐	within _____ days	g. Pests	☐	☐	within _____ days
c. Water Quality	☐	☐	within _____ days	h. Hazardous Waste	☐	☐	within _____ days
d. Radon Air Quality	☐	☐	within _____ days	i. _____	☐	☐	within _____ days
e. Radon Water Quality	☐	☐	within _____ days	j. _____	☐	☐	within _____ days

The use of days is intended to mean calendar days from the effective date of this Agreement. TIME IS OF THE ESSENCE in the observance of all deadlines set forth within this Paragraph 14. All inspections will be done by licensed home inspectors or other professionals normally engaged in the business, to be chosen and paid for by BUYER. If BUYER does not notify SELLER in writing that the results of an inspection are unsatisfactory within the time period set forth above, the contingency is waived by BUYER. If the results of any inspection specified herein reveal significant issues or defects, which were not previously disclosed to BUYER then:

(a) BUYER shall have the option at BUYER'S sole discretion to terminate this Agreement and all deposits shall be returned to BUYER in accordance with NH RSA 331-A:13; or

(b) If BUYER elects to notify SELLER in writing of the unsatisfactory condition(s) then:

1) SELLER and BUYER can reach agreement in writing on the method of repair or remedy of the unsatisfactory condition(s); or

SELLER(S) INITIALS _____ / _____ BUYER(S) INITIALS _____ / _____

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- 2) If SELLER elects not to repair or remedy the unsatisfactory condition(s) the BUYER may release the home inspection contingency and accept the property as is; or
- 3) If SELLER and BUYER cannot reach agreement in writing with respect to the method of repair and remedy of the unsatisfactory condition(s), then this Agreement is terminated and all deposits shall be returned to BUYER in accordance with NH RSA 331-A:13.

Notification in writing of SELLER'S intent to repair or remedy or not to repair or remedy pursuant to Section (b) above, shall be delivered to BUYER or their licensee within five (5) days of receipt by SELLER of notification of unsatisfactory condition(s). BUYER shall respond in writing to SELLER'S notification within five (5) days. If BUYER does not respond within five (5) days, SELLER may elect to terminate this Agreement and all deposits shall be returned to BUYER in accordance with NH RSA 331-A:13.

In the absence of inspection mentioned above, BUYER is relying upon BUYER'S own opinion as to the condition of the PROPERTY.

BUYER HEREBY ELECTS TO WAIVE THE RIGHT TO ALL INSPECTIONS AND SIGNIFIES BY INITIALING

HERE: _____

15. DUE DILIGENCE: This Agreement is contingent upon BUYER'S satisfactory review of the following:

	YES	NO		YES	NO
a. Restrictive Covenants of Record	☐	☐	d. Condominium documentation per N.H. RSA 356-B:58	☐	☐
b. Easements of Record/Deed	☐	☐	e. Co-op/PUD/Association Documents	☐	☐
c. Park Rules and Regulations	☐	☐	f. Availability of Property/Casualty Insurance	☐	☐
			g. Availability and cost of Flood Insurance	☐	☐

If such review is unsatisfactory, BUYER must notify SELLER in writing within _____ days from the effective date of the Agreement failing which such contingency shall lapse.

16. LIQUIDATED DAMAGES: If BUYER shall default in the performance of their obligation under this Agreement, the amount of the deposit may, at the option of SELLER, become the property of SELLER as reasonable liquidated damages. In the event of any dispute relative to the deposit monies held in escrow, the **ESCROW AGENT** may, in its sole discretion, pay said deposit monies into the Clerk of Court of proper jurisdiction in an Action of Interpleader, providing each party with notice thereof at the address recited herein, and thereupon the **ESCROW AGENT** shall be discharged from its obligations as recited therein and each party to this Agreement shall thereafter hold the **ESCROW AGENT** harmless in such capacity. Both parties hereto agree that the **ESCROW AGENT** may deduct the cost of bringing such Interpleader action from the deposit monies held in escrow prior to the forwarding of same to the Clerk of such court.

17. PRIOR STATEMENTS: Any verbal representation, statements and agreements are not valid unless contained herein. This Agreement completely expresses the obligations of the parties.

18. FINANCING: This Agreement (☐ is) (☐ is not) contingent upon BUYER obtaining financing under the following terms:

AMOUNT _____ TERM/YEARS _____ RATE _____ MORTGAGE TYPE _____

For the purposes of this Agreement, financing is to be demonstrated by a conditional loan commitment letter, which states that BUYER is creditworthy, has been approved and that the lender shall make the loan in a timely manner at the Closing on specified customary conditions for a loan of the type specified above. BUYER is responsible to resolve all conditions included in the loan commitment by the Closing date.

SELLER(S) INITIALS _____ / _____ BUYER(S) INITIALS _____ / _____

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The existence of conditions in the loan commitment will not extend either the Financing Deadline described below or the closing date.

BUYER hereby authorizes, directs and instructs its lender to communicate the status of BUYER'S financing and the satisfaction of lender's specified conditions to SELLER and SELLER'S/BUYER'S real estate FIRM.

TIME IS OF THE ESSENCE in the observance of all deadlines set forth within this financing contingency.

BUYER agrees to act diligently and in good faith in obtaining such financing and shall, within _____ calendar days from the effective date, submit a complete and accurate application for mortgage financing to at least one financial institution currently providing such loans, requesting financing in the amount and on the terms provided in this Agreement.

If BUYER provides written evidence of inability to obtain financing to SELLER by _____ ("Financing Deadline"), then:

- (a) This Agreement shall be null and void; and
- (b) All deposits will be returned to BUYER in accordance with the procedures required by the New Hampshire Real Estate Practice Act (N.H. RSA 331-A:13) ("the Deposit Procedures"); and
- (c) The premises may be returned to the market.

BUYER may choose to waive this financing contingency by notifying SELLER in writing by the Financing Deadline and this Agreement shall no longer be subject to financing.

If, however:

- (a) BUYER does not make application within the number of days specified above; or
- (b) BUYER fails to provide written financing commitment or written evidence of inability to obtain financing to SELLER by the Financing Deadline,

Then SELLER shall have the option of either:

- (a) Declaring BUYER in default of this Agreement; or
- (b) Treating the financing contingency as having been waived by BUYER.

If SELLER declares BUYER in default, in addition to the other remedies afforded under this Agreement:

- (a) SELLER will be entitled to all deposits in accordance with the Deposit Procedures; and
- (b) This Agreement will be terminated; and
- (c) The premises may be returned to the market for sale.

If SELLER opts to treat the financing contingency as waived or relies on a conditional loan commitment and BUYER subsequently does not close in a timely manner, SELLER can then declare BUYER in default. SELLER then, in addition to the other remedies afforded under this Agreement:

- (a) Will be entitled to all deposits in accordance with the Deposit Procedures; and
- (b) This Agreement will be terminated; and
- (c) The premises may be returned to the market for sale.

BUYER shall be solely responsible to provide SELLER in a timely manner with written evidence of financing or lack of financing as described above.

SELLER(S) INITIALS _____ / _____ BUYER(S) INITIALS _____ / _____

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[illegible]

PRIOR TO EXECUTION, IF NOT FULLY UNDERSTOOD, PARTIES ARE ADVISED TO CONTACT AN ATTORNEY.

SELLER accepts the offer and agrees to deliver the above-described PROPERTY at the price and upon the terms and conditions set forth.

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APPENDIX B

PROPERTY DISCLOSURE - RESIDENTIAL ONLY

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TO BE COMPLETED BY SELLER

The following answers and explanations are true and complete to the best of SELLER'S knowledge. This statement has been prepared to assist prospective BUYERS in evaluating SELLER'S property. This disclosure is not a warranty of any kind by the SELLER, or any real estate FIRM representing the SELLER, and is not a substitute for any inspection by the BUYER. SELLERS authorize FIRM in this transaction to disclose the information in this statement to other real estate agents and to prospective buyers of this property.

NOTICE TO SELLER(S): COMPLETE ALL INFORMATION AND STATE NOT APPLICABLE OR UNKNOWN AS APPROPRIATE. IF ANY OF THE INFORMATION IN THIS PROPERTY DISCLOSURE FORM CHANGES FROM THE DATE OF COMPLETION, YOU ARE TO NOTIFY THE LISTING FIRM PROMPTLY IN WRITING.

1. SELLER: _____
2. PROPERTY LOCATION: _____
3. CONDOMINIUM, CO-OP, PUD DISCLOSURE RIDER OR MULTIFAMILY DISCLOSURE RIDER ATTACHED? ☐ Yes ☐ No

4. SELLER: _____ has _____ has not _____ occupied the property for _____ years.

5. WATER SUPPLY

Please answer all questions regardless of type of water supply.

- a. TYPE OF SYSTEM: ☐ Public ☐ Private ☐ Seasonal ☐ Unknown
☐ Drilled ☐ Dug ☐ Other _____

- b. INSTALLATION: Location: _____
Installed By: _____ Date of Installation: _____

What is the source of your information? _____

- c. USE: Number of persons currently using the system: _____
Does system supply water for more than one household? ☐ Yes ☐ No

- d. MALFUNCTIONS: Are you aware of or have you experienced any malfunctions with the (public/private/other) water systems?
Pump: ☐ Yes ☐ No ☐ N/A Quantity: ☐ Yes ☐ No
Quality: ☐ Yes ☐ No ☐ Unknown

If YES to any question, please explain in Comments below or with attachment.

- e. WATER TEST: Have you had the water tested? ☐ Yes ☐ No Date of most recent test _____

IF YES to any question, please explain in Comments below or with attachment.

Are you aware of any test results reported as unsatisfactory or satisfactory with notations? ☐ Yes ☐ No

IF YES, are test results available? ☐ Yes ☐ No What steps were taken to remedy the problem? _____

COMMENTS: _____

6. SEWAGE DISPOSAL SYSTEM

- a. TYPE OF SYSTEM: Public: ☐ Yes ☐ No Community/Shared: ☐ Yes ☐ No
Private: ☐ Yes ☐ No ☐ Unknown
Septic Design Available: ☐ Yes ☐ No

- b. IF PUBLIC OR COMMUNITY/SHARED
Have you experienced any problems such as line or other malfunctions? ☐ Yes ☐ No
What steps were taken to remedy the problem? _____

- c. IF PRIVATE:
TANK: ☐ Septic Tank ☐ Holding Tank ☐ Cesspool ☐ Unknown ☐ Other _____
Tank Size _____ Gal. ☐ Unknown ☐ Other _____
Tank Type ☐ Concrete ☐ Metal ☐ Unknown ☐ Other _____
Location: _____ Location Unknown Date of Installation: _____
Date of Last Servicing: _____ Name of Company Servicing Tank: _____
Have you experienced any malfunctions? ☐ Yes ☐ No
Comments: _____

- d. LEACH FIELD: ☐ Yes ☐ No ☐ Other _____
IF YES, Location: _____ Size _____ Unknown
Date of installation of leach field: _____ Installed By: _____
Have you experienced any malfunctions? ☐ Yes ☐ No
Comments: _____

SELLER(S) INITIALS _____ / _____

BUYER(S) INITIALS _____ / _____

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C21/Dumont Assoc, 1100 Valley Street Manchester, NH 03103
Elle Sorrentino

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PROPERTY LOCATION: _____

- e. IS SYSTEM LOCATED ON "DEVELOPED WATERFRONT" as described in RSA 485-A? ☐ Yes ☐ No ☐ Unknown
IF YES, has a site assessment been done? ☐ Yes ☐ No ☐ Unknown

Source of Information: _____

Comments: _____

FOR ADDITIONAL INFORMATION THE BUYER IS ENCOURAGED TO CONTACT THE NH DEPARTMENT OF ENVIRONMENTAL SERVICES SUBSURFACE SYSTEMS BUREAU

7. <u>INSULATION</u>	<u>LOCATION</u>	<u>Yes</u>	<u>No</u>	<u>Unknown</u>	<u>If YES, Type</u>	<u>Amount</u>	<u>Unknown</u>
	Attic or Cap	☐	☐	☐	_____	_____	☐
	Crawl Space	☐	☐	☐	_____	_____	☐
	Exterior Walls	☐	☐	☐	_____	_____	☐
	Floors	☐	☐	☐	_____	_____	☐

8. HAZARDOUS MATERIAL

a. UNDERGROUND STORAGE TANKS - Current or previously existing:

Are you aware of any past or present underground storage tanks on your property? ☐ Yes ☐ No ☐ Unknown

IF YES: Are tanks currently in use? ☐ Yes ☐ No

IF NO: How long have tank(s) been out of service? _____

What materials are, or were, stored in the tank(s)? _____

Age of tank(s): _____ Size of tank(s): _____

Location: _____

Are you aware of any past or present problems such as leakage, etc? ☐ Yes ☐ No Comments: _____

If tanks are no longer in use, have the tanks been removed? ☐ Yes ☐ No ☐ Unknown

b. ASBESTOS - Current or previously existing:

As insulation on the heating system pipes or ducts? ☐ Yes ☐ No ☐ Unknown

In the siding? ☐ Yes ☐ No ☐ Unknown In the roofing shingles? ☐ Yes ☐ No ☐ Unknown

In flooring tiles? ☐ Yes ☐ No ☐ Unknown Other _____ ☐ Yes ☐ No ☐ Unknown

If YES, Source of information: _____

Comments: _____

c. RADON/AIR - Current or previously existing:

Has the property been tested? ☐ Yes ☐ No ☐ Unknown

If YES: Date: _____ By: _____

Results: _____ If applicable, what remedial steps were taken? _____

Has the property been tested since remedial steps? ☐ Yes ☐ No

Are test results available? ☐ Yes ☐ No Comments: _____

d. RADON/WATER - Current or previously existing:

Has the property been tested? ☐ Yes ☐ No ☐ Unknown

If YES: Date: _____ By: _____

Results: _____ If applicable, what remedial steps were taken? _____

Has the property been tested since remedial steps? ☐ Yes ☐ No

Are test results available? ☐ Yes ☐ No Comments: _____

e. LEAD-BASED PAINT - Current or previously existing:

Are you aware of lead-based paint on this property? ☐ Yes ☐ No

If YES: Source of information: _____

Are you aware of any cracking, peeling, or flaking lead-based paint? ☐ Yes ☐ No

Comments: _____

SELLER(S) INITIALS _____ / _____

BUYER(S) INITIALS _____ / _____

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PROPERTY LOCATION:

f. Are you aware of any other hazardous materials? ☐ Yes ☐ No

If YES: Source of information:

Comments:

9. GENERAL INFORMATION

a. Is this property subject to liens, encroachments, easements, rights-of-way, leases, restrictive covenants, attachments, life estates, or right of first refusal?

☐ Yes ☐ No ☐ Unknown If YES, Explain:

What is your source of information?

b. Is this property subject to special assessments, betterment fees, association fees, or any other transferable fees?

☐ Yes ☐ No ☐ Unknown If YES, Explain:

What is your source of information?

c. Are you aware of any onsite landfills or any other factors, such as soil, flooding, drainage, etc?

☐ Yes ☐ No If YES, Explain:

d. Are you aware of any problems with other buildings on the property? ☐ Yes ☐ No If YES, Explain:

e. Are you receiving a tax exemption or reduction for this property for any reason including but not limited to current use, land conservation, etc.? ☐ YES ☐ NO ☐ UNKNOWN If YES, Explain:

f. Is any part of this property in Current Use? ☐ Yes ☐ No ☐ Unknown If YES, Explain:

g. Is this property located in a Federally Designated Flood Zone? ☐ Yes ☐ No ☐ Unknown

h. Has the property been surveyed? ☐ Yes ☐ No ☐ Unknown If YES, By:

If YES, is survey available? ☐ Yes ☐ No ☐ Unknown

i. How is the property zoned?

j. Heating System Age: Type: Fuel: Tank/Location:

Owner of Tank:

Annual Fuel Consumption: Price: Gallons:

Comments:

k. Roof Age: Type of Roof Covering:

Moisture or leakage:

Comments:

l. Foundation/Basement: ☐ Full ☐ Partial ☐ Other: Type:

Moisture or leakage:

Comments:

m. Chimney(s) How Many? Lined? Last Cleaned: Problems?

n. Plumbing Type: Age:

Comments:

o. Domestic Hot Water: Age: Type: Gallons:

p. Electrical System Amps: Circuit Breakers Fuses

Comments:

q. Modifications: Are you aware of any modifications or repairs made without the necessary permits? ☐ Yes ☐ No

If Yes, please explain:

r. Pest Infestation: Are you aware of any past or present pest infestations? ☐ Yes ☐ No Type:

Comments:

s. Methamphetamine Production: Do you have knowledge of methamphetamine production ever occurring on the property?

(Per RSA 477:4-g) ☐ Yes ☐ No If YES, please explain:

t. Other (e.g. Alarm System, Irrigation System, etc.)

SELLER(S) INITIALS /

BUYER(S) INITIALS /

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PROPERTY LOCATION:

Deeds and Leases

Materials Updated by:
Attorney Lisa A. Mindlin
Summit Title Services Corp.
Bedford, NH

Original Materials by:
Attorney Jane M. O'Sullivan
Old Republic National Title Insurance Co.
Hampton Falls, NH

DEEDS AND OTHER MEANS OF CONVEYING AN INTEREST IN REAL ESTATE INCLUDING LEASES

A. Deeds

A voluntary conveyance of fee simple title to another occurs by the execution and delivery of a Deed. The Statute of Frauds is an old rule derived from English law that is intended to protect parties from fraud by requiring that real estate transactions be in writing. See Weale v. Massachusetts General Housing Corp., 117 NH 128 (1977) and NH RSA 506:1. See also NH RSA 477:15. The form of Deed to be used for any transaction is generally distinguished by the type of covenants with which title is to be conveyed. For voluntary conveyances, the New Hampshire statutes set forth three different forms of deed covenants. Use of the statutory form of deed, while preferable, is not necessarily required, provided that the other basic requisite elements required to convey property are included. A deed may, in fact, by agreement of the parties, include no covenants at all relating to title and still be effective to convey title to real property. The covenants establish the responsibility or liability that the Grantor of the Deed will have to the Grantee in event of an issue or problem.

(1) Warranty Deeds

The most commonly used form of Deed in connection with residential transactions is the Warranty Deed. It is the custom and practice in New Hampshire for this to be the preferred form of conveyance. However, the form of Deed is typically determined by the agreement of the parties as set forth in the Purchase and Sale Agreement. The statutory form of Warranty Deed is set forth in NH RSA 477:27. In older deeds, prior to the enactment of legislation that provided the meaning of “warranty covenants,” the covenants were set out at length. NH RSA 477:27, however, now provides that a deed that includes warranty covenants provides the following covenants:

“...at the time of the delivery of such deed, the grantor was lawfully seized in fee simple of the granted premises, that the said premises were free from all incumbrances, except as stated, that the grantor had good right to sell and convey the same to the grantee, heirs, successors and assigns, and that the grantor will, and the heirs, executors, and administrators shall, warrant and defend the same to the grantee and heirs, successors and assigns, against the lawful claims and demands of all persons.”

It has become increasingly common in commercial real estate transactions to encounter a seller that purports to use a “Special Warranty Deed.” New Hampshire has no such statutorily recognized form of deed. However, a careful reading of the covenants set forth in such deeds generally reveals that it is actually not, in fact, a Warranty Deed at all; the covenants contained in a “Special Warranty Deed: are more equivalent to the covenants contained in a Quitclaim Deed.

(2) Quitclaim Deeds

While the Warranty Deed is the most commonly used deed form in residential transactions, the Quitclaim Deed has become more prevalent in commercial real estate transactions. The use of the lesser “quitclaim” covenants may in large part be due to the knowledge and sophistication of the commercial seller as well as to the heavy reliance on title insurance as part of one’s due diligence in commercial transactions. Use of the statutory quitclaim covenant provides a grantee with assurances only as to the grantor’s own actions and encumbrances and does not provide the heightened level of covenants and assurances provided by the Warranty Deed. NH RSA 477:28 sets forth the statutory form of Quitclaim Deed. In addition, NH RSA 477:28 provides that a deed that includes quitclaim covenants provides the following covenants:

“...at the time of the delivery of such deed the premises were free from all incumbrances made by the grantor, except as stated, and that the grantor will, and the heirs, executors and administrators shall, warrant and defend the same to the grantee and heirs, successors and assigns forever against the lawful claims and demands of all persons claiming, by, through or under the grantor, but against none other.”

(3) Fiduciary Deeds

The Fiduciary Deed is only used in situations in which a fiduciary, such as an administrator, executor, guardian or other court appointed fiduciary, is conveying title to real property. The covenants used in a fiduciary deed are very limited, providing assurances as to the authority of the fiduciary to make the conveyance, since the fiduciary is essentially stepping into the shoes of another for purposes of making a conveyance with little or no knowledge of the property. In the case of trustees under an intervivos trust, however, it is the preferred practice to have the conveyance be made by Warranty Deed accompanied by the appropriate Trustee certificates. The purchase and sale agreement of the parties will dictate the type of covenants that are to be provided at the time of transfer. NH RSA 277:30 provides that a deed with fiduciary covenants provides the following covenants:

“...at the time of the delivery of such deed, the grantor was duly authorized to make the sale of the premises; that in all of the grantor’s proceedings in the sale thereof, the grantor has complied with the requirements of the statute in such case provided; and that the grantor will warrant and defend the same to the grantee, heirs, successors and assigns, against the lawful claims of all persons claiming by, from or under him or her in the capacity aforesaid.”

B. Necessary and/or Practical/Preferred Elements to be included in a Valid Deed

(1) Grantor and Grantee

A Deed must have a Grantor to convey title and pursuant to NH RSA 477:3 “shall be signed by the party granting the same and acknowledged by the grantor before a justice, notary public or commissioner and shall show the mailing address of the grantee.” The Grantor must have capacity to execute and deliver the deed and the Grantee capacity to accept the Deed. The Grantee clause of the Deed should, in the case of multiple grantees, indicate the type of tenancy of the parties taking title. Failure to include a clear expression of intent to create a joint tenants with rights of survivorship will result in the parties holding title as tenants in common. Under a tenancy in common, in the event of death of one of the parties, the interest of the decedent will not pass by operation of law to the remaining holders, but will pass instead through the estate of the decedent. See NH RSA 477:18. Proper spelling of names, use of consistent initials and suffixes, and identifying information regarding the type of as well as the state of creation of all entities are also critical in drafting and reviewing a Deed. Keep in mind that since January 1, 1988, conveyances to or from a Trust must be to or from the Trustee(s) of the named Trust. See New Hampshire Title Examination Standard 5-18.

(2) Homestead

Homestead rights arise automatically in New Hampshire, and therefore need to be dealt with in the course of every conveyance of real estate involving individuals. See NH RSA Chapter 480. All voluntary conveyances (including mortgages) should contain a recitation of marital status of all individual grantors in title. Accordingly, in any conveyance of a primary residence, a spouse should join in the conveyance to release their homestead interest. In instances where the premises are not the primary residence of the grantor nor of the grantor's spouse, it is acceptable to rely on a recitation in the instrument of conveyance that “the premises are not homestead property of the grantor or of his/her spouse” or “this is not homestead property.” See New Hampshire Title Examination Standards 5-2 to 5-7. Cautionary note: Be also aware of the provisions of NH RSA 480:9, effective January 1, 1998, which states that a conveyance to trustees of a “revocable” trust does not specifically release the grantors' homestead rights unless expressly released. The Homestead exemption amount has increasingly become a more valuable right. The current exemption amount was raised to its present level of \$100,000.00 at the beginning of 2004.

(3) Consideration

The consideration for a conveyance does not need to be specifically enumerated in the deed, but a recitation that consideration has been paid is required. See Prescott v. Hayes, 43 NH 593, 596 (1862); Runnells v. Bosquet, 60 NH 593 (1880); and see also NH RSA 477:16 (ten year curative statute).

(4) Granting Language

The Grantor in a deed must actually use language that is sufficient to effectively vest title in the named Grantee. Under NH RSA 477:24, "The word "grant" in a conveyance of real estate or any interest therein shall be a sufficient word of conveyance without the use of the words "give, bargain, sell, alien, enfeoff, convey and confirm" or the words "remise, release and forever quitclaim."

(5) Property Description

In order to avoid failure of title on account of indefiniteness, a Deed must contain a legal description of the premises such that the premises may be reasonably determined. See Smith v. Wedgewood Builders Corp., 134 N.H. 125, 129 (1991). If a historic legal description is to be updated or changed, then the plan creating the new legal description should be referenced and the plan recorded.

(6) Grantors' Signatures and Acknowledgements

As noted above, a Deed, pursuant to NH RSA 477:3 must "...be signed by the party granting the same and acknowledged by the grantor before a justice, notary public or commissioner and shall show the mailing address of the grantee." Acknowledgements should comply with the provisions of the new Uniform Law on Notarial Acts that became effective in New Hampshire on January 1, 2006. The signature of a spouse not in title but joining in a deed for purposes of releasing a homestead interest in the property should also be acknowledged. See New Hampshire Title Examination Standard 5-2.

(7) Transfer Tax

Appropriate transfer tax stamps should be affixed to the recorded Deed or, alternatively, a recitation should be noted in the body of the Deed as to the source of the statutory exemption from transfer tax applicable to the transfer represented by the Deed as such exemptions are set forth in NH RSA 78-B:2.

(8) Reservations and/or Exceptions

NH RSA 477:26 provides that appurtenances belonging to the real estate are included in a conveyance "...unless the contrary shall be stated in the deed." Therefore, if any appurtenant rights are not to be included in a conveyance, they should be specifically carved out in the Deed. Accordingly, if any portion of the premises has been previously conveyed out or is not to be included in a conveyance, it, too, should be specifically excluded. Also, depending on the covenants provided in the Deed, frequently known encumbrances or title matters should be specifically listed as excluded matters in the Deed.

(9) Back Title Reference

Inclusion of a "meaning and intending to convey and describe" clause in a Deed is by no means mandatory, but is certainly the preferred practice for a number of reasons. Inclusion of a reference to the source of prior title is particularly beneficial to any future search of the title particularly in cases where (a) title is derived through an estate; (b) there are multiple chains of title or parties in the chain; and/or (c) the premises were carved out from a larger tract or parcel of land. In cases of scrivener's errors in a current deed, the "meaning and intending" clause can often add support to the interpretation of the reasonable description of the premises.

Delivery of the Deed is also a necessary element of any conveyance of real estate. The case of Arwe v. White, 117 N.H. 1025, 1028 (1977) citing Newbury v. Parsons, 103 NH 96, 97 (1960) states that: "*An executed deed validly conveys title only when it is "delivered" by the grantor with present intent to convey and is "accepted" by the grantee.*" Once delivery of the Deed has been made, NH RSA 477:3-a mandates the recording of deeds and other instruments affecting real estate and also provides that a deed will not be effective as against bona fide purchasers for value until so recorded. See also NH RSA 477:7 that provides that no Deed shall be valid except against the grantor or his heirs until recorded.

C. Other Deeds and Other Forms of Conveyances including Leases

(1) Manufactured Housing Deeds

Since August 1983, manufactured housing has been deemed to be real estate in the State of New Hampshire when placed on a site and tied to utilities. See NH RSA 477:44. . The form of Deeds for Manufactured Housing Units is set forth in NH RSA 477:44 II (a) & (b). One of the main differences in using these deeds is that it provides a reference to the land on which the manufactured housing unit is located as well as contains a consent of the landowner for the placement of the unit onto the landowner's property.

(2) Tax Collector's Deed

A Tax Collector is empowered to take action against real estate for which real estate taxes remain unpaid. See NH RSA Chapter 80 generally. The form of Deed for a Tax Collector's Deeds may be found at NH RSA 80:76. Eventually, if proper procedure and notice are provided/followed, then a Tax Collector may convey the property to itself, or may sell the property to a third party, defeating the interest of the record owner and properly notice mortgage holders. As discussed elsewhere in these materials, however, tax deeds are ripe for challenges and are a topic of much concern since a tax collector's deed in the chain of title may well impact the marketability of title.

(3) Foreclosure Deeds

The most commonly employed method of foreclosing on a mortgage in New Hampshire is through the Power of Sale provisions of the Mortgage Deed, by a non-judicial sale pursuant to the provisions of NH RSA 479:25. The Mortgage Deed must be checked to confirm that the Power of Sale was, in fact, included in the original Mortgage. Further, in utilizing this procedure to effectuate a conveyance, all statutorily required procedures of sale must be met. NH RSA 477:29 sets forth the statutory form of a Power of Sale Mortgage and NH RSA 477:31 sets forth the statutory form of a Foreclosure Deed under Power of Sale, and the accompanying form of Affidavit of Sale is set forth in NH RSA 477:32.

(4) Court Order

A court of competent jurisdiction may enter an Order affecting title to real estate. The Superior Court, pursuant to NH RSA 498:5-a, has the power to determine title to real estate, after proper notice and procedure has been followed, by an Order Quieting Title. An Order is generally effective only as to those parties named therein as Defendants, and to whom proper notice has been afforded. Generally, it is necessary to search title prior to a Quiet Title Order in order to assure that the issue over which it was brought has been adequately resolved of record. Court Orders conveying title to real estate may also be encountered in other instances, such as in cases of divorce proceedings. It is always critical to review the terms of any Court Order to determine the scope of the decision and to assess whether the Order itself has vested title or, alternatively, whether a deed is required to effectuate the transfer of title to the real estate.

(5) Inheritance or Devise

Title to New Hampshire real estate vests automatically and immediately at the moment of death in a decedent's surviving spouse and heirs at laws and/or devisees as applicable. However, title is subject to divestment by the Estate of the decedent for the payment of debts or by sale with the consent of the appropriate surviving spouse, heirs at law and/or devisees. See NH RSA 554:17 and NH RSA 559:18 & 19.

(6) Easements

An easement is a right of use over the property of another. Black, Henry Campbell, Black's Law Dictionary, Fifth Edition (1979). The land having the right of use as an appurtenance is known as the "dominant estate" and the land subject to the easement is known as the "servient estate". Id. Under NH RSA 477:26, easements that are appurtenant to a particular parcel of land pass with that land without specific mention in the deed of conveyance, provided that the easement is not specifically excluded. Easements can arise in a number of ways. They can be created in the record by an express grant which must meet all of the requirements of a deed, or by specific reservation in connection with the out conveyance of fee simple title of the burdened estate.

(7) Others (Eminent Domain; Adverse Possession & Sheriff Sales)

There are other methods of involuntary transfer, such as a taking of title from a property owner by a governmental agency with the power of eminent domain pursuant to NH RSA 498-A. Also, title may be acquired, albeit not marketable title, through adverse possession via open and notorious, continuous and uninterrupted, exclusive, actual, adverse or hostile possession for a period of 20 years or more. See NH RSA 508:2 and Flanagan v. Prudhomme, 138 N.H. 561, 571-72 (1994); Kellison v. McIsaac, 131 N.H. 675, 679 (1989); and Seward v. Loranger, 130 N.H. 570, 576-77 (1988). Another method for acquiring title involuntarily is by virtue of a Sheriff's Deed, the result of a Sheriff's Sale. See NH RSA Chapter 529 generally. NH RSA 529:23 sets forth the elements that must be contained in a Sheriff's Deed. Title acquired by Sheriff's Sales are also subject to a one year redemptive period in favor of the owner, and are generally not favored as a method of acquisition. See NH RSA 529:14.

(8) Leases

A lease is defined as "any agreement which gives rise to a relationship of landlord and tenant" and is a "contract for exclusive possession of lands...for a determinate period. Black, Henry Campbell, et als, Black's Law Dictionary, Fifth Edition (1979) . A lease is both a conveyance of an interest in real estate as well as a legally binding contract between parties. Moyniahn, Cornelius J., Introduction to the Law of Real Property (1962) at 69. An interest created under a lease is generally considered an interest in real estate and, being subject to the Statute of Frauds, must be in writing. See NH RSA 506:1; NH RSA 477:7 and 477:15. See also Webster v. Blodgett, 59 NH 120 (1879). Pursuant to NH RSA 477:7 and 7-a, leases of 7 years or more must be executed and acknowledged, and a Notice of Lease recorded. The Notice of Lease must, at minimum, contain the following elements:

- Names and addresses of each party to the lease;
- Date of execution of the lease;
- Description of the demised premises as the same appears in the lease;
- Term of such lease;
- Date of commencement of term of lease and all extensions and renewal rights;
- Signatures and acknowledgements of all parties to the lease.

NH RSA 477:7-b also requires that the lessor provide copies of the executed, written lease to the lessee. It is important to keep in mind when dealing with leases that the State Statute defining Subdivisions includes leases within its parameters. See NH RSA 672:14 which defines a subdivision as:

*"the division of the lot, tract, or parcel of land into 2 or more lots, plats, sites or other divisions of land for the purpose, whether immediate or future, of sale, rent, **lease**, condominium conveyance or building development."* [Emphasis added]

Some Basic Elements included in a Lease:

- Parties to the Lease – Names and Addresses
- Description of Premises to be Leased and any Appurtenant Rights to be provided
- Term of Lease – Commencement, Duration and Extensions or Renewals
- Rent – Amount, How, When and Where Payable
- Restrictions on Use, if any ,or Permitted Uses
- Insurance, Real Estate Taxes and Utility Provisions
- Maintenance and Repair Provisions
- Security Deposits
- Tenant Improvements, Construction and Alterations
- Loss Provisions
- Default and Remedies for Damages
- Termination and Surrender of Premises
- Assignment and Subletting
- Governing Law

A handy checklist of topics to consider relative to commercial leases may be found on the ABA website using the following address:

<http://www.abanet.org/genpractice/newsletter/lawtrends/0607/realestate/checklist.html>

Also on the ABA website is an article relative to smaller leases entitled “Leasing in a Nutshell.” It may be found using the following address:

http://www.abanet.org/rppt/meetings_cle/2007/spring/Programmaterial/YLInstituteRealProperty/Nutshell.pdf

Surveys

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SURVEYS

1. General

Land surveys are performed by licensed land surveyors. A land survey is defined as the determination of boundaries and areas of a tract of land through the activity of establishing and delineating boundaries of a parcel of land. The essential purpose to be accomplished by a survey plat are (1) to represent the correct size and shape of a property to a scale, (2) define with dimensions the correct size and shape of a single unique parcel of land and (3) to specify location points (monuments), and (4) show title identity (record monuments). Thus, a properly compiled and certified survey serves as evidence of the limits of the title rights of the person who has commissioned the survey.

A “resurvey” is limited to the purpose of locating the original surveyor’s lines in the same position as they were originally marked.

2. Steps Taken to Produce a Survey

The surveyor is required by accepted practice to undertake a number of steps in order to gather sufficient evidence for a survey.

Initially, the record title must be searched to identify the source of title and the record title description. All deeds to abutting property are also searched and compared with the boundary description of the subject parcel. Recorded and unrecorded surveys, field notes of previous surveyors, and municipal records such as tax maps or other plats or maps are investigated. The field work that identifies possession and usage (fences, stone walls, line of demarcation), is then undertaken and measurements taken from the found monuments.

The objective is to assemble evidence that proves the position of at least those monuments which relate to the written record of the property. Since no one corner or monument recited in a description has any greater dignity than any other corner or monument, the location of at least two monuments has become the rule.

3. Proof of a Monument

Proving a monument and the position of the corner occupied by that monument as of the date of deed is accomplished by the following evidence.

- the physical character of the monument itself
- the possibility that the monument has been disturbed or moved
- public records or other records, maps, notes or documents that prove historical sequence
- evidence supplied by witnesses
- hearsay evidence
- consensus of common report
- measurements to prove proximity to the record measurements
- established lines of possession

Natural monuments control over artificial monuments (i.e. manmade and set).

A recitation that the boundary is a water course such as a river or stream or that an old oak tree that still exists marks the boundary is preferred over a contrary artificial marking such as a set stone bound.

4. Measurements

Two types of measurements are used, horizontal or angle measurements, and distance. These are combined to form a line or a course with a point of beginning and a termination. For centuries surveyors have relied on “north” as the direction reference point. However, various identifications of “north” have been employed, including so called “true north”, “geodetic north”, “magnetic north” and “assumed north”. Where a previous survey is relied on it becomes incumbent on the surveyor to try to determine which version of “north” was used. Today, surveyors use astronomic north established as the direction between the two poles, as “north”.

5. Equipment

Optical reading transits and electronic calculators are now able to assimilate the raw data, compute the error of closure, adjust the traverse and calculate the area all in a matter of seconds.

6. Error of Closure

All surveyors realize that no quantity can be measured to the absolute true value and that stated measurements have some inherent doubt. Thus, surveys will contain a statement as to the “error of closure”. These ratios are computed by dividing the indicated closure discrepancy by the total distances and are expressed in terms such as 1 in 5000, or 1 in 10,000. The purpose of calculating the error of closure is to determine the precision of the survey, i.e. the relationship of angular measurements and distance measurements to each other and the calculation of the area of the survey. The “error of closure” is the difference between the true value of these measurements and the observed quantity. Even with modern equipment, systematic and accidental errors creep into the surveying process. A systematic error can occur where the steel tape used for measurement changes character due to temperature change, or humidity affects the performance of electronic measuring equipment. Systematic errors can be corrected since they behave in a predictable or discoverable manner.

Accidental errors fall into two categories, random and constant. Random error can occur where a chaining pin is set at the end of a tape, or setting up a tripod for a prism. If the person sets the pin within a given tolerance, each subsequent setting of the pin should accommodate that variance. Constant errors occur in alignment where the tape is not in an exact straight line. It is impossible to correct absolutely for this type of error and is therefore deemed always present. By reducing the systematic and accidental errors down to a manageable mathematical state, the error of closure can be completed and it becomes so small (i.e. in 5000 or/in 10,000) that it has no applicable effect on the accuracy of the survey. That a distance or angle might be off by miniscule value does not affect the ability of the landowner to rely on the survey for the purposes

of their use or conveyance of the property.

7. Possible Limitations of the Boundary Survey

Boundary surveys do not necessarily depict interior features such as the location of improvements, the location of easements, encroachments by abutting property uses, or other physical aspects of the property. Therefore, the use of the survey may be limited as to evidence of the configuration, metes and bounds, and size of the parcel.

8. Other Types of Surveys and Plans

In addition to the boundary survey discussed above, other types of plans or surveys are commonly used with respect to the conveyance of real property.

a. Mortgage Site Inspection Plan

With the emergence of the so-called secondary market (i.e. investor held residential mortgages originated by a bank or lending institution and sold to the investor group), the Mortgage Inspection Plan or “Plot Plan” became a requirement of mortgage loan packages.

The purpose of the Plot Plan is to locate the improvements on the property, such as to determine compliance with local set back zoning provisions and to see if the improvements are all within the lot. However, the plan is not a survey. It assumes that tax map and deed information is correct in connection with distance, monuments, and configuration. The fact that the Plot Plan is not a survey means that its position in the world, i.e. in relation to other properties, may or may not be accurate and it cannot be used as a conveyancing survey. Rather, it merely satisfies the secondary market’s desire to have some evidence that there are no zoning or encroachment problems associated with the property which might affect its value and therefore impact the ability of the foreclosing lender to realize recovery of the mortgage loan amount.

Usually registered land surveyors are employed to produce Plot Plans but that does not translate into a survey, and the Plot Plans normally contain a recitation that it is not a survey.

b. Subdivision Plans

The subdivision plan(s) builds on the perimeter survey. Once the configuration of the parcel is known, it is possible to plot interior lots on subdivision parcels. Subdivision plans are created for two purposes, **a)** to comply with local subdivision regulations, and **b)** for conveyancing of newly created lots. As a general rule, subdivision regulations and planning boards require certain detail be contained within subdivision plans. Matters such as topography, drainage, location of utilities, road locations, road profiles, location of community septic systems, perk tests for individual septic systems, depiction of wetlands and wetlands buffers, aquifer areas, and open spaces or conservation easements are all routinely required as part of the plans. Upon approval by the Planning Board, the portion of the plans which depict the individual lots and their dimensions and metes and bounds are recorded at the Registry of Deeds.

Recorded subdivision plans, may or may not depict abutter encroachments or historical easements and cannot be necessarily relied on for title purposes. Adequate research into the record title may be required.

c. Site Plans

Most municipalities have availed themselves of the enabling legislation authorizing the regulation of multi-family and commercial and industrial projects through site plan regulations administered by the Planning Board. These plans are required to incorporate much of the same detail in terms of site development as found under subdivision regulations, but with the added element of the depiction of the size, configuration and location of proposed buildings and improvements, and off-site improvements such as road widenings. Site plans may or may not incorporate a certified perimeter boundary survey and even when recorded are not generally used as conveyancing or mortgage plans since the improvements have not yet been constructed.

d. The ALTA As Built Site Plan

This is the most detailed and reliable plan and survey. The American Land Title Association has developed standards for the creation of acceptable as built surveys. They are used primarily in commercial loans, as a basis for the removal of the survey exception in the title policy as well as a full property disclosure for the lender's use. ALTA as built surveys contain, at a minimum, the following information:

- i. Records
 1. Current record description of the real property to be surveyed or, in the case of an original survey prepared for purposes of locating and describing real property that has not been previously separately described in documents conveying an interest in the real property, the current record description of the parent parcel that contains the property to be surveyed
 2. Complete copies of the most recent title commitment or, if a title commitment is not available, other title evidence satisfactory to the title insurer
 3. Current record descriptions of any adjoiners to the property to be surveyed, except where such adjoiners are lots in platted, recorded subdivisions
 4. Recorded easements benefitting the property to be surveyed;
 5. Recorded easements, servitudes, or covenants burdening the property to be surveyed
- ii. Fieldwork Results
 1. Monuments
 2. Rights of Way and Access
 3. Lines of Possession and Improvements along the Boundaries
 4. Buildings
 5. Easements and Servitudes
 6. Cemeteries
 7. Water Features
- iii. Plat or Map
 1. Field Locations

2. Boundary, Descriptions, Dimensions, and Closures
3. Easements, Servitudes, Rights of Way, Access, and Documents
4. Presentation Specifications
- iv. Surveyor's Certification
 1. survey;

The ALTA as built survey provides a third party with all the information needed to gain a complete understanding of the physical and legal features or aspects of the property, or which affect the property.

9. Miscellaneous Types of Plans

a. Easement Plans

Attempting to describe easements by narrative in a deed or instrument is rapidly being replaced by the use of easement plans. The location and extent of the easement is best shown on a plan paired with the narrative in the deed. The easement deed references the plan and describes the uses and limitations placed on the easement to be granted.

b. Lot Line Adjustment Plans

These plans are used where adjoining property owners desire to swap land or otherwise adjunct their boundaries. A relatively simple planning board process is required in most municipalities.

Titles and Title Searches

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I. TITLE SEARCHES, ABSTRACTS OF TITLE AND TITLE EXAMINATION

A. Why is a Title Search Necessary?

In connection with any real estate transaction, the Buyer and the Lender, and in some cases, even the Seller, will generally require that title to the real estate that is the subject of the transaction be researched at the Registry of Deeds. There are many different reasons for requiring a title search and they can vary depending on the particular type and nature of the transaction. However, the most basic reasons for requiring a title search of real estate are:

(1) To ascertain the **identity of the actual record title owner** for the premises that are the subject of the transaction.

(Hopefully, the Seller contracting under the Purchase and Sale Agreement will be confirmed by the results of the title search to be the actual record owner of the premises. It is not unusual for “selective amnesia” to occur wherein transfers by parties to themselves as Trustee of a Trust, to a related entity or into joint ownership with others are forgotten at the time of execution of the Agreement.)

(2) To ascertain **what liens, if any, encumber** the property and will need to be discharged and/or released of record to assure that the Purchaser does not acquire the prior owner’s debts and encumbrances along with the property; and also to assure the Lender that it has acquired a valid first mortgage lien on the property.

(Liens often tend to be monetary encumbrances, and can include such items as mortgages, assignments of rents and leases, UCC Financing Statements, IRS and other tax liens, attachments, real estate tax liens, and current use taxation liens. Beware of silent or inchoate liens, which arise automatically without the necessity of any documentation having been recorded with the applicable Registry of Deeds, such as: legacy and succession tax liens, federal and state estate tax liens and mechanic’s liens. Also, it is important to check carefully for liens that affect after-acquired property such as IRS tax liens, and which require the search period for a particular grantor to commence prior to the period of actual ownership.)

(3) To ascertain all **other matters of record that affect title to the premises** and which have the potential to affect the present and future use of the premises.

(Easements [such as for utilities, access, etc.]; restrictive covenants, notice of leases, notices of groundwater management permits, existing options and rights of first refusal are just a few examples.)

B. Where is a Title Search Performed?

A title search of real estate is conducted in the Registry of Deeds in the County in which the real estate is located. New Hampshire has ten counties and accordingly, has ten Registries of Deeds. A complete listing of the Registries of Deeds current locations is listed in for your reference. Since most Registries of Deeds have on-line access of either indices and/or document images, information relative to available on-line information of each Registry has also been included. While the title search commences at the applicable Registry of Deeds, there are other records that may need to be checked in the progression of the title search, and other records or resources that might be helpful to check to advance the progression of the title search itself. The Registry of Probate records, in particular, are a critical source of information in the title search, and interplay with the Registry of Deeds records in situations where a decedent or a party under guardianship or conservatorship had or has a record interest in the real estate being searched. Determining which other public records need to be checked, or which might provide assistance in the course of conducting a title search, actually depends on the information uncovered in the Registry of Deeds. Many other sources often prove helpful in filling in any gaps or deficiencies in the Registry of Deeds records. Aside from the Probate Court records, the following can provide useful information: municipal records including plans, tax maps and assessment cards; the Department of Transportation Right of Way Bureau records; local historical society records, records and/or recollection of a conveyancer who has previously searched title to locus; and various Court records relative to such matters as divorce, quiet title actions, partition actions, bankruptcy, and attachments.

C. How Long a Period is the Search?

According to the New Hampshire Bar Association Real Property Section Title Standards, a title search must cover a minimum search period of thirty-five years. The search may need to cover a greater period depending on the actual "starting deed" or "starting point" that is found; the starting point must be an "arms length" conveyance, meaning that the grantor of the deed is not also a grantee. The minimum thirty-five year search applies when the starting deed is a Warranty Deed. The search period is extended to fifty years when the starting deed is a qualifying Quitclaim Deed, Mortgage Deed and/or Fiduciary Deed. The search period is extended further to a minimum time frame of eighty-five years when a starting deed satisfying the criteria set forth in the Title Standards cannot be found. In such cases, the title abstractor may use as a starting point a Probate Court proceeding or docket

that reasonably identifies the property. The specific time frames for searches are all set forth in Title Standards 2-1, 2-2, 2-3 and 2-4.

D. What is an Abstract of Title?

An Abstract of Title is a report prepared by a title abstractor that discloses the results of a search of the grantor/grantee indices in the Registry of Deeds and the Registry of Probate, reflecting all recorded instruments that affect the property for the designated search period. A true Abstract of Title merely reports on the record instruments found and does not attempt to interpret and/or make judgments regarding the same.

Before a title search and an Abstract of Title can be prepared, it is critical that a determination be made as to the actual legal description of the parcel to be searched. This is an area of frequent frustration and error. In many instances, the property that is the subject of the present transaction is described in the current deed into the Seller, and might even have been provided by the Seller. However, it is not uncommon to find that there are other sources and/or issues of title that might not be evident from the face of the deed provided.

Consider:

- Does the deed description appear to be correct in terms of size and location?
- Are there any additional strips or parcels of property that might have been acquired after or prior to the real estate described in the vesting deed provided? Is there evidence from a tax map or other source that additional property may have been annexed to the property contained in the legal description provided?
- Are there any out conveyances of certain parcels that the Seller may no longer own and which do not require searching?
- If a subdivision of the property is occurring simultaneously with the transaction, or has already occurred and locus is only a portion of a larger tract derived from several source deeds, are you certain of which parcel or parcels your locus is actually derived from? Perhaps multiple chains of title will need to be searched to assure that the locus parcel has been included. It is always beneficial to receive a copy of the subdivision plan for review.
- Are there any appurtenant easements, such as a common driveway, located on an adjacent property, which is necessary or desirable for your property? If so, title to the premises on which the appurtenant easement is located also needs to be searched to assure that the easement was properly acquired free from adverse encumbrances, and is not subject to extinguishment in the event of a foreclosure by a lender of the burdened land.

Once the real estate to be searched has been defined, the next step in the title search is establishing the chain of title. An example of a chain of title is set forth in Appendix. The chain of title basically establishes who and for what period of time the prior and current owners owned the property. The chain of title covers the entire

minimum search period per the criteria established by the New Hampshire Title Standards. Once the chain has been established, it is necessary to have title followed forward to the current date. A party searching title should take care to run each owner in the grantor indices for the period of their ownership; for the ten years prior to that ownership to check for federal tax liens; and for the two to three year period following ownership to check for real estate tax liens/sales. In running names in the grantor indices, it is important to consider and include surname variations. Under the doctrine of Idem Sonans, names that sound alike should be checked under the various spellings. The broader the net that is cast in the running of names, the better. See New Hampshire Title Standard 4-1. In performing grantor runs, one should also keep in mind that, with regard to entities, such as General Partnerships, Limited Partnerships, Trusts, and Limited Liability Companies, the entity name must be run as well as the names of the partners, trustees, and/or manager/member, as applicable. Keep in mind that for estates, the fiduciary, the surviving spouse, if any, and the heirs and/or devisees of the estate should also be checked in the grantor indices. Also, for searches involving condominiums, the condominium association should be included in the grantor runs. It is also important to keep in mind when running each of the grantors that the indexing may differ from registry to registry. Some of the registries index discharges and releases in the grantee index. Given that, it is important to review each party in the chain of title in the grantee and grantor index.

All documents affecting the real estate you are searching should be either photocopied and/or abstracted in full. A sample of a deed abstract is included in the Appendix attached. In preparing an abstract of title, all matters affecting the title should be reported. Keep in mind that documents in your chain of title might reference other documents affecting the real estate not otherwise found in the search, and those other documents should be noted and investigated. All documents in the chain of title should be carefully reviewed, and all marginal notations should be checked.

Also, as part of the title search and the abstracting of recorded documents, it is critical to carefully review and monitor the legal description of locus in every deed and/or other instrument of conveyance appearing in the chain of title. Checking and monitoring the legal description can often bring an issue to light such as missing bounds; a legal description that fails to close; and/or a plan reference that places the property's boundaries in a new perspective. If changes in legal descriptions are found and noted, they should raise concerns relative to the need for subdivision approval and also of the potential for other sources of title not previously searched.

E. Review of Plans in the Title Search

In the process of conducting any title search, it is likely that you will encounter some recorded surveys. Most Registries index plans in the Grantor Indices under the Name indicated as the owner in the title of the plan. Some Registries also index under abutter names as well. However, most Registries also maintain separate plan

indices through which a variety of methods may be used to locate a plan such as street name, surveyor names, etc. Recorded plans generally enhance the search process by graphically pinpointing the location of your parcel(s). Plans also are able to pinpoint and highlight problems that may affect your locus property.

Some things to review on a recorded plan:

- Do the legal descriptions contained in the deeds correspond to and match those in the legal descriptions of the plan?
- Does the description appear to form a closed figure?
- Are there any matters depicted on the plan which you have not already encountered in your title search? You will want to make note of these items on your report and also will want to pay particular attention to locating any missing items you may not have already located of record. For example, if a review of the survey shows a slope and embankment easement to the State of New Hampshire, you will normally be able to locate a recorded condemnation/taking instrument or, alternatively, find an out conveyance to the State. If no such instrument is found of record, then the final report should highlight the issue spotted on the plan and make note of the lack of a corresponding instrument. Also, make note of any easements that traverse the property for which you do not find a recorded instrument or which appear in a different location than in the record instrument creating the easement.
- Are there any visible encroachments shown on the plan? Meandering walls, cart paths and/or improvements that cross onto the property should be noted.
- Does the property abut a public way? If the property does not abut a public way, then does the plan show the means of access?
- Does the plan depict improvements? If so, do any of the improvements for the locus property encroach over property lines or into any setback area?
- Do the Surveyor's Notes placed on the plan raise any potential issues?

All such matters should be noted and reported.

Plans that are found of record will have varying levels of detail. All recent plans, unless they are subdivision plans, must contain the following certification signed and sealed by a Licensed Land Surveyor, by NH RSA 676:18 in order to be acceptable for recording:

"I certify that this survey plat is not a subdivision pursuant to this title and that the lines of the streets and ways of those shown are those of public or private streets and ways already established and that no new ways are shown." NH RSA 676:18.

Any plans that constitute a subdivision must contain the signature of the local

planning board members indicating their approval. Surveys are particularly helpful when found in searching titles since they provide a point of reference. Surveys are also helpful because they have been prepared in accordance with the Research Standards promulgated in the New Hampshire Land Surveyors Administrative Rules. A minimum of Registry work must be performed by the surveyor as to the locus and abutter parcels, in addition to the field survey work. Lan Rule 502.01(b)

In reviewing plans, however, it is important to keep in mind that not all plans are created equal. Land Surveyors in New Hampshire follow the parameters set forth in their Technical Standards, set forth in the Administrative Rule Lan 503. There is a certain level of detail required for a standard property survey plan, which may include a subdivision plan, boundary line agreement plan, lot line revision plan or easement survey. This differs from the level of detail in a topographical survey or as-built survey. A Land Title Survey, otherwise known as an ALTA/ACSM Survey, also differs in level of detail as it must be drafted to meet the standards promulgated by the American Congress on Surveying and Mapping. A Condominium Plan differs in that it must be drafted to meet the standards set forth in NH RSA 356-B:20.

Plans other than those recorded in the Registry of Deeds may be helpful or necessary in connection with your title search. The New Hampshire Department of Transportation maintains records that include roadway and easement plans as well as railroad valuation plans. Town records may also be checked for available site plans and other plans, as well as for reference plans such as tax maps. Local historical societies also may have useful plans, particularly if your search requires that you research very early periods. The Archives Office in Concord is another valuable resource for plans.

F. What is the Examination of Title?

Generally, the next step in the process of a title search is the review of the Title Abstract by a Title Examiner. The Title Examiner reviews and weighs the contents of the Abstract and applies their judgment as to the records of the chain of title to reach a conclusion. A Certificate of Title may be issued by an Attorney to a client, which in effect provides a form of opinion as to the state of the title to the premises. The title certificate generally sets out any encumbrances and/or matters that need to be paid, released and/or cleared up prior to the transaction closing, and also sets forth all matters of record affecting the property that will survive the transfer. A Certificate of Title is not a guaranty of title but rather an opinion. A Certificate of Title will generally contain a listing of matters not intended to be covered or intended to be included in the attorney's opinion, such as unfiled mechanic's liens; tenants and parties in possession; and zoning and land use. A Certificate of Title will also define the exact period of time searched, and identify which indices were reviewed.

In the preparation of a Certificate of Title, the record title is reviewed and certain applications of law and judgment are made. Generally, the Certificate of Title renders an opinion of marketability of the title determining whether the title is free *from any*

reasonable rejections of a reasonable purchaser. " See Buxton v. Glennon 122 NH 674 (1982) quoting Paradis v. Bancroft, 97 NH 477, 479 (1952). Opinions as to marketability can vary given the circumstances and transaction. It is because of these "gray areas" that the concept of insurable title has arisen. There are instances, for example, in which a particular title defect may impact marketability but poses an acceptable level of risk to a title insurer underwriter. In those instances, a defect may be disclosed but "insured" over and the transaction continues forward..

G. Some Common Title Issues in Searching and Examining Title

1. Rights of First Refusal/Options

A Right of First Refusal or Option to Purchase may be found of record in the chain of title to premises. Such a right or option affects the title, since it creates notice of record that a third party exists to whom the property must first be offered by the Seller. Such rights and/or options are commonly found in connection with commercial properties, but can also be found in residential transactions, particularly when a development is being created from a collection of smaller parcels. It is important when confronting a recorded option and/or right of first refusal that the same is terminated as to all future transactions, unless the circumstances and agreement of the parties warrant the continuation of the rights. The recording of options and rights of first refusal is contemplated in the provisions of NH RSA 477:3-a, which calls for all instruments affecting title to real estate be recorded at length in the Registry of Deeds before becoming effective against bona fide purchasers for value. A recorded right of first refusal, while not an interest in real estate per se, does create constructive notice to subsequent purchasers of property of an equitable restriction on the real estate. Smith v. Wedgewood Builders Corp. 134 NH 125 (1991).

2. Restrictive Covenants

Often a title search may reveal that a prior owner/developer of the real estate recorded a Declaration of Restrictive Covenants or imposed restrictions in a deed of conveyance. The law in New Hampshire is that restrictions run with land and are enforceable. See Nashua Garden Corporation v. Robert Gordon et als, 118 NH 379, 382 (1978). Variations on the types of restrictions that may be imposed are endless, ranging from use restrictions (such as limiting use to residential purposes only and/or prohibiting certain uses such as for gas stations) to restrictions pertaining to the placement and location of improvements (such as restrictions that// establish a private setback larger than that required by applicable local zoning). Restrictions discovered in the chain of title should always be reviewed in their entirety. Beware of reverter and/or forfeiture clauses, which state that if a restrictive covenant is breached, title to the premises reverts to a prior owner. Extreme caution should be exercised in cases where restrictive covenants are sought to be eliminated or released. In general, restrictive covenants are governed by the intent of the party or

parties imposing the restriction. See Gauthier v. Robinson, 122 NH 365 (1982). Since the language of restrictions is often ambiguous in defining all parties intending to be benefited by the restrictions, arranging to obtain appropriate releases from restrictions can often be tricky. (Be mindful of situations involving general schemes where a scheme is adopted for an entire development of a subdivision or series of lots and where deed restrictions may be intended to benefit and burden all lots. See Gauthier v. Robinson, 122 NH 365 (1982)). New Hampshire has no statutory mechanism for limiting the duration of restrictive covenants that run with the land. See also a new case regarding standing to enforce restrictive covenants – Shaff v. Leyland, 2006 NH (2005-848) decided December 6, 2006.

3. Life Estates

A Life estate is an interest in real estate, the duration of which is measured by the life of one or more persons. Life estates are generally created by deed or by will. Moynihan, Cornelius J., Introduction to the law of Real Property, (1962) at Page 48. Since a life estate is an interest in real estate, both the interest of the life tenant and the remainder person(s) must be accounted for in connection with any conveyance of the real estate if a life estate has been found to have been granted and/or reserved in the chain of title.

4. Current Use

NH RSA 79-A deals with current use tax assessments. Very often, a notice of current use assessment will be found of record in your chain of title at the Registry of Deeds. However, particularly if you are searching title to a parcel that was recently subdivided from a larger tract of land, one should make inquiry of the Tax Collector's or Assessor's office to confirm whether the property is in current use. Sometimes, given the age of the original Notice of Current Use, it may predate the search period. The most common scenario in which current use is encountered is in the case of larger tracts of land that enjoy a reduced tax basis for many years, and which now or recently have become the subject of a subdivision of the land. A property that has been in current use and which ceases to qualify and/or undergoes a change in use, is subject to payment of a current use tax at a rate of ten percent of the full and true value of the premises. NH RSA 79-A: 7. This tax is treated as an inchoate lien on the premises, and any property in current use should be approached with caution. Even if no change in use is contemplated, the parties should be notified of the current use status of the property, since the penalty, even though not presently triggered, may be triggered at a later time. A Current Use Criteria Booklet is published by the Current Use Board and is extremely helpful and comprehensive. The Booklet may be accessed through the official State Internet website at :

http://www.revenue.nh.gov/currentuse/bklt_06_07.doc

5. Tax Titles

Title that is derived from a Tax Collector's Deed is at risk of being challenged by the

taxpayers who lost the premises through tax sale/lien, and by Lenders that have lost their mortgage lien through a tax sale/lien. There are several methods of tax taking, ranging from the old tax sale and the alternative tax lien procedure to the “new” 1998 tax lien procedure. Historically, the tax sale/tax lien procedures have been subject to a ten year curative incontestability statute. See NH RSA 80:39 and NH RSA 80:78. However, both the “old” tax sale procedures and the alternative tax lien procedures have been the subject of successful constitutional challenges, raising questions as to the reliability of the so-called curative statutes. See, White v. Wolfeboro, 131 NH 1 (1988) (relative to tax sales); and Thomas Tool Services Inc. v. Town of Croydon, 145 NH 218 (2002) (relative to the alternative tax lien procedure). The newest tax lien procedure, which is still to be tested in the courts, was enacted by the legislature in 1998, with an effective date of June 25, 1998. The old tax taking procedures, available to municipalities, provided for a two year redemptive period by the record owner, and purported to wipe out existing mortgagees that received proper notice. See First NH v. Town of Windham, 138 NH 319 (1994) (relative to the requisite language contained in notice to a mortgagee of record). The newest lien procedure, enacted by the legislature in 1998, provides for a three year redemptive period to property owners, provides for a redemption penalty amount to be paid to the Town, and has revival provisions to revive an owner’s prior liens. See NH RSA 80:88-91. Tax Titles are a particular problem area and should be approached cautiously. The case of Lee James Enterprises, Inc. v. Town of Northumberland, 149 NH 728 (2003) considered whether the Thomas Tool ruling was not to be applied retroactively as was indicated in that ruling. The Court in Lee James ruled that the Thomas Tool case had specifically considered the issue of retroactivity and decided to not retroactively apply that decision, and therefore that decision would stand.

6 Condominium - Site and Floor Plans

Originally enacted in 1977, New Hampshire’s Condominium Act is set forth in NH RSA 356-B. NH RSA 356-B: 6 sets forth the required Contents of the Declaration of Condominium, and RSA 356-B:20 recites the required content and need for proper Site and Floor Plans. Sometimes overlooked in connection with a search of title is a search for the requisite recorded Floor and Site plans for the Units. The requisite plans must contain appropriate certifications from a licensed land surveyor that the units shown on the plan have been substantially completed. Particularly troublesome are titles involving Condominiums with convertible and expandable land, especially in cases where the applicable period for conversion or expansion has elapsed, and parties are attempting to revive these rights.

7. Land Sales Full Disclosure Act (NH RA 356-A)

Residential developments in New Hampshire are subject to the Land Sales Full Disclosure Act. See NH RSA 356-A. No sale of lots in a subdivision may be made without registration and approval by the Attorney General's office. Prohibitions under this Statute also extend to advertising as well. To the extent that your title search involves a lot in a subdivision, it is important to ascertain from the record title that your lot has been released for sale by the Attorney General's office. Alternatively, exemptions to the prohibition do exist. The most common exemption is for subdivisions that will never, ever include more than fifteen residential lots. A recorded Certificate of Exemption will generally be found of record. Phased projects are not counted separately for purposes of establishing the fifteen lot maximum and should be approached cautiously.

8. Manufactured Housing

Manufactured Housing is governed by the provisions of NH RSA 477:44. Since 1983, manufactured housing has been deemed to be real estate in the State of New Hampshire. Conveyances commencing in 1983 require a Manufactured Housing Deed to be recorded in the applicable Registry of Deeds. See NH RSA 477:44. Mobile Homes placed on leased land require the Park Owner to sign the Deed to indicate assent to the placement of the Mobile Home on the Park Owner's land. Id. A mobile home may be mortgaged, just as other forms of real estate can. Also, as to manufactured housing subject to a UCC financing statement, the new UCC revisions extend the viable life of such a filing to thirty years without the necessity of an extension filing. See NH RSA 382-A:9-515(b) effective January 1, 2001.

9. Boundary Line Agreements

NH RSA Chapter 472 provides for agreement of property owners as to disputed boundary lines. See NH RSA 472:4. The agreement must be in writing and must meet the other requirements of the statute. Boundary line agreements may not be used in cases where the boundary line is actually known but the parties wish to relocate the boundary. Generally, scenarios involving an intentional relocation of an existing boundary line require subdivision approval. A survey plan must be undertaken to accompany the boundary line agreement and should be recorded. Since the agreement is a cross-release of sorts, it is necessary to perform a title search of the abutting property to verify the ownership and ability and right of the other party to enter into the agreement. A property owner whose existing lender does not join in and consent to a boundary line agreement risks the agreement not being recognized by the lender in a foreclosure situation. It should also be noted that the case of New Hampshire Department of Resources and Economic Development v. Dow, 148 NH 60 (2002) held that the common boundary line must be surveyed and permanent monumentation set to mark the line as set forth in NH RSA 472:4. See New Hampshire Title Standard 5-31.

10. Mechanics Liens

New Hampshire RSA Chapter 447 provides for an inchoate lien to be placed on a property for which a party has provided materials or labor to that site within the last 120 days. The lien, in order to relate back in time, needs to be perfected by an attachment within 120 days of the last substantial work. In the course of a title search, the inchoate lien cannot be seen, but is disclosed only when an attachment is recorded to perfect the lien.

11. Powers of Attorney

A Power of Attorney is a legal instrument by which a party, known as the Principal, appoints an Agent, known as the Attorney-in-Fact, to conduct or handle certain matters on behalf of the Principal, as authorized and defined in the instrument, and which legally bind the Principal. See generally NH RSA Chapter 506. Not all Powers of Attorney are sufficient to authorize the Attorney-in-Fact to execute and deliver deeds and other documents pertaining to real estate. The Power of Attorney must be reviewed for content and the original must be recorded along with any deed or other document that the Attorney-in-Fact purports to execute and deliver on behalf of the Principal. See NH RSA 477:9. Also, use of a Power of Attorney in connection with a transaction generally requires the Attorney in Fact to execute and deliver an Affidavit under oath confirming that the Power of Attorney has not been terminated or otherwise revoked, and that it is still in full force and effect. The Attorney-in-Fact, as well as the Principal should be run in the indices. As a general rule, parties already acting in a fiduciary capacity (i.e., a Trustee, corporate officer, attorney-in-fact) may not further delegate their authority to act unless expressly authorized and directed to do so by the principal to whom a fiduciary duty is owed. Certain statutory disclosures and/or acknowledgements should be attached and recorded with certain Durable General Powers of Attorney. See Title Standards 5-41 through 5-47.

12. Decedent in the Chain of Title

a Joint Tenants

New Hampshire, by statute, creates the presumption of a tenancy in common. See NH RSA 477:18. Joint tenancy is created only by intent to create a joint tenancy, and by a clear and unambiguous manifestation of such intent. In cases where the decedent was a joint tenant, the following should be obtained: sufficient proof of death (i.e. a recorded death certificate); proof of payment of estate taxes; and proof of payment of legacy and succession taxes. A determination should be made from the record as to the relationship of the joint tenants to each other, since the relationship of a surviving joint tenant to the deceased can trigger a legacy and succession tax.

b Tenants in Common or Sole Ownership

(ii) An Open Estate with a New Hampshire Probate Court

When a title search or other sources disclose that a decedent exists in the chain of title, there needs to be a determination of whether an Estate for the Decedent has been opened. An Estate is generally opened and administered through the Probate Court in the place (County) of domicile of the Decedent. See NH RSA 547:8. Dealing with an Estate in the chain of title can be tricky, especially when the Estate is currently in title and will be making the “out conveyance”.

If a probate of the Estate is on file, it should be abstracted to ascertain the date of death of the decedent; the identity and date of appointment of the fiduciary (who should also be run in the grantor indices); the existence and amount of the fiduciary bond; the contents of the inventory (checking to make sure that your real estate is listed); the identity of the surviving spouse, if any; and the identity of the heirs at law/devisees; the contents of the will, if any; the status and contents of the final account with receipts, if any; federal (closing letter) and state estate tax receipts; and legacy and succession tax receipts. The abstract of probate should clearly note and include any documentation pertaining to the disposition of the real estate.

Conveyances from a decedent's estate generally take place by one of three methods. The first method is a consensual sale of the real estate during the pendency of the Estate, whereby the deed is provided by the Executor or Administrator of the Estate with the consent of both the surviving spouse and all of the devisees/heirs at law, as applicable. See NH RSA 559:18. The second method, during the pendency of the Estate, is by deed of the fiduciary based on a license to sell granted by the Probate Court after proper notice is provided to all interested parties. The third method generally is only acceptable after the Estate has been closed and all taxes have been paid, and the statutory period for creditors' claims has passed. In that case, a deed may be accepted from the devisees/surviving spouse and heirs at law, as applicable. (Again, it is important to remember to run those parties in the grantor indices from the date of death of the decedent).

(ii) No Estate Found

In a case where no probate of the Estate can be located, further inquiry of off record matters must be made. In some cases, a probate will need to be opened before title to the real estate may be conveyed. However, in some instances, where the decedent's death is remote and the decedent died intestate, an affidavit, together with a death certificate, may be used to establish for the record (1) the date and place of the decedent's death; (2) that the decedent died intestate, as well as the identity of his/her surviving spouse and sole heirs at law; and (3) that the decedent's estate was not subject to federal and/or state estate taxes, and/or to legacy and succession taxes. See New Hampshire Title Standard 7-23.

(iii) An Estate has been opened with a Foreign Probate Court

In many cases, a foreign probate proceeding is helpful, but is not necessarily sufficient for purposes of effectuating a conveyance of real estate owned by the decedent in New Hampshire. In such cases, an ancillary administration may need to be commenced in New Hampshire. A will is not effective in New Hampshire to pass title to real estate unless probated in New Hampshire and/or probated elsewhere with authenticated copies filed, and with notice and hearing before a New Hampshire Probate Court. See New Hampshire Title Standard 7-22.

13. Homestead

In New Hampshire, homestead rights arise automatically, and therefore need to be dealt with in the course of every conveyance of real estate. See NH RSA Chapter 480. All voluntary conveyances (including mortgages) should contain a recitation of marital status for all individuals in title. Accordingly, in any conveyance of a primary residence, a spouse should join in the conveyance to release their homestead interest. In instances where the premises are not the primary residence of the grantor nor of the grantor's spouse, it is acceptable to rely on a recitation in the instrument of conveyance that "the premises are not homestead property of the grantor nor of their spouse". See New Hampshire Title Standards 5-2 to 5-7. Cautionary note: Be aware of the provisions of NH RSA 480:9 effective January 1, 1998, which requires the Trustees of a "revocable" trust to specifically release their homestead right. Otherwise, it is preserved, and a release of those rights will be required in connection with any future conveyance by the Trustees.

H. Typical and Atypical Liens and Encumbrances in a Title Search

1. Mortgages & Assignments of Rents and Leases

Mortgages are the most commonly encountered type of lien and are voluntary in nature - requiring execution by the owner of the premises. A Mortgage is an interest in real estate created by a written security instrument for payment of an obligation or duty. Mortgages are outstanding in New Hampshire until discharged or released. The only exception to that rule are mortgages held by an individual or non-institutional lender that have been of record for 50 years or more without having been brought forward. Those mortgages are void by operation of law. See NH RSA 479:28 & 29. An Assignment of Rents and Leases is a document that commonly accompanies a commercial mortgage and assigns the borrower's interest in the leases and rents for the real estate as additional collateral, also securing the underlying indebtedness secured by the companion mortgage. An Assignment of Rents and Leases also constitutes an encumbrance on the title, and a release of the same should be obtained.

2. Uniform Commercial Code (UCC) Financing Statements

Financing Statements are used in Article 9 of the Uniform Commercial Code to earmark certain enumerated goods or items as security for the indebtedness. Under the new provisions of Article 9, financing statements are generally effective for a period of five years from the date of recording. There are, however, a few exceptions to that rule. A financing statement recorded in connection with public finance transactions and manufactured housing transactions are effective for a period of thirty years from the date of recording. A continuation of a financing statement may be filed within six months prior to the expiration date of the financing statement. It is important to note that UCC financing statements no longer require the signature of the debtor to be effective.

3. Federal Tax Liens

Pursuant to IRC Sections 6321, 6322 and 6323, the Internal Revenue Code provides for the creation of a lien on any interest in real estate of a taxpayer. The lien is recorded in the county where the real estate is located. A Federal Tax Lien is effective for a period of ten years and thirty days from the tax assessment date provided. However, a federal tax lien may be extended by the refiling of the Notice of Lien within the effective ten year period, or may be prolonged by certain off record suspensions that occur during the ten year period. A Federal Tax Lien has a distinguishing feature from most other liens in that it attaches to after-acquired property. The federal tax lien used to be effective for only a six year period, but that was changed in 1991 to the current ten year period. When reviewing a federal tax lien, always carefully review Column (e) to note the last day for the Internal Revenue Service to refile. The current lien Form 668 (Y) (c) has a box which contains self-releasing language. If the IRS fails to refile the Notice in the Registry of Deeds before the noted refiling date, the lien by its own terms constitutes a Certificate of Release pursuant to IRC Section 6325(a). Also note that because IRS Liens attach to after acquired property so it is important to check the buyer for IRS Liens for 10 years prior to the date of closing.

4. Municipal Liens, including for Aid to Assisted Persons

Municipalities may impose liens on real estate. Cities and Towns have a lien against real estate for unpaid taxes pursuant to NH RSA Chapter 80, and these taxes take precedence over all other liens, even if those other liens were recorded prior in time to the tax lien. Another type of municipal lien relates to the reimbursement to a municipality for aid to assisted persons. Any person who is "poor and unable to support" themselves is entitled to receive the assistance of the city or town of their residence pursuant to NH RSA 165:1-a. The amount of money a city or town extends in assistance may be made a lien on any real estate owned by the assisted persons. The liens are effective until enforced or released pursuant to NH RSA 165:28. The lien's enforcement is generally stayed so long as the real estate

constitutes the residence of the aided person, their spouse or certain qualified children. A public assistance lien may also be recorded by the State pursuant to NH RSA Chapter 167. These State liens pursuant to NH RSA 167:14 are initiated by recording a Notice of Lien in the Registry of Deeds and continue until released or enforced, and may attach to after-acquired property.

5. Attachments

In connection with a court action within the State of New Hampshire, a party to the action may petition the Court to attach another party's interest in real estate with an eye toward effectively garnering an asset to satisfy any judgment that may result from the litigation. Attachments are effective upon recording and have a potential life of sixteen years. According to the provisions of NH RSA 511:55, attachments in cases where no judgment has been entered expire after ten years. If a judgment has been issued, an attachment expires six years after the date of the judgment. It is important to review the Court Docket to determine the status of an attachment.

6. Condominium Assessment Liens

NH RSA 356-B:46 provides a mechanism for the unit owners association of a Condominium to place a lien for unpaid assessments against a condominium unit. This lien, when properly perfected, has priority over all other liens except for (1) liens recorded prior to the Declaration of Condominium; (2) real estate taxes on the unit; and (3) an unpaid first mortgage to an institutional lender on the unit. Perfection of this lien requires that a memorandum of the lien be filed with the applicable Registry of Deeds within six months from the date the unpaid assessment was due and payable. Any such lien must be enforced within six years after the Memorandum of Lien was recorded

7. State of New Hampshire Tax Liens

The New Hampshire Department of Revenue has the ability to place a lien against the real estate of a taxpayer for unpaid taxes, interest and penalties pursuant to NH RSA 21-J:28-c. The lien continues for six years from the date of the recording of the lien or until it is satisfied, whichever is earlier. Effective January 1, 2006, the State of New Hampshire's tax lien may be renewed by refile. New Hampshire Estate Tax is another type of lien that the State of New Hampshire may impose. These liens differ in that no recording of any notice of lien is required to create the lien, but rather the lien arises automatically at the time of death by operation of law and remains valid until paid pursuant to NH RSA 87:5. New Hampshire Legacy and Succession Tax Liens are created similarly, without any recordation of a notice, and are valid for twenty years after the date of death of a decedent. The legacy and succession tax law in New Hampshire was repealed effective January 1, 2003, but only as to decedents who die on or after that date. Legacy and Succession taxes remain a title issue for deaths prior to January 1, 2003.

8. Federal Estate Tax Liens

The federal estate tax is a lien under the Internal Revenue Code Section 6234. 26 U.S.C. § 6234. The federal estate tax lien arises automatically at death if there is estate tax liability. It differs from the general federal tax lien under Section 6321, for which a notice must be recorded with the Registry of Deeds. Generally, in order to take property free of the federal estate tax lien, one would need to establish:

- there is no federal estate tax lien because the decedent's gross estate under the Internal Revenue Code is less than the minimum taxable amount (usually established by an affidavit of the Court appointed fiduciary);
- there is proof of payment of the tax by virtue of the estate tax closing letter from the IRS;
- there is, pursuant to Section 6325 of the IRC, a certificate of discharge, release or non-attachment for the locus property;
- in the case of non-probate property, there is a transfer to a bona fide purchaser for value in an arm's length transaction; or
- ten years or more have elapsed since the decedent's death.

Residential Closing Process

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RESIDENTIAL CLOSING PROCESS

Section I PROCEDURES, TIME FRAMES, AND ATTORNEY DUTIES

The title company's involvement in the process begins with the receipt of the title order. Typically, the order comes directly from the buyer's lender or the buyer's real estate agent. An order from the lender will provide the name of the buyer and the loan amount. Ideally, the order also includes the Purchase and Sales Agreement ("P&S") and the Loan Estimate ("LE"), though this is not always the case. (See attached exhibit.) If the order comes from the buyer's real estate agent, it is imperative that you contact the buyer's lender immediately after receipt, as some lenders will automatically send their title order to a different title company. Before the closing agent starts working on the transaction, the agent should confirm with the lender that the closing agent is approved to handle transactions (residential or commercial) on behalf of that lender. This has become increasingly important as lenders look to limit the number of third-party vendors. At this time, the closing agent should also request the LE from the lender if he or she does not already have it.

The Consumer Financial Protection Bureau regulates the conduct of the Title Company, lender, and real estate agents in transactions where the borrower is obtaining a loan secured by a mortgage to a financial institution. Truth in Lending RESPA Integrated Disclosure Rules "TRID", requires two specific documents that must be used in all closings when a first mortgage is securing the loan. The two documents are the LE and the Closing Disclosure ("CD"). (See attached exhibit.) There are two separate CDs - one is for the seller and the other is for the buyer. The purpose of this is to help maintain the confidentiality of information. If the buyer is paying cash for the property, or if the loan will be secured by a Home Equity Line of Credit (HELOC), TRID regulations typically do not apply.

It is important to review the LE at the time the order is received. The LE is the document prepared by the lender which details all of the fees which the buyer will be required to pay at closing. Although not required at the time the order is received, the title company should also review the fees relating to its own services. Depending upon how the lender discloses the fees, the lender may have to pay for any increase in fees that are above the allowed permitted variance tolerance. In addition, lenders differ on how they disclose the title company's settlement fees and their internal requirements, at times, can be extremely particular. If the fees are disclosed as a "service you cannot shop for," any increase in fee above the disclosed amount must be paid by the lender. However, if the fees are disclosed as a "service you can shop for," the lender may be responsible for the amount of the fee over the 10% tolerance. In the event the closing agent notes that the fee on the LE is different than what its typical fee is, this is the right moment to discuss fees with the lender.

As a courtesy to the lender, the closing agent should also confirm that the transfer taxes are correct. If the actual transfer taxes are higher than what is disclosed, the lender will have to pay the difference. Additionally, a dutiful closing agent can also assist the lender by reviewing recording fees and escrows. TRID rules may not allow these fees to be corrected, but the lender appreciates knowing about these discrepancies in advance.

The CFPB has established very strict vetting standards that a lender must follow in order to work with a particular closing agent. For example, the lender needs to review the agent's Best Practices Manual, Security Assurance Program, E & O insurance, wiring instructions and insured closing protection letter. Be sure you are an approved attorney prior to starting the work; otherwise, you may find that you have completed the work only to have the lender decide that they will only close the transaction with someone who is already on their approved list. Maintaining your Best Practices Manual on an annual basis will make this process much easier. You do not want to find yourself

in the position of having to update the manual within a few hours when a new vendor requests the manual.

Once you have confirmed that you will be retained to be the closing agent in the transaction, it is best to send introductory emails to the Listing Agent, the Buyer's Agent, the Buyer, and the Seller. These emails are ideally sent within a day or two of receiving the order so as to avoid the dreaded "We have not heard from anyone" phone calls. The email to the Buyers and Sellers should include a form for the Buyer or Seller to complete, which asks for the correct spelling of their names, social security numbers, homeowner's insurance information, payoff information, preferred email, and forwarding addresses. This is also a good time to confirm any unique information regarding the transaction, such as whether a party on title is deceased or if parties may be unable to attend at the time of the projected closing date.

If you do not receive the completed information form back from the buyer or seller within a week or two, it is prudent practice to contact the Real Estate Agent and let them know you need the information in order to proceed with the closing. Typically a title company will request that the buyer wire their funds to you the day before closing or day of closing depending on the time of day the closing is scheduled to occur. Many realtors are telling their buyers not to accept emailed wire instructions. Be sure you discuss the wire process with the buyer. While wire transfers typically clear accounts in a day, that depends on the type of account where the funds are initially held. Buyers sometimes find out that brokerage accounts are unable to process wire transfers as quickly, sometimes resulting in unexpected delays of as much as three days. Be sure to confirm well in advance of closing.

In the introductory email that is sent to the Agents Buyers and the Sellers, you should state that all Buyers and Sellers must be available for closing. If a Seller is not going to be available for closing, it is crucial that the Seller sign the Deed prior to the closing, if at all possible, even in the event that there is a Power of Attorney. "Mail

Aways,” closings where the Seller is not present, are very common. In the event the Seller is signing by mail, it is essential to get the documents to the Seller well before closing. You can email the documents to the Seller and provide them specific instructions on how to accurately have the documents signed and notarized. However, it is often best, if you have the time, to overnight documents. Registries are very particular when it comes to font size, margins, ink clarity, notary stamps, etc. More than a few deeds have been returned printed double-sided or with margins altered by the program used to view it, often rendering them essentially useless for your transaction. Some deeds have arrived printed in purple ink or with google ads in the margins! With a letter you can place post-its on the documents indicating where to sign, initial or notarize. While this is not foolproof, it is certainly helpful. In order to prevent fraud in a mail away transaction, ask your sellers to send you copies of their driver’s license(s). The notary involved at their location should also provide you with a business card. As a final piece of due diligence, the closing agent should also confirm that the notary is licensed in the state in which the documents were acknowledged.

In your initial letter to the real estate agents, also ask them for a commission statement. It is a sensible idea to also remind them to send you copies of any Addendums to the Purchase and Sales. Oftentimes, a home inspection may be the catalyst for an addendum. This is very common of late when parties are being as aggressive as possible to secure a contract, then renegotiating some terms after the fact. Two weeks before closing is a good time frame to contact an agent for any new addendums to the Purchase and Sales because inspections have typically been completed by this time. Remind the agent that addendums also need to be sent to the loan officer for the transaction. PLEASE NOTE: Given the prices of properties we are seeing in this area and the number of buyers vying for those properties, much larger deposits are becoming the norm. A company check for \$100,000.00 delivered to the closing table likely takes a few days to clear, so you might also want a wire, or a check a day or two before the closing for the commission. Give the real estate agent plenty of

notice of your requirements and be prepared to arrange accommodations in some instances.

Regarding the title search itself, it is a wise goal to complete the search within five to seven business days of opening the file. Understandably, it is best to determine if there are any title issues well prior to closing, since the earlier a title issue is discovered, the more time the seller and closing agent have to clear the title issue. No one likes to be surprised with a call from the closing agent disclosing a title issue a few days before closing. The standard P&S in New Hampshire allows a seller a reasonable time period, not to exceed 30 days, from the date an issue is disclosed in order to clear the issue. In reality, 30 days is not a lot of time for resolution of many common title issues. If the issue is not cleared within that reasonable time, the buyer may cancel the agreement and is entitled to the return of the deposit funds.

As soon as the title search is complete, the commitment should be sent to the lender. The closing agent should have this done no later than two weeks prior to the closing. Some lenders request an earlier deadline. At the time the commitment is sent, the closing agent should also send the tax information, which provides the lender with the basis it needs to establish the escrow account.

The closing agent is typically responsible for obtaining the seller's mortgage payoff, property tax information, and any final water or sewer bills. If the property is a condominium or part of a homeowner's association, the closing agent must also obtain the monthly dues and any possible assessments.

The timing for requesting this information varies depending upon what time of the month the closing is taking place. Most of the major lenders can now provide a mortgage payoff statement within a few days. When requesting a payoff, be careful to take into consideration whether a seller may make a monthly mortgage payment between the time you request the payoff and the closing. If a payment may be made because the closing is near the beginning of the month, it might make more sense to

request the payoff after the first of the month. A wise closing agent should go one step further and speak with the seller about a possible payment to ensure the payoff used at closing is accurate.

The closing agent should also contact the town about ten days prior to closing regarding the final water/sewer reading. Note that some towns require that the Real Estate agent schedule the reading. This will provide the town with sufficient notice to schedule the final reading just prior to the actual closing date and still have adequate time to forward the bill to the closing agent. The closing agent can send a draft of the settlement statement to the seller and seller's agent without the final utility bill, which thus allows them to review all the other numbers prior to closing.

In addition, the closing agent will need to ascertain if there are any fees of dues that need to be collected or pro-rated on the settlement statement. If the property is a condominium, the condominium lien certificate must be requested directly from the condominium management company or from a third-party vendor that supplies the information. It is very important that the closing agent know as soon as possible if the condominium lien information will be provided by a third-party vendor, such as *CondoCerts.com* and *HomeWise.com*, as these vendors require at least fourteen days to provide the requested information.

The seller information sheet which was emailed to the seller upon the opening of the file should request contacts for any possible condominium association, homeowners' association, or third party vendors. The central concern with ordering the condo information is the expense, as these third-party vendors can charge up to \$250 for the necessary documentation. Of course, the vendors happily accept the closing agent's credit card! Prior to placing that charge on the credit card, the closing agent should be confident that the closing will occur. On most occasions, the seller is responsible for this charge, but make sure that your seller is aware of the charge prior to incurring the fee.

Under TRID guidelines, lenders must send the CD to the buyer a minimum of three days before closing. If the CD is sent to the borrower only three days prior to closing, the buyer must respond in writing to confirm that they have received the closing disclosure. It must be emphasized that with TRID, a closing can only occur if the buyer confirms in writing that they have received the CD three days prior to the close date. To avoid having to delay a closing because the buyer does not acknowledge the CD promptly, many lenders have now begun sending the CD to the buyer ten days prior to closing. Adherence to this longer timeframe avoids the requirement that the buyer acknowledge in writing receipt of the CD. On occasion, the lender will also send the draft CD to the closing agent ten days prior to the closing.

The majority of lenders are currently both creating and distributing the buyer's side of the CD. However, the lenders still rely on title companies to provide certain fees and costs. To facilitate this, the title company will typically prepare its own CD that includes title company fees, title insurance premiums, recording fees, and transfer taxes. The CDs contain the contact information and license numbers for the lender, mortgage broker, realtors, and title companies. The title company needs to supply this information to the lender. Typically, the title company should send the draft CD to the lender at least two weeks prior to closing, allowing the lender adequate time to process the CD and disclose it to the buyer within the Consumer Financial Protection Bureau's time frame.

When you receive the title order, it is a good time to research the tax collector's hours for the town. Most towns now also post their tax information online, at *nhtaxkiosk.com*, or the town website. Some towns still require a phone call to the tax collector to obtain the information, and some small towns are open for only very limited hours, on limited days. If the closing is not occurring around June/July First or December First, the closing agent should obtain taxes at the time the title commitment is being prepared. In New Hampshire, taxes are typically due June/July First and December First.

Some towns collect three times per year. If the closing is occurring near those dates, be sure to update the tax information immediately prior to closing, since a seller or their mortgage company might have made a tax payment. If the seller or their mortgage company has made a payment, but the town's records do not reflect the payment, the wise closing agent should still collect the payment and hold that tax portion of the seller's funds in escrow until the town records show that payment was received. At that point, the closing agent can return the funds to the seller.

The final CD will include all of the settlement fees. The closing agent must provide the lender with the title settlement fees, title insurance fees, recording fees, transfer tax, and any prorations for taxes or condo dues. The closing agent prepares a CD using the lender's figures and the closing agent's figures for review and approval by the lender. Once the lender and the closing agent agree or "match," the lender will send the CD to the borrower.

Section II ESCROW & CLOSING INSTRUCTIONS

The lender will send the title company two types of instructions: General Instructions, which are to be followed for every closing, and Specific Instructions, which apply only to the specific loan at issue in that closing. The closing agent must follow these instructions to the letter to prepare the closing documents and close the loan in compliance with the Consumer Federal Protection Bureau's rules and regulations, as well as the lender's interpretation of said rules.

General Escrow Instructions contain information that the title company needs to know in order to deal with Title Policy submittals, loss payee clauses for insurance binders, and Post-Closing department requirements. They also include relevant federal guidelines to ensure that agents are aware of timelines, how to handle collateral document corrections and a notice prohibiting unauthorized changes to the CD and

other documents. These instructions will include a list of all documents that the lender requires the borrower to sign and that the title company must return to the lender post-closing. It is absolutely imperative that closing agents read each lender's General Escrow Instructions, as every lender is different and there are lender-specific requirements that may affect the lender's ability to fund the loan. Some require you to fax or email certain documents, often referred to as "the funding documents", before the buyers and sellers leave the closing table in order to approve your funding of the transaction and disbursement of funds. These often include, but are not limited to, the Note, Mortgage, signed CDs, Loan Application(s) and the Notice of Right to Cancel (if applicable). As a practical matter, if the closing agent knows funding approval is required, it is often helpful to set these documents aside, to be signed first and sent to the lender for approval, while the rest of the closing is conducted. This will almost certainly shorten the time during which the parties need to wait for final funding.

One additional item that often will not appear in published Lender Instructions, but is very specific to each lender, is the way in which an individual acting under a Power of Attorney or as Trustee of a Trust signs each document. Careful – sometimes what the lender "requires" may not be correct or generally acceptable in your jurisdiction and this is a conversation that should take place before, not after, the closing. Likewise, in the event a lender requires each individual to write a fully written clause such as "*Michael S. Smith, Individually and as Trustee of The Michael S. Smith and Jennifer L. Smith Family Revocable Living Trust of 2023*" when they sign each and every document, it can add appreciable time to your closing.

Some lenders need the title company's gentle encouragement to send the escrow funds for the loan. If the closing is in the morning, it is more convenient if the lender fund the loan the night before the closing, however, many lenders will not comply with that request. In such a case, set everyone's expectations and let parties know that the seller and realtors may have to wait a couple of hours to receive their

checks. It is also good practice to have the parties sign an Escrow Closing Agreement in this situation. The agreement can indicate that the closing agent will hold all documents until the funds are received.

Specific Escrow Instructions are a closing agent's practical guide to navigating each loan, as they instruct the title company on how to complete the Closing Disclosure and conduct the closing. These tend to be sent at the last minute, but contain crucial information and again must be followed explicitly. Specific Escrow Instructions contain information particular to the loan: the loan type (Refinance vs. Purchase), loan number, the borrower's exact name, the amount of the loan, the lender's fees, any escrow deposit, taxes, insurance, interest, and the funding amount. The instructions direct the title company to collect money from the buyer to pay for certain fees. For example, the instructions may tell the title company to collect the annual premium for the homeowner's insurance. They also let the title company know of any fees which are paid by the lender, fees prepaid by the borrowers, and any credits to which the buyer is entitled. These instructions are very significant as they communicate any fees or credits associated with a particular loan and should always be carefully reviewed when preparing the Closing Disclosure prior to sending it to the Lender for their review.

It is also crucial, as mentioned briefly above, to confirm that the name(s) which appear on the lender's documents match the name(s) which appear on the title company's documents, as well as any deeds associated with the closing.

The Specific Instructions will also delineate the amount of escrow money the lender is sending to the title company via wire to fund a specific loan. It is important to note that some of the lender's fees are net funded and thus are not included in the amount the lender will "fund" or wire to the title company. For example, in most transactions the lender will simply retain the amount of money the buyer is paying for an appraisal, prepaid interest and other expenses associated with obtaining a loan. The closing agent must confirm that the amount of money the lender funds is precisely the

same amount that the title company needs to pay all disbursements listed on the closing disclosure. If the funding amount provided by the lender does not match the disbursements amounts, re-read the closing instructions to ensure that they were followed exactly. If the funding number still does not match, either the lender or the closing agent has likely made an error, and at that point, a discussion with the lender may be required to determine what the error is. Note that the checks that are disbursed at the closing should match the amounts that are on the American Land Title Association (“ALTA”) settlement statement. See attached Exhibit.

In order to maintain confidentiality and provide secure correspondence, many lenders are now utilizing direct, secure “Portals” for communication between a title company and the lender. While this is certainly the more secure approach, it is not without complications. At times, it can make collaborative work within your office cumbersome as it is not always the most efficient way to share documents internally for editing, revision, etc. It does, however, allow for your office to have direct communication to a designated recipient at the lender’s office which can often avoid breaks in communication when multiple parties are involved.

Section III Preparing and Reviewing the Closing Disclosure and the American Land and Title Association Settlement Statement and Other Documents

The Consumer Financial Protection Bureau designed and developed the Closing Disclosure. The American Land and Title Association (ALTA) recognized that the title companies would not be able to rely solely on the CD to properly disburse the files and create checks. ALTA used this opportunity to step in and create its own form of settlement statement, aka the ALTA Settlement Statement. There are three CD forms and three ALTA settlement statement forms. One form contains only buyer information, the second contains only seller information, and the third is the combined form. All these forms can be viewed on the CFPB website.

By entering all of the fees for the transaction, the seller's side CD and ALTA settlement statement can be created by the title company's software. Said fees also need to be entered to balance the escrow account and ensure that the lender is properly funding the loan. Remember as noted above that the checks that are disbursed at the closing should match the amounts that are on the ALTA settlement statement.

The lender provides the buyer with the CD. In contrast, the title company prepares and provides the CD to the seller. The seller side CD includes the realtors' commission, mortgage payoffs, transfer taxes, tax pro-rations, final bills and other fees which the seller needs to pay. Many lenders are requesting to review the seller CD prior to closing to be sure all fees match. This should be done as soon as it is available. The ALTA settlement statement should be provided to the buyer, seller, and their respective realtors.

The closing checklist is a great tool for all parties in a commercial transaction, as it will outline who is responsible for preparing each document. In residential closings, the checklist is not always necessary since other than the deed, the documents are prepared either by Title Company or the lender. The check list will detail all of the documents that should be signed at closing. The lender will typically create all their documents directly related to the loan to be signed at closing. In some circumstances, a few smaller banks may ask the residential closing agent to prepare the mortgage and/or note. Some conveyancing software programs utilized by a title company include the Fannie/Freddie forms to help create the mortgage or note. If however the software does not have the form, the FannieMae website is a great tool for locating the standard mortgages that lenders prefer to use.

<https://www.fanniemae.com/singlefamily/legal-documents>

The title company also must create and include all the state specific forms for the buyer to sign. This includes the PA-34 and CD-57. These forms can be found on the Department of Revenue Administration's website.

The title company prepares the documents that the seller must sign as a requirement to issue a title policy. Typically these documents are a mechanic's lien affidavit and a survey waiver affidavit. Filing the 1099 with the IRS is also the responsibility of the title company. In a residential closing, the only document the seller needs to provide is the deed. As a title company, be wary of preparing deeds with property descriptions that require any changes from the current deed, which can change the rights or obligations of the seller and can be interpreted as legal representation of the seller by the title company.

In the event that the seller is an entity, estate, or guardianship, the seller typically already has an attorney and that particular attorney should prepare the deed. In the case of an entity, the attorney should draft the deed in accordance with the entity's rules and regulations and maintain the corporate book as required. Entities will also need to provide a resolution that authorizes the sale of the property and appoints the authorized signatory for the conveyance.

As noted above, in residential closings the lender prepares most closing documents. The most common mistake the closing agent will find when reviewing these documents is that the marital status of the borrowers is not noted on the mortgage. For a purchase money mortgage, the right to foreclosure is not affected in this case, but be cautious with a refinance. The marital status of the borrowers needs to be noted on the mortgage, and a non-borrowing spouse must sign the mortgage to waive homestead rights.

Section IV CLOSING THE TRANSACTION

Attached is a suggested stacking order for the documents that need to be executed at a Residential closing. This order lists the most important documents first and should be of assistance when organizing the closing file. Oftentimes there are a large number of people at the closing table and it is difficult to keep the buyers and sellers properly focused on the task at hand. The closing agent's job is to make sure the buyers and sellers pay attention as each document is executed.

Buyers and sellers, understandably, like to see their 'numbers' as early as possible in the process. It is a good idea to explain the ALTA settlement statement and CD in detail to both parties at the beginning of the closing. This is typically when the closing attorney will be asked the most questions during the closing. The 'numbers' are best presented at the beginning of the closing before the parties' attention begins to wane.

One of the biggest changes in this industry resulting from the COVID-19 adjustments to procedures, is what is often referred to as a "hybrid closing". In essence, rather than sending all documents to the title company for execution at the closing, lender are having the buyer sign many documents online. Even though the buyer might have e-signed some of the documents, such as the note, first payment letter, and escrow disclosure, it is still prudent for the closer to have printed out versions of those three documents. It is important that the buyer understands these three documents and if the buyer is simply swiping on their phone they most likely have not read them.

The closing agent is provided with the loan terms from the lender's escrow instructions and said closing agent typically has not had the opportunity to review the loan terms with the buyer prior to closing to ensure the terms are what the buyer thought he or she had agreed to with his or her lender. The agent might hear for the first time that the buyer was expecting something different. This will require

confirmation with the loan officer and may result in closing delays. By addressing the loan terms at the beginning of the closing, the agent will be in the position to immediately speak with the buyer's mortgage officer. This aids in efficiency, since while the mortgage officer is looking into any discrepancies, the agent can continue signing the remaining documents.

It is also crucial to review the deed with the buyer. Confirm that the buyer's names are correctly spelled and explain their chosen tenancy and their rights therein. Moreover, it is good practice to review any restrictions, conditions or covenants contained in the deed one final time. While it is purely stylistic, some closing agents like to review/sign the deed as the last document as the finalization of the closing, after which keys are exchanged as well important information such as who to avoid in the neighborhood, who has the best wine cellar or what day/time the trash pickup typically arrives.

At this point, the seller will need to properly execute the deed. In some cases, the closing agent might want the seller to sign a letter of non-representation prior to deed execution. In the event that a seller mistakenly thinks the closing agent represented them, this document provides supporting evidence that the seller was properly informed otherwise.

The Note, Mortgage, and First Payment Letter also contain information that the title agent will want to confirm with the buyer and ensure that he or she understands. Thereafter, it is prudent to also review the escrow statement if the buyer is escrowing for taxes and/or insurance.

Once the most important documents are reviewed, including the examples highlighted above, the closing agent can then explain the ancillary documents that are standard in every closing and not specific to the transaction at hand, which include the name affidavits, homeowner's insurance requirements and standard IRS forms. Next,

review all documents that are signed by both the buyer and the seller. Finally, the agent reviews the remaining seller documents, including the mechanic's lien affidavit and survey waiver, which are of the utmost importance for title insurance. Be sure that the seller is paying attention in the process of reviewing their documents with them. This will protect the closing agent if there are any title issues that the seller was aware of but did not disclose.

At the end of the closing, the settlement agent should provide the buyer, seller and real estate agents with a copy of the fully executed ATLA settlement statement and the deed. Remember that the real estate agents need to provide their office manager with these documents to allow their office to pay them their individual portion of the commission. The buyer and seller also need these two documents for tax reporting and as evidence of ownership. If applicable, the closing agent should provide the seller with a copy of the 1099 and let them know that their accountant will need a copy to prepare taxes.

The remaining executed documents can be provided to the buyer and seller in either a hard copy or electronic form. Finally, the closing agent can disburse the checks to the realtors and sellers. Typically, in New Hampshire, title companies will disburse prior to recording, but that is a decision for the title company, unless parties to the transaction specifically request otherwise. In either case, record the deed and mortgage as soon as possible after the closing. With the use of electronic recording, the title can be updated and the deed and mortgages can be recorded without an inconvenient run to the Registry of Deeds.

EXHIBIT A**FICUS BANK**

4321 Random Boulevard • Somectly, ST 12340

Save this Loan Estimate to compare with your Closing Disclosure.

Loan Estimate

DATE ISSUED 2/15/2013
APPLICANTS Michael Jones and Mary Stone
 123 Anywhere Street
 Anytown, ST 12345
PROPERTY 456 Somewhere Avenue
 Anytown, ST 12345
SALE PRICE \$180,000

LOAN TERM 30 years
PURPOSE Purchase
PRODUCT Fixed Rate
LOAN TYPE ☒ Conventional ☐ FHA ☐ VA ☐ _____
LOAN ID # 123456789
RATE LOCK ☐ NO ☒ YES, until 4/16/2013 at 5:00 p.m. EDT
Before closing, your interest rate, points, and lender credits can change unless you lock the interest rate. All other estimated closing costs expire on 3/4/2013 at 5:00 p.m. EDT

Loan Terms		Can this amount increase after closing?
Loan Amount	\$162,000	NO
Interest Rate	3.875%	NO
Monthly Principal & Interest <i>See Projected Payments below for your Estimated Total Monthly Payment</i>	\$761.78	NO
Does the loan have these features?		
Prepayment Penalty	YES • As high as \$3,240 if you pay off the loan during the first 2 years	
Balloon Payment	NO	

Projected Payments		
Payment Calculation	Years 1-7	Years 8-30
Principal & Interest	\$761.78	\$761.78
Mortgage Insurance	+ 82	+ —
Estimated Escrow <i>Amount can increase over time</i>	+ 206	+ 206
Estimated Total Monthly Payment	\$1,050	\$968
Estimated Taxes, Insurance & Assessments <i>Amount can increase over time</i>	\$206 a month	This estimate includes ☒ Property Taxes ☒ Homeowner's Insurance ☐ Other: <i>See Section G on page 2 for escrowed property costs. You must pay for other property costs separately.</i>
		In escrow? YES YES

Costs at Closing	
Estimated Closing Costs	\$8,054 Includes \$5,672 in Loan Costs + \$2,382 in Other Costs – \$0 in Lender Credits. See page 2 for details.
Estimated Cash to Close	\$16,054 Includes Closing Costs. See Calculating Cash to Close on page 2 for details.

Visit www.consumerfinance.gov/mortgage-estimate for general information and tools.

LOAN ESTIMATE

PAGE 1 OF 3 • LOAN ID # 123456789

Closing Cost Details

Loan Costs

A. Origination Charges	\$1,802
.25 % of Loan Amount (Points)	\$405
Application Fee	\$300
Underwriting Fee	\$1,097

B. Services You Cannot Shop For	\$672
Appraisal Fee	\$405
Credit Report Fee	\$30
Flood Determination Fee	\$20
Flood Monitoring Fee	\$32
Tax Monitoring Fee	\$75
Tax Status Research Fee	\$110

C. Services You Can Shop For	\$3,198
Pest Inspection Fee	\$135
Survey Fee	\$65
Title - Insurance Binder	\$700
Title - Lender's Title Policy	\$535
Title - Settlement Agent Fee	\$502
Title - Title Search	\$1,261

D. TOTAL LOAN COSTS (A + B + C)	\$5,672
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Other Costs

E. Taxes and Other Government Fees	\$85
Recording Fees and Other Taxes	\$85
Transfer Taxes	

F. Prepaids	\$867
Homeowner's Insurance Premium (6 months)	\$605
Mortgage Insurance Premium (months)	
Prepaid Interest (\$17.44 per day for 15 days @ 3.875%)	\$262
Property Taxes (months)	

G. Initial Escrow Payment at Closing	\$413
Homeowner's Insurance \$100.83 per month for 2 mo.	\$202
Mortgage Insurance per month for mo.	
Property Taxes \$105.30 per month for 2 mo.	\$211

H. Other	\$1,017
Title - Owner's Title Policy (optional)	\$1,017

I. TOTAL OTHER COSTS (E + F + G + H)	\$2,382
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J. TOTAL CLOSING COSTS	\$8,054
D + I	\$8,054
Lender Credits	

Calculating Cash to Close

Total Closing Costs (J)	\$8,054
Closing Costs Financed (Paid from your Loan Amount)	\$0
Down Payment/Funds from Borrower	\$18,000
Deposit	- \$10,000
Funds for Borrower	\$0
Seller Credits	\$0
Adjustments and Other Credits	\$0
Estimated Cash to Close	\$16,054

Additional Information About This Loan

LENDER Ficus Bank
NMLS/___ LICENSE ID
LOAN OFFICER Joe Smith
NMLS/___ LICENSE ID 12345
EMAIL joesmith@ficusbank.com
PHONE 123-456-7890

MORTGAGE BROKER
NMLS/___ LICENSE ID
LOAN OFFICER
NMLS/___ LICENSE ID
EMAIL
PHONE

Comparisons	Use these measures to compare this loan with other loans.	
In 5 Years	\$56,582	Total you will have paid in principal, interest, mortgage insurance, and loan costs.
	\$15,773	Principal you will have paid off.
Annual Percentage Rate (APR)	4.274%	Your costs over the loan term expressed as a rate. This is not your interest rate.
Total Interest Percentage (TIP)	69.45%	The total amount of interest that you will pay over the loan term as a percentage of your loan amount.

Other Considerations

- Appraisal** We may order an appraisal to determine the property's value and charge you for this appraisal. We will promptly give you a copy of any appraisal, even if your loan does not close. You can pay for an additional appraisal for your own use at your own cost.
- Assumption** If you sell or transfer this property to another person, we
☐ will allow, under certain conditions, this person to assume this loan on the original terms.
☒ will not allow assumption of this loan on the original terms.
- Homeowner's Insurance** This loan requires homeowner's insurance on the property, which you may obtain from a company of your choice that we find acceptable.
- Late Payment** If your payment is more than 15 days late, we will charge a late fee of 5% of the monthly principal and interest payment.
- Refinance** Refinancing this loan will depend on your future financial situation, the property value, and market conditions. You may not be able to refinance this loan.
- Servicing** We intend
☐ to service your loan. If so, you will make your payments to us.
☒ to transfer servicing of your loan.

Confirm Receipt

By signing, you are only confirming that you have received this form. You do not have to accept this loan because you have signed or received this form.

Applicant Signature

Date

Co-Applicant Signature

Date

EXHIBIT B**Closing Disclosure**

This form is a statement of final loan terms and closing costs. Compare this document with your Loan Estimate

Closing Information		Transaction Information		Loan Information	
Date Issued	03/22/2023	Borrower	Peter Smith and Jane Smith	Loan Term	30 years
Closing Date	03/31/2023		123 Gold Road, Sapphire, NH 01234	Purpose	Purchase
Disbursement Date	03/31/2023	Seller	Michael Wood and Mary Wood	Product	Fixed Rate
Settlement Agent	Jewell Title, LLC		123 Diamond Road, Sapphire, NH 01234	Loan Type	☒ Conventional ☐ FHA ☐ VA ☐
File #	2023-1051	Lender	Cactus Home Loans	Loan ID #	
Property	123 Diamond Road Sapphire, NH 01234			MIC #	
Sale Price	\$407,900.00				

Loan Terms		Can this amount increase after closing?
Loan Amount	\$250,000	NO
Interest Rate	0%	NO
Monthly Principal & Interest <i>See Projected Payments below for your Estimated Total Monthly Payment</i>	\$694.44	NO
		Does the loan have these features
Prepayment Penalty		NO
Balloon Payment		NO

Projected Payments	
Payment Calculation	
Principal & Interest	\$694.44
Mortgage Insurance	+ ---
Estimated Escrow <i>Amount can increase over time</i>	+ 666.00
Estimated Total Monthly Payment	\$1,360.44

Estimated Taxes, Insurance & Assessments <i>Amount can increase over time See page 4 for details</i>	\$666.00 a month	This estimate includes ☐ Property Taxes ☐ Homeowner's Insurance ☐ Other: <i>See Escrow Account on page 4 for detail. You must pay for other property costs separately.</i>	In escrow? YES YES NO
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Costs at Closing	
Closing Costs	\$12,448.67 Includes \$3,510.55 in Loan Costs \$8,947.87 in Other Costs - \$9.75 in Lender Credits. See page 2 for details.
Cash to Close	\$160,373.51 Includes Closing Costs. See Calculating Cash to Close on page 3 for details.

Closing Cost Details

Loan Costs	Borrower-Paid		Seller-Paid		Paid by Others
	At Closing	Before Closing	At Closing	Before Closing	
A. Origination Charges	\$1,487.50				
01 .1250% of Loan Amount (Points)	\$312.50				
02 Lender Paid Broker Compensation					(L) \$4,375.00
03 Processing Fee	\$1,175.00				
04					
05					
06					
B. Services Borrower Did Not Shop For	\$588.55				
01 Appraisal Fee to Queen City Appraisals	\$500.00				
02 Credit Report to Meridianlink Birchwood	\$88.55				
03					
04					
05					
06					
07					
08					
C. Services Borrower Did Shop For	\$1,434.50				
01 E-Recording Fee to Simplifile	\$9.50				
02 Title - Lender's title Insurance to Title Guaranty Company	\$675.00				
03 Title - Settlement Agent Fee to Jewell Title, LLC	\$750.00				
04					
05					
06					
07					
08					
D. TOTAL LOAN COSTS (Borrower-Paid)	\$3,510.55				
Loan Costs Subtotals (A + B + C)	\$3,510.55				\$4,375.00
Other Costs					
E. Taxes and Other Government Fees	\$3,217.50				
01 Recording Fees Deed: 41.00 Mortgage: 117.00	\$158.00				
02 City/County tax/stamps to State of New Hampshire					
03 State tax/stamps to State of New Hampshire	\$3,059.50		\$3,059.50		
F. Prepays	\$972.23				
01 Homeowner's Insurance Premium (12 mo.) to Vermont Mutual Insurance	\$926.00				
02 Prepaid Interest (46.2329 per day from 03/31/2023 to 04/01/2023 1 day)	\$46.23				
03					
04					
05					
G. Initial Escrow Payment at Closing	\$3,070.00				
01 Homeowner's insurance 77.17 per month for 4 mo.	\$308.68				
02 Mortgage insurance per month for mo.					
03 Property taxes 588.83 per month for 7 mo.	\$4,121.81				
04					
05					
07 Aggregate Adjustment	-1,360.49				
H. Other	\$1,688.14				
01 Document Preparation Fee to Jewell Title, LLC			\$195.00		
02 Final Water/Sewer Bill to City of Sapphrie			\$55.64		
03 Mail Away Service Fee to Jewell Title, LLC			\$75.00		
04 Overnight/Discharge Tracking Service Fee to Jewell Title, LLC			\$99.00		
05 Propane Bill to Proulx Oil & Propane	\$560.54				
06 Real Estate Commission 10,197.50 to Ruby Group			\$10,197.50		
07 Real Estate Commission 10,197.50 to Ruby Group			\$10,197.50		
08 Second Quarter HOA Dues to Little Quarry HOA	\$510.00				
09 Title - Owner's title insurance (Optional) to Title Guaranty Company					
10 Wire Service Fee to Jewell Title, LLC	\$617.60				
			\$45.00		
I. Total Other Costs (Borrower-Paid)	\$8,947.87				
Other Costs Subtotals (E + F + G + H)	\$8,947.87		\$23,924.14		
J. TOTAL CLOSING COSTS (Borrower-Paid)	\$12,448.67				
Closing Costs Subtotals (D + I)	\$12,458.42		\$23,924.14		\$4,375.00
Lender Credits	\$-9.75				

Calculating Cash to Close

Use this table to see what has changed from your Loan Estimate

	Loan Estimate	Final	Did this change?	
Total Closing Costs (J)	\$.00	\$12,448.67	YES •	See Total Loan Costs (D) and Total Other Costs (I)
Closing Costs Paid Before Closing	\$.00	\$.00	NO	
Closing Costs Financed (Paid from your Loan Amount)	\$.00	\$.00	NO	
Down Payment / Funds from Borrower	\$.00	\$157,900.00	YES •	
Deposit	\$.00	\$-10,000.00	YES •	
Funds for Borrower	\$.00	\$.00	NO	
Seller Credits	\$.00	\$.00	NO	
Adjustments and Other Credits	\$.00	\$24.84	YES •	See details in Section K and L
Cash to Close	\$.00	\$160,373.51		

Summary of Transactions

Use this table to see a summary of your transaction

BORROWER'S TRANSACTION

K. Due from Borrower at Closing	\$420,373.51
01 Sale Price of Property	\$407,900.00
02 Sale Price of Any Personal Property Included in Sale	
03 Closing Costs Paid at Closing (J)	\$12,448.67
04	
Adjustments	
05	
06	
07	
Adjustments for Items Paid by Seller in Advance	
08 City/town taxes 03/31/2023 to 03/31/2023	\$19.36
09 County Taxes to	
10 Assessments to	
11 March HOA Dues 03/31/2023 to 03/31/2023	\$5.48
12	
13	
14	
15	
L. Paid Already by or on Behalf of Borrower at Closing	\$260,000.00
01 Deposit Ruby Group	\$10,000.00
02 Borrower's Loan Amount	\$250,000.00
03 Existing loan(s) taken subject to	
04	
05	
Other Credits	
06	
07	
Adjustments	
08	
09	
10	
11	
Adjustments for Items Unpaid by Seller	
12 City/town taxes to	
13 County taxes to	
14 Assessments to	
15	
16	
17	
CALCULATION	
Total Due from Borrower at Closing (K)	\$420,373.51
Total Paid Already by or on Behalf of Borrower at Closing (L)	-\$260,000.00
Cash to Close ☒ From ☐ To Borrower	\$160,373.51

SELLER'S TRANSACTION

M. Due to Seller at Closing	\$407,924.84
01 Sale Price of Property	\$407,900.00
02 Sale Price of Any Personal Property Included in Sale	
03	
04	
05	
06	
07	
08	
Adjustments for Items Paid by Seller in Advance	
09 City/town taxes 03/31/2023 to 03/31/2023	\$19.36
10 County taxes to	
11 Assessments to	
12 March HOA Dues 03/31/2023 to 03/31/2023	\$5.48
13	
14	
15	
16	
N. Due from Seller at Closing	\$407,924.84
01 Closing Costs Paid at Closing (J)	\$104,299.45
02 Existing loan(s) taken subject to	
03 Carrington Mortgage Services	\$303,625.39
04 Excess Deposit	
05	
06	
07	
08	
09	
10	
11	
12	
13	
Adjustments for Items Unpaid by Seller	
14 City/town taxes to	
15 County taxes to	
16 Assessments to	
17	
18	
19	
CALCULATION	
Total Due to Seller at Closing (M)	\$407,924.84
Total Due from Seller at Closing (N)	-\$327,549.53
Cash ☒ From ☐ To Seller	\$80,375.31

Additional Information About This Loan

Loan Disclosures

Assumption

If you sell or transfer this property to another person, your lender

- ☐ Will allow, under certain conditions, this person to assume this loan on the original terms.
- ☒ Will not allow assumption of this loan on the original terms.

Demand Feature

Your loan

- ☐ has a demand feature, which permits your lender to require early repayment of the loan. You should review your note for details
- ☒ does not have a demand feature.

Late Payment

If your payment is more than 15 days late, your lender will charge a late fee of 5.0000% of the monthly principal and interest payment.

Negative Amortization (Increase in Loan Amount)

Under your loan terms, you

- ☐ are scheduled to make monthly payments that do not pay all of the interest due that month. As a result, your loan amount will increase (negatively amortize), and your loan amount will likely become larger than your original loan amount. Increases in your loan amount lower the equity you have in this property.
- ☐ may have monthly payments that do not pay all of the interest due that month. If you do, your loan amount will increase (negatively amortize), and, as a result, your loan amount may become larger than your original loan amount. Increases in your loan amount lower the equity you have in this property.
- ☒ do not have a negative amortization feature.

Partial Payments

Your Lender

- ☐ May accept payments that are less than the full amount due (partial payments) and apply them to your loan.
- ☐ may hold them in a separate account until you pay the rest of the payment, and then apply the full payment to your loan.
- ☐ does not accept any partial payments

If this loan is sold, your new lender may have a different policy.

Security Interest

You are granting a security interest in

58 Constitution Way, Rochester NH 03867

You may lose this property if you do not make your payments or satisfy other obligations for this loan

Escrow Account

For now, your loan

- ☒ will have an escrow account (also called an "impound" or "trust" account) to pay the property costs listed below. Without an escrow account, you would pay them directly, possibly in one or two large payments a year. Your lender may be liable for penalties and interest for failing to make a payment.

Escrow		
Escrowed Property Costs Over Year 1	\$7,992.00	Estimated total amount over year 1 for Your escrowed property costs: Homeowner's Insurance, Property taxes
Non-Escrowed Property Costs over Year 1	\$0.00	Estimated total amount over year 1 for your non-escrowed property costs:
		You may have other property costs.
Initial Escrow Payments	\$3,070.00	A cushion for the escrow account you pay at closing. See Section G on page 2.
Monthly Escrow Payment	\$666.00	The amount included in your total monthly payment.

- ☐ you will not have an escrow account because ☐ you declined it ☐ your lender does not offer one. You must directly pay your property costs, such as taxes and homeowner's insurance. Contact your lender to ask if your loan can have an escrow account.

No Escrow		
Estimated Property Costs over Year 1		Estimated total amount over year 1. You must pay these costs directly, possibly in one or two large payments a year
Escrow Waiver Fee		

In the future,

Your property costs may change and, as a result, your escrow payment may change. You may be able to cancel your escrow account, but if you do, you must pay your property costs directly. If you fail to pay your property taxes, your state or local government may (1) impose fines and penalties or (2) place a tax lien on this property. If you fail to pay any of your property costs, your lender may (1) add the amounts to your loan balance, (2) add an escrow account to your loan, or (3) require you to pay for property insurance that the lender buys on your behalf, which likely would cost more and provide fewer benefits than you could buy on your own.

Loan Calculations

Total of Payments. Total you will have paid after you make all payments of principal, interest, mortgage insurance, and loan costs, as scheduled.	\$249,998.40
Finance Charge. The dollar amount the loan will cost you	\$-1.60
Amount Financed. The loan amount available after paying your upfront finance charge.	\$250,000.00
Annual Percentage Rate (APR). Your costs over the loan term expressed as a rate. This is not your interest rate.	
Total Interest Percentage (TIP). The total amount of interest that you will pay over the loan term as a percentage of your loan amount.	-.001%



Questions? If you have questions about the loan terms or costs on this form, use the contact information below. To get more information or make a complaint, contact the Consumer Financial Protection Bureau at www.consumerfinance.gov/mortgage-closing

Other Disclosures

Appraisal

If the property was appraised for your loan, your lender is required to give you a copy at no additional cost at least 3 days before closing. If you have not yet received it, please contact your lender at the information listed below.

Contract details

See your note and security instrument for information about

- What happens if you fail to make your payments,
- What is a default on the loan,
- Situations in which your lender can require early repayment of the loan, and
- The rules for making payments before they are due.

Liability after Foreclosure

If your lender forecloses on this property and the foreclosure does not cover the amount of unpaid balance on this loan,

- ☐ state law may protect you from liability for the unpaid balance. If you refinance or take on any additional debt on this property, you may lose this protection and have to pay any debt remaining even after foreclosure. You may want to consult a lawyer for more information.
- ☒ state law does not protect you from liability for the unpaid balance.

Refinance

Refinancing this loan will depend on your future financial situation, the property value, and market conditions. You may not be able to refinance this loan.

Tax Deductions

If you borrow more than this property is worth, the interest on the loan amount above this property's fair market value is not deductible from your federal income taxes. You should consult a tax advisor for more information.

Contact Information

	Lender	Mortgage Broker	Real Estate Broker (B)	Real Estate Broker (S)	Settlement Agent
Name	Cactus Home Loans	Opal Mortgage Corp	Ruby Group	Ruby Group	Jewell Title, LLC
Address	65 Emerald Drive Sapphire, NH 12345	45 Prospect Street Topaz, NH 23456	789 Main Street Granite, NH 56789	789 Main Street Granite, NH 56789	123 Amethyst Drive Granite, NH 56789
NMLS ID		NMLS# 123456	N/A	N/A	N/A
NH License ID			123456	123456	123456
Contact			Bill Martin	Ted Lopez	Nancy Thompson
Contact NMLS ID					
Contact NH License ID			123456	123456	
Email		lori.keymortgage@myfairpoint.net	bill.martin@Rubygroup.com	ted.lopez@Rubygroup.com	nancy@jewelltitle.net
Phone		(603) 964-1888	(800) 123-4567	(800) 123-4567	(603) 123-4567

Confirm Receipt

By signing, you are only confirming that you have received this form. You do not have to accept this loan because you have signed or received this form.

Peter Smith

Date

Jane Smith

Date

Closing Disclosure

Closing Information

Date Issued 03/31/2023
Closing Date 03/31/2023
Disbursement Date 03/31/2023
Settlement Agent Jewell Title, LLC
File # 2023-1051
Property 123 Diamond Road
Sapphire, NH 01234
Sale Price \$407,900.00

Transaction Information

Borrower Peter Smith and Jane Smith
123 Gold Road, Sapphire, NH 01234
Seller Michael Wood and Mary Wood 123 Diamond Road,
Sapphire, NH 01234

Contact Information

Real Estate Broker (B)

Name	Ruby Group
Address	789 Main Street Granite, NH 56789
NH License ID	123456
Contact	Bill Martin
Contact NH License ID	123456
Email	bill.martin@rubygroup.com
Phone	(800) 123-4567

Real Estate Broker (S)

Name	Ruby Group
Address	789 Main Street Granite, NH 56789
NH License ID	123456
Contact	Ted Lopez
Contact NH License ID	123456
Email	ted.lopez@rubygroup.com
Phone	(800) 123-4567

Settlement Agent

Name	Jewell Title, LLC
Address	123 Amethyst Drive Granite, NH 56789
NH License ID	123456
Contact	Nancy Thompson
Contact NH License ID	
Email	nancy@jewelltitle.net
Phone	(603) 123-4567

Summary of Transactions

SELLER'S TRANSACTION

Due to Seller at Closing	\$407,924.84
01 Sale Price of Property	\$407,900.00
02 Sale Price of Any Personal Property Included in Sale	
03	
04	
05	
06	
07	
08	

Adjustments for Items Paid by Seller in Advance

09 City/town taxes 03/31/2023 to 03/31/2023	\$19.38
10 County taxes to	
11 Assessments to	
12 March HOA Dues 03/31/2023 to 03/31/2023	\$5.48
13	
14	
15	
16	

Due from Seller at Closing	\$407,924.84
01 Closing Costs Paid at Closing (J)	\$104,299.45
02 Existing loan(s) taken subject to	
03 Carrington Mortgage Services	\$303,625.39
04 Excess Deposit	
05	
06	
07	
08	
09	

10	
11	
12	
13	

Adjustments for Items Unpaid by Seller

14 City/town taxes to	
15 County taxes to	
16 Assessments to	
17	
18	
19	

CALCULATION

Total Due to Seller at Closing	\$407,924.84
Total Due from Seller at Closing	-\$327,549.53
Cash ☒ From ☐ To Seller	\$80,375.31



Questions? If you have questions about the loan terms or costs on this form, use the contact information below. To get more information or make a complaint, contact the Consumer Financial Protection Bureau at www.consumerfinance.gov/mortgage-closing

Closing Cost Details

		Seller-Paid	
		At Closing	Before Closing
Loan Costs			
A. Origination Charges			
01	1250%		
02			
03			
04			
05			
06			
07			
08			
B. Services Borrower Did Not Shop For			
01			
02			
03			
04			
05			
06			
07			
08			
C. Services Borrower Did Shop For			
01			
02			
03			
04			
05			
06			
07			
08			
Other Costs			
E. Taxes and Other Government Fees			
01			
02			
03	State tax/stamps to State of New Hampshire	\$3,059.50	
04			
F. Prepays			
01			
02			
03			
04			
05			
G. Initial Escrow Payment at Closing			
01			
02			
03			
04			
05			
06			
07			
H. Other			
01	Document Preparation Fee to Jewell Title, LLC	\$195.00	
02	Final Water/Sewer Bill to City of Sapphire	\$55.64	
03	Mail Away Service Fee to Jewell Title, LLC	\$75.00	
04	Overnight/Discharge Tracking Service Fee to Jewell Title, LLC	\$99.00	
05			
06			
07			
08	Real Estate Commission 10,197.50 to Ruby Group	\$10,197.50	
09	Real Estate Commission 10,197.50 to Ruby Group	\$10,197.50	
10			
11	Wire Service Fee to Jewell Title, LLC	\$45.00	
J. TOTAL CLOSING COSTS		\$23,924.14	

Michael Wood

Date

Mary Wood

Date

EXHIBIT C

American Land Title Association

ALTA Settlement Statement - Combined
Adopted 05-01-2015

File No./Escrow No.: 2023-1051

Print Date & Time: 04/24/2023 10:19 AM

Officer/Escrow Officer: Nancy Thompson

Settlement Location: 123 Amethyst Drive
Granite, NH 56789

Jewell Title, LLC

123 Amethyst Drive
Granite, NH 56789

Property Address: 123 Diamond Road, Sapphire, NH 01234

Buyer: Peter Smith and Jane Smith

Seller: Michael Wood and Mary Wood

Lender: Cactus Home Loans

Settlement Date: March 31, 2023

Disbursement Date: March 31, 2023

Additional dates per state requirements:

Seller		Description	Borrower/Buyer	
Debit	Credit		Debit	Credit
		Financial		
	407,900.00	Sale Price of Property	407,900.00	
		Deposit Ruby Group		10,000.00
		Borrower's Loan Amount		250,000.00
		Lender Credit		9.75
		Prorations/Adjustments		
	19.36	City/town taxes from 03/31/2023 to 03/31/2023	19.36	
	5.48	March HOA Dues from 03/31/2023 to 03/31/2023	5.48	
		Loan Charges to Northeast Home Loan, LLC		
		.1250% of Loan Amount (Points) to Cactus Home Loans	312.50	
		Processing Fee to Cactus Home Loans	1,175.00	
		Appraisal Fee to Queen City Appraisals	500.00	
		Credit Report to Meridianlink Birchwood	88.55	
		Prepaid Interest to Cactus Home Loans	46.23	
		Other Loan Charges		
		Homeowner's Insurance Premium to Vermont Mutual Insurance	926.00	
		Impounds		
		Homeowner's Insurance 4 mo @ \$77.17/mo	308.68	
		Property taxes 7 mo @ \$588.83/mo	4,121.81	

Seller		Description	Borrower/Buyer	
Debit	Credit		Debit	Credit
		Aggregate Adjustment	- 1,360.49	
		Title Charges & Escrow / Settlement Charges		
		Title - Settlement Agent Fee to Jewell Title, LLC	750.00	
		Title - Owner's title insurance (Optional) to Title Guaranty Company	617.60	
		Title - Lender's title insurance to Title Guaranty Company	675.00	
		E-Recording Fee to Simplifile	9.50	
		Commission		
10,197.50		Real Estate Commission 10,197.50 to Ruby Group		
10,197.50		Real Estate Commission 10,197.50 to Ruby Group		
		Government Recording and Transfer Charges		
		Recording Fees Deed: \$41.00 Mtg: \$117.00	158.00	
3,059.50		State tax/stamps to State of New Hampshire	3,059.50	
		Payoff(s)		
303,625.39		Carrington Mortgage Services		
		Miscellaneous		
		Second Quarter HOA Dues to Little Quarry HOA	510.00	
195.00		Document Preparation Fee to Jewell Title, LLC		
45.00		Wire Service Fee to Jewell Title, LLC		
99.00		Overnight/Discharge Tracking Service Fee to Jewell Title, LLC		
75.00		Mail Away Service Fee to Jewell Title, LLC		
		Propane Bill to Proulx Oil & Propane	560.54	
55.64		Final Water/Sewer Bill to City of Sapphire		
Seller			Borrower/Buyer	
Debit	Credit		Debit	Credit
327,549.53	407,924.84	Subtotals	420,383.26	260,009.75
		Due From Borrower		160,373.51
80,375.31		Due To Seller		
407,924.84	407,924.84	Totals	420,383.26	420,383.26

Acknowledgement

We/I have carefully reviewed the ALTA Settlement Statement and find it to be a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction and further certify that I have received a copy of the ALTA Settlement Statement. We/I authorize Jewell Title, LLC to cause the funds to be disbursed in accordance with this statement.

Peter Smith

Jane Smith

Michael Wood

Mary Wood

Escrow Officer

EXHIBIT D

Document Stacking Order

Loan Closing ID form
Lender ID forms
Haz Binder
Payoffs and other items paid on CD-ie final water/sewer
Deed prep letter
Deed
ALTA Statement
Buyers CD
Sellers CD
Note
Mortgage
First payment letter
Escrow statement
Compliance Form
Hazard Insurance form(Lender)
Lender ancillary forms- ie borrower auth form, fair lending disclosures
etc
Flood Forms
Name Affidavit
Mail Form
4506t Forms
W9's
Commitment from Lender
Application
Pa34 -NH
CD57P-NH
CD57S-NH
REW 4 Form -buyer-ME
REW 2 Form seller-ME
RETT Form-ME
Mechanics Lien Affidavit
Survey Affidavit
1099 Forms
Certificate of Non-Foreign Status



The Closing Process

Attorney Kate Catalano
Cornerstone Title
603-766-8121

www.cornerstoneonline.net *we close for you*

1



Receipt of Title Order

- From Lender or Real Estate Agent.
- Includes P&S and hopefully, I.E.
- Lenders use of secure emails portals, Encompass, Clear Path.
- CFPB, regulations require strict vetting of title companies.

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2



Review P&S, LE

- Review P&S for accurate information.
- LE, accuracy of settlement fee and title insurance for tolerance violations.
- Services you can shop for vs. cannot shop for.
- Title insurance is optional.
- Review all fees as a courtesy.

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3



Initial Contact with Parties

- “We have not heard from anyone”.
- Buyers Agent, be clear who you represent.
- Listing Agent, commission statement.
- Buyers, manner of taking title. Wires.
- Sellers, deed preparation, payoff information and attendance at closing.

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4



Title Search and Results

- Goal of 5 to 7 days.
- P&S allows for 30 days to clear title.
- Inform agents when title is complete and “clear”.
- Notify buyers of restrictions, covenants and easements.
- Send title commitment and tax information to lender.

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5



Timing of Obtaining Information for CD

- Seller's payoff, current payments that are pending.
- Tax information, proration, pending payments from escrow, and current use.
- Condo or HOA dues, assessments and prorations.
 - Timeframes for obtaining depending on source
- Water, sewer, oil readings and prorations.

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6



CORNERSTONE TITLE
Your Real Estate Ally

Closing Disclosure

- Lenders are now sending CD to borrowers, either 3 or 10 days prior to closing.
- Lenders prepare CD with information the title company provides.
- Lender and title company go back and forth with CD until it “matches”.
- Prepare seller closing disclosure.
- Alta Settlement statement.

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7



CORNERSTONE TITLE
Your Real Estate Ally

Closing Instructions

- General and Specific
- Request Funds Early
- Escrow agreement
- Funding Requirements
- Unique Lender Expectations
 - Signing format, etc.

www.cornerstoneonline.net *we close for you*

8



CORNERSTONE TITLE
Your Real Estate Ally

Contact **Cornerstone Title** at 603-766-8121
www.cornerstoneonline.net
 One Greenleaf Woods, Suite 201
 Portsmouth, NH 03801


 CORNERSTONE TITLE, LLC

www.cornerstoneonline.net *we close for you*

9

Choice of Entity to Hold Title to Real Estate

*Attorney Roy W. Tilsley
Bernstein, Shur, Sawyer & Nelson, PA
Manchester, NH*

CHOICE OF ENTITY TO HOLD TITLE TO REAL ESTATE

Legal Aspects

In considering what type of entity to hold title to real estate, we must first consider what we are trying to accomplish by placing title into some type of entity. There are several factors which we need to consider in making any decision.

Probably the most important consideration concerns taxation. Entity selection should always involve the expertise of an accountant, or an attorney qualified in both state and federal taxation. While there is normally a preference for the pass-through taxation available through a LLC or a S corporation, pass-through taxation also means that profitable entities will pass their profits through to their owners on K-1s, even if the entity retains the profit. If a company is going to be profitable from the start, consideration needs to be given to this issue. The State Business Profits Tax and Business Enterprise Tax may also impact the company's bottom line in unexpected ways. Similarly, if a principal of an entity is also going to be an employee of the entity, there may be unique tax rules which affect the choice of entity. Real estate transfer taxes can also be affected by the choice of entity. Simply put, the determination of the best type(s) of entities for tax purposes should always involve the company's accountant in order to avoid hidden traps.

The most important legal consideration is normally liability protection. We place assets into separate entities in order to assure that the individual principals who own the entities will not be liable for any debts or claims arising out of ownership of the assets. Corporations, LLCs, and limited partnerships can all, if they are formed and managed properly, provide liability protection.

In assuring that their clients receive liability protection, the lawyer should be focused on proper entity formation and governance. Are the structure and logistical requirements of maintaining the entity consistent with the ability of the principals to so? Do the principals understand what their obligations are to the state for annual filings and

to customers and the public regarding corporate formalities? Are the governance requirements of the entity(ies) consistent with the size and sophistication of its management and operations? As real estate lawyers we all can agree that holding properties in separate entities is good from a liability protection perspective, as it should prevent a problem with one property from affecting the other property. On the other hand, is it really appropriate to expect a client who owns several multi-family properties as a side business to keep a separate set of books for each property. Is it sufficient to separate property ownership into one entity and property operations into another entity? Lawyers need to explain the pros and cons of these approaches to their clients. Not everyone needs, or is capable of maintaining, a bulletproof fortress.

In making recommendations on entity formation, the lawyer needs to consider early on who his/her client is. Is the lawyer representing the entity, one of the principals, or all of the principals? The lawyer should be clear up front as to who his/her client is, and when necessary and appropriate obtain any needed conflict waivers. To the extent that the lawyer does not represent certain participants, those participants should be advised to get their own counsel. Many professional liability claims arise out of client confusion during the business entity creation process. While it can be difficult to slow down the enthusiasm to get a new business off the ground and to consider uncomfortable questions about what will happen if the business doesn't do well, these things need to be considered and discussed up front.

Liability Protection

In determining what type, and how many, entities to use for a particular client, consideration needs to be given to what type of liabilities from which you are seeking protection. Are you trying to protect the real estate from claims that may be made by users of the real estate, claims of the principal's creditors, or claims arising out of unrelated activities? Or are you trying to protect the principals from claims that may arise out of ownership of the real estate? While the liability protection offered by LLCs, corporations, and limited partnerships is similar, multiple entities may be desirable to

shield certain business activities from other business activities. However, as mentioned above, there may be a practical limit as to how sophisticated a given client wants or can afford their operation to be.

The liability protection offered by corporations, partnerships, and LLCs is not limitless. The corporate veil can be pierced in certain instances, and courthouses are open from 8 am to 4 pm five days a week for those who wish to pursue this option. Clients are well advised to consider additional options to insulate themselves from liability. Adequate insurance coverage, sufficient for the most catastrophic of accidents, should always be obtained by anyone owning and managing real estate. Clients buying commercial real estate with conventional financing should understand that banks are going to want personal guarantees from some or all of the principals. The corporate veil offers very little protection from your lender. Finally, the liability protection offered by an entity is limited. The corporate veil will not necessarily protect a principal from his/her participation in a tort, criminal activity or regulatory offenses.

Consideration should also be given to creditors of the owners and what rights they will have if they seize an ownership interest. Companies will want to protect themselves from an owner's creditor gaining control of the entity and forcing a liquidation.

Following Proper Corporate Formalities

Care should be given to follow proper procedures in the creation of an entity. While an entity exists once the Secretary of State accepts the filing forms and filing fee, proper creation is still necessary to assure your clients the benefit of the corporate veil. By-laws are required for corporations. While a written membership agreement is not required for an LLC, it is highly recommended for all LLCs, especially multi-member ones. Make sure that the chosen corporate name is spelled precisely as the client wants. Clients should be advised of their annual registration obligations and deadlines. Clients should also be advised as to whether their activities may require them to file as a foreign entity in any other state.

Clients also need to understand how to follow proper corporate formalities in the operation of an entity. Clients should understand who is authorized to act on behalf of the entity, and who isn't. Clients should understand that when signing documents on behalf of the entity that they need to clearly indicate that they are signing in their corporate capacity by detailing the entity's name and their position in the entity. Clients need to be sure that their business cards, advertising, letterhead, and all forms of communication reflect the proper legal entity. The easiest way to pierce the corporate veil is to prove confusion over whether an entity properly communicated that it was doing business as an entity, as opposed to an individual or d/b/a.

Inadequate capitalization is another basis for piercing the corporate veil. Clients need to consider their initial capitalization when starting a business. While adequate capitalization does not require businesses to have money on hand to pay every obligation, there needs to be a reasonable plan in place for the company to pay its obligations prior to incurring them.

Accounting requirements should also be considered. New entities need to obtain a Federal ID number. The cost of keeping separate accounting books for multiple entities may not justify the liability protection gained by separating all business operations. Similarly, the cost involved with forming separate entities may not be justified by the additional liability protection provided.

Finally, the creation of corporations and LLCs require a disclosure regarding the offering of securities. In most cases, this is a non-issue when an entity is being formed. However, clients do need to be advised that the sale of interests in an entity is governed by securities laws and that clients should consult with an attorney prior to trying to sell interest in, or raise capital for, the entity. Nothing puts the brakes on a potential investment faster than putting it on hold for several weeks for securities registration purposes. Similarly, principals who sell interests in an entity without proper securities registration or exemption can be personally liable to the investor if the entity fails. Clients need to understand that there is no corporate veil for these violations.

Limits of Liability Protection – A Real Estate Example

In Mbahaba v. Morgan, 163 N.H. 561 (2012), the New Hampshire Supreme Court considered whether a tenant could bring an action based on lead poisoning against the individual owner of a property management company. The Plaintiff alleged that the manager had an individual duty sounding in tort to investigate, remedy, and warn regarding the dangers of lead paint. The Court found that a tort duty existed, independent of any contractual obligation between the landowner and the management company, that a landlord would exercise a reasonable degree of care for the protection of a vulnerable tenant. A party without a direct contractual duty who possesses the knowledge and authority of a landlord may be held liable for his/her own negligence. The individual defendant's management of the apartment was sufficient to establish an individual duty to avoid exposing the plaintiff to an unreasonable risk of harm.

The Court then considered whether the Defendant could be held liable for the LLC's debts under a veil piercing theory. The Court analyzed the case under the presumption that the corporate veil piercing doctrine applied to LLCs, but did not decide this issue. The Court found that there were general issues of material fact concerning the LLC's transfer of its accounts to a new company after the plaintiff brought her claims. The Defendant found that this "fresh start", although not unlawful in and of itself, could permit a finding that the limited liability identity was used to promote an injustice upon the Plaintiff. The trial court's grant of summary judgment to the individual defendant was reversed.

Limited Liability Companies – RSA 304-C

Currently, LLCs are the most common type of entity formed in New Hampshire for all purposes, including holding real estate. Essentially LLCs offer the benefits of partnership (pass through) taxation while providing the limited liability protection of a corporation. In general, LLCs are more informal than corporations. Annual meetings are not required. Operating agreements do not need to be in writing. This informality will often lead clients to believe that they can simply file paperwork with the Secretary of State's Office and do nothing further. Regardless of this informality, from a lawyer's

perspective, it is important that the LLC have a written operating agreement that details the relationship among the members. Can members freely transfer their interests or are there restrictions? What happens when a member dies or becomes disabled? Who are the members and what are their interests? Is the LLC managed by the members or a manager? Who is the manager? What obligations do the members have to the LLC? Failure to consider these issues in advance can cause problems for the LLC when the relationship between parties break down and there is no governing document to rely on to determine the rights of the parties. I constantly deal with clients who have created their own LLC but haven't even determined who the owners are, or what their interests are. Failure to consider these issues up front could lead to the corporate veil being pierced in the right circumstance.

The LLC statute, RSA 304-C *et seq.* contains a number of default provisions. These provisions may be amended in an operating agreement. Essentially, these default provisions operate as a *de facto* operating agreement for LLCs who fail to adopt their own operating agreement. While there is some comfort in having the statute to fall back on, it is still the better practice to consider provisions that make sense for the LLC. For example, one of the default provisions creates a duty of loyalty among members of the LLC. RSA 304-C:110. Members of an LLC formed to purchase a particular property may not want to have an obligation to offer all future property purchases to the same LLC. Individual members may wish to purchase other real estate in different entities with different members. As such, in the real estate context, it may make sense to have an operating agreement that eliminates this duty of loyalty.

The LLC statute also contains certain mandatory provisions which cannot be waived. In drafting an operating agreement, care should be given to not changing these mandatory provisions.

Finally while LLCs can be more informal or simpler than corporations, the LLC statute does provide the flexibility for complex ownership structures, including different classes of membership interests.

S-Corporation

A Subchapter S corporation is very similar to a limited liability company in terms of taxation, it provides pass-through taxation and limited liability. Again, as referenced above, since New Hampshire Business Profit Taxes and Business Enterprise Taxes may impact the company's bottom line, a discussion with an accountant as to the proposed business plan is important in determining which entity to use. It must be remembered that a corporation when set up with the Secretary of State is a "corporation". Subchapter S status is an election made between the corporation and the Internal Revenue Service – it is not a separate, distinct filing with the New Hampshire Secretary of State's office. There are specific filing requirements in order to make this election, and again, consultation with the client's accountant is highly recommended despite the apparent simplicity of the filing. Also, an S corporation may be valuable to allow a group of investors to become part of the business entity. In general, the corporate format with ownership interests represented by shares (as opposed to the LLC format with ownership interests represented by membership interests), is a more familiar and comfortable format to outside investors.

C-Corporation

A C corporation is the "classic" corporate entity which has its own separate tax status, unlike S corporations or limited liability companies. Taxes are paid at the corporate level and again by the shareholders when dividends are paid. C-Corporations provide limited liability protection. Because it can retain earnings and develop pension and profit sharing plans, C corporations may be helpful to some shareholders. For example, shareholders who do not want retained income passed through to them personally on a K-1 may prefer the corporate format. In addition, different classes of stock may be issued including preferred stock and non-voting stock to allow "participation without intervention". The C-Corporation will be the most familiar type of entity to outside investors.

Limited Partnerships

While limited partnerships were popular prior to advent of limited liability companies, it must be remembered that liability can flow to the general partners of a limited partnership. Oftentimes those general partners are limited liability companies or corporations. As result, the business entity itself may end up being more complex requiring two or three sets of books and management of two or three entities.

Family Limited Partnership

Family limited partnerships are quite similar to limited liability companies and are comprised exclusively of family members as general partners and members. Typically, family limited partnerships are used to allow discounting of family assets when placed into the partnership and spread among family members. These valuation discounts can be significant if the parents have significant other assets and sources of income. With the formation of a family limited partnership, the parents can make lifetime gifts of limited partnership interests and the assets within the partnership are part of a “pool of assets” rather than fractional interests in separate pieces of property. For a family business, the family limited partnership could hold the real estate as well as the manufacturing and retailing divisions. Family members could participate in the equity of that business without the need of separate interests in the various business operations.

Some of the disadvantages of family limited partnerships is that they are rather complex to administer. Income tax returns must be filed every year and historically family limited partnerships are a red flag to the IRS. An estate or gift tax form that reports the transfer of a family limited partnership interest will typically increase the IRS’s level of scrutiny for that return. It is worth remembering that a family limited partnership is probably the IRS’s least favored estate planning technique.

Finally, in some instances, a family limited partnership can divide a family when mom and dad clearly believe that the person that they picked to manage the partnership (the next general partner) is not the family member that the others believe is most suited to the task.

As a practical matter, many of the benefits associated with family limited partnerships can be accomplished through a limited liability company.

General Partnerships

General partnerships do not provide limited liability protection, and will rarely make sense for the ownership of real estate.

Estate Planning Trust

In family situations where federal estate tax is not likely to be an issue, placing real estate in an estate planning trust may be an effective means for securing that ownership of the real estate stays in the family after the death of the first generation. The appointment of a trustee upon the death of the current owners allows the current owners to have a higher level of control over the property upon their death, while still assuring that the property benefits those whom they intend to benefit. Pursuant to REV 802.02(e)(1), the presumption that the consideration for transfer tax purposes is the fair market value of the property, does not apply to a transfer to a revocable trust created as a testamentary substitute. In many cases, this will reduce the transfer tax obligation to the \$40 minimum.

The trustee of the estate planning trust is not personally liable for his/her actions as trustee, provided that he/she is acting within the scope of his/her duties. Beneficiaries are not personally liable for the trust's obligations. However, trustees are subject to a high degree of scrutiny both in their dealings with third parties and in their dealings with beneficiaries. The fiduciary duties owed to beneficiaries can be a source of personal liability for a trustee. The strictness of these duties combined with the emotion of a family relations tends to make trustees more subject to personal liability than other types of entity managers.

Real Estate Trusts

Prior to the advent of LLCs, real estate trusts were a common form used to own real estate. In these nominee trusts, the beneficiaries had the power to direct the trustee's actions. As such, they were not really trusts at all. The primary purpose of these trusts was that the beneficiaries' identities would not be disclosed in deeds or any corporate filings. The ability to hide the beneficiaries identities could provide a barrier to creditors of these beneficiaries trying to find these interests. Real Estate Trusts do not provide liability protection and are not a commonly used form of ownership these days.

When to Use Multiple Entities or Brother/Sister Entities

The most common use of multiple entities or brother/sister entities occurs when real estate becomes part of the business equation. Specifically, it is not uncommon to have a limited liability company own and manage any real estate used by the business and to lease that real estate to a separate limited liability company or corporate entity which operates the business. In addition, a family limited partnership is a possible way to hold real estate and lease it back to the business entity involved in the manufacturing and/or wholesaling and retailing of products. This keeps the different liability issues away from each company and allows maximum flexibility in creating entities for favorable tax treatment for the investors.

Succession Planning: Knowing the Exit Strategy Before Starting the Business

Brother/sister entities clearly allow for different options when planning an exit strategy. Clearly, at some point the business itself may be sold while the limited liability company, corporation or partnership could hold the real estate and continue leasing it to the new owners of the business. Likewise, in order to raise capital, the real estate may be sold retaining a long term lease of same to allow the continuation of the business itself. This would allow the real estate equity to be used rather than bank loans and could allow for significant business expansion without the attendant cost and expense of same.

If more than one person is involved in the ownership either as a partner, a member of a limited liability company or a corporate shareholder, appropriate restrictions/buy-sell agreements are important to facilitate continuance of the business in the event that those persons die, become disabled, or want to sell their business interests. Suffice it to say, it will be important to discuss these matters with a skilled estate planning attorney who can look at the entire asset/liability picture of the person transferring the interest together with the age and financial acumen of the person receiving the transfer. Oftentimes shares, membership interests or partnership interests are held by revocable or irrevocable trusts to insure the proper continuation of the business especially in the event of death.

Conclusion

Since there are several types of entities which provide similar liability protections, corporations and LLCs being the primary two, the decision of what type of entity to use to own real estate will largely be driven by tax considerations. This decision should be made in consultation with the client's accountant, as the person who is likely to sign the tax return should be involved.

While tax implications may drive this determination, non-tax lawyers still have an important role in making sure that their clients are provided with the liability protection which they are seeking. Proper formation of any entity is a must. In addition, clients need to be educated on how to operate the entity to assure that they will be able to take advantage of the corporate veil when issues arise.

REAL ESTATE ENTITY SELECTION

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LLC

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3

Legal Aspects of Business Entity Selection

1. Liability Protection
2. Structure and Governance
3. Who is your client?

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Liability Protection

1. What are you trying to protect?
2. How detailed do you want to get?
3. Other options – Insurance?
4. Limits of Liability Protection
 - a. Personal Guaranty
 - b. Piercing the Corporate Veil
 - c. Regulatory offenses



5

Formalities

1. Proper creation of entity
2. Annual registration
3. Where to register
4. Following proper formalities
5. Who is authorized to act on behalf of entity
6. Signing on behalf of the entity
7. Let the world know
8. Adequate capitalization
9. Formation cost
10. Accounting



6

Piercing the corporate veil

Ordinarily, corporate owners, like LLC members and managers, are not liable for a company's debts. *Norwood Group v. Phillips*, 149 N.H. 722, 724, 828 A.2d 300 (2003); see RSA 304-C:25. The company and its owners are considered separate legal entities. See *Norwood Group*, 149 N.H. at 724, 828 A.2d 300. In particular cases, however, a corporation and those owning all of its stock and assets will be treated as identical. *Id.* Thus, for instance, we will pierce the veil and assess individual liability where the owners have used the company to promote an injustice or fraud upon the plaintiff, as is argued here. *Id.* In such a case, we will disregard the fiction that the corporation is independent of its stockholders and treat the stockholders as the corporation's "alter egos."

Mbahaba v. Morgan

Supreme Court of New Hampshire, May 11, 2012, 163 N.H. 561

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Mbahaba

1. Piercing veil of LLC?
2. Transfer of assets after claim made. (Fraudulent transfer?)

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Structure and Governance

1. By-laws and operating agreements
2. Statutes
3. Case law?
4. Who are the owners and what are their interests?
5. Who is managing the company?
6. Can owners transfer their interests?
7. What happens if an owner dies or becomes disabled?
8. What obligations do owners have to the entity moving forward?
9. Protection from owners creditors.
10. Shareholders Agreements

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What is the nature of the business? What liability is created by business operations?

1. Production
2. Wholesaling or retailing
3. Real Estate

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Operation of the Business

1. Management of different aspects
2. Training to reduce risk
3. Insurance
4. Flexibility – ability to transfer some portions of business



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Limited Liability Companies RSA 304-C

1. More informal
2. Members
3. Managers
4. Operating Agreements
5. Mandatory and Permissive provisions
6. Liability protection and pass through taxation



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CORPORATIONS – RSA 293-A

1. Formal – By-Laws and Annual Meetings Required
2. Shareholders
3. Officers and directors
4. Shareholders Agreements
5. Statute is not as flexible
6. More traditional and comfortable format for investors?
7. Liability Protection
8. Taxation at corporate level unless Sub-Chapter S election is made

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Limited Partnerships – RSA 304-B

1. Formal formation and documents required.
2. General Partner(s) – Management and Personal Liability
3. Limited Partners – Hands off and liability protection
4. Entity as general partner? Complexity?
5. LLCs are more popular.
6. Family Limited Partnerships – Tax benefits

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Partnerships – RSA 304-A

1. Informal – No agreement necessary
2. General partners are liable
3. Registered Limited Liability Partnerships – RSA 304-A:44



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What is an entity?

1. Separate Legal Person
2. In general, dissolution does not kill an entity.



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Succession Planning

1. Sale – Entity or assets? Liabilities? What portion of operation?
2. Buy/Sell Agreements
 - Options?
 - Sales? Price and terms
 - Ownership interests held by trusts?
 - How do you keep the entity viable for the 2nd generation, while still getting money out for the 1st generation?

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Commercial Closing Process

*Attorney Suzanne Brunelle
Devine, Millimet & Branch, PA
Manchester, NH*

Real Estate 101:

Commercial Closing Documents

Presented by:
Suzanne Brunelle, Chair of the
Real Estate Practice Group
Shareholder

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1

Commercial Purchase & Sales Agreement

- Due Diligence documents and time
- Assignment of Leases, Rent Adjustments and Security Deposits
- Limitations of Liability
- Potential 1031 exchange

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Bill of Sale & General Assignment

- List of items
- Warranty of Title -no previous assignment
- No liens, pledges, security interests

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3

Loan Commitment Letter

- Borrower
- Loan Amount
- Collateral
- Term
- Purpose of Loan
- Interest Rate
- Rate Adjustment Period
- Payments
- Loan Fees
- Guarantors
- Prepayment Penalties
- Opinions

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Loan Agreement

- Description of the Loan
- Loan Terms: repayment, interest rate, late charges
- Collateral
- Guarantors
- Prepayment Penalty
- Payments
- Representations and Warranties of Borrower
- Litigation Disclosure
- Financial Disclosure
- Affirmative Covenants of the Borrower: payments, use of proceeds, financial statements, maintenance
- Special Covenants Relating to Collateral
- Negative Covenants of Borrower
- Conditions Precedent to Making of Loan
- Events of Default

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Collateral Assignment of Leases and Rents

- Assigning Leases to Lender -granting right to Lender to collect rents
- Warranties, Representations and Covenants of Assignor
- Assignor's Rights Prior to Default
- Assignee's Rights

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Assignments of Permits, Plans, Contracts, and Leases

- What type of rights are being assigned
- Gives Lender the right to step into the shoes of Borrower
- Warranties from Borrower
- Rights of Assignor Prior to Default
- Indemnification

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Security Agreement & Fixture Filing

- Granting security interest in non-real estate assets
- UCC Financing Statements
- Where inventory is located
- Warranties of Debtor
- Right of Secured Party on Default

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Guaranty

- Who is guarantor
- Consideration received
- Type of Guaranty
- Demand
- Waivers

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399-B Statement of Finance Charges

- New Hampshire RSA 399-B: 2 requires, "Any person in the business of extending credit shall furnish to each person to whom such credit is extended, concurrently with the consummation of the transaction or agreement to extend credit, a clear statement in writing setting forth the finance charges, express in dollars, rate of interest, or monthly rate of interest, or a combination thereof, to be borne by such person in connection with such extension of credit as originally scheduled".
- New Hampshire RSA 399-B: 4 states, "Whoever willfully violates any provision of RSA 399-B shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person".

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Environmental / Hazardous Indemnity Agreement

- Indemnification
- Survival

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Subordination & Non-Disturbance Agreement

- Lender acknowledge existence of Lease
- Lender agrees to allow Tenant to remain in property after a default/foreclosure
- Lender has right to cure default of Landlord
- Tenant acknowledges that Lease is subordinate to Loan
- Tenant agrees to make rental payments to Lender if notified in writing
- Tenant agrees to recognize Lender as Landlord in certain situations

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Estoppel Certificate

- Tenant recites facts with regard to Lease
- No default by Landlord
- Any amendment to Lease
- Current amount of rent

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Enforceability Opinion

- Typically an attorney licensed to practice in the state where the documents are enforceable will, after a review of the loan documents, deliver a written opinion where in the law firm/attorney indicates that the:
 - borrower is a legally existing entity
 - has the corporate/limited liability authority to execute, deliver and perform the obligations under the loan documents
 - that the execution of the loan documents has been duly authorized
 - that the execution, delivery and performance under the loan documents will not violate the organizational documents of the borrower
 - that the terms of the loan documents are enforceable against the borrower
- Many carve outs for limitations and assumptions are given with the opinion to narrow the scope

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Thank you!

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CLOSING AGENDA

SELLER:

**SELLER'S
COUNSEL:** ("Seller's Counsel")

BUYER:

**BUYER'S
COUNSEL:** ("Buyer's Counsel")

LENDER: ("Lender")

**LENDER'S
COUNSEL:** ("Lender's Counsel")

PREMISES:

**CLOSING
DATE:**

Item		Responsible	Received
A. <u>ACQUISITION DOCUMENTS</u>			
1.	Purchase and Sale Agreement	Buyer/Seller	()
2.	Amendments and Assignments of PSA (if any)	Buyer/Seller	()
3.	1031 Exchange documents (if applicable)	Buyer/Seller	()
4.	Warranty Deed	Seller's Counsel	()
5.	Authority Documents if Seller is an entity	Seller's Counsel	()
6.	Bill of Sale for Fixtures and Personal Property	Seller's Counsel	()
7.	Property Tax Receipt/Statement	Buyer's Counsel	()
8.	New Hampshire DRA Declaration of Consideration	Buyer's Counsel	()
9.	New Hampshire DRA Inventory of Property Transfer	Buyer's Counsel	()
10.	Certification of Non-Foreign Status	Buyer's Counsel	()
11.	IRS Form 1099-S	Lender's Counsel	()

	Item	Responsible	Received
12.	Title Insurance Commitment	Lender's Counsel	()
	(a) Release of Existing Liens/Mortgage Payoff Letter	Seller's Counsel	()
	(b) Termination of existing lease (if applicable)	Seller's Counsel	()
	(c) Assignment and Assumption of Leases and Security Deposits		
	i. Certified Rent Roll	Seller/Seller's Counsel	()
	ii. Copies of all Leases	Seller/Seller's Counsel	()
	iii. Copies of Tenant Ledgers	Seller/Seller's Counsel	()
	iv. Copies of Tenant Notices	Seller/Seller's Counsel	()
13.	Title Affidavits:		
	<u>For Seller:</u> Mechanics Lien/Parties in Possession	Lender's Counsel	()
	<u>For Buyer:</u> Notice of Availability	Lender's Counsel	()
14.	Other Affidavits:		
	(a) Affidavit of No Tax Lien and SSN	Lender's Counsel	()
	(b) Same Name Affidavit	Lender's Counsel	()
	(c) Other recent applicable Affidavits	Lender's Counsel	()
15.	Compliance Agreement	Lender's Counsel	()
16.	Closing Statement (with wire instructions)	Lender's Counsel	()
17.	Wire Confirmation Affidavit of Seller	Seller/Seller's Counsel	()

B. FINANCING DOCUMENTS

18.	Loan Commitment Letter	Lender	()
19.	Commercial Loan Agreement	Lender's Counsel	()
20.	Commercial Term Note - \$	Lender's Counsel	()
21.	Mortgage and Security Agreement	Lender's Counsel	()
22.	Collateral Assignment of Leases and Rents	Lender's Counsel	()
23.	Assignment of Permits, Plans, Contracts and Licenses	Lender's Counsel	()
24.	Security Agreement and Fixture Filing	Lender's Counsel	()
25.	Negative Pledge Agreement	Lender's Counsel	()
26.	Guaranty	Lender's Counsel	
	(a) Entity		()
	(b) Individual		()

Item	Responsible	Received
27. 399-B Statement of Finance Charges	Lender's Counsel	()
28. Environmental/Hazardous Indemnity Agreement	Lender's Counsel	()
29. Subordination and Non-Disturbance Agreement	Lender's Counsel	()
30. Estoppel Certificate	Lender's Counsel	()
31. Borrower's Authority Documents:		
(a) Certificate of Good Standing	Buyer's Counsel	()
(b) Operating Agreement (certified by Members)	Buyer's Counsel	()
(c) Member's Certificate	Buyer's Counsel	()
(d) Resolution/Authority	Buyer's Counsel	()
32. Guarantor's Authority Documents		
(a) Certificate of Good Standing	Buyer's Counsel	()
(b) Articles of Agreement (certified by Secretary)	Buyer's Counsel	()
(c) By-Laws (certified by Secretary)	Buyer's Counsel	()
(d) Certificate of Incumbency	Buyer's Counsel	()
(e) Borrower's Resolution/Authority	Buyer's Counsel	()
33. Opinion Letter of Borrower's Counsel	Buyer's Counsel	()
(a) Due Authority of Borrower and Corporate Guarantor	Buyer's Counsel	()
(b) Enforceability		()
(c) Use/Zoning	Buyer's Counsel	()
34. Lender's/Owner's Policy of Title Insurance (issued post-closing)	Lender's Counsel	()
35. Certificates Evidencing Property and Liability Insurance	Buyer's Counsel	()
36. Financial Statements/Tax Returns for Borrower and Guarantors	Borrower/ Guarantors	() ()
37. Flood Certification	Lender	()
38. Environmental Report	Lender	()
39. Appraisal	Lender	()

Mortgages and Foreclosure Procedures

Materials Updated by:
Attorney Suzanne Brunelle
Devine, Millimet & Branch, PA
Manchester, NH

Original Materials by:
Attorney Peter B. Rotch
McLane Middleton Professional Association
Manchester, NH

Previously Updated in 2017 by:
Attorney Timothy A. Boucher

MORTGAGES AND FORECLOSURE PROCEDURES

Materials Updated by: Suzanne Brunelle

Original Materials by: Peter Rotch (2007)

A. MORTGAGES

1. Introduction

These materials deal with the method of foreclosing a real property mortgage under New Hampshire statutes and practice. Before there can be a foreclosure, there must be a valid mortgage.

2. Definitions

a. Mortgage. "Every conveyance of lands made for the purpose of securing the payment of money or the performance of any other thing in the condition thereof stated is a mortgage within the meaning of this chapter." New Hampshire Revised Statute Annotated (hereinafter "RSA") 479:1. A mortgage is a conveyance of real estate and, as such, governed by the general laws of deeds and conveyancing with respect to format, signatures, acknowledgment and recording (see NH RSA 477).

b. Condition. No written conveyance of lands shall be defeated nor any estate encumbered by an agreement unless it is inserted in the condition of the conveyance and made part thereof, stating the sum of money to be secured or other things to be performed." RSA 479:2.

c. Performance of the condition. Upon the performance of the acts stated in the condition of a mortgage and the payment of all damages and costs arising by reason of the nonperformance of such condition according to the terms thereof, or upon the legal tender of such performance and payment, the mortgage shall be void. RSA 479:6. Upon such performance, the mortgagor is entitled to a discharge. RSA 479:7. A failure to grant the discharge of a satisfied mortgage upon request is a violation of law. RSA 479:8.

d. Redemption after condition broken. A mortgagor has an absolute right to redeem his or her land conveyed via mortgage after a breach of a condition contained in the mortgage by payment and performance of all things secured by the mortgage and the payment of all damages caused by the breach so long as

the performance, or a legal tender thereof, occurs before foreclosure. Upon written request from a mortgagor, a mortgagee must provide an accounting of all demands secured by the mortgage and of all damages caused by nonperformance of the condition. RSA 479:18. Foreclosure occurs upon the acceptance of a final bid at the foreclosure sale. Title passes upon filing of the deed and affidavit. RSA 479:26.

3. Forms of Mortgages

Many forms of mortgages are used in New Hampshire.

a. Statutory short form. The statutory short form mortgage is contained in RSA 477:29. Three key phrases are included in the form and are defined in the statute:

(1) "Mortgage covenants" are defined in RSA 477:29 to include the same covenants given by Warranty Covenants in RSA 477:27, which include:

- i. That the mortgagor was lawfully seized in fee simple of the granted premises;
- ii. That the premises were free from all encumbrances, except as stated;
- iii. That the mortgagor has good right to sell and convey property; and
- iv. That the mortgagor and his heirs will defend the same against claims. RSA 477:27.

(2) "Statutory conditions" as defined in RSA 477:29, II shall mean "Provided, nevertheless, that if the mortgagor, his heirs, executors and administrators, successors and assigns shall pay unto the mortgagee or his executors, administrators, successors or assigns the principal and interest secured by the mortgage, shall perform any and each obligation provided in the note or other instrument secured by the mortgage, until such payment and performance shall pay when due and payable all taxes, charges and assessments for which the property mortgaged may become liable, shall keep the buildings on said premises insured against perils insured in the New Hampshire standard fire policy in a sum equal to that portion of the amount secured by the mortgage allocable to said buildings, or as otherwise provided therein, for the benefit of

the mortgagee and his executors, administrators, successors and assigns in such form as he or they shall approve, deliver the policies therefor to him or them, and shall not commit or suffer any strip or waste of the mortgaged premises, or any breach of any covenant in said mortgage, then this mortgage deed shall be void.”

(3) "Statutory power of sale" permits the mortgagee to use the speediest and most efficient means of foreclosure discussed below. RSA 477:29, III.

b. FNMA/FHLMC Form. This form is widely used in New Hampshire for residential properties because it is a standard form required when mortgages are to be sold on the secondary mortgage market. The New Hampshire version of this form provides for the statutory power of sale, but also requires notice to the mortgagee prior to demand and acceleration and permits the mortgagee to reinstate the loan after default.

c. Other Forms. There is no requirement that the statutory form of mortgage be used. Many mortgage deeds use the language of an absolute conveyance, a statement of the condition and a recitation that upon the performance of the condition, the conveyance is void.

B. FORECLOSURE METHODS

1. Statutory Methods

The New Hampshire statutes provide for five methods of foreclosure. The following three methods are time-consuming and have been largely superseded by the power of sale methods. They are unique to New Hampshire and a few other states. Generally, they are only pursued where the mortgage omits the language granting the right to a statutory power of sale as stated in RSA 477:29. A mortgage should, therefore, never omit this language.

a. Entry under process- RSA 479:19, I- The requirements are:

- (1) Entry into the mortgaged premises under process of law.
- (2) Continued actual possession for one year.

b. Entry and publication- RSA 479:19, II

- (1) Peaceable entry into the mortgaged premises.
- (2) Continued, actual, peaceable possession for one year.

(3) Publishing a notice in a newspaper, printed in the same county and containing the following information:

- i. Published three weeks successively. First publication to be at least six (6) months prior to the date at which the right to redeem would be foreclosed.
- ii. The time at which possession for condition broken commenced.
- iii. The object for such possession.
- iv. The name of the mortgagor and the mortgagee.
- v. The date of the mortgage.
- vi. A description of the premises.

(4) Evidence of the entry and possession may be proven by recording an affidavit. RSA 479:21.

c. Possession and publication- RSA 479:19, III. A mortgagee in possession of the mortgaged premises shall:

(1) Publish in a newspaper printed in the county a notice which includes the following:

- i. Published three (3) weeks successively.
- ii. Stating that from and after a certain day which shall be specified in the notice and not more than four (4) weeks from and after the last day of publication of the notice, such possession will be held for condition broken and for the purpose of foreclosing the right of mortgagor and all persons claiming under him to redeem the same.
- iii. Stating the names of the mortgagor and the mortgagee.
- iv. The date of the mortgage.
- v. A description of the premises.

- (2) Retain actual, peaceable possession of the premises for one
- (1) year from and after the dates specified in the notice.

2. Miscellaneous Considerations

- a. These methods are time-consuming and difficult. Minimum of one (1) year of possession is necessary and the foreclosure is not complete until passage of the one-year period.
- b. Strict compliance with statute is necessary for foreclosure to be effective. Minor defects will void the foreclosure.
- c. Note: During the period of foreclosure, the property is virtually unmarketable.

C. FORECLOSURE BY POWER OF SALE

1. Introduction

The New Hampshire statutes provide for a foreclosure of a mortgage pursuant to power of sale. This is by far the most common and prevalent practice of foreclosure in New Hampshire. There are two methods of foreclosure by power of sale are authorized under the statute; a sale by court decree or a sale by the mortgagee following notice and publication. The power of sale method by notice and publication is the most used method in New Hampshire.

a. The Power of Sale

To be authorized to foreclose pursuant to a power of sale, a "Power of Sale" must be contained in the mortgage. RSA 479:22. Any mortgage drafted for use in New Hampshire should contain the words, "statutory power of sale" because RSA 477:29, III states that this phrase "shall be understood as giving the mortgagee ...the right upon default of the performance of the statutory condition ...or any other condition contained in the mortgage, to foreclose by sale under the provisions of RSA Ch. 479, 25-27-a inclusive." (See RSA 477:29 for form language)

b. Failure to Provide Power of Sale

If the mortgage fails to authorize a power of sale, you will be required to use one of the burdensome foreclosure modes previously discussed; an attempt to conduct a foreclosure pursuant to the non-existent power of sale would be illegal and invalid.

2. Decree For Sale

a. Statute

New Hampshire statutes provide for foreclosure pursuant to a power of sale by a court decree. See RSA 479:22-24.

b. Procedure

Bring an action, obtain a conditional judgment and in lieu of a writ of possession, request a decree that the property be sold pursuant to the power of sale.

(1) The method of sale is controlled by the court in its decree. It would be best for the petitioner in such a case to request that the sale follow the requirements of the statutory power of sale contained in RSA 479:25.

(2) Within ten (10) days of the sale, a report is made of the sale and filed with the court. The court has the right upon receipt of the report to confirm or set it aside. RSA 479:23. Interested parties may intervene at the confirmation hearing which would presumably include the mortgagor, junior lienors and guarantors. The order of the court confirming the sale is conclusive evidence that the power of sale was duly executed. RSA 479:24.

c. When utilized

Not a common method, but one that could be helpful or appropriate under certain circumstances, for example many parcels of land in several counties or a dispute over priorities.

3. Sale Under The Power

a. RSA 479:25-27-a

This is a method of foreclosure that is most widely used in New Hampshire and the method of choice barring some unusual circumstances. The procedures are governed by RSA 479:25-27a. However, there are certain steps which should be taken prior to publishing a foreclosure notice in the newspaper.

b. Case Law

A substantial portion of the foreclosure law has been determined by the case law and mere compliance with the requirements of RSA 479:25 et seq. may not be sufficient for a valid foreclosure sale. For example, in *Murphy v. Financial Development Corporation*, the Court held that, “although lenders *did* comply with the statutory requirements of notice of the foreclosure sale, these efforts were not sufficient in this case to demonstrate due diligence.” 126 N.H. 536, 543 495 A.2d 1245 (1985).

D. NEW HAMPSHIRE FORECLOSURE PROCEDURE

1. Pre-Sale Procedures. A successful foreclosure sale will depend in large part upon the time and effort devoted to understanding the law, reviewing the cases and the making preparations prior to the sale. The following should be considered in any foreclosure:

a. Review Documents. The first step in connection with any foreclosure is to carefully review the loan documents and your collateral position.

- (1) What obligations are secured?
- (2) Have all actions necessary to perfect the lien been taken? This may be the last chance to remedy defects.
- (3) What collateral secures the obligation(s)? Could it present problems? In construction projects, have architects and construction contracts been assigned?
- (4) What priority does the lien securing the obligation have? Are there senior tax or mechanics' liens?
- (5) What type of default(s) has occurred?
- (6) Are there any special notice provisions?

- (7) What defense will borrower assert?
- (8) What is the latest address of the borrower?
- (9) Does the legal description adequately and property identify the mortgaged real estate?

b. Demand and Acceleration. Has notice of the default been given to the mortgagor? Guarantors? Has the debt been accelerated? Is there a right to accelerate the debt? If no specific demand has been sent to mortgagor, it is the better practice to give written notice of demand and notice of acceleration even if not required in the note. There may be an obligation to give notice of a refusal to grant further advances and accelerate the note even if a demand note is involved. Good faith may require that Borrower be given time to find alternative financing.

NOTE: In the FNMA/FHLMC mortgage, there is a requirement that the initial notice must offer the mortgagor the right to reinstate the loan within a specific time period.

c. Verification of Addresses. Do you have current addresses for all of the mortgagors and the parties? What address do you use for the failed bank which holds a junior lien?

d. Title Search and Verification of Lien Position. A title search should be conducted to enable you to send out the notices under the statute to all lienholders, and to verify your lien. Be alert for prior mortgages that have been subordinated or otherwise not released which may not be picked up by a title search which begins with the date of the mortgage.

e. Appraisal. Review appraisals in the file. Are they current? Consider having them updated. See Murphy. As discussed subsequently, appraisals may be necessary to satisfy due diligence obligation of mortgagee.

f. Bankruptcy. Has mortgagor filed bankruptcy? The automatic stay will bar your foreclosure sale. 11 U.S.C. §362. If a bankruptcy petition has been filed, a motion for relief from stay must be filed and granted pursuant to §362(d) of the Bankruptcy Code prior to instituting foreclosure proceedings. A failure to obtain permission can lead to serious penalties. 11 U.S.C. § 362(h).

g. Impact of other Statutes. Is the loan affected by any other statute? Is the mortgagor entitled to benefits under the Servicemembers Civil Relief Act 50 USC § 3901 which invalidates the foreclosure of mortgages made while mortgagor is in military service or within the relevant lookback period prior to the foreclosure. See also NH Title Standard 6-10.

h. Ownership of Property. Is the property owned by the mortgagor exclusively? Any joint owners?

2. The Notice

a. Form of Notice. Must meet requirements of RSA 479:25 II, setting forth:

- (1) Date, time and place of sale;
- (2) Town, county, street or highway and street number of mortgaged premises (NOTE: legal description not required by statute. The elimination of the legal description will reduce costs of publication.);
- (3) The date of the mortgage;
- (4) The volume and page of the recording of the mortgage (including the Registry of Deeds where recorded);
- (5) Terms of sale;
- (6) Specific language - "You are hereby notified that you have a right to petition the superior court for the county in which the mortgaged premises are situated, with service upon the mortgagee, and upon such bond as the court may require, to enjoin the scheduled foreclosure sale."
- (7) Mortgages for owner-occupied dwellings of 4 or fewer dwelling units foreclosed after January 1, 2016 must also include contact information for the New Hampshire banking department (address and/or email) , along with the statement: "For information on getting help with housing and foreclosure issues, please call the foreclosure information hotline at _____ (insert toll-free telephone number). The hotline is a service of the New Hampshire banking department. There is no charge for this call."; and the address of mortgagee for service of process and the name of mortgagees agent for service of process.

NOTE: The list above includes the minimum information to be included under the statute but you must also include the borrowers' names in the notice.

b. Terms of Sale. Include in the notice outline of the terms of sale.

(1) Amount of Deposit. Preferable to state a specific amount rather than a percentage to allow prospective bidders to arrive with the correct deposit.

(2) Type of funds. Bank check, or "other form satisfactory to mortgagee."

(3) Disclaimers as to Title.

(4) Foreclosure mortgage priority.

(5) Any Tenant rights.

(6) Timing of Closing. Foreclosure deed and affidavit must be recorded within 60 days of sale to bar intervening creditors and to be free of any liens against the property that may be recorded 30 days before the sale or 60 days after the sale. RSA 479:26 requires the mortgagee to record the foreclosure deed.

(7) Method by which property being sold will be offered, by the piece or as a whole. Review mortgage for any requirements for method of sale.

(8) Subject to all prior liens and encumbrances.

(9) Reserve right to amend or add to terms of sale at time of sale.

c. Publication. The notice must be published once a week for three successive weeks, with the first publication not less than 20 days before the date of sale (the date of publication and date of sale are not included in the 20 days). The notice may be published in a newspaper of general circulation in the town or county where the property is situated or if the property is in more than one county, publication in a newspaper of statewide circulation is sufficient. RSA 479:25 I.

(1) Do not cut date too close. Problems and delays can and do occur with publication.

(2) Obtain publisher's certification of publication.

d. To Whom Sent. For non-residential mortgages the notice must be sent registered or certified mail (or served upon) the mortgagor at last known address at least 25 days before the sale, or in the case of residential mortgages, at least 45 days before the sale. The statute provides the term "Mortgagor" shall include the Mortgagor and any grantee, assignee, devisee or heir of the Mortgagor holding a recorded interest in the mortgaged premises subordinate to the lien of the mortgage", and provides that the interest is recorded thirty (30) days prior to the date of the sale, or in the case of a residential mortgage, at least fifty (50) days, before the date of sale, in the registry of deeds for the county in which the mortgaged premises are situated. RSA 479:25 II(a).

e. Lienholders. Notice must also be sent to any person having a lien on the premises not less than 21 days before the sale, provided that such lien is recorded 30 days prior to sale (50 days for residential mortgage) in the registry of deeds. This provision effectively requires a title up-date be conducted on the 29th day before the sale.

f. Internal Revenue Service Lien. If an IRS lien has been recorded, you must give the IRS 25 days' notice.

(1) Notice must comply with IRC §7425 and the regulations thereunder. Requires more information than in statutory notice, although generally send statutory notices as well

(2) IRS has right of redemption for 120 days after the sale. An IRS redemption is rare, and typically occurs when a mortgaged property has significant equity.

For any and all other federal liens, the United States must receive notice, along with any other notice mandated by the regulations of the particular agency to be notified.

g. Failure to give notice. See RSA 479:25 IV, which confirmed what was probably the existing law that a foreclosure sale is not invalid if a party entitled

to receive notice waives such notice either before or after the sale, or if a lienholder releases its lien.

3. Conduct of Sale

a. Location. Sale shall be held upon the mortgaged premises except where a different place is agreed upon in mortgage. RSA 479:25 III. If more than one parcel, sale may be on either parcel as specified in the notice.

b. Type of Sale. Foreclosure sales are conducted by auction, See RSA 477:32. Earlier practice has been to have mortgagee's attorney conduct sale, but case law suggests and it is common current practice that auctioneer conduct sale.

c. Procedures for Sale

(1) Read notice. Not required by statute but custom in practice.

(2) Qualify bidders. Approve form of deposit.

(3) Announce additional terms of sale.

(4) Solicit and record questions of bidders.

(5) Avoid representations. Do not represent amount of outstanding taxes, superior mortgages, etc. Those facts should be obtained by or made available to bidders.

(6) Record persons in attendance, and bidding progress. Consider tape recording or videotaping proceeding.

d. Memorandum of Sale. Have a simple Memorandum of Sale to be signed by successful bidder.

(1) Necessary under Statute of Frauds.

(2) Establishes that deposit will be held as liquidated damages if buyer defaults. Any deposits paid may be kept if default occurs. RSA 479:26 III.

(3) Confirms timing of closing and any other conditions of sale.

e. Mortgagee as Purchaser. The mortgagee is permitted to purchase the property at the sale pursuant to RSA 479:27 unless the mortgage provides otherwise.

f. Postponement of sale

(1) Sale can be postponed by mortgagee. No new publication or notice required if postponed to definite hour and day at time of sale.

(2) Factors which might cause a postponement:

i. Mortgagor offers reasonable settlement proposal (e.g. selling, refinancing or restructuring the debt)

ii. Poor weather - snowstorm, hurricane

iii. Unexpected occurrence with respect to property, fire, water damage, evidence of hazardous waste

4. Closing

a. Foreclosure Deed. Follow statutory form at RSA 477:31.

b. Affidavit. Follow statutory form at RSA 477:31.

(1) Generally includes photocopy of newspaper notice.

(2) The affidavit may be signed by authorized signatory of the mortgagee or attorney for mortgagee.

c. Timing. RSA 479:26 I requires foreclosure deed and affidavit to be recorded within 60 days from date of sale. That period is extended in case of a bankruptcy filing for ten (10) days after lifting automatic stay. The statute also provides that if such recording is, in accordance with the provisions of this chapter, made more than 60 days after the sale, the reasons therefor shall be set forth fully and particularly in the affidavit.

d. Effect. RSA 479:26 II provides that the failure to record deed and affidavit within such 60-day period "shall render the sale void and of no effect

only as to liens or other encumbrances of record ... intervening between the day of the sale and the time of recording of said deed and affidavit."

e. Transfer Tax. Transfer tax, pursuant to RSA 78-B, required on a foreclosure deed even when the mortgagee is the sole bidder and purchaser at the sale.

f. Right to possession. Upon the recording of the foreclosure deed, the purchaser has the right to possession of the property and may bring a possessory action if the mortgagor remains in possession. RSA 540:12.

g. Interpleader. In the event the purchase price exceeds the mortgage obligation and costs, the excess must be distributed in order of priority to subsequent lienholders, and then to the mortgagor. If agreement cannot be reached with all parties interpleading funds to court will be necessary.

Real Estate 101:

Mortgages and Foreclosures

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Definitions

- Mortgage
- Condition
- Performance of the Condition
- Redemption After Condition Broken

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Forms of Mortgages

- Statutory Short Form
 - Mortgage Covenants
 - Statutory Conditions
 - Statutory Power of Sale
- FNMA/FHLMC Form
- Other Forms

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Foreclosure - Methods

- Statutory Methods
 - Entry Under Process – RSA 479:19, I
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- Miscellaneous Considerations

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Foreclosure by Power of Sale

- | | |
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| • Introduction | • Decree for Sale |
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Foreclosure by Power of Sale (cont...)

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 - RSA 479:25-27-a
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New Hampshire Foreclosure Procedure

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New Hampshire Foreclosure Procedure (cont...)

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Thank you!

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Transfer Tax – Revenue Stamps and Forms

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TRANSFER TAX – REVENUE STAMPS AND FORMS

In General

RSA Chapter 78-B sets forth the provisions of the so-called Transfer Tax Statute. The New Hampshire Department of Revenue Administration has promulgated rules interpreting the Statute (Rev. 800 et seq). The tax applies to transfer of interest in real estate unless specifically excepted. The current rate is \$1.50 per hundred split between Buyer and Seller, with a below \$4,000 consideration minimum tax of \$40.00.

Definitions

The tax is imposed on “the sale, granting and transfer of real estate” including transfers by operation of law. The phrase “sale, granting and transfer of a real estate interest is defined as encompassing every contractual transfer of real estate from a person or entity to another person or entity whether or not either person or entity is controlled directly or indirectly by the other person or entity in the transfer (RSA 78-B:1-a V). The term “contractual transfer” is in turn defined as a “bargained for exchange of all transfers of real estate or an interest thereon . . .” (RSA 78-B:1-a II). Although “bargained for exchange” is not statutorily defined, the statute provides a non-exclusive list of examples of “contractual transfers”.

The transfer tax is computed based on the “price or consideration” for a “sale, grant or transfer of an interest in real estate”. The term price or consideration is defined as the amount of money or other property and services given in exchange for real estate and measured at a time immediately after the transfer of real estate.

A non-contractual transfer is a transfer which satisfies the three elements of a gift transfer, namely donative intent, actual delivery and immediate relinquishment of control (RSA 78-B:1 a III).

Exemptions

RSA 78-B:2 sets forth the exemptions where the tax is not imposed on the following.

- To a transfer of title to the state, a state agency, a county, a city, a town, a school district, or a village district;
- To the United States, or any agency or instrumentality thereof;
- To a mortgage or other instrument given to secure payment of a debt or obligation;

- To a discharge of mortgage or other instrument solely to release security for a debt or obligation;
- To a deed or other instrument which corrects a deed or other instrument previously given;
- To a deed given by a collector of taxes for property purchased at a tax sale;
- To a transfer of title from one organization exempt from federal taxation under section 501 of the United States Internal Revenue Code, as amended, to another organization which is also exempt from federal taxation under section 501, when both the transfer organization and the transferee organization are created by or result from the corporate reorganization of a licensed, general, or specialty hospital;
- To a transfer of title to the Trust for New Hampshire Lands when the Trust for New Hampshire Lands acquires the real estate for the purpose of transferring title to the real estate so acquired to the land conservation investment program, RSA 221-A, prior to June 30, 1993. This exception only applies to the Trust for New Hampshire Lands. The seller, grantor, assignor, or transferor of any real estate to the Trust is liable for payment of the tax;
- To non-contractual transfers;
- To transfers of cemetery plots;
- To transfers that occur by devise or by the laws regulating intestate succession and descent or by the death of any co-tenant in real estate held by joint tenancies;
- To the beneficiary of a partnership interest where the partnership dissolves by operation of law due to the death of a partner;
- To a transfer of title between spouses pursuant to a final decree of divorce or nullity;
- to an otherwise taxable transfer between a land trust, incorporated under RSA 292 and established to provide affordable housing to low-income people, and a housing cooperative, incorporated under RSA 301-A, if the transfer tax is paid by the trust on the initial purchase of the property.
- To a deed transferred in accordance with RSA 80:89, VI (the reacquisition of tax title by a former owner).

- To a lease, including any sales, transfers, or assignments of any interest in the leased property, where the term of the lease, including all renewals, is less than 99 years.
- To a transfer of title provided that (1) The transfer of title, where no consideration is exchanged, is coincidental to a change in the transferor's form of organization to that of the transferee; (2) As a result of the change in the transferor's form of organization, the assets and liabilities of the transferor immediately preceding the change in form of organization and the assets and liabilities of the transferee immediately following the change in form of organization are the same; and (3) At the time of the transfer of title, the owner or owners of the transferor and the owner or owners of the transferee, and the respective ownership percentages of each, are identical. A beneficial interest in a trust shall be considered an ownership interest in such trust.
- To a transfer of title from the owners of an entity to the entity, or from the entity to the owners of the entity; provided that (a) No consideration is exchanged for the transfer of the real estate; and (b) The direct or indirect owners of the parties to the transfer remain the same before and after the transfer of the real estate, the respective ownership percentages of each are identical, and the combined assets and liabilities of the transferor and transferee remain the same except with respect to the real estate.
- To a direct or indirect transfer of an interest in real property, provided that the real estate transfer tax was paid by the buyer or seller, or an affiliate of either, when the real property title was acquired, unless otherwise exempt pursuant to this section, and the transfer is made in connection with the commencement, syndication, development, re-syndication, or conclusion of investment financing related to any of the following:
 - (1)(A)(i) A federal low-income housing tax credit project, as defined in Section 42 of the Internal Revenue Code of 1986, as amended; or
 - (ii) A project funded with federal grants made to states for low-income housing projects in lieu of low-income housing tax credits under Section 1602 of the American Recovery and Reinvestment Act of 2009 ;
 - (B) Provided that the project under subparagraph (A)(i) or (A)(ii) remains subject to an extended low-income housing commitment in accordance with the provisions of Section 42(h)(6) of the Internal Revenue Code of 1986, as amended.
 - (2) A Rental Assistance Demonstration (RAD) public housing conversion under the federal Consolidated and Further Continuing Appropriations Act of 2012, as amended.
 - (3) Such other federal, state, or local financing program requiring that the real estate remains subject to land use restriction and rental housing affordability covenants which limit allowable rents charged to individuals or

families, consistent with (i) RSA 674:58, IV, pertaining to workforce housing; or (ii) as otherwise required under the applicable federal, state, or local program.

(b) For purposes of this paragraph, "affiliate" means any entity which controls or is controlled by, or is under common control with, another entity. For purposes of this definition, an entity controls another entity when the first entity possesses or exercises directly, or indirectly through one or more other affiliates or related entities, the power to direct the management and policies of the other entity, whether through the ownership of voting rights, membership, or the power to appoint members, trustees, or directors, by contract or otherwise.

XXIV. To a lease of any term by and between the Pease development authority and any other person, including any sales, transfers, or assignments of any interest in the leased property.

Revocable Trusts

Revocable trusts are placed into the contractual transfers category (Rev. 802.02) since the elements of relinquishment of control necessary for a gift is absent. The measure of the tax is the actual price or consideration. However in determining the actual price or consideration for the transfer to or from a revocable trust, the Department of Revenue Administration cannot presume that the price or consideration is the fair market value where the beneficial interest in the trust is not transferable, and the trust is created or funded for estate planning purposes as a testamentary substitute.

Declaration of Consideration and Inventory of Property Transfer Forms

Form CD-57S (Real Estate Transfer Tax Declaration of Consideration Real Estate Seller) and CD-57 P (Real Estate Transfer Tax Declaration of Consideration Real Estate Purchaser) promulgated by the Department of Revenue Administration is used to report the amount of tax paid and other details of the transfer and the transaction. The forms and instructions are available on the NH Department of Revenue website here <https://www.revenue.nh.gov/forms/real-estate.htm>. E-filing is available. Separate forms are available on the website for use with Real Estate Holding Companies. The PA-34, asks if the sales price was for fair market value. If the transfer is exempt from the transfer tax, you will want to state the exemption to the tax in this section.

Form PA-34 (Inventory of Property Transfer) is a questionnaire about property characteristics and exchange of value. This form is to be completed by the purchaser, grantee or assignee in every deed. There are no exceptions for the obligation to file.

Real Estate Holding Companies

In 2006 the statute was amended with respect to real estate holding companies to broaden the categories of transactions subject to tax. The statute provides that the

tax applies to transfers of interests in real estate holding companies to the extent of the ownership interest of the entity in the real estate holding company. (RSA 78-B:1-a V) This makes the tax applicable to sales of interests in entities involved in real estate holding companies as well as sales of interests in the company itself. A real estate holding company is now defined as any entity that is engaged principally in the business of owning, holding, selling or leasing real estate, and which owns real estate or an interest in real estate in New Hampshire.

Thus, if an LLC owns and leases space in an office building it is a real estate holding company. A transfer of an interest in that LLC is taxable.

If the office building were owned by an LLC which is turn is owned by other LLC's, any sale or transfer of an interest in any of the LLC's would be taxable. The fair market value of the real estate is the measure against which the tax applies. A sale of less than 100% of the entire interest is proportionately allocated. Thus a sale of 50% of the interest would result in a tax against 50% of the value. Perhaps the actual price paid should be the proper basis but the DRA Regulations do not seem to accommodate that measure.

DEEDS

The Registries require that the deed includes a statement explaining the reason for the transfer tax exemption. Below is sample language to include in deeds when an exemption applies to the transfer tax.

Transferring deeds to a trust: This is a non-contractual transfer for estate planning purposes and thus is not subject to transfer tax pursuant to NH RSA 78-B:2 XXI .

Transferring deeds between individuals and their own LLC: This is a transfer for no consideration and is recorded with no tax stamps as a transfer that is exempt pursuant to NH R.S.A. 78-B:2 (XXI) and/or 78-B:2 (XXII).

Transferring deed due to a divorce: This transfer is pursuant to a divorce decree and d pursuant to 78-B:2 XIII and no transfer tax is due. Docket number XXXX.



REAL ESTATE TRANSFER TAX DECLARATION OF CONSIDERATION REAL ESTATE SELLER (GRANTOR)

STEP 1 - SELLER

Grantor / Assignor / Transferor (use new mailing address)

Entity Type - (Check One)

☐ Individual

☒ Joint

☐ Partnership

☐ Corporation

☐ Trust

☐ LLC

☐ Original Return

☐ Amended Return

Seller 1 - Last Name / Entity

Wood

First Name

Michael

FEIN / SSN

Seller 2 - Last Name / Entity

Wood

First Name

Mary

FEIN / SSN

Street No.

123

Street Name

Diamond Road

Apt / Unit

Phone Number

City

Sapphire

State

NH

Zip Code + 4 (or Canadian Postal Code)

01234

STEP 2 - PURCHASER

Grantee / Assignee / Transferee

Last Name / Entity

Smith

First Name

Peter

Last Name / Entity

Smith

First Name

Jane

STEP 3 - REAL ESTATE

Municipality

Sapphire

County

Stone

Street No.

123

Street Name

Diamond Road

Apt / Unit

Multi Town Sale?

☐ Yes

☒ No

If Yes, list municipalities:

STEP 4 - DEED

Transfer Date

03312023

Recording Date

03312023

Book No.

1234

Page No.

123

Deed Type
(Check One)

☒ Warranty

☐ Quitclaim

☐ Mortgage

☐ Sheriff's

☐ Tax

☐ Foreclosure

☐ Commissioner's

☐ Fiduciary

☐ Probate

☐ In Lieu of Foreclosure

Smith

123

Gold Road

Sapphire

03312023

256

61-14



New Hampshire
Department of
Revenue Administration

CD-57-S



0CD57S1521862

REAL ESTATE TRANSFER TAX DECLARATION OF CONSIDERATION REAL ESTATE SELLER (GRANTOR)

STEP 5 - TAX AMOUNT

a) Full price or consideration for the real estate

407900.00

b) Divide Line 5(a) by \$100

4079.00

c) Tax rate per \$100 at time of transfer

0.75

d) Subtotal of Seller's tax (Minimum of \$20 for all considerations \$4,000 or less, per RSA 78-B:1)

3059.5

e) Total tax paid to County on behalf of Seller and Purchaser

6119

Are you claiming tax
exemption under
RSA 78-B:2?

☐ Yes ☐ No

DO NOT file form CD-57-S for transfers specifically exempted from taxation under RSA 78-B:2, except transfers exempted by RSA 78-B:2, IX. Form CD-57-S must be filed for non-contractual transfers although exempted under RSA 78-b:2, IX.

STEP 6 - TAXPAYER'S SIGNATURE & INFORMATION (Seller's Signature is Required)

Under penalties of perjury, I declare that I have examined this return and to the best of my belief it is true, correct and complete.

Seller 1 Signature

MMDDYYYY

Seller 1 Printed Name

Michael Wood

Seller 2 Signature

MMDDYYYY

Seller 2 Printed Name

Mary Wood

Witness Signature

MMDDYYYY

Witness Printed Name

Smith

123

Gold Road

Sapphire

03312023

256

61-14



New Hampshire
Department of
Revenue Administration

CD-57-S



REAL ESTATE TRANSFER TAX DECLARATION OF CONSIDERATION REAL ESTATE SELLER (GRANTOR)

STEP 7 - PREPARER'S SIGNATURE & INFORMATION (If prepared by someone other than the Seller)

☐ **Power of Attorney (POA):** By checking this box and signing Step 6, you authorize the preparer listed on this return to act on your behalf for this return only, including entering the book and page numbers and filing this return electronically.

Under penalties of perjury, I declare that I have examined this return and to the best of my belief it is true, correct and complete. (If prepared by a person other than the taxpayer, this declaration is based on all information of which the preparer has knowledge.)

Preparer's Signature (if other than taxpayer)

MMDDYYYY

03/31/2023

Preparer's Printed Name (required if POA box is checked)

Nancy Thompson

Entity

Jewell Title, LLC

Last Name

Thompson

First Name

Nancy

Street No.

123

Street Name

Amethyst Drive

Apt / Unit

Phone Number

603-123-4567

City

Granite

State

NH

Zip Code + 4 (or Canadian Postal Code)

56789

Smith

123

Gold Road

Sapphire

03312023

256

61-14



New Hampshire
Department of
Revenue Administration

CD-57-P



REAL ESTATE TRANSFER TAX DECLARATION OF CONSIDERATION REAL ESTATE PURCHASER (GRANTEE)

STEP 1 - PURCHASER

Grantee / Assignee / Transferee (use new mailing address)

Entity Type - (Check One)

☐ Individual

☒ Joint

☐ Partnership

☐ Corporation

☐ Trust

☐ LLC

☐ Original Return

☐ Amended Return

Last Name / Entity

Smith

First Name

Peter

FEIN / SSN

Last Name / Entity

Smith

First Name

Jane

FEIN / SSN

Street No.

123

Street Name

Gold Road

Apt / Unit

Phone Number

City

Sapphire

State

NH

Zip Code + 4 (or Canadian Postal Code)

01234

STEP 2 - SELLER

Grantor / Assignor / Transferor

Last Name / Entity

Wood

First Name

Michael

Last Name / Entity

Mary

First Name

Wood

STEP 3 - REAL ESTATE

Municipality

Sapphire

County

Stone

Street No.

123

Street Name

Diamond Road

Apt / Unit

Multi Town Sale?

☐ Yes

☒ No

If Yes, list municipalities:

STEP 4 - DEED

Transfer Date

03312023

Recording Date

03312023

Book No.

1234

Page No.

123

Deed Type
(Check One)

☒ Warranty

☐ Quitclaim

☐ Mortgage

☐ Sheriff's

☐ Tax

☐ Foreclosure

☐ Commissioner's

☐ Fiduciary

☐ Probate

☐ In Lieu of Foreclosure

Smith

123

Gold Road

118429881

Sapphire

03312023

256

61-14



New Hampshire
Department of
Revenue Administration

CD-57-P



REAL ESTATE TRANSFER TAX DECLARATION OF CONSIDERATION REAL ESTATE PURCHASER (GRANTEE)

STEP 5 - TAX AMOUNT

a) Full price or consideration for the real estate

407900.00

b) Divide Line 5(a) by \$100

4079.00

c) Tax rate per \$100 at time of transfer

0.75

d) Subtotal of Purchaser's tax (Minimum of \$20 for all considerations \$4,000 or less, per RSA 78-B:1)

3059.5

e) Total tax paid to County on behalf of Seller and Purchaser

6119

Are you claiming tax
exemption under
RSA 78-B:2?

☐ Yes ☐ No

DO NOT file form CD-57-P for transfers specifically exempted from taxation under RSA 78-B:2, except transfers exempted by RSA 78-B:2, IX. Form CD-57-P must be filed for non-contractual transfers although exempted under RSA 78-B:2, IX.

STEP 6 - TAXPAYER'S SIGNATURE & INFORMATION(Purchaser's Signature is Required)

Under penalties of perjury, I declare that I have examined this return and to the best of my belief it is true, correct and complete.

Purchaser 1 Signature

MMDDYYYY

Purchaser 1 Printed Name

Peter Smith

Purchaser 2 Signature

MMDDYYYY

Purchaser 2 Printed Name

Jane Smith

Witness Signature

MMDDYYYY

Witness Printed Name

Smith

123

Gold Road

118429881

Sapphire

03312023

256

61-14



New Hampshire
Department of
Revenue Administration

CD-57-P



REAL ESTATE TRANSFER TAX DECLARATION OF CONSIDERATION REAL ESTATE PURCHASER (GRANTEE)
Signature Page

STEP 7 - PREPARER'S SIGNATURE & INFORMATION (If prepared by someone other than the Purchaser)

☐ **Power of Attorney (POA):** By checking this box and signing Step 6, you authorize the preparer listed on this return to act on your behalf for this return only, including entering the book and page numbers and filing this return electronically.

Under penalties of perjury, I declare that I have examined this return and to the best of my belief it is true, correct and complete. (If prepared by a person other than the taxpayer, this declaration is based on all information of which the preparer has knowledge.)

Preparer's Signature (if other than taxpayer)

MMDDYYYY

03/31/2023

Preparer's Printed Name (required if POA box is checked)

Nancy Thompson

Entity

Jewell Title, LLC

Last Name

Thompson

First Name

Nancy

Street No.

123

Street Name

Amethyst Drive

Apt / Unit

Phone Number

603-123-4567

City

Granite

State

NH

Zip Code + 4 (or Canadian Postal Code)

56789

Smith

123

Gold Road

118429881

Sapphire

03312023

256

61-14



INVENTORY OF PROPERTY TRANSFER

STEP 1 - PURCHASER(S) Grantee (use new primary mailing address)

Entity Type - (Check One) ☐ Individual ☒ Joint ☐ Partnership ☐ Corporation ☐ Trust ☐ LLC ☐ Holding Company

Last Name / Entity

Smith

First Name

Peter

Last Name / Entity

Smith

First Name

Jane

Last Name / Entity

First Name

Street No.

123

Street Name

Gold Road

Apt / Unit

Phone Number

City

Sapphire

State

NH

Zip Code + 4 (or Canadian Postal Code)

01234

Email (optional)

STEP 2 - SELLER(S) Grantor (use new primary mailing address)

Entity Type - (Check One) ☐ Individual ☒ Joint ☐ Partnership ☐ Corporation ☐ Trust ☐ LLC ☐ Holding Company

Last Name / Entity

Wood

First Name

Michael

Last Name / Entity

Wood

First Name

Mary

Last Name / Entity

First Name

Street No.

123

Street Name

Diamond Road

Apt / Unit

Phone Number

City

Sapphire

State

NH

Zip Code + 4 (or Canadian Postal Code)

01234

Email (optional)

STEP 3 - REAL ESTATE

Municipality

Sapphire

County

Stone

Street No.

123

Street Name

Diamond Road

Apt / Unit

Smith

123

Gold Road

Wood

Sapphire

03312023

256

61-14



New Hampshire
Department of
Revenue Administration

PA-34



00PA341428475

INVENTORY OF PROPERTY TRANSFER

STEP 3 - REAL ESTATE (continued)

Tax Map

256

Block

Lot

61-14

Acreage

0

Number of Parcels Purchased

1

Multi Town Sale?

If Yes, list municipalities:

☐ Yes ☐ No

Property Use
(Check One):



Residential



Commercial



Mixed Res / Comm



Industrial



Other

Property Type
(Check All
That Apply)



Land Only



Building Only



Land & Building



Condo



Condo



Land & Manufactured Housing



Manufactured Housing



Multi-unit



Timber Rights



Mineral Rights

Features
(Check One):



Waterfront



Water Access

If multi-unit building, how many units?

STEP 4 - DEED

Transfer Date

03312023

Recording Date

03312023

Book No.

1234

Page No.

123

Sale Price

407900.00

Type of



Warranty



Quitclaim



Mortgage



Sheriff's



Tax



Foreclosure

Transfer

(Check One)



Commissioner's



Fiduciary



Probate



In Lieu of Foreclosure

STEP 5 - TRANSACTION DETAIL

Were there any special circumstances in the transfer which suggest that the full price or consideration of the property was either more or less than its fair market value?



Yes



No

If Yes, please choose all that apply from the list below or select "other" and fill in an explanation



Family Sale



Sheriff's Sale



Business Affiliates



Bank Sale



Easement



Life Estate / Trust



Time Share



Government Sale



Abutter Sale



Other

Did the sale transfer 100% interest in the property?



Yes



No

If no what % interest transferred?

Did the sale price above include a consideration for non-taxable personal property?



Yes



No

If yes, indicate value below:

Furnishings

Other

Inventory

Timber

Was the sale price reduced because of a Land Use Change Tax?



Yes



No

If yes, by what amount?

Do you consider the selling price to be fair market value?



Yes



No

If no, explain

Have you or will you make improvements to the property after the purchase but before April 1st?



Yes



No

If yes please indicate approximate cost of these improvements

Occupancy and status of structure



No Structure



New Construction (1 yr)



Previously Occupied

Will the property serve as your primary residence?



Yes



No

Smith

123 Gold Road

Wood

Sapphire

03312023

256



INVENTORY OF PROPERTY TRANSFER

STEP 6 - PREPARER

Entity

Jewell Title, LLC

Last Name

Thompson

First Name

Nancy

Street No.

123

Street Name

123 Amethyst Drive

Apt / Unit

Phone Number

603-123-4567

City

Granite

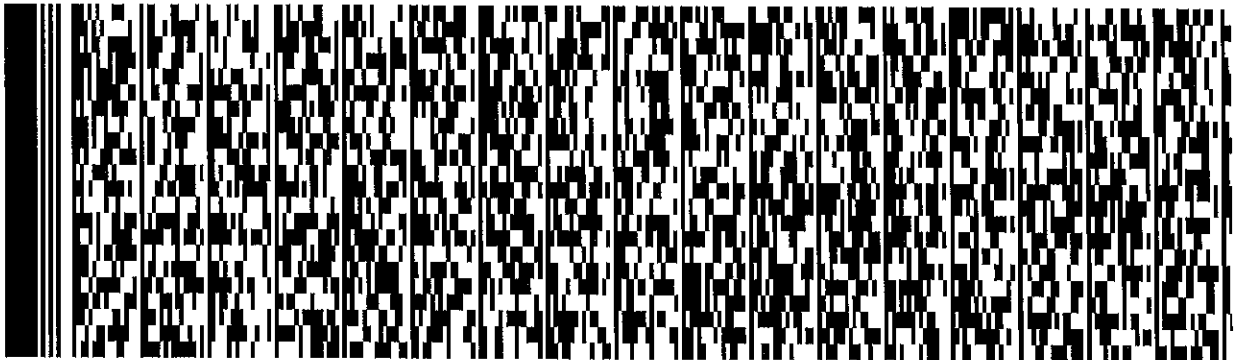
State

NH

Zip Code + 4 (or Canadian Postal Code)

56789

Email (optional)



CO ID	Book	Page	Recording Date
09	1234	123	03312023

Smith

123

Gold Road

Wood

Sapphire

03312023

256



INVENTORY OF PROPERTY TRANSFER
Signature Page

STEP 7 - SIGNATURES

☐ **Power of Attorney (POA):** By checking this box and signing below, you authorize the preparer listed on this document to act on your behalf for this document only, including entering the book and page numbers and filing this document electronically.

TAXPAYER'S SIGNATURE & INFORMATION(Purchaser's Signature is Required)

Under penalties of perjury, I declare that I have examined this return and to the best of my belief it is true, correct and complete.

Purchaser's Signature

MMDDYYYY

Purchaser's Printed Name

Peter Smith

Purchaser 2 Signature

MMDDYYYY

Purchaser 2 Printed Name

Jane Smith

Purchaser 3 Signature

MMDDYYYY

Purchaser 3 Printed Name

PREPARER'S SIGNATURE & INFORMATION(If prepared by someone other than the Purchaser)

Under penalties of perjury, I declare that I have examined this document and to the best of my belief it is true, correct and complete. (If prepared by a person other than the taxpayer, this declaration is based on all information of which the preparer has knowledge.)

Preparer's Signature (if other than taxpayer)

MMDDYYYY

03/31/2023

Preparer's Printed Name (required if POA box is checked)

Nancy Thompson



CO ID	Book	Page	Recording Date
09	1234	123	03312023

Buyer Last Name

Smith

Buyer Street No

123

Buyer Street Name

Gold Road

Municipality

Sapphire

Transfer Date

03312023

Tax Map

256

Block

Lot

61-14

Adverse Possession – Prescriptive Rights and Easements

Materials Updated by:

Attorney Amy Manzelli

BCM Environmental & Land Law, PLLC

Concord, NH

and

Attorney Roy W. Tilsley

Bernstein, Shur, Sawyer & Nelson, PA

Manchester, NH

Original Materials by:

Attorney Stephan T. Nix

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Gilford, NH

Previously Updated in 2017 by:

Attorney Timothy A. Boucher

ADVERSE POSSESSION

To acquire title to real property by adverse possession, the possessor must show twenty years of adverse, continuous, exclusive, and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made.

Mastroianni v. Wercinski, 158 N.H. 380 (2009).

1. The theory of adverse possession (from Harvard Law Review – 1918):

TITLE by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it. When the novice is told that by the weight of authority not even good faith is a requisite, the doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law.

"For true it is, that neither fraud nor
might Can make a title where there
wanteth right."

The policy of statutes of limitation is something not always clearly appreciated. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: "English lawyers regard not the merit of the possessor, but the demerit of the one out of possession." It has been suggested, on the other hand, that the policy is to reward those using the land in a way beneficial to the community. This takes too much account of the individual case. The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.

Title by Adverse Possession, 32 Harv. L. Rev. 135 (1918).

The Harvard article articulates several theories behind the doctrine including:

- The quieting of titles to real property that would otherwise remain unsettled for very long periods of time.
- The economic theory where real property is a driving economic force and those in actual physical possession should be "rewarded" with clear title.
See Thomas J. Miceli & CF Simians. An Economic Theory of Adverse Possession, 15 Int'l Rev. L. & Econ 161 (1995).

2. Prescriptive Easements

Prescriptive easements contrast with adverse possession in that only a non-possessory right of use is acquired through the prescriptive use. In establishing a prescriptive easement, it is not necessary to exclude the fee owner from the underlying possession or from similar use.

An easement is a nonpossessory interest in real property that can be created by written conveyance, prescription or implication."

Soukup v. Brooks, 159 N.H. 9 (2009)

To establish a prescriptive easement, the defendant must prove by the balance of the probabilities that she used the plaintiff's driveway for twenty years and that her use was adverse, continuous, and uninterrupted . . . in such a manner as to give notice to [the plaintiff] that an adverse claim was being made to it. *Bonardi v. Kazmirchuk*, 146 N.H. 649 (2001).

Town employees' plowing of disputed area between house and barn on landowner's property was not evidence of adverse public use, as necessary to establish that area had become part of a public highway by prescription; landowner would not have understood town to be making claim of right to his property by such conduct, since town asserted that plowing and maintenance done on the area was simply to reach an area where the plow trucks on the public highway could safely turn around.

Town of Dunbarton v. Guiney, 173 N.H. 1, 236 A.3d 860 (2020)

3. The Elements of Adverse Possession and Prescription

a. The 20-year element emanates from RSA **508:2, I Real Actions**,

No action for the recovery of real estate shall be brought after 20 years from the time the right to recover first accrued to the party claiming it or to some persons under whom the party claims. The 20-year limit is essentially a statute of limitations.

b. Possession must be Adverse

From
Mastoianti:

A use of land is adverse when made under a claim of right where no right exists. ...

Adverse use has been defined as a use without license or permission

... Adverse use is trespassory in nature. ...

Use is 'trespassory' if it consists of a wrong which the fee holder can prevent or for which he can obtain damages by means of legal action.

...

The widely accepted view is that an adverse claim, otherwise valid, is not defeated by an initial mistake as to where the claimant's property ends and the neighbor's property begins. ...

Thus, where a landowner-claimant holds actual possession of a disputed strip of land under a claim of right openly, exclusively, and continuously for the statutory period, mistakenly believing that he or she is holding to the true line, the landowner-claimant acquires the neighbor's title up to that line, and it is immaterial what the landowner-claimant might have claimed in the absence of a mistake. ...

Support for the majority rule lies within our jurisprudence. We have previously recognized that in determining whether use was adverse, it matters not, that the possessor was mistaken, and had he been better informed, would not have entered on the land....

It is well established that acquiescence may establish a boundary where the parties for twenty years or more have recognized a certain boundary as being the true one and have occupied their respective lots accordingly. ... *Mastroianni v. Wercinski*, 158 N.H. 380 (2009).

c. Notice to Record Owner

[T]he element of notoriety, which rests on the public policy that existing rights in land should not be lost unless the owner has been put on guard sufficiently to enable him or her to take preventive action with reasonable promptness. ...

Subjective beliefs regarding the location of boundaries do not impair in any way the adversely possessed party's ability to gain notice of the possession. ...

If the owner actually knows of the possession, there is actual notice." ... Thus, when a possessor is actually in possession of the disputed property, the open and notorious requirement is normally met. *Mastroianni v. Wercinski*, 158 N.H. 380 (2009).

d. Continuous and uninterrupted use.

[I]t is well settled that adverse possession may be acquired by "tacking" that of several owners. *Page v. Downs*, 115 N.H. 373 (1975).

The doctrine of "tacking," ... is one which permits an adverse possessor to add his period of possession to that of a prior adverse possessor, in order to establish continuous adverse possession for the prescriptive period. *Fagan v. Grady*, 101 N.H. 18 (1957).

Municipal tax deeds (i) toll the running of the 20-year statute of limitations and (ii) extinguish prescriptive periods accumulated prior to the tax deed.

In [*Kellison v. McIsaac*, 131 N.H. 675 (1989)] we held that a municipality holding title to land through tax foreclosure proceedings, without more, holds the property in a governmental capacity for public use, thereby preventing the running of the statute of limitations in an adverse possession case. Although we decided that a municipality's ownership interrupts the running of the statute of limitations, we did not determine the effect or scope of such interruption on the twenty-year prescriptive period. Consistent with established authority in this and other jurisdictions, we now hold that a municipality's title to land through tax foreclosure proceedings extinguishes the prescriptive period accumulated prior to a tax sale.

Burke v. Pierro, 159 N.H. 504, 2009.

Permission tolls the running of time:

In this case, the record does not reveal that [Adverse Claimant] took any action, following the issuance of the letter [granting permission] by [Record Owner], to put her on notice of his adverse claim. Although [Adverse Claimant] may have held the land adversely for nineteen years prior to the issuance of the letter, a reasonable person would have concluded that his use was permissive for a short period after the issuance of the letter. Furthermore, the granting of permission by [Record Owner] to use her land precluded her from successfully bringing an action against [Adverse Claimant] regarding the legality of his subsequent use. [Adverse Claimant's] use of the land for a brief period in 1968 and 1969 therefore was not trespassory in nature. As a consequence, we hold that the use of the land was not continuously adverse for twenty years,

Zivic v. Place, 122 N.H. 808 (1982).

Ouster:

The ouster of an adverse possessor of property must be more than orally claiming title to the disputed land and demanding removal. An owner must reassert actual control and dominion over the disputed land. **O'Malley v. Little, 170 N.H. 272 (2017)**

e. Use Must be Exclusive

[U]se or occupation in common with neighbors, third persons, or the public is not exclusive possession. Nonetheless, even if the Lorangers were unable to establish title through adverse possession, the evidence might suffice to establish their right to an easement through prescription. *Seward v. Loranger*, 130 N.H. 570 (1988).

4. No Adverse Possession Against the State or Railroads

a. RSA 539:6 No Right Acquired by Adverse Possession of State Lands.

No right shall be acquired by such entry or possession, nor by any adverse possession of such land, as against the state or its grantees.

b. RSA 236:30 No Adverse Right.

No person shall acquire, as against the public, any right to any part of a highway by enclosing or occupying it adversely for any length of time.

c. RSA 367:45 Adverse Possession.

No title to any real estate or to any interest therein shall be acquired by or against a railroad by adverse possession, however exclusive or long continued.

5. How to perfect an adverse possession claim.

Jurisdiction for adjudication of adverse possession claims and prescriptive easements rests with the superior court:

As a general rule, since actions involving a claim to an easement by prescription require a determination of ownership and possessory rights to realty, the state court with jurisdiction to determine title to the property where the claimed easement is located will be the appropriate forum. In this state, the legislature has specifically provided that declaratory judgment actions can be brought in superior court by parties faced with adverse claims to an interest in real property.' ...; see RSA 491:22, I (2010) ('any person claiming a present legal or equitable right or title may maintain a petition in the superior court against any person claiming adversely to such right or title to determine the question as between the parties').

Gordon v. Town of Rye, 162 N.H. 144 (2010).

6. Partition

RSA 547-C:1 - Any person owning a present undivided legal or equitable interest or estate in real or personal property (hereinafter called "property"), not subject to redemption, or the holder of an equity of redemption shall be entitled to have partition or division in the manner hereinafter provided. If such interest or estate is in fee, he or she shall be entitled to partition or division in fee; if a life estate or a term for years, he or she shall be entitled to partition or division thereof to continue so long as his or her estate or interest endures. A life tenant, remainderman, or a tenant for years of whose term at least 20 years remains unexpired may, in the exercise of the court's equitable powers, have partition of the fee. The existence of a lease of the whole or a part of the property to be divided shall not prevent partition

or division, but such partition or division shall not disturb possession of a lessee under a lease covering the interests of all the co-tenants.

In a petition to partition property, the trial court retains broad power and discretion to determine the rights of those with an interest in real property and to craft an equitable remedy. *Hayes v. Connolly*, 172 N.H. 102 (2019).

Mechanic's Liens; Statutory Liens for Labor and Materials (NH RSA 447); An Overview

Materials Updated by:

Attorney Amy Manzelli

BCM Environmental & Land Law, PLLC

Concord, NH

Original Materials by:

Attorney John J. Ryan

Previously Updated in 2017 by:

Attorney Timothy A. Boucher

MECHANICS LIENS
STATUTORY LIENS FOR LABOR AND MATERIALS (RSA 447)
AN OVERVIEW

MECHANICS LIENS:

Statutory Liens for Labor and Materials (RSA 447) - Overview

A. Persons entitled to the Lien

Pursuant to RSA 447:2, any person performing labor, providing professional design services or furnishing materials in constructing or repairing a building or appurtenance under a contract with the owner, shall have a lien on the material provided and on the structure as well as a lien on any interest in the land of the owner on which the structure is situated. The right to the lien is not available in cases involving a contract with a municipality.

B. Special Requirements for Subcontractors' Liens

Liens available pursuant to RSA 447:2 to general contractors are also available to subcontractors if special requirements are met under RSA 447:5, 6 & 8. The lien is extended under these provisions of the statute to include any person performing labor, providing professional design services or furnishing materials by virtue of a contract not with the owner, as required in RSA 447:2, but with an agent, contractor or subcontractor of the owner. Subcontractors' liens, however, under the statute are subject to the requirement that the subcontractor must give notice in writing to the owner that he/she will claim such a lien before performing the labor or furnishing materials for which the lien is claimed. RSA 447:5. If a subcontractor provides notice in writing to the owner after performing the labor or furnishing the materials, the lien is limited "to the extent of the amount then due or that may thereafter become due to the contractor." RSA 447:6. Thus an owner, under the terms of the statute, should be protected against claims from subcontractors when the owner has fully paid the general contractor without written notice of any unpaid subcontractors. An Accounting of the Subcontractor to the Owner should be provided at least every thirty days, as the owner must retain enough funds to pay the subcontractor's claim. RSA 447:8. The rationale is that RSA 447:6 was designed to protect owners from unknown liabilities of subcontractors which are in excess of the amount due the general contractor with whom the owner has privity of contract.

C. Duration of the Lien

A mechanic's lien under the statute is inchoate and arises automatically when work is performed. A lien created under the mechanic's lien statute continues for 120 days after the work has been performed or materials have been furnished unless payment of it was previously

made, and the lien shall take precedence over all prior claims except real estate taxes. RSA 447:9. Even though the lien itself arises automatically when work is first performed or materials are first provided relative to the site, the lien must be perfected within 120 days by an attachment. RSA 447:10.

D. Perfection of the Lien

The Mechanic's Lien may be secured by an attachment of the property upon which the work was done within 120 days from the date of last substantial work. RSA 447:10. The writ and return must specify that the purpose is to attach as a mechanic's lien pursuant to RSA 447:10.

E. Priority of the Multiple Mechanic's Lien Attachment

A Mechanic's Lien Attachment is superior to all other lien claims for labor, professional design services and/or materials done or furnished after the attachment is made, except for those services or goods provided under an existing contract or which are necessary for preservation of attached premises. RSA 447:11. To the extent there are other attaching mechanic's lien creditors who have priority under RSA 447:11, mechanic's lien creditors in like positions will share pro-rata in any judgments or proceeds. RSA 447:12.

F. No Statutory Provisions Directly Relative to Owners Protection

There are no express provisions of the Mechanic's Lien Statute that afford protection against unrecorded mechanics' liens for purchasers of real estate. However, in 1984, the New Hampshire Supreme Court in the case of *Chagnon Lumber Co., Inc v. Stone Mill Construction Com. and John W. and Ann M. Breiten*, 124 NH 820 (1984) dealt directly with the issue of priority of mechanics' liens as it related to a bona fide purchaser for value. The Court found that where there was evidence that an affidavit from the Seller was obtained at closing stating that all laborers and persons providing materials have been paid; where the Buyers had no knowledge of any nonpayment or any actual or constructive notice of any lien; and where the Buyers had acted in good faith, the Buyers were bona fide purchasers for value and therefore were not subject to the unrecorded mechanic's lien.

Traditionally, mechanics' lien coverages in title insurance policies were provided only in lender's policies where the funds were not for construction purposes, and were issued based on the strength of the content of the mechanics' lien affidavit. However, over the years, market changes have resulted in mechanics' lien coverages evolving and being provided in construction loan policies. More recently, mechanics' lien coverages have also been provided in owners' policies in non-construction commercial transactions, as well as in non-construction residential transactions under the new extended or enhanced policy coverages. One should

always check with their title insurance underwriter regarding the availability of mechanics' lien coverage since it is considered a "special risk".

G. Liens for Labor and Materials Statute-Priority Afforded Construction Mortgages

Mechanics' Lien Attachments shall have precedence over construction mortgages (defined as "any mortgage loan made for the purpose of financing the construction, repair or alteration of any structure on the mortgaged premises where the lien secured by such attachment arises from the same construction, repair or alteration work") RSA 447:12-a, except:

1. To the extent that the mortgagee shows that the proceeds of the mortgage loan were disbursed either toward payment of invoices from or claims due subcontractors and suppliers of materials or labor for the work on the mortgaged premises; or
2. Upon receipt by the mortgagee from the mortgagor or his agent of an affidavit that the work on the mortgaged premises for which such disbursement is to be made has been completed and that the subcontractors and suppliers of materials or labor have been paid for their share of such work, or will be paid out of such disbursement.

Mortgagees granting construction loans may not knowingly accept a fraudulent affidavit and are required to promote and encourage the notice and posting practices set forth and referred to in RSA 447:12-b.

In connection with the priority of funds advanced under a construction loan, it is critical to be aware that no priority is afforded to construction loan funds disbursed toward acquisition costs based purely on the nature of the disbursements themselves. *See Bruce E. Lewis d/b/a Lewis Companies v. Shawmut Bank, N.A.*, 139 NH 50 (1994). It is the terms of the Loan Agreement, and not the disbursements, that will determine the true nature of the loan (i.e., construction, mixed, etc.) and thereby determine the rules of priority to be attached. *Lewis*, 139 NH at 52.

In cases of "mixed" liens, the written loan agreement needs to clearly and unequivocally delineate between the construction portion of the loan and the non-construction portion of the mortgage so that the entire loan does not qualify as a construction loan, and so that the non-construction loan disbursements will be afforded their own priority protection. It is not always an option but the safest alternative in a mixed loan situation is to structure the transaction with two promissory notes and two mortgages, one for the construction portion and one for the non-construction portion.

H. Liens for Labor and Materials Statute - Posting and Notice Responsibilities of Construction Lender

Lenders are to encourage and promote the following practices set forth in RSA 447:12-b:

1. Within 10 business days of the execution of a construction mortgage, including any refinancing thereof, the mortgagor or his agent shall post in a conspicuous place on the jobsite for which the construction funds were secured, the name, address and telephone number of the institution providing the construction funds. RSA 447:12-b(I).

2. Any person entitled to a lien pursuant to RSA 447:2-7 shall, within 15 business days of the posting required in paragraph I or of commencing to furnish services, materials, supplies or other things, whichever is later, provide written notice to the institution providing the construction funds that such person is furnishing services, materials, supplies or other things. The written notice provided under this paragraph shall include the name and address of the jobsite. Failure to provide the notice required by this paragraph shall not alone invalidate the lien created by RSA 447:2-7.

3. In the event that a written contract between the mortgagor or his agent and any person furnishing services, materials, supplies or other things shall provide that the disbursement of construction funds, a portion of which is intended to pay such person, shall be by a 2-party check, the mortgagor or his agent shall transmit a copy of such agreement to the mortgagee. Upon receipt of a copy of such written agreement, the mortgagee shall subsequently disburse funds intended in part to pay any such person only by a check made payable to the mortgagor or his agent and such person. Unless otherwise agreed by the mortgagor and mortgagee, disbursements shall be made only for actual work completed and materials consumed on the jobsite for which the construction funds were secured.

Condominiums

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CONDOMINIUMS

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Introduction

A condominium is a form of real estate ownership where two or more owners have joint dominion as common owners of the “common areas and facilities”, and hold undivided fractional shares in the common areas and facilities with the right to vote their individual shares. Physically, a condominium typically consists of land, building components and common utilities or amenities. In multi-unit buildings, the unit owner has exclusive title to the air space within their unit and interior improvements (interior walls, cabinets and fixtures). So-called standalone single buildings are completely owned by the unit owner and the undivided interest is found in the common land areas or facilities and not within the building components.

In short, so long as the element of common ownership in real estate is present, the condominium form of ownership can be used as a vehicle for conveying and vesting ownership in a wide variety of physical facilities.

These materials will deal with the New Hampshire Condominium Statute, RSA 356-B (the “Condominium Act”) which includes a New Hampshire Attorney General Registration component for residential condominiums over a certain number, and with RSA 356-C which pertains to tenants’ rights in conversion of apartment buildings into the condominium form of ownership.

Components of Condominium Documentation

The documents and materials, which establish a condominium, are **a)** Declaration; **b)** Bylaws, **c)** Site Plan(s) and **d)** Floor Plans.

The Declaration

This document “declares” the condominium regime and is recorded at the Registry of Deeds. The Declarant under the Declaration submits the land to be included within the condominium. The recording of the Declaration in the Registry of Deeds is deemed by some conveyancing attorneys to constitute a conveyance. At the least, recording the Declaration constitutes a dedication and submission of the land under the Condominium Act.

The contents of the Declaration are specified by statute. After more than 35 years of document development in New Hampshire, the contents of Declarations now exceed the statutory minimum prescribed content requirements. The statutory references in this Chapter are supplemented by references to generally prevailing practice standards.

In August 2018, the Condominium Act was amended requiring “[a]ll lands within the declaration of the condominium which are within the original bounds of the condominium [to] be identified therein as individual units, common areas, limited common areas,

convertible spaces, or convertible lands,” and “[a]ll lands proposed for possible future expansion [to] be identified as expandable lands.”

Name, Address

The name of the condominium must include the word condominium and the name of the town or city and county where it is located.

Identification of Declarant

The proper name of the record title owner and a reference to the book and page of the deed into the Declarant should be stated. The word Declarant is defined as all persons who execute the declaration or who subsequently succeed or stand in the same relation to the condominium as the original Declarant. It is important to note the distinction between Declarant as unit owner and Declarant as holder of rights and burdened with responsibilities under the Declaration. Until the condominium is completed and all units declared, the Declarant retains the right and duty to perform as required by the Declaration regardless of whether the Declarant owns any units. Thus, the Declarant as “developer” is distinguished from Declarant as the owner of a unit(s) with the same rights and duties as the unit owner. This distinction is manifested where the common areas and facilities are not completed or unsatisfactorily constructed. The Declarant’s responsibilities to complete or correct deficiencies is not obviated simply by reason of the conveyance of all of the units.

Definitions

Common Areas

The statutory definition of “common area” is “all portions of the condominium other than the units”. In practical as well as legal effect this means that reference to the definition of the unit and the boundaries will render everything else common area. This will result in all of the land, the utilities, roadways, amenities and no unit portion of the buildings being designated as common area or common area facilities.

Limited Common Areas

These areas are defined as being a portion of the common area reserved for the exclusive use of those entitled to the use of one or more, but less than all, of the units. The Declaration must designate the unit(s) to which each limited common area is assigned.

Typical examples of limited common areas include designated front, side, and back yard land areas for single unit buildings, porches or entranceways that service specific units, in multi-unit buildings, parking spaces reserved for particular owners, portions of attics and basements which are set aside for use by specific units, boilers, electrical boxes or other utility appurtenances or equipment which service specified units. In simple terms, where land areas or physical components are set aside from the common area and facilities for use by enumerated units but not all of the units, limited common areas are created. It is critical to the condominium process that limited common areas be called out and labeled on site plans or floor plans and that the Declaration describe the limited common areas in

narrative form, all to avoid later misunderstandings as to the existence of limited common areas.

Assignment of Limited Common Areas

Ordinarily, limited common areas once assigned remain attached to their units and cannot be reassigned without the consent of the affected owners. However, at the outset the Declaration can contain provisions authorizing the reassignment of limited common areas. This may occur where the Declarant or the Board of Directors have a need to rearrange limited common areas such as parking or utility facilities. The statute further provides that unless prohibited by the condominium instruments, a limited common area may be reassigned upon written application of the concerned unit owners to the principal officer of the unit owners' association. An amendment to the Declaration is then prepared and recorded.

If the Declaration originally provided for the potential future assignment of specified area as limited common area such assignments are authorized if the Declaration recites that they may be so assigned.

A 2/3rds vote or such greater percentage of unit owners specified in the Declaration may also create or expand a limited common area. However, the creation or expansion of limited common area does not alter the undivided interest in the common area allocated to each unit.

Unit

A unit is a portion of the condominium designed and intended for individual ownership and use. As a practical and legal matter the boundaries of the unit circumscribe the limits of the common areas where the unit boundary ends, the common or limited common areas begin. Therefore, it is necessary delineate the boundaries with care to eliminate confusion as to what parts of the condominium are within the units and the common areas. "No condominium instruments shall be recorded unless all units located or to be located on any portion of the submitted land, other than within the boundaries of any convertible lands, are depicted on site plans and floor plans that comply with RSA 356-B:20." See RSA 356-B:7.

For buildings where the unit consists of the entire building, a statement that the units includes the building and all exterior and interior boundaries of the building, will suffice.

For multi-unit buildings it is necessary to distinguish the unit features from the common elements. A common unit description is as follows.

"The boundaries of each unit shall be as follows:

The walls, floors and ceilings shall be the boundaries of the units. All doors, windows, wallboard, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished surfaces thereof shall be deemed a part of such units. All other portions of such walls, floors and ceilings shall be part of the common area.

If any chutes, flues, ducts, conduits, wires, bearing walls, bearing columns, or any other apparatus lie partially within and partially outside of the boundaries of a unit, any portions thereof serving only that unit shall be deemed part of that unit, while any portion of the building shall be deemed a part of the common area.

All space, interior partitions, and other fixtures and improvements within the boundaries of a unit shall be deemed a part of that unit.

Any shutters, awnings, window boxes, doorsteps, porches, balconies, patios, and any other apparatus designed to serve a single unit, but located outside the boundaries thereof, shall be deemed a limited common area appertaining to that unit exclusively.”

Of course, each condominium must be analyzed to determine if variances in a standard or typical boundary description are to be changed.

Description of Development Plan

It is advisable to include with the Declaration a narrative description of the physical features of the condominium and the Declarant’s development plan. In 2018, RSA-356-B:16 was amended to specifically include that declarations must identify “[a]ll lands proposed for possible future expansion shall be identified as expandable lands.” RSA-356-B:16 I-a.

This section of the Declaration should detail the number of buildings, number of units in each building, any of the amenities, description of roadway access (public or private), types of utilities (e.g. public or private water or sewer), legal description of the submitted land, and whether the condominium contains any expandable or convertible or withdrawable land. In addition, if the project is to be “phased” (i.e. constructed in segments), the Declaration should state the maximum number of units contemplated and how many units are being declared at the outset.

Percentage of Undivided Interest

The undivided ownership interest in the common areas to be assigned to each unit must be stated in the Declaration in accordance with RSA 356-B:17. Three alternative methods of proportioning the allocation of undivided interests are allowed. The simplest is to assign each unit an equal undivided interest in the common areas and facilities. Alternatively the undivided interests may be based on size or value. Where the condominium is to contain structures of disparate sizes or values either of those methods of allocation may be advisable. If size or value is chosen, the Declaration must include a table with three separate columns. The first column identifies the units by number or other designation. The second and third columns must set forth the respective areas or values of those units and the fraction or percentage of undivided interest in the common areas allocated thereto. See RSA 356-B:17 V.

Where the condominium includes convertible, expandable or withdrawable land, the description of the percentage of undivided interest in the common areas must recite the

formula which governs the adjustment to the initially assigned percentage. For example, where all of the units are to have an equal undivided interest the formula would be:

One

Number of Units Declared

Thus, until the condominium ultimately becomes fixed as to the final number of units, the percentage of undivided interest at any given point is determined by the then number of declared units.

Declarant Control

The Condominium Act authorizes the Declarant or his or her agent to exercise the powers of the Association subject to certain constraints related to time or percentage of units conveyed. For condominiums which do not contain any convertible or expandable provisions, the Declarant's maximum control period ends two years after the recording of the Declaration or the conveyance of 3/4ths of the units whichever comes first. For condominiums containing any convertible land, the control period must terminate after 3 years or the sale of 3/4ths of the units, whichever comes first, and for expandable condominiums, after 5 years or the sale of 3/4ths of the units whichever comes first. See RSA 356-B:36 I. Shorter time periods may be chosen by the Declarant. The Declaration or By-Laws should include a provision detailing the applicable Declarant's period of control. This provision should be drafted such as to make clear that the 3/4ths criteria applies to the maximum number of units declarable where convertibility or expansion of the condominium are present.

Management contracts, leases of amenities or other agreements entered into by the Declarant during the period of control are not binding upon the Association after the termination of that control, unless ratified by the Association. See RSA 356-B:36 II.

Uses and Restrictions

The Condominium Act mandates that restrictions upon the uses of the units be stated in the Declaration. RSA 356-B:16 I(h). Although the Declarant will normally tailor the use restrictions to the needs of that condominium, provisions common to residential condominiums include the following:

- Restrictions as to residential and home office uses;
- Restrictions prohibiting change of grades and drainage;
- Restrictions prohibiting nuisances, storage of junk automobiles, boats, mobile homes, campers or trash;
- Limitations on the number of and type of household pets;
- Prohibition against displays or advertising materials;
- Limits on radio towers or antenna;
- Prohibitions against any uses which would increase common area insurance rates;
- A requirement that all rules regarding the use of common areas be adhered to and that the unit owner is bound to comply with the provisions of the Condominium Act and the condominium documents.

- In cases where limited common areas are assigned to units, restrictions on the use of those areas by the units owners should be stated;
- A reservation in favor of the Declarant to use the common areas for the storage of materials or to use the common areas for any purpose related to the construction of the condominium facilities, including the right to maintain signs, model unit or office.
- Where applicable, (such as in land unit condominiums) the uses and restrictions section will contain the provisions for architectural control over the construction or alteration of buildings. Usually, an architectural control committee consisting of the Board of Directors or such other appointed committee is designated to review and approve or disapprove plans and specifications submitted by a unit owner (see discussion of land units above). A system of review periods and recording of a plan approval certificate will lend certainty to the architectural control process.

Designation of Agent for Service of Process

Until control of the Association affairs is passed to the unit owners, the Declarant should designate who is authorized to accept service of process for the Declarant. Thereafter any member of the Board of Directors or the condominium manager is usually the designated agent for the Association.

Damage or Destruction

The Condominium Act requires a description of the manner of determining appropriate action following damage to any portion of the condominium by fire or other casualty. RSA 356-B:16 I.(i). For multi-unit buildings the Board of Directors is customarily given the authority to collect insurance proceeds and assessments and engage in the reconstruction of the common areas leaving the unit owner to rely on the unit insurance coverage for any damage to the interior of the unit or its contents.

Where the units are free standing individual dwellings or structures, and the insurance is carried by the unit owner, the choice is whether to leave the reconstruction solely to the unit owner, or to involve the Board of Directors in the reconstruction. The better practice is to provide in the Declaration that the unit owner is required to turn over the insurance proceeds and vest the authority and responsibility in the Board of Directors to reconstruct the unit, to insure that the condominium is not burdened with a unit owner or mortgagee who is reluctant to proceed in a timely manner. Obviously, the value and quality of the condominium integrity would be adversely affected by an unrepaired building. The reconstruction provisions should also state that the damaged facilities be reconstructed in the same style and materials as originally constructed.

Insurance

The Condominium Act requires certain insurances to be obtained, as listed in RSA 356-B:43. The enumerated categories are:

- Master casualty policy covering fire and extended coverage in an amount equal to full replacement value of the structures within the condominium, or of structures that in whole or in part comprise portions of the common areas. Note as of April 10, 2020: “any unit owner’s association that does not obtain such policy covering common area

shall result in each unit owner equally sharing in the replacement cost to repair common areas to the extent that damage would have been covered by a policy providing fire and extended coverage. When such damage is only within one or a few limited common areas, only the unit owners in each area must share the replacement costs.”

- Master liability policy, covering the unit owners Association, the Board of Directors and any managing agent(s) or employees, and all unit owners and others entitled to occupy any unit or other portion of the condominium. (this amount should be specified by the condominium instrument).
- Other policies which may be specified in the condominium instruments such as workman’s compensation, motor vehicle coverage for any vehicles owned by the Association, and specialized policies covering lands or improvements in which the Association has or shares ownership or other rights.

The unit owners are entitled to written notice, sent in accordance with RSA 356-B:37-a, of the insurances obtained by the Association, and unless the unit owners vote to terminate the condominium the proceeds of the master casualty policy shall be used to repair, replace or restore the structure or common area damaged by the casualty.

In addition to the inclusion of this above insurance provisions in the Declaration, it is recommended that the responsibility of the unit owner to obtain insurance covering the interior and contents of the unit be explicitly stated in the Declaration. Most often that insurance is placed with the underwriter of the master policies to avoid any gap in coverage.

Common Expenses

The unit owner’s obligation to pay a proportionate share of common expenses is based on the voting rights pertaining to that unit. The authority to determine the annual expenses or special assessments is best lodged with the Board of Directors rather than the Association as a whole.

Limited Common Area Expenses

Unless the Declaration provides otherwise, any common expenses associated with the maintenance, repair, renovation, restoration, or replacement of any limited common area must be specially assessed against the condominium unit(s) to which that limited common area was assigned at the time such expenses were incurred. The Declaration may also provide that any common expenses which benefit less than all of the units or are the result of the actions of less than all of the unit owners will be assessed against the units so involved. See RSA 356-B:45.

Liens and Collection

Although not required to be part of the condominium instruments by the Condominium Act, inclusion of reference to the lien protection afforded by the Condominium Act in the Declaration serves the purpose of direct notice to the unit owner of the availability of lien to the Association.

The Association is granted a statutory lien against a unit for unpaid assessments levied against that unit. Once perfected, the lien is prior to all other liens except real estate tax

liens and encumbrances recorded prior to the Declaration, any outstanding first mortgages applicable to the unit, and priority of mechanic's liens. RSA 356-B:46 I(a).

Perfection of the lien must occur by the recording of a Memorandum at the Registry of Deeds not later than 6 months from the time the assessment was due. The contents of the Memorandum are specified in RSA 356-B:46 III. Suit to obtain judgment and enforce the lien must be filed within 6 years after the recording of the lien.

The delinquent unit owner's common privileges may be terminated and services provided by the Association may be terminated upon proper notice, being prior written notice to a unit owner by the association terminating the common area privileges and any services normally supplied and paid by the association, as a means to enforce payment of assessments.

A brief description of the rights of the Association to the lien and termination of privileges and services should be contained within the Declaration.

Mortgagee Provisions

The so-called secondary mortgage market including government sponsored loans or loan guarantees have demanded that condominium Declarations contain provisions requiring the consent of at least 75% of the mortgagees holding first mortgage. Written mortgagee approval is required for actions such as termination of the condominium, partition or subdivision of a unit, sale of any common areas and changes in insurance coverage for anything other than repair, replacement or reconstruction. In addition, mortgagees have come to insist that the Declaration provide that mortgage holders are not responsible for unpaid unit condominium assessments accrued prior to the foreclosure, and for notice of delinquent assessments thereafter. The association however may have a super-priority for up to six months of condominium fees if proper notice is provided the mortgagee. See NH RSA 356-B:46.

By-Laws

The Condominium Act specifies minimum provisions to be included in the By-Laws. The following discussion of By-Law provisions will include those minimum requirements and describe typical By-Law provisions in use currently.

The Association, Membership and Voting

Every unit is a member of the Association and entitled to a vote equal to his or her percentage of undivided interest. Where the undivided interest is equal covering all unit owners, the "one unit one vote" rule applies. Often the unit is owned by more than one person or owned by one entity. The By-Laws should provide that only one of the multi-person ownership can vote and that only an authorized member of the entity can vote. The formalities of a proper proxy should be specified. See RSA 356-B:39 & 356-B:39-a.

Meetings

The first annual meeting should be held some reasonable period of time after the expiration of the Declarant's period of control. Although the conduct of the first annual meeting is ordinarily not particularized in the By-Laws, it is useful to illustrate a typical first meeting and the issues which can arise. The principal item of business is the election of the new Board of Directors. It is therefore necessary to call for nomination and have an election of the Board by the unit owners. The officers are then chosen from within the Board (president, treasurer and secretary). Questions or comments concerning the manner in which the Declarant has been handling the common area expense budget are not uncommon. It is advisable for the Declarant to present a clear compilation of the income and expenses associated with the operation of the condominium since its inception. Care should be taken to segregate expenses which the Declarant incurred as part of the development of the condominium and expenses which are directly associated with the operation of the common areas and facilities. Often the Declarant will have made "in kind" contributions (e.g. have paid utility or plowing bills) from the Declarant's funds which are legitimately due to the Declarant but which must be accounted for. Furthermore, the budget and common charge assessments originally established by the Declarant may not have reflected the actual expenses incurred and the budget may need adjustment.

It is therefore recommended that at the first meeting the Declarant be prepared to fully disclose the state of the Association's finances, whether the Declarant is entitled to any reimbursement for out of pocket "in kind" expenses, and to recommend adjustments to the budget. The Declarant should also provide information pertaining to the insurance agent and underwriter used by the Declarant and a list of contractors employed to maintain the common area and facilities. Subsequent to the first meeting of the Association the Declarant should meet with the Board of Directors to review the financial or other aspects of the condominium operation to effect as smooth a transition as possible.

Finally, if the Declarant has failed to satisfactorily complete any promised improvements or there are deficiencies and the Declarant has been unable or unwilling to ameliorate these problems the first meeting will provide a convenient forum for the unit owners to vent their complaints.

The By-Laws should specify the date of the annual meeting and provide for the calling of special meetings by any Director or a percentage of the unit owners. The notice provisions should provide adequate time for the unit owners to make arrangements to attend the meeting (21 days' notice is usually acceptable).

The Secretary or other designee duly authorized by the Board of Directors shall take minutes of all meetings held in accordance with RSA 356-B:37 & RSA 356-B:37-c. RSA 356-B:37 was recently amended to include a special set of rules for "small condominiums", statutorily defined as condominiums containing 25 or fewer residential units. See RSA 356-B:37 VII.

Quorums

A minimum quorum of 25% of the unit owners is mandated by the Condominium Act and if the By-Laws are silent on the quorum requirement the percentage is 33 1/3. RSA 356-B:38 was recently amended to include a special quorum provision for small condominiums, specifically small condominiums containing no time share interests. The

amended language notes that, unless the condominium instrument indicates otherwise, a quorum is deemed present throughout a meeting of an Association until adjourned if 3 persons, or persons entitled to cast more than 33 percent of the votes, whichever is greater, are present at the beginning of such meeting. See RSA 356-B:38 IV. Section IV does not apply to condominiums comprised of time share interests. If quorum is not met, a Board shall reschedule the meeting within 60 days and provide proper notice and proxies. See *Id.*

Board of Directors

Number

The Condominium Act specifies that, not later than termination of any period of declarant control, the unit owners shall elect a Board of Directors with at least 3 members, a majority of whom shall be unit owners. The range varies from at least three to five or seven members. Even in larger condominiums it may not be easy to attract interest in serving on the Board of Directors and boards larger than 3 members should be justified on the basis of some need for an expanded board. Since most larger condominium projects utilize professionals to manage the day to day affairs of the condominium, the need for a larger multi-member Board of Directors may not exist.

Power and Duties

The Association and its Board of Directors are granted the authority to employ agents and employees, make improvements to the common areas, regulate changes to the exterior appearance of units, acquire title to real estate and grant easements and to exercise such other powers granted in the Declaration or By-Laws.

Election – Terms

The terms of the Board of Directors should be staggered so as to preserve continuity of Board members (i.e. 1, 2 and 3 year terms).

- **Meetings of the Board of Directors**

The By-Laws should specify how often the Board of Directors will be required to meet, and the procedure for special meetings.

- **Liability and Indemnity**

It is common practice to include a provision obviating Board of Director members from liability from actions which are not negligent or the result of willful misconduct, and an indemnity for costs, expenses and liabilities by reason of any suit, non-negligent or non-willful acts.

Officers

The officers are customarily chosen from within the Board of Directors, however, this is not a requirement. The By-Laws should recite the authority and responsibility assigned to the President, Treasurer and Secretary, which generally track the powers and duties found in corporate organizations.

Amendments

Either the Declaration or the By-Laws should provide for the method of and percentage of votes required for amending the condominium instruments.

Prior to the sale of the first unit, the Declarant is authorized to unilaterally amend the condominium documents. RSA 356-B:33.

After the sale of the first unit at least a 2/3rds plurality is mandated unless the amendments relate to the extension of the time limits for conversion, expansion or contraction of the condominium. If the condominium is non-residential (e.g. commercial), then the percentage of unit owner votes can be less than 2/3rds. Either the required number of unit owners sign the amendment or the document is signed by the President with a certification of the secretary regarding the vote. All amendments must be recorded at the Registry of Deeds. RSA 356-B:34.

Amendments which alter the boundaries of a unit, or change the undivided interest in the common areas or the units owners liability for common expenses or rights to common profits, or affect the voting rights of a unit owner, are not permitted except as authorized by the Condominium Act (e.g. convertible, expandable and withdrawable condominiums).

However, if 100% of the unit owners were to agree, such a change is generally considered to be effective.

Per RSA 356-B:35, III, when an amendment to the declaration is required by RSA 356-B:18, II, III, or IV, there must also be an amendment to the by-laws

Site Plans and Floor Plans

Introduction

Recorded site plans and floor plans are an integral component of the condominium documents. They should be of such detail as to allow the reconstruction of the condominium facilities in the event of a disaster which literally obliterates the improvements. The Condominium Act mandates the type of detail that must appear on site plans and floor plans.

Site Plan

RSA 356-B:20 I sets forth the requirements for site plans. The plan must be a survey certified by a registered land surveyor. The plan must show the following:

- the location and dimensions of the submitted land, i.e. the perimeter boundaries of the land which is submitted under the Declaration. That parcel should be labeled “submitted land” and its acreage called out on the plan.
- the location and dimensions of all convertible lands labeled as such with either letter or numerical designations where there are multiple convertible lands.
- the location and dimension of withdrawable lands with appropriate labeling.

- Although not required by the Condominium Act, it is a good practice to depict the expandable land areas, particularly in phased condominiums in which the expandable land approach is adopted.
- The location and dimensions of any existing improvements.
- The intended location and dimensions of contemplated improvements to be located within the submitted land.
- Where feasible, the location and dimensions of all easements that affect the submitted land.
- If the submitted lands are not contiguous the distance between the parcels is to be shown on the plan.
- If the condominium is a leasehold condominium where only portions of the submitted land is included in the lease.
- Encroachments must be depicted on the plan.
- If the buildings or improvements are not begun as of the date of the recording of the site plan the plan should be labeled “not yet begun” in the area on the plan where the buildings are to be situated. If construction has commenced but the buildings have not yet been completed, the label “not yet completed” must appear.
- In any case where the vertical boundaries of any unit be either partially or wholly outside of the structure and such boundaries are not shown on the floor plans, the site plan would show the location and dimensions of those boundaries.

Floor Plans

RSA 356-B:20 II proscribes the contents of floor plans. With respect to buildings with multiple units the floor plans should depict the horizontal and vertical dimensions of the units, and any convertible space. Standard practice includes length, width and height measurements in each room with the total square footage of living space within each unit. The floor plans also should include an elevation plan depicting the exterior of the building and its location on the ground in terms of sea level or some other established datum. The respective heights of the floors in multistory buildings is commonly called out on the floor plans.

Where the units are single free standing buildings the floor plans need not contain the interior detail since the entire building constitutes the unit. However the outside elevation and configuration of the building and its size should be clearly evidence on the floor plans.

Unless the condominium instruments provide otherwise, it is prescribed that in the case of any unit not wholly contained within or constituting one or more such structures, the horizontal boundaries are deemed to extend at the same elevation with regard to any part of such unit that lies outside of those structures. This rule does not apply in the case of a unit which does not lie over any other unit other than basement units. In that instance it is prescribed that the lower horizontal boundary, if any, of that unit lies at the level of the ground with regard to any part of that unit lying outside of such structures.

The floor plans must be certified as to their accuracy and compliance with the provisions of RSA 356-B:20 II by a registered architect, registered engineer and licensed land surveyor. That certification must state that the units or portions of the units depicted on the floor plans as completed have been substantially completed.

So called “typical floor” plans have become acceptable as satisfying the provisions of RSA 356-B:20 II. Often the buildings within the condominium are homogeneous with 2 or 3 styles or types of units. Rather than recording multiple duplicate floor plans for each of the types of units, one floor plan depicting the standard layout is used reciting which units are constructed as per that floor plan, provided that the certification states that the units have been substantially completed as shown by that typical floor plan, such plans will suffice.

Prior to 1990, Declarations and floor plans were recorded which declared units that had not been constructed, and in some cases never came into existence. This created substantial problems. In effect the Declarant remained the owner of the undivided interests in the common areas and facilities represented by the declared but unbuilt units often the builder/declarant had ceased to have any real connection with the condominium or had gone insolvent. This left the other owners with less than 100% control of the condominium and an absentee owner of declared units.

The Condominium Act was amended in 1990-1991, and RSA 356-B:20 II was revised to require that the units be constructed before they are deemed to exist. Thus, although the Site Plan may contain the statement that the improvements have not yet begun or are not yet completed, before any conveyance of a unit can occur it must be substantially completed and the floor plans with that certification must be recorded.

Convertible Condominiums

Land to be included within the common areas from the outset of the condominium but which may or may not house units, is convertible land. Thus, the potential for further additional units is preserved through the use of a convertible condominium.

The Condominium Act specifies that the Declaration must contain certain provisions where a convertible condominium is elected, set forth in RSA 356-B:16 II.

- A legal description of the metes and bounds of each convertible land;
- A statement of the maximum number of units that may be created within each convertible land;
- A statement with respect to each convertible land, as to whether or not any portion of the convertible land will be restricted to residential use, and, if not, the nature of the permitted uses, and the maximum percentage of the aggregate land and aggregate floor area of all units that may be created which will not be restricted exclusively to residential use;
- A statement of the extent to which any structure erected on any convertible land will be compatible with structures on other portions of the submitted land in terms of quality of construction, the principal materials to be used, and architectural style;
- A description of all other improvements that may be made on each convertible land within the condominium;
- A statement that any units created within each convertible land will be substantially identical to the units on other portions of the submitted land, or a statement describing in detail any differences in design, layout, size, quality or other significant characteristics of the units that may be created therein;

- A description of the declarant's reserved right, if any, to create limited common areas within any convertible land, and/or to designate common areas therein which may subsequently be assigned as limited common areas in terms of the types, sizes and maximum number of those areas within each convertible land.

The convertible land is brought into the condominium by a recorded Amendment to the Declaration describing the conversion. The Amendment must assign identifying numbers to each unit and reallocate the undivided interests in the common areas.

Along with the recording of the Amendment, the Declarant must record site plans and floor plans which comply with RSA 356-B:20 II (discussed above). Where the converted land is less than all of the convertible land, the remaining convertible land must also be depicted.

Any Amendment(s) converting common area and creating new units must be recorded not later than five years after the recording of the Declaration. This period may be extended by an additional 5 years by at least a 2/3rd vote of the unit owners. The conversion can occur beyond that period of 100% if the unit owners vote to allow the conversion. A special form and procedure, involving the State Attorney General's office is proscribed by the Condominium Act.

Expandable Condominiums

Where the option to add additional land to the condominium is reserved by the Declarant the Condominium Act requires certain disclosures set forth in RSA 356-B:16 III.

- The explicit reservation of an option to expand the condominium;
- A statement of any limitations on that option, including, without limitation, a statement as to whether the consent of any unit owners shall be required, and, if so, a statement as to the method whereby such consent shall be evidenced; or a statement that there are no such limitations;
- A time limit, not exceeding 7 years from the recording of the declaration, upon which the option to expand the condominium shall expire, the time limit contained in the declaration may be extended by not more than 7 years by an amendment to the declaration adopted pursuant to RSA 356-B:54 V, together with a statement of the circumstances, if any, which will terminate that option prior to the expiration of the time limit so specified.
- A legal description by metes and bounds of all land that may be added to the condominium;
- A statement as to whether, if any of the additional land is added to the condominium, all of it or any particular portion of it must be added, and, if not, a statement of any limitations as to what portions may be added or a statement that there are no such limitations;
- A statement as to whether portions of the additional land may be added to the condominium at different times, together with any limitations fixing the boundaries of those portions by legal descriptions setting forth the metes and bounds thereof and/or regulating the order in which they may be added to the condominium;
- A statement of any limitations as to the locations of any improvements that may be made on any portions of the additional land added to the condominium or a statement that no assurances are made in that regard;

- A statement of the maximum number of units that may be created on the additional land. If portions of the additional land may be added to the condominium and the boundaries of those portions are not fixed, then the declaration must also state the maximum number of units per acre that may be created on any such portion added to the condominium. If portions of the additional land may be added to the condominium, and the boundaries of those portions are not fixed, then the declaration must also state the maximum number of units per acre that may be created on any such portion added to the condominium;
- A statement, with respect to the additional land and to any portion or portions thereof that may be added to the condominium, as to whether or not any portion of such expandable land will not be restricted to residential use, and, if not, the nature of the permitted uses and the maximum percentage of the aggregate land and aggregate floor area of all units that may be created thereon which will not be restricted exclusively to residential use;
- A statement of the extent to which any structures created on any portion of the additional land added to the condominium will be compatible with structures on the submitted land in terms of quality of construction, the principal materials to be used, and architectural style, or a statement that no assurances are made in those regards;
- A description of all other improvements that will be made on any portion of the additional land added to the condominium or a statement of any limitations as to what other improvements may be made thereon, or a statement that no assurances are made in that regard;
- A statement that any units created on any portion of the additional land added to the condominium will be substantially identical to the units on the submitted land, or a statement of any limitations as to what differences in design, layout, size, quality or other significant characteristics of the units may be created thereon, or a statement that no assurances are made in that regard;
- A description of the declarant's reserved right, if any, to create limited common areas within any portion of the additional land added to the condominium, and/or to designate common areas therein which may subsequently be assigned as limited common areas in terms of types, sizes, and maximum number of such areas within each such portion, or a statement that no assurances are made in those regards.

RSA 356-B:16 III

The expansion of the condominium by the addition of more land and units occurs when the amendment to the condominium declaration and the site plans and floor plans related thereto is recorded. The amendment must contain a legal description by metes and bounds of the land added to the condominium and shall reallocate the undivided interests in the common areas. The same restrictions regarding allocation based on value which apply to convertible condominiums also apply to expandable condominiums (See discussion under convertible condominiums; *supra*).

Convertible Condominiums/Expandable Condominiums; which to choose.

There are important differences between convertible condominium and expandable condominiums which lead to the conclusion that expandable condominiums provide greater flexibility to the Declarant than do convertible condominiums.

Initially, if by the end of the 5 year period or any extension thereof additional units are not constructed within the convertible land(s), the land itself stays as part of the common area. Unless there is some overriding need to include that land as part of the condominium property, classifying the land as expandable land provides the developer with 2 extra years in which to decide whether additional units are to be constructed (7 years in the case of expandable land condominiums), and if the decision is not to proceed forth with the condominium, the land is retained by the developer for possible use independent of the condominium.

Secondly, the convertible land disclosure requirements under the Condominium Act, are more demanding in terms of the details of potential future development than are the disclosure requirements for expandable lands. Convertible landowners must contain a statement that any units created within each convertible land will be substantially identical to the units on other portions of the submitted land, or a statement describing in detail any differences in design, layout, size, quality or other significant characteristics of the units. Under expandable land disclosure requirements a statement that no such assurances suffices. Thus, where in instances where the Declarant may not be easily able to plan the exact type of construction that may take place in future phases of the condominium the expandable land approach will accommodate deferring those decisions whereas the convertible land requirements would force a perhaps unwanted determination as the design layout, size quality or other significant characteristics of the future units.

Attorney General Approval

RSA 356-B:49, III provides that the “attorney general may, from time to time . . . exempt from any one or more of the provisions of this chapter any condominium if he finds that enforcement of this chapter . . . is not necessary . . .”. Under Jus 1404.07 of the New Hampshire Code of Administrative Rules, the Bureau of Consumer Protection must exempt condominiums from the registration and reporting requirements established under RSA 356-B:50, I and RSA 356-B:51-55 where not more than 10 units are intended for residential use. This exemption does not apply to condominiums involving time sharing units. In other words, condominiums with 11 or more residential units must comply with the Attorney General registration requirements. Such requirements protect consumers by requiring developers to register prior to selling or offering to sell any units or lots. Developers must present all material facts about the unit or lot to the potential buyer. Material facts include any information that would influence an average person’s decision to purchase a property,

Real Estate 101:

Condominiums

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Introduction

- What is a condominium?
- Common ownership is key
- New Hampshire Condominium Act (RSA 356-B)
governs

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Components of Condominium Documentation

- Declaration
- Bylaws
- Site Plan(s)
- Floor Plans

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Declarations

- "Declares" the condominium regime
- Recorded with the Registry of Deeds
 - Deemed by some to constitute a "conveyance"
 - At the least, constitutes a dedication and submission of the land under the Act

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Definitions

- Common Area
- Limited Common Area
- Unit

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Description of Development Plan

- Advisable to include a narrative describing physical within Declaration
 - Number of Buildings, units, amenities
 - Description of roadway access
 - Types of utilities
 - Max units contemplated if "Phased"

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Percentage of Undivided Interest

- Undivided Ownership in common areas must be stated in the Declaration
 - Simple way is to divide equally
 - Alternatives available based on size and value

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Declarant Control

- Act authorizes Declarant or the Declarant's agent to exercise powers of the Association
- Various timing limitations for Declarant control depending on whether a condominium contains convertible land
- Contracts entered into by Declarant are not binding on Association upon transfer unless Association ratifies

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Uses and Restrictions

- Acts mandates that all restrictions on uses of the units be stated in the Declaration
- Common provisions shown in materials

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Designation of Agent for Service of Process

- Unit control of the Association is passed to the Unit Owners
- Declarant should designate someone to be authorized
 - A member of the Board of Directors is usually the designated agent for the Association

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Damage or Destruction

- Act requires a description of the manner of determining appropriate action following damage to condominium by fire or other casualty
- Typically...
 - Multi-unit = Board of Directors given authority
 - Individual dwellings or structures = Unit Owner given authority

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Insurance

- Act requires certain insurances be obtained:
 - Master casualty policy
 - Master liability policy
 - Policies as specified in condominium instrument
 - I.e. Worker's Compensation, Motor Vehicle coverage, and other specialized policies covering land or improvements
 - Unit Owners entitled to notice of policies obtained

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Expenses

- Common Area Expenses
 - Unit owner pays proportionate share based on voting rights
- Limited Common Area Expenses
 - Unless Declaration states otherwise, expenses are specifically assessed against owners assigned the limited common area

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Liens and Collections

- Including lien protection afforded by the Act serves the purpose of direct notice to the unit owner
- Association granted statutory lien against a unit for unpaid assessments levied against that unit
- Perfection must occur not later than 6 months after assessment
- RSA 356-B:46 III specifies contents of Memorandum

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Mortgagee Provisions

- Secondary Mortgage Market
- Written mortgage approval required for termination
- Association may have super-priority

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Governance

- By-Laws
- Membership & Voting
- Meetings
- Quorums
- Board of Directors
- Officers
- Amendments

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Site Plans and Floor Plans

- Integral component
- Site Plan requirements – RSA 356-B:20 I
- Floor Plan requirements – RSA 356-B:20 II

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Convertible Condominiums

- Land to be included in the condominium from the outset
- Act requires Declarations to contain provisions for convertible land where applicable – RSA 356-B:16 II
- Convertible land is brought into the condominium by a recorded Amendment

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Expandable Condominiums

- The Act requires disclosures to add additional land to the condominium – RSA 356-B:16 III
- Expansion occurs when the amendment to the condominium declaration, site plan, and floor plan is recorded
- Amendment must contain legal description

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Convertible or Expandable?

- Convertible land has 5 years until it becomes common area v. 7 year period for expandable land
- More extensive disclosure required for Convertible
- Overall, expandable provides more flexibility for developer

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Attorney General Approval

- RSA 356-B:49 III – may exempt from any one or more of the provisions of this chapter if determined to be unnecessary
- Registration and reporting requirements for condominiums with more than 10 units
- Registration protects consumers

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Thank you!

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Introduction to Title Insurance

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I. TITLE INSURANCE

A. What is Title Insurance?

Quite simply – title insurance is an indemnity contract designed to pay actual loss to an insured when that loss is a result of title to real estate not being the same as described in the policy. It is not a guaranty as to the status of title, or condition of the property itself – but rather a promise to pay losses caused by defects in the title. A title insurance policy operates somewhat like other property or casualty loss products but is created following an individualized exercise in risk elimination. The following discussion is intended to clarify these statements.

Title insurance was first offered for sale in 1876, following the 1868 case of Watson v. Muirhead, 57 Pa. 161 (1868). Muirhead lost his investment in a real estate deal as the result of the failure to discover a lien on the property. Watson discovered the lien prior to the sale but told Muirhead that the title was clear based on the erroneous opinion of his lawyer that the lien was not valid. The court ruled that Watson was not liable to Muirhead for his mistake based on the professional opinion of his lawyer. The Pennsylvania legislature subsequently passed a statute authorizing the issuance of title insurance. The reason for the product was obvious - parties could acquire an additional source of security for their investment.

Real estate and interests therein, continue to be an important economic commodity. While some losses may be recouped through professional liability insurance, certain matters affect title to real estate which may not be discoverable through a reasonable search of the appropriate records. In addition, some losses may exceed the amount of professional liability insurance that is available for the given matter or may not be discovered at a time when a valid liability insurance policy is in place.

As part of any real estate transaction, title to the property must be searched. Title searches are generally performed in accordance with the laws of the relevant state. When examining title, we rely on state statutes and case law, and keenly on the New Hampshire Title Examination Standards promulgated by the Real Estate Section of the New Hampshire Bar Association to evaluate the documents in the chain of title. A title search serves as the basis for the issuance of a title insurance policy.

Title insurance carriers apply some principals of insurance to risks that are not resolved through an examination of title. Through title insurance, a title insurance carrier re-allocates those risks to itself in return for a one time premium. Just as owners and mortgagees of real estate require that the improvements be insured against fire and other casualty, owners and mortgagees came to see the value in requiring that title be insured against defects. Mortgagees have long realized that a claim against title can result in a more costly or incapacitating loss than destruction of improvements by fire; after a fire, there is still an opportunity to rebuild on the land itself. If title to real estate which is mortgaged as collateral is defective, there can be a complete loss of the collateral - leaving nothing against which to levy or upon which to rebuild, and no means of recovery. The more common situation is when there is not a total loss, but instead needs to be cleared of a defect, or the priority of the mortgagee or owner needs to be defended against a

claim. The cost of rectifying a defect in title or defending against a claim (valid or otherwise) can be substantial. Title insurance helps to fill this void. All residential real estate transactions involving a mortgage to be sold on the secondary market, and in virtually all commercial mortgage transactions, are contingent upon the borrower purchasing title insurance for the protection of the mortgagee. A mortgagee's policy (typically called a loan policy) insures the priority of the mortgage being granted as against the real estate described in the policy. Owners of real estate also have the option to purchase title insurance in the form of an owner's policy. The owner's policy generally insures that title is vested in the owner in the manner described in the policy.

Title insurance has traditionally been based on risk elimination, relying on the title search to minimize risks uncovered through the title examination by applying underwriting criteria based on relevant law and practice standards. In contrast, property, casualty, life and health insurance focus on risk assumption for future events based on past experience. Over time, and in response to market pressures, title insurance has developed with an eye toward risk assumption – for example the use of endorsements in commercial transactions to provide coverage for matters not typically associated with real estate title and the availability of enhanced title policies in residential transactions.

B. What does title insurance cover and what are its principal features?

1. Coverages

Title insurance generally covers:

(1) Matters/Defects which are of record in the Registry of Deeds but for some reason missed or overlooked. For example, outstanding mortgages; attachments; rights of first refusal which have not been released; notices of violations of restrictive covenants; and unreleased homestead rights; and

(2) Matter/Defects which could not be uncovered by a title search. For example, use of a terminated or forged power of attorney; forgery of a deed; a deed signed under duress or by an incompetent person; and unpaid real estate taxes not yet appearing of record as a lien; and

(3) A legal right of access to the property described in the policy. Note that a legal right of access does not equate to a physical access. For example, a property may have frontage on a public road (legal right of access), but that frontage may be physically impassable (no physical access).

For more particular details of the elements of coverage, please refer to Appendix T-1 attached which details the contents of the insuring provisions contained in the traditional owner and loan policy jackets.

2. Features

The Principal Features of Title Insurance are:

Indemnification: A title insurance policy is a contract of indemnity – meaning that the insured must suffer an actual loss as the term is defined by the policy. In the event that a claim against the title is made, and that claim comes within the insuring provision, if the insured suffers a full or partial loss of title to the property, or if expenses are incurred clearing title defects, title insurance compensates the insured, in accordance with the terms and conditions of the policy.

Defense: In the event a third party asserts a claim against title that is covered by the policy or asserts a priority as against a mortgagee's lien/mortgage, the title insurer will work with the insured to provide a defense and pay the cost of defense, in accordance with the terms and conditions of the policy.

Over time, and in response to market pressures, title insurers have expanded coverage in some cases to touch on matters not traditionally thought of as based on the title. For example, policies may insure against forced removal of a structure on the basis that it was constructed without proper building permits or may insure against loss in the event there is no direct physical (as opposed to legal) access to the property.

3. Types of Policies

- a. *Loan Policy:* The Loan Policy insures a mortgagee against losses incurred in the event that, as of the date of policy, the mortgage is NOT a valid, recorded mortgage lien against title with the priority described in the policy – typically a first mortgage. As such, the loan policy protects the mortgagee's interest in the property as security for the outstanding balance of the loan up to the face amount of the policy. The premium paid for the policy is a single premium, typically paid by the borrower as a cost of obtaining the loan. The policy runs solely to the benefit of the mortgagee and its successors and assigns, for the life of the particular loan, or beyond if the mortgagee takes title as a result of foreclosure.
- b. *Owner's Policy:* Title insurance may also be purchased by a buyer to protect its equity in the real estate against defects in title. An owner's policy covers the owner of the real estate against losses incurred as a result of a covered defect in title typically existing on or before the date of the policy. The policy terms require the title insurer to provide defense on behalf of an owner in the face of a covered claim against title or to indemnify against loss incurred as the result of a covered claim. Coverage under an owner's policy continues as long as the insured has an ownership interest in the property, or for as long as the policy holder (or their heirs or devisees) remain liable under the warranty covenants of a subsequent deed. The premium paid for an owner's policy is also a one-time premium.

C. Standardization in the Title Insurance Industry?

1. American Land Title Association (ALTA)

ALTA is the acronym used to refer to the American Land Title Association. ALTA is a national trade organization whose membership is comprised of title insurance companies, title agents, title abstractors and other members of the title industry, as well as associate members from many related industries, such as lending, surveying, construction, and development.

ALTA monitors and advocates the interest of its members with Congress, Fannie Mae, Freddie Mac and governmental agencies. In addition to legislative monitoring and advocacy, ALTA works to develop and promulgate somewhat standardized title insurance policy forms for use by title insurers and title agents across the country. The use of standardized policies meets an important need of the secondary market by facilitating risk management and assessment for investors in the secondary mortgage market. The title insurance forms promulgated by ALTA include various types of policy jackets, as well as endorsements and other forms, such as the insured closing protection letter. Of course, endless customizations of the ALTA forms abound and any such forms are subject to compliance with local law.

2. New Hampshire Insurance Department Regulations

In New Hampshire, title insurance is closely regulated by the New Hampshire Insurance Department. All rates and forms must be filed and approved by the Insurance Department. Penalties for issuing policies without the appropriate license and for charging unfiled rates are steep. See NH RSA Chapter 416-A (Title Insurance Code). Title insurers in New Hampshire are limited to a single line of insurance – risk as arising in connection with title. In addition, title insurance carriers must register with the New Hampshire Insurance Department and meet the requirements of state law pertaining to reserve funds for payment of claims and expenses. See generally NH RSA 416-A.

Title insurance carriers may issue policies directly, but more typically do so through appointed agents. Title insurance agents are attorneys or title companies who issue policies in conjunction with their representation of clients or when acting as a closing agent for a real estate transaction. New Hampshire law requires that a reasonable examination of title be performed in connection with the issuance of title insurance, and that the search records be retained for a period of twenty years. See NH RSA 416-A:6. All producers of insurance must be licensed by the Insurance Department, and such licenses must be renewed every two years. Each title insurance carrier appoints its respective agents in the records of the Insurance Department. See NH RSA 416-A:15, and regulations promulgated pursuant thereto.

D. What is a Title Insurance Commitment?

Many times, a party to a transaction, usually the mortgagor, will request that a commitment for title insurance be prepared and delivered prior to closing. A commitment is based on the results of a title examination and is the equivalent of a written promise to issue a policy with specific exceptions upon the satisfaction of certain events, such as payment of the relevant premium. The commitment converts the title examination into a format that more effectively states to the mortgagee and/or buyer that if certain requirements are met (i.e., payoff and receive a discharge of outstanding mortgages, obtain a deed, etc.), then the insurance carrier will issue a policy containing only the disclosed exceptions as set forth in the commitment, as well as those found

during the final update of the title. The commitment functions as a platform from which to negotiate different types of coverage and alerts a prospective buyer or mortgagee of particular issues affecting title to be reviewed and, in some cases, addressed prior to closing. The commitment generally binds the insurer for a period of 180 days (though its terms can be extended), during which a title insurance policy may issue if the requirements are met. The basic components of a title insurance commitment are as follows:

Cover - Contains the terms and conditions under which the commitment is issued and, when executed on behalf of the title insurer, serves to bind the insurance company for the noted time period.

Schedule A - Describes the parties and real estate to be insured. Also, identifies the current record owner of the premises as of the commitment's effective date.

Exhibit A - Contains a detailed description of the real estate title to be insured (supplements the Schedule A description).

Schedule B-I - Contains the requirements to be met before a policy is issued.

Schedule B-II - Contains standard exceptions and site-specific exceptions to title.

A sample Title Insurance Commitment is attached in Appendix T-2 hereof.

In connection with commercial transactions, an insured or their counsel may request a Specimen or ProForma Policy. This allows the parties to see what the final policy will look like ahead of time. Specimen or Pro Forma policies must be clearly marked as such, should be accompanied by requirements, and should reference the Commitment to which they are linked if applicable. The other primary use of the Specimen is as an addendum or exhibit to an escrow instruction letter, spelling out what the insured requires for coverage in order for the transaction to be carried out. Prior to issuing a Specimen or ProForma policy, one should always check with their underwriter for assistance with any particular requirements, notations and instructions relative to issuance of a Specimen or ProForma policy.

E. Understanding the Title Insurance Policy

Policies are prepared based on an abstract or certification of title. They generally mirror the Commitment. Any requirements from the Commitment that were not fulfilled must be noted as exceptions to title on Schedule B of the Policy. A title insurance policy, like other insurance policies, is comprised of boilerplate language (terms and conditions) in addition to its Schedules.

The basic components of a title insurance policy are as follows:

Jacket: Contains the terms and conditions under which the Policy is issued and the standard Exclusions from Coverage.

Schedule A: Describes the insured and the premises, title to which is insured, identifies the type of interest insured, the date as of which the insurance is given, and the amount of insurance.

Exhibit A: Contains a more detailed description of the premises, title to which is insured — Supplements the Schedule A.

Schedule B, Part I: Contains the Standard Exceptions and Site-Specific Exceptions (Items not covered by the policy).

Schedule B, Part II: Typically, only applies to a loan policy, as it is used to set forth encumbrances or exception matters that are subordinate to the insured estate (such as second mortgages).

Endorsements: Additional coverages, which may be requested by the insured and provided.

Sample Lender and Owner Policies are included and attached in Appendix T-3 hereof.

F. Standard v. Site-Specific Exceptions

1. Standard Exceptions

There are three standard exceptions that appear in virtually all traditional title insurance policies. These three exceptions relate to (1) survey matters; (2) parties in possession of the premises and (3) unfiled liens for labor and/or materials. Deletion of these standard exceptions depends upon the particular title insurance underwriter's guidelines, as well as the nature of the transaction. Typically, the standard exceptions are removed in connection with the loan policy, so long as applicable underwriting requirements are met. Generally, the parties in possession and mechanic's liens standard exceptions are removed from the lender's policy in non-construction situations with the execution and delivery of an affidavit from the seller and buyer attesting to certain facts relevant to claims based on possession or mechanic's liens. As to the general survey exception, this is often removed from loan policies based upon a survey affidavit with payment of an additional risk premium, a mortgage inspection report, or an acceptable survey and surveyor's report – depending upon the nature of the transaction. With respect to an owner's policy, requirements for deletion of these three standard exceptions will vary according to the transaction. One should check with their underwriter for guidelines. Some sample affidavits as referred to herein are included in Appendix T-4.

2. Some Site-Specific Exceptions

Any defect, encumbrance, lien or other matter uncovered in the course of the title search should generally be included in Schedule B of the policy as an exception. Your underwriter will be able to assist in determining whether an exception may be omitted or deleted from a policy, in providing language for specific exceptions, and in providing language for any affirmative coverage that might be available as to a particular exception.

a. Adjacent Water Sources

Water sources located within the bounds of the premises to be insured or adjacent to or abutting the premises to be insured may require that additional site-specific exceptions be added to Schedule B, Part I of the Policy (and in Schedule B, Section 2 of the Commitment). It should be noted that multiple exceptions may be appropriate depending on the water source involved.

Some limited examples include:

For Navigable Waters, Oceans and Bays

Title to and rights of the United States of America, The State of New Hampshire and the public generally in and to that portion of the premises lying below the high water mark of _____

For Brooks and Streams

Rights of upper and lower riparian owners in and to the waters of the _____ and the natural flow thereof.

b. Condominiums

All policies insuring condominium units should contain a condominium exception in Schedule B, Part I of the Policy, similar to the following:

Covenants, conditions, restrictions, reservations, easements, liens for assessments, options, power of attorneys, and limitations on title, created by the laws of the State of New Hampshire or set forth in the Declaration of Condominium, dated _____ recorded with the _____ County Registry of Deeds at Book _____ Page _____, as amended of record, in the related articles and bylaws, in the related site and floor plans, and in any instruments creating the estate or interest insured by this policy and in any of the instruments aforesaid.

c. Easements, Restrictions and Rights of Way

Easements come in all shapes, sizes and forms, as do restrictions and rights of way. Accordingly, relevant exceptions also take different forms. Below are just a few examples of the exception language used for commonly found utility easements, restrictions, and some rights of way.

Rights and easements granted by _____ to Exeter & Hampton Electric Company and New England Telephone and Telegraph Company by instrument dated July 15, 1976, recorded with the _____ County Registry of Deeds at Book _____, Page _____.

Restrictions as set forth in deed from _____ to _____ dated July 2 1976, recorded with the _____ County Registry of Deeds at Book _____, Page _____

Right of Way described in _____ dated July 25, 1976, recorded with the _____ County Registry of Deeds at Book _____, Page _____

Rights of others in and to that certain right of way known as _____

Rights of others in and to that certain right of way described in _____, dated July 25, 1976, recorded with the _____ County Registry of Deeds at Book _____ Page _____

Site specific exceptions are needed for virtually all matters noted during the course of the title search, including, but not limited to, such matters as easements, restrictions,

railroad beds, leases, and description discrepancies. Always check with your underwriter for assistance with language and concerns.

G. Residential Enhanced Policies

For years, Lenders have largely driven the nature and extent of coverage in the title insurance market. Just as the general real estate market may favor one party to the transaction over another, consumers have now gained a position of greater power in the title insurance market. Consumers in certain residential transactions are now routinely offered enhanced coverage with provisions that step beyond traditional title concepts. While underwriting differs among carriers, enhanced coverage policies are generally not available in construction situations, commercial transactions, or for raw land because of the higher risk associated with the enhanced coverages and those types of property.

The areas of enhanced of coverage are many, and typically include the following:

- Not only of a right of access but vehicular and pedestrian access;
- Certain zoning and subdivision coverage (though some are limited in amount, and some have deductibles, a concept not previously used in connection with title insurance) such as a loss stemming from forced removal of an improvement because the improvement was not built pursuant to a valid building permit or because the improvement violates zoning ordinances;
- After the date of the policy, an abutter constructs a building that encroaches on the insured property;
- Mechanic's lien coverage.

Title insurance carriers have their own versions of coverage and, while similar, are not identical. Copies of the ALTA versions of expanded coverage policies may be viewed on the ALTA website: www.alta.org.

H. Endorsement Usage

1. Generally

Whereas enhanced coverages are not available in connection with commercial transactions, commercial insureds enjoy some additional coverages through the use of endorsements. Endorsements were (and continue to be) developed to meet the needs of insureds who require additional risk coverages beyond those included or covered in the traditional policy jacket. Endorsements are designed either to modify or extend the coverage in the preprinted policy; to modify the conditions and stipulations of the preprinted policy; and to provide express or affirmative coverage over a specific issue or matter pertaining to the title of a particular site. Endorsements are generally available based on specific underwriting requirements of the given

underwriter, and for an additional premium. Since New Hampshire is a “filed” forms and rate state, before issuing any “new” or “custom” endorsement not previously approved by your underwriter, one should check with the title insurance underwriter for authorization, availability and pricing.

ALTA endorsement forms are in widespread use today, particularly in connection with residential transactions, however they are not the only forms of endorsements available. Endorsements are constantly being invented and created to provide additional coverages to insureds. Some state title associations have their own library of endorsements. Perhaps the largest and most well-known endorsements in the industry are those produced by the California Land Title Association (“CLTA”). In addition, title insurance carriers themselves have created many other endorsements. Endorsements are constantly being created and modified to meet the unique and varied title insurance needs of the consumer and lenders alike. In addition, ALTA’s website contains many forms and articles to anyone interested in more detailed information about ALTA and its forms.

2. Commonly Requested Endorsements

Particularly in commercial transactions, it is not uncommon for a proposed insured to provide a laundry list of requested endorsements. Endorsements have become part of the landscape. The speed and frequency with which new endorsements are being requested and created is on the rise. The number of existing endorsements is endless ... access, last dollar, first loss, usury, utility facility, fairway, contiguity, tax parcel, shopping center. The information contained herein is only a small sampling of some of the endorsements that are requested in today’s title insurance market.

Some of the more commonly requested endorsements are as follows:

The ALTA 9 Series — Comprehensive Endorsements

The ALTA 9 and 9.3 Endorsements, sometimes referred to as the “Comprehensive Endorsement,” are available for issuance in connection with a loan policy. The ALTA 9.1 and 9.2 Endorsements are a variation of the ALTA 9 and are designed for issuance with an owner’s policy for unimproved and improved property respectively. While not truly comprehensive, the additional coverages afforded by the ALTA 9 series of endorsements are significant. Requests for and issuance of these endorsements generally occur in connection with commercial transactions. Prior to issuance of this Endorsement, an underwriter may require a review of a current ALTA Survey and of all of the instruments encumbering the premises. In particular, careful attention must be paid when reviewing the covenants, conditions and restrictions contained in any recorded instruments, together with the survey for encroachments into easement areas or across boundary lines. Any such encroachments must be set forth on Schedule B of the policy. The ALTA 9.3 provides coverages assuring the priority of the lender’s mortgage against: (1) assessments and charges established in a recorded instrument; and (2) present or future violations of covenants, conditions and restrictions (CCR). In particular, coverage is provided against forfeiture and/or reversion of title. The ALTA 9 and 9.3 also provide

certain survey related coverages against: (1) forced removal of encroachments noted in Schedule B; (2) forced removal of improvements violating CCRs or recorded setbacks; and (3) damages to improvements caused by the exercise of excepted easements or mineral rights. The ALTA 9.3 extends to losses to future improvements resulting from the exercise of certain rights, while the ALTA 9.0 only extends to existing improvements. As such, the ALTA 9.3 is likely useful for unimproved properties on which development is planned in connection with the secured loan. Additionally, the ALTA 9 and 9.3 provides coverage to the insured lender for loss due to any CCR violation, encroachment, charge, assessment, option, easement, etc. which is not specifically excluded from coverage in Schedule B. Should your review of the title and survey uncover items that suggest issuance of the endorsement is problematic, you should contact your underwriter for assistance and possible revisions.

The ALTA 9 Endorsement may also be requested in connection with residential loan policies. As with the issuance of the endorsement in commercial transactions, you should also check with your underwriter for specific requirements associated with issuance. Often with regards to a residential transaction, the underwriting criteria will not include the need for a survey. The owner's versions of ALTA 9 coverage vary in degree from the lender's versions, but the required review process in connection with issuance is typically similar. A copy of the ALTA 9 series of is included in Appendix T-5.

ALTA 4 & ALTA 4.1 — Condominium Endorsements

The ALTA 4 and 4.1 Endorsements are available for issuance in connection with either an owner's and/or lender's policy of title insurance. The difference between the ALTA 4 Endorsement and the ALTA 4.1 Endorsement is the coverage provided as to unpaid condominium charges and assessments. The ALTA 4 provides coverage to lenders which insures the priority of the insured mortgage over any and all liens for charges and assessments under the Condominium Statute. The ALTA 4.1 Endorsement, alternatively, provides coverage which insures that all condominium charges and assessments are paid current through the date of policy. New Hampshire's Condominium Act provides for some priority of unpaid condominium charges and assessments liens, as follows:

I.(a) The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments, if perfected as hereinafter provided. The said lien, once perfected, shall be prior to all other liens and encumbrances except (1.) real estate tax liens on that condominium unit, (2.) liens and encumbrances recorded prior to the recordation of the declaration, and (3.) sums unpaid on any first mortgages or first deeds of trust encumbering that condominium unit and securing institutional lenders.

(b). The provisions of this paragraph shall not affect the priority of mechanics' and materialmen's liens. NH RSA 356-B:46 I(a) and (b).

The Condominium Statute must be carefully reviewed for the ability of the Unit Owners' Association to obtain priority as against a prior recorded mortgage. Accordingly, in New Hampshire, the preferable form of endorsement to be used is the ALTA 4.1 Endorsement because it speaks to dues and assessments reflected in a recorded lien.

In addition to coverages relating to the priority of the condominium assessments and charges, both the ALTA 4 and the ALTA 4.1 Endorsements provide additional coverages (1) that the Condominium was properly created and formed under state law; (2) that there are no present use violations, nor are there any restrictive covenants that provide for reversion or forfeiture of title; (3) that the condominium unit and its associated interest in the common areas are or will be afforded its own, separate real estate tax bill; (4) against any encroachment that would give rise to an obligation for removal; and (5) that there is no possibility of failure of title on account of an outstanding right of first refusal which could be exercised.

Issuance of the ALTA 4.1 in New Hampshire will generally require evidence to be obtained to ensure that all condominium charges and assessments for the particular unit or units being insured are current. Also, prior to issuance of the endorsement, a careful review of the Condominium documentation, specifically the Declaration, Floor and Site Plans, as well as the Unit Deed, and any approvals required by the New Hampshire Attorney General's office, will be necessary to assure the Condominium's valid formation and the validity of the other conditions insured.

Copies of the ALTA 4 and 4.1 are contained in Appendix T-6 hereof.

ALTA 6 & 6.1 — Variable Rate Endorsements

Most secondary market lenders will not accept a policy for a residential mortgage that secures a variable rate interest loan unless the ALTA 6 endorsement is attached. The ALTA 6 endorsement is available for attachment to a lender's policy only. The purpose of the ALTA 6 endorsement is to insure the Lender that the provision in the loan allowing for the interest rate to change will not impair the priority of the lien of the mortgage. The Note and Mortgage must both contain provisions for such change in interest in order for the endorsement to be issued. The ALTA 6.2, less frequently requested or used, provides additional insurance to the lender against loss of priority in the event the loan has a negative amortization feature. Copies of the ALTA 6 and 6.2 are contained in Appendix T-7 hereof.

ALTA 7— Manufactured Housing Endorsement

The ALTA 7.0 Endorsement is available for issuance in connection with loan and owner's policies. Manufactured Housing is defined in NH RSA 674:31 as

any structure, transportable in one or more sections, which, in the traveling mode, is 8 body feet or more in width and 40 body feet or more in length, or when erected on site, is 320 square feet or more, and which is built on a permanent chassis and

designed to be used as a dwelling with or without a permanent foundation when connected to required utilities, which include plumbing, heating and electrical heating systems contained therein. Manufactured housing as defined in this section shall not include presite built housing

Since August 17, 1983, the date of enactment of NH RSA 477:44, manufactured housing, when sufficiently tied to the land, constituted real estate under New Hampshire law. NH RSA 477:44 provides that

Manufactured housing, as defined by RSA 674:31, shall be deemed a building for the purpose of paragraph I when such manufactured housing is placed on a site and tied into required utilities.

The ALTA 7.0 Endorsement, when attached to a policy of title insurance, merely expands the definition of land contained therein to include the manufactured housing unit located on the land. However, when insuring a manufactured housing unit that is located on land of another, there are special exceptions that need to be included in Schedule B of any policy to be issued. One should check with their underwriter for guidance and assistance relating thereto. Further, in order to insure title to the manufactured housing unit and issue the ALTA 7.0 Endorsement, some evidence that the manufactured housing unit has been affixed to the land and is tied into utilities will generally be required. A form of affidavit, provided to you by your underwriter, usually satisfies this requirement. A copy of the ALTA 7.0 Endorsement is included in Appendix T-8 hereof, together with a sample affidavit evidencing compliance with the definition of NH RSA 674:31.

ALTA 8 Series — Environmental Lien Endorsement

The ALTA 8.1 is available for issuance in connection with a lender's policy of title insurance when the insured property is residential. The ALTA 8.1 Endorsement provides coverage to lenders insuring that there are no environmental liens of record as of the date of the policy; and that, unless noted on the endorsement, there are no state statutes that would provide super-priority for environmental liens, thereby affecting the priority of the insured mortgage. New Hampshire RSA 147-B: 10-b, III.(a) provides for an environmental lien to be recorded and to have the following priorities:

As to the real property on which the hazardous waste or hazardous material is located, the lien shall constitute a first priority lien against such real property prior to all encumbrances, whether of record or inchoate, when the notice of lien is recorded in the registry of deeds for the county in which such real property is located and the notice of lien identifies the record owner of such real property. This subparagraph shall not apply to real property in use as, or being constructed primarily for, residential purposes. . . Such residential real property shall be governed by subparagraph (c) of this paragraph. . . . (c) As to all other property, whether real, personal or business revenues, other than

that which is described in subparagraph (a) or (b) of this paragraph, the notice of lien shall constitute a lien that is effective as of the date and time of recording or filing, without priority on antecedent encumbrances of record when the notice of lien is properly recorded in the appropriate registry of deeds or filed with the secretary of state.

Therefore, in New Hampshire, it is appropriate, in cases involving residential properties, to add the word “NONE” in the space provided for super priority statutes. But note that, the ALTA 8.1 only assures priority of the mortgage lien and the lack of recorded environmental liens. It is not a replacement for an environmental site assessment and does not provide any other coverages to a Lender. A copy of the ALTA 8.1 Environmental Lien Endorsement is included in Appendix T-8.

In connection with commercial transactions, the ALTA 8.2 Commercial Environmental Lien Endorsement would be appropriate. This endorsement provides coverage against loss or damage sustained by reason of an environmental protection lien recorded in the public records. While typically used in commercial transactions, the ALTA 8.2 is available for issuance in conjunction with lender’s and owner’s policies relating to residential or commercial properties, whether improved or unimproved. A copy of the ALTA 8.2 Commercial Environmental Endorsement is included in Appendix T-9.

Secondary Mortgage Market Endorsement

The most commonly requested non-ALTA Endorsement in connection with residential transactions remains the Secondary Mortgage Market Endorsement. The Secondary Mortgage Market Endorsement is designed to provide affirmative assurances that: (1) no exception matter included on Schedule B, Part I of the Loan Policy will adversely affect the use of the premises as currently improved for residential purposes; (2) no violation of the restrictive covenants affecting the premises will result in a reverter of forfeiture of title, and (3) all real estate taxes and municipal liens, including any for water and sewer, are paid and current. In order to issue this Endorsement, a determination must be made that the state of the title and the municipal tax and other payment status supports its issuance. A copy of a typical Secondary Mortgage Market Endorsement is contained in Appendix T-10.

3. ALTA 34 Series – Identified Risk Endorsements & Affirmative Coverages

There are several common situations and many more uncommon situations that can arise which may be appropriate for a buyer or lender to accept affirmative coverage with respect to a disclosed risk found during the title search of the premises, rather than to reject title outright. Such an issue generally affects the marketability of the title but the practical risk of anyone objecting or making a claim as a result of the disclosed defect is so low that an underwriter is willing, upon request, to issue affirmative coverage. Common scenarios where affirmative language might be used include certain situations involving missing discharges of a mortgage, encroachments by improvements onto adjacent property, and possible fractional outstanding interests.

Traditionally, affirmative coverage was provided by identifying a risk as a Schedule B-Part I exception in the policy, followed by language describing the coverage being provided. The following are just a few examples of some affirmative coverage language that might be offered by an underwriter.

Example relating to an undischarged mortgage:

Mortgage from Edna and Joseph Breezeman to Long Gone Bank, dated January 22, 1978, recorded with the Merrimack County Registry of Deeds at Book 1234, Page 123; as affected by Affidavit of Joseph Breezeman recorded with said Registry of Deeds at Book 2222, Page 11.

NOTE: This policy insures the insured lender against loss or damage on account of any enforcement or attempted enforcement of the underlying indebtedness secured by the above referred mortgage lien.

Example relating to an existing encroachment into setback area:

Possible encroachment of roof eaves, garage and shed into side set back area along the easterly boundary as shown on Mortgage Loan Inspection Report prepared by Good Work Surveys, Inc., dated January 12, 2003.

NOTE: This policy insures the insured lender against any actual loss or damage on account of a final decree or order of a court of competent jurisdiction requiring removal of the aforesaid roof eaves, garage and/or shed on account of their encroachment into the side set back area as shown and/or described on the above report.

Example relating to a certain missing interest:

Any outstanding right, title and/or interest of the Motley Crew Limited Partnership or those claiming by, through or under it.

NOTE: This policy insures the insured against loss or damage on account of a court of competent jurisdiction entering a final decree vesting superior right, title and interest in the Motley Crew Limited Partnership or any party claiming by, through or under it. Nothing herein shall be deemed to insure against loss or damage sustained by the insured on account of failure of any person to purchase, lease, lend money, or accept assignment of a mortgage due to the aforesaid exception.

In lieu of affirmative coverage language, many insurers now prefer use of the ALTA 34 Identified Risk Coverage and/or ALTA 34.1 Identified Exception & Identified Risk Coverage endorsements, as they better define the scope, and reduce inconsistencies and variations, in affirmative coverages.

The ALTA 34 endorsement provides coverage against loss or damage resulting from a final order or decree enforcing a defined "Identified Risk." The Identified Risk is identified by a Schedule B policy exception number and a description of the defect or encumbrance. A copy of the ALTA 34 Identified Risk Coverage Endorsement is included in Appendix T-11.

Like the ALTA 34 endorsement, the purpose of the ALTA 34.1 endorsement is to insure against loss or damage by reason of stated consequences of a specified defect, lien, or encumbrance. Both endorsements provide this coverage by modifying the Policy's existing coverage for "Unmarketable Title" and both include coverage for defense costs. However, unlike the ALTA 34, the 34.1 differentiates a defined "Identified Exception" from the consequences of an Identified Risk posed by the exception. Rather than insuring over the identified exception, this endorsement more specifically targets the consequences that may result from the exercise or enforcement of the matter described in the exception. Importantly, neither endorsement obligates the Company to establish the Title free of the Identified Risk or to remove or eliminate the Identified Risk.

A copy of the ALTA 34.1 Identified Exception & Identified Risk Coverage Endorsement is included in Appendix T-12.

Regardless of whether affirmative coverage is being provided by specifically drafted language or by endorsement issuance, one should always check with their underwriter before proceeding for authority, appropriate language and/or form, and for associated fees.

APPENDIX T-1

2021 Policy Jackets:

LOAN POLICY JACKET

Loan Policy covers for any loss or damage sustained on account of:

Title vested other than as stated in the Policy

Defects or encumbrances on the title such as those arising through forgery, fraud, incompetency, lack of authority, ineffective execution, ineffectively filed document, unpaid tax liens, and other such defects, for which no exception is taken in the policy.

Unmarketability of Title

Lack of a Right of Access

Invalidity or Unenforceability of the Insured Mortgage

Priority of any Lien over that of the Insured Mortgage

Lack of Priority of the Insured Mortgage as against mechanics liens for work occurring prior to the policy date or financed by the insured mortgage which at policy date the insured has advanced payment for or is obligated to advance payment for.

Invalidity/unenforceability of any Assignment referred to in Schedule A of the policy

Plus Legal Defense

OWNER'S POLICY JACKET

Owner's Policy covers for any loss or damage sustained on account of:

Title vested other than as stated in the Policy

Defects or encumbrances on the title not reflected on Schedule B of the Policy

Unmarketability of Title

Lack of a Right of Access

Plus Legal Defense

HOWEVER, POLICIES SUBJECT TO:

Exclusions from Coverage

1. Governmental Regulations - Zoning/Environmental/Subdivision/Building Codes
2. Eminent Domain
3. Acts/Knowledge of Insured
4. Creditors Rights in Transaction creating insured interest
5. Doing Business Law Compliance
6. Usury or Truth in Lending Laws
7. Mechanic's Liens after Policy Date not financed by insured mortgage

Exceptions set forth in Schedule B

1. Parties in Possession
2. Matters an accurate survey would disclose
3. Mechanics' Liens
4. Real Estate Taxes not yet due and payable
5. Title/Rights in Streets
6. Other Exceptions Particular to Specific Title/Transaction

Conditions

1. Definitions including Insured Successors/Guarantors
2. Length of Coverage
3. Timeliness of Notice of Claim
4. Proof of Loss
5. Defense
6. Ensured Duty of Cooperation
7. Payment/Settlement of Claims

8. Amount of Liability
9. Limit of Liability
10. Reduction of Liability
11. Payment
12. Rights of Subrogation
13. Arbitration
14. Entirety of contract
15. Severability
16. Choice of Law/Forum
17. Notice – where to make

Exclusions from Coverage

1. Governmental Regulations
2. Eminent Domain
3. Defects/Liens related to
 - a. Known, suffered or assumed by the Insured
 - b. Undisclosed to the Company
 - c. Resulting in no loss
 - d. Post-policy
 - e. Failure to pay value for the insured estate
 - f. Failure to comply with doing business laws of jurisdiction
 - g. Creditor's Rights in Transaction creating interest insured
 - h. Usury laws



ALTA COMMITMENT FOR TITLE INSURANCE
issued by
FIRST AMERICAN TITLE INSURANCE COMPANY

NOTICE

IMPORTANT—READ CAREFULLY: THIS COMMITMENT IS AN OFFER TO ISSUE ONE OR MORE TITLE INSURANCE POLICIES. ALL CLAIMS OR REMEDIES SOUGHT AGAINST THE COMPANY INVOLVING THE CONTENT OF THIS COMMITMENT OR THE POLICY MUST BE BASED SOLELY IN CONTRACT.

THIS COMMITMENT IS NOT AN ABSTRACT OF TITLE, REPORT OF THE CONDITION OF TITLE, LEGAL OPINION, OPINION OF TITLE, OR OTHER REPRESENTATION OF THE STATUS OF TITLE. THE PROCEDURES USED BY THE COMPANY TO DETERMINE INSURABILITY OF THE TITLE, INCLUDING ANY SEARCH AND EXAMINATION, ARE PROPRIETARY TO THE COMPANY, WERE PERFORMED SOLELY FOR THE BENEFIT OF THE COMPANY, AND CREATE NO EXTRACTIONAL LIABILITY TO ANY PERSON, INCLUDING A PROPOSED INSURED.

THE COMPANY'S OBLIGATION UNDER THIS COMMITMENT IS TO ISSUE A POLICY TO A PROPOSED INSURED IDENTIFIED IN SCHEDULE A IN ACCORDANCE WITH THE TERMS AND PROVISIONS OF THIS COMMITMENT. THE COMPANY HAS NO LIABILITY OR OBLIGATION INVOLVING THE CONTENT OF THIS COMMITMENT TO ANY OTHER PERSON.

COMMITMENT TO ISSUE POLICY

Subject to the Notice; Schedule B, Part I—Requirements; Schedule B, Part II—Exceptions; and the Commitment Conditions, First American Title Insurance Company, a Nebraska Corporation (the "Company"), commits to issue the Policy according to the terms and provisions of this Commitment. This Commitment is effective as of the Commitment Date shown in Schedule A for each Policy described in Schedule A, only when the Company has entered in Schedule A both the specified dollar amount as the Proposed Amount of Insurance and the name of the Proposed Insured.

If all of the Schedule B, Part I—Requirements have not been met within six months after the Commitment Date, this Commitment terminates and the Company's liability and obligation end.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 
Kenneth D. DeGiorgio, President

By: 
Lisa W. Cornehl, Secretary

This page is only a part of a 2021 ALTA Commitment for Title Insurance[issued by _____]. This Commitment is not valid without the Notice; the Commitment to Issue Policy; the Commitment Conditions; Schedule A; Schedule B, Part I—Requirements;[and] Schedule B, Part II—Exceptions; and a counter-signature by the Company or its issuing agent that may be in electronic form].

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Form 50143133 (8-5-22)



**COMMITMENT CONDITIONS****1. DEFINITIONS**

- a. "Discriminatory Covenant": Any covenant, condition, restriction, or limitation that is unenforceable under applicable law because it illegally discriminates against a class of individuals based on personal characteristics such as race, color, religion, sex, sexual orientation, gender identity, familial status, disability, national origin, or other legally protected class.
- b. "Knowledge" or "Known": Actual knowledge or actual notice, but not constructive notice imparted by the Public Records.
- c. "Land": The land described in Item 5 of Schedule A and improvements located on that land that by State law constitute real property. The term "Land" does not include any property beyond that described in Schedule A, nor any right, title, interest, estate, or easement in any abutting street, road, avenue, alley, lane, right-of-way, body of water, or waterway, but does not modify or limit the extent that a right of access to and from the Land is to be insured by the Policy.
- d. "Mortgage": A mortgage, deed of trust, trust deed, security deed, or other real property security instrument, including one evidenced by electronic means authorized by law.
- e. "Policy": Each contract of title insurance, in a form adopted by the American Land Title Association, issued or to be issued by the Company pursuant to this Commitment.
- f. "Proposed Amount of Insurance": Each dollar amount specified in Schedule A as the Proposed Amount of Insurance of each Policy to be issued pursuant to this Commitment.
- g. "Proposed Insured": Each person identified in Schedule A as the Proposed Insured of each Policy to be issued pursuant to this Commitment.
- h. "Public Records": The recording or filing system established under State statutes in effect at the Commitment Date under which a document must be recorded or filed to impart constructive notice of matters relating to the Title to a purchaser for value without Knowledge. The term "Public Records" does not include any other recording or filing system, including any pertaining to environmental remediation or protection, planning, permitting, zoning, licensing, building, health, public safety, or national security matters.
- i. "State": The state or commonwealth of the United States within whose exterior boundaries the Land is located. The term "State" also includes the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and Guam.
- j. "Title": The estate or interest in the Land identified in Item 3 of Schedule A.

2. If all of the Schedule B, Part I—Requirements have not been met within the time period specified in the Commitment to Issue Policy, this Commitment terminates and the Company's liability and obligation end.

3. The Company's liability and obligation is limited by and this Commitment is not valid without:

- a. the Notice;
- b. the Commitment to Issue Policy;
- c. the Commitment Conditions;
- d. Schedule A;
- e. Schedule B, Part I—Requirements;[and]
- f. Schedule B, Part II—Exceptions;[and]
- g. a counter-signature by the Company or its issuing agent that may be in electronic form].

4. COMPANY'S RIGHT TO AMEND

The Company may amend this Commitment at any time. If the Company amends this Commitment to add a defect, lien, encumbrance, adverse claim, or other matter recorded in the Public Records prior to the Commitment Date, any liability of the Company is limited by Commitment Condition 5. The Company is not liable for any other amendment to this Commitment.

This page is only a part of a 2021 ALTA Commitment for Title Insurance[issued by _____]. This Commitment is not valid without the Notice; the Commitment to Issue Policy; the Commitment Conditions; Schedule A; Schedule B, Part I—Requirements;[and] Schedule B, Part II—Exceptions;[and a counter-signature by the Company or its issuing agent that may be in electronic form].

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5. LIMITATIONS OF LIABILITY

- a. The Company's liability under Commitment Condition 4 is limited to the Proposed Insured's actual expense incurred in the interval between the Company's delivery to the Proposed Insured of the Commitment and the delivery of the amended Commitment, resulting from the Proposed Insured's good faith reliance to:
 - i. comply with the Schedule B, Part I—Requirements;
 - ii. eliminate, with the Company's written consent, any Schedule B, Part II—Exceptions; or
 - iii. acquire the Title or create the Mortgage covered by this Commitment.
- b. The Company is not liable under Commitment Condition 5.a. if the Proposed Insured requested the amendment or had Knowledge of the matter and did not notify the Company about it in writing.
- c. The Company is only liable under Commitment Condition 4 if the Proposed Insured would not have incurred the expense had the Commitment included the added matter when the Commitment was first delivered to the Proposed Insured.
- d. The Company's liability does not exceed the lesser of the Proposed Insured's actual expense incurred in good faith and described in Commitment Condition 5.a. or the Proposed Amount of Insurance.
- e. The Company is not liable for the content of the Transaction Identification Data, if any.
- f. The Company is not obligated to issue the Policy referred to in this Commitment unless all of the Schedule B, Part I—Requirements have been met to the satisfaction of the Company.
- g. The Company's liability is further limited by the terms and provisions of the Policy to be issued to the Proposed Insured.

6. LIABILITY OF THE COMPANY MUST BE BASED ON THIS COMMITMENT; CHOICE OF LAW AND CHOICE OF FORUM

- a. Only a Proposed Insured identified in Schedule A, and no other person, may make a claim under this Commitment.
- b. Any claim must be based in contract under the State law of the State where the Land is located and is restricted to the terms and provisions of this Commitment. Any litigation or other proceeding brought by the Proposed Insured against the Company must be filed only in a State or federal court having jurisdiction.
- c. This Commitment, as last revised, is the exclusive and entire agreement between the parties with respect to the subject matter of this Commitment and supersedes all prior commitment negotiations, representations, and proposals of any kind, whether written or oral, express or implied, relating to the subject matter of this Commitment.
- d. The deletion or modification of any Schedule B, Part II—Exception does not constitute an agreement or obligation to provide coverage beyond the terms and provisions of this Commitment or the Policy.
- e. Any amendment or endorsement to this Commitment must be in writing[and authenticated by a person authorized by the Company].
- f. When the Policy is issued, all liability and obligation under this Commitment will end and the Company's only liability will be under the Policy.

7. IF THIS COMMITMENT IS ISSUED BY AN ISSUING AGENT

The issuing agent is the Company's agent only for the limited purpose of issuing title insurance commitments and policies. The issuing agent is not the Company's agent for closing, settlement, escrow, or any other purpose.

8. PRO-FORMA POLICY

The Company may provide, at the request of a Proposed Insured, a pro-forma policy illustrating the coverage that the Company may provide. A pro-forma policy neither reflects the status of Title at the time that the pro-forma policy is delivered to a Proposed Insured, nor is it a commitment to insure.

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9. CLAIMS PROCEDURES

This Commitment incorporates by reference all Conditions for making a claim in the Policy to be issued to the Proposed Insured. Commitment Condition 9 does not modify the limitations of liability in Commitment Conditions 5 and 6.

10. CLASS ACTION

ALL CLAIMS AND DISPUTES ARISING OUT OF OR RELATING TO THIS COMMITMENT, INCLUDING ANY SERVICE OR OTHER MATTER IN CONNECTION WITH ISSUING THIS COMMITMENT, ANY BREACH OF A COMMITMENT PROVISION, OR ANY OTHER CLAIM OR DISPUTE ARISING OUT OF OR RELATING TO THE TRANSACTION GIVING RISE TO THIS COMMITMENT, MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS OR REPRESENTATIVE PROCEEDING. ANY POLICY ISSUED PURSUANT TO THIS COMMITMENT WILL CONTAIN A CLASS ACTION CONDITION.

11. ARBITRATION

The Policy contains an arbitration clause. All arbitrable matters when the Proposed Amount of Insurance is \$2,000,000 or less may be arbitrated at the election of either the Company or the Proposed Insured as the exclusive remedy of the parties. A Proposed Insured may review a copy of the arbitration rules at <http://www.alta.org/arbitration>.

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**Transaction Identification Data, for which the Company assumes no liability as set forth in Commitment Condition 5.e.:**

Issuing Agent:

Issuing Office:

Issuing Office's ALTA® Registry ID:

[Loan ID Number:]

Commitment Number:

Issuing Office File Number:

Property Address:

[Revision Number:]

SCHEDULE A

1. Commitment Date:
2. Policy to be issued:
 - a. [____ ALTA® _____ Policy]
 Proposed Insured:
 Proposed Amount of Insurance: \$
 The estate or interest to be insured:
 - [b. [____ ALTA® _____ Policy]
 Proposed Insured:
 Proposed Amount of Insurance: \$
 The estate or interest to be insured:]
 - [c. [____ ALTA® _____ Policy]
 Proposed Insured:
 Proposed Amount of Insurance: \$
 The estate or interest to be insured:]
3. The estate or interest in the Land at the Commitment Date is: *(Identify each estate or interest covered, i.e., fee, leasehold, etc.)*
4. The Title is, at the Commitment Date, vested in[:] *(Identify vesting for each estate or interest identified in Item 3 above)* [and, as disclosed in the Public Records, has been since (Date)]
5. The Land is described as follows: and is described as set forth in Exhibit A attached hereto and made a part hereof.

(insert "First American Title Insurance Company" or Agent name here)By: _____
Authorized Signatory

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**SCHEDULE B, PART I—Requirements**

All of the following Requirements must be met:

1. The Proposed Insured must notify the Company in writing of the name of any party not referred to in this Commitment who will obtain an interest in the Land or who will make a loan on the Land. The Company may then make additional Requirements or Exceptions.
2. Pay the agreed amount for the estate or interest to be insured.
3. Pay the premiums, fees, and charges for the Policy to the Company.
4. Documents satisfactory to the Company that convey the Title or create the Mortgage to be insured, or both, must be properly authorized, executed, delivered, and recorded in the Public Records.
(Documents to be listed here)

(Additional Requirements may be listed here by number)

SCHEDULE B, PART II—Exceptions

Some historical land records contain Discriminatory Covenants that are illegal and unenforceable by law. This Commitment and the Policy treat any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is redacted, repudiated, removed, and not republished or recirculated. Only the remaining provisions of the document will be excepted from coverage.

The Policy will not insure against loss or damage resulting from the terms and conditions of any lease or easement identified in Schedule A, and will include the following Exceptions unless cleared to the satisfaction of the Company:

1. Any facts, rights, interests, or claims which are not shown in the Public Records but which could be ascertained by an inspection of the Land or by making inquiry of persons in possession of the Land.
2. Any, encroachment, encumbrance, violation, variation or adverse circumstance affecting the Title, including discrepancies, conflicts in boundary lines, shortages in area, or any other facts that would be disclosed by an accurate and complete land survey of the Land, and that are not shown in the Public Records.
3. Any lien or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown in the Public Records.
4. Any defect, lien, encumbrance, adverse claim, or other matter that appears for the first time in the Public Records or is created, attaches, or is disclosed between the Commitment Date and the date on which all of the Schedule B, Part I—Requirements are met.
5. Real estate taxes and municipal charges as follows:
6. IF THE LAND IS A CONDOMINIUM UNIT: Covenants, conditions, restrictions, reservations, easements, liens for assessments, options, powers of attorney, and limitations on title, created by the laws of the State of the Land or set forth in the Declaration of Condominium, in the related By-Laws, or Site Plans and Floor Plans as duly recorded in the Public Records and as the same may have been lawfully emended, and in any instrument creating the Title.

(Additional Exceptions may be listed here by number)

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**ALTA EXPANDED COVERAGE RESIDENTIAL LOAN POLICY OF TITLE INSURANCE—
CURRENT ASSESSMENTS
FOR ONE-TO-FOUR FAMILY RESIDENTIAL PROPERTY
issued by
FIRST AMERICAN TITLE INSURANCE COMPANY**

This policy, when issued by the Company with a Policy Number and the Date of Policy, is valid even if this policy or any endorsement to this policy is issued electronically or lacks any signature.

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Condition 16.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, First American Title Insurance Company, a Nebraska corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, and 27, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
 - a. a defect in the Title caused by:
 - i. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - ii. the failure of a person or Entity to have authorized a transfer or conveyance;
 - iii. a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
 - iv. a failure to perform those acts necessary to create a document by electronic means authorized by law;
 - v. a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - vi. a document not properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - vii. a defective judicial or administrative proceeding; or
 - viii. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
 - b. the lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
 - c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.
3. Unmarketable Title.
4. Lack of actual vehicular and pedestrian access to and from the Land, based on a legal right.





5. A violation or enforcement of a law, ordinance, permit, or governmental regulation (including those relating to building and zoning), but only to the extent of the violation or enforcement described by the enforcing governmental authority in an Enforcement Notice that identifies a restriction, regulation, or prohibition relating to:
 - a. the occupancy, use, or enjoyment of the Land;
 - b. the character, dimensions, or location of an improvement on the Land;
 - c. the subdivision of the Land; or
 - d. environmental remediation or protection on the Land.
6. An enforcement of a governmental forfeiture, police, regulatory, or national security power, but only to the extent of the enforcement described by the enforcing governmental authority in an Enforcement Notice.
7. An exercise of the power of eminent domain, but only to the extent:
 - a. of the exercise described in an Enforcement Notice; or
 - b. the taking occurred and is binding on a purchaser for value without Knowledge.
8. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. Covered Risk 8 includes, but is not limited to, insurance against loss caused by:
 - a. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - b. the failure of a person or Entity to have authorized a transfer or conveyance;
 - c. the Insured Mortgage not being properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
 - d. a failure to perform those acts necessary to create an Insured Mortgage by electronic means authorized by law;
 - e. a document having been executed under a falsified, expired, or otherwise invalid power of attorney;
 - f. the Insured Mortgage not having been properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - g. a defective judicial or administrative proceeding; or
 - h. invalidity or unenforceability of the lien of the Insured Mortgage as a result of the repudiation of an electronic signature by a person that executed the Insured Mortgage because the electronic signature on the Insured Mortgage was not valid under applicable electronic transactions law.
9. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.
10. The lack of priority of the lien of the Insured Mortgage upon the Title:
 - a. as security for each advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for service, labor, material, or equipment arising from construction of an improvement or work related to the Land when the improvement or work is:
 - i. contracted for or commenced on or before the Date of Policy; or
 - ii. contracted for, commenced, or continued after the Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on the Date of Policy to advance;
 - b. over the lien of any assessments for street improvements under construction or completed at the Date of Policy; and
 - c. over any defect in or lien or encumbrance on the Title attaching or created before, on, or after the Date of Policy; as to each and every advance of proceeds of the loan secured by the Insured Mortgage, which at the Date of Policy the Insured has made or is legally obligated to make.
11. The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.





12. The failure of the Land:
 - a. to have the Property Address shown in Schedule A, and the failure of the map, if any, attached to this policy to show the correct location and dimensions of the Land according to the Public Records.
 - b. to be improved with a one-to-four family residential structure or, if stated in the description of the Land, a residential condominium unit.
 - c. to be zoned by State or Municipal zoning law or State or Municipal zoning regulation to permit a one-to-four family residential structure or, if stated in the description of the Land, a residential condominium unit.
 - d. to be a lawfully created one-to-four family residential parcel according to State or Municipal subdivision law or State or Municipal subdivision regulation.
13. The forced removal, modification, or replacement of any existing one-to-four family residential structure or residential condominium unit located on the Land resulting from the violation of any of the following requirements of any applicable State or Municipal zoning law or State or Municipal zoning regulation:
 - a. area or dimensions of the Land as a building site;
 - b. floor space area of the structure;
 - c. height of the structure; or
 - d. distance of the structure from the boundary lines of the Land.
14. The assessment or taxation of the Land by a governmental authority as part of a larger parcel.
15. The failure of the existing one-to-four family residential structure or residential condominium unit or a portion of it, or future modification or replacement, to be constructed with a valid building permit from the appropriate Municipal authority.
16. The inability to use the existing one-to-four family residential structure or residential condominium unit or a portion of it, or future modification or replacement, for one-to-four family residential purposes, because that use violates a restriction identified in Schedule B.
17. Damage to any improvement, lawn, shrubbery, or tree constructed or planted on the Land before, on, or after the Date of Policy resulting from the future exercise of the right to use the surface of the Land for the extraction or development of oil, gas, minerals, groundwater, or any other subsurface substance.
18. The encroachment of an improvement constructed after the Date of Policy onto the Land.
19. The encroachment of an improvement constructed on the Land after the Date of Policy onto adjoining property or over any easement or building setback line on the Land.
20. Forgery after the Date of Policy of any instrument purporting to:
 - a. subordinate, assign, release, or reconvey the Insured Mortgage; or
 - b. convey or encumber the Title.
21. The invalidity, unenforceability, or lack of priority of the lien of the Insured Mortgage as to Advances made or changes in the rate of interest charged subsequent to any modification of the terms of the Insured Mortgage made after the Date of Policy that are secured by the terms of the Insured Mortgage as modified.
22. Damage to any improvement, lawn, shrubbery, or tree constructed or planted on the Land before, on, or after the Date of Policy resulting from the exercise of the right to use or maintain any easement identified in Schedule B.
23. The interference with the use of any improvement constructed on the Land before, on, or after the Date of Policy for one-to-four family residential purposes resulting from the exercise of the right to use or maintain any easement identified in Schedule B.





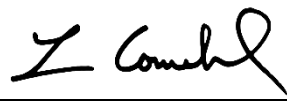
24. Supplemental real estate taxes, including those caused by construction or change of ownership or use, that occurred before the Date of Policy, not previously assessed against the Land before the Date of Policy.
25. The invalidity or unenforceability, in whole or in part, of the lien of the Insured Mortgage upon the Title based upon a violation of usury law of the State where the Land is located if no other Mortgage is identified as an Exception in Schedule B.
26. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title, or the effect of a court order providing an alternative remedy:
 - a. resulting from the avoidance, in whole or in part, of any transfer of all or any part of the Title to the Land or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a:
 - i. fraudulent conveyance, fraudulent transfer, or preferential transfer under federal bankruptcy, state insolvency, or similar state or federal creditors' rights law; or
 - ii. voidable transfer under the Uniform Voidable Transactions Act; or
 - b. because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar state or federal creditors' rights law by reason of the failure:
 - i. to timely record the Insured Mortgage in the Public Records after execution and delivery of the Insured Mortgage to the Insured; or
 - ii. of the recording of the Insured Mortgage in the Public Records to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
27. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 26 that has been created or attached or has been filed or recorded in the Public Records subsequent to the Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.
28. Unless stated to the contrary in Schedule B, the Company incorporates the following endorsements, as adopted by the American Land Title Association (ALTA) and authorized for use in the State as of the Date of Policy, into this policy by this reference as if these endorsements are attached to this policy:
 - a. ALTA 4.1 Condominium—Current Assessments, if a condominium unit is referred to in the description of the Land;
 - b. ALTA 5.1 Planned Unit Development—Current Assessments;
 - c. ALTA 6 Variable Rate Mortgage;
 - d. ALTA 6.2 Variable Rate Mortgage—Negative Amortization;
 - e. ALTA 8.1 Environmental Protection Lien, subject to the State statutes, if any, identified in Schedule B specifically for this endorsement;
 - f. ALTA 9.6.1 Private Rights—Current Assessments—Loan Policy; and
 - g. ALTA 9.10 Restrictions, Encroachments, Minerals—Current Assessments—Loan Policy.

DEFENSE OF COVERED CLAIMS

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this policy, but only to the extent provided in the Conditions.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 
Kenneth D. DeGiorgio, President

By: 
Lisa W. Cornehl, Secretary

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EXCLUSIONS FROM COVERAGE

The following matters are excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. a. any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) that restricts, regulates, prohibits, or relates to:
 - i. the occupancy, use, or enjoyment of the Land;
 - ii. the character, dimensions, or location of any improvement on the Land;
 - iii. the subdivision of land; or
 - iv. environmental remediation or protection.b. any governmental forfeiture, police, regulatory, or national security power.
c. the effect of a violation or enforcement of any matter excluded under Exclusion 1.a. or 1.b.
Exclusion 1.b. does not modify or limit the coverage provided under Covered Risk 5, 6, 12.c., 12.d., 13, or 15.
2. Any power of eminent domain. Exclusion 2 does not modify or limit the coverage provided under Covered Risk 7.
3. Any defect, lien, encumbrance, adverse claim, or other matter:
 - a. created, suffered, assumed, or agreed to by the Insured Claimant;
 - b. not Known to the Company, not recorded in the Public Records at the Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
 - c. resulting in no loss or damage to the Insured Claimant;
 - d. attaching or created subsequent to the Date of Policy (Exclusion 3.d. does not modify or limit the coverage provided under Covered Risk 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, and 27); or
 - e. resulting in loss or damage that would not have been sustained if consideration sufficient to qualify the Insured named in Schedule A as a bona fide purchaser or encumbrancer had been given for the Insured Mortgage at the Date of Policy.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business law.
5. Invalidity or unenforceability of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury law or Consumer Protection Law. Exclusion 5 does not modify or limit the coverage provided in Covered Risk 25.
6. Any claim of invalidity, unenforceability, or lack of priority of the lien of the Insured Mortgage as to Advances or modifications made after the Insured has Knowledge that the vestee shown in Schedule A is no longer the owner of the Title. Exclusion 6 does not modify or limit the coverage provided under Covered Risk 10.
7. The failure of the residential structure, or any portion of it, to have been constructed before, on, or after the Date of Policy in accordance with applicable building codes. Exclusion 7 does not modify or limit the coverage provided in Covered Risk 5 or 6.
8. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights law, that the transaction creating the lien of the Insured Mortgage is a:
 - a. fraudulent conveyance or fraudulent transfer;
 - b. voidable transfer under the Uniform Voidable Transactions Act; or





- c. preferential transfer:
 - i. to the extent the Insured Mortgage is not a transfer made as a contemporaneous exchange for new value; or
 - ii. for any other reason not stated in Covered Risk 26.b.
- 9. Contamination, explosion, fire, flooding, vibration, fracturing, earthquake, or subsidence.
- 10. Negligence by a person or an Entity exercising a right to extract or develop oil, gas, minerals, groundwater, or any other subsurface substance.
- 11. Any lien on the Title for real estate taxes or assessments imposed by a governmental authority and created or attaching between the Date of Policy and the date of recording of the Insured Mortgage in the Public Records. Exclusion 11 does not modify or limit the coverage provided under Covered Risk 10.b. or 24.
- 12. Any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any improvement to the Land.





Transaction Identification Data, for which the Company assumes no liability as set forth in Condition 9.e.:

Issuing Agent:
Issuing Office:
Issuing Office's ALTA® Registry ID:
Loan ID Number:
Issuing Office File Number:
Property Address:

SCHEDULE A

Name and Address of Title Insurance Company:

Policy Number:

Property Address of the Land:

Amount of Insurance: \$ [Premium: \$]

Date of Policy: [at a.m./p.m.]

1. The Insured is:
2. The estate or interest in the Land encumbered by the Insured Mortgage is:
3. The Title encumbered by the Insured Mortgage is vested in:
4. The Insured Mortgage and its assignments, if any, are described as follows:
5. The Land is described as follows: and is described as set forth in Exhibit A attached hereto and made a part hereof.

(insert "First American Title Insurance Company" or Agent name here)

By: _____
Authorized Signatory





SCHEDULE B

Policy Number:

EXCEPTIONS FROM COVERAGE

Some historical land records contain Discriminatory Covenants that are illegal and unenforceable by law. This policy treats any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is redacted, repudiated, removed, and not republished or recirculated. Only the remaining provisions of the document are excepted from coverage.

PART I

This policy does not insure against loss or damage and the Company will not pay costs, attorneys' fees, or expenses resulting from the terms and conditions of any lease or easement identified in Schedule A, and the following matters:

1. The following State statutes, reference to which are made part of the ALTA 8.1 Environmental Protection Lien endorsement incorporated into this policy: N.H. RSA ch 147-B

(Additional Exceptions may be listed here by number)

PART II

Covered Risk 10 insures against loss or damage sustained by the Insured by reason of the lack of priority of the lien of the Insured Mortgage over the matters listed in Part II, subject to the terms and conditions of any subordination provision in a matter listed in Part II:





CONDITIONS

1. DEFINITION OF TERMS

In this policy, the following terms have the meanings given to them below. Any defined term includes both the singular and the plural, as the context requires:

- a. “Advances”: Disbursements of Indebtedness made after the Date of Policy as provided by the Insured Mortgage.
- b. “Affiliate”: An Entity:
 - i. that is wholly owned by the Insured;
 - ii. that wholly owns the Insured; or
 - iii. if that Entity and the Insured are both wholly owned by the same person or entity.
- c. “Amount of Insurance”: One hundred twenty-five percent (125%) of the Amount of Insurance stated in Schedule A, as may be increased by Condition 8.c.; decreased by Condition 10; or increased or decreased by endorsements to this policy.
- d. “Consumer Protection Law”: Any law regulating trade, lending, credit, sale, and debt collection practices involving consumers; any consumer financial law; or any other law relating to truth-in-lending, predatory lending, or a borrower’s ability to repay a loan.
- e. “Date of Policy”: The Date of Policy stated in Schedule A.
- f. “Discriminatory Covenant”: Any covenant, condition, restriction, or limitation that is unenforceable under applicable law because it illegally discriminates against a class of individuals based on personal characteristics such as race, color, religion, sex, sexual orientation, gender identity, familial status, disability, national origin, or other legally protected class.
- g. “Enforcement Notice”: A document recorded in the Public Records that describes any part of the Land and:
 - i. is issued by a governmental agency that identifies a violation or enforcement of a law, ordinance, permit, or governmental regulation; or
 - ii. is issued by a holder of the power of eminent domain or a governmental agency that identifies the exercise of a governmental power.
- h. “Entity”: A corporation, partnership, trust, limited liability company, or other entity authorized by law to own title to real property in the State where the Land is located.
- i. “Government Mortgage Agency or Instrumentality”: Any government agency or instrumentality that is the owner of the Indebtedness, an insurer, or a guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness, or any part of it, whether named as an Insured or not.
- j. “Indebtedness”: Any obligation secured by the Insured Mortgage, including an obligation evidenced by electronic means authorized by law. If that obligation is the payment of a debt, the Indebtedness is:
 - i. the sum of:
 - (a). principal disbursed as of the Date of Policy;
 - (b). principal disbursed subsequent to the Date of Policy;
 - (c). the construction loan advances made subsequent to the Date of Policy for the purpose of financing, in whole or in part, the construction of an improvement to the Land or related to the Land that the Insured was and continues to be obligated to advance at the Date of Policy and at the date of the advance;
 - (d). interest on the loan;
 - (e). prepayment premiums, exit fees, and other similar fees or penalties allowed by law;
 - (f). expenses of foreclosure and any other costs of enforcement;
 - (g). advances for insurance premiums;
 - (h). advances to assure compliance with law or to protect the validity, enforceability, or priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title; including, but not limited to:
 - (1). real estate taxes and assessments imposed by a governmental taxing authority, and
 - (2). regular, periodic assessments by a property owners’ association; and
 - (i). advances to prevent deterioration of improvements before the Insured’s acquisition of the Title, but





- ii. reduced by the sum of all payments and any amounts forgiven by an Insured.
- k. "Insured":
 - i. (a). The Insured named in Item 1 of Schedule A or future owner of the Indebtedness other than an Obligor, if the named Insured or future owner of the Indebtedness owns the Indebtedness, the Title, or an estate or interest in the Land as provided in Condition 2, but only to the extent the named Insured or the future owner either:
 - (1). owns the Indebtedness for its own account or as a trustee or other fiduciary, or
 - (2). owns the Title after acquiring the Indebtedness;
 - (b). the person or Entity who has "control" of the "transferable record," if the Indebtedness is evidenced by a "transferable record," as defined by applicable electronic transactions law;
 - (c). the successor to the Title of an Insured resulting from dissolution, merger, consolidation, distribution, or reorganization;
 - (d). the successor to the Title of an Insured resulting from its conversion to another kind of Entity;
 - (e). the grantee of an Insured under a deed or other instrument transferring the Title, if the grantee is an Affiliate;
 - (f). an Affiliate that acquires the Title through foreclosure or deed-in-lieu of foreclosure of the Insured Mortgage; or
 - (g). any Government Mortgage Agency or Instrumentality.
 - ii. With regard to Conditions 1.k.i.(a). and 1.k.i.(b)., the Company reserves all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by this policy.
 - iii. With regard to Conditions 1.k.i.(c)., 1.k.i.(d)., 1.k.i.(e)., and 1.k.i.(f)., the Company reserves all rights and defenses as to any successor or grantee that the Company would have had against any predecessor Insured.
- l. "Insured Claimant": An Insured claiming loss or damage arising under this policy.
- m. "Insured Mortgage": The Mortgage described in Item 4 of Schedule A.
- n. "Knowledge" or "Known": Actual knowledge or actual notice, but not constructive notice imparted by the Public Records.
- o. "Land": The land described in Item 5 of Schedule A and improvements located on that land at the Date of Policy that by State law constitute real property. The term "Land" does not include any property beyond that described in Schedule A, nor any right, title, interest, estate, or easement in any abutting street, road, avenue, alley, lane, right-of-way, body of water, or waterway, but does not modify or limit the extent that a right of access to and from the Land is insured by this policy.
- p. "Mortgage": A mortgage, deed of trust, trust deed, security deed, or other real property security instrument, including one evidenced by electronic means authorized by law.
- q. "Municipal": A political subdivision of a State, such as a city, county, parish, town, or village.
- r. "Obligor": A person or entity that is or becomes a maker, borrower, or guarantor as to all or part of the Indebtedness or other obligation secured by the Insured Mortgage. A Government Mortgage Agency or Instrumentality is not an Obligor.
- s. "Public Records": The recording or filing system established under State statutes in effect at the Date of Policy under which a document must be recorded or filed to impart constructive notice of matters relating to the Title to a purchaser for value without Knowledge. The term "Public Records" does not include any other recording or filing system, including any pertaining to environmental remediation or protection, planning, permitting, zoning, licensing, building, health, public safety, or national security matters.
- t. "State": The state or commonwealth of the United States within whose exterior boundaries the Land is located. The term "State" also includes the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and Guam.
- u. "Title": The estate or interest in the Land identified in Item 2 of Schedule A.
- v. "Unmarketable Title": The Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title, a lender on the Title, or a prospective purchaser of the





Insured Mortgage to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF COVERAGE

This policy continues as of the Date of Policy in favor of an Insured:

- a. after the Insured's acquisition of the Title, so long as the Insured retains an estate or interest in the Land; and
- b. after the Insured's conveyance of the Title, so long as the Insured:
 - i. retains an estate or interest in the Land;
 - ii. owns an obligation secured by a purchase money Mortgage given by a purchaser from the Insured; or
 - iii. has liability for warranties given by the Insured in any transfer or conveyance of the Insured's Title.

Except as provided in Condition 2, this policy terminates and ceases to have any further force or effect after the Insured conveys the Title. This policy does not continue in force or effect in favor of any person or entity that is not the Insured and acquires the Title or an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured must notify the Company promptly in writing if the Insured has Knowledge of:

- a. any litigation or other matter for which the Company may be liable under this policy; or
- b. any rejection of the Title or the lien of the Insured Mortgage as Unmarketable Title.

If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under this policy is reduced to the extent of the prejudice.

4. PROOF OF LOSS

The Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, adverse claim, or other matter insured against by this policy, that constitutes the basis of loss or damage and must state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

- a. Upon written request by the Insured and subject to the options contained in Condition 7, the Company, at its own cost and without unreasonable delay, will provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company has the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those covered causes of action. The Company is not liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of any cause of action that alleges matters not insured against by this policy.
- b. The Company has the right, in addition to the options contained in Condition 7, at its own cost, to institute and prosecute any action or proceeding or to do any other act that, in its opinion, may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it is liable to the Insured. The Company's exercise of these rights is not an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under Condition 5.b., it must do so diligently.
- c. When the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court having jurisdiction. The Company reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

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- a. When this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured will secure to the Company the right to prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose.

When requested by the Company, the Insured, at the Company's expense, must give the Company all reasonable aid in:

- i. securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement; and
- ii. any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title, the lien of the Insured Mortgage, or any other matter, as insured.

If the Company is prejudiced by any failure of the Insured to furnish the required cooperation, the Company's liability and obligations to the Insured under this policy terminate, including any obligation to defend, prosecute, or continue any litigation, regarding the matter requiring such cooperation.

- b. The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos, whether bearing a date before or after the Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant must grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all the records in the custody or control of a third party that reasonably pertain to the loss or damage. No information designated in writing as confidential by the Insured Claimant provided to the Company pursuant to Condition 6 will be later disclosed to others unless, in the reasonable judgment of the Company, disclosure is necessary in the administration of the claim or required by law. Any failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in Condition 6.b., unless prohibited by law, terminates any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company has the following additional options:

- a. *To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness*
 - i. To pay or tender payment of the Amount of Insurance under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay; or
 - ii. To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay.

If the Company purchases the Indebtedness, the Insured must transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security. Upon the exercise by the Company of either option provided for in Condition 7.a., the Company's liability and obligations to the Insured under this policy terminate, including any obligation to defend, prosecute, or continue any litigation.
- b. *To Pay or Otherwise Settle with Parties other than the Insured or with the Insured Claimant*
 - i. To pay or otherwise settle with parties other than the Insured for or in the name of the Insured Claimant. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or
 - ii. To pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by





the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either option provided for in Condition 7.b., the Company's liability and obligations to the Insured under this policy for the claimed loss or damage terminate, including any obligation to defend, prosecute, or continue any litigation.

8. CONTRACT OF INDEMNITY; DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by an Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy. This policy is not an abstract of the Title, report of the condition of the Title, legal opinion, opinion of the Title, or other representation of the status of the Title. All claims asserted under this policy are based in contract and are restricted to the terms and provisions of this policy. The Company is not liable for any claim alleging negligence or negligent misrepresentation arising from or in connection with this policy or the determination of the insurability of the Title.

- a. The extent of liability of the Company for loss or damage under this policy does not exceed the least of:
 - i. the Amount of Insurance;
 - ii. the Indebtedness;
 - iii. the difference between the fair market value of the Title, as insured, and the fair market value of the Title subject to the matter insured against by this policy; or
 - iv. if a Government Mortgage Agency or Instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage or in satisfaction of its insurance contract or guaranty relating to the Title or the Insured Mortgage.
- b. Fair market value of the Title in Condition 8.a.iii. is calculated using either:
 - i. the date the Insured acquires the Title as a result of a foreclosure or deed in lieu of foreclosure of the Insured Mortgage; or
 - ii. the date the lien of the Insured Mortgage or any assignment set forth in Item 4 of Schedule A is extinguished or rendered unenforceable by reason of a matter insured against by this policy.
- c. If the Company pursues its rights under Condition 5.b. and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured:
 - i. the Amount of Insurance will be increased by 15%; and
 - ii. the Insured Claimant may, by written notice given to the Company, elect, as an alternative to the dates set forth in Condition 8.b., to use either the date the settlement, action, proceeding, or other act described in Condition 5.b. is concluded or the date the notice of claim required by Condition 3 is received by the Company as the date for calculating the fair market value of the Title in Condition 8.a.iii.
- d. In addition to the extent of liability for loss or damage under Conditions 8.a. and 8.c., the Company will also pay the costs, attorneys' fees, and expenses incurred in accordance with Conditions 5 and 7.

9. LIMITATION OF LIABILITY

- a. The Company fully performs its obligations and is not liable for any loss or damage caused to the Insured if the Company accomplishes any of the following in a reasonable manner:
 - i. removes the alleged defect, lien, encumbrance, adverse claim, or other matter;
 - ii. cures the lack of actual vehicular and pedestrian access to and from the Land, based on a legal right;
 - iii. cures the claim of Unmarketable Title; or
 - iv. establishes the lien of the Insured Mortgage,all as insured. The Company may do so by any method, including litigation and the completion of any appeals.
- b. The Company is not liable for loss or damage arising out of any litigation, including litigation by the Company or with the Company's consent, until a State or federal court having jurisdiction makes a final, non-appealable determination adverse to the Title or to the lien of the Insured Mortgage.





- c. The Company is not liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.
- d. An Insured Claimant must own the Indebtedness or have acquired the Title at the time that a claim under this policy is paid.
- e. The Company is not liable for the content of the Transaction Identification Data, if any. Condition 9.e. does not modify or limit the coverage provided under Covered Risk 12.a.

10. REDUCTION OR TERMINATION OF INSURANCE

- a. All payments under this policy, except payments made for costs, attorneys' fees, and expenses, reduce the Amount of Insurance by the amount of the payment. However, any payment made by the Company prior to the acquisition of the Title as provided in Condition 2 does not reduce the Amount of Insurance afforded under this policy, except to the extent that the payment reduces the Indebtedness.
- b. When the Title is acquired by the Insured as a result of foreclosure or deed in lieu of foreclosure, the amount credited against the Indebtedness does not reduce the Amount of Insurance.
- c. The voluntary satisfaction or release of the Insured Mortgage terminates all liability of the Company, except as provided in Condition 2.

11. PAYMENT OF LOSS

When liability and the extent of loss or damage are determined in accordance with the Conditions, the Company will pay the loss or damage within 30 days.

12. COMPANY'S RECOVERY AND SUBROGATION RIGHTS UPON SETTLEMENT AND PAYMENT

- a. *Company's Right to Recover*
 - i. If the Company settles and pays a claim under this policy, it is subrogated and entitled to the rights and remedies of the Insured Claimant in the Title or Insured Mortgage and all other rights and remedies in respect to the claim that the Insured Claimant has against any person, entity, or property to the fullest extent permitted by law, but limited to the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant must execute documents to transfer these rights and remedies to the Company. The Insured Claimant permits the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.
 - ii. If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company defers the exercise of its subrogation right until after the Insured Claimant fully recovers its loss.
- b. *Company's Subrogation Rights against Obligors*

The Company's subrogation right includes the Insured's rights against Obligors including the Insured's rights to repayment under a note, indemnity, guaranty, warranty, insurance policy, or bond, despite any provision in those instruments that addresses recovery or subrogation rights. An Obligor cannot avoid the Company's subrogation right by acquiring the Indebtedness as a result of an indemnity, guaranty, warranty, insurance policy, or bond, or in any other manner. The Obligor is not an Insured under this policy. The Company may not exercise its rights under Condition 12.b. against a Government Mortgage Agency or Instrumentality.
- c. *Insured's Rights and Limitations*
 - i. The owner of the Indebtedness may release or substitute the personal liability of any debtor or guarantor, extend or otherwise modify the terms of payment, release a portion of the Title from the lien of the Insured Mortgage, or release any collateral security for the Indebtedness, if the action does not affect the enforceability or priority of the lien of the Insured Mortgage.
 - ii. If the Insured exercises a right provided in Condition 12.c.i. but has Knowledge of any claim adverse to the Title or the lien of the Insured Mortgage insured against by this policy, the Company is required to pay only that part of the loss insured against by this policy that exceeds the amount, if any, lost to the Company by reason of the impairment by the Insured Claimant of the Company's subrogation right.





13. POLICY ENTIRE CONTRACT

- a. This policy together with all endorsements, if any, issued by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy will be construed as a whole. This policy and any endorsement to this policy may be evidenced by electronic means authorized by law.
- b. Any amendment of this policy must be by a written endorsement issued by the Company. To the extent any term or provision of an endorsement is inconsistent with any term or provision of this policy, the term or provision of the endorsement controls. Unless the endorsement expressly states, it does not:
 - i. modify any prior endorsement,
 - ii. extend the Date of Policy,
 - iii. insure against loss or damage exceeding the Amount of Insurance, or
 - iv. increase the Amount of Insurance.

14. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, this policy will be deemed not to include that provision or the part held to be invalid, but all other provisions will remain in full force and effect.

15. CHOICE OF LAW AND CHOICE OF FORUM

- a. *Choice of Law*

The Company has underwritten the risks covered by this policy and determined the premium charged in reliance upon the State law affecting interests in real property and the State law applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the State where the Land is located.

The State law of the State where the Land is located, or to the extent it controls, federal law, will determine the validity of claims against the Title or the lien of the Insured Mortgage and the interpretation and enforcement of the terms of this policy, without regard to conflicts of law principles to determine the applicable law.
- b. *Choice of Forum*

Any litigation or other proceeding brought by the Insured against the Company must be filed only in a State or federal court within the United States of America or its territories having jurisdiction.

16. NOTICES

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at: **First American Title Insurance Company, Attn: Claims National Intake Center, 5 First American Way, Santa Ana, California 92707. Phone: 888-632-1642 (claims.nic@firstam.com).**

17. CLASS ACTION

ALL CLAIMS AND DISPUTES ARISING OUT OF OR RELATING TO THIS POLICY, INCLUDING ANY SERVICE OR OTHER MATTER IN CONNECTION WITH ISSUING THIS POLICY, ANY BREACH OF A POLICY PROVISION, OR ANY OTHER CLAIM OR DISPUTE ARISING OUT OF OR RELATING TO THE TRANSACTION GIVING RISE TO THIS POLICY, MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS OR REPRESENTATIVE PROCEEDING.

18. ARBITRATION

- a. All claims and disputes arising out of or relating to this policy, including any service or other matter in connection with issuing this policy, any breach of a policy provision, or any other claim or dispute arising out of or relating to the transaction giving rise to this policy, may be resolved by arbitration. If the Amount of Insurance is \$2,000,000 or less, any claim or dispute may be submitted to binding arbitration at the election of either the Company or the Insured. If the Amount of Insurance is greater than \$2,000,000, any claim or dispute may be submitted to binding arbitration only when agreed to by both the Company





and the Insured. Arbitration must be conducted pursuant to the Title Insurance Arbitration Rules of the American Land Title Association (“ALTA Rules”). The ALTA Rules are available online at www.alta.org/arbitration. The ALTA Rules incorporate, as appropriate to a particular dispute, the Consumer Arbitration Rules and Commercial Arbitration Rules of the American Arbitration Association (“AAA Rules”). The AAA Rules are available online at www.adr.org.

- b. ALL CLAIMS AND DISPUTES MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS OR REPRESENTATIVE PROCEEDING IN ANY ARBITRATION GOVERNED BY CONDITION 18. The arbitrator does not have authority to conduct any class action arbitration or arbitration involving joint or consolidated claims under any circumstance.
- c. *If there is a final judicial determination that a request for particular relief cannot be arbitrated in accordance with this Condition 18, then only that request for particular relief may be brought in court. All other requests for relief remain subject to this Condition 18.*
- d. Fees will be allocated in accordance with the applicable AAA Rules. The results of arbitration will be binding upon the parties. The arbitrator may consider, but is not bound by, rulings in prior arbitrations involving different parties. The arbitrator is bound by rulings in prior arbitrations involving the same parties to the extent required by law. The arbitrator must issue a written decision sufficient to explain the findings and conclusions on which the award is based. Judgment upon the award rendered by the arbitrator may be entered in any State or federal court having jurisdiction.

NOTE: Bracketed [] material optional





ALTA HOMEOWNER'S POLICY OF TITLE INSURANCE
issued by
FIRST AMERICAN TITLE INSURANCE COMPANY

This policy, when issued by Us with a Policy Number and the Date of Policy, is valid even if this policy or any endorsement to this policy is issued electronically or lacks any signature.

As soon as You Know of anything that might be covered by this policy, You must notify Us promptly in writing at the address shown in Condition 3.

COVERAGE STATEMENT

SUBJECT TO THE PROVISIONS SET FORTH BELOW, We insure You against loss or damage resulting from one or more of the Covered Risks if the matter creating the risk exists on the Date of Policy or, to the extent expressly stated in any Covered Risk, after the Date of Policy. We will also pay the costs, attorneys' fees, and expenses provided for under this policy.

Your insurance is effective on the Date of Policy.

This policy covers You only if the Land is improved with an existing one-to-four family residence and each party named in Item 1 of Schedule A is a Natural Person or Estate Planning Entity.

Your insurance is further limited by all of the following:

- Amount of Insurance
- For Covered Risks 16, 18, 19, and 21, Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A
- Exceptions from Coverage in Schedule B
- Our Duty to Defend against Legal Actions
- Exclusions from Coverage
- Conditions

COVERED RISKS

1. Someone else owns an interest in Your Title.
2. Someone else has a right affecting Your Title because of a lease, contract, or option.
3. Someone else claims to have a right affecting Your Title because of forgery or impersonation.
4. Someone else has an Easement on the Land.
5. Any of Covered Risks 1 through 4 occurring after the Date of Policy.
6. Someone else has a right to enforce a Covenant to limit Your use of the Land.
7. Your Title is defective. Some examples of title defects are:
 - a. someone else's failure to have authorized a transfer or conveyance of Your Title.
 - b. a defective judicial or administrative proceeding.

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- c. a document, including an electronic document, on which Your Title is based:
 - i. was signed using a falsified, expired, or otherwise invalid power of attorney;
 - ii. was not properly authorized, executed, created, signed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered; or
 - iii. was not properly filed, recorded, or indexed in the Public Records.
 - d. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
8. Someone else has a lien on Your Title. Some examples of liens are:
- a. a lien of real estate taxes or assessments imposed on Your Title by a governmental authority due or payable, but unpaid;
 - b. a Mortgage;
 - c. a judgment lien;
 - d. a State or federal tax lien;
 - e. a charge by a homeowner's or condominium association; or
 - f. a statutory lien, attaching before or after the Date of Policy, for service, labor, material, or equipment in connection with an improvement or work related to the Land and furnished before the Date of Policy.
9. Someone else has an encumbrance on Your Title.
10. Someone else claims to have a right affecting Your Title because of fraud, duress, incompetency, or incapacity.
11. You do not have actual vehicular and pedestrian access to and from the Land, based on a legal right.
12. You are forced to remove or remedy a violation, existing at the Date of Policy, of any Covenant, even if the Covenant is excepted in Schedule B. You are not covered for any violation of an obligation contained in a Covenant:
- a. to perform maintenance or repair on the Land; or
 - b. relating to environmental protection of any kind, including hazardous or toxic conditions or substances; unless there is a notice of either of these violations recorded in the Public Records at the Date of Policy, and then, Our liability for Covered Risk 12 is limited to the extent of the violation described in that notice.
13. Your Title is lost or taken because of a violation, existing at the Date of Policy, of any Covenant, even if the Covenant is excepted in Schedule B.
14. A violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning), but only to the extent of the violation or enforcement described by the enforcing governmental authority in an Enforcement Notice that identifies a restriction, regulation, or prohibition relating to:
- a. the occupancy, use, or enjoyment of the Land;
 - b. the character, dimensions, or location of an improvement on the Land;
 - c. the subdivision of the Land; or
 - d. environmental remediation or protection on the Land.
15. An enforcement of a governmental forfeiture, police, regulatory, or national security power, but only to the extent of the enforcement described by the enforcing governmental authority in an Enforcement Notice.





16. Because of a violation existing at the Date of Policy of a State or Municipal subdivision law or State or Municipal subdivision regulation affecting the Land:
- You are unable to obtain a building permit from a Municipal authority;
 - You are ordered by a State or Municipal authority to remove or remedy the violation; or
 - someone else refuses to perform a contract to purchase the Land, lease the Land, or make a mortgage loan on the Land, based on that violation.
- The Amount of Insurance for Covered Risk 16 is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
17. You lose Your Title to any portion of the Land to an enforcement authority because of an exercise of the power to take the Land by condemnation, but only to the extent:
- of the taking described in an Enforcement Notice; or
 - the taking occurred before the Date of Policy and is binding on You, if You purchased the Land without Knowledge of the taking.
18. You are ordered by a State or Municipal authority to remove or remedy any portion of Your existing structures—other than boundary walls or fences—because any portion of Your existing structures was built without obtaining a building permit from the proper Municipal authority. The Amount of Insurance for Covered Risk 18 is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
19. You are ordered by a State or Municipal authority to remove or remedy any portion of Your existing structures, because they violate an existing State or Municipal zoning law or State or Municipal zoning regulation. The Amount of Insurance for Covered Risk 19 is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
20. You are not able to use the Land because use as a single-family residence violates an existing State or Municipal zoning law or State or Municipal zoning regulation.
21. You are forced to remove any portion of Your existing structures because they encroach onto Your neighbor's land. If the encroaching structures are boundary walls or fences, the Amount of Insurance for Covered Risk 21 is subject to Your Deductible Amount and Our Maximum Dollar Limit of Liability shown in Schedule A.
22. Someone else exercises a legal right refusing to perform a contract to purchase, lease, or make a mortgage loan on the Land because Your neighbor's existing structures encroach onto the Land.
23. You are forced to remove any portion of Your existing structures that encroach onto an Easement or over a building set-back line, even if the Easement or building set-back line is excepted in Schedule B.
24. Your existing structures are damaged because of the exercise of the right to maintain or use any Easement affecting Your Title, even if the Easement is excepted in Schedule B.
25. Your existing improvements (or a replacement or modification made to them after the Date of Policy), including lawns, shrubbery, or trees, are damaged because of the future exercise of the right to use the surface of the Land for the extraction or development of oil, gas, minerals, groundwater, or any other subsurface substance, even if those rights are excepted or reserved from the description of the Land or excepted in Schedule B.
26. Someone else tries to enforce a Discriminatory Covenant that they claim affects Your Title.
27. A State or Municipal taxing authority assesses supplemental real estate taxes not previously assessed against the Land for any period before the Date of Policy because of construction or change of ownership or use, that occurred before the Date of Policy.





28. Your neighbor builds any structures after the Date of Policy—other than boundary walls or fences—that encroach onto the Land.
29. Your Title is unmarketable, which allows someone else to refuse to perform a contract to purchase, lease, or make a mortgage loan on the Land.
30. Someone else owns an interest in Your Title because a court order invalidates a prior transfer of the Title under federal bankruptcy, state insolvency, or similar state or federal creditors' rights law.
31. The residence with the Property Address shown in Schedule A is not located on the Land at the Date of Policy.
32. Any defect in or lien or encumbrance on the Title that has been created or attached or has been filed or recorded in the Public Records subsequent to the Date of Policy and prior to the recording of the deed or other instrument vesting the Title in the Public Records.
33. The map, if any, attached to this policy does not show the correct location of the Land according to the Public Records.

OUR DUTY TO DEFEND AGAINST LEGAL ACTIONS

We will defend Your Title in any legal action, only as to that portion of the legal action for a matter that is based on a Covered Risk and that is not excepted or excluded from coverage in this policy. We will pay the costs, attorneys' fees, and expenses We incur in that defense.

We will not pay for any portion of the legal action for a matter that is not based on a Covered Risk or that is excepted or excluded from coverage in this policy.

We can end Our duty to defend Your Title under Condition 4.

THIS POLICY IS NOT COMPLETE WITHOUT SCHEDULE A AND SCHEDULE B.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 
Kenneth D. DeGiorgio, President

By: 
Lisa W. Cornehl, Secretary





EXCLUSIONS FROM COVERAGE

The following matters are excluded from the coverage of this policy and We will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. a. any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) that restricts, regulates, prohibits, or relates to:
 - i. the occupancy, use, or enjoyment of the Land;
 - ii. the character, dimensions, or location of any improvement on the Land;
 - iii. the subdivision of land; or
 - iv. environmental remediation or protection.b. any governmental forfeiture, police, or regulatory, or national security power.
c. the effect of a violation or enforcement of any matter excluded under Exclusion 1.a. or 1.b.
Exclusion 1 does not modify or limit the coverage provided under Covered Risk 8.a., 14, 15, 16, 18, 19, 20, 23, or 27.
2. Any power to take the Land by condemnation. Exclusion 2 does not modify or limit the coverage provided under Covered Risk 17.
3. Any defect, lien, encumbrance, adverse claim, or other matter:
 - a. created, suffered, assumed, or agreed to by You;
 - b. not Known to Us, not recorded in the Public Records at the Date of Policy, but Known to You and not disclosed in writing to Us by You prior to the date You became an Insured under this policy;
 - c. resulting in no loss or damage to You;
 - d. attaching or created subsequent to the Date of Policy (Exclusion 3.d. does not modify or limit the coverage provided under Covered Risk 5, 8.f., 25, 26, 27, 28, or 32); or
 - e. resulting in loss or damage that would not have been sustained if You paid consideration sufficient to qualify You as a bona fide purchaser of the Title at the Date of Policy.
4. Lack of a right:
 - a. to any land outside the area specifically described and referred to in Item 3 of Schedule A; and
 - b. in any street, road, avenue, alley, lane, right-of-way, body of water, or waterway that abut the Land.Exclusion 4 does not modify or limit the coverage provided under Covered Risk 11 or 21.
5. The failure of Your existing structures, or any portion of Your existing structures, to have been constructed before, on, or after the Date of Policy in accordance with applicable building codes. Exclusion 5 does not modify or limit the coverage provided under Covered Risk 14 or 15.
6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights law, that the transfer of the Title to You is a:
 - a. fraudulent conveyance or fraudulent transfer;
 - b. voidable transfer under the Uniform Voidable Transactions Act; or
 - c. preferential transfer:
 - i. to the extent the instrument of transfer vesting the Title as shown in Schedule A is not a transfer made as a contemporaneous exchange for new value; or
 - ii. for any other reason not stated in Covered Risk 30.
7. Contamination, explosion, fire, flooding, vibration, fracturing, earthquake, or subsidence.
8. Negligence by a person or an entity exercising a right to extract or develop oil, gas, minerals, groundwater, or any other subsurface substance.





9. Any lien on Your Title for real estate taxes or assessments imposed or collected by a governmental authority that becomes due and payable after the Date of Policy. Exclusion 9 does not modify or limit the coverage provided under Covered Risk 8.a. or 27.
10. Any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any improvement to the Land.

SAMPLE



**CONDITIONS****1. DEFINITIONS**

- a. "Amount of Insurance": The Amount of Insurance stated in Schedule A, as may be increased by Condition 6.d. or 10 or decreased by Condition 7.d. or 7.e.; or increased or decreased by endorsements to this policy.
- b. "Covenant": A covenant, condition, restriction, or limitation affecting the Title in a document or instrument in effect at the Date of Policy.
- c. "Date of Policy": The Date of Policy stated in Schedule A.
- d. "Discriminatory Covenant": Any covenant, condition, restriction, or limitation that is unenforceable under applicable law because it illegally discriminates against a class of individuals based on personal characteristics such as race, color, religion, sex, sexual orientation, gender identity, familial status, disability, national origin, or other legally protected class.
- e. "Easement": The right of someone else to use any part of the Land for a specified purpose.
- f. "Enforcement Notice": A document recorded in the Public Records at the Date of Policy that describes any part of the Land and:
 - i. is issued by a governmental agency that identifies a violation or enforcement of a law, ordinance, permit, or governmental regulation; or
 - ii. is issued by a holder of the power of condemnation or a governmental agency that identifies the exercise of a governmental power.
- g. "Estate Planning Entity": A legal entity, a trust, or a trustee of a trust, if the entity or trust is established by a Natural Person for the purpose of planning the disposition of that person's estate.
- h. "Insured": The Insured named in Item 1 of Schedule A and also the parties identified in Condition 2.b.
- i. "Knowledge" or "Known": Actual knowledge or actual notice, but not constructive notice imparted by Public Records.
- j. "Land": The land or condominium unit described in Item 3 of Schedule A and improvements located on that Land at the Date of Policy that by State law constitute real property. The term "Land" does not include any property beyond that described in Schedule A, nor any right, title, interest, estate, or easement in any abutting street, road, avenue, alley, lane, right-of-way, body of water, or waterway, but does not modify or limit the extent that a right of access to and from the Land is insured by this policy.
- k. "Mortgage": A mortgage, deed of trust, trust deed, security deed, or other real property security instrument, including one evidenced by electronic means authorized by law.
- l. "Municipal": A political subdivision of a State, such as a city, county, parish, town, or village.
- m. "Natural Person": A human being, not a commercial or legal organization or entity.
- n. "Public Records": The recording or filing system established under State statutes in effect at the Date of Policy under which a document must be recorded or filed to impart constructive notice of matters relating to the Title to a purchaser for value without Knowledge. The term "Public Records" does not include any other recording or filing system, including any pertaining to environmental remediation or protection, planning, permitting, zoning, licensing, building, health, public safety, or national security matters.
- o. "State": The state or commonwealth of the United States within whose exterior boundaries the Land is located. The term "State" also includes the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and Guam.
- p. "Title": The estate or interest in the Land identified in Item 2 of Schedule A.
- q. "We," "Our," or "Us": First American Title Insurance Company.
- r. "You" or "Your": The Insured.

2. CONTINUATION OF COVERAGE

- a. Your coverage under this policy continues as of the Date of Policy, so long as You:
 - i. own Your Title;
 - ii. own an obligation secured by a purchase money mortgage given by a purchaser from You; or
 - iii. have liability for warranties of title given by You in any transfer or conveyance of Your Title.

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- b. This policy also insures:
 - i. anyone who receives Your Title by operation of law upon Your death;
 - ii. Your spouse who receives Your Title because of a dissolution of Your marriage;
 - iii. Your Estate Planning Entity to which You transfer Your Title after the Date of Policy;
 - iv. any beneficiary or distributee of Your Estate Planning Entity who receives Your Title;
 - v. anyone who receives Your Title by a transfer effective upon Your death as provided by law; or
 - vi. another Insured named in Item 1 of Schedule A.
- c. We may assert against any Insured identified in Condition 2.b. any rights and defenses that We have against any previous Insured under this policy.

3. HOW TO MAKE A CLAIM

- a. *Prompt Notice of Your Claim*
 - i. You must notify Us promptly in writing as soon as You Know of anything that might be covered by this policy.
 - ii. Send Your notice to:
*First American Title Insurance Company
Attn: Claims National Intake Center
5 First American Way
Santa Ana, California 92707
Phone: 888-632-1642*

Please include Your Policy Number shown in Schedule A and the county and State where the Land is located. Please enclose a copy of this policy, if available.
 - iii. If You do not give Us prompt notice, Your coverage may be reduced or ended, but only to the extent Your failure affects Our ability to resolve the claim or defend You.
- b. *Proof of Your Loss*
 - i. We may require You to give Us a written statement signed by You describing Your loss that includes:
 - (a). the facts supporting Your claim;
 - (b). the Covered Risks that apply to Your claim;
 - (c). the dollar amount of Your loss; and
 - (d). the method You used to compute the amount of Your loss.
 - ii. We may require You to make available to Us records, checks, letters, contracts, insurance policies, and other papers relating to Your claim. We may make copies of these papers.
 - iii. We may require You to answer questions about Your claim under oath.
 - iv. If You fail or refuse to give Us a statement of loss, answer Our questions under oath, or make available to Us the papers We request, Your coverage may be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.

4. OUR CHOICES WHEN WE LEARN OF A CLAIM

- a. After We receive Your notice or otherwise learn of a claim covered by this policy, and after subtracting Your Deductible Amount, if it applies, Our choices include one or more of the following:
 - i. pay the claim;
 - ii. negotiate a settlement;
 - iii. bring or defend a legal action related to the claim;
 - iv. pay You the amount required by this policy;
 - v. end the coverage of this policy for the claim by paying You Your loss determined in Condition 6.a., as applicable, resulting from the Covered Risk;
 - vi. end the coverage described in Covered Risk 16, 18, 19, or 21 by paying You Our Maximum Dollar Limit of Liability then in force for the particular Covered Risk;
 - vii. end all coverage of this policy by paying You the Amount of Insurance then in force; or
 - viii. take other appropriate action, including to cure or otherwise resolve the covered matter giving rise to the claim.





- b. When We choose the options in Condition 4.a.v., 4.a.vi., or 4.a.vii., all Our liability and obligations to You under this policy terminate, including Our obligation to defend or continue any legal action. In addition, We will pay any costs, attorneys' fees, and expenses that were authorized by Us up to that time and that We are obligated to pay.
- c. Whether or not We agree there is coverage, We may choose one or more of the options above. By doing so, We do not give up any rights.

5. HANDLING A CLAIM OR LEGAL ACTION

- a. You must cooperate with Us in handling any claim or legal action and give Us all relevant information.
- b. If You fail or refuse to cooperate with Us, Your coverage may be reduced or ended, but only to the extent Your failure or refusal affects Our ability to resolve the claim or defend You.
- c. We are only required to repay You for amounts, including settlement costs, attorneys' fees, and expenses, that We approve in advance.
- d. We have the right to choose the attorney when We bring or defend a legal action on Your behalf. We can appeal any decision to the highest level. We do not have to pay Your claim until a State or federal court having jurisdiction makes a final, non-appealable determination adverse to the Title.

6. CONTRACT OF INDEMNITY; DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by You by reason of matters insured against by this policy. This policy is not an abstract of the Title, report of the condition of the Title, legal opinion, opinion of the Title, or other representation of the status of the Title. All claims asserted under this policy are based in contract and are restricted to the terms and provisions of this policy. We are not liable for any claim alleging negligence or negligent misrepresentation arising from or in connection with this policy or the determination of the insurability of the Title.

- a. After subtracting Your Deductible Amount, if it applies, Our liability for Your loss or damage is limited to the least of:
 - i. the difference between the fair market value of Your Title, as insured, and the fair market value of Your Title subject to the matter insured against by this policy;
 - ii. Our Maximum Dollar Limit of Liability then in force for the particular Covered Risk, for claims covered only under Covered Risk 16, 18, 19, or 21; or
 - iii. the Amount of Insurance then in force.
- b. Except as provided in Condition 6.c. or 6.d., the fair market value of Your Title in Condition 6.a.i. is calculated using the date You discover the defect, lien, encumbrance, adverse claim, or other matter insured against by this policy.
- c. If, at the Date of Policy, the Title to all of the Land is void by reason of a matter insured against by this policy, then You may, by providing Us written notice, elect to use the Date of Policy as the date for calculating the fair market value of Your Title in Condition 6.a.i.
- d. If We pursue Our rights under Conditions 4.a.iii. and 4.a.viii. and are unsuccessful in establishing Your Title, as insured:
 - i. the Amount of Insurance then in force will be increased by 15% of the Amount of Insurance shown in Schedule A; and
 - ii. You may, by providing Us written notice, elect, as an alternative to the dates set forth in Condition 6.b. or, if it applies, 6.c., to use either the date the settlement, action, proceeding, or other act described in Conditions 4.a.iii. and 4.a.viii. is concluded or the date the notice of claim required by Condition 3 is received by Us as the date for calculating the fair market value of Your Title in Condition 6.a.i.
- e. In addition to the extent of liability for loss or damage under Conditions 6.a.:
 - i. We will also pay the costs, attorneys' fees, and expenses incurred in accordance with Conditions 4 and 5; and
 - ii. if You are unable to use the Land because of a claim covered by this policy:
 - (a). You may rent a reasonably equivalent substitute residence and We will repay You for the actual rent You pay, until the earlier of:
 - (1). the cause of the claim is removed; or

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- (2). We pay You the amount required by this policy. If Your claim is covered only under Covered Risk 16, 18, 19, or 21, that payment is the Amount of Insurance then in force for the particular Covered Risk.
- (b). We will pay reasonable costs You pay to relocate any personal property You have the right to remove from the Land, including transportation of that personal property for up to fifty (50) miles from the Land, and repair of any damage to that personal property because of the relocation. The amount We will pay You under Condition 6.e.ii.(b). is limited to the value of the personal property before You relocate it.

7. LIMITATION OF OUR LIABILITY

- a. Other than as provided in Condition 6.e., if We remove the cause of the claim after receiving notice of the claim, all Our obligations for the claim end, including any obligation for loss You had while We were removing the cause of the claim.
- b. We are not liable for loss or damage arising out of any litigation, including litigation by Us or with Our consent, until a State or federal court having jurisdiction makes a final, non-appealable determination adverse to the Title.
- c. We are not liable for loss or damage to You for liability voluntarily assumed by You in settling any claim or suit without Our prior written consent.
- d. All payments under this policy reduce the Amount of Insurance then in force, except for costs, attorneys' fees, and expenses. All payments for claims covered only under Covered Risk 16, 18, 19, or 21 also reduce Our Maximum Dollar Limit of Liability for the particular Covered Risk, except for costs, attorneys' fees, and expenses.
- e. If We issue, or have issued, a policy to the owner of a Mortgage that is on Your Title and We have not given You any coverage against the Mortgage, then:
 - i. We have the right to pay any amount due to You under this policy to the owner of the Mortgage, and any amount paid will be treated as a payment to You under this policy, including under Condition 4.a.;
 - ii. any amount paid to the owner of the Mortgage will be subtracted from the Amount of Insurance then in force; and
 - iii. if Your claim is covered only under Covered Risk 16, 18, 19, or 21, any amount paid to the owner of the Mortgage will also be subtracted from Our Maximum Dollar Limit of Liability for the particular Covered Risk.
- f. If You do anything to affect any right of recovery You may have against someone else, We can subtract from Our liability the amount by which You reduced the value of that right.
- g. We are not liable for the content of the Transaction Identification Data, if any. Condition 7.g. does not modify or limit the coverage provided under Covered Risk 31.

8. TRANSFER OF YOUR RIGHTS TO US

- a. If We settle and pay Your claim, We have all the rights and remedies You have against any person, entity, or property related to the claim. You must not do anything to affect these rights and remedies. If We ask, You must execute documents to transfer these rights and remedies to Us. You must let Us use Your name in enforcing these rights and remedies.
- b. We will not be liable to You if We do not pursue these rights and remedies or if We do not recover any amount that might be recoverable.
- c. We will pay any money We collect from enforcing these rights and remedies in the following order:
 - i. to Us for the costs, attorneys' fees, and expenses We paid to enforce these rights and remedies;
 - ii. to You for Your loss that You have not already collected;
 - iii. to Us for any money We paid out under this policy on account of Your claim; and
 - iv. to You whatever is left.
- d. If You have rights and remedies under contracts (such as indemnities, guaranties, warranties, insurance policies, or bonds) to recover all or part of Your loss, then We have all of those rights and remedies, even if those contracts provide that those obligated have all of Your rights and remedies under this policy.



**9. POLICY ENTIRE CONTRACT**

- a. This policy together with all endorsements, if any, issued by Us is the entire policy and contract between You and Us. In interpreting any provision of this policy, this policy will be construed as a whole. This policy and any endorsement to this policy may be issued by electronic means authorized by law.
- b. Any claim You make against Us must be made under this policy and is subject to its terms.
- c. Any amendment of this policy must be by a written endorsement issued by Us. To the extent any term or provision of an endorsement is inconsistent with any term or provision of this policy, the term or provision of the endorsement controls. Unless the endorsement expressly states, it does not:
 - i. modify any prior endorsement,
 - ii. extend the Date of Policy,
 - iii. insure against loss or damage exceeding the Amount of Insurance, or
 - iv. increase the Amount of Insurance.

10. INCREASED AMOUNT OF INSURANCE

The Amount of Insurance then in force will increase by ten percent (10%) of the Amount of Insurance shown in Schedule A each year for the first five years following the Date of Policy shown in Schedule A, up to one hundred fifty percent (150%) of the Amount of Insurance shown in Schedule A. The increase each year will happen on the anniversary of the Date of Policy shown in Schedule A.

11. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, both You and We can still enforce the rest of this policy.

12. CHOICE OF LAW AND CHOICE OF FORUM

The State law of the State where the Land is located, or to the extent it controls, federal law, applies to this policy. A court or arbitrator must not apply conflict of law principles to determine the applicable law. Any litigation or other proceeding brought by You against Us must be filed only in a State or federal court having jurisdiction.

13. CLASS ACTION

ALL CLAIMS AND DISPUTES ARISING OUT OF OR RELATING TO THIS POLICY, INCLUDING ANY SERVICE OR OTHER MATTER IN CONNECTION WITH ISSUING THIS POLICY, ANY BREACH OF A POLICY PROVISION, OR ANY OTHER CLAIM OR DISPUTE ARISING OUT OF OR RELATING TO THE TRANSACTION GIVING RISE TO THIS POLICY, MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS, REPRESENTATIVE, OR PRIVATE ATTORNEY GENERAL PROCEEDING.

14. ARBITRATION

- a. All claims and disputes arising out of or relating to this policy, including any service or other matter in connection with issuing this policy, any breach of a policy provision, or any other claim or dispute arising out of or relating to the transaction giving rise to this policy, may be resolved by arbitration. If the Amount of Insurance is \$2,000,000 or less, any claim or dispute may be submitted to binding arbitration at the election of either You or Us. If the Amount of Insurance is greater than \$2,000,000, any claim or dispute may be submitted to binding arbitration only when agreed to by both You and Us. Arbitration must be conducted pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("ALTA Rules"). The ALTA Rules are available online at www.alta.org/arbitration. The ALTA Rules incorporate, as appropriate to a particular dispute, the Consumer Arbitration Rules and Commercial Arbitration Rules of the American Arbitration Association ("AAA Rules"). The AAA Rules are available online at www.adr.org.
- b. ALL CLAIMS AND DISPUTES MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS, REPRESENTATIVE, OR PRIVATE ATTORNEY GENERAL PROCEEDING IN ANY ARBITRATION GOVERNED BY





- CONDITION 14. The arbitrator does not have authority to conduct any class action arbitration, private attorney general arbitration, or arbitration involving joint or consolidated claims under any circumstance.
- c. *If there is a final judicial determination that a request for particular relief cannot be arbitrated in accordance with this Condition 14, then only that request for particular relief may be brought in court. All other requests for relief remain subject to this Condition 14.*
 - d. We will pay all AAA filing, administration, and arbitrator fees of the consumer when the arbitration seeks relief of \$100,000 or less. Other fees will be allocated in accordance with the applicable AAA Rules. The results of arbitration will be binding upon the parties. The arbitrator may consider, but is not bound by, rulings in prior arbitrations involving different parties. The arbitrator is bound by rulings in prior arbitrations involving the same parties to the extent required by law. The arbitrator must issue a written decision sufficient to explain the findings and conclusions on which the award is based. Judgment upon the award rendered by the arbitrator may be entered in any State or federal court having jurisdiction.

SAMPLE



**Transaction Identification Data, for which the Company assumes no liability as set forth in Condition 7.g.:**

Issuing Agent:

Issuing Office:

Issuing Office's ALTA® Registry ID:

Issuing Office File Number:

Property Address:

SCHEDULE A

Name and Address of Title Insurance Company:

Policy Number: [Premium: \$]

Amount of Insurance: \$

Date of Policy: [at a.m./p.m.]

Deductible Amounts and Maximum Dollar Limits of Liability for Covered Risks 16, 18, 19, and 21:

	Your Deductible Amount	Our Maximum Dollar Limit of Liability
Covered Risk 16:	1% of Amount of Insurance shown in Schedule A or \$2,500 (whichever is less)	\$10,000
Covered Risk 18:	1% of Amount of Insurance shown in Schedule A or \$5,000 (whichever is less)	\$25,000
Covered Risk 19:	1% of Amount of Insurance shown in Schedule A or \$5,000 (whichever is less)	\$25,000
Covered Risk 21:	1% of Amount of Insurance shown in Schedule A or \$2,500 (whichever is less)	\$5,000

Property Address of the Land:

1. The Insured is:
2. Your interest in the Land covered by this policy is:
3. The Land referred to in this policy is described as:

(insert "First American Title Insurance Company" or Agent name here)

By: _____
Authorized Signatory



SCHEDULE B

EXCEPTIONS FROM COVERAGE

Policy Number:

Some historical land records contain Discriminatory Covenants that are illegal and unenforceable by law. This policy treats any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is redacted, repudiated, removed, and not republished or recirculated. Only the remaining provisions of the document are excepted from coverage.

In addition to the Exclusions from Coverage, this policy does not insure You against loss or damage and We will not pay costs, attorneys' fees, or expenses resulting from the terms and conditions of any lease or easement identified in Schedule A, and the following matters:

(Insert Schedule B exceptions here)





ALTA LOAN POLICY OF TITLE INSURANCE
issued by
FIRST AMERICAN TITLE INSURANCE COMPANY

This policy, when issued by the Company with a Policy Number and the Date of Policy, is valid even if this policy or any endorsement to this policy is issued electronically or lacks any signature.

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Condition 16.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a Nebraska corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
 - a. a defect in the Title caused by:
 - i. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - ii. the failure of a person or Entity to have authorized a transfer or conveyance;
 - iii. a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
 - iv. a failure to perform those acts necessary to create a document by electronic means authorized by law;
 - v. a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - vi. a document not properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - vii. a defective judicial or administrative proceeding; or
 - viii. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
 - b. the lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
 - c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.
3. Unmarketable Title.
4. No right of access to and from the Land.





5. A violation or enforcement of a law, ordinance, permit, or governmental regulation (including those relating to building and zoning), but only to the extent of the violation or enforcement described by the enforcing governmental authority in an Enforcement Notice that identifies a restriction, regulation, or prohibition relating to:
 - a. the occupancy, use, or enjoyment of the Land;
 - b. the character, dimensions, or location of an improvement on the Land;
 - c. the subdivision of the Land; or
 - d. environmental remediation or protection on the Land.
6. An enforcement of a governmental forfeiture, police, regulatory, or national security power, but only to the extent of the enforcement described by the enforcing governmental authority in an Enforcement Notice.
7. An exercise of the power of eminent domain, but only to the extent:
 - a. of the exercise described in an Enforcement Notice; or
 - b. the taking occurred and is binding on a purchaser for value without Knowledge.
8. An enforcement of a PACA-PSA Trust, but only to the extent of the enforcement described in an Enforcement Notice.
9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. Covered Risk 9 includes, but is not limited to, insurance against loss caused by:
 - a. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - b. the failure of a person or Entity to have authorized a transfer or conveyance;
 - c. the Insured Mortgage not being properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
 - d. a failure to perform those acts necessary to create an Insured Mortgage by electronic means authorized by law;
 - e. a document having been executed under a falsified, expired, or otherwise invalid power of attorney;
 - f. the Insured Mortgage not having been properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - g. a defective judicial or administrative proceeding; or
 - h. invalidity or unenforceability of the lien of the Insured Mortgage as a result of the repudiation of an electronic signature by a person that executed the Insured Mortgage because the electronic signature on the Insured Mortgage was not valid under applicable electronic transactions law.
10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance on the Title as security for the following components of the Indebtedness:
 - a. the amount of the principal disbursed as of the Date of Policy;
 - b. the interest on the obligation secured by the Insured Mortgage;
 - c. the reasonable expense of foreclosure;
 - d. amounts advanced for insurance premiums by the Insured before the acquisition of the estate or interest in the Title; and
 - e. the following amounts advanced by the Insured before the acquisition of the estate or interest in the Title to protect the priority of the lien of the Insured Mortgage:
 - i. real estate taxes and assessments imposed by a governmental taxing authority; and
 - ii. regular, periodic assessments by a property owners' association.
11. The lack of priority of the lien of the Insured Mortgage upon the Title:
 - a. as security for each advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for service, labor, material, or equipment arising from construction of an improvement or work related to the Land when the improvement or work is:
 - i. contracted for or commenced on or before the Date of Policy; or



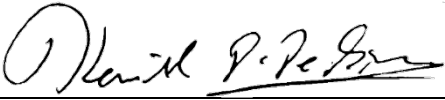


- ii. contracted for, commenced, or continued after the Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on the Date of Policy to advance; and
 - b. over the lien of any assessments for street improvements under construction or completed at the Date of Policy.
- 12. The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.
- 13. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title, or the effect of a court order providing an alternative remedy:
 - a. resulting from the avoidance, in whole or in part, of any transfer of all or any part of the Title to the Land or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a:
 - i. fraudulent conveyance, fraudulent transfer, or preferential transfer under federal bankruptcy, state insolvency, or similar state or federal creditors' rights law; or
 - ii. voidable transfer under the Uniform Voidable Transactions Act; or
 - b. because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar state or federal creditors' rights law by reason of the failure:
 - i. to timely record the Insured Mortgage in the Public Records after execution and delivery of the Insured Mortgage to the Insured; or
 - ii. of the recording of the Insured Mortgage in the Public Records to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
- 14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to the Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.

DEFENSE OF COVERED CLAIMS

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this policy, but only to the extent provided in the Conditions.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 
Kenneth D. DeGiorgio, President

By: 
Lisa W. Cornehl, Secretary





EXCLUSIONS FROM COVERAGE

The following matters are excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. a. any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) that restricts, regulates, prohibits, or relates to:
 - i. the occupancy, use, or enjoyment of the Land;
 - ii. the character, dimensions, or location of any improvement on the Land;
 - iii. the subdivision of land; or
 - iv. environmental remediation or protection.b. any governmental forfeiture, police, regulatory, or national security power.
c. the effect of a violation or enforcement of any matter excluded under Exclusion 1.a. or 1.b.
Exclusion 1 does not modify or limit the coverage provided under Covered Risk 5 or 6.
2. Any power of eminent domain. Exclusion 2 does not modify or limit the coverage provided under Covered Risk 7.
3. Any defect, lien, encumbrance, adverse claim, or other matter:
 - a. created, suffered, assumed, or agreed to by the Insured Claimant;
 - b. not Known to the Company, not recorded in the Public Records at the Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
 - c. resulting in no loss or damage to the Insured Claimant;
 - d. attaching or created subsequent to the Date of Policy (Exclusion 3.d. does not modify or limit the coverage provided under Covered Risk 11, 13, or 14); or
 - e. resulting in loss or damage that would not have been sustained if consideration sufficient to qualify the Insured named in Schedule A as a bona fide purchaser or encumbrancer had been given for the Insured Mortgage at the Date of Policy.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business law.
5. Invalidity or unenforceability of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury law or Consumer Protection Law.
6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights law, that the transaction creating the lien of the Insured Mortgage is a:
 - a. fraudulent conveyance or fraudulent transfer;
 - b. voidable transfer under the Uniform Voidable Transactions Act; or
 - c. preferential transfer:
 - i. to the extent the Insured Mortgage is not a transfer made as a contemporaneous exchange for new value; or
 - ii. for any other reason not stated in Covered Risk 13.b.
7. Any claim of a PACA-PSA Trust. Exclusion 7 does not modify or limit the coverage provided under Covered Risk 8.
8. Any lien on the Title for real estate taxes or assessments imposed by a governmental authority and created or attaching between the Date of Policy and the date of recording of the Insured Mortgage in the Public Records. Exclusion 8 does not modify or limit the coverage provided under Covered Risk 2.b. or 11.b.
9. Any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any improvement to the Land.

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Form 50143233 (8-5-22)



**Transaction Identification Data, for which the Company assumes no liability as set forth in Condition 9.e.:**

Issuing Agent:

Issuing Office:

Issuing Office's ALTA® Registry ID:

Loan ID Number:

Issuing Office File Number:

Property Address:

SCHEDULE A

Name and Address of Title Insurance Company:

Policy Number:

Amount of Insurance: \$ [Premium: \$]

Date of Policy: [at a.m./p.m.]

1. The Insured is:
2. The estate or interest in the Land encumbered by the Insured Mortgage is:
3. The Title encumbered by the Insured Mortgage is vested in:
4. The Insured Mortgage and its assignments, if any, are described as follows:
5. The Land is described as follows: and is described as set forth in Exhibit A attached hereto and made a part hereof.
6. This policy incorporates by reference the endorsements designated below, adopted by the American Land Title Association as of the Date of Policy:

- ☐ FATIC (Secondary Mortgage Market)
- ☐ 4 (Condominium – Assessments Priority)
- ☐ 4.1 (Condominium – Current Assessments)
- ☐ 5 (Planned Unit Development – Assessments Priority)
- ☐ 5.1 (Planned Unit Development – Current Assessments)
- ☐ 6 (Variable Rate)
- ☐ 6.2 (Variable Rate – Negative Amortization)
- ☐ 8.1 (Environmental Protection Lien) Paragraph b refers to the following state statute(s):
(N.H. RSA ch 147-B)
- ☐ 9 (Restrictions, Encroachments, Minerals)
- ☐ 13.1 (Leasehold – Loan)
- ☐ 14.1 (Future Advance – Knowledge)
- ☐ 14.3 (Future Advance – Reverse Mortgage)
- ☐ 22 (Location)

(insert "First American Title Insurance Company" or Agent name here)By: _____
Authorized Signatory**Copyright 2021 American Land Title Association. All rights reserved.**

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**SCHEDULE B**

Policy Number:

EXCEPTIONS FROM COVERAGE

Some historical land records contain Discriminatory Covenants that are illegal and unenforceable by law. This policy treats any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is redacted, repudiated, removed, and not republished or recirculated. Only the remaining provisions of the document are excepted from coverage.

PART I

This policy does not insure against loss or damage and the Company will not pay costs, attorneys' fees, or expenses resulting from the terms and conditions of any lease or easement identified in Schedule A, and the following matters:

1. Any facts, rights, interests, or claims that are not shown in the Public Records but that could be ascertained by an inspection of the Land or by making inquiry of persons in possession of the Land.
2. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title, including discrepancies, conflicts in boundary lines, shortages in area, or any other facts that would be disclosed by an accurate and complete land survey of the Land, and that are not shown in the Public Records.
3. Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown in the Public Records.
4. Liens for taxes and assessments which become due and payable subsequent to the Date of Policy.
5. IF THE LAND IS A CONDOMINIUM UNIT: Covenants, conditions, restrictions, reservations, easements, liens for assessments, options, powers of attorney, and limitations on title, created by the laws of the State of the Land or set forth in the Master Deed or Declaration of Condominium, in the related By-Laws, in the Declaration of Condominium, or Site Plans and Floor Plans as duly recorded in the appropriate Public Records and as the same may have been lawfully amended, and in any instrument creating the Title.

(Additional Exceptions may be listed here by number)

- ☐ For additional exceptions see attached Schedule B-Part I Continuation Sheet.
☐ See exceptions on attached Schedule B Part II.

Exception(s) numbered _____ are hereby omitted from the Loan Policy.

PART II

Covered Risk 10 insures against loss or damage sustained by the Insured by reason of the lack of priority of the lien of the Insured Mortgage over the matters listed in Part II, subject to the terms and conditions of any subordination provision in a matter listed in Part II:



**CONDITIONS****1. DEFINITION OF TERMS**

In this policy, the following terms have the meanings given to them below. Any defined term includes both the singular and the plural, as the context requires:

- a. "Affiliate": An Entity:
 - i. that is wholly owned by the Insured;
 - ii. that wholly owns the Insured; or
 - iii. if that Entity and the Insured are both wholly owned by the same person or entity.
- b. "Amount of Insurance": The Amount of Insurance stated in Schedule A, as may be increased by Condition 8.c.; decreased by Condition 10; or increased or decreased by endorsements to this policy.
- c. "Consumer Protection Law": Any law regulating trade, lending, credit, sale, and debt collection practices involving consumers; any consumer financial law; or any other law relating to truth-in-lending, predatory lending, or a borrower's ability to repay a loan.
- d. "Date of Policy": The Date of Policy stated in Schedule A.
- e. "Discriminatory Covenant": Any covenant, condition, restriction, or limitation that is unenforceable under applicable law because it illegally discriminates against a class of individuals based on personal characteristics such as race, color, religion, sex, sexual orientation, gender identity, familial status, disability, national origin, or other legally protected class.
- f. "Enforcement Notice": A document recorded in the Public Records that describes any part of the Land and:
 - i. is issued by a governmental agency that identifies a violation or enforcement of a law, ordinance, permit, or governmental regulation;
 - ii. is issued by a holder of the power of eminent domain or a governmental agency that identifies the exercise of a governmental power; or
 - iii. asserts a right to enforce a PACA-PSA Trust.
- g. "Entity": A corporation, partnership, trust, limited liability company, or other entity authorized by law to own title to real property in the State where the Land is located.
- h. "Government Mortgage Agency or Instrumentality": Any government agency or instrumentality that is the owner of the Indebtedness, an insurer, or a guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness, or any part of it, whether named as an Insured or not.
- i. "Indebtedness": Any obligation secured by the Insured Mortgage, including an obligation evidenced by electronic means authorized by law. If that obligation is the payment of a debt, the Indebtedness is:
 - i. the sum of:
 - (a). principal disbursed as of the Date of Policy;
 - (b). principal disbursed subsequent to the Date of Policy;
 - (c). the construction loan advances made subsequent to the Date of Policy for the purpose of financing, in whole or in part, the construction of an improvement to the Land or related to the Land that the Insured was and continues to be obligated to advance at the Date of Policy and at the date of the advance;
 - (d). interest on the loan;
 - (e). prepayment premiums, exit fees, and other similar fees or penalties allowed by law;
 - (f). expenses of foreclosure and any other costs of enforcement;
 - (g). advances for insurance premiums;
 - (h). advances to assure compliance with law or to protect the validity, enforceability, or priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title; including, but not limited to:
 - (1). real estate taxes and assessments imposed by a governmental taxing authority, and
 - (2). regular, periodic assessments by a property owners' association; and
 - (i). advances to prevent deterioration of improvements before the Insured's acquisition of the Title, but
 - ii. reduced by the sum of all payments and any amounts forgiven by an Insured.





- j. "Insured":
 - i. (a). The Insured named in Item 1 of Schedule A or future owner of the Indebtedness other than an Obligor, if the named Insured or future owner of the Indebtedness owns the Indebtedness, the Title, or an estate or interest in the Land as provided in Condition 2, but only to the extent the named Insured or the future owner either:
 - (1). owns the Indebtedness for its own account or as a trustee or other fiduciary, or
 - (2). owns the Title after acquiring the Indebtedness;
 - (b). the person or Entity who has "control" of the "transferable record," if the Indebtedness is evidenced by a "transferable record," as defined by applicable electronic transactions law;
 - (c). the successor to the Title of an Insured resulting from dissolution, merger, consolidation, distribution, or reorganization;
 - (d). the successor to the Title of an Insured resulting from its conversion to another kind of Entity;
 - (e). the grantee of an Insured under a deed or other instrument transferring the Title, if the grantee is an Affiliate;
 - (f). an Affiliate that acquires the Title through foreclosure or deed-in-lieu of foreclosure of the Insured Mortgage; or
 - (g). any Government Mortgage Agency or Instrumentality.
 - ii. With regard to Conditions 1.j.i.(a). and 1.j.i.(b)., the Company reserves all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by this policy.
 - iii. With regard to Conditions 1.j.i.(c)., 1.j.i.(d)., 1.j.i.(e)., and 1.j.i.(f)., the Company reserves all rights and defenses as to any successor or grantee that the Company would have had against any predecessor Insured.
- k. "Insured Claimant": An Insured claiming loss or damage arising under this policy.
- l. "Insured Mortgage": The Mortgage described in Item 4 of Schedule A.
- m. "Knowledge" or "Known": Actual knowledge or actual notice, but not constructive notice imparted by the Public Records.
- n. "Land": The land described in Item 5 of Schedule A and improvements located on that land at the Date of Policy that by State law constitute real property. The term "Land" does not include any property beyond that described in Schedule A, nor any right, title, interest, estate, or easement in any abutting street, road, avenue, alley, lane, right-of-way, body of water, or waterway, but does not modify or limit the extent that a right of access to and from the Land is insured by this policy.
- o. "Mortgage": A mortgage, deed of trust, trust deed, security deed, or other real property security instrument, including one evidenced by electronic means authorized by law.
- p. "Obligor": A person or entity that is or becomes a maker, borrower, or guarantor as to all or part of the Indebtedness or other obligation secured by the Insured Mortgage. A Government Mortgage Agency or Instrumentality is not an Obligor.
- q. "PACA-PSA Trust": A trust under the federal Perishable Agricultural Commodities Act or the federal Packers and Stockyards Act or a similar State or federal law.
- r. "Public Records": The recording or filing system established under State statutes in effect at the Date of Policy under which a document must be recorded or filed to impart constructive notice of matters relating to the Title to a purchaser for value without Knowledge. The term "Public Records" does not include any other recording or filing system, including any pertaining to environmental remediation or protection, planning, permitting, zoning, licensing, building, health, public safety, or national security matters.
- s. "State": The state or commonwealth of the United States within whose exterior boundaries the Land is located. The term "State" also includes the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and Guam.
- t. "Title": The estate or interest in the Land identified in Item 2 of Schedule A.
- u. "Unmarketable Title": The Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title, a lender on the Title, or a prospective purchaser of the Insured Mortgage





to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF COVERAGE

This policy continues as of the Date of Policy in favor of an Insured:

- a. after the Insured's acquisition of the Title, so long as the Insured retains an estate or interest in the Land; and
- b. after the Insured's conveyance of the Title, so long as the Insured:
 - i. retains an estate or interest in the Land;
 - ii. owns an obligation secured by a purchase money Mortgage given by a purchaser from the Insured; or
 - iii. has liability for warranties given by the Insured in any transfer or conveyance of the Insured's Title.

Except as provided in Condition 2, this policy terminates and ceases to have any further force or effect after the Insured conveys the Title. This policy does not continue in force or effect in favor of any person or entity that is not the Insured and acquires the Title or an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured must notify the Company promptly in writing if the Insured has Knowledge of:

- a. any litigation or other matter for which the Company may be liable under this policy; or
- b. any rejection of the Title or the lien of the Insured Mortgage as Unmarketable Title.

If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under this policy is reduced to the extent of the prejudice.

4. PROOF OF LOSS

The Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, adverse claim, or other matter insured against by this policy that constitutes the basis of loss or damage and must state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

- a. Upon written request by the Insured and subject to the options contained in Condition 7, the Company, at its own cost and without unreasonable delay, will provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company has the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those covered causes of action. The Company is not liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of any cause of action that alleges matters not insured against by this policy.
- b. The Company has the right, in addition to the options contained in Condition 7, at its own cost, to institute and prosecute any action or proceeding or to do any other act that, in its opinion, may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it is liable to the Insured. The Company's exercise of these rights is not an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under Condition 5.b., it must do so diligently.
- c. When the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court having jurisdiction. The Company reserves the right, in its sole discretion, to appeal any adverse judgment or order.





6. DUTY OF INSURED CLAIMANT TO COOPERATE

- a. When this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured will secure to the Company the right to prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose.

When requested by the Company, the Insured, at the Company's expense, must give the Company all reasonable aid in:

- i. securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement; and
- ii. any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title, the lien of the Insured Mortgage, or any other matter, as insured.

If the Company is prejudiced by any failure of the Insured to furnish the required cooperation, the Company's liability and obligations to the Insured under this policy terminate, including any obligation to defend, prosecute, or continue any litigation, regarding the matter requiring such cooperation.

- b. The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos, whether bearing a date before or after the Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant must grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all the records in the custody or control of a third party that reasonably pertain to the loss or damage. No information designated in writing as confidential by the Insured Claimant provided to the Company pursuant to Condition 6 will be later disclosed to others unless, in the reasonable judgment of the Company, disclosure is necessary in the administration of the claim or required by law. Any failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in Condition 6.b., unless prohibited by law, terminates any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company has the following additional options:

- a. *To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness*
- i. To pay or tender payment of the Amount of Insurance under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay; or
 - ii. To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay.
- If the Company purchases the Indebtedness, the Insured must transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security. Upon the exercise by the Company of either option provided for in Condition 7.a., the Company's liability and obligations to the Insured under this policy terminate, including any obligation to defend, prosecute, or continue any litigation.
- b. *To Pay or Otherwise Settle with Parties other than the Insured or with the Insured Claimant*
- i. To pay or otherwise settle with parties other than the Insured for or in the name of the Insured Claimant. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or
 - ii. To pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the





Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either option provided for in Condition 7.b., the Company's liability and obligations to the Insured under this policy for the claimed loss or damage terminate, including any obligation to defend, prosecute, or continue any litigation.

8. CONTRACT OF INDEMNITY; DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by an Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy. This policy is not an abstract of the Title, report of the condition of the Title, legal opinion, opinion of the Title, or other representation of the status of the Title. All claims asserted under this policy are based in contract and are restricted to the terms and provisions of this policy. The Company is not liable for any claim alleging negligence or negligent misrepresentation arising from or in connection with this policy or the determination of the insurability of the Title.

- a. The extent of liability of the Company for loss or damage under this policy does not exceed the least of:
 - i. the Amount of Insurance;
 - ii. the Indebtedness;
 - iii. the difference between the fair market value of the Title, as insured, and the fair market value of the Title subject to the matter insured against by this policy; or
 - iv. if a Government Mortgage Agency or Instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage or in satisfaction of its insurance contract or guaranty relating to the Title or the Insured Mortgage.
- b. Fair market value of the Title in Condition 8.a.iii. is calculated using either:
 - i. the date the Insured acquires the Title as a result of a foreclosure or deed in lieu of foreclosure of the Insured Mortgage; or
 - ii. the date the lien of the Insured Mortgage or any assignment set forth in Item 4 of Schedule A is extinguished or rendered unenforceable by reason of a matter insured against by this policy.
- c. If the Company pursues its rights under Condition 5.b. and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured:
 - i. the Amount of Insurance will be increased by 15%; and
 - ii. the Insured Claimant may, by written notice given to the Company, elect, as an alternative to the dates set forth in Condition 8.b., to use either the date the settlement, action, proceeding, or other act described in Condition 5.b. is concluded or the date the notice of claim required by Condition 3 is received by the Company as the date for calculating the fair market value of the Title in Condition 8.a.iii.
- d. In addition to the extent of liability for loss or damage under Conditions 8.a. and 8.c., the Company will also pay the costs, attorneys' fees, and expenses incurred in accordance with Conditions 5 and 7.

9. LIMITATION OF LIABILITY

- a. The Company fully performs its obligations and is not liable for any loss or damage caused to the Insured if the Company accomplishes any of the following in a reasonable manner:
 - i. removes the alleged defect, lien, encumbrance, adverse claim, or other matter;
 - ii. cures the lack of a right of access to and from the Land;
 - iii. cures the claim of Unmarketable Title; or
 - iv. establishes the lien of the Insured Mortgage,all as insured. The Company may do so by any method, including litigation and the completion of any appeals.
- b. The Company is not liable for loss or damage arising out of any litigation, including litigation by the Company or with the Company's consent, until a State or federal court having jurisdiction makes a final, non-appealable determination adverse to the Title or to the lien of the Insured Mortgage.
- c. The Company is not liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

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- d. An Insured Claimant must own the Indebtedness or have acquired the Title at the time that a claim under this policy is paid.
- e. The Company is not liable for the content of the Transaction Identification Data, if any.

10. REDUCTION OR TERMINATION OF INSURANCE

- a. All payments under this policy, except payments made for costs, attorneys' fees, and expenses, reduce the Amount of Insurance by the amount of the payment. However, any payment made by the Company prior to the acquisition of the Title as provided in Condition 2 does not reduce the Amount of Insurance afforded under this policy, except to the extent that the payment reduces the Indebtedness.
- b. When the Title is acquired by the Insured as a result of foreclosure or deed in lieu of foreclosure, the amount credited against the Indebtedness does not reduce the Amount of Insurance.
- c. The voluntary satisfaction or release of the Insured Mortgage terminates all liability of the Company, except as provided in Condition 2.

11. PAYMENT OF LOSS

When liability and the extent of loss or damage are determined in accordance with the Conditions, the Company will pay the loss or damage within 30 days.

12. COMPANY'S RECOVERY AND SUBROGATION RIGHTS UPON SETTLEMENT AND PAYMENT

- a. *Company's Right to Recover*
 - i. If the Company settles and pays a claim under this policy, it is subrogated and entitled to the rights and remedies of the Insured Claimant in the Title or Insured Mortgage and all other rights and remedies in respect to the claim that the Insured Claimant has against any person, entity, or property to the fullest extent permitted by law, but limited to the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant must execute documents to transfer these rights and remedies to the Company. The Insured Claimant permits the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.
 - ii. If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company defers the exercise of its subrogation right until after the Insured Claimant fully recovers its loss.
- b. *Company's Subrogation Rights against Obligors*

The Company's subrogation right includes the Insured's rights against Obligors including the Insured's rights to repayment under a note, indemnity, guaranty, warranty, insurance policy, or bond, despite any provision in those instruments that addresses recovery or subrogation rights. An Obligor cannot avoid the Company's subrogation right by acquiring the Indebtedness as a result of an indemnity, guaranty, warranty, insurance policy, or bond, or in any other manner. The Obligor is not an Insured under this policy. The Company may not exercise its rights under Condition 12.b. against a Government Mortgage Agency or Instrumentality.
- c. *Insured's Rights and Limitations*
 - i. The owner of the Indebtedness may release or substitute the personal liability of any debtor or guarantor, extend or otherwise modify the terms of payment, release a portion of the Title from the lien of the Insured Mortgage, or release any collateral security for the Indebtedness, if the action does not affect the enforceability or priority of the lien of the Insured Mortgage.
 - ii. If the Insured exercises a right provided in Condition 12.c.i. but has Knowledge of any claim adverse to the Title or the lien of the Insured Mortgage insured against by this policy, the Company is required to pay only that part of the loss insured against by this policy that exceeds the amount, if any, lost to the Company by reason of the impairment by the Insured Claimant of the Company's subrogation right.

13. POLICY ENTIRE CONTRACT

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Form 50143233 (8-5-22)





- a. This policy together with all endorsements, if any, issued by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy will be construed as a whole. This policy and any endorsement to this policy may be evidenced by electronic means authorized by law.
- b. Any amendment of this policy must be by a written endorsement issued by the Company. To the extent any term or provision of an endorsement is inconsistent with any term or provision of this policy, the term or provision of the endorsement controls. Unless the endorsement expressly states, it does not:
 - i. modify any prior endorsement,
 - ii. extend the Date of Policy,
 - iii. insure against loss or damage exceeding the Amount of Insurance, or
 - iv. increase the Amount of Insurance.

14. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, this policy will be deemed not to include that provision or the part held to be invalid, but all other provisions will remain in full force and effect.

15. CHOICE OF LAW AND CHOICE OF FORUM

- a. *Choice of Law*

The Company has underwritten the risks covered by this policy and determined the premium charged in reliance upon the State law affecting interests in real property and the State law applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the State where the Land is located.

The State law of the State where the Land is located, or to the extent it controls, federal law, will determine the validity of claims against the Title or the lien of the Insured Mortgage and the interpretation and enforcement of the terms of this policy, without regard to conflicts of law principles to determine the applicable law.
- b. *Choice of Forum*

Any litigation or other proceeding brought by the Insured against the Company must be filed only in a State or federal court having jurisdiction.

16. NOTICES

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at: **First American Title Insurance Company, Attn: Claims National Intake Center, 5 First American Way, Santa Ana, California 92707. Phone: 888 632 1642.**

17. CLASS ACTION

ALL CLAIMS AND DISPUTES ARISING OUT OF OR RELATING TO THIS POLICY, INCLUDING ANY SERVICE OR OTHER MATTER IN CONNECTION WITH ISSUING THIS POLICY, ANY BREACH OF A POLICY PROVISION, OR ANY OTHER CLAIM OR DISPUTE ARISING OUT OF OR RELATING TO THE TRANSACTION GIVING RISE TO THIS POLICY, MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS OR REPRESENTATIVE PROCEEDING.

18. ARBITRATION

- a. All claims and disputes arising out of or relating to this policy, including any service or other matter in connection with issuing this policy, any breach of a policy provision, or any other claim or dispute arising out of or relating to the transaction giving rise to this policy, may be resolved by arbitration. If the Amount of Insurance is \$2,000,000 or less, any claim or dispute may be submitted to binding arbitration at the election of either the Company or the Insured. If the Amount of Insurance is greater than \$2,000,000, any claim or dispute may be submitted to binding arbitration only when agreed to by both the Company and the Insured. Arbitration must be conducted pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("ALTA Rules"). The ALTA Rules are available online at





- www.alta.org/arbitration. The ALTA Rules incorporate, as appropriate to a particular dispute, the Consumer Arbitration Rules and Commercial Arbitration Rules of the American Arbitration Association (“AAA Rules”). The AAA Rules are available online at www.adr.org.
- b. ALL CLAIMS AND DISPUTES MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS OR REPRESENTATIVE PROCEEDING IN ANY ARBITRATION GOVERNED BY CONDITION 18. The arbitrator does not have authority to conduct any class action arbitration or arbitration involving joint or consolidated claims under any circumstance.
 - c. *If there is a final judicial determination that a request for particular relief cannot be arbitrated in accordance with this Condition 18, then only that request for particular relief may be brought in court. All other requests for relief remain subject to this Condition 18.*
 - d. The Company will pay all AAA filing, administration, and arbitrator fees of the consumer when the arbitration seeks relief of \$100,000 or less. Other fees will be allocated in accordance with the applicable AAA Rules. The results of arbitration will be binding upon the parties. The arbitrator may consider, but is not bound by, rulings in prior arbitrations involving different parties. The arbitrator is bound by rulings in prior arbitrations involving the same parties to the extent required by law. The arbitrator must issue a written decision sufficient to explain the findings and conclusions on which the award is based. Judgment upon the award rendered by the arbitrator may be entered in any State or federal court having jurisdiction.

NOTE: Bracketed [] material optional





ALTA OWNER'S POLICY OF TITLE INSURANCE
issued by
FIRST AMERICAN TITLE INSURANCE COMPANY

This policy, when issued by the Company with a Policy Number and the Date of Policy, is valid even if this policy or any endorsement to this policy is issued electronically or lacks any signature.

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Condition 17.

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a Nebraska corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 9 and 10, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
 - a. a defect in the Title caused by:
 - i. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - ii. the failure of a person or Entity to have authorized a transfer or conveyance;
 - iii. a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
 - iv. a failure to perform those acts necessary to create a document by electronic means authorized by law;
 - v. a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - vi. a document not properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - vii. a defective judicial or administrative proceeding; or
 - viii. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
 - b. the lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
 - c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.
3. Unmarketable Title.
4. No right of access to and from the Land.



5. A violation or enforcement of a law, ordinance, permit, or governmental regulation (including those relating to building and zoning), but only to the extent of the violation or enforcement described by the enforcing governmental authority in an Enforcement Notice that identifies a restriction, regulation, or prohibition relating to:
 - a. the occupancy, use, or enjoyment of the Land;
 - b. the character, dimensions, or location of an improvement on the Land;
 - c. the subdivision of the Land; or
 - d. environmental remediation or protection on the Land.
6. An enforcement of a governmental forfeiture, police, regulatory, or national security power, but only to the extent of the enforcement described by the enforcing governmental authority in an Enforcement Notice.
7. An exercise of the power of eminent domain, but only to the extent:
 - a. of the exercise described in an Enforcement Notice; or
 - b. the taking occurred and is binding on a purchaser for value without Knowledge.
8. An enforcement of a PACA-PSA Trust, but only to the extent of the enforcement described in an Enforcement Notice.
9. The Title being vested other than as stated in Schedule A, the Title being defective, or the effect of a court order providing an alternative remedy:
 - a. resulting from the avoidance, in whole or in part, of any transfer of all or any part of the Title to the Land or any interest in the Land occurring prior to the transaction vesting the Title because that prior transfer constituted a:
 - i. fraudulent conveyance, fraudulent transfer, or preferential transfer under federal bankruptcy, state insolvency, or similar state or federal creditors' rights law; or
 - ii. voidable transfer under the Uniform Voidable Transactions Act; or
 - b. because the instrument vesting the Title constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar state or federal creditors' rights law by reason of the failure:
 - i. to timely record the instrument vesting the Title in the Public Records after execution and delivery of the instrument to the Insured; or
 - ii. of the recording of the instrument vesting the Title in the Public Records to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
10. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 9 that has been created or attached or has been filed or recorded in the Public Records subsequent to the Date of Policy and prior to the recording of the deed or other instrument vesting the Title in the Public Records.

DEFENSE OF COVERED CLAIMS

The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of any matter insured against by this policy, but only to the extent provided in the Conditions.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____

Kenneth D. DeGiorgio, President

By: _____

Lisa W. Cornehl, Secretary

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EXCLUSIONS FROM COVERAGE

The following matters are excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. a. any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) that restricts, regulates, prohibits, or relates to:
 - i. the occupancy, use, or enjoyment of the Land;
 - ii. the character, dimensions, or location of any improvement on the Land;
 - iii. the subdivision of land; or
 - iv. environmental remediation or protection.
- b. any governmental forfeiture, police, regulatory, or national security power.
- c. the effect of a violation or enforcement of any matter excluded under Exclusion 1.a. or 1.b.
Exclusion 1 does not modify or limit the coverage provided under Covered Risk 5 or 6.
2. Any power of eminent domain. Exclusion 2 does not modify or limit the coverage provided under Covered Risk 7.
3. Any defect, lien, encumbrance, adverse claim, or other matter:
 - a. created, suffered, assumed, or agreed to by the Insured Claimant;
 - b. not Known to the Company, not recorded in the Public Records at the Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
 - c. resulting in no loss or damage to the Insured Claimant;
 - d. attaching or created subsequent to the Date of Policy (Exclusion 3.d. does not modify or limit the coverage provided under Covered Risk 9 or 10); or
 - e. resulting in loss or damage that would not have been sustained if consideration sufficient to qualify the Insured named in Schedule A as a bona fide purchaser had been given for the Title at the Date of Policy.
4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights law, that the transaction vesting the Title as shown in Schedule A is a:
 - a. fraudulent conveyance or fraudulent transfer;
 - b. voidable transfer under the Uniform Voidable Transactions Act; or
 - c. preferential transfer:
 - i. to the extent the instrument of transfer vesting the Title as shown in Schedule A is not a transfer made as a contemporaneous exchange for new value; or
 - ii. for any other reason not stated in Covered Risk 9.b.
5. Any claim of a PACA-PSA Trust. Exclusion 5 does not modify or limit the coverage provided under Covered Risk 8.
6. Any lien on the Title for real estate taxes or assessments imposed or collected by a governmental authority that becomes due and payable after the Date of Policy. Exclusion 6 does not modify or limit the coverage provided under Covered Risk 2.b.
7. Any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any improvement to the Land.





Transaction Identification Data, for which the Company assumes no liability as set forth in Condition 9.d.:

Issuing Agent:
Issuing Office:
Issuing Office's ALTA® Registry ID:
Issuing Office File Number:
Property Address:

SCHEDULE A

Name and Address of Title Insurance Company:

Policy Number:

Amount of Insurance: \$ [Premium: \$]

Date of Policy: [at a.m./p.m.]

1. The Insured is:
2. The estate or interest in the Land insured by this policy is:
3. The Title is vested in:
4. The land herein described is encumbered by the following mortgage, and the assignment thereof, if any:
5. The Land referred to in this policy is described as follows: Street/Road, in the Town/City of ,
County of and State of New Hampshire and is described as set forth in Exhibit "A" attached hereto
and made a part hereof.

(insert "First American Title Insurance Company" or Agent name here)

By: _____
Authorized Signatory





SCHEDULE B

Policy Number:

EXCEPTIONS FROM COVERAGE

Some historical land records contain Discriminatory Covenants that are illegal and unenforceable by law. This policy treats any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is redacted, repudiated, removed, and not republished or recirculated. Only the remaining provisions of the document are excepted from coverage.

This policy does not insure against loss or damage and the Company will not pay costs, attorneys' fees, or expenses resulting from the terms and conditions of any lease or easement identified in Schedule A, and the following matters:

1. Any facts, rights, interests, or claims that are not shown in the Public Records but that could be ascertained by an inspection of the Land or by making inquiry of persons in possession of the Land.
2. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title, including discrepancies, conflicts in boundary lines, shortages in area, or any other facts that would be disclosed by an accurate and complete land survey of the Land, and that are not shown in the Public Records.
3. Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown in the Public Records.
4. The mortgage, if any, referred to in Item 4 of Schedule A. (This exception does NOT apply to Loan Policies).
5. Liens for taxes and assessments which become due and payable subsequent to the Date of Policy.
6. IF THE LAND IS A CONDOMINIUM UNIT: Covenants, conditions, restrictions, reservations, easements, liens for assessments, options, powers of attorney, and limitations on title, created by the laws of the State of the insured premises or set forth in the Declaration of Condominium, in the related By-Laws, in the Site Plans or Floor Plans as duly recorded in the Public Records and as the same may be lawfully amended, and in any instrument creating the Title.

(Additional Exceptions may be listed here by number)

☐ For additional exceptions see attached Schedule B-Part I Continuation Sheet.

**CONDITIONS****1. DEFINITION OF TERMS**

In this policy, the following terms have the meanings given to them below. Any defined term includes both the singular and the plural, as the context requires:

- a. "Affiliate": An Entity:
 - i. that is wholly owned by the Insured;
 - ii. that wholly owns the Insured; or
 - iii. if that Entity and the Insured are both wholly owned by the same person or entity.
- b. "Amount of Insurance": The Amount of Insurance stated in Schedule A, as may be increased by Condition 8.d. or decreased by Condition 10 or 11; or increased or decreased by endorsements to this policy.
- c. "Date of Policy": The Date of Policy stated in Schedule A.
- d. "Discriminatory Covenant": Any covenant, condition, restriction, or limitation that is unenforceable under applicable law because it illegally discriminates against a class of individuals based on personal characteristics such as race, color, religion, sex, sexual orientation, gender identity, familial status, disability, national origin, or other legally protected class.
- e. "Enforcement Notice": A document recorded in the Public Records that describes any part of the Land and:
 - i. is issued by a governmental agency that identifies a violation or enforcement of a law, ordinance, permit, or governmental regulation;
 - ii. is issued by a holder of the power of eminent domain or a governmental agency that identifies the exercise of a governmental power; or
 - iii. asserts a right to enforce a PACA-PSA Trust.
- f. "Entity": A corporation, partnership, trust, limited liability company, or other entity authorized by law to own title to real property in the State where the Land is located.
- g. "Insured":
 - i.
 - (a). The Insured named in Item 1 of Schedule A;
 - (b). the successor to the Title of an Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;
 - (c). the successor to the Title of an Insured resulting from dissolution, merger, consolidation, distribution, or reorganization;
 - (d). the successor to the Title of an Insured resulting from its conversion to another kind of Entity; or
 - (e). the grantee of an Insured under a deed or other instrument transferring the Title, if the grantee is:
 - (1). an Affiliate;
 - (2). a trustee or beneficiary of a trust created by a written instrument established for estate planning purposes by an Insured;
 - (3). a spouse who receives the Title because of a dissolution of marriage;
 - (4). a transferee by a transfer effective on the death of an Insured as authorized by law; or
 - (5). another Insured named in Item 1 of Schedule A.
 - ii. The Company reserves all rights and defenses as to any successor or grantee that the Company would have had against any predecessor Insured.
- h. "Insured Claimant": An Insured claiming loss or damage arising under this policy.
- i. "Knowledge" or "Known": Actual knowledge or actual notice, but not constructive notice imparted by the Public Records.
- j. "Land": The land described in Item 4 of Schedule A and improvements located on that land at the Date of Policy that by State law constitute real property. The term "Land" does not include any property beyond that described in Schedule A, nor any right, title, interest, estate, or easement in any abutting street, road, avenue, alley, lane, right-of-way, body of water, or waterway, but does not modify or limit the extent that a right of access to and from the Land is insured by this policy.





- k. "Mortgage": A mortgage, deed of trust, trust deed, security deed, or other real property security instrument, including one evidenced by electronic means authorized by law.
- l. "PACA-PSA Trust": A trust under the federal Perishable Agricultural Commodities Act or the federal Packers and Stockyards Act or a similar State or federal law.
- m. "Public Records": The recording or filing system established under State statutes in effect at the Date of Policy under which a document must be recorded or filed to impart constructive notice of matters relating to the Title to a purchaser for value without Knowledge. The term "Public Records" does not include any other recording or filing system, including any pertaining to environmental remediation or protection, planning, permitting, zoning, licensing, building, health, public safety, or national security matters.
- n. "State": The state or commonwealth of the United States within whose exterior boundaries the Land is located. The term "State" also includes the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and Guam.
- o. "Title": The estate or interest in the Land identified in Item 2 of Schedule A.
- p. "Unmarketable Title": The Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or a lender on the Title to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF COVERAGE

This policy continues as of the Date of Policy in favor of an Insured, so long as the Insured:

- a. retains an estate or interest in the Land;
- b. owns an obligation secured by a purchase money Mortgage given by a purchaser from the Insured; or
- c. has liability for warranties given by the Insured in any transfer or conveyance of the Insured's Title.

Except as provided in Condition 2, this policy terminates and ceases to have any further force or effect after the Insured conveys the Title. This policy does not continue in force or effect in favor of any person or entity that is not the Insured and acquires the Title or an obligation secured by a purchase money Mortgage given to the Insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured must notify the Company promptly in writing if the Insured has Knowledge of:

- a. any litigation or other matter for which the Company may be liable under this policy; or
- b. any rejection of the Title as Unmarketable Title.

If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under this policy is reduced to the extent of the prejudice.

4. PROOF OF LOSS

The Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, adverse claim, or other matter insured against by this policy that constitutes the basis of loss or damage and must state, to the extent possible, the basis of calculating the amount of the loss or damage.

5. DEFENSE AND PROSECUTION OF ACTIONS

- a. Upon written request by the Insured and subject to the options contained in Condition 7, the Company, at its own cost and without unreasonable delay, will provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. The Company has the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those covered causes of action. The Company is not liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of any cause of action that alleges matters not insured against by this policy.
- b. The Company has the right, in addition to the options contained in Condition 7, at its own cost, to institute and prosecute any action or proceeding or to do any other act that, in its opinion, may be





necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it is liable to the Insured. The Company's exercise of these rights is not an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under Condition 5.b., it must do so diligently.

- c. When the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court having jurisdiction. The Company reserves the right, in its sole discretion, to appeal any adverse judgment or order.

6. DUTY OF INSURED CLAIMANT TO COOPERATE

- a. When this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured will secure to the Company the right to prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose.

When requested by the Company, the Insured, at the Company's expense, must give the Company all reasonable aid in:

- i. securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement; and
- ii. any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title or any other matter, as insured.

If the Company is prejudiced by any failure of the Insured to furnish the required cooperation, the Company's liability and obligations to the Insured under this policy terminate, including any obligation to defend, prosecute, or continue any litigation, regarding the matter requiring such cooperation.

- b. The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos, whether bearing a date before or after the Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant must grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all the records in the custody or control of a third party that reasonably pertain to the loss or damage. No information designated in writing as confidential by the Insured Claimant provided to the Company pursuant to Condition 6 will be later disclosed to others unless, in the reasonable judgment of the Company, disclosure is necessary in the administration of the claim or required by law. Any failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in Condition 6.b., unless prohibited by law, terminates any liability of the Company under this policy as to that claim.

7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company has the following additional options:

- a. *To Pay or Tender Payment of the Amount of Insurance*
To pay or tender payment of the Amount of Insurance under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment or tender of payment and that the Company is obligated to pay. Upon the exercise by the Company of this option provided for in Condition 7.a., the Company's liability and obligations to the Insured under this policy terminate, including any obligation to defend, prosecute, or continue any litigation.
- b. *To Pay or Otherwise Settle with Parties other than the Insured or with the Insured Claimant*
 - i. To pay or otherwise settle with parties other than the Insured for or in the name of the Insured Claimant. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or





- ii. To pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either option provided for in Condition 7.b., the Company's liability and obligations to the Insured under this policy for the claimed loss or damage terminate, including any obligation to defend, prosecute, or continue any litigation.

8. CONTRACT OF INDEMNITY; DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by an Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy. This policy is not an abstract of the Title, report of the condition of the Title, legal opinion, opinion of the Title, or other representation of the status of the Title. All claims asserted under this policy are based in contract and are restricted to the terms and provisions of this policy. The Company is not liable for any claim alleging negligence or negligent misrepresentation arising from or in connection with this policy or the determination of the insurability of the Title.

- a. The extent of liability of the Company for loss or damage under this policy does not exceed the lesser of:
 - i. the Amount of Insurance; or
 - ii. the difference between the fair market value of the Title, as insured, and the fair market value of the Title subject to the matter insured against by this policy.
- b. Except as provided in Condition 8.c. or 8.d., the fair market value of the Title in Condition 8.a.ii. is calculated using the date the Insured discovers the defect, lien, encumbrance, adverse claim, or other matter insured against by this policy.
- c. If, at the Date of Policy, the Title to all of the Land is void by reason of a matter insured against by this policy, then the Insured Claimant may, by written notice given to the Company, elect to use the Date of Policy as the date for calculating the fair market value of the Title in Condition 8.a.ii.
- d. If the Company pursues its rights under Condition 5.b. and is unsuccessful in establishing the Title, as insured:
 - i. the Amount of Insurance will be increased by 15%; and
 - ii. the Insured Claimant may, by written notice given to the Company, elect, as an alternative to the dates set forth in Condition 8.b. or, if it applies, 8.c., to use either the date the settlement, action, proceeding, or other act described in Condition 5.b. is concluded or the date the notice of claim required by Condition 3 is received by the Company as the date for calculating the fair market value of the Title in Condition 8.a.ii.
- e. In addition to the extent of liability for loss or damage under Conditions 8.a. and 8.d., the Company will also pay the costs, attorneys' fees, and expenses incurred in accordance with Conditions 5 and 7.

9. LIMITATION OF LIABILITY

- a. The Company fully performs its obligations and is not liable for any loss or damage caused to the Insured if the Company accomplishes any of the following in a reasonable manner:
 - i. removes the alleged defect, lien, encumbrance, adverse claim, or other matter;
 - ii. cures the lack of a right of access to and from the Land; or
 - iii. cures the claim of Unmarketable Title,all as insured. The Company may do so by any method, including litigation and the completion of any appeals.
- b. The Company is not liable for loss or damage arising out of any litigation, including litigation by the Company or with the Company's consent, until a State or federal court having jurisdiction makes a final, non-appealable determination adverse to the Title.
- c. The Company is not liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.
- d. The Company is not liable for the content of the Transaction Identification Data, if any.





10. REDUCTION OR TERMINATION OF INSURANCE

All payments under this policy, except payments made for costs, attorneys' fees, and expenses, reduce the Amount of Insurance by the amount of the payment.

11. LIABILITY NONCUMULATIVE

The Amount of Insurance will be reduced by any amount the Company pays under any policy insuring a Mortgage to which exception is taken in Schedule B or to which the Insured has agreed, assumed, or taken subject, or which is executed by an Insured after the Date of Policy and which is a charge or lien on the Title, and the amount so paid will be deemed a payment to the Insured under this policy.

12. PAYMENT OF LOSS

When liability and the extent of loss or damage are determined in accordance with the Conditions, the Company will pay the loss or damage within 30 days.

13. COMPANY'S RECOVERY AND SUBROGATION RIGHTS UPON SETTLEMENT AND PAYMENT

- a. If the Company settles and pays a claim under this policy, it is subrogated and entitled to the rights and remedies of the Insured Claimant in the Title and all other rights and remedies in respect to the claim that the Insured Claimant has against any person, entity, or property to the fullest extent permitted by law, but limited to the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant must execute documents to transfer these rights and remedies to the Company. The Insured Claimant permits the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.
- b. If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company defers the exercise of its subrogation right until after the Insured Claimant fully recovers its loss.
- c. The Company's subrogation right includes the Insured's rights to indemnity, guaranty, warranty, insurance policy, or bond, despite any provision in those instruments that addresses recovery or subrogation rights.

14. POLICY ENTIRE CONTRACT

- a. This policy together with all endorsements, if any, issued by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy will be construed as a whole. This policy and any endorsement to this policy may be evidenced by electronic means authorized by law.
- b. Any amendment of this policy must be by a written endorsement issued by the Company. To the extent any term or provision of an endorsement is inconsistent with any term or provision of this policy, the term or provision of the endorsement controls. Unless the endorsement expressly states, it does not:
 - i. modify any prior endorsement,
 - ii. extend the Date of Policy,
 - iii. insure against loss or damage exceeding the Amount of Insurance, or
 - iv. increase the Amount of Insurance.

15. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, this policy will be deemed not to include that provision or the part held to be invalid, but all other provisions will remain in full force and effect.

16. CHOICE OF LAW AND CHOICE OF FORUM

- a. *Choice of Law*
The Company has underwritten the risks covered by this policy and determined the premium charged in reliance upon the State law affecting interests in real property and the State law applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the State where the Land is located.

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Form 50143333 (8-5-22)





The State law of the State where the Land is located, or to the extent it controls, federal law, will determine the validity of claims against the Title and the interpretation and enforcement of the terms of this policy, without regard to conflicts of law principles to determine the applicable law.

b. *Choice of Forum*

Any litigation or other proceeding brought by the Insured against the Company must be filed only in a State or federal court having jurisdiction.

17. NOTICES

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at: **First American Title Insurance Company, Attn: Claims National Intake Center, 5 First American Way, Santa Ana, California 92707. Phone: 888-632-1642 (claims.nic@firstam.com).**

18. CLASS ACTION

ALL CLAIMS AND DISPUTES ARISING OUT OF OR RELATING TO THIS POLICY, INCLUDING ANY SERVICE OR OTHER MATTER IN CONNECTION WITH ISSUING THIS POLICY, ANY BREACH OF A POLICY PROVISION, OR ANY OTHER CLAIM OR DISPUTE ARISING OUT OF OR RELATING TO THE TRANSACTION GIVING RISE TO THIS POLICY, MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS, REPRESENTATIVE, OR PRIVATE ATTORNEY GENERAL PROCEEDING.

19. ARBITRATION

- a. All claims and disputes arising out of or relating to this policy, including any service or other matter in connection with issuing this policy, any breach of a policy provision, or any other claim or dispute arising out of or relating to the transaction giving rise to this policy, may be resolved by arbitration. If the Amount of Insurance is \$2,000,000 or less, any claim or dispute may be submitted to binding arbitration at the election of either the Company or the Insured. If the Amount of Insurance is greater than \$2,000,000, any claim or dispute may be submitted to binding arbitration only when agreed to by both the Company and the Insured. Arbitration must be conducted pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("ALTA Rules"). The ALTA Rules are available online at www.alta.org/arbitration. The ALTA Rules incorporate, as appropriate to a particular dispute, the Consumer Arbitration Rules and Commercial Arbitration Rules of the American Arbitration Association ("AAA Rules"). The AAA Rules are available online at www.adr.org.
- b. ALL CLAIMS AND DISPUTES MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS, REPRESENTATIVE, OR PRIVATE ATTORNEY GENERAL PROCEEDING IN ANY ARBITRATION GOVERNED BY CONDITION 19. The arbitrator does not have authority to conduct any class action arbitration, private attorney general arbitration, or arbitration involving joint or consolidated claims under any circumstance.
- c. *If there is a final judicial determination that a request for particular relief cannot be arbitrated in accordance with this Condition 19, then only that request for particular relief may be brought in court. All other requests for relief remain subject to this Condition 19.*
- d. The Company will pay all AAA filing, administration, and arbitrator fees of the consumer when the arbitration seeks relief of \$100,000 or less. Other fees will be allocated in accordance with the applicable AAA Rules. The results of arbitration will be binding upon the parties. The arbitrator may consider, but is not bound by, rulings in prior arbitrations involving different parties. The arbitrator is bound by rulings in prior arbitrations involving the same parties to the extent required by law. The arbitrator must issue a written decision sufficient to explain the findings and conclusions on which the award is based. Judgment upon the award rendered by the arbitrator may be entered in any State or federal court having jurisdiction.

NOTE: Bracketed [] material optional

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Form 50143333 (8-5-22)



APPENDIX T-4



RESIDENTIAL AFFIDAVIT



Subject property (Street Address) 125 Kite Way, Electric City, NH 03104

Owned by: John Q Public

Now, therefore, the Seller(s)/Owner(s), for the purpose of inducing First American to remove exceptions from the lender's title insurance policy to be issued in this transaction, on oath depose(s) and say(s) as follows: I/We have owned the property now being sold or mortgaged by me/us continuously for _____ years last past, and my/our enjoyment thereof has been peaceable and undisturbed and the title to said property has never been disputed or questioned to my/our knowledge, nor do we know of any facts by reason of which the title to, or possession of, said property might be disputed or questioned, or by reason of which any claim to any of said property might be asserted adversely to me/us, and more particularly:

1. No party other than the Seller(s)/Owner(s) is/are in possession of all or any portion of the premises above described under any unrecorded leases, tenancy at will or otherwise. I/we have not leased, contracted or granted an option to other parties.
2. The Seller(s)/Owner(s) during the time of ownership of the premises above described has/have conveyed no portion of the premises nor done any act or allowed any act to be done which has changed or could change the boundaries of the premises. The Seller(s)/Owner(s) has/have allowed no encroachments on the premises above described by any adjoining land owners nor has/have the undersigned encroached upon any property of adjoining land owners. The Seller(s)/Owner(s) has/have allowed no easements, rights of way, continuous driveway usage, drain, sewer, water, gas or oil pipeline or other rights of passage to others over the premises above described and has/have no knowledge of such adverse rights. The Seller(s)/Owner(s) has/have no knowledge of any discontinued highways, abandoned roads, lanes, cemetery or family burial grounds, springs, streams, rivers, ponds, or lakes bordering or running through said premises, other than those shown in the title search.
3. The Seller(s)/Owner(s), at present, and for a period of 180 days past, has/have caused no construction erection, alteration or repairs of any structures or improvements on the premises above cited to be done, nor has/have contracted for any materials to be delivered to the premises for which charges remain unpaid.
4. The Undersigned has/have no knowledge of any taxes or special assessments which are not shown as existing liens by the public records other than as shown in the title insurance binder and/or attorney's title opinion.
5. The Undersigned has/have not allowed and know(s) of no violation of any covenants, restrictions, agreements, conditions or zoning ordinances affecting the premises. I/we have obtained all required Building Permits and Town/City Approvals for past construction, remodeling, etc.
6. The following is true. The property is; 1-4 Family Owner-Occupied Dwelling, or Condominium: is in a Residential Zone: has frontage on a public street and I/we have vehicular and pedestrian access to get to and from my/our property.

Seller/Owner

Seller/Owner

Subscribed and sworn to before me this first _____ day of July _____, 2011

Notary Public

Note: If this transaction includes a transfer of title, then Buyer(s) must sign below.

In order to induce First American to remove exceptions from the Lenders Title Insurance Policy Only, the undersigned (Buyer(s) of subject property) on oath depose and say(s) that _____ have read the contents of the above, have viewed the property, and know of no facts which would contradict the contents of said Affidavit.

Buyer

Buyer

Subscribed and sworn to before me this first _____ day of July _____, 2011

Notary Public

FOR RESIDENTIAL MORTGAGE PURPOSES ONLY

NH2002



First American Title Insurance Company

**COMMERCIAL
MECHANIC'S LIEN AND PERSONS IN POSSESSION
INDEMNITY AFFIDAVIT**

NAME OF INSURED: Madison Bank and Trust

Amount of Policy: 500,000.00

PROPERTY IS LOCATED AT: 125 Kite Way, Electric City, NH 03104

The above named insured requests First American Title Insurance Company (hereinafter referred to as "FIRST AMERICAN") to issue its policy of title insurance without exception for and insuring against any loss arising from possible unfiled mechanic's and/or materialmen's liens or claims, and/or arising from the rights of tenants or parties in possession with respect to the above-referenced property. In consideration of such insurance, and in order to induce FIRST AMERICAN to provide such insurance, the undersigned (hereinafter referred to as "INDEMNITOR") agrees to and undertakes the following obligations:

1. INDEMNITOR hereby agrees to, and hereby does indemnify FIRST AMERICAN for any loss, cost or damage including attorneys fees resulting from any such mechanic's and/or materialmen's liens or from any such rights of tenants or parties in possession.
2. In the event that any lien, claim or action arises as indemnified against hereinabove, is filed, recorded, made or commenced with respect to the above-referenced property, INDEMNITOR shall upon written demand cause such lien, claim or action to be removed, terminated, satisfied, released or otherwise disposed of in any form and manner satisfactory to FIRST AMERICAN.
3. If within ten (10) days after written demand, INDEMNITOR has unreasonably failed to cause any lien, claim or action to be removed, terminated, satisfied, released or discharged, INDEMNITOR hereby agrees to reimburse or repay in full any reasonable costs and expenses incurred by FIRST AMERICAN as a result of any reasonable action taken by FIRST AMERICAN to extinguish such lien, claim or action.
4. The total liability INDEMNITOR assumes under this agreement shall not exceed the face AMOUNT of Policy issued in connection with the above-referenced property.
5. The INDEMNITOR hereby further swears and represents that there are no tenants or persons in possession other than those listed below.

6. Any notice required to be given to INDEMNITOR shall be deemed given if sent by certified or registered mail to INDEMNITOR at the following address, and if no address is listed, at the address of the property specified above:

EXECUTED as a sealed instrument to all parties on this _____ day of _____,

BY: _____ Witnessed by: _____

Name: _____ Name: _____
Title: _____



SURVEYOR'S REPORT

(To be filled in, signed and submitted with survey plats. Attach an additional sheet if necessary)

TO: _____

THIS IS TO CERTIFY that I have made an accurate on the ground instrument survey according to the best local professional practices between the dates of _____ and _____ of the premises located as follows:

Street/Road	Town/City	County	State
-------------	-----------	--------	-------

I base the following statements upon facts found from such survey which has an error of closure of 1/_____ and any subsequent inspection(s).

1. (a) I found the premises occupied by _____
(b) Said party(s) claimed to be owner(s) / tenant (s).

2. (a) Building, walls fences and other man-made changes observable from the surface are/are not shown on the survey plat.

NOTE: The words "man-made changes" are intended to include, among other things, all evidence of easements visible from the surface, e.g. utility poles, guys, anchors, overhead wires, valves, or manhole covers indicating underground pipes, roads or paths, whether paved or unpaved, etc.

- (b) Observable cemeteries or family burial ground:

- (I) Are/are not on the premises
- (II) If on the premises, they are not shown on the plat
- (III) If not shown, the reason is: _____

- (c) Springs, streams, rivers, ponds lakes or other water-course or wetlands located on, bordering on or running through the premises:

- (I) Were/were not observed.
- (II) If observed, they are/are not shown on the plat.
- (III) If not shown, the reason is: _____

- (d) In addition to the above, the following important features of the premises were observed: _____

- (I) If observed, they are/are not shown on the plat.
- (II) If not shown, the reason is: _____

- (III) If no such features were observed, write NONE OBSERVED across this entire paragraph.

3. The street line shown on the plat is based on: _____

4. The plat does/does not show three corners of the premises tied to known fixed record points outside the surveyed premises. If not, please explain: _____

Dated at: _____ this _____ day of _____, 20____

Address: _____ Signature _____

Title: _____ Registrant of _____ No. _____

(State)

Seal/Stamp



First American Title

APPENDIX T-5

RESTRICTIONS, ENCROACHMENTS, MINERALS - LOAN POLICY ENDORSEMENT

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.
2. For the purposes of this endorsement only:
 - a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy,
 - b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
 - a. A violation of a Covenant that:
 - i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,
 - ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage,or
 - iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;
 - b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;
 - c. Enforced removal of an Improvement located on the Land as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or
 - d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.
4. The Company insures against loss or damage sustained by reason of:
 - a. An encroachment of:
 - i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or
 - ii. an Improvement located on adjoining land onto the Land at Date of Policy,unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;
 - b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or
 - c. Damage to an Improvement located on the Land, at Date of Policy:
 - i. that is located on or encroaches onto that portion of the Land subject to an 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

- ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.
5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:
- a. any Covenant contained in an instrument creating a lease;
 - b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;
 - c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.
 - d. contamination, explosion, fire, fracturing vibration, earthquake or subsidence; or
 - e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

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:

First American Title Insurance Company



Dennis J. Gilmore
President

Timothy Kemp
Secretary

By: _____
Authorized Countersignature



ALTA FORM 9.2 RESTRICTIONS, ENCROACHMENTS & MINERALS - IMPROVED LAND

ENDORSEMENT

Attached to Policy No. _____

Issued By

First American Title Insurance Company

The Company hereby 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:
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.

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.

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.

Any encroachment of existing improvements located on the land onto that portion of the land subject to any easement excepted in Schedule B.

Any notices of violation of covenants, conditions and restrictions relating to environmental protection recorded or filed in the public records.

2. Damage to existing buildings:
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;

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.



*First American
Title Insurance Company*

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 restrictions relating to environmental protection.

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.

[Witness clause optional]

Date of Endorsement: _____

Date: _____

First American Title Insurance Company

Authorized Signatory

ENDORSEMENT

Attached to Policy No.
Issued by
FIRST AMERICAN TITLE INSURANCE COMPANY

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. The existence at Date of Policy of any of the following:

- a. Covenants, conditions, or restrictions under which the lien of the Insured Mortgage can be divested, subordinated, or extinguished or its validity, priority, or enforceability impaired.
- b. Unless expressly excepted in Schedule B
 - i. Present violations on the Land of any enforceable covenants, conditions, or restrictions, or existing improvements on the Land that violate any building setback lines shown on a plat of subdivision recorded or filed in the Public Records.
 - ii. Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land that, in addition, (A) establishes an easement on the Land, (B) provides a lien for liquidated damages, (C) provides for a private charge or assessment, (D) provides for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant.
 - iii. 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.
 - iv. Any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.
 - v. Any notices of violation of covenants, conditions, or restrictions relating to environmental protection recorded or filed in the Public Records.

2. Any future violation on the Land of any existing covenants, conditions, or restrictions occurring prior to the acquisition of Title by the Insured, provided the violation results in:

- a. invalidity, loss of priority, or unenforceability of the lien of the Insured Mortgage; or
- b. loss of Title if the Insured shall acquire Title in satisfaction of the Indebtedness.

3. Damage to existing improvements, including lawns, shrubbery, or trees, located or encroaching on 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.

4. Damage to improvements, including lawns, shrubbery, or trees, located on the Land on or after Date of Policy resulting 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.

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

6. Any final court order or judgment denying the right to maintain any existing improvements 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 do not include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1.b.i. and 6, the words “covenants, conditions, or restrictions” do not include any covenants, conditions, or restrictions (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 or filed in the Public Records at Date of Policy and is not excepted in Schedule B.

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.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____
Authorized Signatory

Page 2 of 2

**ALTA 4 CONDOMINIUM—ASSESSMENTS PRIORITY ENDORSEMENT**

**This endorsement is issued as part of
Policy Number
issued by
FIRST AMERICAN TITLE INSURANCE COMPANY**

[File 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 State in which the unit and its common elements are located.
2. The failure of the documents required by the State 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 Section 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 the Date of Policy and is not excepted in Schedule B.
4. The priority of any lien for charges and assessments provided for in the State condominium statutes and condominium documents at the Date of Policy over the lien of any Insured Mortgage identified in Schedule A.
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 the Date of Policy because of any present encroachments or because of any future unintentional encroachments of the common elements upon any unit or of any unit upon the common elements or another unit.
7. The failure of the Title by reason of a right of first refusal to purchase the unit and its common elements that was exercised or could have been exercised at the 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.

[(insert "First American Title Insurance Company" or Agent name here)]

By: _____
 Authorized Signatory]

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Form 50-097700 (12-17-21)



**ALTA 4.1 CONDOMINIUM—CURRENT ASSESSMENTS ENDORSEMENT**

**This endorsement is issued as part of
Policy Number
issued by
FIRST AMERICAN TITLE INSURANCE COMPANY**

[File 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 State in which the unit and its common elements are located.
2. The failure of the documents required by the State 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 Section 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 the Date of Policy and is not excepted in Schedule B.
4. Any charges or assessments provided for in the State condominium statutes and condominium documents due and unpaid at the 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 the Date of Policy because of any present encroachments or because of any future unintentional encroachments of the common elements upon any unit or of any unit upon the common elements or another unit.
7. The failure of the Title by reason of a right of first refusal to purchase the unit and its common elements that was exercised or could have been exercised at the 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.

[(insert "First American Title Insurance Company" or Agent name here)]

By: _____
 Authorized Signatory]

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Form 50-097800 (12-17-21)



APPENDIX T-7

American Land Title Association

Endorsement 6-06 (Variable Rate Mortgage)
Adopted 6/17/06

ENDORSEMENT

Attached to Policy No.

Issued by

FIRST AMERICAN TITLE INSURANCE COMPANY

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 resulting from its provisions that provide for changes in the rate of interest.
2. Loss of priority of the lien of the Insured Mortgage as security for the unpaid principal balance of the loan, together with interest as changed in accordance with the provisions of the Insured Mortgage, which loss of priority is caused by the changes in the rate of interest.

“Changes in the rate of interest”, as used in this endorsement shall mean only those changes in the rate of interest calculated pursuant to the formula provided in the Insured Mortgage at Date of Policy.

This endorsement does not insure against loss or damage based upon:

1. usury, or
2. any consumer credit protection or truth in lending law.

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.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____
Authorized Signatory

Adopted 6/17/06

ENDORSEMENT
Attached to Policy No. _____
Issued By

First American Title Insurance Company

The Company insures the owner of the indebtedness insured by the insured mortgage against loss or damage sustained by reason of:

1. The invalidity or unenforceability of the lien of the insured mortgage resulting from the provisions therein which provide for (a) interest on interest; (b) changes in the rate of interest; or (c) the addition of unpaid interest to the principal balance of the loan.
2. Loss or priority of the lien of the insured mortgage as security for the principal balance of the loan, including any unpaid interest which was added to principal in accordance with the provisions of the insured mortgage, interest on interest, or interest as changed in accordance with the provisions of the insured mortgage, which loss of priority is caused by (a) changes in the rate of interest; (b) interest on interest; or (c) increases in the unpaid principal balance of the loan resulting from the addition of unpaid interest.

"Changes in the rate of interest", as used in this endorsement shall mean only those changes in the rate of interest calculated pursuant to the formula provided in the insured mortgage at Date of Policy.

This endorsement does not insure against loss or damage based upon:

- (a) usury, or
- (b) any consumer credit protection or truth-in-lending law.

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.

[Witness clause optional]

Date: _____

First American Title Insurance Company

By: _____

Authorized Signatory 1

APPENDIX T-8

American Land Title Association

Endorsement 7-06 (Manufactured Housing Unit)
Adopted 6/17/06

ENDORSEMENT

Attached to Policy No. _____

Issued by

FIRST AMERICAN TITLE INSURANCE COMPANY

The term "Land" includes the manufactured housing unit located on the land described in Schedule A 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.

FIRST AMERICAN TITLE INSURANCE COMPANY

By: _____
Authorized Signatory



N.H. MANUFACTURED HOUSING AFFIDAVIT

Re: _____
(List Manufactured Housing Serial # as well as any land owned/to be owned by Manufactured Housing owner)

Site: _____

Name of land owner if different from Manufactured Housing Owner:

I (we) understand that First American Title Insurance Company (herein "First American") intends to issue a policy of title insurance and insure that the **Manufactured Housing is real property** as required by New Hampshire statute, in connection with the following:

a mortgage to _____ in the amount of \$ _____

a deed to _____ in the amount of \$ _____

In consideration of your issuing said policy(s), insuring said Manufactured Housing, we hereby state on oath that:

1. the said Manufactured Housing is **PERMANENTLY** on-site at _____;
2. the said Manufactured Housing is **permanently affixed** to a slab or foundation;
3. the said Manufactured Housing is **connected to all necessary utilities** such as electricity, plumbing, heating and water systems;
4. all necessary city and town requirements have been met and the Manufactured Housing is taxed as real estate.;
5. in the event that said Manufactured Housing has been relocated from another state, county or town, I (we) have provided the necessary tax receipts to the Agent(s) of First American Title Insurance Company;
6. that we own/do not own the land on which the Manufactured Housing is located. [CIRCLE ONE]

In the event that we do not own the land noted in 6 above:

7. that we have permission to locate the Manufactured Housing by virtue of a _____

In further consideration of the foregoing we jointly and severally do hereby indemnify First American and agree to hold First American harmless by reason of any loss, costs or damages which First American may sustain by reason of issuing said policy(s) and in reliance on the foregoing.

EXECUTED as a sealed instrument to all parties on this _____ day of _____, 20____
SIGNED in the presence of:

Seller/Current Owner

(Witness)

Seller/Current Owner

Subscribed and sworn to before me on this _____ day of _____, 20____
by _____

Notary Public
My Commission Expires:

NH 2002

**ALTA 8.1 ENVIRONMENTAL PROTECTION LIEN ENDORSEMENT**

This endorsement is issued as part of
Policy Number
issued by
FIRST AMERICAN TITLE INSURANCE COMPANY

[File No.:]

1. The insurance afforded by this endorsement is only effective if the Land is used or is to be used primarily for residential purposes.
2. 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 the Date of Policy, is recorded in those records established under State statutes at the 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 the Date of Policy, except environmental protection liens provided by the following State statutes:

N H RSA ch 147-B

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.

[(insert "First American Title Insurance Company" or Agent name here)]

By: _____
 Authorized Signatory]





*First American Title*TM

APPENDIX T-9b

**COMMERCIAL ENVIRONMENTAL
PROTECTION LIEN ENDORSEMENT**

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

The Company insures against loss or damage sustained by the Insured by reason of an environmental protection lien that, at Date of Policy, is recorded in the Public Records or filed in the records of the clerk of the United States district court for the district in which the Land is located, unless the environmental protection lien is set forth as an exception in Schedule B.

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:

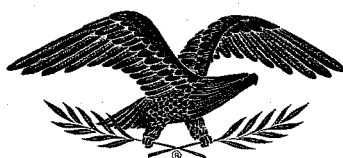
First American Title Insurance Company

Kenneth D. DeGiorgio, President

Greg L. Smith, Secretary

By:

Authorized Countersignature



First American Title Insurance Company

SECONDARY MORTGAGE MARKET ENDORSEMENT

Attached to and forming part of Residential Loan Policy No. _____ of FIRST
AMERICAN TITLE INSURANCE COMPANY, insuring property located at _____
_____ and issued to _____.

The following affirmative coverage is hereby added to the above-referenced Loan Policy:

Easement(s) set forth in Schedule B-Part I, if any, do not adversely affect the use and enjoyment of the premises for residential purposes as presently improved and none of the improvements encroach upon said easement(s).

Restriction(s), covenant(s) and condition(s) set forth in Schedule B-Part I, if any, have not been violated, and future violations will not result in forfeiture or reversion of title.

Taxes, water and sewer use charges, and other municipal liens, if any, are not yet due and payable.

Nothing herein contained shall be construed as extending or changing the original effective date of said policy, unless otherwise expressly stated herein.

This endorsement, when countersigned below by a validating signatory, is made a part of said policy and is subject to the Exclusions from Coverage, Schedules, Conditions and Stipulations therein, except as modified by the provisions hereof.

Signed this _____ day of _____, 20____.



FIRST AMERICAN TITLE INSURANCE COMPANY

BY

Parker S. Kennedy

PRESIDENT

BY

Anthony F. Casey

ASSISTANT SECRETARY

COUNTERSIGNED:

By: _____

Authorized Signatory



First American Title™

APPENDIX T-11

**IDENTIFIED RISK COVERAGE
ENDORSEMENT**

Issued by

First American Title Insurance Company

Attached to Policy No.:

File No.:

1. As used in this endorsement "Identified Risk" means: [insert description of the title defect, restriction encumbrance or other matter] described in Exception _____ of Schedule B.
2. The Company insures against loss or damage sustained by the Insured by reason of:
 - a. A final order or decree enforcing the Identified Risk in favor of an adverse party; or
 - b. The release of a prospective purchaser or lessee of the Title or lender on the Title from the obligation to purchase, lease, or lend as a result of the Identified Risk, but only if
 - i. there is a contractual condition requiring the delivery of marketable title, and
 - ii. neither the Company nor any other title insurance company is willing to insure over the Identified Risk with the same conditions as in this endorsement.
3. The Company will also pay the costs, attorneys' fees, and expenses incurred in defense of the Title by reason of the Identified Risk insured against by Paragraph 2 of this endorsement, but only to the extent provided in the Conditions.
4. This endorsement does not obligate the Company to establish the Title free of the Identified Risk or to remove the Identified Risk, but if the Company does establish the Title free of the Identified Risk or removes it, Section 9(a) of the Conditions applies.

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:

First American Title Insurance Company

Kenneth D. DeGiorgio, President

Greg L. Smith, Secretary

By: _____
Authorized Countersignature

**ALTA 34.1 IDENTIFIED EXCEPTION & IDENTIFIED RISK COVERAGE ENDORSEMENT**

**This endorsement is issued as part of
Policy Number
issued by
FIRST AMERICAN TITLE INSURANCE COMPANY**

[File No.:]

1. As used in this endorsement, the following terms mean:
 - a. "Identified Exception": Exception of Schedule B.
 - b. "Identified Risk": The consequences specified below that may result from the exercise or enforcement of the matter described in the Identified Exception:
[Insert the specific consequences potentially arising out of the Identified Exception against which you intend to insure]
2. The Company insures against loss or damage sustained by the Insured by reason of:
 - a. the exercise or enforcement of an Identified Risk specified in Section 1.b. by an adverse party; or
 - b. the release of a prospective purchaser or lessee of the Title or a lender on the Title from the obligation to purchase, lease, or lend, as a result of the Identified Risk arising out of the Identified Exception, but only if:
 - i. there is a contractual condition requiring the delivery of marketable title; and
 - ii. neither the Company nor any other title insurance company will insure over the Identified Risk with the same coverage as in this endorsement.
3. This endorsement does not obligate the Company to establish the Title free of the Identified Exception or to eliminate the Identified Risk. The Company does not assume any liability for loss or damage arising out of the Identified Exception other than the Identified Risk. If the Company establishes the Title free of the Identified Risk, Condition 9.a. of the policy applies.

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.

[(insert "First American Title Insurance Company" or Agent name here)]

By: _____
 Authorized Signatory]

Closing Funds and Escrow

*Attorney Amy Manzelli
BCM Environmental & Land Law, PLLC
Concord, NH*

Closing Funds and Escrow

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 - c. N.H. Supreme Court Rule 50 Trust Account Certification Requirement
 - d. *In the Matter of the Unnamed Attorney and Unnamed Title Company*, 138 NH 729 (1994)
2. N.H. Bar Association Ethics Committee Opinion #2022-23/01 Ancillary Business Under Rule 5.7
3. N.H. Bar Association Ethics Committee Opinion (1990) Conflict of Interest in a Real Estate
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RULE 1.5. Fees

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee or expenses include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) 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 law or these rules. A contingent fee agreement shall be in writing signed by the client 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 for which the client will be liable whether or not the client is the prevailing party, 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.

(d)

(1) A lawyer shall not enter into an arrangement for, charge, or collect any fee in a divorce or other domestic relations matter, which is contingent on:

- a. securing a divorce;
- b. establishing or modifying a child support, alimony, property division, or other financial order; or
- c. obtaining any specific non-financial relief.

(2) However, a contingent fee arrangement is permissible, subject to 1.5(c) above, in domestic relations matters regarding:

- a. enforcing a property division order or an accrued obligation for child support or alimony;
- b. enforcing any other financial order; or
- c. obtaining a property division of assets hidden during the divorce.

(e) A lawyer shall not enter into an arrangement to charge or collect a contingent fee for representing a defendant in a criminal case.

(f) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is made either:

- a. in reasonable proportion to the services performed or responsibility or risks assumed by each, or

b. based on an agreement with the referring lawyer;

(2) in either case above, the client agrees in a writing signed by the client to the division of fees;

(3) in either case, the total fee charged by all lawyers is not increased by the division of fees and is reasonable.

Ethics Committee Comment

The language used in Rule 1.5(a) is substantially the same as proposed ABA Model Rule 1.5(a) and changes the prior rule in two respects. First, it replaces the prior rule's standard prohibiting a "clearly excessive fees" with the ABA Model Rule standard of an "unreasonable fee." This change reflects the fact that a "reasonableness" standard defines a lawyer's obligation to the client with respect to other aspects of their relationship governed by the Rules of Professional Conduct. See, for example, Rules 1.3(a), 1.4(a), 1.8(a), and 3.2. There is no sound policy or other reason why the reasonableness standard should not govern legal fees and expenses. As the Statement of Purpose notes, "[t]he Rules of Professional Conduct are rules of reason." Whether a fee is reasonable is subject to independent determination. Indeed, the eight factors listed in Rule 1.5(a) all bear on ascertaining the reasonableness of a fee, not whether the fee is "clearly excessive." See *In Re Kelley's Case*, 137 N.H. 314, 320 (1993) (under prior rule 1.5(a) to determine whether fee is "clearly excessive," a "generally accepted, reasonable fee" must first be determined); Restatement (Third) of the Law Governing Lawyers § 46 (proposed official draft 1998) (lawyer prohibited from charging a fee "larger than is reasonable under the circumstances").

Changing the standard under Rule 1.5(a) from "clearly excessive" to "unreasonable" raises the issue of the potential impact of a decision in a fee-shifting case that rejects a portion of the fee application as being unreasonable. This raises a concern as to whether such a ruling would pave the way for a misconduct complaint under Rule

8.4(a) since "professional misconduct" is defined to include a violation or an attempt to violate the Rules of Professional Conduct.

The New Hampshire Supreme Court has stated that "legislative authorizations for the granting of attorney's fees usually are based upon an intent to permit private parties to enforce a law as 'private attorneys general' and the realization that in many non-class action cases the verdict or damages often may be offset or even exceeded by the successful plaintiff's attorney fees." *Couture v. Mammoth Grocers, Inc.*, 117 N.H. 294, 295 (1977). In reviewing awards under fee-shifting statutes, the Court has consistently looked to rule 1.5(a), or its predecessor, to determine whether an award is reasonable. *E.g., McCabe v. Arcidy*, 138 N.H. 20 (1993); *In Re Estate of Rolfe*, 136 N.H. 294 (1992); *City of Manchester v. Doucet*, 133 N.H. 680 (1990); *Couture v. Mammoth Grocers, Inc.*, *supra*. But in doing so, the Court has made clear that fee agreements "do not dictate the amount of attorney's fees recoverable" because the fee-shifting statute "allow[s] the court to exercise its discretion in determining a reasonable fee." *Cheshire Toyota/Volvo, Inc. v. O'Sullivan*, 132 N.H. 168, 171 (1989). The Court has noted that the fee arrangement is "but one of a number of factors for a court to consider in determining a reasonable fee," *id.*, and that "[t]here can be no rigid, precise measure of reasonableness, however, because the weight accorded each factor depends on the circumstances of each particular case." *McCabe*, 138 N.H. at 29.

Although unstated, the Court's approach in fee-shifting cases also appears to reflect the notion that the amount of fees the adverse party should bear may well differ from the amount the client should reasonably be expected to pay. In any event, none of the cases contains even a hint that a rejection of a portion of the application might raise the specter of a misconduct complaint.

Federal fee-shifting statutes serve the same general purpose as New Hampshire statutes: to encourage attorneys to take cases that otherwise might not be economically feasible or attractive. See generally *The Civil Rights Attorneys Fees*

Awards Act of 1976, H.R. Rep. No. 94-1588, at 3 (1976). But awards may not produce a windfall for attorneys. *See generally* S. Rep. No. 94-1011, at 6 (1976).

The United States Supreme Court has recognized that "billing judgment" is as important in fee-shifting cases as in the private sector: "Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (quoting from *Copeland v. Marshall*, 641 F.2d 880, 891 (1980) (*en banc*)). Yet, the *Hensley* court stated that multiplying "reasonable hours times a reasonable rate" is only one consideration in determining a proper statutory award. *Id.* Courts also must consider whether the relief obtained is "significant," and even if significant whether the relief "is limited in comparison to the scope of the litigation as a whole." *Id.* at 440. Further, work on unsuccessful claims, even if reasonable, usually may not be considered, nor may an award be made where the documentation is inadequate. *Id.* at 433-434. Finally, the Court has made clear that in determining reasonableness "the most critical factor is the degree of success obtained." *Id.* at 436.

Given the purposes of fee-shifting statutes, the New Hampshire Supreme Court has made clear that the determination of a reasonable fee is based on considerations that go beyond private fee agreements so the award reflects the policies served by such statutes. Its approach is consistent with federal law. For this reason, and in the absence of any reported decision in which a ruling in a fee-shifting case has been cited to support a misconduct complaint, there is only a minimal risk that adoption of an unreasonable standard would prejudice an attorney against whom a complaint of professional misconduct has been filed because a court had determined a portion of the fees was unreasonable. That minimal risk must be weighed against the benefit to be gained by adopting an unreasonable standard. Simply stated, the "clearly excessive" standard is indefensible. A lawyer should not be able to collect a fee that is unreasonable or excessive.

Such a standard is neither fair to the client nor justifiable. Moreover, to permit a lawyer to charge and collect an unreasonable or excessive fee is unseemly, reflects poorly on the legal profession, and does not serve the public interest in promoting access to legal services in a country founded on the rule of law. *See* ABA Formal Opinion 93-379 ("A lawyer should not charge more than a reasonable fee, for excessive costs of legal service would deter a laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client"). Finally, it is difficult to imagine any argument that could be made to defend such a fee, which the public would understand, let alone accept. While how lawyers are viewed by the public cannot be the sole yardstick by which lawyer conduct is measured, in the area of legal fees it should be a paramount consideration.

The second change to Rule 1.5(a) is that it has been revised to make explicit that a lawyer may not charge an unreasonable amount for expenses for which the client is responsible. This change in the text of the rule, which is consistent with the opinions of state ethics committees, is not intended to change the substance of the prior rule. *See* ABA Formal Opinion 93-379.

The New Hampshire rule differs markedly from the ABA Model Rule because it allows so-called "naked" referral fees. The ABA Model Rule allows a division of a fee between lawyers not in the same law firm only where each lawyer actively participates in a matter or assumes joint responsibility and risk for the representation of the client. The New Hampshire rule changes this requirement and allows a division of fee with a forwarding lawyer, regardless of the work performed or responsibility assumed, provided that the client consents in writing to the division of fees and the total fee is not increased because of the fee division and is reasonable. This change from the ABA Model Rule and from the previous New Hampshire rule is intended to facilitate the association of alternate counsel in order to best serve the client and is often but not exclusively

used when the division is between a referring lawyer and a trial lawyer.

2004 ABA Model Code Comment

RULE 1.5 FEES

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable,

or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). 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 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] 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.

Prohibited Contingent Fees

[6] Paragraph (d) 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.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one 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. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary,

the lawyer should conscientiously consider submitting to it. Law may prescribe 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.

RULE 50. Trust Accounts

(1) *Interest-Bearing Pooled Trust Accounts.* In addition to any individual client trust accounts, a member of the New Hampshire Bar who is not exempt from this requirement pursuant to Rule 50(1)(F) shall create or maintain a pooled, interest-bearing trust account known as "Interest on Lawyers Trust Accounts program" or "IOLTA" account for clients' funds which are nominal in amount or to be held for a short period of time and must comply with the following provisions:

A. An interest-bearing trust account shall be established with any bank or savings and loan association authorized by federal or State law to do business in New Hampshire and insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation or other financial institution with adequate federal insurance covering client funds ("financial institution"). Funds in each interest-bearing trust account shall be subject to withdrawal upon demand.

B. The rate of interest payable on any interest-bearing trust account shall be the same rate of interest paid by the depository institution for all other holders of similar accounts. Interest rates higher than those offered by the institution on regular checking or savings accounts may be obtained by a lawyer or law firm on some or all deposited funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

C. Lawyers, law firms or others acting on their behalf when depositing clients' funds in a pooled, interest-bearing account shall direct the depository institution:

(i) to remit interest or dividends, as the case may be, at least quarterly, to the New Hampshire Bar Foundation; and

(ii) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is

sent, the account number(s), and rate of interest applied for the reporting period; and

(iii) to transmit to the depositing lawyer or law firm at the same time a report showing the accounts number(s), rate of interest applied for the reporting period, and amount paid to the Foundation.

(iv) to provide the New Hampshire Attorney Discipline Office with a notice whenever a trust account contains insufficient funds or shows a negative balance. Such notice shall be a duplicate of the standard depository institution notice provided to the customer. The Attorney Discipline Office will determine what investigation and further action may be appropriate. The direction to a depository institution to provide a copy of the notice to the Attorney Discipline Office is between the depository institution and the lawyer, law firm or other acting on its behalf only. This requirement is for the sole purpose of alerting the Attorney Discipline Office that there has been an overdraft of the trust account. It is not the intention of this requirement to create any direct or third party beneficiary rights.

D. The interest or dividends received by the Foundation shall be used solely by the Foundation for the following purposes:

(i) for the support of civil legal services to the disadvantaged;

(ii) for public education relating to the courts and legal matters;

(iii) for such other programs as may be approved by the supreme court.

Such income shall be applied only to activities permitted to be conducted by organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1954, as from time to time amended.

E. Attorneys, either individually or through their firm organizations, shall complete an annual Trust Accounting Compliance Certification by

July 1 of each year which includes a listing of all interest-bearing trust account(s) for clients' funds under paragraph (1). Any pooled non-interest bearing client trust account(s) must be converted to interest-bearing trust account(s) under provisions of Rule 50(1).

Each attorney who has been on active status at any time during a reporting year must make such a certification. An attorney who is requesting a change in membership status from active to inactive or retired status, or who is resigning from the New Hampshire Bar, must make such a certification prior to the submission of the request for change in status or resignation.

F. A lawyer is exempt from the requirement that he or she create or maintain a pooled, interest-bearing trust account known as "Interest on Lawyers Trust Accounts program" or "IOLTA" account if:

- (i) the lawyer is not engaged in the private practice of law;
- (ii) the lawyer is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;
- (iii) the lawyer is a corporate counsel or teacher of law and is not otherwise engaged in the private practice of law;
- (iv) the nature of the lawyer's practice is such that the lawyer does not hold IOLTA-eligible funds of any client or third person; or
- (v) the lawyer does not have an office within the State of New Hampshire, does not have a trust account in a financial institution within the State of New Hampshire, and any trust accounts the lawyer has in a foreign jurisdiction are maintained in compliance with the rules and regulations of that jurisdiction.

G. This rule may be subsequently amended to effectuate its purposes or to comply with any amendments to the Internal Revenue Code.

(2) Attorney's Financial Records:

A. *Account Designation.* All funds of clients or third parties received by attorneys in connection with a representation shall be deposited in one or more clearly designated trust accounts (collectively, "client trust accounts") separate from the attorney's own funds in financial institutions. Any attorney depositing client or third party funds into an out-of-state financial institution shall file a written authorization with the Clerk of the Supreme Court authorizing the Court or its agents to examine and copy such out-of-state account records. Under no circumstances may any attorney deposit client or third party funds with out-of-state financial institutions other than those located in Maine, Vermont, Massachusetts, or the state in which the attorney's office is situated, without obtaining prior written approval from the Supreme Court.

B. *Recordkeeping Generally.* A lawyer who practices in this jurisdiction shall maintain current financial records as provided in these Rules and required by Rule 1.15 of the New Hampshire Rules of Professional Conduct and shall retain the following records for a period of six (6) years from the time of final distribution:

- (i) receipt and disbursement journals or comparable records containing a record of deposits to and withdrawals from each client trust account, specifically identifying the date, source, and description of each item deposited, as well as the date, payee, and purpose of each disbursement;
- (ii) ledger or comparable records showing, for each separate trust client or beneficiary, the source of all funds deposited in a client trust account for or on their behalf, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the

names of all persons or entities to whom such funds were disbursed;

(iii) copies of accountings to clients or third parties showing the disbursement of funds to them or on their behalf;

(iv) copies of records showing disbursements on behalf of clients or third parties;

(v) the physical or electronic equivalents of all checkbook registers, statements, records of deposits, and cancelled checks provided by a financial institution;

(vi) records of all electronic transfers from client trust accounts, including the name of the person authorizing the transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;

(vii) copies of monthly reconciliations of the client trust accounts maintained by the lawyer;

C. Client Trust Account Safeguards. With respect to client trust accounts required by Rule 1.15 of the New Hampshire Rules of Professional Conduct:

(i) only a lawyer admitted to practice in this jurisdiction or, to the extent such person is bonded, a person under the direct supervision of the lawyer, shall be an authorized signatory on or may authorize transactions with respect to a client trust account;

(ii) attorneys who have authorized persons under their direct supervision to deal with a client trust account shall remain responsible for any and all transactions authorized by such persons;

(iii) each transfer of funds to or from a client trust account by way of electronic funds transfers must be specifically authorized by a party described in Rule 50(2)(c)(i).

(iv) receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item;

(v) withdrawals shall be made only by check payable to a named payee and not to cash, or authorized electronic transfer;

(vi) each account at a financial institution that is required by Rule 50, except those accounts excluded by Rule 50 -A(3), shall be reconciled by the lawyer or law firm on a monthly basis. Such reconciliation shall disclose (a) the balance of the account according to the financial institution's records; (b) the balance of the account according to the lawyer or law firm's records; (c) a detailed listing of all differences between items (a) and (b); (d) a listing of all clients' and third parties' funds in the accounts as of the reconciliation date; and (e) a detailed listing of all differences between items (b) and (d);

(vii) funds received as retainers shall not be withdrawn from the client trust account of the attorney or law firm until earned;

(viii) all funds received as proceeds of collections or awards on behalf of a client shall be deposited in a client trust account, and shall not be charged with a fee until authorized or permitted distribution; and

(ix) the practice of law in the form of an entity that is permitted by these Rules shall not relieve an attorney from the obligation of compliance with this Supreme Court Rule.

D. Availability of Records. Records required by Rule 50(2)(B) and (C) may be maintained by electronic, photographic, or other media provided that they otherwise comply with these Rules and that printed copies can be produced. These records shall be readily accessible to the lawyer and shall not be dependent upon or solely available to the attorney via access to third party electronic sources.

E. Dissolution of Law Firm. Upon dissolution of a law firm, the lawyers shall make reasonable

arrangements for the maintenance of the client trust account records specified in Rule 50(2)(B) and (C). The specific details of those arrangements must be provide to the Attorney Discipline Office of the New Hampshire Bar Association.

F. Sale of Law Practice. Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of the records specified in Rule 50(2)(B) and (C). The specific details of those arrangements must be provide to the Attorney Discipline Office of the New Hampshire Bar Association.

History:

Amended Apr. 4, 2014, eff. June 1, 2014; amended May 21, 2015, eff. July 1, 2015; amended May 2, 2016, eff. 7/1/2016.

RULE 50-A. Trust Accounting Certification Requirement

(1)

(A) In order to assure compliance with the requirements of Rule 50 and in order to ascertain that the records and accounts described in Rule 50 are properly maintained, all attorneys and foreign legal consultants licensed to practice in the State of New Hampshire, whether in private practice or not, other than those in Limited Active Membership status who meet the criteria set forth in the Supreme Court's August 10, 2022 order, Military Active Membership status, or Inactive Membership status, shall individually or through their firm organization complete an annual Trust Accounting Compliance Certification in such form as the court shall prescribe. The Compliance Certification shall be completed on or before July 1st of each year and shall certify compliance with the requirements of Rule 50 for the reporting period beginning on June 1 of the preceding year and ending on May 31 of the reporting year.

The New Hampshire Bar Association shall make the Compliance Certification form available to attorneys and foreign legal consultants annually with the annual dues and court fees assessments.

For purposes of this rule, an attorney shall not be considered to be "in inactive status" if the attorney's New Hampshire Bar Association membership status was active *at any time* during the one-year reporting period, excluding Limited Active status as set forth in the Supreme Court's August 10, 2022 order and Military Active status. The certification requirements of this rule shall not apply to any full-time judge, full-time marital master or full-time supreme, superior, or circuit court clerk or deputy clerk, except that the certification requirement shall apply where such judge, marital master, clerk or deputy clerk was in the active practice of law at any time during the reporting period.

(B) The Trust Accounting Compliance Certification shall certify to one of two things:

(1) That the attorney or foreign legal consultant does not maintain a trust account and does not possess any assets or funds of clients; or

(2) That client funds maintained by the attorney or foreign legal consultant are held in accounts in full compliance with the requirements of Rule 50

The certification may be completed by the attorney or foreign legal consultant or by a private accountant employed for this purpose by the attorney or foreign legal consultant. The completed Trust Accounting Compliance Certification shall be filed through the New Hampshire Bar Association by July 1st of each year.

(C) The certification procedure shall be supplemented by annual compliance checks by an accountant selected by the Supreme Court. The accountant's purpose in conducting a compliance check will be to determine whether the minimum standards set forth in Rule 50 are being maintained. All information obtained by the accountant shall remain confidential except for purposes of transmitting notice of violations to the Professional Conduct Committee or the Supreme Court. The information derived from such compliance checks shall not be disclosed by anyone in such a way as to violate the attorney-client privilege except by express order from the Supreme Court.

(2) An attorney or foreign legal consultant who fails to comply with the requirements of Rule 50 with respect to the maintenance, availability, and preservation of accounts and records, who fails to file the required annual Trust Accounting Compliance Certification, or who fails to produce trust account records as required shall be deemed to be in violation of Rule 1.15 of the Rules of Professional Conduct and the applicable Supreme Court Rule. Unless upon petition to the Supreme Court an extension has been granted, failure to file the required annual Trust Accounting Compliance Certification by July 1st shall, in addition, subject the attorney or foreign legal consultant to one or more of the following penalties and procedures:

A. On August 2, attorneys and foreign legal consultants who have not filed their Trust Accounting Compliance Certifications shall be assessed a delinquency fee of \$300, or as subsequently amended by order of the Supreme Court.

B. On or after September 1, the New Hampshire Bar Association shall provide the Supreme Court with the names of attorneys and foreign legal consultants who have not filed their Trust Accounting Compliance Certifications. The court shall initiate proceedings to suspend the attorneys from the practice of law or to suspend the licenses of the foreign legal consultants.

C. An audit of the attorney's or foreign legal consultant's trust accounts and other financial records, at the expense of the attorney or foreign legal consultant, may be required.

Delinquency fees provided for by this rule shall be collected by the New Hampshire Bar Association for the benefit of the Attorney Discipline Office. The delinquency fee may be used by the Attorney Discipline Office to pay for audits of the trust accounts of attorneys or foreign legal consultants, or for other purposes related to trust accounting compliance upon approval of the Supreme Court.

Reinstatement following a suspension ordered pursuant to Rule 50 -A (2)(B) above shall be only by order of the Supreme Court, upon petition to the court following the filing of the Trust Accounting Compliance Certification and payment of all fees. A petition for reinstatement shall be accompanied by the required filing fee and payment of the fine. If the petition is filed more than one year after the date of the order suspending the person from the practice of law in this State, the petition shall be accompanied by evidence of continuing competence and learning in the law or evidence that the foreign legal consultant meets the eligibility requirements of Rule 42D(1), and evidence of continuing moral character and fitness. If the evidence of continuing competence and learning in the law or evidence of continued eligibility to serve as a foreign legal consultant, and evidence of

continuing moral character and fitness, are satisfactory to the court, the court may order reinstatement upon such conditions as it deems appropriate.

If the evidence of continuing competence and learning in the law or evidence of continued eligibility to serve as a foreign legal consultant, is not satisfactory to the court, the court shall refer the petition for reinstatement to the Professional Conduct Committee for review. The Professional Conduct Committee shall review the petition and conduct such proceedings as it deems necessary to make a recommendation to the court as to whether the petition should be granted. The Professional Conduct Committee shall file its recommendations and findings, together with the record, with the court. Following the submission of briefs, if necessary, and oral argument, if any, the court shall enter a final order.

If the evidence of continuing moral character and fitness is not satisfactory to the court, the court shall order the attorney or foreign legal consultant to file with the committee on character and fitness and with the clerk of the supreme court the petition and questionnaire referred to in Supreme Court Rule 42(VI)(c). Further proceedings shall be governed by Rule 42.

(3) Except for requirements of Rule 50, subparagraph (2)A, requiring the inclusion of probate accounts in the index of trust accounts, the provisions of Rule 50, paragraph (2), and of this Rule 50 -A shall not apply to probate accounts (including estate, testamentary trusts, guardian, and conservator accounts).

(4) The Supreme Court may at any time order an audit of such financial records or trust accounts of an attorney or foreign legal consultant, and take such other action as it deems necessary to protect the public.

History:

Amended May 2, 2016, eff. 7/1/2016; amended effective 6/1/2021; amended December 22, 2022, eff. 1/1/2023.

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138 N.H. 729

In the Matter of UNNAMED ATTORNEY and Unnamed Title Company.

No. SMC-93-016.

Supreme Court of New Hampshire.

July 27, 1994

[138 N.H. 730] Boutin & Solomon, P.A., Londonderry (Edmund J. Boutin, on the brief and orally), for Committee on Professional Conduct.

Boynton, Waldron, Doleac, Woodman & Scott, P.A., Portsmouth (Ralph R. Woodman, Jr., on the brief and orally), for respondents.

Mulhern & Scott, P.A., Portsmouth (Peter C. Scott, on the brief), by brief as amicus curiae.

Law Offices of William B. Parnell, P.C., Londonderry (William B. Parnell, on the brief), by brief as amicus curiae.

Douglas & Douglas, Concord (Charles G. Douglas, III and C. Kevin Leonard, on the brief), by brief for New Hampshire Ass'n of Title Companies, as amicus curiae.

JOHNSON, Justice.

This is a petition filed by the committee on professional conduct (committee) for an accounting pursuant to Supreme Court Rule 50-A(4). The committee, pursuant to their authority to conduct audits of attorneys on a random basis, wishes to inspect the trust accounts of an incorporated title closing company (the corporation) that is largely owned by a New Hampshire attorney (the respondent). The issue is whether the New Hampshire Rules of Professional Conduct and the Supreme Court Rules require the corporation and the respondent to submit to such an audit. See Sup.Ct.R. 50, 50-A; N.H.R.Prof.Conduct 1.15. Based on the facts presented to us, we hold that the corporation's financial records are subject to audit.

The following is the parties' agreed statement of facts, with citations omitted:

"The Unnamed Attorney (hereinafter 'the Respondent') became a member of the New Hampshire Bar in 1975. He maintains an active law practice in one of New Hampshire's [138 N.H. 731] cities. Unnamed Title Services, Inc. (hereinafter 'the Corporation') is a New Hampshire

Corporation, formed in 1984. There are 300 shares of common stock of the Corporation issued and outstanding: 220 issued to Respondent and 80 issued to Respondent's spouse, (a non-Lawyer), who is the Corporation's President and Treasurer. Respondent is the Secretary of the Corporation. Respondent and Respondent's spouse are the only two members of the Board of Directors.

In 1993 the Corporation handled approximately 100 closings for approximately 7 customers, including 6 banks and 1 mortgage company. The typical transaction would begin with an individual applying to a bank for a mortgage loan (either for an initial mortgage or a refinance); that application being accepted by the bank; and the bank sending a requisition form to the Corporation, requesting that the Corporation perform certain services for the bank.

The Corporation serves as an agent of the bank. It bills the bank for its services on a predetermined fee basis. The fee of the Corporation to the bank is paid by the borrower, similar to the borrower being

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responsible for appraisal fees, environmental assessment costs, etc. of other third party vendors providing closing related services to the bank. The essential services which the Corporation provides to the bank are as follows: (a) a title search at the Registry of Deeds, (b) preparation of numerous bank documents (mortgage deed, settlement statement, etc[.]), (c) procurement of title insurance for the bank and, if requested, title insurance for the mortgagor, (d) supervision of closing and disbursement of settlement funds in accordance with the settlement statement.

The Corporation bills for its services on the settlement statement as a 'settlement or closing fee.' On an infrequent basis, the borrower may ask Respondent to perform a legal service which is associated with the closing, such as to prepare a deed. Such legal services are billed separately as a legal service on the settlement statement. Any fee for such legal services of Respondent or other Attorneys retained by borrower is collected by the Corporation at closing and disbursed to the Respondent or such other Attorney. The bank transfers the settlement funds to the Corporation which disburses [138 N.H. 732] the funds, together with any additional monies which might be needed from the borrower to effectuate the closing. Funds are disbursed in accordance with the bank's instructions and a permanent record of disbursement is retained by the Corporation.

The Corporation and Respondent share office space. The Corporation has a separate operating bank account, a separate escrow disbursement bank account and separate equipment from the law offices of Respondent. Respondent's spouse serves as the operating manager of the business of the Corporation.

In 1993, Respondent performed no legal services for the Corporation. There is no stipulation

as to whether Respondent provided legal services to the Corporation in prior years. The Corporation had no full time employees in 1993. Five (5) people worked for the Corporation in 1993, doing such things as file preparation, abstracting, preparing documents, and supervising the closings. These same five (5) people are considered employees of Respondent's law practice, a sole proprietorship.

In 1993, approximately 20% of these individuals' time was spent working for the Corporation and 80% working for Respondent. Respondent had two (2) additional employees who worked exclusively for him in 1993. One of the employees who works for Respondent and spent approximately 20% of such employee's time working for the Corporation is a member of the New Hampshire Bar. This person reviewed title abstracts prepared by the Corporation and the cost of such services was part of the Corporation's 'settlement fee' paid by the borrower. The person who formerly performed the same services for the Corporation, currently being provided by this Attorney, was not an Attorney.

The Corporation provides no written disclosure to the borrower as to the nature of its services; nor does it provide a written disclosure as to whether or not the Respondent has an ownership interest in the Corporation. This stipulation does not address whether or not borrowers are otherwise represented in the transaction, except to the extent that the Respondent is sometimes retained to draft deeds or other instruments for the borrower or Sellers whose closings are handled by the Corporation.

[138 N.H. 733] The Corporation maintains no malpractice or liability insurance. The bank and/or borrower rely upon Closing Protection Letters written by title insurance companies licensed in New Hampshire. These Closing Protection Letters are issued to banks but are not copied to borrowers. Borrowers receive no written disclosure of their contents. These Closing Protection Letters indemnify the bank and borrower against damage arising out of certain claims which they may encounter against the Corporation, as agent of the title insurance company. This indemnity covers claims set forth in the Closing Protection Letter and includes protection against 'Fraud and dishonesty of the Issuing Agent or Approved Attorney in handling your (the mortgagee's) funds or documents in connection with such closing.'

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In the case of the Corporation, a title insurance company on whose behalf the Corporation issues title insurance policies, as its agent, has conducted an audit of the Corporation's books and escrow accounts as recently as the summer of 1993. Such audit was performed in accordance with the standards of the title insurance company set forth in its Agent Review Programs/File Audit. The title insurance companies also periodically audit the policy 'jackets' (numbered policy forms which must be accounted for) and other title insurance documentation."

The committee argues that Professional Conduct Rule 1.15 and Supreme Court Rules 50 and

50-A apply to the escrow accounts held by the corporation and operate to permit the accounting sought by the committee pursuant to Supreme Court Rule 50-A(4). We hold that for the committee to prevail, it must show that: (1) the committee sought to audit records of a New Hampshire lawyer; (2) the audit of the lawyer led to information that there exists financial records maintained by an entity performing services customarily performed by a lawyer; and (3) there is a substantial nexus between the New Hampshire lawyer and the entity in question so that it is reasonable that the committee be permitted to audit the entity's records. Thus, a case such as this is essentially factually driven.

The parties agree that the respondent is a New Hampshire attorney, who, in the course of a random audit of his or her records, was revealed to be a majority shareholder in a certain title closing corporation. It thus remains to be established whether the corporation [138 N.H. 734] was performing services customarily performed by a lawyer. The corporation, acting through its employees, conducts title searches, prepares closing documents such as mortgage deeds, settlement statements, etc., procures title insurance for either a bank or the mortgagor, and conducts closings of real estate contracts, including disbursing funds in accordance with settlement statements prepared by the corporation. Thus, the committee met the burden of establishing that the records sought to be audited fall under the second prong of the test set forth above.

As to the third prong of the test, the stipulated facts demonstrate that a substantial nexus exists between the lawyer and the entity. The respondent owns seventy-three percent of the corporation stock and his or her spouse owns the remaining twenty-seven percent. The respondent thus has the ability to control the annual meeting of the corporation. See RSA 293-A:7.01, : 7.21(a) (Supp.1993). The respondent and his or her spouse are the only members of the board of directors of the corporation. See RSA 293-A:8.03 (Supp.1993). While the respondent's spouse acts as the corporation president and treasurer and serves as the operating manager of the business of the corporation, the respondent may at any time call a special meeting of the shareholders, see RSA 293-A:7.02(a)(2) (Supp.1993), and the facts give no hint that the corporation by-laws prevent the respondent from removing his or her spouse as a director at such a meeting, see RSA 293-A:8.08 (Supp.1993). The officers of a New Hampshire corporation may be appointed by the directors. See RSA 293-A:8.40 (Supp.1993). Thus, the respondent's spouse appears to serve as an officer of the corporation and the operating manager at the pleasure of the respondent. See RSA 293-A:8.43(b) (Supp.1993).

In addition to the control of the corporation, other facts indicate a clear link or nexus between the respondent and the corporation. In this case, the respondent and the corporation share office space, and five people who are employees of the corporation also serve as employees of the respondent in the conduct of his or her law practice (the employees spend approximately twenty percent of their time working for the corporation and eighty percent of their time working for the respondent). Further, in connection with the corporation's business, the respondent is occasionally retained to draft deeds or other instruments for the parties involved in a particular closing. The

totality of the circumstances involving this attorney and this corporation leads us to find that a substantial nexus exists between the respondent and the corporation.

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[138 N.H. 735] Accordingly, we hold that the financial records of the corporation are subject to audit under Supreme Court Rules 50 and 50-A.

So ordered.

All concurred.

NEW HAMPSHIRE BAR ASSOCIATION

Ethics Committee Opinion #2022-23/01

Ancillary Businesses Under Rule 5.7

ABSTRACT:

In 2007, New Hampshire adopted NHRPC Rule 5.7, which applies to the provision of services that might reasonably be performed in conjunction with, and in substance are related to, the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer. Prior to the adoption of Rule 5.7, a lawyer providing such services was considered to be practicing law when providing those services, and therefor subject to all the Rules of Professional Conduct.

After the adoption of Rule 5.7, lawyers are presumably exempt from some of the rules, if the lawyer provides law-related services exclusively under circumstances that are distinct from the lawyer's provision of legal services to clients, or if the lawyer takes reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist. Rule 5.7 identifies some of the rules which remain applicable, giving Rule 8.4 as an example.

This opinion discusses four situations that troubled the Committee before the adoption of Rule 5.7, and which may linger after the adoption. The first situations concern conflict of interest. A lawyer providing law-related services to a customer might negotiate with a lawyer from the same firm providing legal services to a current client. The lawyer providing law-related services would appear to be exempt from Rule 1.7, but the lawyer providing the legal services would need to carefully examine Rule 1.7 to confirm compliance.

Another potential conflict of interest arises if the opposing party is a former client. Whether Rule 1.9 might apply depends in large part on whether the current matter is substantially related to previous matter handled on behalf of the former legal client. Even if Rule 1.9 does not block the current provision of law-related services, however, the lawyer may not use information learned from the prior representation to the disadvantage of the former legal client.

The other situations involve “feeding” of one business to the other. A law firm that refers its legal clients to its law-related business must carefully comply with the provisions of Rule 1.8. As this Committee has stated in earlier opinions, lawyers who enter into business transactions with their clients may expect a high level of scrutiny.

A law-related business that refers its law-related customers to its law firm may run afoul of Rule 7.3 which bans certain in-person solicitation.

ANNOTATIONS:

Cases and opinions prior to the adoption of Rule 5.7 consistently disfavored the provision of law-related services, unless those services were offered under the protection of all the ethical rules.

In some cases, such as those involving real estate brokerage, the Committee believed that it would be impossible to provide such services while complying with the ethical rules.

Rule 5.7, adopted in 2007, applies to the provision of law-related services – those services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Under Rule 5.7, a lawyer is subject to the Rules of Professional Conduct with respect to the provision of law-related services **unless** the services are provided in circumstances that are distinct from the lawyer's provision of legal services to clients; **or** the lawyer takes reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

If the lawyer complies with the requirements of Rule 5.7, the lawyer may be relieved from compliance with some the Rules of Professional Conduct.

A lawyer who complies with Rule 5.7 and provides law-related services to a customer may not run afoul of the conflict-of-interest provisions of Rule 1.7, even if the lawyer's partner represents an opposing side. In such cases, however, the lawyer's partner would still need to comply with Rule 1.7.

A lawyer who complies with Rule 5.7 and provides law-related services to a customer may not run afoul of the conflict of interest provisions of Rule 1.9, even if the opposing side is a former client. In such cases, however, the lawyer may not use information learned in the prior representation to the detriment of the former client.

A lawyer may not refer a legal client to the law-related business unless the lawyer strictly complies with the provisions of Rule 1.8 dealing with business transactions with clients.

A lawyer who seeks to refer a law-related services customer to the lawyer's law firm for legal services should be cognizant of Rule 7.3 which controls certain types of solicitation.

The current (2022) version of New Hampshire's Rule 7.3 differs in certain material ways from the current (2019) version of ABA Model Rule 7.3.

ISSUE PRESENTED:

May a New Hampshire attorney actively engaged in the practice of law also conduct a law-related business under NHRPC Rule 5.7, without creating problems under other Rules?

DISCUSSION:

This issue as it relates specifically to real estate brokers has been addressed numerous times since it was first tackled by the Committee in 1970. Each time the Committee found a per se prohibition against a practicing lawyer from acting as a broker. These rulings consistently raise the same issues, so it will be useful to review the history before tackling the problem under the current Rules.

I. Pre-Code Case (1958)

Many of the early opinions cite Hines v. Donovan, 101 N.H. 239 (1958). Hines involved a New Hampshire lawyer (Hines) who represented a widow (Donovan) in settling her husband's estate. The estate included a restaurant, which needed to be sold. The lawyer, "who also deals in real estate, asked Mrs. Donovan ... if he might list the property." Id. at 240. The lawyer, through one of his employees, contacted the operator of a local restaurant, who said he might be interested, "but if he did anything he would have to act through the defendant Bean Real Estate Agency." Id. at 241.

An attorney employed by defendant Bean prepared a draft purchase and sale agreement that said Donovan acknowledge that defendant Bean had brought about the sale, and would be paid a commission by Donovan. The Court found that defendant Bean connived with the buyers "for the express purpose of depriving the plaintiff of the commission to which he was entitled." Id. at 243.

Prior to the closing, the plaintiff did not notify the buyers or defendant Bean that he thought he was entitled to the commission, as he did not want to jeopardize the sale. "To his credit," the plaintiff advised Donovan to sign, as the sale was in her best interest, indicating that he would bring a bill in equity after the closing to vindicate his right to the commission. Id.

While ruling in large part in the plaintiff's favor, the Court was troubled with the lawyer's behavior.

The circumstances which arose because of competition between Hines and Bean for the commission may be thought to have confronted Hines with the ethical problem of whether he could properly continue to represent his client with respect to the negotiations for the sale, and at the same time undertake to further his own conflicting interest as a broker.

Id. at 244 (emphasis added). The Court concluded that Donovan ended up in court as the stakeholder because of the lawyer's actions, and that her cost to hire another attorney to represent her should be paid out of the plaintiff's commission.

The case raises several interesting issues. First, there was no per se prohibition, at least in 1958, of a lawyer acting simultaneously as a real estate broker. The problem instead related to "the circumstances which arose." Second, the Court seemed to have no problem that the lawyer had suggested his client enter into a business transaction with him as broker.

II. Code of Professional Responsibility (1970-1984)

In 1970, the New Hampshire Real Estate Commission asked the New Hampshire Committee on Professional Conduct (NHCP) to issue an opinion “as to whether or not a New Hampshire lawyer may also be a licensed real estate broker in New Hampshire.” Advisory Opinion #2, Attorney Practicing as a Real Estate Broker (NHEC 1970). That advisory opinion cites a 1932 opinion of the ABA, which stated that it would be “improper for an attorney to engage in a business ... (1) when the business is one that will readily lend itself as a means for procuring professional employment for him, (2) is such that it can be used as a cloak for indirect solicitation on his behalf, (3) or is of a nature that if handled by a lawyer, would be regarded as the practice of law.” Opinion 57 (ABA 1932) (lawyer operating an insurance adjuster’s bureau). With relatively little analysis, the Committee concluded that conducting a real estate brokerage business would violate all three concerns, and concluded “that there is a basic inconsistency between a lawyer practicing law and also working at the same time as a real estate agent or broker.” Advisory Opinion #2, supra.

In 1975, the Ethics Committee revisited the issue. After first concluding that holding a brokerage license and a law license at the same time did not result in unprofessional conduct “so long as a practicing attorney in no way engages in a brokerage business,” the Committee concluded “that no unprofessional conduct results from an attorney who holds an inactive membership in the New Hampshire Bar association and who engages in an active brokerage business.” Formal Opinion #5, Attorney Practicing as a Real Estate Broker (NHEC 12/5/1975). In other words, a lawyer could do one or the other, but not both. The Opinion cited the following issues: Conflict of interest, advertising, solicitation, “feeding”, breach of the attorney/client relationship, public confusion, billing and sharing of fees. Id. (citing Hines v. Donovan, supra).

In 1982, the Ethics Committee was asked to reconsider its 1970 and 1975 opinions, and declined to issue an opinion contrary to those prior opinions, citing with approval the prior analysis. Advisory Opinion, New Hampshire Practicing Lawyer Operating a New Hampshire Real Estate Brokerage – Request to Reconsider Committee on Professional Conduct Informal Opinion No. 2 (7/30/70) and Formal Opinion No. 5 (12/5/75) (NHEC 10/12/1982).

In 1984, the Ethics Committee again revisited the problem, this time under slightly different facts. A New Hampshire lawyer had “formed a New Hampshire corporation with a licensed realtor and another party experienced in the real estate business. The purpose of the corporation is to develop, manage, and sell real estate in the (small town) area.” Advisory Opinion #1984-85/9, Dual Professions: Attorney-Realtor (NHEC 1984). The Ethics Committee again declined to approve the dual practice, unless the lawyer divested any ownership interest and acted solely as corporate counsel of the ancillary business, or become an inactive member of the New Hampshire Bar. Id. There was, however, a dissenting opinion: “The existing Ethics Opinions on this matter should be reexamined and reversed. The dissenters feel that the present rule acts as an unwarranted restraint of trade.” Id.

III. Rules of Professional Conduct before Rule 5.7 (1986-2007)

In 1986, New Hampshire adopted the Rules of Professional Conduct. This required the Ethics Committee to revise its analysis, but not its conclusions. In 1987, the Committee considered an inquiring attorney who intended to “carry on the two occupations out of the same office.”

When the lawyer conducts both occupations from the same office, “the public could not be expected to distinguish between his dual capacities and know when he is acting in the capacity of a lawyer and when in that of a layman.”

Formal Opinion #1987-88/2, Dual Practice: Attorney as a Realtor (NHEC 1987). The Committee also observed “that real estate brokerage involves many tasks, such as the proper drafting and execution of contracts, that lawyers are usually called on to perform.” *Id.* The Committee concluded that “the lawyer engaged in the dual practice of law and real estate brokerage is considered to be engaged in the practice of law while conducting his or her real estate brokerage business.” *Id.* See In the Matter of Unnamed Attorney and Unnamed Title Company, 138 N.H. 729 (1994) (financial records of a title company held subject to audit under Supreme Court Rules 50 and 50_A); Formal Opinion #1998-99/14, Lawyers Selling Insurance to Their Clients (NHEC 2000) (“lawyer selling insurance to her clients can expect that the Rules of Professional Conduct and the Supreme Court Rules will be applied to her insurance business”).

By concluding that the lawyer is acting as a lawyer when acting as a broker, the Committee found several problems. These included Rule 5.4(a) (sharing of legal fees), Rule 7.3 (solicitation), Rule 1.5 (legal fees), Rule 7.2 (advertising), Rule 1.6 (confidentiality), Rule 4.2 (dealing with represented parties), Rule 4.3 (dealing with unrepresented individuals), Rule 1.8 (certain conflicts of interest), and Rule 2.1 (independent judgment). *Id.* The opinion observed that Hines v. Donovan, *supra*, “provides an example of a lawyer who faced the problem of continuing to represent a client while maintaining his own conflicting interest as a broker.” Formal Opinion #1987-88/2, *supra*.

In 1989, the Ethics Committee was asked to revisit the issue for an attorney who held active status in the New Hampshire Bar Association, but who was “engaged full-time and exclusively as a real estate salesperson.” Formal Opinion #1989-90/12, Attorney/Realtor Related Questions (NHEC 1990). After reviewing the prior decisions and Rules, the Committee concluded that it would be “ethically permissible for a non-practicing attorney ... to engage in the real estate brokerage business,” whether that attorney held active or inactive status. *Id.*

The Committee then looked at several Rules that could cause problems for even non-practicing attorneys, and reviewed opinions in other jurisdictions that appeared to allow dual practice. The Committee concluded by reminding the attorney/broker:

The non-practicing Bar member is still fully subject to those Rules of Professional Conduct that apply at all times to attorneys in any capacity, e.g., Rule 1.6(a), 1.9(b), 8.3 and 8.4, especially 8.4(c).

Id.

IV. Rule 5.7 (2007-present)

In 2007, New Hampshire adopted NHRPC Rule 5.7. The rule applies to the provision of law-related services, which “denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.” NHRPC Rule 5.7(b). These include providing “real estate counseling.” 2004 ABA Model Rule 5.7 Comment 9.

Rule 5.7(a) provides as follows.

A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services ... if the law-related services are provided:

- (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
- (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

In large part, this rule falls in line with the prior New Hampshire decisions. Thus, if the lawyer is handling the brokerage business out of her law office, in circumstances that are not distinct from her law practice, then Rule 5.7(a)(1) makes the lawyer subject to the Rules of Professional Conduct. As the earlier decisions indicated, it would be virtually impossible to conduct real estate brokerage business in the way it is usually performed, consistent with the Rules of Professional Conduct. At the other end, if a lawyer is not actively practicing law, he easily escapes both parts of Rule 5.7(a).

It gets murky, however, where the lawyer is actively engaged in the practice of law, but offers law-related services distinct from the legal services, “for example through separate entities or different support staff within the law firm.” 2004 ABA Model Rule 5.7 Comment 3. Such a circumstance was explicitly not addressed in our later opinions. “Neither our 1987 opinion nor the instant one address the situation of a practicing attorney running a real estate business in a separate setting from his or her law office.” Formal Opinion #1989-90/12, supra.

A. Taking Reasonable Measures

Even if the lawyer can offer brokerage services under circumstances that are distinct from her provision of legal services, Rule 5.7(a)(1), she must also “take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.” Rule 5.7(a)(2). In doing so, ...

... the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer

relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

2004 ABA Model Rule 5.7 Comment 6. Indeed, the burden will be on the lawyer to show that she has taken reasonable measures under the circumstances to communicate the desired understanding. *Id.* at comment 7.

B. Parsing Rule 5.7

The wording of Rule 5.7 creates some logical ambiguity. The Rule contains a standard IF-THEN statement. IF a lawyer does NOT do x, y, z, THEN all the Rules apply. For the lawyer considering operating an ancillary business, however, the question becomes IF I DO x, y, z, THEN what happens? In logical terms, the lawyer wants to look at the “inverse” of the original rule – If I DO x, y, z, THEN NOT all the Rules apply. Unfortunately, the inverse does not always follow logically from the original conditional statement.¹ Rule 5.7 would be pointless, however, unless the lawyer who complied was relieved of at least some of the Rules that would apply to a lawyer-client relationship.

The comments are somewhat coy about declaring what happens if a lawyer does comply with Rules 5.7(a)(1) and 5.7(a)(2).

The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

2004 ABA Model Rule 5.7 Comment 2 (emphasis added).

When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

2004 ABA Model Rule 5.7 Comment 11 (emphasis added).

That leaves open the question of what rules remain applicable when the lawyer follows the requirements of Rule 5.7(a). Undoubtedly, Rule 8.4 still applies. See 2004 ABA Model Rule

¹ The inverse of a conditional cannot be inferred from the conditional itself. Consider a teacher explaining a harsh reality to a marginal student: “**If** you do **not** take the final exam, **then** you **will** fail the course.” But that does not necessarily mean that the inverse is true: “**If** you **do** take the final exam, then you will **not** fail the course.” Why? The student might fail the exam. The converse, however, is always true: “If you did **not** fail the course, then you **did** take the final exam.”

5.7 Comments 2 and 11.² Likewise, the lawyer may not reveal information relating to the representation of past or current law clients under Rule 1.6. The lawyer cannot use information relating to the representation to the disadvantage of a former client under Rule 1.9(c)(1). See also Rule 1.11(c) (government lawyers); Rule 1.18(b) (prospective clients).

This opinion cannot possibly address how every rule may, or may not, affect the provision of law-related services. We will address, however, two concerns that drove earlier opinions – conflict of interest and feeding – to determine what rules still apply.

C. Conflict of Interest – Current Client (Rule 1.7)

Suppose a New Hampshire attorney who holds a real estate broker’s license (the broker) represents a seller of real estate and her law partner represents the buyer. We will assume in this and future hypotheticals that the broker has taken reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist. See NHRPC Rule 5.7(a)(2).

If the broker were acting as an attorney for the seller in the transaction, the partner could not simultaneously represent the buyer. This would constitute a concurrent conflict of interest as the representation of each client would be directly adverse to the other. See NHRPC Rule 1.7(a)(1); 2004 ABA Model Rule 1.7 Comment 7. See also REBA Ethical Standard No. 4, Attorney Acting in Dual Capacity as Attorney and Real Estate (Mass. Real Est. Bar Ass. 2012). The fact that it is the attorney’s partner would not solve the conflict, since such conflict would be imputed to the partner under NHRPC Rule 1.10(a).

Our broker, however, has complied with the requirements of Rule 5.7(a)(2), so we next need to determine whether Rule 1.7 still applies. By its terms, Rule 1.7 applies when representing “a client.” The word “client” is not a defined term under Rule 1.0, but the Committee interprets that to mean a client in the context of an attorney-client relationship. Since the fair implication of Rule 5.7(a) is that this broker does not have an attorney client relationship with the seller, then Rule 1.7 does not apply **to the broker**.

There are, however, two attorneys in the hypothetical. A concurrent conflict of interest can still exist if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a third person or by a personal interest of the lawyer.” NHRPC Rule 1.7(a)(2). Since the broker/attorney and partner/attorney are law partners, there would seem to be a significant risk that the partner’s representation of the client will be limited by the partnership relationship.

If a concurrent conflict does exist, the partner may be able to seek a waiver under Rule 1.7(b):

² Some parts of Rule 8.4 may not arise when the lawyer is not providing legal services. As an example, Rule 8.4(g) applies only “while acting as a lawyer in any context.” This opinion does not address the question of whether the provision of law-related services falls under the protection of Rule 8.4(g).

Notwithstanding the existence of a concurrent conflict of interest under paragraph (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 claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

NHRPC Rule 1.7(b). The affected client would be the partner's client. In seeking consent, however, the cautious lawyer will carefully consider whether she reasonably believes that she will be able to provide competent and diligent representation to the buyer. Expect a certain amount of pushback if things go south.

In general, if a reasonable and disinterested lawyer would conclude that one or more of the affected clients could not consent to the conflicted representation because the representation would likely fall short in either respect, the conflict is nonconsentable.

Restatement (Third) Of the Law Governing Lawyers, §122 comment g(iv) (ALI-ABA 2008).

The broker's client would not need to give consent under the Rules of Professional Conduct, as there is no attorney-client relationship. There may, however, be obligations outside the Rules, such as the rules governing real estate brokers, which might need to be addressed.

This situation is analogous to the issue faced by this Committee in Formal Opinion #1992-93/12, Conflict of Interest: Lawyer and Real Estate Broker Who Are Spouses Participating in the same Real Estate Transaction (NHEC 1993). That opinion involved an attorney representing the buyer and the attorney's spouse (a non-lawyer) representing the seller. The Committee concluded that the lawyer could represent the buyer provided the lawyer received consent. The 1993 opinion can be distinguished since the lawyer stood to gain indirectly from the spouse's successful sale, but the analysis uniformly supports the necessity of consent.

D. Conflict of Interest – Former Client (Rule 1.9)

Suppose the broker represents the seller and the buyer is a former client of broker-lawyer. Suppose that during the earlier representation, the broker-lawyer learned from the former client that the property had extra value to that former client. Perhaps the land has oil and gas reserves, or mineral deposits, or sand and gravel, or old-growth timber. Perhaps the land has sentimental value to the former client, who is now a potential buyer. We will assume that the information is not generally known.

If the broker were providing legal services to the seller instead of brokerage services, this would require an interesting analysis under Rule 1.9.

A lawyer who has formerly represented a client [the buyer in this case] in a matter shall not thereafter represent another person [the seller in this case] 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, confirmed in writing.

NHRPC Rule 1.9(a). This in turn requires a determination of whether the sale was a “substantially related matter” to the earlier representation.

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

2004 ABA Model Rule 1.9 Comment 3. Since we have assumed in our hypothetical that the information learned would be useful, Rule 1.9 would bar the representation without Rule 5.7.

As with the previous analysis involving Rule 1.7, the Committee interprets the word “client” in Rule 1.9 to refer to a legal client. Accordingly, the fair interpretation of Rule 5.7 is that Rule 1.9(a) does not apply to the broker.

Even with the help of Rule 5.7, however, several rules will still apply in this situation. First, the information learned by the lawyer related to the representation of the client is protected from disclosure by Rule 1.6. Accordingly, the broker could not tell the seller. See also Rule 1.9(c)(2).

Even without actual disclosure, however, the information itself could be valuable. It could help determine a higher market value for the seller. For example, the broker could simply advise the seller to reject an offer as too low, without giving a reason.

Rule 1.9(c)(1) forbids a lawyer to “**use** information relating to the representation to the disadvantage of the former client.” If the seller gets a better price for the property than would appear reasonable without the “confidential factual information,” the lawyer may be hard pressed to persuade a disciplinary body, or a court, that such information was not **used**.

E. “Feeding” – Law Firm to Law-Related Business

Suppose a divorce client needs to sell off real estate as part of a settlement. Can the lawyer representing the client suggest using the law-related brokerage business to accomplish the sale?

This would constitute “enter[ing] into a business transaction with a client.” Such transactions are governed by Rule 1.8(a). See Rule 5.7, Comment 5. Rule 1.8(a) requires several things, including informed consent, in a writing signed by the client. See generally Opinion #2017-18/01, Providing Legal Services in Exchange for a Client’s Goods and Services (NHEC 2017).

Accordingly, while an attorney may refer a law client to her real estate business, she must comply with the provisions of Rule 1.8. See Formal Opinion #1998-99/14, Lawyers Selling Insurance to Their Clients (NHEC 2000); Opinion 02-8 (Fla. Bar Ass. 2004); Opinion 05-01 (AZ

2005) (lawyer faces a “substantial burden” in showing that the requirements of Rule 1.8(a) are met).

Meeting this “substantial burden” may prove difficult. The Restatement suggests that the burdens will always rest on the attorney in any dispute with a client dissatisfied with the business arrangement.

In any civil proceeding between a lawyer and a client or their successors, the lawyer has the burden of persuading the tribunal that requirements stated in this Section have been satisfied. ... In a discipline case, once proof has been introduced that the lawyer entered into a business transaction with a client, the burden of persuasion is on the lawyer to show that the transaction was fair and reasonable and that the client was adequately informed.

Restatement, *supra*, § 126, com. a.

F. “Feeding” – Law-Related Business to Law Firm

Suppose a legal issue arises during the sale of a property. Can the broker recommend the lawyer’s firm to handle the issue?

This is the prototypical feeding situation feared by earlier opinions. One can imagine it arising with almost any law-related business – title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting. 2004 ABA Model Rule 5.7 Comment 9. The law-related client gets law-related services, but the lawyer recognizes that the brokerage client also needs legal services.

Before discussing the need for legal services in connection with brokerage issue, the broker-lawyer should ascertain whether the brokerage client is represented by another attorney in other matters. The broker-lawyer may not technically be “representing a client” within the meaning of Rule 4.2, and Comment 4 confirms that the Rule does not preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. Comment 9, however, makes it clear that if Rule 4.2 does not apply, Rule 4.3 might.

When providing brokerage services to the brokerage client, the broker-lawyer is not “dealing on behalf of [another] client” so Rule 4.3 may not technically apply. It would nevertheless be prudent to refrain from giving legal advice to the brokerage client, other than the advice to secure legal counsel. See Rule 4.3.

The broker-lawyer, however, should refrain from suggesting that the broker-client engage the lawyer’s firm to handle the legal work. The CURRENT (as of this writing) version of Rule 7.3(a) prohibits in-person contact “for the purpose of obtaining **professional** employment,” unless (among other exceptions) the person contacted has a “prior **professional** relationship with the lawyer.” The issue then becomes whether the business relationship between the brokerage

customer and the broker-lawyer, who is acting in an avowedly non-attorney capacity, is such a relationship.

Rule 7.3 uses the word “professional” initially to describe “professional employment,” referring to the establishment of an attorney-client relationship. Accordingly, the Committee interprets the second use of the word “professional” in the phrase “prior professional relationship” to refer to a prior attorney-client relationship. See Wisc. Inf. Ethics Op. IE-16-01 (the term “professional relationship” does not include the relationships from a lawyer’s nonlaw business). Accordingly, the Committee concludes that a referral to the law firm would violate Rule 7.3. See Informal Opinion 18-03 (Conn. 2018) (due to the risk of abuse, harassment, and overreaching).

The issue becomes a bit more complicated as we look at possible ways the conversation could play out. Suppose, for example, when the broker-lawyer points out that the situation requires a lawyer, the client simply asks if the broker’s law firm handles that sort of issue. If the law firm does handle those matters, the Committee believes that the broker can truthfully respond in the affirmative, without violating Rule 7.3(a). In that case, the broker-lawyer has not **initiated** contact with a prospective legal client; it is the client initiating the contact.

On the other hand, suppose the brokerage client simply asks if the broker-lawyer knows anybody who does the type of legal work required. May the broker-lawyer provide, for example, a list of four or five law firms that do that type of work, and include the broker-lawyer’s firm on that list? A plurality on the Committee concluded that such a list would be a truthful response to a legitimate question, and that the broker-lawyer was not initiating contact in violation of Rule 7.3(a).

Most on the Committee felt that the length of the list might bear on the issue. For example, if the list only included the broker-lawyer’s firm, that could be problematic.

The Committee also notes that the current version of NHRPC Rule 7.3 differs from the current version of the ABA Model Rule. The current Model Rule allows a lawyer to have contact with a “person who has a ... prior **business** or professional relationship with the lawyer or law firm.” ABA Model Rule 7.3(b)(2) (2019) (emphasis added). Accordingly, under the newer version, the whole solicitation problem would go away. The careful attorney should always check the current version of the New Hampshire Rules to verify that the rules have not changed since the writing of any of our opinions.

CONCLUSION:

The ABA proposed the current version of Model Rule 5.7 – the version adopted by New Hampshire – in February 1994 and amended it in 2002. Ironically, the first version of Model Rule 5.7, adopted in 1991, prohibited ancillary businesses. Law firms (and lawyers generally) could offer law-related services only to their legal clients, and then only by the law firms

themselves under the Rules. Law firms were prohibited from owning or operating a separate entity that offered law-related services.³

Lawyers seeking to establish law-related businesses in accordance with Rule 5.7 should exercise great caution. Such businesses have historically been viewed with hostility. Even after the adoption of Rule 5.7, many presumptions remain against the lawyer.

NH RULES OF PROFESSIONAL CONDUCT:

Rule 1.0	Rule 1.9(c)	Rule 5.7
Rule 1.5	Rule 1.10	Rule 5.7(a)
Rule 1.6	Rule 1.10(a)	Rule 5.7(b)
Rule 1.6(a)	Rule 1.11	Rule 7.2
Rule 1.7	Rule 1.11(c)	Rule 7.3
Rule 1.7(a)	Rule 1.18	Rule 7.3(a)
Rule 1.7(b)	Rule 1.18(b)	Rule 7.3(b)
Rule 1.8	Rule 2.1	Rule 8.3
Rule 1.8(a)	Rule 4.2	Rule 8.4
Rule 1.9	Rule 4.3	Rule 8.4(c)
Rule 1.9(a)	Rule 5.4	Rule 8.4(g)
Rule 1.9(b)	Rule 5.4(a)	

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

Advisory Opinion #2, Attorney Practicing as a Real Estate Broker (NHEC 1970)

Formal Opinion #5, Attorney Practicing as a Real Estate Broker (NHEC 12/5/1975)

Advisory Opinion, New Hampshire Practicing Lawyer Operating a New Hampshire Real Estate Brokerage – Request to Reconsider Committee on Professional Conduct Informal Opinion No. 2 (7/30/70) and Formal Opinion No. 5 (12/5/75) (NHEC 10/12/1982)

Advisory Opinion #1984-85/9, Dual Professions: Attorney-Realtor (NHEC 1984)

³ This limitation on the entrepreneurial activities in the prior version of Model Rule 5.7 may have been felt necessary to forestall regulation by governmental and prevent ethical and professional harm to clients. See Block, Model Rule of Professional Conduct 5.7: Its Origin and Interpretation, 5 Geo. J. Legal Ethics 739 (1992). The ABA, however, rescinded the earlier version of Model Rule 5.7 a year after its proposal before any state had adopted it.

Formal Opinion #1987-88/2, Dual Practice: Attorney as a Realtor (NHEC 1987)

Formal Opinion #1989-90/12, Attorney/Realtor Related Questions (NHEC 1990)

Formal Opinion #1992-93/12, Conflict of Interest: Lawyer and Real Estate Broker Who Are Spouses Participating in the same Real Estate Transaction (NHEC 1993)

Formal Opinion #1998-99/14, Lawyers Selling Insurance to Their Clients (NHEC 2000)

Opinion #2017-18/01, Providing Legal Services in Exchange for a Client's Goods and Services (NHEC 2017)

SUBJECTS:

Business Transactions with Clients

Competent and Diligent Representation

Concurrent Conflicts of Interest

Confidentiality

Confidentiality of Information

Conflict of Interest

Disinterested Lawyer

Dual Practice

Duties to Former Clients

Independent Judgment

Informed Consent

Law-Related Services

Lawyer Advertising

Professional Relationship

Solicitation

Substantially Related

- **By the NHBA Ethics Committee**

This opinion was submitted for publication to the NHBA Board of Governors at its November 17, 2022 meeting.

Conflict of Interest in A Real Estate Transaction

By the NHBA Ethics Committee
Practical Ethics Article: April 19, 1990

Lawyers are frequently asked to represent more than one party to real estate transactions, including every combination of seller, buyer, borrower, and lender. Even more frequently, lawyers are asked to perform limited real estate tasks (such as deed or mortgage drafting or title searching) for parties other than their principal clients in a transaction. Clients and real estate brokers often favor such practices, on the grounds that such practices promote economy and speed in the completion of the transaction.

However, the potential for conflicts of interest is vast. Full disclosure and consent are minimum, not maximum, requirements for ethical compliance. Even if consent is obtainable, the lawyer should decline to represent the general interests of both a buyer and a seller, or a lender and a borrower, absent unusual circumstances. Even if consent is obtainable, the lawyer should decline to represent the general interests of a secondary client in a transaction for which the lawyer represents the interests of a primary or original client, absent circumstances in which the lawyer and the parties reasonably believe that there is no likelihood of material disadvantage to either party.

Avoidance of impermissible conflicts in the performance of specific tasks, particularly in the closing of standard residential transactions, is generally much easier. However, the lawyer's performance of specific tasks for a secondary client still raises important issues of whether the lawyer can reasonably believe that such performance will not materially adversely affect either client. With this limited exception, the difficulty of the questions raised, and the ease in identifying the alternative - namely, separate representation - raise a presumption that the lawyer should generally decline multiple representation when there is any question of a potentially damaging conflict or appearance of impropriety. The presumption should be applied as a rule of reason, not a rigid formula; in applying the rule the lawyer should keep in mind the harsh realities of other peoples' hindsight if the transaction goes wrong.

Applicable rule¹

Rule 1.7 of the Rules of Professional Conduct incorporates two vital components. First is the "directly

¹ Since the publication of this article, the rule has been updated as follows, however, the thrust of the analysis in this article still applies:

Rule 1.7. Conflicts of Interest

(a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one 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) Notwithstanding the existence of a concurrent conflict of interest under paragraph (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 claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

adverse" component, which generally pertains to litigation. Second is the "materially limited" adversity component:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation and with knowledge of the consequences. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Both consent and reasonable belief are thus required before multiple representation may be undertaken; consent alone is not sufficient. As a threshold matter, the lawyer should consider that declining multiple representation offers the advantage of avoiding the issue entirely.

Application: reasonable belief

A. General representation

Any analysis by a lawyer facing proposed multiple representation in real estate transactions must begin with two simple questions: whom am I proposed to represent here? and who feels that I am looking after their interests here? If the answer is more than one party, and the lawyer does not immediately recommend separate representation for the proposed clients, the lawyer must go on to analyze whether the lawyer can reasonably believe that there is no likelihood of material limitation of the lawyer's responsibilities to all proposed clients, and if there is material limitation, whether any proposed client will be adversely affected.

Parties to real estate transactions traditionally view conscientious lawyers as nay-sayers standing in the way of "getting the deal done." The parties want that lawyer to define transactional expectations, which is an important function of the lawyer, but, as unpopular as the concept generally is for the parties, the other and usually more important function of legal representation in real estate transactions is to define defaults, and to provide for the protection of the interests of the lawyer's client after default occurs. The lawyer must consider possible injury to, and possible protection for, the client when a contest does somehow later arise.

In addition to keeping an eye on the client's transactional expectations, the conscientious lawyer will keep an eye on the client's representational expectations. It is useless for the lawyer to understand and believe that only one party is being represented if a second party believes that the lawyer is also serving the second party. If there is any possibility of a question about representation, a good lawyer will ensure that all parties are clear about the lawyer's role. A wise lawyer will ensure that there is evidence of such clarity.

Analyzing beliefs in light of future contests is consonant with the "harsh reality" test the

Ethics Committee used in a recent opinion on conflicts in municipal representation. "Under this test, a lawyer attempting to resolve such an issue should ask himself or herself whether, if a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent .

If this 'harsh reality' test may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation of the [second client]." Ethics Opinion 1988-9/24.

For example, the lawyer is unlikely to believe that her or his representation of both sides of a proposed purchase and sale agreement will pass the test, even if the parties think they already agree on the terms of the agreement. The lawyer is obliged to explore that proposed transaction, to raise issues the parties may not have explored, and to propose alternative terms, all the more if the parties profess to wish to use "form" documents. Similarly, such reasonable belief is unlikely where the lawyer is asked to represent both sides of a non-standard residential loan transaction, for similar reasons. A lawyer representing both parties is simply less likely to push any one party's interests quite as hard as the same lawyer properly representing only the one party. And when those interests lead to a conflict, the lawyer-client privilege is threatened in litigation following multiple representation, while it unarguably remains intact following single representation.

The unusual circumstances in which the lawyer may find no adverse effect from multiple general representations are quite limited. In most cases they will amount to a finding that the secondary client really needs no general representation, for example if the secondary client is a residential buyer/borrower already signed on to a purchase and sale agreement and/or borrowing on a standard secondary market mortgage. The lawyer should then disclose the lack of need for the lawyer's services, and charge accordingly. (The lawyer may provide and charge for such specific services, as an owner's title insurance policy or drafting of a deed without generally representing the secondary client. Other issues are raised in the performance of these tasks, which are discussed below.)

The same analysis applies, for another example, when a borrower's lawyer is asked by the lender to prepare commercial loan documentation, in which case the lawyer should disclose that the lawyer proposes to prepare the documentation from the borrower's perspective and insure that the lender understands that fact and adequately consents. In the few circumstances in which genuine multiple representation may be permissible, it will almost always be because of extreme economic circumstances.

As the New Jersey Supreme Court found in *In the Matter of Edward J. Dolan*, 76 NJ 1, 384 A2d. 1076 (1978), where the buyer/borrower was a low income residential consumer, "the stark economic realities are that were an unyielding requirement of individual representation to be declared, many prospective purchasers in marginal financial circumstances would be left without representation. That being so, the legal profession must be frank to recognize any element of economic compulsion attendant upon a client's consent to dual representation is a real estate purchase and to be circumspect in avoiding any penalization or victimization of those who, by

force of these economic facts of life, give such consent." *Id.* at 1081. That, as the dissent (which would ban all multiple representations per se) makes clear, is a tall order.

No matter what the circumstances may be, there is a consensus, with which this committee agrees, that a developer's lawyer may not represent buyers in their purchase of the developer's product. The likelihood of conflicts being resolved in favor of the consumer is too small.

B. Specific tasks

The presumption that impermissible risk will arise from multiple representation applies less consistently to the performance of specific tasks for a secondary client. There is a lesser, but still real, potential for damaging conflict when the lawyer's role for the secondary client is limited to specific tasks. For example, lawyers for mortgagees or buyers are frequently asked to provide deeds for sellers. The lawyer must be sensitive to the pressure of the buyer's need for completeness and specificity in the deed. If the record description does not fully meet title insurance standards, warranty issues must be fully aired before a lawyer asks a seller to sign a deed which is different from that to sign a deed which is different from that which the seller originally received. Similarly, lawyers for borrowers are frequently asked to provide title insurance policies for lenders. The potentially adverse effects of an encumbrance or of a title irregularity must be fully disclosed, especially if not insured over, as must the degree to which a survey might be advisable to assure that the mortgagee is obtaining all that is necessary, even if the borrower has accepted the title as is.

Beyond documentation, in the handling of even the simplest closing there is ample room for potential conflicts.

Frequently, closing costs involve more discretion than parties recognize. Also, the perennial question of the handling of the deed and of closing proceeds during the "gap" - the time between closing and recording - is sometimes answered with "gap insurance," which is fine for the lender, but which may not be adequate for the buyer. The lender's lawyer should be particularly careful to affirmatively inform the borrower that the lawyer is not looking after borrower's interests. See Rule 4.3.

While this article has primarily been concerned with raising consciousness about potential problems, the fact that a huge number of residential transactions occur with some degree of multiple representation, and without ethical lapse, should not be obscured. After examination of the risks, and satisfaction of the harsh reality test, the lawyer may in such circumstances reasonably conclude that neither party's representation will be materially adversely affected and proceed to deal with consent.

Application: consent

Consent is of little use if the lawyer cannot properly provide the representation consented to. Only once the lawyer has cleared the hurdle of reasonable belief under the "harsh reality" test may the lawyer proceed to analyze the issues of consent to multiple representation. Reasonableness of consent will vary, as the rule makes clear, not only according to the substance of

the representation being consented to, but according to the quality of the lawyer's consultation with the consenting party.

The Dolan case again presents an excellent overview of the considerations allowing consent. The majority opinion deserves quotation at length:

In a real estate transaction, the positions of vendor and purchasers are inherently susceptible to conflict. [citation omitted]. This is likewise the case with borrower-lending relationship. [citation omitted] ... {quoting from the same court's opinion in *In re Kamp*, 40 NH 588, 194 A.2d 236 (1963)}: 'Full disclosure requires the attorney not only to inform the prospective client of the attorney's relationship to the seller, but also to explain in detail the pitfalls that may arise in the course of the transaction which would make it desirable that the buyer have independent counsel. The full significance of the representation of conflicting interests should be disclosed to the client so that he or she may make an intelligent decision before giving consent. If the attorney cannot properly represent the buyer in all aspects of the transaction because of the relationship to the seller, full disclosure requires that the attorney inform the buyer of the limited scope of the intended representation of the buyer's interest and point out the advantages of the buyer's retaining independent counsel. A similar situation may occur, for example, when the buyer of real estate utilizes the services of the attorney who represents a party financing the transaction. To the extent that both parties seek a marketable title, there would appear to be no conflict between their interests. Nevertheless, a conflict may arise concerning the terms of the financing, and therefore at the time of the retainer the attorney should make clear to the buyer the potential area of conflict. In addition, if the buyer's interests are protected only to the extent that they coincide with those of the party financing the transaction, the attorney should explain the limited scope of this protection so that the buyer may act intelligently with full knowledge of the facts.' 384 A.2d at 1080.

... [W]here dual representation is sought to be justified on the basis of the parties' consents, this Court will not tolerate consents which are less than knowing, intelligent and voluntary. Consents must be obtained in such a way as to insure that the client has adequate time ... to reflect upon the choice, and must not be forced upon the client by the exigencies of the closing. This applies with equal force to the dual representation of mortgagor and mortgagee.

Id. at 1081-1082.

In the real estate context, the lack of knowing, intelligent, voluntary consent does not narrowly refer to legal incapacity: even a consent by a sophisticated commercial borrower or lender may be insufficient if the lawyer could not reasonably request it. If the use is closer, the lawyer should notify the original client in writing of the lawyer's proposed dual role. This should be done in addition to the telephone of live consultation which the lawyer should employ at the outset to be satisfied that the original client fully understands the issues. The lawyer would notify the secondary party in a similar fashion (generally, but not always, after the original client so consents). The frequent claim by parties that such sensitivity to the niceties of consent is unwarranted and/or wastes time does not excuse the lawyer from a more detached

view. Whether consent needs to be obtained in writing will depend on the circumstances. The lawyer may decide that the formality of a written consent helps impress on a particular client that the consent is not a minor step. The lawyer may also decide that a written consent - coupled with a written disclosure - will help impress specific risks on the client's consciousness.

Many lawyers already use form disclosures for standard multiple representation tasks. The classic example is the standard form for notice to the borrower by the lender's counsel that title has been examined solely for the benefit of the lender and informing the borrower of the availability of owner's title insurance. The standard form for divulging the owner's title policy premium split, and the potential conflict between lender, buyer, and title insurer, is another. (As it has been some time since these forms have been generally published, samples are appended to this article). Lawyers should consider sending such forms to the parties in advance to maximize the potential for reasonable consent.

The disclosure and consent issues are similar when the lawyer is asked to serve as an intermediary (see Rule 2.2) and when the lawyer is asked to perform specific tasks for an otherwise unrepresented client (see Rule 4.3).

In summary, the committee feels that it is likely that the general representation of multiple clients in real estate matters will result, in most instances, in an improper division of loyalty or an impairment of representation. The representation of a secondary party for specific tasks is more likely to be able to overcome such risks but does require close examination under the "harsh reality" test. This article serves not to provide solutions for all such specific real estate situations, but rather to provide a means of analysis for the application of the rule. This analysis, with a recognition that the lawyer may not undertake representation of multiple parties to a real estate matter is consent cannot reasonably be requested or obtained.

Suggested Real Estate Transaction Forms

RE: How to Avoid Potential Conflict of Interest Issues

DATE: _____

BORROWER(S): _____

PREMISES: _____

BORROWER(S) AFFIDAVIT:

The undersigned jointly and severally, if more than one, being duly sworn, hereby depose and say that the undersigned owns or is purchasing the Premises.

The undersigned acknowledges that (i) no title evidence has been provided to the undersigned relative to the said premises and (ii) no certificate or opinion of title has been issued to the undersigned by [Lawyer]. [Lawyer], attorney for [Lender] ("Lender"), have explained to the undersigned that owner's title insurance, through _____ Title Insurance Company, is available, and said attorneys have explained the general purposes and costs of owner's title insurance.

The undersigned further understands that the lender's coverage is for the protection of the

lender ONLY and that unless the undersigned purchases owner's title insurance, the undersigned may have no protection relative to the title on said premises.

The undersigned hereby acknowledges that [lawyer] bears no responsibility for any damage to the undersigned which may occur relative to said title.

The undersigned does not wish to purchase owner's title insurance.

BORROWER:

STATE OF NEW HAMPSHIRE

COUNTY OF _____

The foregoing instrument was acknowledged before me, this _____
day of _____

2

Before me,

Justice of the Peace

Notary Public

My Commission Expires:

AGENT'S DISCLOSURE TO PURCHASER
AS TO OWNER'S TITLE INSURANCE PREMIUM

The undersigned has requested the opportunity to purchase owner's title insurance from _____ Title Insurance Company. [Lawyer] is acting as agent for said title insurance company in this transaction. The premium for said policy is\$ _____, of which [lawyer] will be paid _____% by said company to compensate for services, costs and expenses as agent. [Lawyer] has no ownership interest in said title insurance company.

[Lawyer] is also issuing lender's title insurance to [Lender]. There is thus a possibility of a conflict between the undersigned, the Lender, the title insurance company, and [Lawyer] in the event of a claim on the owner's policy.

The undersigned has read and understands the above disclosure, and consents to the facts described above.

Dated: _____

PURCHASER(S)

Fees Charged by Attorney Settlement Agents

By the NHBA Ethics Committee
Practical Ethics Article - December 15, 1994

Attorneys often act as settlement agents in real estate transactions in New Hampshire. As settlement agents, the attorneys perform a variety of services for different parties to the transaction. This article addresses the ethical limitations on the fees that may be charged for such services.

A residential closing settlement agent is expected to collect all of the funds necessary to close the transaction and to disburse the funds from the closing to the appropriate parties. As part of the agent's services, the settlement agent will often contact the holders of existing liens on the property involved in the closing to obtain lien pay-off information. As changes in the residential loan marketplace have occurred, the settlement agents have had to change the way that they conduct their businesses and the way that they charge for their services. Attorneys who act as settlement agents in real estate transactions must comply with the New Hampshire Rules of Professional Conduct ("Rules") in their dealings with their clients and with third party participants in the closings.

Not long ago, the vast majority of residential mortgages on New Hampshire real estate were held by New Hampshire lenders. When property was sold or a loan refinanced, most lenders would provide loan payoff information to settlement agents over the phone, and many lenders would furnish an executed discharge in advance of the closing. The U.S. Mail used to provide overnight delivery service within New Hampshire and in much of New England. Mortgage payoff checks were customarily sent to the lender by the settlement agent by mail.

Times have changed. It is now rare to find a residential mortgage loan that is still held in New Hampshire by the original lender. Loans are now freely assigned among lenders--and are frequently serviced by large in-state and out-of-state loan services. Often, the lenders omit to record proper evidence of assignments of loans and the settlement agent is forced to chase down the intervening holders of the loan for proper assignments. The loan servicers will no longer provide loan information over the phone. They require written requests for loan payoff information and loan payment instructions, they will not provide mortgage discharges in advance of payment, and they rarely provide mortgage discharges in a timely fashion once a loan has been paid. The settlement agent must forward the loan payment to these services at the time of closing, and then monitor the title servicer to assure that a mortgage discharge is recorded. As a result, the time and effort required by settlement agents to obtain loan payoff information and assure that a mortgage discharge has been recorded is significant.

When the U.S. Mail could be counted upon for one- or two-day delivery and residential loans were held in New Hampshire, most parties were content to have their loan payoffs mailed to the lender with an additional one- or two-day's interest to allow for the delivery time. However, because of the unreliability of the U.S. Mail, most parties now insist that their mortgage payoffs be sent by the settlement agent to the loan servicer by overnight courier service in order to minimize extra interest expense on the loan.

Where once a settlement agent's job was completed at closing, the settlement agent is now required to file information about many closings with both state and federal authorities. Whenever title

to property changes hands, a so-called "1099 Report" for the closing must be filed by the settlement agent with the IRS by year end, and a Declaration of Consideration Form must be filed by the purchaser with the Department of Revenue Administration within 30 days of the closing. The settlement agent is personally liable for failing to file a proper 1099 Report, and settlement agents have customarily filed the Declaration of Consideration Form on behalf of the purchaser.

Both lawyer and non-lawyer settlement agents have responded to these growing administrative burdens by increasing the fees that they charge for certain closing services. These such fee increases include:

1. Charging the seller a fee to obtain mortgage payoff information, to remit the mortgage payoff, and to obtain a mortgage discharge;
2. Charging a fee in excess of the actual fee charged to the settlement agent by an overnight courier service; and
3. Charging a fee to the purchaser to file the Declaration of Consideration Form with the State of New Hampshire.

While a non-lawyer settlement agent's right to charge fees at closing is limited solely by the law-of contracts, an attorney who acts as a settlement agent may only-charge a party a fee that is consistent with both the attorney's contractual relationship with the party and the Rules. Generally, the lawyer/settlement agent's client may be charged any fee that is consistent with the lawyer's fee agreement with the client so long as the fee is not illegal or clearly excessive. Rules 1.2 and 1.5. If the lawyer/settlement agent is representing the lender in the closing, and the lender's contract with the borrower requires the borrower to pay the lender's legal fees, the lawyer/settlement agent's bill for services must be consistent with the lawyer's fee agreement with the lender. The lawyer/settlement agent may only charge fees and expenses to a non-client third party in accordance with an express agreement between the lawyer and the third party.

It has been the custom and practice in New Hampshire for settlement agents to obtain loan payoff information and to assure that a proper discharge of mortgage has been recorded without charging the seller or the borrower an extra fee for this service. However, there is no question that it is now much more difficult and burdensome for a settlement agent to provide this service. In light of the changes in the loan marketplace, it is reasonable for a settlement agent, including a lawyer/settlement agent, to charge an additional fee for that service.

Because the parties are likely to assume that a lawyer/settlement agent will provide loan payoff and discharge services without an additional fee, the lawyer/settlement agent must communicate with the property owner relative to the owner's obligation to properly discharge the mortgage lien at closing. If the owner does not desire to take the steps necessary to discharge the mortgage lien at closing, the lawyer/settlement agent may offer to provide that service for a fee. If the party agrees to pay the fee, the lawyer/settlement agent may proceed to render the service and collect the agreed upon fee. However, absent the agreement of the third party, the lawyer/settlement agent may not charge an additional fee to the third party for mortgage payoff and discharge services. See Rules 4.1 and 4.3.

It is administratively more burdensome for a settlement agent to send a loan payoff via overnight courier than by U.S. Mail. The lawyer/settlement agent must prepare and maintain proper

records of the delivery of the package to the courier. The invoice for the delivery must be processed and paid when received. For many settlement agents, delivery of the package to the courier drop-off location requires additional staff time. For these reasons, if a party to a closing elects to have the loan payoff sent by overnight courier so as to save interest expense, it is not unreasonable for a lawyer/settlement agent to charge a fee that includes both the actual cost of using the courier service and a charge for the lawyer/settlement agent's additional administrative expenses associated with providing the additional service. However, because parties may justifiably expect to be charged the actual amount of a disbursement, the lawyer/settlement agent may only assess a surcharge on such a disbursement if the surcharge is described in the fee agreement with the party and if the surcharge is reasonably related to the lawyer/settlement agent's additional expenses associated with the disbursement. ABA Formal Opinion 93-379 (1993).

By law, the settlement agent is prohibited from charging a fee for making the 1099 Report to the Internal Revenue Service. There is no comparable prohibition with respect to the State of New Hampshire Declaration of Consideration Form. Virtually all of the information that is required for the Declaration of Consideration Form is filled in prior to closing, and the parties typically sign the Declaration of Consideration Form at closing. Since the settlement agent must do little more than fill in two blanks when the deed is returned from the Registry of Deeds, and mail the Declaration of Consideration Form to the Department of Revenue Administration, it would be hard to argue that a lawyer/settlement agent may charge more than a minimal fee for the filing of the Declaration of Consideration Form. Moreover, the fee for filing the Declaration of Consideration Form cannot include any of the settlement agent's costs of filing the 1099 or be a subterfuge to collect those costs. Rule 8.4.

When an attorney acts as a settlement agent in a real estate transaction, the attorney will often receive fees from more than one party. The fees charged to the lawyer/settlement agent's client must be consistent with the lawyer's fee agreement with the client. Fees charged to a third party are not in the nature of legal fees. However, such fees must be consistent with a contractual agreement between the lawyer/settlement agent and the third party.

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1992-93/9
Client Funds and Property: Real Estate Settlement Accounts
June 24, 1993

RULE REFERENCES:

Rule 1.4	Rule 5.1
Rule 1.5	Rule 5.2
Rule 1.6	Rule 5.3
Rule 1.7(b)	Rule 5.4(a)
Rule 1.8(a)	Rule 5.4(b)
Rule 1.15	Rule 5.5
Rule 1.15(a)	Rule 7.1
Rule 1.15(a) (1)	Rule 7.2
Rule 1.15(a)(2)	Rule 7.3
Rule 2.1	Rule 8.4(a)

SUBJECTS:

Business Activities
Client Funds and Property
Conflict of Interest
Division of Fees
Dual Practice
Real Estate/Realtors
Trust Accounts
Unauthorized Practice

SUPREME COURT RULE REFERENCES:

Rule 50

ANNOTATION:

An attorney must place funds received from a client or third party in "clearly designated" trust accounts, separate from the attorney's own funds or accounts. (Rule 1.15(a)).

The term "funds" for purpose of attorney safeguarding under 1.15, includes money held by an attorney as escrow or settlement agent for real estate closings. (Rule 1.15(a)).

Stringent record keeping requirements specifically apply to an attorney handling client funds under Rule 1.15(a)(2) and NH Supreme Court Rule. While such rules do not specifically apply to third party funds, basic fiduciary law would indicate prudent adherence to such rules in all cases.

An attorney cannot withdraw and disburse funds from a real estate settlement account & deposit them in the law firm's general operating account. Excess funds collected must be promptly returned to the party entitled to receive them or handled in accordance with the law regarding lost property.

A real estate title company owned or controlled by an attorney performing services typically overseen by an attorney is not considered practicing law as determined by most states addressing the issue. No decision has been reached on this issue by NH courts, but there is concern that the activities of such a title company may constitute, in part, the practice of law, & therefore would be subject to rules restricting the handling of funds. [This question was subsequently addressed In the Matter of Unnamed Attorney and Unnamed Title Co., 138 NH 729 (1994).]

Lawyers involved in ancillary businesses (such as the operation of a lawyer-owned or controlled real estate title company) must consider many troublesome ethical dilemmas. (Rule 1.4; Rule 1.5; Rule 1.6; Rule 1.7(b); Rule 1.8(a); Rule 2.1; Rule 5.1; Rule 5.2; Rule 5.4(a); Rule 5.4(b); Rule 5.5;

Rule 7.1; Rule 7.2; Rule 7.3).

It may well be improper for an attorney to refer clients to or represent as clients, persons who are doing business with a real estate title company owned by the lawyer, absent full disclosure & consent of the client. (Rule 1.8).

QUESTIONS:

May a lawyer withdraw undisbursed funds from a real estate settlement account and deposit them in the lawyer's general account prior to disbursement for the purposes for which the funds were collected?

If a lawyer conducts real estate closings through a title company, of which the attorney is an employee and sole stockholder, are the attorney or the title company subject to the same rules with respect to the handling of settlement accounts as an attorney who handles settlement accounts directly?

BRIEF RESPONSE:

A real estate settlement account is a trust account, and a lawyer may disburse funds from the account only for the purposes for which they were collected.

A real estate title company is subject to the laws governing fiduciaries and may be subject to the Rules of Professional Conduct or the New Hampshire Supreme Court Rules relative to trust accounting.

RESPONSE:

A law firm serves as settlement agent for real estate closings. At the closing the law firm collects and disburses the funds necessary to close the transaction. The funds are deposited with the attorney by the attorney's client, or by third parties. The funds are disbursed to the lawyer's client or to third parties according to a settlement statement approved by the parties at closing. In some cases, the total amount of recording fees is estimated at the closing. Occasionally months or even years may pass after closing before a mortgage discharge from a lender that has been paid from closing proceeds is received and recorded.

An attorney must segregate the property of clients and third parties that the attorney is holding from the attorney's own property. All funds of clients or third parties must be placed in "clearly designated" trust accounts. New Hampshire Rules of Professional Conduct, Rule 1.15(a). Attorneys must maintain detailed and accurate records of "funds and other property of the client" in their trust accounts for a period of six years after final distribution of the funds. Rule 1.15(a) (2). New Hampshire Supreme Court Rule 50 imposes additional requirements on the creation and administration of lawyer trust accounts into which client funds or property have been deposited. In addition to the rules that govern the legal profession, a lawyer who holds property of others is also governed by "the applicable law relating to fiduciaries." "[A] lawyer should hold property of others with the care required of a professional fiduciary such as a trust company". ABA Model

Code Comments to Rule 1.15.

The term "funds" as used in Rule 1.15(a) (1) includes money held by an attorney as escrow or settlement agent for real estate closings. Consequently, funds collected by an attorney as the settlement agent for a real estate closing must be held in a lawyer's trust account.

If client funds are deposited in a lawyer's settlement account, the record keeping and reporting obligations of Rule 1.15(a)(2) and Supreme Court Rule 50 will apply to that account. In addition, while neither Rule 1.15(a)(2) nor Supreme Court Rule 50 specifically impose record keeping and reporting obligations with respect to property or funds of "third parties" that are held by a lawyer, it is the opinion of the Committee that the law relating to fiduciaries requires an attorney to maintain records of a trust account in which no client funds have been deposited in a manner similar to that required by Rule 1.15(a) (2) and New Hampshire Supreme Court Rule 50.

Whether or not a client of the attorney is involved in a transaction, the attorney cannot withdraw undisbursed funds from a real estate settlement account and deposit them in the law firm's general operating account. The attorney can only disburse the funds from the settlement account for the specific purposes for which they were collected and must keep a record of all transactions within the settlement account. If excess funds have been collected by the attorney, the excess funds must be promptly returned to the party entitled to receive them. Funds that cannot be disbursed as planned or returned to the party entitled to receive them must be handled in accordance with the New Hampshire law regarding lost property, NH Op 82-3/9.

The answer to the inquiry is less certain if the closings are conducted by a real estate title company that is owned or controlled by a lawyer or employs a lawyer. (For the purposes of this opinion, it is assumed that a real estate title company undertakes some or all of the following services, all of which are overseen by a licensed attorney: perform title searches, prepare documents, conduct closings, or issue title insurance policies.) While some jurisdictions have held that the review of titles or the preparation of routine closing documents, without legal analysis, by a real estate title company constitutes the unauthorized practice of law, Virginia State Bar, Legal Ethics Opinion #1469 (1992), an apparent majority of jurisdictions have held otherwise. Wolfram, *Modern Legal Ethics*. §15.1.3 (1986). The question has never been addressed in New Hampshire, but there is strong sentiment on the Committee that the activities of a real estate title company constitute, at least in part, the practice of law. In addition, no decisions have been found that hold that the New Hampshire Rules of Professional Conduct or the New Hampshire Supreme Court Rules relative to trust accounts apply to an entity solely because it is owned or controlled by an attorney or because the entity employs an attorney. It has been observed that:

An abstract company in which a lawyer is financially interested, whether a sole proprietorship, a partnership, or a corporation, has only a business relationship with its real estate customer, not an attorney-client relationship governed by the [Rules].

New York State Bar Association, Committee on Professional Ethics, Opinion No. 621 (4/1890).

However, it has also been held that a real estate title company must comply with rules of professional ethics so long as the services of the real estate title company to the customer are deemed to constitute the practice of law. Virginia State Bar, Standing Committee on Legal Ethics, Opinion No. 1469 (6/23/92).

If New Hampshire follows the majority rule, it is likely that the real estate title company and not the attorney employee would be deemed to be the settlement agent for the real estate closings, and the real estate title company, as a non-lawyer, would not be subject to the Rules of Professional Conduct or New Hampshire Supreme Court Rule 50 with respect to trust accounting. On the other hand, if New Hampshire follows the minority rule, some or all of the activities of the real estate title company would be deemed to constitute the practice of law. Because the real estate title company is not an attorney or law firm, such activities might be deemed to constitute the unauthorized practice of law, in which case, its illegal activities would have to cease, and issues such as trust account reporting will become moot. It is also possible, that New Hampshire might agree that some activities of the real estate title company constitute the practice of law, but allow it to continue based upon an assumption that an attorney-client relationship exists between the lawyer employed by the organization and the customer. In such case, the Rules of Professional Conduct and the New Hampshire Supreme Court Rules would apply to the trust funds of the real estate title company. In any event, the common law rules relative to the obligations of fiduciaries will always apply to the actions of a real estate title company with respect to the funds of others that it holds.

Though a discussion of the limitations on a lawyer's ancillary businesses is beyond the scope of this opinion, lawyers must remember that the operation of ancillary businesses raises numerous difficult ethical issues. The operation of lawyer-owned or controlled real estate title companies appear to present particularly troublesome issues, such as:

- a. Reasonableness of Fee (Rule 1.5) - Does the attorney's legal fee when combined with the lawyer's share of the profits of the ancillary business constitute a reasonable fee?
- b. Fee Splitting with Non-Lawyers (Rule 5.4 (a)) Does the lawyer share fees with the principals of the real estate title company? Are they legal fees?
- c. Solicitation of Business (Rule 7.3) - Is the real estate title company used as a feeder for business for the lawyer?
- d. Confidentiality (Rule 1.6) - Do non-lawyers have access to client records in the hands of the real estate title company?
- e. Partnership with Non-Lawyers (Rule 5.4(b)) Do non-lawyers co-own the real estate title company?
- f. Aiding the Unauthorized Practice of Law (Rule 5.5) Is the real estate title company engaged in the unauthorized practice of law?
- g. Advertising (Rule 7.2) - Are the services of the lawyer improperly advertised with the services of the real estate title company?
- h. Conflict of Interest (Rules 1.7(6), 1.8(a), and 2.1) - Does the lawyer's interest in the real estate title company affect the exercise of the lawyer's independent professional judgment on behalf of the client?

- i. Disclosure (Rules 1.4 and 7.1) - Has the client hired the real estate title company with the expectation that the lawyer or the lawyer's law firm will actually do the work? Does the client understand that services will be provided by the real estate title company and that the lawyer's liability for the results is limited?
- j. Supervision of Subordinates (Rules 5.1, 5.2, and 5.3) What is the lawyer-owner's responsibility to properly supervise the activities of the managers and employees of the real estate title company?
- k. Lawyer's Non-Legal Activities (Preamble to ABA Model Rules of Professional Conduct) "A lawyer's conduct should conform to the requirements of the law, both in professional services to clients and in the lawyer's business and personal affairs."

In most jurisdictions that have addressed the question of lawyer-owned or controlled real estate title companies, it has been held to be improper for a lawyer to refer clients to or to represent as clients, persons who are doing business with a real estate title company owned by the lawyer, without full disclosure and consent of the client. Alabama State Bar Association Opinion 82-702 (undated); Oregon State Bar Opinion 1991-10 (7/91); Virginia State Bar Association Opinion 712 (8/30/85). See Rule 1.8; DR 5 101(A); DR 5-104(A). Even with disclosure, it has been held to be improper for an attorney to pay the attorney's law office expenses with the profits of an affiliated real estate title company, Virginia State Bar Association Opinion 1405 (9/17/91), and at least one jurisdiction has held that it is improper for an attorney to refer clients to a real estate title company owned by the attorney. New York State Bar Association Opinion 621 (4/18/91). Given the extremely difficult ethical issues outlined above, and the application of the "harsh reality test" frequently referred to by this Committee (see New Hampshire Ethics Committee Opinion No. 1988-89/24), the Committee is of the opinion that the situations in which a lawyer can represent a client who is doing business with a real estate title company that is owned or controlled by the lawyer will be rare. Furthermore, both the lawyer and the real estate title company must take steps to assure that third parties who do business with the real estate title company understand that the real estate title company and not the lawyer is providing the contracted services, and that the liability of the lawyer for the services is limited.

Finally, attorneys are reminded that it is unethical for an attorney to violate or attempt to violate the Rules of Professional Conduct through the acts of another. Rule 8.4(a). If an attorney forms a real estate title company for the purpose of evading the record keeping and reporting requirements of Rule 1.15(a) (2), the attorney may be deemed to have violated Rule 8.4(a). Furthermore, it may well be inherently improper for an attorney to form a real estate title company and refer clients to it, for the purpose of shielding the lawyer from the liability or responsibility for services rendered.

[ED NOTE: After the Committee issued this opinion, the Supreme Court decided *In the Matter of Unnamed Attorney and Unnamed Title Co.*, 138 NH 729 (1994). The Court considered whether Rule 1.15 and Supreme Court Rules 50 and 50-A apply to the escrow accounts held by a title company owned jointly by an attorney and the attorney's spouse (a non-lawyer). In order for the Professional Conduct Committee to require the attorney and the title company to submit to an audit of the company's escrow account, the Committee must show that:

(1) the committee sought to audit records of a New Hampshire lawyer; (2) the audit of the lawyer led to information that there exists financial records maintained by an entity performing services customarily performed by a lawyer; and (3) there is a substantial nexus between the New Hampshire lawyer and the entity in question so that it is reasonable that the committee be permitted to audit the entity's records. Thus, a case such as this is essentially factually driven.

Id. at 733. The Court held that under the facts before it, the financial records of the title company were subject to audit under Supreme Court Rules 50 and 50-A. *Id.* at 735.]



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Notes:



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