

# TITLE ISSUES IN EASEMENTS, DEVELOPMENT AGREEMENTS AND CCRs

John W. Steele, Esquire  
LSI - September 10, 2007

## I. Basic Legal Issues

- A. Ownership/Title
  - Proper Joinder
  - Chain of Title
- B. Description of Land
  - Benefitted
  - Burdened
  - Location of Easements
  - Survey vs. drawing
- C. Liens
  - Joinder of Lenders
  - Tax Liens
  - Assessments
- D. Encroachments
- E. Instrument Terms
  - Perpetual vs. Temporary
  - Termination of Rights

## II. Special Problems

- Access
- Lack of Subdivision
- Unreleased/Uncooperative Lienholders
- Lack of Current Survey
- Project-wide Declarations/REA's
- Language Interpretation
- Missing or Illegible Exhibits

## III. Title Insurance Solutions

- A. Contiguity
- B. Access
- C. Affirmative Insuring of Benefits
- D. Covenants/Assessments/Restrictions Against Violations
- E. Survey/Encroachment Issues
- F. Special Affirmative Coverages

INTERSTATE 95

40' BUFFER

CELL TOWER

16-4C  
0.08 AC

SWIM FACILITY

SWIM FACILITY

16-4A  
18.27 AC

ROSS  
30,108 S.F.

MARSHALLS  
37,000 S.F.

(S04 SHELTER WITH DISTRICT OFFICE)  
176,000 S.F. BUILDING

16-3  
15.50 AC

**MAJOR Retailer**

PETS MART  
20,087 SF

BEST BUY  
30,188 SF

JUSTICE  
3,900 SF

PACKROOM  
6,000 SF

WORLD MARKET  
18,300 S.F.

DRESS BARN  
8,050 S.F.

SPORTS ZONE  
6,000 SF

5 BELOW  
10,000 SF

PARTY AMERICA  
8,000 SF

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Public

**ENDORSEMENTS AND AFFIRMATIVE COVERAGES**  
**APPLICABLE TO OWNER'S AND LOAN POLICIES**

**Access Endorsement**

The ALTA owner's and loan policy each contain a clause insuring against loss or damage incurred by the insured by reason of "lack of a right of access to and from the land". From the title insurer's perspective, this coverage merely requires that there be a legal right of access to and from the land. It has been decided, however, that this coverage must be considered in light of the facts and circumstances surrounding the property and that mere pedestrian access may be inadequate. *Marriott Financial Services v. Capitol Funds*, 217 S.E. 2d 551 (N.C., 1975), *Aff'g in Part, Rev'g in Part*, 209 S.E. 2d 423 (N.C. App., 1974). Owners and lenders want to make sure that their expectations of access via a particular route or at a particular location are in fact realized.

A typical simple form of access endorsement provides:

The Company hereby insures the insured against loss or damage which the insured shall sustain in the event that:

1. The land described in Schedule A is not contiguous to, or does not have vehicular and pedestrian access to a physically open street known as \_\_\_\_\_, a dedicated public road.

Contiguity itself with the physically open street may not be adequate. Especially in the retail setting, the insured may wish affirmative coverage that the property has access to an identified and physically open street, at particular access points depicted on a specifically identified survey. Access at certain points from certain streets or roads is crucial to the success of a retail center. To ensure the availability of such access, an enhanced version of the access endorsement that reads as follows should be obtained:

The Company hereby insures the insured against loss or damage which the insured shall sustain in the event that:

1. The land described in Schedule A is not contiguous to, or does not have vehicular and pedestrian access to a physically open and publicly dedicated street known as \_\_\_\_\_ at the places shown on the survey prepared by \_\_\_\_\_ under its Order No. \_\_\_\_\_ and dated \_\_\_\_\_ and last revised \_\_\_\_\_.

Occasionally, access to the parcel in question is provided through an easement to a public street, as opposed to being directly to the street that abuts the property. This is frequently the case where the insurance relates to an out parcel of a shopping center that is accessed only by the ring road. It is also not unusual that a retail development will be accessed only by passing over land that may be owned by a third-party, perhaps another retail development. In either of these situations, the insured will typically want that easement insured as a separate parcel of the legal description set forth where the land is described in Schedule A of the title policy.

The insured must be cautious to make sure that there are no encumbrances on the easement, such as a mortgage that predates the easement grant, the foreclosure of which could extinguish the easement. Other encumbrances on the required easement may limit the manner in which the easement way can be used. Accordingly, great care must be exercised in evaluating the exceptions that relate to the parcel of the legal description in which the easement is described.

If access to the physically open street is obtained by way of an easement that is described as a parcel of the insured land, the access endorsement should read:

The Company hereby insures the insured against loss or damage which the insured shall sustain in the event that:

1. The easement described as Parcel 2 in Schedule A is not contiguous to both Parcel 1 in Schedule A and a physically open and publicly dedicated street known as \_\_\_\_\_ all at the places shown on the survey prepared by \_\_\_\_\_ under its Order No. \_\_\_\_\_ and dated \_\_\_\_\_, and last revised \_\_\_\_\_, \_\_\_\_\_, and Parcel 1 in Schedule A has pedestrian and vehicular access to such street over and by way of the easement described as such Parcel 2.

### Affirmative Coverage Over Special Exceptions

The Company hereby insures the insured against loss or damage (including costs, attorneys' fees, and expenses of defense as provided in the conditions and stipulations of this policy) which the insured shall sustain by reason of the entry of a final order in a proceeding commenced subsequent to the Date of Policy in a court of competent jurisdiction to enforce the lien, encumbrance or interest noted on Schedule B at Exception \_\_\_\_, which order determines that said lien, encumbrance or interest has priority over the estate insured by this policy and enforces or awards full or partial satisfaction thereof out of the land described in Schedule A.

The Company hereby insures the insured against loss or damage which the insured shall sustain in the event that:

Parcels 1 and 2 are not contiguous to each other as shown on the survey prepared by \_\_\_\_\_ under its Order No. \_\_\_\_\_ and last revised \_\_\_\_\_, or taken as a tract, Parcels 1 and 2 do not constitute one parcel of land, without any gores or gaps.

### Encroachment Endorsements

The standard owner's policy takes a general exception for "encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey and inspection of the premises." A survey is typically required by the title insurer to give extended coverage thereby deleting this and the other general exceptions. Obviously, retail center transactions are of such magnitude and complexity that surveys are required as a routine matter. If that survey reveals the presence of an encroachment, a specific exception will typically be raised in Schedule B. An insured will seek to have losses resulting from the encroachment covered by an endorsement that may be available if the property has been so improved for several years or the encroachment is *de minimis*. The encroachment endorsement will typically read as follows:

The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of the entry of any final judgment of a court of competent jurisdiction denying the right to maintain the improvements as now located on the land because of the encroachment noted in Schedule B at Exception No. \_\_\_\_.

### Restriction Endorsement

Covenants, conditions and restrictions of various kinds are frequently raised as Schedule B exceptions. When this is done, the insured may seek an endorsement to protect itself against violations of those restrictions. A typical restriction endorsement reads:

The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of:

- (1) Any inaccuracies in the following assurances:
  - (A) There are no present violations on the land of the covenants or restrictions referred to in Exception \_\_\_\_ in Schedule B or of any plat building lines;
  - (B) A past, present or future violation on the land of the covenants or restrictions or plat building lines, if any, will not give rise to a right of re-entry or result in a forfeiture or reversion of title;
- (2) The exercise or attempt to exercise any right of re-entry or forfeiture or reversion or other right of termination of title based on a past, present or future violation of said covenants or restrictions or plat building lines.

The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of the entry of any court order or judgment which constitutes a final determination and denies the right to maintain the existing improvements or to be constructed improvements on the land.

The Company insures the insured against actual loss or damage which may be sustained due to the entry of any final judgment extinguishing the easement described as Parcel \_\_\_\_\_ in Schedule A, or denying or limiting the use thereof by reason of the issuance of a tax deed for nonpayment of any general tax or a special assessment levied against the taxable parcel identified as follows:

\_\_\_\_\_.

### Operating Agreement Endorsement

Especially in shopping centers, a great deal of concern is focused on the validity and enforceability of the key document, the reciprocal easement agreement, the operation and easement agreement, or whatever other name may be used to describe this agreement. Initially, since this document typically creates easements for utilities, parking and access, it should be specifically included in Schedule A as a parcel of the Insured land. Additionally, to provide coverage that this constitution of the development is valid, the operating agreement endorsement has been developed. This endorsement provides:

The Company insures the insured against loss or damage which the insured shall sustain by reason of any inaccuracies in the following assurances:

- (a) that there were no defects in the execution of the \_\_\_\_\_ referred to as Parcel 2 in Item 5 of Schedule A which has been recorded on \_\_\_\_\_ as Document No. \_\_\_\_\_; and
- (b) that there was no defect in or lien or encumbrance on the land subject to the estate or interest covered, hereby described or referred to as Parcel 2 of Item 5 of Schedule A existing at the date hereof, which has priority over said estate or interest, except as shown or referred to in Schedule B or excluded from coverage in the Exclusions from Coverage.

The Company insures the owner of the indebtedness secured by the insured mortgage against loss or damage sustained by reason of:

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

(B) Unless expressly excepted in Schedule B:

- (1) There are no present violations on the land of any enforceable covenants, conditions or restrictions, nor do any existing improvements on the land violate any building setback lines shown on a plat of subdivision recorded or filed in the public records.
- (2) Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the land does not, in addition, (i) establish an easement on the land; (ii) provide a lien for liquidated damages; (iii) provide for a private charge or assessment; (iv) provide for an option to purchase, a right of first refusal or the prior approval of a future purchaser or occupant.
- (3) There is no encroachment of existing improvements located on the land onto adjoining land, nor any encroachment onto the land of existing improvements located on adjoining land.
- (4) There is no encroachment of existing improvements located on the land onto that portion of the land subject to any easement excepted in Schedule B.
- (5) There are no notices of violation of covenants, conditions and restrictions relating to environmental protection recorded or filed in the public records.

- (2) Any future violation of the land of any existing covenants, conditions or restrictions occurring prior to the acquisition of title to the estate or interest in the land 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 to the estate or interest in the land if the insured shall acquire title in satisfaction of the indebtedness secured by the insured mortgage.
- (3) Damage to existing improvements, including lawns, shrubbery or trees:
  - (A) which are located or encroach upon that portion of the land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved;
  - (B) resulting from the future exercise of any right to use the surface of the land for the extraction or development of minerals excepted from the description of the land or excepted in Schedule B.
- (4) Any final court order or judgment requiring the removal from any land adjoining the land, or from any easement excepted in Schedule B, of any encroachment excepted in Schedule B.
- (5) 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 or subdivision recorded or filed in the public records.

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

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

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