



# THE TITLE COMPANY OF NORTH CAROLINA

A MEMBER OF THE OLD REPUBLIC TITLE INSURANCE GROUP

## A PUBLICATION OF THE TITLE COMPANY OF NORTH CAROLINA

### Strength & Support for Our Attorneys

*The Title Company of North Carolina is proud to be part of the Old Republic Title Insurance Group, whose financial strength enables TCNC to provide unmatched stability and assurance to real property attorneys and their clients during these difficult economic times. The following is a message from Rande Yeager, Chairman of the Old Republic Title Insurance Group:*

Greetings Friends:

In these uncertain economic times, real estate attorneys need the strength and support of a stable underwriter. For 17 consecutive years the Old Republic Title Insurance Group has been the highest rated title insurance group in the nation, and continues to be the #1 leader in financial strength ratings. We are not distracted by the consolidations and reorganizations happening around us in the title insurance industry, but are focused on supporting our local offices and their attorneys' needs.

Our strength and support can be attributed to and measured by the following.

- ❖ The Old Republic Title Insurance Group is a wholly-owned subsidiary of Old Republic International Corp. (ORI), a multi-billion dollar, diversified public company with \$13.26 billion\* in total assets.
- ❖ We support our attorneys with a network of knowledgeable, experienced and innovative underwriting counsel, who are second to none. In North Carolina, TCNC has seven full-time attorneys located throughout the state to handle your questions and to suggest solutions to any problems which might arise.
- ❖ We continually serve our attorneys with the highest level of ethics and integrity.
- ❖ The Old Republic Title Insurance Group is in its 102nd year of operation.
- ❖ We are here to stay!

Call your local TCNC representative today if your current title agency is not exclusively focused on your success.

Rande Yeager  
Chairman, Old Republic Title Insurance Group

\* As of 12/31/2008



*Candice Williams*

### **Candice Williams Heads NC Land Title Association**

Candice Williams, Vice President of The Title Company of North Carolina and co-manager of our Charlotte office, was installed as the 34th President of the North Carolina Land Title Association (NCLTA) at its annual meeting in August, 2008.

“I am excited about the upcoming year and feel honored to serve as President of the North Carolina Land Title Association,” says Williams. Her goals as NCLTA President are to protect the public and to support the approved attorney system in North Carolina through a program to prevent losses. The NCLTA will also seek to finalize the preliminary and final opinion attorney forms and to develop an updated lien affidavit form for mechanics liens. The organization will be active in pursuing issues in the General Assembly which could adversely affect the title insurance industry and the public.

Candice joined The Title Company of North Carolina in 2004 as co-manager of the Charlotte office. A native of Charlotte, she graduated from University of North Carolina at Chapel Hill, earning a degree in English in 1997. While at Carolina, Candice was a member of Kappa Kappa Gamma sorority. She attended law school at Wake

Forest University, graduating in 2000. Candice is a member of the NC Bar Association, serving as Membership Chair of the Real Property Section. She is an active member of the North Carolina State Bar, the Mecklenburg County Bar, and the Charlotte CREW. Candice enjoys traveling, reading, yoga and jogging, although she doesn't expect to have a lot of spare time in the next few months.

Candice becomes the tenth member of the TCNC family elected to head the title insurance industry in North Carolina in the 32 year history of NCLTA. In addition, two former employees of TCNC were President of the Carolinas Land Title Association, which was the predecessor to the NCLTA.

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#### **CASENOTES:**

**No Unilateral Right to Move Easement—Alternate Location—Quiet Title—Declaratory Judgment Cannot Nullify Easement—*A. Perin Dev. Co., LLC v. Ty-Par Realty, Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_, (COA07-1500, 21 October 2008).** Property was conveyed subject to a duly recorded easement. Plaintiff now wants to relocate the easement on his property without the consent of the Defendant. Trial court dismissed the action. The Court of Appeals found that there was no basis in North Carolina common law to allow unilateral relocation of an easement, rejecting Defendant's argument that cases in other jurisdictions allowed such relocation. The Court also found that the Declaratory Judgment Act was designed to determine the rights and liabilities as to written instruments and could not be used to void a valid conveyance or nullify a written instrument.

**Zoning Variance—Restrictive Covenants—No Legally Reasonable Use—*Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill* \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (NC Supreme Court, No. 27508 12 December 2008)** The Supreme Court reversed the Court of Appeals, holding that where 78.5% of the petitioner's property was within a “Resource Conservation District” (“RCD”), and the rest was subject to restrictive covenants preventing construction, the petitioner was left with “no legally reasonable use of their property” unless a variance from the RCD ordinance was granted.

The Supreme Court found that the trial court was correct in finding that the applicable restrictive covenants prevented the construction of any building in the remaining 21.5% portion of the petitioner's property. The Court noted the RCD ordinance required the Board of Adjustment ("BOA") "to consider the actual state in which the property was found—including both its physical and legal conditions—and how those conditions interact with the RCD ordinance, when determining if a variance is necessary to leave an owner with a 'legally reasonable use' of the property." In other words, the BOA could not limit its review to only that portion of the petitioner's land that was subject to the RCD ordinance.

**Deed of Trust—Mistaken Cancellation—Surplus Proceeds—N.C.G.S. §§45-36.6—Foreclosure Branch Banking & Trust v. Schiphof (In re Schiphof Foreclosure)** \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_, (COA08-159, 16 September 2008). Where Branch Banking & Trust Co. ("BB&T") had mistakenly and inadvertently cancelled its senior deed of trust, and all times from the filing of the foreclosure action until the expiration of the upset bid, there was nothing on the public record to indicate the cancellation was a mistake, BB&T had no priority interest in the surplus foreclosure proceeds. BB&T held a first lien deed of trust, recorded on April 4, 1985. Somehow the unpaid deed of trust was cancelled of record on August 17, 2006. At no time did BB&T intend to cancel the deed of trust. A second lien deed of trust (recorded in 2002) was foreclosed by an action begun in June, 2006. The original foreclosure sale took place on July 28, 2006, and the upset bid period expired finally on October 23, 2006. A third party purchased the property from the Substitute Trustee, and the foreclosure sale left a surplus.

Unfortunately for BB&T, there were several lien claimants who contended they were entitled to pro-rata portions of the surplus. BB&T filed a Notice of Rescission of the mistaken cancellation, but only after the upset period for the foreclosure had expired. BB&T filed a petition to be paid all of the surplus proceeds. The trial court ordered the surplus to be paid to the judgment lien creditors instead, and BB&T appealed.

For the first time, an N.C. Appeals court looked at the meaning of N.C.G.S. §45-36.6 (adopted in 2007) which provides for the recording of a document of rescission when a cancellation is made erroneously. The court held that the high bidder at the foreclosure took free and clear of BB&T's erroneously cancelled lien. The Court cited *Smith v. Clerk of Superior Court*, 5 N.C. App. 67, 168 S.E.2d 1 (1969) holding that surplus funds "did not constitute real estate. The surplus funds represented the general funds of the . . . grantors in the deed of trust which was foreclosed." As a result, the reinstatement of the BB&T 1985 deed of trust did not attach to any real property. The judgment of the trial court was upheld.

**Appraisal Contingency—"Time is of the Essence" Clause—Pre-Closing Condition—Reasonable Time to Perform—Harris v. Stewart**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_, (COA07-1174, 7 October 2008). A contract to purchase contained an appraisal contingency clause allowing the buyer to terminate the contract if the property did not appraise for a value equal to the purchase price. The buyer was to have the appraisal completed by December 15, 2005. The appraisal determined the value to be \$200,000 less than the purchase price, but it was not signed by the appraiser and received by the buyer until December 20, 2005. On that day the buyer mailed a notice of termination to the seller and requested a refund of the earnest money deposit. The seller refused to refund the deposit on the grounds that the appraisal was not completed by December 15, 2005.

The Court of Appeals said that absent a "time is of the essence" provision in a contract for the sale of real property, the "reasonable time to perform" rule applies. The date stated in the appraisal contingency served only as a guideline unless a time is of the essence provision was included. If a contingency date in a contract for sale of real property is crucial, then the contract must provide that (1) the date is a "condition precedent" and (2) "time is of the essence" in connection with that specific date.

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