



# CHICAGO TITLE INSURANCE COMPANY

<b>TOPIC:</b>	<b><u>North Carolina Real Property Legislative Review: 2005, 2006, and Beyond</u></b>
---------------	---

**By: Nancy Short Ferguson**  
**Senior State Underwriting Counsel, Chicago Title Insurance Company**

This manuscript provides supporting information for a brief PowerPoint presentation, including forms and provisions affected by 2005, 2006, and proposed 2007 legislative initiatives affecting real property. It will not give detailed information on any particular area of law, as each would merit its own full presentation. NOTE: All statutory recitals are drawn from Lexis or the North Carolina General Assembly web site. The North Carolina General Statutes are referred to interchangeably herein as N.C.G.S. or G.S. THIS IS NOT A SUBSTITUTE FOR A CAREFUL READING OF THE STATUTORY PROVISIONS THEMSELVES! This is an updated version of an earlier presentation (May 2006) at the Real Property Section Annual Meeting.

Bill history, editions and ratified acts can be found on-line at the North Carolina General Assembly web site: <http://www.ncga.state.nc.us/homePage.pl>

Bar Association sponsored or supported bills can be found on-line at: <http://www.ncbar.org/governmentalAffairs/2007legislation.aspx>

## **I. 2005 & 2006 Notary Acts (New Chapter 10B of the North Carolina General Statutes)**

Some changes of importance:

- Examination requirement on *some* recommissionings (i.e. post-1991 non-lawyer notaries, those who have been disciplined or allowed their commissions to expire)
- Six (6)-hour class requirement for new commissioning
- Adding requirements for execution by “mark” or by person unable to sign or make their mark
- Blank lines or blanks in lines must be filled in
- New detailed seal requirements and specifications
- Reinforcement of “personal appearance” requirement including new definition
- New stronger definitions of the requisite “identification”
- Notarial act statutory presumptions of due commissioning, personal appearance, adequate identification of principal, no indication of incompetence or duress
- Broader flexibility and simplified notarial certificate forms
  - Expanded safe harbors in Chapter 47, including fiduciary or representative capacities

- Out of state notarial certificates in compliance with the law of the state of execution authorized
- Federal notarial certificates recognized
- New simplified “generic” safe harbor certificate forms
- *NO* preemption of other statutorily sanctioned forms, such as self-proving will, short form power of attorney, health care power of attorney, etc.
- Change in the proof / verification by subscribing and nonsubscribing witnesses including impartiality
- Reinforced criminal penalties for noncompliance by the notary or *aiding and abetting by a non-notary* regarding a notarial act
- Electronic Notary regulations in process in sole discretion of Secretary of State
- Uniform Real Property Electronic Recording Act (URPERA) technical standards still be considered by Electronic Recording Commission
- Savings provisions, technical corrections and curative provisions

See attached **Exhibit A** for “safe harbor” forms in existing statutes.

## **II. Mortgage Satisfaction Act**

**Article originally appeared in *Real Property*, the newsletter published by the North Carolina Bar Association’s Real Property Section. Reprinted with permission.**

**Satisfactions, Recordings, Re-recordings, Indexing and More  
Under the New North Carolina Mortgage Satisfaction Act  
(SL 2005-123, S734)  
By Nancy Short Ferguson**

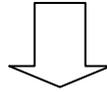
By enacting Session Law 2005-123, Senate Bill 734, signed by Gov. Easley on June 29, 2005, North Carolina became one of the first states to adopt a version of the Uniform Residential Mortgage Satisfaction Act promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Our North Carolina Act (the “Act”), however, applies to commercial as well as residential transactions, was organized to be integrated into the existing statutory framework of Chapter 45, and contains some related recording and indexing provisions affecting Registers of Deeds under Chapters 47 and 161 of the statutes. Otherwise, it remains substantially intact as the national act. (The N.C. Act is online at: [www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S734v5.html](http://www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S734v5.html), while the uniform act is available at [www.mortgagebankers.org/industry/docs/04/nccusl\\_urmsa-final.pdf](http://www.mortgagebankers.org/industry/docs/04/nccusl_urmsa-final.pdf)).

The creation of the uniform act involved prior publication of drafts to thousands of attorneys, lenders, software vendors, title insurers and others across the country; assimilation of thousands of e-mails, letters, faxes and phone calls amongst these parties; and, ultimately, a bill broad enough to encompass more than just a process to obtain a record satisfaction. Key elements include provisions for: a mandatory, reliable, and unconditional written payoff; a nondiscretionary penalty for failure to timely cancel (plus actual loss, court costs and attorneys’

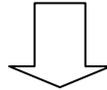
fees); simplified trustee's and secured creditor's satisfaction forms; the ability of a N.C. licensed attorney to serve as satisfaction agent to cancel the deed of trust (after due notice and with evidence of payment); change from certification to verification by the Registers of Deeds in order to record a document; and more stringent subsequent instrument indexing requirements.

The Act itself is overall quite simple. The cancellation process would basically be:

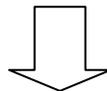
**Pre-closing:** Request payoff  
(Same method as always, but in writing)



**By closing:** Receipt of Lender's written payoff (within max. of 10 days)  
Mortgage / deed of trust specific



**At least 30 days post-closing:**  
Follow-up notice to lender that, if cancellation is not filed already or within next 30 days, statute provides for:  
(1) penalties, actual loss, costs or  
(2) self-help satisfaction or  
(3) both



**After more than 30 days following follow-up notice:**

If no objection by lender to self-help notice above, satisfaction agent is allowed to record affidavit of satisfaction ("self-help").  
If lender objects erroneously or has not yet canceled the mortgage / deed of trust, lender is liable for actual loss, costs, damages due to detrimental reliance and penalties attach if payment was made in reliance on written payoff statement.

This article should not be considered a substitute for a thorough reading of the Act itself. However, some of the key provisions of the Act are substantially as set forth below:

**Reliable unconditional payoff (G.S. 45-36.7 and 45-36.8):** Many of us have experienced either the lender's refusal to provide any type of payoff in writing or its providing a payoff so condition-laden that it is totally unreliable (e.g., subject to post-closing and post-payoff audit that may increase the balance substantially, or subject to the lender's decision to make a draw

from escrow without notice). RESPA requires the lender to provide a balance outstanding, a statement of account—within 30 days. 24 CFR 203.558. The UCC similarly provides for a “request for accounting” which allows at least 14 days. N.C.G.S. 25-9-210. The written payoff statement must be unconditional and, once payment is made in reliance, third parties relying upon the statement are entitled to a cancellation of the deed of trust, even if amounts are still owed by the borrower (who does remain personally liable). It must be a full payoff amount for the security interest requested, not just an account number. A lender may correct an erroneous payoff statement, but if not delivered to the closing agent prior to closing, the lender cannot claim the notice of correction as a basis for refusing to cancel the deed of trust. For situations involving pre-closing conditions, such as equity lines or revolving lines of credit, the lender must provide a contact from whom the closing attorney may obtain current valid final payoff information within 24 hours prior to closing. A borrower is entitled to one payoff statement without charge every 6 months and cannot be charged for correction of any previous error by the lender. A lender may, however, charge a fee of up to \$25 for subsequent statements requested within the 6-month period as well as reasonable costs for expedited delivery.

**Mandatory cancellation; nondiscretionary penalties (N.C.G.S. 45-36.9 *et seq.*):** If a deed of trust is not canceled of record within 30 days following closing, and the lender thereafter fails to cancel after an additional 30-day notice, the lender is automatically subject to a \$1,000 penalty, plus actual loss, court costs and attorneys’ fees incurred to pursue the cancellation. The only exception to this mandate is if the secured creditor had reasonable procedures in place, with which it complied, but was unable to obtain the satisfaction timely due to circumstances beyond its control. The uniform act’s official comments make it clear that such circumstances would not be internal problems such as a shortage of staff or a computer crash on the last day of compliance. Instead, such “circumstances” could include a hurricane inflicting severe damage or a several-day blackout affecting broad geographical territory. The \$1,000 penalty is non-assignable, but is available to the “landowner” defined in the act to include the owner at the time of the enforcement as the holders of the equity of redemption, including a subsequent purchaser trying to clear their record title. The penalty provision is not retroactive, however, and will apply only to payoffs made on or after 10/1/05. For payoffs made prior to that time, the previously existing statute, G.S. 45-36.3, will continue to apply.

**“Self-help” Satisfaction by N.C. licensed attorney as “satisfaction agent” (N.C.G.S. 45-36.13 *et seq.*):** In addition to the penalties and costs outlined above, if a deed of trust remains uncanceled more than 30 days following closing, a N.C. licensed attorney acting on behalf of the landowner may (but *is not required to*) [*serve as satisfaction agent. In that capacity, the attorney would*]also notify the lender that if the lender does not cancel the lien within 30 days following this follow-up notice, the attorney will do so, thereby invoking the new “self-help” satisfaction provision. Before exercising self-help cancellation, the landowner’s attorney must have “reasonable grounds” to believe that the lien has been paid in full. However, the attorney does not have to have been involved in the original closing in which the lien was paid. This self-help cancellation would constitute an additional professional service of the attorney, as with any other legal service. If the procedures outlined in the statute are followed and the lender does not file timely objection, the attorney is protected from liability even if the cancellation is eventually determined to be erroneous. If, upon receipt of the attorney’s notice, the lender timely objects to the cancellation, it does so at its own risk because if the objection is unfounded the lender is subject to penalties. Whether objection without good

cause or simply failing to cancel timely, the lender remains subject to the penalties and costs for failure to cancel outlined above as well. Most importantly, the satisfactory evidence of payment does not have to be a “reliable payoff statement” as provided earlier in the act in N.C.G.S. 45-36.7 (discussed above). In fact, a part of the basis for this particular provision was its availability to clear up old paid but uncanceled liens already cluttering the record. [NOTE CORRECTION FROM ORIGINAL ARTICLE IN FIRST & SECOND SENTENCE]

**Simplified “safe harbor” forms:** The act has modified G.S. 45-37(a) to provide for three (3) primary satisfaction forms under G.S. 45-37(a)(7):

[See **Exhibits B, C and D** attached as well as forms as set forth below]

\*\*\*\*\*

- (1) **Trustee’s Satisfaction** (adding G.S. 45-36.20, safe harbor form at G.S. 45-36.21, deleting G.S. 45-37(a)(1) & (5), replacing them with G.S. 45-37(a)(7)c.).

**“TRUSTEE’S SATISFACTION OF DEED OF TRUST  
(G.S. 45 36.20; G.S. 45 37(a)(7)c.)**

The undersigned is now serving as the trustee or substitute trustee under the terms of the deed of trust identified as follows:

Original Grantor(s): (Identify original grantor(s) or trustor(s))

Original Secured Party(ies): (Identify the original beneficiary(ies) or secured party(ies) in the deed of trust)

Recording Data: The deed of trust is recorded in Book \_\_\_\_\_ at Page \_\_\_\_\_ or as document number \_\_\_\_\_ in the office of the Register of Deeds for \_\_\_\_\_ County, North Carolina.

This satisfaction terminates the effectiveness of the deed of trust.

Date: \_\_\_\_\_

\_\_\_\_\_  
(Signature of trustee or substitute trustee)

[Acknowledgment before officer authorized to take acknowledgments]”

\*\*\*\*\*

(2) **Satisfaction by the Secured Creditor** (adding G.S. 45-36.10, safe harbor form at GS 45-36.11, deleting G.S. 45-37(a)(6), replacing it with G.S. 45-37(a)(7)a).

**“SATISFACTION OF SECURITY INSTRUMENT  
(G.S. 45 36.10; G.S. 45 37(a)(7)a.)**

The undersigned is now the secured creditor in the security instrument identified as follows:

Type of Security Instrument: (identify type of security instrument, such as deed of trust or mortgage)

Original Grantor(s): (Identify original grantor(s), trustor(s), or mortgagor(s))

Original Secured Party(ies): (Identify the original beneficiary(ies), mortgagee(s), or secured party(ies) in the security instrument)

Recording Data: The security instrument is recorded in Book \_\_\_\_\_ at Page \_\_\_\_\_ or as document number \_\_\_\_\_ in the office of the Register of Deeds for \_\_\_\_\_ County, North Carolina.

This satisfaction terminates the effectiveness of the security instrument.

Date: \_\_\_\_\_

\_\_\_\_\_  
(Signature of secured creditor)

[Acknowledgment before officer authorized to take acknowledgments].”

\*\*\*\*\*

(3) **Affidavit of Satisfaction by the Satisfaction Agent** (G.S. 45-36.13 *et seq.*)

**“AFFIDAVIT OF SATISFACTION  
(G.S. 45-36.16; G.S. 45-37(a)(7)b.)**

(Date of Affidavit)

The undersigned hereby states as follows:

1. I am an attorney licensed to practice law in the State of North Carolina.
2. I am signing this Affidavit of Satisfaction to evidence full payment or performance of the obligations secured by real property covered by the following security instrument (the “security instrument”) currently held by \_\_\_\_\_ (the “secured creditor”):

Type of security instrument:

Original parties to security instrument:

County and state of recording:

Recording data for security instrument:

3. I have reasonable grounds to believe that the secured creditor has received full payment or performance of the balance of the obligations secured by the security instrument.
4. With the authorization of the owner of the real property described in the security instrument, I gave notification to the secured creditor by method authorized by G.S. 45 36.5 that provides proof of receipt that I would sign and record an affidavit of satisfaction of the security instrument if, within 30 days after the effective date of the notification, the secured creditor did not submit a satisfaction of the security interest for recording or give notification that the secured obligation remains unsatisfied.

5. [Check appropriate box]

The 30 day period identified in paragraph 4 has elapsed, I have no knowledge that the secured creditor has submitted a satisfaction for recording, and I have not received notification that the secured obligation remains unsatisfied.

The secured creditor responded to the notification in paragraph 4 by authorizing me to execute and record this Affidavit of Satisfaction.

\_\_\_\_\_  
(Signature of Satisfaction Agent)

[Acknowledgment before officer authorized to take acknowledgments]”

\*\*\*\*\*

Though the existing Notice of Satisfaction by trustee or mortgagee (G.S. 47-46.1) and Certificate of Satisfaction by deed of trust beneficiary (G.S. 47-46.2) will still be sufficient to comply, they are more detailed than the new, more streamlined, more nationally consistent forms. Ultimately, the Affidavit of Lost Note (G.S. 47-46.3) will not be required at all in the future. Whichever form is used will be recorded and indexed as any other subsequent instrument (below), including a cross-index reference to the book and page referenced in the satisfaction document itself.

When combined with the simplified notary acknowledgment form under new G.S. 10B-26(a) which takes effect 12/1/05 under Senate Bill 671 ([www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S671v6.html](http://www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S671v6.html)), the rejection rate for cancellations should be reduced significantly as well. Lenders will have increasing incentive to clear titles of their paid liens, a lower expense for generating the satisfactions, and a higher cost for failing to do so.

**Rescission of Erroneous Satisfaction (N.C.G.S. 45-36.6):** If a deed of trust is erroneously canceled of record, a document of rescission can be filed by either the secured creditor or the person who recorded the erroneous cancellation. However, this reinstatement of the security interest will not affect the rights of intervening lien creditors and purchasers for value. This provision is consistent with case law in North Carolina. See **G.E. Capital Mortg. Servs., Inc. v. Neely**, 135 N.C. App. 187; 519 S.E.2d 553 (1999).

**Record of Satisfaction or Filing of Satisfaction (N.C.G.S. 45-37.2):** Under the N.C. Act, the register of deeds will simply file any of the satisfaction forms above, cross-indexing them as a subsequent instrument (see below), without review of the prior instrument itself. This should reduce the delays and the number of “technical” rejections for matters such as variations in middle name or initials, etc. For the existing cancellations by original presentation, 10-year-old obligations, and bearer instruments under N.C.G.S. 45-37.2(a)(2), (3) and (4), the register will enter a record of satisfaction, again indexed as a subsequent instrument (below). Of course, recording is not and never has been a guarantee of the validity of the document for its intended purpose, as attorneys are well aware!

**Verification versus Certification by the Registers of Deeds (N.C.G.S. 47-14):** Upon presentation of documents to the registers for recording after 10/1/05, they will no longer be responsible for approving (“certifying” to) the *form* of the notary acknowledgment. They will review to verify that “the execution of the instrument by one or more signers appears to have been proved or acknowledged before an officer with the apparent authority to take proofs or acknowledgements, and the said proof or acknowledgement includes the officer’s signature, commission expiration date, and official seal, if required.” The certification process has always been rather inconsistently followed, with some counties extremely restrictive and others more laissez faire. The adequacy of notary acknowledgments has always been a risk for attorneys not cautiously reviewing all documents in their chain of title, and will continue to be so. Under the new Act, as in the past, if a deed was incorrectly signed or notarized, it is invalid as record notice as to the party whose signature or notary acknowledgment was defective, even if recorded. (Again, recording is not and never has been a guarantee of the validity of the document for its intended purpose!)

**Subsequent Instruments Cross-indexing and Re-recording (N.C.G.S. 47-14 and 161-14.1):**

A longer list of subsequent instruments (i.e., those referencing previously recorded instruments) is set forth in new N.C.G.S. 161-14.1(a)(3). These instruments must be indexed in the names of the parties to the subsequent instrument, in the names of parties the subsequent instrument indicates to be parties to the original instrument and must include a cross-index reference to the book and page of the prior instrument as shown in the first 2 pages of the subsequent instrument. “The register of deeds is expressly authorized to rely solely on the information contained in the subsequent instrument, including, but not limited to, the names of the original parties to the original instrument and the recording data for the original instrument.” In the past, county registers had been inconsistent in this indexing and the statute was less than comprehensive in its approach. For example, assignments of deeds of trust were often not cross-indexed to the book and page of the deed of trust itself and were virtually unlocatable to title examiners relying on the public records.

**Re-recordings (N.C.G.S. 47-14):** In addition, re-recordings of an original document, even if no changes (such as re-recordings to place a deed of trust appropriately in the chain of title after a correction deed), were inconsistently treated, with some registers accepting them, some requiring a separate explanation statement from the drafting attorney (if available) erroneously relying on N.C.G.S. 47-36.1 and some requiring a statement on the front page explaining the reason for the re-recording. Pursuant to N.C.G.S. 47-14, as revised, “Any document previously recorded or any certified copy of any document previously recorded may be rerecorded, regardless of whether it is being rerecorded pursuant to G.S. 47 36.1. The register of deeds shall not be required to verify or make inquiry concerning (i) the legal sufficiency of any proof or acknowledgement, (ii) the authority of any officer who took a proof or acknowledgement, or (iii) the legal sufficiency of any document presented for registration.” This amendment does not change the provisions of N.C.G.S. 47-36.1 which continue to be applicable in cases of minor corrections by the attorney drafter (a subject of serious concern, but not addressed in this act.)

**Conclusion and References:** As always, an overview article such as this one is no substitute for reading the Act’s provisions or the views of others who will be administering its provisions. So, for further information, attorneys should consult and carefully review:

*Land Records Bulletin*, Number 31, September 2005, by Charles Szypszak, editor, discussing these changes in detail from the perspective of the Registers of Deeds, can be ordered online from the UNC School of Government at: <http://php.unc.edu/sogcart/singlebook.php?id=901>

**III. Simultaneous Recording Priority (G.S. 47-18 and G.S. 47-20)**

Previous changes have been clarified, effective only for instruments recorded on or after (and not the subject of litigation as of) October 1, 2003. This provision will presumably *not* be made retroactive. The key provisions (only) of the statutes, as rewritten, are as follows:

**§ 47-18. Conveyances, contracts to convey, options and leases of land**

(a) No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer or lesser but from the time of registration thereof in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county. Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration, and (ii) if instruments are registered simultaneously, then the instruments shall be presumed to have priority as determined by:

- (1) The earliest document number set forth on the registered instrument.
- (2) The sequential book and page number set forth on the registered instrument if no document number is set forth on the registered instrument.

The presumption created by this subsection is rebuttable.

**§ 47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration**

(a) No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article; provided however that any transaction subject to the provisions of the Uniform Commercial Code (Chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section. Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration, and (ii) if instruments are registered simultaneously, then the instruments shall be presumed to have priority as determined by:

- (1) The earliest document number set forth on the registered instrument.
- (2) The sequential book and page number set forth on the registered instrument if no document number is set forth on the registered instrument.

The presumption created by this subsection is rebuttable.

#### **IV. Subordinations (G.S. 39-6.6)**

Effective for all types of subordinations (deeds of trust, leases, etc.), prospectively and retroactively, which were not the subject of litigation as of 10/1/03, N.C.G.S. 39-6.6 provides as follows:

##### **§ 39-6.6. Subordination agreements**

(a) A subordination agreement shall be given effect in accordance with its terms and is not required to state any interest rate, principal amount secured, or other financial terms.

(b) The trustee of a deed of trust shall not be a necessary party to a subordination agreement unless the deed of trust provides otherwise.

(c) For purposes of G.S. 1-47, a subordination agreement is deemed a conveyance of an interest in real property.

(d) This section is not exclusive. No subordination agreement that is otherwise valid shall be invalidated by this section.

(e) This section applies to a subordination agreement regardless of when the agreement was signed by the party or parties thereto, except that this section does not apply to an agreement that (i) is the subject of litigation pending on the effective date of this subsection, and (ii) was filed or recorded before October 1, 2003.

(f) In this section:

(1) "Interest in real property" includes all rights, title, and interest in and to land, buildings, and other improvements of an owner, tenant, subtenant, secured lender, materialman, judgment creditor, lienholder, or other person, whether the interest in real property is evidenced by a deed, easement, lease, sublease, deed of trust, mortgage, assignment of leases and rents, judgment, claim of lien, or any other record, instrument, document, or entry of court.

(2) "Subordination agreement" means a written commitment or agreement to subordinate or that subordinates an interest in real property signed by a person entitled to priority.

## **V. Tax Certifications Prior to Recording (G.S. 161-31)**

This statute has been expanded and provides as follows:

### **§ 161-31. Tax certification**

(a) Tax Certification. -- The board of commissioners of a county may, by resolution, require the register of deeds not to accept any deed transferring real property for registration unless the county tax collector has certified that no delinquent ad valorem county taxes, ad valorem municipal taxes, or other taxes with which the collector is charged are a lien on the property described in the deed. The county commissioners may describe the form the certification must take in its resolution.

(a1) Exception to Tax Certification. -- If a board of county commissioners adopts a resolution pursuant to subsection (a) of this section, notwithstanding the resolution, the register of deeds shall accept without certification a deed submitted for registration under the supervision of a closing attorney and containing this statement on the deed: "This instrument prepared by: \_\_\_\_\_, a licensed North Carolina attorney. Delinquent taxes, if any, to be paid by the closing attorney to the county tax collector upon disbursement of closing proceeds."

(b) Applicability. -- This section applies only to Anson, Beaufort, Bertie, Cabarrus, Camden, Carteret, Cherokee, Chowan, Clay, Cleveland, Currituck, Davidson, Duplin, Durham, Edgecombe, Forsyth, Gaston, Gates, Graham, Granville, Halifax, Harnett, Haywood, Henderson, Hertford, Hyde, Iredell, Jackson, Johnston, Lee, Lenoir, Macon, Madison, Martin, Montgomery, Nash, Northampton, Onslow, Pasquotank, Pender, Perquimans, Person, Pitt, Polk, Robeson, Rockingham, Rowan, Rutherford, Stanly, Surry, Swain, Transylvania, Vance, Warren, Washington, Wilson, and Yadkin Counties.

## **VI. Powers of Attorney (G.S. 32A-40 et seq.)**

This statute expands the authority for and protection of third parties relying upon a power of attorney for which no termination is recorded in the appropriate county. It includes key authority provisions in G.S. 32A-40 (a), (b) and (c), and a form in G.S. 32A-40(d) (set out in attached **Exhibit E**), penalties for unreasonable refusal to recognize the power under G.S. 32A-41 and protection for third parties in G.S. 32A-42. (These provisions were recodified by the Revisor of Statutes and the references below are the statutes rather than the Session Law.) The key provisions are set forth below:

### **§ 32A-40. Reliance on power of attorney**

(a) Unless (i) a person has actual knowledge that a writing is not a valid power of attorney, or (ii) the action taken or to be taken by a person named as attorney-in-fact in a writing that purports to confer a power of attorney is beyond the apparent

power or authority of that named attorney-in-fact as granted in that writing, a person who in good faith relies on a writing that on its face is duly signed, acknowledged, and otherwise appears regular, and that purports to confer a power of attorney, durable or otherwise, shall be protected to the full extent of the powers and authority that reasonably appear to be granted to the attorney-in-fact designated in that writing, and no person so dealing in good faith with that named attorney-in-fact shall be held responsible for any breach of fiduciary duty by that attorney-in-fact, including any breach of loyalty, any act of self-dealing, or any misapplication of money or other property paid or transferred as directed by that attorney-in-fact. This subsection applies without regard to whether or not the person dealing with the attorney-in-fact demands or receives an affidavit under subsection (b) of this section. A person who conducts activities through employees or other agents has actual knowledge of a fact involving a power of attorney only from the time the information was received by an employee or agent having the authority to approve the power of attorney presented.

(b) A person may, prior to acceptance of the authority of the attorney-in-fact or at any other time, request an affidavit executed by the attorney-in-fact to the effect that the attorney-in-fact did not have, at the time of the presentation to the person of the writing purporting to confer a power of attorney, actual knowledge of either (i) the revocation of the power of attorney, or (ii) facts that would cause the attorney-in-fact to question the authenticity or validity of the power of attorney. An affidavit meeting the requirements of this subsection shall be sufficient proof to the requesting person, as of the date of the affidavit, of (i) the nonrevocation of the power of attorney, and (ii) the authenticity and validity of the power of attorney. If the exercise of the power of attorney requires execution and delivery of an instrument that is recordable, the affidavit shall be prepared so as to be recordable. An affidavit prepared under this subsection may also be used as an affidavit under G.S. 32A-13(c). An affidavit in the form described in subsection (d) of this section shall be deemed to meet the requirements of this subsection but shall not be the sole means of meeting those requirements.

(c) This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than an express revocation or a change in the principal's capacity.

. . . [Form is attached in **Exhibit E**]

#### **§ 32A-41. Penalty for unreasonable refusal to recognize power**

(a) A person dealing with an attorney-in-fact who unreasonably refuses to accept a power of attorney shall be subject to all of the following:

(1) Liability for reasonable attorneys' fees and costs incurred in any action or proceeding necessary to confirm the validity of a power of attorney or to implement a power of attorney.

(2) An order of the court requiring acceptance of the valid power of attorney.

(3) Any other remedy available under applicable law.

(b) Acceptance of a power of attorney shall mean (i) acknowledging the validity and authenticity of the document, and (ii) allowing the attorney-in-fact to conduct business in accordance with the powers that reasonably appear to be granted in the document.

**§ 32A-42. Protection for third parties**

(a) A person is not required to honor the attorney-in-fact's authority or to conduct business with the attorney-in-fact if the person is not otherwise required to conduct business with the principal in the same circumstances.

(b) Without limiting the generality of subsection (a) of this section, nothing in this Article requires a person to do any of the following:

(1) Engage in any transaction with an attorney-in-fact if the attorney-in-fact has previously breached any agreement with the person, whether in an individual or fiduciary capacity.

(2) Open an account for a principal at the request of an attorney-in-fact if the principal is not currently a customer of the person.

(3) Make a loan to the principal at the request of the attorney-in-fact.

(c) A person who is presented with a power of attorney shall not be deemed to have unreasonably refused to accept the power of attorney solely on the basis of failure to accept the power of attorney within seven business days.

(d) A person who has reasonable cause to question the authenticity or validity of a power of attorney may refuse to accept the authority granted by that document.

(e) A person who promptly requests, and does not within a reasonable time receive, an affidavit as described in G.S. 32A-40(b), is not deemed under G.S. 32A-41 to have unreasonably refused to accept a power of attorney.

(f) The principal, the attorney-in-fact, or a person presented with a power of attorney may initiate a special proceeding in accordance with the procedures of Article 33 of Chapter 1 of the General Statutes to request a determination of the validity of the power of attorney. If the decision in that special proceeding is that reasonable cause to refuse to accept the power of attorney existed, and that the attorney-in-fact willfully misrepresented the authenticity or validity of the power of attorney, the attorney-in-fact, and not the principal, is liable for reasonable attorneys' fees and costs incurred in that action.

(g) Nothing in this Article requires a person who accepts a power of attorney to permit an attorney-in-fact to conduct business not authorized by the terms of the power of attorney.

(h) Nothing in this Article amends or modifies the rights of banks and other depository institutions to terminate any deposit account in accordance with applicable law.

## **VII. Uniform Trust Code**

This is a very long and detailed statute, having been discussed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and again reviewed and discussed in detail by the Estate Planning and Probate Section of the North Carolina Bar Association, for several years. Key provisions that will affect real estate transactions include the following:

- Nonjudicial Settlement Agreement (G.S. 36C-1-111)
- Representation of minors and contingent beneficiaries (G.S. 36C-3-303)
- Termination or Modification of Trust (G.S. 36C-4-411)
- Oral trusts recognized only on clear and convincing evidence (G.S. 36C-4-907)
- Title should be conveyed to and vest in trustee (G.S. 36C-4-401)
- Presumption of *revocability* for any trust created on or after 1/1/06 (G.S. 36C-6-602)
- Expanded powers to sell or mortgage real property (G.S. 36C-8-815 & -816)
- Expanded authority to pledge trust property as security for debts of grantor of revocable trust (G.S. 36C-8-808 & -603)
- Conflicts of interest (G.S. 36C-8-802)
- Beneficiary ratification (G.S. 36C-10-1009)
- Protection for Reliance on Trustee in good faith (G.S. 36C-10-1012)
- Certification of Trustee vs. Copies of Trust Agreement (G.S. 36C-10-1013)

The Certificate of Trust provisions are very broad, leaving much room for discretion in information to be incorporated or recited, as set forth below. Attorneys would be well-advised to obtain the Certificate regularly and even to record it, as record evidence for purposes of marketability, authority and reliance.

### **§ 36C-10-1013. Certification of trust**

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

- (1) The existence of the trust and the date the trust instrument was executed;
- (2) The identity of the settlor, unless withheld under a provision in the trust instrument;
- (3) The identity and address of the currently acting trustee;
- (4) The powers of the trustee;
- (5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
- (7) The trust's taxpayer identification number; and
- (8) The manner of taking title to trust property.

(b) Any trustee may sign or otherwise authenticate a certification of trust.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that the person relying upon the certification holds a copy of all or part of the trust instrument.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

(j) In transactions involving real property, a person who acts in reliance upon a certification of trust may require that the certification of trust be executed and acknowledged in a manner that will permit its registration in the office of the register of deeds in the county where the real property is located. The certification of trust need not contain the trust's taxpayer identification number if that taxpayer identification number is also the social security number of a grantor. However, the trust's taxpayer identification number shall be certified by the trustee to the person acting in reliance upon the certification of trust in a manner reasonably satisfactory to that person.

In addition, a few technical corrections are being considered by the 2007 Legislature, proposed by the NC Bar Association Estate Planning Section, on-line at <http://www.ncbar.org/download/governmentalAffairs/explanationOfTechnicalCorrectionsToChapter36C.pdf>

## VIII. Co-Executors of Estate (G.S. 28A-13-6)

Effective January 1, 2006, Session Law 2005-192 has amended the above statute as follows:

### "§ 28A-13-6. Exercise of powers of joint personal representatives by one or more than one.

~~(a) As used in this section, the term "personal representatives" includes testamentary trustees.~~

(b) If a will expressly makes provision for the execution of any of the powers of personal representatives by all of them or by any one or more of them, the provisions of the will govern.

~~(c) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives may be exercised by any designated one or more of them:~~

- ~~(1) Open bank accounts and draw checks thereon;~~
- ~~(2) Subject to the provisions of G.S. 105-24, enter any safe deposit box of the deceased or any safe deposit box rented by the personal representative or representatives;~~
- ~~(3) Employ attorneys and accountants;~~
- ~~(4) List property for taxes and prepare and file State, municipal and county tax returns;~~
- ~~(5) Collect claims and debts due the estate and give receipts therefor;~~
- ~~(6) Pay claims against and debts of the estate;~~
- ~~(7) Compromise claims in favor of or against the estate;~~
- ~~(8) Have custody of property of the estate.~~

(c1) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which the personal representatives qualified, provide that any designated one or more of the personal representatives may exercise one or more of the following powers:

- (1) Establish and maintain bank accounts for the trust and issue checks for the estate.
- (2) Maintain inventories, accountings, and income and expense records of the estate.
- (3) Enter any safety deposit box rented by the estate.
- (4) Employ persons as advisors or assistants in the performance of administrative duties, including agents, attorneys, accountants, brokers, appraisers, and custodians.
- (5) List estate property for taxes and prepare and file tax returns for the trust.
- (6) Collect and give receipts for claims and debts of the estate.
- (7) Pay debts, claims, costs of administration, and taxes of the estate.
- (8) Compromise, adjust, or otherwise settle any claim by or against the trust and release, in whole or in part, a claim belonging to the estate.
- (9) Have custody of the estate property.
- (10) Perform any function relating to investment of estate assets.

(d) Subject to subsection (b) of this section, if two or more personal representatives own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

- (1) If only one votes, in person or by proxy, ~~his~~ that personal representative's act binds all;
- (2) If more than one vote, in person or by proxy, the act of the majority so voting binds all;
- (3) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately.

(e) Subject to ~~the provisions of~~ subsections (b), ~~(e)~~ (c1), and (d) of this section, all other acts and duties must be performed by both of the personal representatives if there are two, and by a majority of them if there are more than two. No personal representative who has not joined in exercising a power shall be liable for the consequences of such exercise, nor shall a dissenting personal representative be liable for the consequences of an act in which ~~he~~ the personal representative joins at the direction of the majority of the personal representatives, if ~~he~~ that personal representative expressed his or her dissent in writing to any other personal representative at or before the time of such joinder.

(f) No personal representative shall be relieved of liability on his or her bond or otherwise by entering into any agreement under this section."

## **IX. Mechanics' Lien Law Revisions / Clarifications**

These were primarily aimed at clarifying subcontractor lien titles, methods of evidencing liens in local county records, bonding and prorations among competing claimants for insufficient funds. Because of its importance to Real Property practitioners, Session Law 2005-229 is set forth below in its entirety:

### **AN ACT TO REVISE THE STATUTES THAT ADDRESS STATUTORY LIENS ON REAL PROPERTY.**

The General Assembly of North Carolina enacts:

**SECTION 1.** Article 2 of Chapter 44A of the General Statutes reads as rewritten:

"Article 2.

"Statutory Liens on Real Property.

"Part 1. Liens of Mechanics, ~~Laborers~~ Laborers, and Materialmen Dealing with Owner.

#### **"§ 44A-7. Definitions.**

Unless the context otherwise requires in this Article:

- (1) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such

improvements, and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapter 83A, 89A or 89C of the General Statutes, and rental of equipment directly utilized on the real property in making the improvement.

- (2) "Improvement" means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.
- (3) An "owner" is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. "Owner" includes successors in interest of the owner and agents of the owner acting within their authority.
- (4) "Real property" means the real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon.

**"§ 44A-8. Mechanics', laborers'-laborers', and materialmen's lien; persons entitled to lien-claim of lien on real property.**

Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on such-the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to such-the contract.

**"§ 44A-9. Extent of lien-claim of lien on real property.**

~~Liens-A~~ claim of lien on real property authorized under ~~the provisions of~~ this Article shall extend to the improvement and to the lot or tract on which the improvement is situated, to the extent of the interest of the owner. When the lot or tract on which a building is erected is not surrounded at the time of making the contract with the owner by an enclosure separating it from adjoining land of the same owner, the lot or tract to which any claim of lien on real property extends shall be such-the area as ~~that~~ is reasonably necessary for the convenient use and occupation of such-the building, but in no case shall the area include a building, structure, or improvement not normally used or occupied or intended to be used or occupied with the building with respect to which the claim of lien on real property is claimed.

**"§ 44A-10. Effective date of liens-claim of lien on real property.**

~~Liens-A~~ claim of lien on real property granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the lien-claim of lien on real property.

**"§ 44A-11. Perfecting liens-claim of lien on real property.**

~~Liens-A~~ claim of lien on real property granted by this Article shall be perfected as of the time ~~set forth-provided~~ in G.S. 44A-10 upon the filing of the claim of lien on real property pursuant to-under G.S. 44A-12 and may be enforced pursuant to G.S. 44A-13.

**"§ 44A-12. Filing claim of lien-lien on real property.**

(a) Place of Filing. – All claims of lien ~~against any-on~~ real property must be filed in the office of the clerk of superior court in each county ~~wherein-where~~ the real property subject to the claim of lien on real property is located. The clerk of superior court shall note the claim of lien on real property on the judgment docket and index the same under the name

of the record owner of the real property at the time the claim of lien on real property is filed. An additional copy of the claim of lien on real property may also be filed with any receiver, referee in bankruptcy or assignee for benefit of creditors who obtains legal authority over the real property.

(b) Time of Filing. – Claims of lien on real property may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

(c) Contents of Claim of Lien on Real Property to Be Filed. – All claims of lien on real property must be filed using a form substantially as follows:

#### CLAIM OF LIEN ON REAL PROPERTY

- (1) Name and address of the person claiming the ~~lien~~: claim of lien on real property:
- (2) Name and address of the record owner of the real property claimed to be subject to the claim of lien on real property at the time the claim of lien on real property is filed:
- (3) Description of the real property upon which the claim of lien on real property is claimed: (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)
- (4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:
- (5) Date upon which labor or materials were first furnished upon said property by the claimant:
- (5a) Date upon which labor or materials were last furnished upon said property by the claimant:
- (6) General description of the labor performed or materials furnished and the amount claimed therefor:

\_\_\_\_\_  
Lien Claimant

Filed this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

\_\_\_\_\_  
Clerk of Superior Court

A general description of the labor performed or materials furnished is sufficient. It is not necessary for lien claimant to file an itemized list of materials or a detailed statement of labor performed.

(d) No Amendment of Claim of ~~Lien~~: Lien on Real Property. – A claim of lien on real property may not be amended. A claim of lien on real property may be cancelled by a claimant or ~~his~~ the claimant's authorized agent or attorney and a new claim of lien on real property substituted therefor within the time herein provided for original filing.

(e) Notice of Assignment of Claim of ~~Lien~~: Lien on Real Property. – When a claim of lien on real property has been filed, it may be assigned of record by the lien claimant in a writing filed with the clerk of superior court who shall note ~~said~~ the assignment in the margin of the judgment docket containing the claim of ~~lien~~: lien on real property. Thereafter the assignee becomes the lien claimant of record.

(f) ~~Waiver of Right to File, File, Serve, or Claim Liens as Consideration for Contract Against Public Policy.~~ – An agreement to waive the right to file a claim of lien on real property granted under this Part, or claim an agreement to waive the right to serve a notice of claim of lien upon funds granted under Part 2 of this Article, which agreement is in anticipation of and in consideration for the awarding of any contract, either expressed or implied, for the making of an improvement upon real property under this Article is against public policy and is unenforceable. This section does not prohibit subordination or release of a lien granted under this Part or Part 2 of this Article.

**"§ 44A-12.1. No docketing of lien unless authorized by statute.**

(a) The clerk of superior court shall not index, docket, or record a claim of lien on real property or other document purporting to claim or assert a lien on real property in such a way as to affect the title to any real property unless the document:

- (1) Is offered for filing under this Article or another statute that provides for indexing and docketing of claims of lien on real property; and
- (2) Appears on its face to contain all of the information required by the statute under which it is offered for filing.

(b) The clerk may accept, for filing only, any document that does not meet the criteria established for indexing, docketing, or recording under subsection (a) of this section. If the clerk does accept this document, the clerk shall inform the person offering the document that it will not be indexed, docketed, or recorded in any way as to affect the title to any real property.

(c) Any person who causes or attempts to cause a claim of lien on real property or other document to be filed, knowing that the filing is not authorized by statute, or with the intent that the filing is made for an improper purpose such as to hinder, harass, or otherwise wrongfully interfere with any person, shall be guilty of a Class 1 misdemeanor.

(d) A claim of lien on real property, a claim of lien on real property with a notice of claim of lien upon funds attached thereto, or other document purporting to claim or assert a lien on real property that is filed by an attorney licensed in the State of North Carolina and that otherwise complies with subsection (a) of this section shall not be rejected by the clerk of superior court for indexing, docketing, recording, or filing.

**"§ 44A-13. Action to enforce ~~lien.~~ claim of lien on real property.**

(a) ~~Where and When Action Instituted. Commenced.~~ – An action to enforce ~~the a claim of lien created by this Article on real property~~ may be ~~instituted commenced~~ in any county ~~in which the lien is filed. where venue is otherwise proper.~~ No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the ~~lien.~~ claim of lien on real property. If the title to the real property against which the claim of lien on real property is asserted is by law vested in a receiver or ~~trustee in bankruptcy,~~ is subject to the control of the bankruptcy court, the claim of lien on real property shall be enforced in accordance with the orders of the court having jurisdiction over said real property. The filing of a proof of claim with a receiver or in bankruptcy and the filing of a notice of lis pendens in each county where the real property subject to the claim of lien on real property is located within the time required by this section satisfies the requirement for the commencement of a civil action.

(b) Judgment. ~~— Judgment~~ A judgment enforcing a lien under this Article may be entered for the principal amount shown to be due, not exceeding the principal amount stated in the claim of lien enforced thereby. The judgment shall direct a sale of the real property subject to the lien thereby enforced.

(c) Notice of Action. —~~Unless the action enforcing the lien created by this Article is instituted in the county in which the lien is filed, in~~ In order for the sale under the provisions of G.S. 44A-14(a) to pass all title and interest of the owner to the purchaser good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the site of the improvement by the person claiming the ~~lien~~, claim of lien on real property, a notice of lis pendens shall be filed in each county in which the real property subject to the claim of lien on real property is located ~~except within 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.~~ It shall not be necessary to file a notice of lis pendens in the county in which the action enforcing the lien is commenced in order for the judgment entered therein and the sale declared thereby to carry with it the priorities set forth in G.S. 44A-14(a). If neither an action nor a commenced. The notice of lis pendens is ~~shall be filed in each county in which the real property subject to the lien is located within 180 days after the~~ time provided in subsection (a) last furnishing of this section for labor or materials at the site commencement of the action improvement by the person claiming the lien, as to real property claimed to be subject to the lien in such counties where the lien claimant. If neither an action was ~~neither commenced nor a notice of lis pendens filed,~~ is filed in accordance with this section, the judgment entered in the action enforcing the claim of lien on real property shall not direct a sale of the real property subject to the claim of lien on real property enforced thereby nor be entitled to any priority under the provisions of G.S. 44A-14(a), but shall be entitled only to those priorities accorded by law to money judgments.

**"§ 44A-14. Sale of property in satisfaction of judgment enforcing claim of lien on real property or upon order prior to judgment; distribution of proceeds.**

(a) Execution Sale; Effect of Sale. – Except as provided in subsection (b) of this section, sales under this Article and distribution of proceeds thereof shall be made in accordance with the execution sale provisions set out in G.S. 1-339.41 through 1-339.76. The sale of real property to satisfy a claim of lien on real property granted by this Article shall pass all title and interest of the owner to the purchaser, good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the site of the improvement by the person claiming a lien.

(b) Sale of Property upon Order Prior to Judgment. – A resident judge of superior court in the district in which the action to enforce the claim of lien on real property is pending, a judge regularly holding the superior courts of the said district, any judge holding a session of superior court, either civil or criminal, in the said district, a special judge of superior court residing in the said district, or the chief judge of the district court in which the action to enforce the claim of lien on real property is pending, may, upon notice to all interested parties and after a hearing thereupon and upon a finding that a sale prior to judgment is necessary to prevent substantial waste, destruction, depreciation or other damage to said real property prior to the final determination of said action, order any real property against which a claim of lien on real property under this Article is asserted, sold in any manner determined by said judge to be commercially reasonable. The rights of all parties shall be transferred to the proceeds of the sale. Application for such order and further proceedings thereon may be heard in or out of session.

**"§ 44A-15. Attachment available to lien claimant.**

In addition to other grounds for attachment, in all cases where the owner removes or attempts or threatens to remove an improvement from real property subject to a claim of lien on real property under this Article, without the written permission of the lien claimant or

with the intent to deprive the lien claimant of his ~~lien~~, or her claim of lien on real property, the remedy of attachment of the property subject to the claim of lien on real property shall be available to the lien claimant or any other person.

**"§ 44A-16. Discharge of record ~~lien~~-claim of lien on real property.**

Any claim of lien on real property filed under this Article may be discharged by any of the following methods:

(1) The lien claimant of record, ~~his~~-~~the claimant's~~ agent or attorney, in the presence of the clerk of superior court may acknowledge the satisfaction of the claim of lien on real property indebtedness, whereupon the clerk of superior court shall forthwith make upon the record of such claim of lien on real property an entry of such acknowledgment of satisfaction, which shall be signed by the lien claimant of record, ~~his~~-~~the claimant's~~ agent or attorney, and witnessed by the clerk of superior court.

(2) The owner may exhibit an instrument of satisfaction signed and acknowledged by the lien claimant of record which instrument states that the claim of lien on real property indebtedness has been paid or satisfied, whereupon the clerk of superior court shall cancel the claim of lien on real property by entry of satisfaction on the record of such ~~lien~~-claim of lien on real property.

(3) By failure to enforce the claim of lien on real property within the time prescribed in this Article.

(4) By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction showing that the action by the claimant to enforce the claim of lien on real property has been dismissed or finally determined adversely to the claimant.

(5) Whenever a sum equal to the amount of the claim or claims of lien ~~or liens~~ on real property claimed is deposited with the clerk of court, to be applied to the payment finally determined to be due, whereupon the clerk of superior court shall cancel the claim or claims of lien on real property or ~~liens~~-claims of lien on real property of record.

(6) Whenever a corporate surety bond, in a sum equal to one and one-fourth times the amount of the ~~lien~~-claim or ~~liens~~-claims of lien on real property claimed and conditioned upon the payment of the amount finally determined to be due in satisfaction of said claim or claims of lien ~~or liens~~, on real property, is deposited with the clerk of court, whereupon the clerk of superior court shall cancel the claim or claims of lien on real property ~~or liens~~ of record.

"Part 2. Liens of Mechanics, ~~Laborers~~-Laborers, and Materialmen Dealing with One Other Than Owner.

**"§ 44A-17. Definitions.**

Unless the context otherwise requires in this Article:

- (1) "Contractor" means a person who contracts with an owner to improve real property.
- (2) "First tier subcontractor" means a person who contracts with a contractor to improve real property.
- (3) "Obligor" means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other's partial or total performance of a contract to improve real property.
- (4) "Second tier subcontractor" means a person who contracts with a first tier subcontractor to improve real property.

(5) "Third tier subcontractor" means a person who contracts with a second tier subcontractor to improve real property.

**"§ 44A-18. Grant of ~~lien~~; lien upon funds; subrogation; perfection.**

Upon compliance with this Article:

(1) A first tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which that~~ are owed to the contractor with whom the first tier subcontractor dealt and ~~which that~~ arise out of the improvement on which the first tier subcontractor worked or furnished materials.

(2) A second tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which that~~ are owed to the first tier subcontractor with whom the second tier subcontractor dealt and ~~which that~~ arise out of the improvement on which the second tier subcontractor worked or furnished materials. A second tier subcontractor, to the extent of ~~his the second tier subcontractor's~~ lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the first tier subcontractor with whom ~~he the second tier contractor~~ dealt provided for in subdivision (1) of this section and shall be entitled to perfect it by notice of claim of lien upon funds to the extent of ~~his the~~ claim.

(3) A third tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which that~~ are owed to the second tier subcontractor with whom the third tier subcontractor dealt and ~~which that~~ arise out of the improvement on which the third tier subcontractor worked or furnished materials. A third tier subcontractor, to the extent of ~~his the third tier subcontractor's~~ lien upon funds provided in this subdivision, shall also be entitled to be subrogated to the lien upon funds of the second tier subcontractor with whom ~~he the third tier contractor~~ dealt and to the lien upon funds of the first tier subcontractor with whom the second tier subcontractor dealt to the extent that the second tier subcontractor is entitled to be subrogated thereto, and in either case shall be entitled to perfect the same by notice of claim of lien upon funds to the extent of ~~his the~~ claim.

(4) Subcontractors more remote than the third tier who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds ~~which that~~ are owed to the person with whom they dealt and ~~which that~~ arise out of the improvement on which they furnished labor, materials, or rental equipment, but such remote tier subcontractor shall not be entitled to subrogation to the rights of other persons.

(5) The liens upon funds granted under this section shall secure amounts earned by the lien claimant as a result of ~~his~~ having furnished labor, materials, or rental equipment at the site of the improvement under the contract to improve real property, including interest at the legal rate provided in G.S. 24-5, whether or not such amounts are due and whether or not performance or delivery is complete. In the event insufficient funds are retained to satisfy all lien claimants, subcontractor lien claimants may recover the interest due under this subdivision on a pro rata basis, but in no event shall interest due under this subdivision increase the liability of the obligor under G.S. 44A-20.

(6) A lien upon funds granted under this section is perfected upon the giving of notice of claim of lien upon funds in writing to the obligor as provided in G.S. 44A-19 and shall be effective upon the obligor's receipt of the notice. The subrogation rights of a first, second, or third tier subcontractor to the claim of lien on real property of the contractor created by Part 1 of Article 2 of this Chapter are perfected as provided in G.S. 44A-23.

**"§ 44A-19. Notice to obligor of claim of lien upon funds.**

(a) Notice of a claim of lien upon funds shall set ~~forth~~forth all of the following information:

- (1) The name and address of the person claiming the ~~lien~~lien upon funds.
- (2) A general description of the real property ~~improved~~improved.
- (3) The name and address of the person with whom the lien claimant contracted to improve real ~~property~~property.
- (4) The name and address of each person against or through whom subrogation rights are ~~claimed~~claimed.
- (5) A general description of the contract and the person against whose interest the lien upon funds is ~~claimed~~and claimed.
- (6) The amount of the lien upon funds claimed by the lien claimant under ~~his~~the contract.

(b) All notices of claims of liens upon funds by first, ~~second~~second, or third tier subcontractors must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN UPON FUNDS BY  
FIRST, ~~SECOND~~SECOND, OR THIRD TIER SUBCONTRACTOR

To:

1. \_\_\_\_\_, owner of property involved.  
(Name and address)
2. \_\_\_\_\_, general contractor.  
(Name and address)
3. \_\_\_\_\_, first tier subcontractor against or through  
(Name and address) whom subrogation is claimed, if any.
4. \_\_\_\_\_, second tier subcontractor against or through  
(Name and address) whom subrogation is claimed, if any.

General description of real property where labor performed or material furnished:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

General description of undersigned lien claimant's contract including the names of the parties thereto:

\_\_\_\_\_  
\_\_\_\_\_

The amount of lien upon funds claimed pursuant to the above described contract:

\$ \_\_\_\_\_

The undersigned lien claimant gives this notice of claim of lien upon funds pursuant to North Carolina law and claims all rights of subrogation to which he is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated \_\_\_\_\_

\_\_\_\_\_, Lien Claimant

\_\_\_\_\_  
(Address)

(c) All notices of claims of liens upon funds by subcontractors more remote than the third tier must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN UPON FUNDS BY SUBCONTRACTOR  
MORE REMOTE THAN THE THIRD TIER

To:

\_\_\_\_\_, person holding funds against which lien upon funds  
(Name and Address) is claimed.

General description of real property where labor performed or material furnished:

\_\_\_\_\_  
\_\_\_\_\_

General description of undersigned lien claimant's contract including the names of the parties thereto:

\_\_\_\_\_

The amount of lien upon funds claimed pursuant to the above described contract:

\$ \_\_\_\_\_

The undersigned lien claimant gives this notice of claim of lien upon funds pursuant to North Carolina law and claims all rights to which he or she is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated: \_\_\_\_\_

\_\_\_\_\_, Lien Claimant

\_\_\_\_\_  
(Address)

(d) Notices of claims of lien upon funds under this section shall be served upon the obligor ~~in person~~ by personal delivery or by certified mail in any manner authorized by Rule 4 of the North Carolina Rules of Civil Procedure. A copy of the notice of claim of lien upon funds shall be attached to any claim of lien on real property filed pursuant to ~~G.S. 44A-20(d)~~ G.S. 44A-20(d) or G.S. 44A-23.

(e) Notices of claims of lien upon funds shall not be filed with the clerk of superior court and shall not be indexed, docketed, or recorded in any way as to affect title to any real property, except a notice of a claim of lien upon funds may be filed with the clerk of superior court under either of the following circumstances:

(1) When the notice of claim of lien upon funds is attached to a claim of lien on real property filed pursuant to G.S. 44A-20(d) or G.S. 44A-23.

(2) When the notice of claim of lien upon funds is filed by the obligor for the purpose of discharging the claim of lien upon funds in accordance with G.S. 44A-20(e).

(f) Filing a notice of claim of lien upon funds pursuant to subsection (e) of this section is not a violation of G.S. 44A-12.1.

**"§ 44A-20. Duties and liability of obligor.**

(a) Upon receipt of the notice of claim of lien upon funds provided for in this ~~Article~~ Article, the obligor shall be under a duty to retain any funds subject to the lien or liens upon

funds under this Article up to the total amount of such liens upon funds as to which ~~notice~~ ~~has~~ ~~notices~~ of claims of lien upon funds have been received.

(b) If, after the receipt of the notice of claim of lien upon funds to the obligor, the obligor ~~shall make~~ makes further payments to a contractor or subcontractor against whose interest the lien or liens upon funds are claimed, the lien upon funds shall continue upon the funds in the hands of the contractor or subcontractor who received the payment, and in addition the obligor shall be personally liable to the person or persons entitled to liens upon funds up to the amount of such wrongful payments, not exceeding the total claims with respect to which the notice of claim of lien upon funds was received prior to payment.

(c) If an obligor ~~shall make~~ makes a payment after receipt of notice of claim of lien on funds and ~~incurs~~ incurs personal liability ~~therefor, under subsection (b) of this section,~~ the obligor shall be entitled to reimbursement and indemnification from the party receiving such payment.

(d) If the obligor is an owner of the property being improved, the lien claimant shall be entitled to a claim of lien upon real property upon the interest of the obligor in the real property to the extent of the owner's personal liability under ~~subsection (b),~~ subsection (b) of this section, which claim of lien on real property shall be enforced only in the manner set forth in G.S. 44A-7 through G.S. 44A-16 and which claim of lien on real property shall be entitled to the same priorities and subject to the same filing requirements and periods of limitation applicable to the contractor. The claim of lien on real property is perfected as of the time set forth in G.S. 44A-10 upon the filing of the claim of lien on real property pursuant to G.S. 44A-12. The claim of lien on real property shall be in the form set out in G.S. 44A-12(c) and shall contain, in addition, a copy of the notice of claim of lien upon funds given pursuant to G.S. 44A-19 as an exhibit together with proof of service thereof by affidavit, and shall state the grounds the lien claimant has to believe that the obligor is personally liable for the debt under ~~subsection (b),~~ subsection (b) of this section.

(e) A notice of claim of lien upon funds under G.S. 44A-19 may be filed by the obligor with the clerk of superior court in each county where the real property upon which the filed notice of claim of lien upon funds is located for the purpose of discharging the notice of claim of lien upon funds by any of the methods described in G.S. 44A-16.

(f) A bond deposited under this section to discharge a filed notice of claim of lien upon funds shall be effective to discharge any claim of lien on real property filed by the same lien claimant pursuant to subsection (d) of this section or G.S. 44A-23 and shall further be effective to discharge any notices of claims of lien upon funds served by lower tier subcontractors or any claims of lien on real property filed by lower tier subcontractors pursuant to subsection (d) of this section or G.S. 44A-23 claiming through or against the contractor or higher tier subcontractors up to the amount of the bond.

**"§ 44A-21. Pro rata payments.**

(a) Where the obligor is a contractor or subcontractor and the funds in the hands of the obligor and the obligor's personal liability, if any, under G.S. 44A-20 are less than the amount of valid liens upon funds that have been received by the obligor under this Article, the parties entitled to liens upon funds shall share the funds on a pro rata basis.

~~In the event that (b)~~ Where the obligor is an owner and the funds in the hands of the obligor and the obligor's personal liability, if any, under G.S. 44A-20 are less than the sum of the amount of valid ~~lien~~-claims of liens upon funds that have been ~~filed with~~ received by the obligor under this Article and the amount of the valid claims of liens on real property upon the owner's property filed by the subcontractors with the clerk of superior court under

G.S. 44A-23, the parties entitled to liens upon funds and the parties entitled to subrogation claims of liens on real property upon the owner's property shall share the funds on a pro rata basis.

**"§ 44A-22. Priority of ~~liens~~ liens upon funds.**

Liens upon funds perfected under this Article have priority over all other interests or claims theretofore or thereafter created or suffered in the funds by the person against whose interest the lien upon funds is asserted, including, but not limited to, liens arising from garnishment, attachment, levy, judgment, assignments, security interests, and any other type of transfer, whether voluntary or involuntary. Any person who receives payment from an obligor in bad faith with knowledge of a ~~claim of lien upon funds~~ claim of lien upon funds shall take such payment subject to the ~~claim of lien~~ claim of lien upon funds.

**"§ 44A-23. Contractor's ~~lien~~; claim of lien on real property; perfection of subrogation rights of subcontractor.**

(a) First tier subcontractor. – A first tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of ~~his~~ this claim, enforce the claim of lien on real property of the contractor created by Part 1 of ~~Article 2 of this Chapter~~ this Article. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The claim of lien on real property is perfected as of the time set forth in G.S. 44A-10 upon filing of the claim of lien on real property pursuant to G.S. 44A-12. Upon the filing of the claim of lien on real property, with the notice and of claim of lien upon funds attached, and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

(b) Second or third subcontractor. –

(1) A second or third tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of his claim, enforce the claim of lien on real property of the contractor created by Part 1 of Article 2 of the Chapter except when:

- a. The contractor, within 30 days following the date the building permit is issued for the improvement of the real property involved, posts on the property in a visible location adjacent to the posted building permit and files in the office of the ~~Clerk of Superior Court~~ clerk of superior court in each county wherein the real property to be improved is located, a completed and signed ~~Notice of Contract~~ notice of contract form and the second or third tier subcontractor fails to serve upon the contractor a completed and signed ~~Notice of Subcontract~~ notice of subcontract form by the same means of service as described in G.S. 44A-19(d); or
- b. After the posting and filing of a signed ~~Notice of Contract~~ notice of contract and the service upon the contractor of a signed ~~Notice of Subcontract~~ notice of subcontract, the contractor serves upon the second or third tier subcontractor, within five days following each subsequent payment, by the same means of service as described in G.S. 44A-19(d), the written notice of payment setting forth the date of payment and the period for which payment is made as requested in the ~~Notice of Subcontract~~ notice of subcontract form set forth herein.

- (2) The form of the ~~Notice of Contract~~notice of contract to be so utilized under this section shall be substantially as follows and the fee for filing the same with the ~~Clerk of Superior Court~~clerk of superior court shall be the same as charged for filing a ~~Claim~~claim of ~~Lien~~lien on real property:

"NOTICE OF CONTRACT

- "(1) Name and address of the Contractor:  
"(2) Name and address of the owner of the real property at the time this Notice of Contract is recorded:  
"(3) General description of the real property to be improved (street address, tax map lot and block number, reference to recorded instrument, or any other description that reasonably identifies the real property):  
"(4) Name and address of the person, firm or corporation filing this Notice of Contract:  
"Dated: \_\_\_\_\_

\_\_\_\_\_  
"Contractor  
"Filed this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.  
\_\_\_\_\_  
Clerk of Superior Court"

- (3) The form of the ~~Notice of Subcontract~~notice of subcontract to be so utilized under this section shall be substantially as follows:

"NOTICE OF SUBCONTRACT

- "(1) Name and address of the subcontractor:  
"(2) General description of the real property where the labor was performed or the material was furnished (street address, tax map lot and block number, reference to recorded instrument, or any description that reasonably identifies the real property):  
"(3)  
    "(i) General description of the subcontractor's contract, including the names of the parties thereto:  
    "(ii) General description of the labor and material performed and furnished thereunder:  
"(4) Request is hereby made by the undersigned subcontractor that he be notified in writing by the contractor of, and within five days following, each subsequent payment by the contractor to the first tier subcontractor for labor performed or material furnished at the improved real property within the above descriptions of such in paragraph (2) and subparagraph (3)(ii), respectively, the date payment was made and the period for which payment is made.  
"Dated: \_\_\_\_\_

Subcontractor"

- (4) The manner of such enforcement shall be as provided by G.S. 44A-7 through G.S. 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon the filing of a ~~Claim of Lien~~claim of lien on real property pursuant to G.S. 44A-12. Upon the filing of the claim of lien on real property, with the notice and of claim of lien upon funds attached, and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the second or third tier subcontractor without his written consent."

**SECTION 2.** This act becomes effective October 1, 2005, and applies to claims of lien on real property filed and notices of claims of lien upon funds served on or after that date.

In the General Assembly read three times and ratified this the 18<sup>th</sup> day of July, 2005.

s/ Beverly E. Perdue  
President of the Senate

s/ James B. Black  
Speaker of the House of Representatives

s/ Michael F. Easley  
Governor

Approved 4:14 p.m. this 27<sup>th</sup> day of July, 2005

In addition, under Senate Bill 2009, Session Law 2006-232, the 2006 Legislature authorized Public-Private Partnership for School construction. This legislation authorizes capital lease transactions such that property is owned by the county, leased to a private entity which builds the school, then leases the completed project back to the school system, thus avoiding the public contracting requirements and allowing Chapter 44A lien laws to apply. This bill was immediately subject to technical corrections including that "All laws relating to liens on private property apply to private property interests in a capital lease project undertaken under this section." (Senate Bill 1523, Session Law 2006-259, section 54.(a))

## **X. Medicaid Liens**

With a delayed effective date of January 1, 2007, attorneys must be alert to determine if parties to a transaction are or have been the recipient of medical assistance under Medicaid as the effect of the below act will be significant on titles in which Medicaid recipients hold an interest. Relevant portions only of Senate Bill 622 of the 2005 NC General Assembly) are set forth below:

**MEDICAID ESTATE RECOVERY TO INCLUDE LIENS ON REAL PROPERTY**  
**SECTION 10.21C.(a)** G.S. 108A-70.5 reads as rewritten:

**"§ 108A-70.5. MEDICAID ESTATE RECOVERY PLAN.**

(a) There is established in the Department of Health and Human Services, the Medicaid Estate Recovery Plan, as required by the Omnibus Budget Reconciliation Act of 1993, ~~to recover from the estates of recipients of medical assistance an equitable amount of the State and federal shares of the cost paid the recipient.~~1993. The Department shall administer the program in accordance with applicable federal law and regulations, including those under Title XIX of the Social Security Act, 42 U.S.C. § 1396(p). To the extent allowed by section 1396(p) of Title XIX of the Social Security Act, the Department may impose liens against real property, including the home, of a recipient of medical assistance. The Department shall file any liens imposed under this section in the court where the property is located in the same manner as for any other lien under North Carolina law.

(b) As used in this section:

(1) "Medical assistance" means medical care services paid for by the North Carolina Medicaid Program on behalf of the recipient:

- a. If the recipient of any age is receiving ~~these~~ medical care services as an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, and cannot reasonably be expected to be discharged to return home; or
- b. If the recipient is 55 years of age or older and is receiving ~~these medical care services, including related hospital care and prescription drugs, for nursing facility services, personal care services, or home and community based services.~~one or more of the following medical care services:

1. Nursing facility services.
2. Home and community-based services.
3. Hospital care and prescription drugs related to nursing facility services or home and community-based services.
4. Personal care services.
5. Medicare premiums.
6. Private duty nursing.
7. Home health aide services.
8. Home health therapy.
9. Speech pathology services.

(2) "Estate" means all the real and personal property considered assets of the estate available for the discharge of debt pursuant to G.S. 28A-15-1.

(3) "Home" means property in which a recipient has, or had immediately before or at the time of the recipient's death, an ownership interest or legal title to, consisting of the recipient's dwelling and the land used and operated in connection with the dwelling.

(c) The amount the Department recovers from the estate of any recipient shall not exceed the amount of medical assistance made on behalf of the recipient and shall be recoverable only for medical care services prescribed in subsection (b) of this section. The To the extent that allowable Medicaid claims are not satisfied as a result of the execution of any liens held by the Department, the Department is a fifth-class creditor, as prescribed in

G.S. 28A-19-6, for purposes of determining the order of claims against an estate; provided, however, that judgments in favor of other fifth-class creditors docketed and in force before the Department seeks recovery for medical assistance shall be paid prior to recovery by the Department.

(d) The Department of Health and Human Services shall adopt rules pursuant to Chapter 150B of the General Statutes to implement the ~~Plan, including rules to waive whole or partial recovery when this recovery would be inequitable because it would work an undue hardship or because it would not be administratively cost effective and rules~~ Plan to ensure that all recipients are notified that their estates are subject to recovery at the time they become eligible to receive medical assistance.

(e) Regarding trusts that contain the assets of an individual who is disabled as defined in Title 19 of Section 1014(a)(3) of the Social Security Act, as amended, if the trust is established and managed by a nonprofit association, to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the nonprofit association, the trust pays to the Department from these remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the North Carolina Medicaid Program."

**SECTION 10.21C.(b)** Part 6 of Article 2 of Chapter 108A of the General Statutes is amended by adding the following new sections to read:

**"§ 108A-70.6. Postponement of estate recovery required in cases of undue hardship.**

(a) The Department shall postpone or waive its claim pursuant to G.S. 108A-70.5, including the execution of a lien in whole or in part, when the Department determines that the enforcement of its claim would work an undue hardship to an heir or a beneficiary of the Medicaid recipient. Nothing in this section shall be construed to prevent the Department from enforcing its claim if the owner of the property sells or transfers ownership of the property that is subject to the Department's claim.

(b) A claim of undue hardship to an heir or beneficiary shall be made in writing to the Department within 30 days after the receipt of notification of the Medicaid lien or claim. The claim for hardship shall describe the financial circumstance of the heir or beneficiary and the basis for the claim.

(c) An undue hardship exists if:

(1) The property subject to the lien has a tax value that is equal to or less than thirty thousand dollars (\$30,000).

(2) The property subject to the Department's claim is the sole source of income for a surviving heir or beneficiary, and the loss of the net income derived from the property would result in the heir's or beneficiary's annual gross income to fall below one hundred percent (100%) of the federal poverty guidelines in the year in which the hardship is claimed; or

(3) The sale of the property would be required to satisfy the Department's claim, and all of the following conditions are met:

a. The heir or beneficiary resided in the decedent's home on a continual basis for at least 24 months immediately prior to the date of the recipient's death and the heir or beneficiary was using the property as a principal place of residence on the date of the recipient's death;

- b. The heir or beneficiary has, from the time the Department first presents its claim for recovery against the deceased recipient's estate and after, annual gross income in the amount not exceeding one hundred fifty percent (150%) of the federal poverty income standard;
- c. The heir or beneficiary owns no other real property or agrees to sell other real property in partial payment of the Department's claim; and
- d. The heir or beneficiary owns other assets not exceeding a net value of thirty thousand dollars (\$30,000).

**"§ 108A-70.7. Estate recovery not cost effective.**

The Department shall waive its claim or lien imposed under G.S. 108A-70.5 upon the Department's determination that:

- (1) The amount of Medicaid payments for services and benefits subject to recovery is less than eight thousand dollars (\$8,000); or
- (2) The assets subject to the Department's claim or lien are less than five thousand dollars (\$5,000).

**"§ 108A-70.8. Notice of estate recovery.**

(a) The Department shall provide each applicant for medical assistance, or the applicant's representative, written notice that:

- (1) Receipt of medical assistance may result in a Medicaid claim or lien upon the recipient's estate, including the recipient's home, to recover costs paid on behalf of the recipient for medical assistance in accordance with G.S. 108A-70.5; and
- (2) The Department may seek a lien against the real property of a recipient of any age before or after the recipient's death in the amount of assistance paid or to be paid for the recipient if the recipient is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, and the Department determines, after notice and an opportunity for a hearing in accordance with applicable law, that the recipient cannot reasonably be expected to be discharged and return home.

(b) Notice under this section shall also explain the hardship conditions under which estate recovery, including the execution of a lien, may be postponed or waived.

**"§ 108A-70.9. County departments of social services to provide information.**

The Department may require the county department of social services administering medical assistance to gather and provide the Department with the information and administrative or legal assistance needed to recover medical assistance under G.S. 108A-70.5. The Department shall pay to the county department of social services an amount equal to twenty percent (20%) of the nonfederal share of recovery collected by the Department. The Department may withhold payments under this section for a county department's failure to comply with the Department's requirements under this section."

**SECTION 10.21C.(c)** This section becomes effective January 1, 2006, and applies to recipients of medical assistance on or after that date.

Proposed rules were posted November 1, 2006, at  
<http://www.ncoah.com/rules/register/Volume21Issue09.pdf>  
(pages 763 – 765 only)

## **XI. Equitable Distribution (G.S. 28A-19-6)**

Prioritization has been changed to identify equitable distribution claims as a separate 7<sup>th</sup> class general creditor, moving all other general creditors to 8<sup>th</sup> class, to avoid circular distribution determinations.

## **XII. Tax Prorations and Delinquency Enforcement**

Given the importance of this bill to real property practitioners and the multitude of statutes affected, it is set forth below in its entirety. This is a “MUST READ”!!

### **SENATE BILL 1451, SESSION LAW 2006-106**

BRIEF DESCRIPTION FROM THE ACT: AN ACT TO ENFORCE COLLECTION OF PROPERTY TAXES ON REAL PROPERTY AGAINST THE RECORD OWNER AS OF THE DATE THE TAXES BECOME DELINQUENT, TO CODIFY THE PRORATION OF TAXES ON REAL PROPERTY, TO REQUIRE A TAX COLLECTOR TO TAKE REASONABLE ADDITIONAL STEPS TO NOTIFY A PROPERTY OWNER OF A TAX SALE UNLESS THE TAX COLLECTOR HAS AFFIRMATIVE KNOWLEDGE THAT THE MAILED NOTICE REACHED THE RECIPIENT, TO AMEND THE DEFINITION OF INVENTORIES TO INCLUDE DISPLAY MODULAR HOMES, AND TO STUDY THE VALUATION OF PROPERTY AT ITS PRESENT-USE VALUE FOR PROPERTY TAX PURPOSES.

**SECTION 1.** G.S. 105-273(17) reads as rewritten:

#### **"§ 105-273. Definitions.**

When used in this Subchapter (unless the context requires a different meaning):

...

(17) "Taxpayer" means any person whose property is subject to ad valorem property taxation by any county or municipality and any person who, under the terms of this Subchapter, has a duty to list property for taxation. For purposes of collecting delinquent ad valorem taxes assessed on real property under G.S. 105-366 through G.S. 105-375, "taxpayer" means the owner of record on the date the taxes become delinquent and any subsequent owner of record of the real property if conveyed after that date."

**SECTION 2.** G.S. 105-369 reads as rewritten:

**"§ 105-369. Advertisement of tax liens on real property for failure to pay taxes.**

(a) **Report of Unpaid Taxes That Are Liens on Real Property.** – In February of each year, the tax collector must report to the governing body the total amount of unpaid taxes for the current fiscal year that are liens on real property. A county tax collector's report is due the first Monday in February, and a municipal tax collector's report is due the second Monday in February. Upon receipt of the report, the governing body must order the tax collector to advertise the tax liens. For purposes of this section, district taxes collected by county tax collectors shall be regarded as county taxes and district taxes collected by municipal tax collectors shall be regarded as municipal taxes.

(b) **Repealed by Session Laws 1983 (Regular Session, 1984), c. 1013.**

(b1) **Notice to Owner.** – After the governing body orders the tax collector to advertise the tax liens, the tax collector must send a notice to the ~~listing owner and to the~~ record owner of each affected parcel of property, as determined as of ~~December 31 of the fiscal year for which the taxes are due.~~ the date the taxes became delinquent. The notice must be sent to ~~each~~ the owner's last known address by first-class mail at least 30 days before the date the advertisement is to be published. The notice must state the principal amount of unpaid taxes that are a lien on the parcel to be advertised and inform the owner that the ~~names~~ name of ~~the listing owner and~~ the record owner as of the date the taxes became delinquent will appear in a newspaper advertisement of delinquent taxes if the taxes are not paid before the publication date. Failure to mail the notice required by this section to the correct ~~listing owner or~~ record owner does not affect the validity of the tax lien or of any foreclosure action.

(c) **Time and Contents of Advertisement.** – A tax collector's failure to comply with this subsection does not affect the validity of the taxes or tax liens. The county tax collector shall advertise county tax liens by posting a notice of the liens at the county courthouse and by publishing each lien at least one time in one or more newspapers having general circulation in the taxing unit. The municipal tax collector shall advertise municipal tax liens by posting a notice of the liens at the city or town hall and by publishing each lien at least one time in one or more newspapers having general circulation in the taxing unit. Advertisements of tax liens shall be made during the period March 1 through June 30. The costs of newspaper advertising shall be paid by the taxing unit. If the taxes of two or more taxing units are collected by the same tax collector, the tax liens of each unit shall be advertised separately unless, under the provisions of a special act or contractual agreement between the taxing units, joint advertisement is permitted.

The posted notice and newspaper advertisement shall set forth the following information:

~~(1) In the case of property that the listing owner has not transferred after January 1 preceding the fiscal year for which the tax liens are~~

~~advertised, the name of each person to whom is listed real property on which the taxing unit has a lien for unpaid taxes, in alphabetical order.~~

(1a) ~~In the case of property that the listing owner has transferred after January 1 preceding the fiscal year for which the tax liens are advertised, the name of the record owner as of December 31 of each parcel on which the taxing unit has a lien for unpaid taxes, in alphabetical order, followed by a notation that the property was transferred to the record owner and a notation of the name of the listing owner.~~The name of the record owner as of the date the taxes became delinquent for each parcel on which the taxing unit has a lien for unpaid taxes, in alphabetical order.

(1b) After the information required by subdivision ~~(1)~~ or (1a) of this subsection for each parcel, a brief description of each parcel of land to which a lien has attached and a statement of the principal amount of the taxes constituting a lien against the parcel.

(2) A statement that the amounts advertised will be increased by interest and costs and that the omission of interest and costs from the amounts advertised will not constitute waiver of the taxing unit's claim for those items.

(3) In the event the list of tax liens has been divided for purposes of advertisement in more than one newspaper, a statement of the names of all newspapers in which advertisements will appear and the dates on which they will be published.

(4) A statement that the taxing unit may foreclose the tax liens and sell the real property subject to the liens in satisfaction of its claim for taxes.

(d) Costs. – Each parcel of real property advertised pursuant to this section shall be assessed an advertising fee to cover the actual cost of the advertisement. Actual advertising costs per parcel shall be determined by the tax collector on any reasonable basis. Advertising costs assessed pursuant to this subsection are taxes.

(e) Payments during Advertising Period. – At any time during the advertisement period, any parcel may be withdrawn from the list by payment of the taxes plus interest that has accrued to the time of payment and a proportionate part of the advertising fee to be determined by the tax collector. Thereafter, the tax collector shall delete that parcel from any subsequent advertisement, but the tax collector is not liable for failure to make the deletion.

(f) Listing and Advertising in Wrong Name. – No tax lien is void because the real property to which the lien attached was listed or advertised in the name of a person other than the person in whose name the property should have been listed for taxation if the property was in other respects correctly described on the abstract or in the advertisement.

(g) Wrongful Advertisement. – Any tax collector or deputy tax collector who willfully advertises any tax lien knowing that the property is not subject to taxation or that the taxes advertised have been paid is guilty of a Class 3 misdemeanor, and shall be required to pay the injured party all damages sustained in consequence."

**SECTION 3.** G.S. 105-374(c) reads as rewritten:

"(c) Parties; Summonses. – The listing taxpayer owner of record as of the date the taxes became delinquent and spouse (if any), ~~the current owner,~~ any subsequent owner, all other taxing units having tax liens, all other lienholders of record, and all persons who would be entitled to be made parties to a court action (in which no deficiency judgment is sought) to foreclose a mortgage on such property, shall be made parties and served with summonses in the manner provided by G.S. 1A-1, Rule 4.

The fact that the listing taxpayer owner of record as of the date the taxes became delinquent, any subsequent owner, or any other defendant is a minor, is incompetent, or is under any other disability shall not prevent or delay the tax lien sale or the foreclosure of the tax lien; and all such persons shall be made parties and served with summons in the same manner as in other civil actions.

Persons who have disappeared or who cannot be located and persons whose names and whereabouts are unknown, and all possible heirs or assignees of such persons, may be served by publication; and such persons, their heirs, and assignees may be designated by general description or by fictitious names in such an action."

**SECTION 4.** G.S. 105-375(b) reads as rewritten:

"(b) Docketing Certificate of Taxes as Judgment. – In lieu of following the procedure set forth in G.S. 105-374, the governing body of any taxing unit may direct the tax collector to file with the clerk of superior court, no earlier than 30 days after the tax liens were advertised, a certificate showing the following: the name of the taxpayer ~~listing real property on which the taxes are a lien,~~ listing real property on which the taxes are a lien, as defined in G.S. 105-273(17), for each parcel on which the taxing unit has a lien for unpaid taxes, together with the amount of taxes, penalties, interest, and costs that are a lien thereon; the year or years for which the taxes are due; and a description of the property sufficient to permit its identification by parol testimony. The fees for docketing and indexing the certificate shall be payable to the clerk of superior court at the time the taxes are collected or the property is sold."

**SECTION 5.** G.S. 105-375(c) reads as rewritten:

"(c) Notice ~~Listing to~~ Taxpayer and Others. –

(1) Notice required. – The tax collector filing the certificate provided for in subsection ~~(b), above,~~ (b) of this section, shall, at least 30 days prior to docketing the judgment, send notice of the tax lien foreclosure a registered or certified letter, return receipt requested, to the ~~listing taxpayer at his~~ taxpayer, as defined in G.S. 105-273(17), at the taxpayer's

last known address, and to all lienholders of record who have a lien against the ~~listing taxpayer or against any subsequent owner of the property~~ (including any liens referred to in the conveyance of the property to the taxpayer), ~~listing taxpayer or to the subsequent owner of the property~~, stating that the judgment will be docketed and the execution will be issued thereon in the manner provided by law. A notice stating that the judgment will be docketed and that execution will be issued thereon shall also be mailed by certified or registered mail, return receipt requested, to the current owner of the property (if different from the listing owner) if: (i) a deed or other instrument transferring title to and containing the name of the current owner was recorded in the office of the register of deeds or filed or docketed in the office of the clerk of superior court after January 1 of the first year in which the property was listed in the name of the listing owner, and (ii) the tax collector can obtain the current owner's mailing address through the exercise of due diligence.

(2) Contents of notice. – All notice required by this subsection shall state that a judgment will be docketed and the proposed date of the docketing, that execution will be issued as provided by law, a brief description of the real property affected, and that the lien may be satisfied prior to judgment being entered.

(3) Service of notice. – The notice required by this subsection shall be sent to the taxpayer by registered or certified mail, return receipt requested.

(4) Additional efforts may be required. – If within 10 days following the mailing of ~~said letters of the notice~~, a return receipt has not been received by the tax collector indicating receipt of the ~~letter, notice~~, then the tax collector shall ~~have~~ do both of the following:

a. Make reasonable efforts to locate and notify the taxpayer and all lienholders of record prior to the docketing of the judgment and the issuance of the execution. Reasonable efforts may include posting the notice in a conspicuous place on the property, or, if the property has an address to which mail may be delivered, mailing the notice by first-class mail to the attention of the occupant.

b. Have a notice published in a newspaper of general circulation in ~~said~~ the county once a week for two consecutive weeks directed to, and naming, all unnotified lienholders and the ~~listing taxpayer~~ that a judgment will be docketed against the ~~listing taxpayer~~. The notice shall contain the proposed date of such docketing, that execution will issue thereon as provided by law, a brief description of the real property affected, and notice that the lien may be paid off prior to judgment being entered.

(5) Costs of notice added to lien. – All costs of mailing and publication, plus a charge of fifty dollars (\$50.00) to defray administrative costs, shall be added to the amount of taxes that are a lien on the real property and shall be paid by the taxpayer to the taxing unit at the time the taxes are collected or the property is sold."

**SECTION 6.** G.S. 105-375(i) reads as rewritten:

"(i) Issuance of Execution. – At any time after three months and before two years from the indexing of the judgment as provided in subsection (b), above, execution shall be issued at the request of the tax collector in the same manner as executions are issued upon other judgments of the superior court, and the real property shall be sold by the sheriff in the same manner as other real property is sold under execution with the following exceptions:

(1) No debtor's exemption shall be allowed.

(2) In lieu of personal service of notice on the owner of the property, taxpayer, the sheriff shall send notice by registered or certified mail, return receipt requested, notice shall be mailed to the listing owner taxpayer at the listing owner's taxpayer's last known address at least 30 days prior to the day fixed for the sale. The notice must also be mailed to the current owner by registered or certified mail if notice was required to be mailed to the current owner pursuant to subsection (c) of this section. If within 10 days following the mailing of the notice, a return receipt has not been received by the sheriff indicating receipt of the notice, then the sheriff shall make additional efforts to locate and notify the taxpayer and all lienholders of record of the sale under execution in accordance with subdivision (4) of subsection (c) of this section.

(3) The sheriff shall add to the amount of the judgment as costs of the sale any postage expenses incurred by the tax collector and the sheriff in foreclosing under this section.

(4) In any advertisement or posted notice of sale under execution, the sheriff may (and at the request of the governing body shall) combine the advertisements or notices for properties to be sold under executions against the properties of different taxpayers in favor of the same taxing unit or group of units; however, the property included in each judgment shall be separately described and the name of the ~~listing~~ taxpayer specified in connection with each.

The purchaser at the execution sale shall acquire title to the property in fee simple free and clear of all claims, rights, interests, and liens except the liens of other taxes or special assessments not paid from the purchase price and not included in the judgment."

**SECTION 7.** Chapter 39 of the General Statutes is amended by adding the following new Article to read:

"Article 10.

"Real Property Tax Proration.

**"§ 39-60. Property tax proration on sale of real property.**

Unless otherwise provided by contract, property taxes on the real property being sold shall be prorated between the seller and buyer of the real property on a calendar-year basis."

**SECTION 8.** G.S. 105-273(8a) reads as rewritten:

"(8a) "Inventories" means (i) goods held for sale in the regular course of business by manufacturers, retail and wholesale merchants, and contractors, and (ii) goods held by contractors to be furnished in the course of building, installing, repairing, or improving real property. As to manufacturers, the term includes raw materials, goods in process, and finished goods, as well as other materials or supplies that are consumed in manufacturing or processing, or that accompany and become a part of the sale of the property being sold. The term also includes a modular home as defined in G.S. 105-164.3(21b) that is used exclusively as a display model and held for eventual sale at the retail merchant's place of business. The term also includes crops, livestock, poultry, feed used in the production of livestock and poultry, and other agricultural or horticultural products held for sale, whether in process or ready for sale. The term does not include fuel used in manufacturing or processing, nor does it include materials or supplies not used directly in manufacturing or processing. As to retail and wholesale merchants and contractors, the term includes, in addition to articles held for sale, packaging materials that accompany and become a part of the sale of the property being sold."

**SECTION 9.** The Revenue Laws Study Committee shall study and recommend any changes to the special class of property taxed on the basis of the value of the property at its present use. The study shall include an evaluation of the following:

- (1) Expanding the present-use value system to include wildlife land and other conservation land.
- (2) Adding more specific land resource management criteria to the sound management programs required for lands enrolled in the present-use value system.

The Committee shall make a report of its findings and recommendations to the 2007 General Assembly.

**SECTION 10.** Section 7 of this act becomes effective for contracts entered into on or after October 1, 2006. Section 9 of this act is effective when it becomes law [July 13, 2006]. The remainder of this act is effective for taxes imposed for taxable years beginning on or after July 1, 2006.

### **XIII. Uniform Unincorporated Non-Profit Associations Act**

For those who have dealt with churches, homeowners' associations or other unincorporated nonprofit associations, this new act, Session Law 2006-226, Senate Bill 1479, enacted as new Chapter 59B of the North Carolina General Statutes, is important to understand. Upon its effective date (January 1, 2007), it will replace the earlier provisions of G.S. 39-24 *et seq.* Because of the frequency of these types of issues and the focus of the statute primarily on property issues, the act is set forth in its entirety below

**SESSION LAW 2006-226, SENATE BILL 1479, was adopted, as follows:**

AN ACT TO ENACT THE UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT AND TO MAKE TECHNICAL CORRECTIONS AND CONFORMING CHANGES TO THE GENERAL STATUTES, AS RECOMMENDED BY THE GENERAL STATUTES COMMISSION.

The General Assembly of North Carolina enacts:

#### **PART I. UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT.**

**SECTION 1.** The General Statutes are amended by adding a new Chapter to read:

##### **"Chapter 59B.**

##### **"Uniform Unincorporated Nonprofit Association Act.**

##### **"§ 59B-1. Short title.**

This Chapter may be cited as the Uniform Unincorporated Nonprofit Association Act.

##### **"§ 59B-2. Definitions.**

In this Chapter:

- (1) "Member" means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.

(2) "Nonprofit association" means an unincorporated organization, other than one created by a trust and other than a limited liability company, consisting of two or more members joined by mutual consent for a common, nonprofit purpose. However, joint tenancy, tenancy in common, or tenancy by the entireties does not by itself establish a nonprofit association, even if the co-owners share use of the property for a nonprofit purpose.

(3) "Person" means an individual, corporation, limited liability company, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

**"§ 59B-3. Supplementary general principles of law and equity.**

Principles of law and equity supplement this Chapter unless displaced by a particular provision of it.

**"§ 59B-4. Title to property; choice of law.**

Real and personal property in this State may be acquired, held, encumbered, and transferred by a nonprofit association, whether or not the nonprofit association or a member has any other relationship to this State.

**"§ 59B-5. Real and personal property; nonprofit association as legatee, devisee, or beneficiary.**

(a) A nonprofit association is a legal entity separate from its members for the purposes of acquiring, holding, encumbering, and transferring real and personal property.

(b) A nonprofit association, in its name, may acquire, hold, encumber, or transfer an estate or interest in real or personal property.

(c) A nonprofit association may be a beneficiary of a trust or contract, a legatee, or a devisee.

(d) Any judgments and executions against a nonprofit association bind its real and personal property in like manner as if it were incorporated.

**"§ 59B-6. Statement of authority as to real property.**

(a) A nonprofit association may execute and record a statement of authority to transfer an estate or interest in real property in the name of the nonprofit association.

(b) An estate or interest in real property in the name of a nonprofit association may be transferred by a person so authorized in a statement of authority recorded in the office of the register of deeds in the county in which a transfer of the property would be recorded.

(c) A statement of authority must be set forth in a document styled "affidavit" that contains all of the following:

(1) The name of the nonprofit association.

(2) Reserved for future codification purposes.

(3) The street address, and the mailing address if different from the street address, of the nonprofit association, and the county in which it is located, or, if the nonprofit association does not have an address in this State, its address out-of-state.

(4) That the association is an unincorporated nonprofit association.

(5) The name or office of a person authorized to transfer an estate or interest in real property held in the name of the nonprofit association.

(6) That the association has duly authorized the member or agent executing the statement to do so.

(d) A statement of authority must be sworn to and subscribed in the same manner as an affidavit by a member or agent who is not the person authorized to transfer the estate or interest.

(e) The register of deeds shall collect a fee for recording a statement of authority in the amount authorized by G.S. 161-10(a)(1). The register of deeds shall index the name of the nonprofit association and the member or agent signing the statement of authority or any subsequent document relating thereto as Grantor and the name of the appointee as Grantee.

(f) An amendment, including a termination, of a statement of authority must meet the requirements for execution and recording of an original statement. Unless terminated earlier, a recorded statement of authority or its most recent amendment expires by operation of law five years after the date of the most recent recording.

(g) If the record title to real property is in the name of a nonprofit association and the statement of authority is recorded in the office of the register of deeds in the county in which a transfer of real property would be recorded, the authority of the person or officer named in a statement of authority is conclusive in favor of a person who gives value without notice that the person or officer lacks authority.

**"§ 59B-7. Liability of members or other persons.**

(a) A nonprofit association is a legal entity separate from its members for the purposes of determining and enforcing rights, duties, and liabilities.

(b) A person is not liable for the contract, tort, or other obligations of a nonprofit association merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

(c) Reserved for future codification purposes.

(d) A tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

(e) A member of, or a person referred to as a "member" by, a nonprofit association may assert a claim against or on behalf of the nonprofit association. A nonprofit association may assert a claim against a member or a person referred to as a "member" by the nonprofit association.

**"§ 59B-8. Capacity to assert and defend; standing.**

(a) A nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution.

(b) A nonprofit association may assert a claim in its name on behalf of its members or persons referred to as "members" by the nonprofit association if one or more of them have standing to assert a claim in their own right, the interests the nonprofit association seeks to protect are germane to its purposes, and neither the claim asserted nor the relief requested requires the participation of a member or a person referred to as a "member" by the nonprofit association.

**"§ 59B-9. Effect of judgment or order.**

A judgment or order against a nonprofit association is not by itself a judgment or order against a member, a person referred to as a "member" by the nonprofit association, or a person authorized to participate in the management of the affairs of the nonprofit association.

**"§ 59B-10. Disposition of personal property of inactive nonprofit association.**

If a nonprofit association has been inactive for three years or longer, or a different period specified in a document of the nonprofit association, a person in possession or control of personal property of the nonprofit association may transfer custody of the property:

(1) If a document of the nonprofit association or document of gift specifies a person to whom transfer is to be made under these circumstances, to that person; or

(2) If no person is so specified, to a nonprofit association, nonprofit corporation, or other nonprofit entity pursuing broadly similar purposes, or to a government or governmental subdivision, agency, or instrumentality.

**"§ 59B-11. Appointment of agent to receive service of process.**

(a) A nonprofit association may file in the office of the Secretary of State a statement appointing an agent authorized to receive service of process, notice, or demand required or permitted by law to be served on a nonprofit association.

(b) A statement appointing an agent must set forth all of the following:

(1) The name of the nonprofit association.

(2) Reserved for future codification purposes.

(3) The street address, and the mailing address if different from the street address, of the nonprofit association, and the county in which it is located, or, if the nonprofit association does not have an address in this State, its address out-of-state.

(4) The name of the person in this State authorized to receive service of process and the person's address, including the street address, in this State.

(c) A statement appointing an agent must be signed and acknowledged by a person authorized to manage the affairs of a nonprofit association. The statement must also be signed and acknowledged by the person appointed agent, who thereby accepts the appointment. The appointed agent may resign by filing a resignation in the office of the Secretary of State and giving written notice to the nonprofit association at its last known address.

(d) The sole duty of the appointed agent to the nonprofit association is to forward to the nonprofit association at its last known address any notice, process, or demand that is served on the appointed agent.

(e) The Secretary of State is not an agent for service of any process, notice, or demand on any nonprofit association.

(f) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to the Secretary of State for filing:

	<u>Document</u>	<u>Fee</u>
(1)	<u>Statement appointing an agent to receive service of process</u>	<u>\$5.00</u>
(2)	<u>Amendment of statement appointing an agent</u>	<u>5.00</u>
(3)	<u>Cancellation of statement appointing an agent</u>	<u>5.00</u>
(4)	<u>Agent's statement of resignation</u>	<u>No fee</u>

(g) An amendment to or cancellation of a statement appointing an agent to receive service of process must meet the requirements for execution of an original statement.

**"§ 59B-12. Claim not abated by change.**

A claim for relief against a nonprofit association does not abate merely because of a change in its members or persons authorized to manage the affairs of the nonprofit association.

**"§ 59B-13. Venue.**

For purposes of venue, a nonprofit association is a resident of a county in which it has an office or maintains a place of operation or, if on due inquiry no office or place of operation can be found, in which any officer resides.

**"§ 59B-14. Uniformity of application and construction.**

This Chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it."

**SECTION 2.(a)** G.S. 39-24 and G.S. 39-25 are repealed.

**SECTION 2.(b)** G.S. 39-26 and G.S. 39-27 are recodified as G.S. 59B-15(a) and (b), respectively. As recodified by this act, G.S. 59B-15 reads as rewritten:

**"§ 59B-15. Effect as to conveyances by ~~trustees.~~ trustees; prior deeds validated.**

(a) Nothing in this Article shall be deemed in any manner to change Chapter changes the law with reference to the holding and conveyance of land by the trustees of churches or other voluntary organizations under Chapter 61 of the General Statutes where such the land is conveyed to and held by such the trustees.

(b) All deeds heretofore executed in conformity with this Article before the effective date of this Chapter in conformity with former G.S. 39-24 and former G.S. 39-25 are declared to be sufficient to pass title to real estate held by such organizations. estate."

**SECTION 3.** G.S. 1-69.1 reads as rewritten:

**"§ 1-69.1. Unincorporated associations and partnerships; suit by or against.**

(a) Except as provided in subsection (b) of this section:

(1) All unincorporated associations, organizations or societies, or general or limited partnerships, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it.

(2) Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated.

(3) Any unincorporated association, organization, society, or general partnership bringing a suit in the name by which it is commonly known and called must allege the specific location of the recordation required by G.S. 66-68.

(b) Unincorporated nonprofit associations are subject to Chapter 59B of the General Statutes and not this section."

**SECTION 4.** G.S. 47C-3-101 reads as rewritten:

**"§ 47C-3-101. Organization of unit owners' association.**

A unit owners' association shall be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners, or following termination of the condominium, of all persons entitled to distributions of proceeds under G.S. 47C-2-118. The association shall be organized as a profit or nonprofit corporation or as an unincorporated nonprofit association."

**SECTION 5.** If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect any other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

**SECTION 6.** This act does not affect an action or proceeding commenced or right accrued before this act takes effect.

**SECTION 7.** The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Unincorporated Nonprofit Association Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate.

The NCCUSL Uniform Act and national history are on-line at:  
<http://www.nccusl.org/Update/ActSearchResults.aspx>

#### **XIV. Slayer Statute**

Senate Bill 1378, Session Law 2006-107, modified somewhat the definition of a “slayer” under G.S. 31A-3 for purposes of the statute and should be read carefully by anyone reviewing an estate in which a potential beneficiary of the decedent was a potential slayer of the decedent.

#### **XV. Change of Name on Divorce – G.S. 50-12**

A woman or man can petition the court in which they are divorced and/or in which they reside to return to a pre-marital name (as defined in the statute) under new Session Law 2005-38, House Bill 508, amending G.S. 50-12.

#### **XVI. Miscellaneous Provisions**

Multiple other changes were adopted regarding:

- Homeowners’ associations
- Condominiums
- Planned communities
- Plats
- Identity Theft (*See Exhibit F*)
- Residential rentals
- Vacation rentals

#### **ON THE HORIZON: UPCOMING / ONGOING INITIATIVES**

**Bar Association Initiatives are on-line at**

<http://www.ncbar.org/governmentalAffairs/2007legislation.aspx>

#### **Foreclosure Reform**

The House Select Committee has continued to meet. The focus has shifted somewhat from a focus on the process of the foreclosure itself to the mortgage origination and fraud situations affecting consumers, including possible changes such as reflecting the appraiser and mortgage broker on the face page of the deed of trust, additional disclosures, as well as judicial foreclosure and counseling or non-binding arbitration pre-foreclosure. (Possible open bills for this purpose from 2005 Session are H877, H1146 and S809.)

### **Residential Real Estate Resale Dealers Regulation (HB 725)**

Spearheaded by Assistant Attorneys General Harriett Worley and Lynne Weaver, this proposal is intended to set registration, reporting, bonding and disclosure requirements (and penalties for noncompliance) on, among others, the “We Buy Homes” marketers who post signs at street corners. They typically give an option or even take a deed subject to outstanding mortgage on the home of a desperate (usually FSBO) homeowner. If they find a potential purchaser, they pocket lease-option payments, maybe make the seller’s house payments (maybe not), and if the purchase falls through, they walk away, leaving the owner/seller with an unmaintained home, a defaulted mortgage and even a defective title. A couple of versions of the act are under consideration. (Attorney General)

### **Testamentary Additions to Trust**

The General Statutes Commission is considering a proposal to amend G.S. 31-47, as stated by Floyd Lewis, the Revisor of Statutes: “Primarily, the draft updates the law regarding testamentary additions to trusts (i) to make it clear that the trust need not have been funded during the testator's lifetime but can be funded by the devise or bequest itself, (ii) to allow the trust terms to be set forth in a written instrument executed concurrently with as well as before the execution of the will, (iii) to require the devised or bequeathed property to be administered in accordance with the terms of the trust as amended after as well as before the testator's death, unless the testator's will provides otherwise, and (iv) to allow the testator's will to provide that the devise or bequest is not to lapse even if the trust is revoked or terminated before the testator's death.” Aside from a couple of technical changes, the proposals to date appear to improve upon the current statute.

### **Enforcement of Attorneys’ Fees**

Business Law Section has proposed G.S. 6-21.6 with stated purpose: “The purpose of the proposed legislation is to bring North Carolina in line with other states that enforce provisions in business contracts requiring the breaching party to reimburse the enforcing party for legal fees and expenses incurred in enforcing the contract. This bill is not aimed at benefiting attorneys but instead protects the rights of businesses (especially small businesses) who may find the economics of enforcing their contracts to be unworkable.” The 2007 version of the proposal is on-line at: <http://www.ncbar.org/download/governmentalAffairs/businessLaw2007.pdf>

### **Boatslips**

Senator Julia Boseman is considering legislation addressing title and other issues on boatslips in North Carolina

### **Subdivision – Preliminary Plat Approvals - Pre-Sale**

This proposal will be considered by the Real Property Section for presentation for the 2007 Long Session.

### **Eminent Domain – Response to Kelo**

Various proposals will be considered by the Real Property Section for presentation for the 2007 Long Session, and have been the subject of discussion by a House Subcommittee.

### **Property Taxes – Study on Undeveloped Subdivided Lots (SB 623, Committee on Rules and Operations of the Senate)**

The act would provide for “Revenue Laws Study Committee [which] shall study the valuation of partially improved, undeveloped lots in subdivisions. The Subcommittee shall report its findings and recommendations to the Revenue Laws Study Committee. The Revenue Laws Study Committee shall make an interim report of its findings and recommendations to the 2006 Regular Session of the 2005 General Assembly and shall make a final report of its findings and recommendations to the 2007 General Assembly.”

### **Estate Personal Representatives Sales of Real Property**

This proposal from the Estate Planning Section of the NC Bar Association would clearly authorize a personal representative with power of sale under a will to be able to sell real estate of the decedent, without court order, notwithstanding whether the property was devised to others (and not the personal representative in that capacity). More detailed description and draft of current proposal is on-line at: <http://www.ncbar.org/download/governmentalAffairs/2007estatePlanningPRsellingRP.pdf>

### **Renunciations of Inheritance (G.S. Ch. 31B)**

The General Statutes Commission is preparing a redraft proposal for Chapter 31B, regarding renunciation of inheritance, devise or other receipt of property on death of an owner, primarily to clarify the rights of fiduciaries to renounce interests on behalf of their beneficiaries and principals. Other technical corrections have been suggested by members of the Real Property Section, specifically with regard to renunciations of surviving joint tenant or tenants-by-the-entireties, validity if filed with the appropriate Clerk but not the Register of Deeds with priority as to third parties deferred until recording in the registry (or the office of the Clerk) of the county in which the land is located, determination of “entitled parties” upon renunciation, notices and rights of third parties (such as judgment creditors, deed of trust noteholders, tax authorities and spouses) and other technical clarifications. Issues regarding a proposed special proceeding before the Clerk to approve of a fiduciary renunciation are still being researched regarding matters such as appeal, effect on existing renunciation, interests of intervening third parties, res judicata, collateral estoppel, compulsory counter- and cross-claims. As of this writing, the draft is still under consideration and will presumably be introduced at the request of the General Statutes Commission in the 2007 Session.

### **Wish List:**

Joint Tenancy with Right of Survivorship  
Re-recording / correction clarification legislation

### **Revocation of G.S. 39-6**

This proposal is still under active consideration by the Estate Planning Section and the Real Property Section and is not anticipated to go to the Legislature this session. The rationale for this proposal from the Estate Planning Section was described as follows:

*As originally enacted, G.S. 39-6 provided that a grantor of a contingent future interest in a voluntary conveyance of real estate, or a grantor who establishes a trust for the benefit of himself or any other person with a future contingent interest to*

persons not “in esse,” or not determined until the happening or a future event, could revoke the contingent future interest before it vested.

Subsequently, in 1943 the statute was amended to provide that it does not apply to an instrument creating a future interest when the instrument “shall expressly state” that the grantor may not revoke it. The amendment was made to ensure irrevocability for federal gift and estate tax purposes.

By providing that a future interest could not be revoked by the grantor if the instrument expressly provides for irrevocability, there is an apparent conflict between G.S. 39-6 and the provisions of Article 11A, Modification and Termination of Irrevocable Trusts, which, in effect, allow a grantor to revoke the terms of an irrevocable trust under certain circumstances. The provisions of Article 11A should supercede the provisions of G.S. 39-6.

According to Graham Holding:

“G.S. 39-6 still applies to allow the grantor to revoke a contingent interest when the instrument is silent as to irrevocability. If so, this is an exception to the general common law rule that if a trust instrument contains no provision for revocation, it is irrevocable. See *Starling v. Taylor*, 1 N.C. App. 287, 161 S.E. 2d 204 (1968). . . The grantor’s right to revoke a future interest when the instrument is silent and does not reserve the right to revoke may be a “bomb shell” for gift and estate tax planning purposes. We see no overriding reasons why section 39-6 should be retained to preserve this right when it could create a tax trap for the unwary, particularly real estate practitioners who may not be familiar with gift and estate tax laws. If the grantor in a deed, trust or otherwise desires to retain a right to revoke the contingent interest, he or she should expressly provide for that right.”

However, the statute applies to more than just trusts. And, as indicated in the notes on the Uniform Trust Code, this common law presumption would be changed for trusts upon adoption of that uniform act. So further research is needed.

NOTE: It is hoped that a team from the Real Property Section will research this issue and provide a proposal / comments to our Section and the Estate Planning Section.

**Attorney’s Office – Landlord Lien only if Notify State Bar (not introduced):**

This act would require landlords of attorneys, doctors or other professionals to notify the state regulatory agencies prior to discarding or destroying client/patient files on non-payment of rent and would allow the state agencies to take possession of the files. Senator Kay Hagan was introducing at request of Margaret Burnham. The situation is still under consideration by a subcommittee of the Real Property Section of the North Carolina Bar Association.

**“MERS as nominee”**

Given significant litigation in Florida, New York and elsewhere regarding the authority of MERS to foreclose on behalf of its member-noteholder, recommendation for clarification of the law applicable or sanctioning of this process has been suggested.

### **Future Advance Amendments – G.S. Ch. 45, Articles 7 & 9**

North Carolina's future advance statute is out of sync with market custom and needs clarification and simplification. Many deeds of trust, residential, construction and commercial, are recorded regularly that do not comply, for local and national lenders, putting these lenders and the attorneys handling their closings at significant risk. Several proposals have been drafted and the task force which created the mortgage satisfaction act is anticipating working on a new future advance proposal as well.

### **Real Property Section Rapid Response Team**

This has been created so that members can alert the Team to possible legislative actions which *might* deserve attention and action by the Real Property Section. The Team would then give a recommendation (action, no action, monitor) and the Council would contact and assign appropriate members to follow up. The assigned member may or may not be the attorney who reported, depending on their interest and willingness to serve. The goal is to assure that matters are not ignored simply because they are not brought to the attention of the Council or solely because the member who knows about the issue is unable to actively pursue it!!

**EXHIBITS**

A	ACKNOWLEDGMENTS, OATHS / AFFIRMATIONS, JURATS: NOTARIAL CERTIFICATES IN NORTH CAROLINA (Updated 11/14/06)	
B	Satisfaction of Security Instrument by Secured Creditor	
C	Trustee's Satisfaction of Deed of Trust	
D	Affidavit of Satisfaction of Security Instrument	
E	Affidavit of Attorney in Fact	
F	Identity Theft Protection Notice	

## EXHIBIT A

### ACKNOWLEDGMENTS, OATHS / AFFIRMATIONS, JURATS: NOTARIAL CERTIFICATES IN NORTH CAROLINA (Updated 11/14/06)

The 2005 Notary Act and the Technical Corrections of 2006 changed the notarial act and the notarial certificate forms, and ultimately made the forms much more flexible. The new *certificate* forms do not in any way change the requirements for assuring *authority and current representative capacity* of the individual signing and acknowledging the document in any fiduciary capacity or on behalf of any entity, or the added statutory presumptions of affixing the corporate seal. In addition, by performing a notarial act, the notary is by statute certifying that:

1. The notary is duly commissioned to act in the particular jurisdiction;
2. The principal personally appeared before the notary;
3. The notary obtained satisfactory evidence of identification
4. “the person whose signature was notarized did not appear in the judgment of the notary to be incompetent, lacking in understanding of the nature and consequences of the transaction requiring the notarial act, or acting involuntarily, under duress, or undue influence”
5. the notary is not otherwise disqualified from acting under G.S. 10-20(c), such as by relationship, or being a party to or beneficiary of the transaction, or other the notary will receive a fee, commission or other benefit from the transaction, other than as a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker."

In addition, North Carolina notary commissions do not extend outside the boundaries of this state; any notarial act pursuant to a NC notary commission must be fully completed with North Carolina and in compliance with NC law.

Many of the notarial certificate forms included herein provide a place for the notary's printed or typed name beneath the notary's signature. This is not required if the legible appearance of the notary's signature may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal.

#### For all acknowledgments (G.S. 10B-41(a))

- (1) The notary can create an acknowledgment certificate that complies with the provisions of G.S. 10B-40(b),
- (2) The notary can use forms in specific sections of Chapter 47, which include only those outlined below specifically, i.e.:

- |   |  |
|---|--|
| • <b>Individual *</b>                   | G.S. 47-38                               |
| • <b>Husband &amp; wife *</b>           | G.S. 47-40                               |
| • <b>Corporation *</b>                  | G.S. 47-41.01<br>G.S. 47-41.02           |
| • <b>Attorney in fact for principal</b> | G.S. 47-43                               |
| • <b>Subscribing Witness</b>            | G.S. 47-13.1, G.S. 47-12.2, G.S. 47-43.2 |
| • <b>Proof of signature</b>             | G.S. 47-43.3                             |
| • <b>Officer proof of signature</b>     | G.S. 47-43.4                             |

*\* The above forms marked by an asterisk (“ \* “) can be used for fiduciary or representative capacities as well, such as partner of a partnership, member or manager of a limited liability companies, trustee, guardian, or executor*

(3) G.S. 10B-41(a) form can be used, or

[state and county in which acknowledged]

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she signed the foregoing document: [name(s) of principal(s).]

Date: \_\_\_\_\_

*(Official Seal)*

Official Signature of Notary

[Notary's printed or typed name], Notary Public

My commission expires: \_\_\_\_\_

**For individual acknowledgments or husband and wife (G.S. 47-38 and 47-40), or representative or fiduciary capacity:**

“Safe Harbor” form of G.S. 10B-41(a) can be used, or the below:

[state and county in which acknowledged]

I [here give the name of the official and his official title], do hereby certify that [here give the name of the grantor or maker] personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

*(Official Seal)*

Official Signature of Notary

[Notary's printed or typed name], Notary Public

My commission expires: \_\_\_\_\_

**For corporate acknowledgments (G.S. 47-41.01 and G.S. 47-41.02), or representative of fiduciary capacity**

“Safe Harbor” form of G.S. 10B-41(a) can be used, or the below:

**Alternative #1: G.S. 47-41.01(b)**

If the deed or other instrument is executed by an official of the corporation, signing the name of the corporation by him in his official capacity, or any other agent authorized by resolution pursuant to G.S. 47-18.3(e), is sealed with its common or corporate seal, and is attested by another person who is an attesting official of the corporation, the following form of acknowledgement is sufficient:

[state and county in which acknowledged]

I, [notary’s printed or typed name], a Notary Public of [county of notary’s commission] County, North Carolina, certify that [name of attesting corporate official] personally came before me this day and acknowledged that he (or she) is [title of attesting corporate official] of [name of corporation], a corporation, and that by authority duly given and as the act of the corporation, the foregoing instrument was signed in its name by its [title of official whose signature is being attested], sealed with its corporate seal, and attested by himself (or herself) as its [title of attesting corporate official].

Witness my hand and official seal this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

*(Official Seal)*

Official Signature of Notary  
[Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

**Alternative #2: G.S. 47-41.01(c)**

If the deed or other instrument is executed by an official of the corporation, signing the name of the corporation in his official capacity, or any other agent authorized by resolution pursuant to G.S. 47-18.3(e) the following form of acknowledgment is sufficient:

[state and county in which acknowledged]

I, [notary's printed or typed name], a Notary Public of [county of notary's commission] County, North Carolina, certify that [name of official] personally came before me this day and acknowledged that he (or she) is [title of official] of [name of corporation], and that he/she, as [title of official], being authorized to do so, executed the foregoing on behalf of the corporation.

Witness my hand and official seal this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Official Signature of Notary  
[Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

(Official Seal)

**Alternative #3: G.S. 47-41.02(c)**

If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

[state and county in which acknowledged]

This the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, personally came before me [notary's printed or typed name], [name of attesting secretary or assistant secretary], who, being by me duly sworn, says that he/she knows the common seal of [name of corporation], and is acquainted with [name of signing president], who is the president of said corporation, and that he/she, the said [name of attesting secretary or assistant secretary], is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he/she, the said [name of attesting secretary or assistant secretary], secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he/she, the said [name of attesting secretary or assistant secretary], signed his/her name in attestation of the execution of said instrument in the presence of said president of said corporation.

Witness my hand and official seal this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Official Signature of Notary  
[Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

(Official Seal)

**Alternative #4: G.S. 47-41.02(c)**

If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

[state and county in which acknowledged]

This is to certify that on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me personally came [name of president, vice-president, secretary or assistant secretary], with whom I am personally acquainted, who being by me duly sworn, says that he/she is the president (or vice-president), and [name of secretary or assistant secretary] is the secretary (or assistant secretary) of the [name of corporation], the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation.

Witness my hand and official seal this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

*(Official Seal)*

Official Signature of Notary  
[Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

**Alternative #5: G.S. 47-41.02(d)**

If the deed or other instrument is executed by the signature of the president, vice-president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

[state and county in which acknowledged]

This \_\_\_\_ day of \_\_\_\_\_, 20 \_\_, personally came before me [notary's printed or typed name], [name of president, vice president, presiding member, trustee], who, being by me duly sworn, says that he/she is [president, vice-president, presiding member, trustee] of the [name of corporation] , and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of said company, and that said writing was signed and sealed by him/her in behalf of said corporation by its authority duly given. And the said [name of president, vice-president, presiding member, trustee] acknowledged the said writing to be the act and deed of said corporation.

Witness my hand and official seal this the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_.

(Official Seal)

Official Signature of Notary  
[Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

**NOTE: G.S. 47-18.3(e)** provides as follows:

Any corporation may convey an interest in real property which is transferable by instrument which is duly executed by either an officer, manager, or agent of said corporation and has attached thereto a signed and attested resolution of the board of directors of said corporation authorizing the said officer, manager, or agent to execute, sign, seal, and attest deeds, conveyances, or other instruments. This section shall be deemed to have been complied with *if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority.* Notwithstanding the foregoing, this section shall not require a signed and attested resolution of the board of directors of the corporation to be attached to an instrument or separately recorded in the case of an instrument duly executed by the corporation's *chairman, president, chief executive officer, a vice-president, assistant vice-president, treasurer, or chief financial officer.* All deeds, conveyances, or other instruments which have been heretofore or shall be hereafter so executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the real or personal property described therein. *[emphasis added]*

Therefore, the instrument must be executed by the corporation's chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial

officer signing the name of such corporation by him as such officer, OR an appropriate separately recordable resolution must accompany the document.

Note regarding corporate seal: For corporations, a formally adopted official seal of the corporation should be clearly affixed near the execution by the officers, in order to have the statutory presumption of authority of the signing officers, though its absence will not alone invalidate the conveyance. G.S. 47-18.3(b). If an embossed or imprinted seal with the corporation's name in it is not available, providing a certified copy of the resolution of the board of directors of the corporation adopting the seal form to appear on the recorded documents is strongly recommended to avoid future marketability problems. The name of the corporation should appear in the seal. If a seal is not affixed, the particular notary acknowledgment should be conformed to delete reference to the corporate seal. (The notary seal requirement is, however, still mandatory.)

Certain form acknowledgments above require attestation by another person who is its secretary or assistant secretary, trust officer, assistant trust officer, associate trust officer, or, in case of a bank, its secretary, assistant secretary, cashier or assistant cashier.

**For Verification or Proof by subscribing witness (either G.S. 47-43.2 or G.S. 10B-42(a)):**

G.S. 47-43.2 certificate:

[state and county in which verification or proof occurs]

I, [notary's printed or typed name], a Notary Public of [county of notary's commission] County, North Carolina, certify that [name of subscribing witness] personally appeared before me this day, and being duly sworn, stated that in his presence [name of signer / maker / principal] (signed the foregoing instrument.) (acknowledged the execution of the foregoing instrument.) *[Strike out the words not applicable]*

Witness my hand and official seal this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

(Official Seal) Official Signature of Notary  
[Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

G.S. 10B-42(a) form can be used, or the notary can create a notarial certificate that complies with the provisions of G.S. 10B-40(c):

[state and county in which verification or proof occurs]

I certify that [name of subscribing witness] personally appeared before me this day and certified to me under oath or by affirmation that he or she is not a grantee or beneficiary of the transaction, signed the foregoing document as a subscribing witness, and either (i) witnessed [name of principal] sign the foregoing document or (ii) witnessed [name of principal] acknowledge his or her signature on the already-signed document.

Date: \_\_\_\_\_

*(Official Seal)*

\_\_\_\_\_  
*Official Signature of Notary*

[Notary's printed or typed name], Notary Public

My commission expires: \_\_\_\_\_

**For power of attorney (G.S. Chapter 32A):**

[state and county in which oath taken]

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_., personally appeared before me, the said named [name of person executing power of attorney] to me known and known to me to be the person described in and who executed the foregoing instrument and he (or she) acknowledged that he (or she) executed the same and being duly sworn by me, made oath that the statements in the foregoing instrument are true.

*(Official Seal)*

\_\_\_\_\_  
*Official Signature of Notary*

[Notary's printed or typed name], Notary Public

My commission expires: \_\_\_\_\_

NOTE: See below for military notarial certificates, specifically including powers of attorney.

**For Attorney-in-fact signing on behalf of principal of a power of attorney (G.S. 47-43)**

“Safe Harbor” form of G.S. 10B-41(a) can be used, or the below:

[state and county in which oath taken]

I, [notary’s printed or typed name], a Notary Public of [county of notary’s commission] County, North Carolina, do hereby certify that [name of attorney-in-fact], attorney-in-fact for [names of parties who executed the instrument through attorney-in-fact], personally appeared before me this day, and being by me duly sworn, says that he/she executed the foregoing and annexed instrument for and in behalf of [names of parties who executed the instrument through attorney-in-fact], and that his/her authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of [name of official in whose office power of attorney is recorded, and the county and state of recordation], on the [day of month, month, and year of recordation], and that this instrument was executed under and by virtue of the authority given by said instrument granting him power of attorney; that the said [name of attorney-in-fact] acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed for and in behalf of the said [names of parties who executed the instrument through attorney-in-fact].

Witness my hand and official seal this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

(Official Seal) Official Signature of Notary  
[Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

**For Oaths or Affirmations (Jurat) (G.S. 10B-43(a):**

- (1) The notary can create a notarial certificate that complies with the provisions of G.S. 10B-40(d); or
- (2) G.S. 10B-43(a) forms can be used,

[state and county in which oath or affirmation taken]

Signed and sworn to (or affirmed) before me this day by [name of principal, which can be eliminated if signature is near jurat and therefore principal is clear from the record].

Date: \_\_\_\_\_ Official Signature of Notary  
[Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

OR

[state and county in which oath or affirmation taken]

Sworn to (or affirmed) and subscribed before me this day by [name of principal],  
*which can be eliminated if signature is near jurat and therefore principal is clear  
from the record*].

Date: \_\_\_\_\_ Official Signature of Notary  
*(Official Seal)* [Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

**For proof of signature where signer (“maker”) is unavailable (G.S. 47-43.3 &  
G.S. 10B-42.1)**

“Safe Harbor” form provided in G.S. 10B-42.1:

[state and county in which verification or proof occurs]

I certify that [name of nonsubscribing witness] personally appeared before me this  
day and certified to me under oath or by affirmation that he or she is not a grantee  
or beneficiary of the transaction, that [name of nonsubscribing witness]  
recognizes the signature of [name of the principal or the subscribing witness] and  
that the signature is genuine.

Date: \_\_\_\_\_ Official Signature of Notary  
*(Official Seal)* [Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

**By signature of maker, if instrument is unattested (G.S. 47-13)dsg**

[state and county in which oath taken]

I, [notary’s printed or typed name], a Notary Public of [county of notary’s  
commission] County, North Carolina, certify that [name of person familiar with  
signer’s signature] and being duly sworn, stated that he knows the handwriting of  
[name of maker] and that the signature to the foregoing instrument is the signature  
of [name of maker].

Witness my hand and official seal this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

*(Official Seal)* Official Signature of Notary  
[Notary's printed or typed name], Notary Public  
My commission expires: \_\_

**For Proof by familiarity with signature of subscribing witness (G.S. 47-43.4):**

If all subscribing witnesses have died or have left the State or have become of unsound mind or otherwise incompetent or unavailable (G.S. 47-12.1)

[state and county in which verification or proof occurs]

I, [notary's printed or typed name], a Notary Public of [county of notary's commission] County, North Carolina, certify that [name of person familiar with handwriting of subscribing witness], personally appeared before me this day, and being duly sworn, stated that he knows the handwriting of [name of subscribing witness], and that the signature of [name of subscribing witness] as a subscribing witness to the foregoing instrument is the signature of [name of subscribing witness].

Witness my hand and official seal this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Official Signature of Notary  
[Notary's printed or typed name], Notary Public  
My commission expires: \_\_\_\_\_

(Official Seal)

**Out of state, foreign or military acknowledgments and notarial certificates:**

NOTE: Acknowledgments taken out of state (i.e. by notaries of other states) can be in the form authorized by that state. The attorney should assure they have verification of the requirements of that state and compliance with its terms.

N.C.G.S. § 47-2, Officials of the United States, foreign countries, and sister states, authorizes any of the following officials to execute acknowledgments of signatories to documents to be recorded. The forms above with respect to the particular type of signatory should be used.

“The execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: *Any judge of a court of record, any clerk of a court of record, any notary public, any commissioner of deeds, any commissioner of oaths, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice-consul, consul general, vice-consul general, or commercial agent of the United States, any justice of the peace of any state or territory of the United States, any officer of the army or air force of the United States or United States marine corps having the rank of warrant officer or higher, any officer of the United States navy or coast guard having the rank of warrant officer, or higher, or any officer of the United States merchant marine having the rank of warrant officer, or higher.* [emphasis added] No official seal shall be required of said military, naval or merchant marine official, but he shall sign his name, designate his rank, and give the name of his ship or military

organization and the date, and for the purpose of certifying said acknowledgment, he shall use a form in substance as follows:

On this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me [name of officer executing this acknowledgment], the undersigned officer, personally appeared [name of principal], known to me (or satisfactorily proven) to be accompanying or serving in or with the armed forces of the United States (or to be the spouse of a person accompanying or serving in or with the armed forces of the United States) and to be the person whose name is subscribed to the within instruments and acknowledged that he executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

Official Signature of Officer  
[Rank of Officer and command to which attached]

If the proof or acknowledgment of the execution of an instrument is had before a justice of the peace of any state of the United States other than this State or of any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate.”

**Acknowledgment of armed forces personnel.**

In addition to the above provisions, military acknowledgments are also allowed under Title 10, United States Code, Section 1044a and 1044b.

**10 USCS § 1044a. Authority to act as notary**

(a) The persons named in subsection (b) have the general powers of a notary public and of a consul of the United States in the performance of all notarial acts to be executed by any of the following:

- (1) Members of any of the armed forces.
- (2) Other persons eligible for legal assistance under the provisions of section 1044 of this title [10 USCS § 1044] or regulations of the Department of Defense.
- (3) Persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(4) Other persons subject to the Uniform Code of Military Justice (chapter 47 of this title [10 USCS §§ 801 et seq.]) outside the United States.

(b) Persons with the powers described in subsection (a) are the following:

(1) All judge advocates, including reserve judge advocates when not in a duty status.

(2) All civilian attorneys serving as legal assistance attorneys.

(3) All adjutants, assistant adjutants, and personnel adjutants, including reserve members when not in a duty status.

(4) All other members of the armed forces, including reserve members when not in a duty status, who are designated by regulations of the armed forces or by statute to have those powers.

(5) For the performance of notarial acts at locations outside the United States, all employees of a military department or the Coast Guard who are designated by regulations of the Secretary concerned or by statute to have those powers for exercise outside the United States.

(c) No fee may be paid to or received by any person for the performance of a notarial act authorized in this section.

(d) The signature of any such person acting as notary, together with the title of that person's offices, is prima facie evidence that the signature is genuine, that the person holds the designated title, and that the person is authorized to perform a notarial act.

#### **10 USCS § 1044b. Military powers of attorney: requirement for recognition by States**

(a) Instruments to be given legal effect without regard to State law. A military power of attorney--

(1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and

(2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.

(b) Military power of attorney. For purposes of this section, a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title [10 USCS § 1044a] or other applicable State or Federal law.

(c) Statement to be included.

(1) Under regulations prescribed by the Secretary concerned, each military power of attorney shall contain a statement that sets forth the provisions of subsection (a).

(2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a military power of attorney that does not include a statement described in that paragraph.

(d) State defined. In this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.

### **Federal Prisoners**

Under 18 U.S.C. Section 4004,

“The wardens and superintendents, associate wardens and superintendents, chief clerks, record clerks, and parole officers, of Federal penal or correctional institutions, may administer oaths to and take acknowledgments of officers, employees, and inmates of such institutions, but shall not demand or accept any fee or compensation therefor.”

**EXHIBIT B**

**SATISFACTION OF SECURITY INSTRUMENT  
BY SECURED CREDITOR  
[N.C.G.S. 45-36.10; N.C.G.S. 45-37(a)(7)]**

The undersigned is now the Secured Creditor in the Security Instrument identified as follows:

Type of security instrument: \_\_\_\_\_  
[Identify type of security instrument, such as deed of trust or mortgage]

Original Grantor(s): \_\_\_\_\_  
[Identify original grantor(s), trustor(s), or mortgagor(s)]

Original Secured Party(ies): \_\_\_\_\_  
[Identify the original beneficiary(ies), mortgagee(s), or secured party(ies) in the Security Instrument]

Recording Data: The Security Instrument is recorded in Book \_\_\_\_\_ at Page \_\_\_\_\_  
or as document number \_\_\_\_\_ in the Office of the Register of Deeds for  
\_\_\_\_\_ County, North Carolina.

This satisfaction terminates the effectiveness of the Security Instrument.

Date: \_\_\_\_\_

SECURED CREDITOR

By: \_\_\_\_\_  
Print or Type Name: \_\_\_\_\_  
Title: \_\_\_\_\_

State of \_\_\_\_\_  
County of \_\_\_\_\_

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she signed the foregoing document: \_\_\_\_\_  
\_\_\_\_\_ [insert name(s) of principal(s)].

Date: \_\_\_\_\_

\_\_\_\_\_, Notary Public

(Official/Notarial Seal)

Notary's Printed or Typed Name  
My commission expires: \_\_\_\_\_

**EXHIBIT C**

**TRUSTEE'S SATISFACTION OF DEED OF TRUST  
[N.C.G.S. 45-36.20; N.C.G.S 45-37(a)(7)]**

The undersigned is now serving as the trustee or substitute trustee under the terms of the Deed of Trust identified as follows:

Original Grantor(s): \_\_\_\_\_  
[Identify original grantor(s), trustor(s), or mortgagor(s)]

Original Secured Party(ies): \_\_\_\_\_  
[Identify the original beneficiary(ies), mortgagee(s), or secured party(ies) in the Security Instrument]

Recording Data: The Deed of Trust is recorded in Book \_\_\_\_\_ at Page \_\_\_\_\_  
or as document number \_\_\_\_\_ in the office of the Register of Deeds for  
\_\_\_\_\_ County, North Carolina.

This satisfaction terminates the effectiveness of the Deed of Trust.

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Print or Type Name: \_\_\_\_\_  
Title: \_\_\_\_\_

State of \_\_\_\_\_  
County of \_\_\_\_\_

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she signed the foregoing document: \_\_\_\_\_  
\_\_\_\_\_ [insert name(s) of principal(s)].

Date: \_\_\_\_\_

\_\_\_\_\_, Notary Public  
Notary's Printed or Typed Name  
My commission expires: \_\_\_\_\_

(Official/Notarial Seal)

**EXHIBIT D**

**AFFIDAVIT OF SATISFACTION  
OF SECURITY INSTRUMENT BY  
ATTORNEY LICENSED TO PRACTICE LAW IN NORTH CAROLINA  
[N.C.G.S. 45-36.16 and 45-37(a)(7)]**

DATE OF AFFIDAVIT: \_\_\_\_\_

The undersigned hereby states as follows:

1. I am an attorney licensed to practice law in the State of North Carolina.
2. I am signing this Affidavit of Satisfaction to evidence full payment or performance of the obligations secured by real property covered by the following security instrument (the "Security Instrument") currently held by \_\_\_\_\_  
\_\_\_\_\_ (the "Secured Creditor"):

Type of security instrument: \_\_\_\_\_  
[identify type of security instrument, such as deed of trust or mortgage]

Original Grantor(s): \_\_\_\_\_  
[Identify original grantor(s), trustor(s), or mortgagor(s)]

Original Secured Party(ies): \_\_\_\_\_  
[Identify the original beneficiary(ies), mortgagee(s), or secured party(ies) in the Security Instrument]

County and state of recording: \_\_\_\_\_

Recording data for Security Instrument: Book \_\_\_\_\_ at Page \_\_\_\_\_  
or as document number \_\_\_\_\_.

3. I have reasonable grounds to believe that the Secured Creditor has received full payment or performance of the balance of the obligations secured by the security instrument.
4. With the authorization of the owner of the real property described in the Security Instrument, I gave notification to the Secured Creditor by method authorized by G.S. 45-36.5 that provides proof of receipt that I would sign and record an affidavit of satisfaction of the Security Instrument if, within 30 days after the effective date of the notification, the Secured Creditor did not submit a satisfaction of the security interest for recording or give notification that the secured obligation remains unsatisfied.

5. Check appropriate box:

- The 30-day period identified in paragraph 4 has elapsed, I have no knowledge that the Secured Creditor has submitted a satisfaction for recording, and I have not received notification that the secured obligation remains unsatisfied.
- The Secured Creditor responded to the notification in paragraph 4 by authorizing me to execute and record this Affidavit of Satisfaction.

\_\_\_\_\_  
 Print or Type Name: \_\_\_\_\_  
 Satisfaction Agent – North Carolina Licensed Attorney

State of \_\_\_\_\_  
 County of \_\_\_\_\_

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she signed the foregoing document: \_\_\_\_\_ [insert name(s) of principal(s)].  
 \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_, Notary Public  
 Notary's Printed or Typed Name  
 My commission expires: \_\_\_\_\_

(Official/Notarial Seal)

**EXHIBIT E**

**AFFIDAVIT OF ATTORNEY-IN-FACT**  
**(Pursuant to N.C.G.S. 32A-40)**

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

The undersigned does hereby state and affirm the following:

- (1) The undersigned is the person named as Attorney-in-Fact in the Power of Attorney executed by \_\_\_\_\_ ("Principal") on \_\_\_\_\_ [date] (the "Power of Attorney").
- (2) The Power of Attorney is currently exercisable by the undersigned.
- (3) The undersigned has no actual knowledge of any of the following:
  - a. The Principal is deceased.
  - b. The Power of Attorney has been revoked or terminated, partially or otherwise.
  - c. The Principal lacked the understanding and capacity to make and communicate decisions regarding his estate and person at the time the Power of Attorney was executed.
  - d. The Power of Attorney was not properly executed and is not a legal, valid power of attorney.
- (4) The undersigned agrees not to exercise any powers granted under the Power of Attorney if the undersigned becomes aware that the Principal is deceased or has revoked such powers.

This is the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_.

\_\_\_\_\_  
Name: \_\_\_\_\_  
Attorney-in-Fact for: \_\_\_\_\_

State of \_\_\_\_\_  
County of \_\_\_\_\_

Signed and sworn to (or affirmed) before me this day by \_\_\_\_\_  
\_\_\_\_\_[insert name(s) of principal(s)]  
and I certify that each of the aforesaid person(s) personally appeared before me this day acknowledging to me that he or she signed the foregoing document.

Date: \_\_\_\_\_

\_\_\_\_\_, Notary Public  
Notary's Printed or Typed Name  
My commission expires: \_\_\_\_\_

(Official/Notarial Seal)

## EXHIBIT F

### **Identity Theft Protection Act**

**Per G.S. 132-1.8 (g)**

**Effective DECEMBER 1, 2005**

**Viewable at: [www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S1048v6.html](http://www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S1048v6.html)**

Any person preparing or filing a document for recordation or filing in the official records may not include a social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords in the document, unless expressly required by law or court order, adopted by the State Registrar on records of vital events, or redacted so that no more than the last four digits of the identification number is included.

Any person has a right to request a register of deeds to remove, from an image or copy of an official record placed on a register of deeds' Internet Web site available to the general public or on an Internet Web site available to the general public used by a register of deeds to display public records, any social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords contained in an official record. The request must be made in writing and delivered by mail, facsimile, or electronic transmission, or delivered in person, to the register of deeds. The request must specify the personal information to be redacted, information that identifies the document that contains the personal information and unique information that identifies the location within the document that contains the social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords to be redacted. No fee will be charged for the redaction pursuant to such a request. Any person who requests a redaction without proper authority to do so shall be guilty of an infraction, punishable by a fine not to exceed five hundred dollars (\$500.00) for each violation.