THE NC CONNECTION

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Best Laid Plans and Plats

Implied Easements and Dedications

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It is only after the well-reviewed plat is recorded that you discover that misspelled word (it hides until the plat is recorded), or the client realizes that they may need to change a lot line, setback, or reduce a common area. Making a change to a plat, when everything is still owned by the developer can be fairly simple. Making changes after lots have been conveyed may be complicated as certain equities and implications may have taken effect.

Certainly everyone recognizes that restrictions and restrictive covenants control what you can build and what you can do with your real property. The subdivision plat, however, is not readily identified as a restrictive instrument, but usually as a descriptive reference for the lots and dedication of the access. The subdivision plat, however, is often intended to have a restrictive effect. An easy example would be the inclusion of building setback lines shown on the plat. These setback lines become a restriction on where the improvements can be located on a lot.

> **"It has become commonplace not to explicitly convey an easement to a lot purchaser..."**

It has become commonplace not to explicitly convey an easement to a lot purchaser, when the conveyance is according to a recorded map detailing lots, streets, and roads. The certifying attorney reviews the dedication to the public of the roads and rights of way and concludes that easements have been created. This assumption is correct even if those street and roads have not been taken over by the public, because such a conveyance by a developer impliedly grants a private easement to the purchaser to use those roads and rights of way for purposes of ingress and egress.[i] This implied dedication, however, does not limit itself only to easements and rights of way and can include common area, parkland, playgrounds, and other amenities shown on the plat.

In the Cleveland Realty Company v. Hobbs[ii], the court stated:

Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. Steadman v. Pinetops, 251 N.C. 509, 112 S.E.2d 102; Conrad v. West End Hotel & Land Company, 126 N.C. 776, 36 S.E. 282. It is said that such streets, parks and playgrounds are dedicated to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. Jackson v. Gastonia, 246 N.C. 404, 98 S.E.2d 444.

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It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. Irwin v. Charlotte, 193 N.C. 109, 136 S.E. 368; Todd v. White, 246 N.C. 59, 97 S.E.2d 439.

This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. Hughes v. Clark, 134 N.C. 457, 46 S.E. 956, 47 S.E. 462; Conrad v. West End Hotel & Land Co., supra. Thus, a street, park or playground may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated. Home Real Estate Loan & Insurance Co. v. Carolina Beach, 216 N.C. 778, 7 S.E.2d 13; Conrad v. West End Hotel & Land Co., supra.

This is especially true when a developer has recorded a plat that shows a common area, and has conveyed out several lots. The developer could not re-subdivide this common area into additional lots without the prior platted lot owners releasing their interest in the property or joining in the re-dedication. There is not an easy solution to this unanimous requirement, but a prudent draftsman could include in a declaration of covenants, conditions and restrictions, prior to any transfers, a means to facilitate less then a majority requirement to change or alter the plat(s) even after lots are conveyed to purchasers. This ability to change the plat and alter common areas and park land will be limited by the recent case of Ledges v. Armstrong[iii] and, as such, any resulting changes should be reasonable in light of the previous development scheme.

It is not only the developer that can cause an implied dedication when he transfers lots. A release deed from a lender of a lot sold to a purchaser using the recorded plat as a descriptive reference will be considered an implied consent to the dedication.[iv] Thus, a subsequent foreclosure of a superior deed of trust will not foreclose the easement dedication because of the implied waiver of the lender's rights due to the descriptive reference and resulting implication. [v]

These resulting implied appurtenant easements are created by less then traditional means yet are subject to the traditional rules of conveyancing [vi]; therefore, amenities such as parkland and playgrounds, shown on a plat, must be particularly described and not ambiguous.[vii] A vague description without boundaries entitled parkland on a recorded plat did not result in an implied easement because the property was not adequately described. [viii]

Implied easements and dedications protect purchasers and allow them some equitable protection from the whims of the developer, or the unanticipated financial failure of the same. Yet, as a servitude on the fee, the 'same' can be lessened with some insight and planning. These appurtenant easements are much like wild mushrooms, you need to know exactly what they look like before you plan dinner. So, like any other conveyance, you should use care when examining or creating them.

[i] Rudisil v. Icenhour, 92 N.C. App. 741, 375 S.E.2d 682 (1989).
[ii] 261 N.C. 414, 135 S.E.2d 748 (1954).
[iii] 360 N.C. 547, 633 S.E.2d 78 (2006).
[iv] Tower Dev. Partners v. Zell, 120 N.C.App. 136, 461 S.E.2d 17 (1995).
[v]Id.
[vi] Stines v. Willing, 81 N.C. App. 98, 344 S.E.2d 546 (1986).
[vii] Id.
[viii] Id.

NC FUN FACTS

High Point is currently the eighth-largest municipality in North Carolina and is known for its furniture, textiles, and bus manufacturing. The city is sometimes referred to as the "Furniture Capital of the World" although its official slogan is "North Carolina's International City" due to the semi-annual High Point Market that attracts 100,000 exhibitors and buyers from around the world. Most of the city is located in Guilford County, with portions spilling into neighboring Randolph, Davidson, and Forsyth counties. High Point is North Carolina's only city that extends into four counties.

High Point is the home of world's largest chest of drawers (pictured right). This iconic symbol of the city since 1926 is an example of automobile-oriented pop architecture and has been featured on numerous broadcasts such as MTV and The Travel Channel.

World's Largest Chest of Drawers
High Point, NC

Check Your Notary Clause

By Kellie Army, Claims Counsel

In 2009, Marshall and Lilly decide to move to the suburbs and into a lovely house on Legendary Lane. They secure financing from Barney's Bank and hire a closing attorney. The closing attorney has ensured that all of the closing documents are properly prepared. The Deed of Trust is accurate and complete, and the property is correctly identified in the Exhibit A. Marshall and Lilly sign, the Exhibit A is attached, and the Deed of Trust is recorded.

In 2010, Marshall and Lilly have been having trouble financially; they are barely making their payments to Barney's Bank and have stopped paying the Homeowner's Association altogether. As a result, the Homeowner's Association forecloses on the property. Ted buys the property at the Homeowner's Association's foreclosure sale. Marshall and Lilly move back to the city and stop making their payments to Barney's Bank. Ted moves into his new house and makes no payments to Barney's Bank.

"A defective notary acknowledgment in the Deed of Trust means that... it does not provide notice of the encumbrance to purchasers for value..."

In early 2011, Barney's Bank begins its own foreclosure proceedings against the property. A public records search reveals that Ted is the new owner of the property and Barney's Bank provides notice to Ted, Marshall, and Lilly.

Ted, upon receiving notice of the impending foreclosure, protests that he had no notice whatsoever that Barney's Bank had any interest at all in the property. Barney's Bank is stunned by this declaration, as their Deed of Trust was recorded immediately after Marshall and Lilly signed. They quickly print a copy of the recorded document as proof that Ted did indeed have notice of their security interest in the property.

What do they find? Despite the fact that the document was so carefully prepared and the property properly identified, Marshall and Lilly's names were missing from the notary acknowledgment clause, rendering the acknowledgment defective. Barney's Bank immediately files a claim with the title company, who, of course, immediately notifies the closing attorney of the error.

A defective notary acknowledgment in the Deed of Trust means that, although the document was properly recorded, it does not provide notice of the encumbrance to purchasers for value like Ted. Whether or not Ted had actual knowledge of the Deed of Trust does not matter, it is record notice that counts, and it is record notice that is missing here.

Notary defects are easy to miss, especially in documents that have already been checked and double checked for accuracy. Often, these errors can be corrected by the execution and recording of a Notary Recertification. Where there are intervening liens, where the borrowers file bankruptcy or where somebody like Ted comes into the picture, however, these simple errors can have serious consequences.

Note: Names of people, places, and organizations have been changed for privacy purposes.

NC CONTENT ONLY

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MEET OUR MARKETING MANAGERS

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Carol Faucette is the Marketing Manager for the Greensboro, North Carolina market. She began her career with Investors in June of 1996 as an underwriter in the Chapel Hill branch and was promoted shortly thereafter to Commercial Transactions Coordinator in the Commercial Services Division in Chapel Hill. In April of 2006, Carol joined the North Carolina marketing team and is responsible for business development efforts in Alamance, Caswell, Rockingham, and Guilford counties. Carol lives in Graham, North Carolina with her husband, Chris, and their two daughters, Caris and Carlie.

Capps v. Blondeau

When a contract that the parties allegedly signed cannot be produced, courts are free to determine that no agreement existed. The North Carolina Court of Appeals issued that holding in a case that developed when Martha Capps, through her son as guardian, filed suit against her investment adviser and the adviser's employer, Morgan Keegan. In a 2009 criminal proceeding, the adviser pleaded guilty to defrauding Capps of $1.78 million. Capps, who suffered from dementia, had filed suit two years earlier—in October 2007—alleging, *inter alia*, breach of various fiduciary duties, fraud and deceptive trade practices. Morgan Keegan sought to dismiss the complaint, arguing that Capps had signed the firm's new accounts form, which required the parties to submit any disputes to an arbitration panel. But after moving the client agreements into a digital format, the firm destroyed the original contracts, except for each signature page. The firm had similar new accounts forms that it submitted to the court, but there were inconsistencies between those documents and the page numbers on the existing signature pages. The trial court acknowledged that relying on electronically stored copies "is not necessarily inappropriate," but that, in this case, the firm's "record keeping… was sloppy and fragmented at best." Accordingly, the trial court found that no arbitration agreement between the parties existed, thereby allowing the case to move forward—without arbitration. The appellate court agreed, and affirmed.

--*Capps v. Blondeau,* No. COA 10-1077, N.C. Ct. App. 11/15/11

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