DELAWARE STATE BAR ASSOCIATION

PRESENTS

FUNDAMENTALS OF REAL ESTATE 2021

LIVE SEMINAR AT DSBA WITH ZOOM OPTION

SPONSORED BY THE REAL AND PERSONAL PROPERTY SECTION OF THE DELAWARE STATE BAR ASSOCIATION

TUESDAY, OCTOBER 5, 2021 | 8:30 A.M. TO 4:00 P.M.

6.0 Hours CLE credit including 0.5 credit in Enhanced Ethics for Delaware and Pennsylvania Attorneys

CLE

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

FUNDAMENTALS OF REAL ESTATE 2021

ABOUT THE PROGRAM

One of the seven Fundamentals courses for all new attorneys. If you are new to real and personal property law, either as a new admittee or you're handling a *pro bono* case or just need a refresher, this seminar is invaluable. Experts in the field will discuss the real estate essentials of settlements, titles searches, financing, land use, and escrow.

MODERATOR

Brian F. Funk, Esquire
Brian Frederick Funk, P.A.

PROGRAM

8:00 a.m. – 8:30 a.m.
Registration and Check-in

8:30 a.m. – 9:30 a.m.
Agreements of Sale
Andrew P. Taylor, Esquire
Copeland Taylor, LLC

9:30 a.m. – 10:15 a.m.
Title Searches
George J. Danneman, Esquire
The Danneman Firm, LLC

10:15 a.m. – 10:30 a.m. | Break

10:30 a.m. – 11:15 a.m.
Land Use Regulations
Richard "Shark" Forsten, Esquire
Saul Ewing Arstein & Lehr LLP

11:15 a.m. – 11:30 a.m.
Relationship Between Attorneys and Title Companies
James F. Harker, Esquire
Cohen Seglias Pallas Greenhall & Furman PC

11:30 a.m. – 12:00 p.m.
Protecting Your Escrow Account
Brian F. Funk, Esquire
Brian Frederick Funk, P.A.

12:00 p.m. – 1:00 p.m.
Lunch (on your own)

1:00 p.m. – 2:00 p.m.
Real Estate Settlements
Deborah J. Galonsky, Esquire
Giordano Delcollo Werb & Gagne LLC

2:00 p.m. – 2:15 p.m. | Break

2:15 p.m. – 2:45 p.m.
Ethics and Real Estate Law
Charles Slanina, Esquire
Finger and Slanina, LLC
William Patrick Brady, Esquire
The Brady Law Firm, P.A.
Kathleen M. Vavala, Esquire
Office of Disciplinary Counsel
David A. White, Esquire
Office of Disciplinary Counsel

2:45 p.m. – 3:30 p.m.
Mortgage and Residential Financing
Jenna L. Stayton, Esquire
Giordano Delcollo Werb & Gagne LLC

3:30 p.m. – 4:00 p.m.
Liens on Real Estate
Thomas P. Carney, Esquire
T. Carney Sussex Law, LLC

4:15 p.m. – 7:00 p.m.
Happy Hour
Iron Hill Brewery | 620 Justison St, Wilmington, DE 19801

COVID-19 POLICY: The DSBA requires that everyone, including speakers and attendees, must be fully vaccinated against COVID-19 to attend live CLE events. In addition, all participants and attendees, regardless of COVID-19 vaccination status, must wear masks except when presenting, eating, or drinking.

CLE is a HYBRID CLE. You may register for this event as a live participant or by Zoom. Even if you register as a live participant, you will receive a Zoom link by email immediately which you may disregard if not attending by Zoom. (Check spam folders if you do not.) If you are going to attend the live session, you will report to the venue and check in. Only live attendees will receive live CLE credits after 12/31/2021.

REGISTRATION INFORMATION AND RATES

This CLE will be conducted live and via Zoom. To register, visit www.dsba.org/cle and select this seminar, choosing whether you wish to attend live or by Zoom. If registering for EITHER method, you will receive an email back from Zoom immediately providing you with the correct login information. If attending by zoom and you do not receive this email, contact DSBA via email: reception@dsba.org. The Supreme Court of the State of Delaware Commission on Continuing Legal Education cannot accept phone conferencing only. You must attend through a device that allows DSBA to obtain your Bar ID in order to receive CLE Credit. Your attendance will be automatically monitored beginning at the scheduled start time and will be completed when the CLE has ended. If you enter or leave the seminar after or before the scheduled start /end time, you will receive credit only for the time you attended. Your

CLE credits will be submitted to the Delaware and Pennsylvania Commissions on CLE, as usual. Naturally, if you attend the seminar live, you must sign in and we will use your attendance as the means for reporting the live credit.

Moderator

Brian F. Funk, Esquire
Brian Frederick Funk, P.A.

Agreements of Sale

Andrew P. Taylor, Esquire
Copeland Taylor, LLC

BIOGRAPHICAL SKETCH

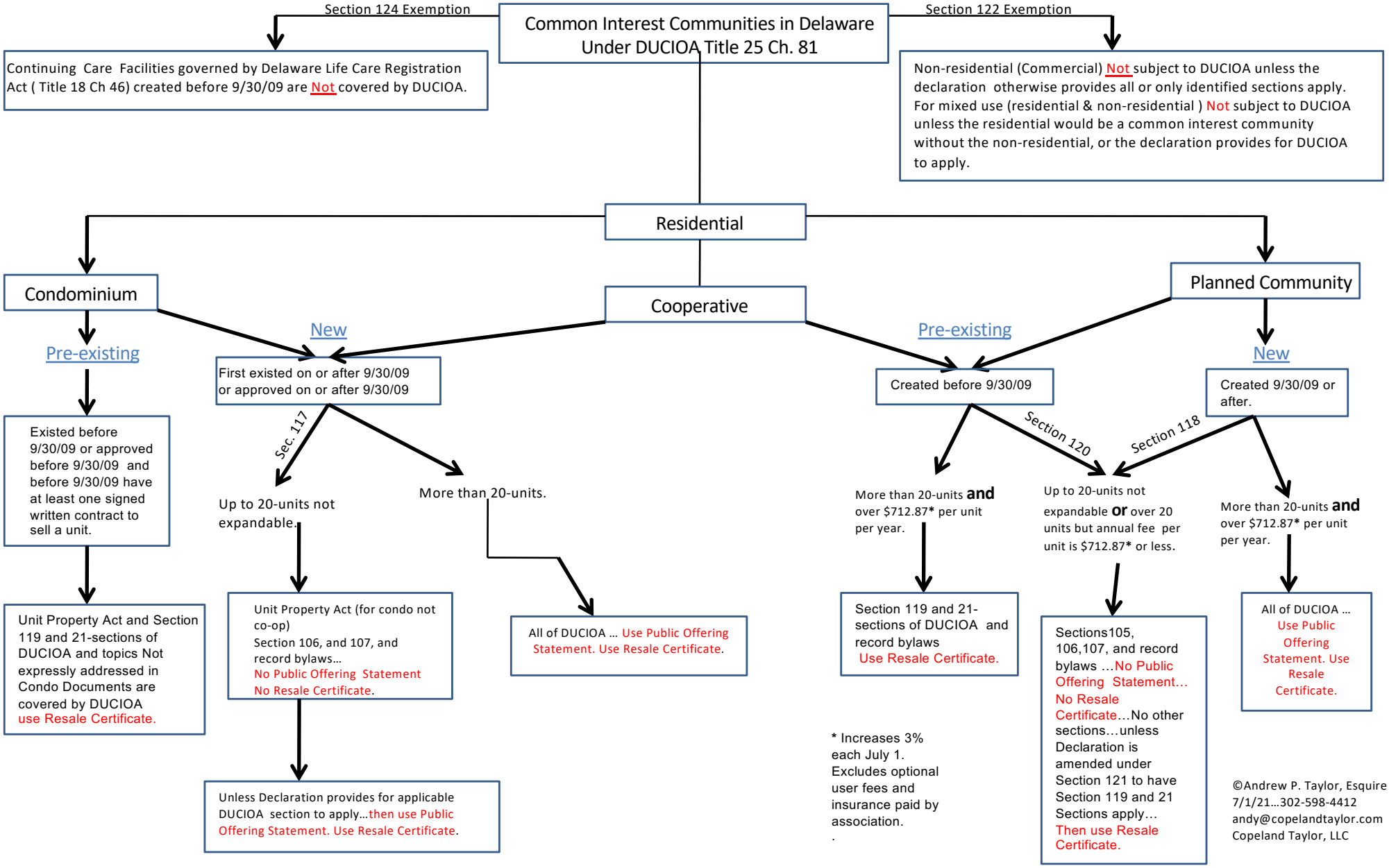
ANDREW P. TAYLOR, ESQ.
Copeland Taylor, LLC
andy@copelandtaylor.com (302) 281-5547(w) (302) 598-4412(c)

Mr. Taylor is a manager Attorney with the firm of Copeland Taylor, LLC. He is a graduate of The Dickinson School of Law and the University of Delaware. He is admitted to practice in Delaware and Pennsylvania. He was the 1994-96 Chairman of the Real and Personal Property Section of the Delaware State Bar Association. For the years 1987-2021, Mr. Taylor has been named in Woodward/White's Directory as one of the Best Lawyers in America in the Real Estate field. He has been recognized by Martindale-Hubbell with their top rating of AV. In 1991 he was a consultant to the Delaware Human Relations Commission responsible for re-writing Delaware's Fair Housing Act and Regulations enacted in 1992. He is the Legal Counsel for the Delaware Association of REALTORS® and The New Castle County Board of REALTORS®. He is a Corporator and Director of Artisans' Bank and a past President of the Board of Trustees of The Independence School. He is an assistant Scoutmaster for Boy Scout Troop 2 and from 2008 – 2018 was mentor in aluminum welding for the FIRST MOE365 robotics team. He is also a former board member and current volunteer for Family Promise of Northern New Castle County, Inc. providing housing and services for families experiencing homelessness. Mr. Taylor is a member of St. James Episcopal Church and the Committee of 100. He also lectures and teaches extensively to real estate brokers and salespeople in the field of Real Estate Law and in 1994 was the recipient of the Education Award from the New Castle County Board of Realtors®. In 2017 he received the President's Award from the Delaware Association of Realtors® and in 2021 received the Affiliate of the Year award from New Castle County Board of Realtors® in recognition of his work keeping real estate brokerage open safely during the COVID State of Emergency in Delaware. Mr. Taylor was an expert witness in the Mid-Atlantic Settlement Services case before the Board on the Unauthorized Practice of Law of the Supreme Court of the State of Delaware. He has also been recognized in Delaware Today magazine as one of the top real estate lawyers in Delaware most recently in 2021.

Primarily responsible for drafting the following legislation or regulations:

1. Delaware's original agency disclosure statute.
2. Psychologically Impacted Properties section, 1991
3. Buyer Property Protection Act and first Seller's Disclosure of Real Property Condition Report Form.

4. Delaware Fair Housing Act 1992.
5. Delaware Agency statute, 2007 and Consumer Information Statements.
6. Amendments to Delaware Agency Statute 2008.
7. Provided substantial comments to DeREC for revisions to Seller's Disclosure form. 2008
8. Provided comments to re-write of Delaware Landlord Tenant Code.
9. Substantial assistance on revisions to Licensing Act Real Estate Brokers 2008-11
10. Assisted with amendments to DUCIOA 09 &10 & drafted Resale Certification Form 2009
11. Statute prohibiting Private Transfer Fees in DE. 2010
12. Assisted with revisions to DeREC Rules & Regs. and education rules 2011-2012
13. Assisted with revisions to CIS forms 2011-2012
14. Commercial Broker's Lien Statute 2013
15. Amendment to Buyer Property Protection Act to add form for vacant land. 2016
16. Amendment to Source of Income in Fair Housing to clarify effect on Landlords 2016.
17. 2017 Assisted with revisions to Real Estate Commission Regulations and Seller's Disclosure forms.
18. 2017 Assisted to delay increase in State Realty Transfer Tax.
19. 2018 amendment to State Transfer tax for first time buyers.
19. Assisted with revisions to form 5403.
20. 2018-2020 Assisted with revisions to DeREC regulations.
21. 2019 wrote Delaware statute to exempt real estate agents from municipal business licenses.
22. 2017-19 Assisted with amendments to DE law on Solar panels and deed restrictions.
23. 2019 Assisted with amendments to statute on form 5403 concerning non-resident sellers of multiple properties, such as builders.
24. 2020.3 appointed as the person to negotiate with the Executive branch for what activities of real estate agents are allowable during the COVID-19 State of Emergency in Delaware.



©Andrew P. Taylor, Esquire
7/1/21…302-598-4412
andy@copelandtaylor.com
Copeland Taylor, LLC

Delaware Statutes concerning Real Estate Contracts

Notes from Andrew Taylor, Esq., © 2002, 03, 04, 08, 10, 11, 12, 14, 15, 16, 17,19,21
andy@copelandtaylor.com

I. Many sections in Title 6, but here are some of the more important ones.

1. Delaware Uniform Unincorporated Nonprofit Association Act. 6 Del.C. Ch 19
2. Age of Majority; capacity to contract. Age 18. 6 Del. C. §2705 and 25 Del C. §312
3. Contracts Joint and Several unless otherwise expressed. 6 Del.C. §2701
4. Choice of Law 6 Del.C. §2708 parties can choose Delaware Law to control contract.
5. Delaware Statute of Frauds. 6 Del. C. §2714
6. Buyer Property Protection Act (Seller's Disclosure) 6 Del. C. Subchapter VII §§2570-2578 forms revised 10/1/2017, and exemption form.
7. Campground Resorts Membership and Vacation Time Sharing Plans Sales Act. 6 Del.C. Subtitle II Chapter 28.
8. Building Construction Payments, 6 Del.C. Subtitle II, Chapter 35.
9. New Home Buyers Protection Act. 6 Del. C. Subchapter I. §§3601-3652 Provides for escrow of funds from seller of newly constructed residence when unfinished work exceeds 1 percent of the contract price.
10. New Home Buyers Fire Protection Act, 6 Del.C. Subtitle II, Subchapter III §3681-3683
11. Home Owner's Protection Act, for residential properties, 6 Del.C. Subchapter II Ch. 36, Subchapter II
12. Home Solicitation Sales. 6 Del.C. Subtitle II Chapter 44
13. Fair Housing Act 6 Del. C. chapter 46, protects on 13 statuses.
14. What I call Plain English provisions. But only applies to consumer contracts $50,000 and less. 6 Del. C. Subchapter IV. §§2731-2736. Definition of Merchandise includes real property.
15. Uniform Electronic Transactions Act (UETA) Title 6, Subtitle II, Chapter 12A
16. Delaware Consumer Fraud Act. Title 6, Subtitle II, Chapter 25, Subchapter II
17. Radon Disclosure Title 6 §2572A, exemptions track seller disclosure.
18. Voluntary Alternative Dispute Resolution Act. Involving business disputes at least $100,000. Title 6, Subtitle IV, Chapter 77

II. Other sections Many in Title 25

19. Amenity fees not collected till constructed and open Title 25 §317,
    Title 25§317A. Disclosure of financial obligations in chain of title for new home sales. (new in 2010)
20. Notices required under Delaware Common Interest Ownership Act. DUCIOA Title 25 Part V. Chapter 81 (New10/31/08 and amended in 2009 and 2010). §409 Resale Certificate and builders offering statement.
21. Escrow of deposit under DUCIOA §410 if required to use Public Offering Statement, then must escrow with attorney or broker.
22. Express, Implied, Exclusion of, and Statute of Limitations for warranties, DUCIOA 413-416.
23. Seller Financing and Conditional Sales: 25 Del. C. §314 (1/21/1992) revised 2008

24. Rule Against Perpetuities. Still applies to real property. 25 Del. C. §503.
25. Contracts for the sale of Agricultural Land 25 Del. C. §315
26. Title and disposal of property by aliens. 25 Del. C. §306 does not matter if you are a citizen or not.
27. Contracts for the sale of unimproved real estate. Notice to buyer of public sewerage and water facilities. 25 Del. C. §313.
28. Unit Property Act (Condominiums) 25 Del. C. Chapter 22 §§ 2201-2240, amended 09 Also see Common Interest Ownership Act. Title 25 Part V. Chapter 81 (DUCIOA)
29. Mechanics Liens 25 Del. C. Chapter 27 §§2701-2737
30. Real Estate Brokers, Salespersons and Appraisers 24 Del C. Chapter 29. See §2927 Certain Psychological impacts not material facts also applies to FSBOs.
31. Agency disclosure language for commercial contracts and leases. 24 Del C.§2938(f)
32. Smoke detector requirements Title 16 Ch 66, Subchapter IV.

33. Manufactured Home Community right of first refusal for Owner's Association to purchase. Title 25 §7026. Also, Landlord's right to purchase manufactured home for 1% higher than contact price. Title 25 §7022.

34. Restrictive Covenants: Title 25, §318 No unreasonable restrictions on rooftop solar systems after 1/1/2010, but see below for retroactive effect. Also allows for amending restrictions for rooftop solar system by a vote of 2/3 of property owners.

In 2010 similar provisions were added for restrictions on ground mounted solar systems on residential lots of ½ acre or more.

Amended in 2019 to apply retroactively to not allow unreasonable restrictions on roof mounted solar systems and implement a system of notice to and seeking input from the neighborhood association and neighbors .

Also allows for amendment of any covenants, restrictions or conditions in a deed or declaration, including a Unit Property Act condominium declaration (added 2010) that do not by their terms have a means to amend, may be amended by a 2/3 vote of property owners.
Be aware that solar system might not be owned by the homeowner. It may be owned by the Solar Company with a financing statement recorded or paid for through the real estate taxes. May want to consider a contingency for buyer to review program and to qualify to take over the obligations.

35. Wind Power restrictions: Limitations on restrictions for residential wind energy system. Title 29 §8060.
36. Private Transfer fee prohibition. Title 25, §319.
37. Commercial Broker's Lien Act. Title 25, Chapter 26

III. Local ordinances that may surprise you.

38. New Castle County maintenance corporation notice. UDC section 27.150
39. Sale of properties with outstanding code violation notices.
International Property Maintenance Code PM 106 and 107.6
Similar to BOCA Property Maintenance Code PM 106.1 & 107.5

IV. Cases concerning "Seal"

Whittington v. Dragon Group, L.L.C., 991 A.2d 1 (Del. 2009).

Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC, 2010 WL 975581, *1+ (Del.Ch. Mar 04, 2010) (NO. CIV.A. 4119-VCS)

8/1/2014 10 Del.C. 8106(c) allows parties to written contract involving at least $100,000 to specify statute of limitations up to 20 years from accruing of the cause of action. See Article in Delaware Law Review Volume 16:2 page 164.

As of 6.28.16 a mortgage no longer needs to be under seal to be foreclosed upon in Superior Court. 25 Del.C. 2101(b).

Notes from Andrew Taylor, Esq., © 2002, 03, 04, 08, 10, 11, 12, 14, 15, 16, 17, 19, 21

Title Searches

George J. Danneman, Esquire
The Danneman Firm, LLC

Title Searches

Fundamentals of Real Estate

October 5, 2021

George J. Danneman, Esquire
The Danneman Firm, LLC
Wilmington, Delaware
Phone: 302.793.9660
Fax: 302.295.0018
E-mail: George@DannemanFirm.com
www.DannemanFirm.com

My Blog at:
www.DannemanFirm.com/blog/

The Title Search (AKA Abstract of Title)

What is it?

A search through public records to determine the state of a title.

Grantor/Grantee Index

The title search is usually a summary of what is found in the indexes available at the Recorder of Deeds.

Chain of Title

The chain of title shows who the owner of the subject property was at any particular point in time.

Encumbrances/Liens

A burden on title or charge on the property, including:

- Real Estate Taxes
- Mortgages
- Judgments
- Federal Tax Liens
- Mechanics' Liens
- Municipal Utility Liens
- Easements
- Utility Agreements
- Restrictions

Real Estate Taxes

There are two types of real estate taxes, both of which are levied against specific property and automatically become a lien against that property.

Mortgages

A conveyance of a conditional fee of a debtor to his or her creditor, intended as a security for the repayment of a loan.

Judgments

A decree by a court at the end of a lawsuit that awards money damages to a party.

Federal Tax Liens

A federal tax lien results from a person's failure to pay any portion of the taxes owed to the Internal Revenue Service.

Mechanics' Liens

A mechanic's lien is a specific, involuntary lien available to contractors.

Municipal Utility Liens

A municipality has a right to obtain a lien on property of an owner who has not paid a bill for a utility service.

Easement

This is the right to use the property of another for a particular purpose.

License

A license is a personal privilege or permission with respect to some use of land.

Utility Agreements

These are easements, rights of way and other types of agreements that a property owner grants a utility company for the provision of utility service to that property.

Restrictions

Deed restrictions are private agreements that affect the use of property.

Interests in Real Estate – Most Common

- Fee Simple Absolute

  This is the highest and best kind of estate an owner can have. It is complete ownership. This estate is commonly referred to as fee or fee simple.

Interests in Real Estate – Most Common (cont'd)

- Life Estate

  This is an ownership interest measured by the life of one or more persons.

Leasehold Estates – Most Common

- Estate for Years

  This is an estate that continues for a definite period of time, whether for year, months, weeks or even days.

- Estate From Period to Period

  This is an estate that continues for a specific period and automatically renews for an indefinite time without a specific ending date.

Forms of Ownership

- Severalty

  Title is vested in one person or a single legal entity.
- Tenants in Common

  An interest held by two or more persons, each having a possessory right, usually deriving from a title (though also from a lease) in the same piece of land.

Forms of Ownership (cont'd)

- Joint Tenants with Right of Survivorship

  This is a form of co-ownership in which the parties have the right of survivorship. When one joint tenant dies, the surviving joint tenant(s) acquire the deceased party's interest.

Forms of Ownership (cont'd)

- Tenants by the Entirety

  This is a special form of tenancy available only to married couples with a right of survivorship.

Legal Descriptions

- Metes and Bounds

  A method of describing the territorial limits of property by means of measuring distances and angles from designated landmarks and in relation to adjoining properties.

Legal Descriptions (cont'd)

- Filed Map

  Also sometimes referred to as lot and block system. This system uses lot and block numbers referred to in a plat map that is recorded with the Recorder of Deeds.

Title Insurance

- What Is It?

  Title insurance is a contract by which a title insurance company agrees, subject to the terms of its policy, to indemnify (compensate or reimburse) the insured against losses sustained as a result of the defects of title other than those exceptions listed in the policy.

Title Insurance (cont'd)

- Owner's Policy

  This policy insures the title of the owner of the property. The premium for the policy will last as long as that party owns the property.

- Lender's Policy

  This policy insures the lien and the priority of a lien that a lender has against the property.

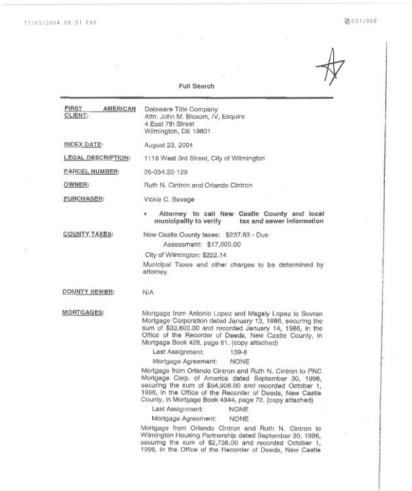
Title Insurance (cont'd)

- Endorsements

  Endorsements are attachments to a title insurance policy that provide additional coverages in addition to the standard policy.

The Title Search - Examples

Outstanding Mortgage

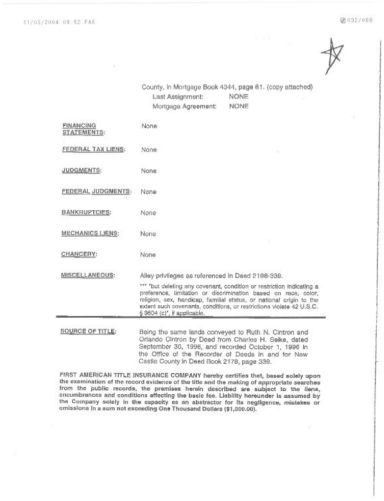


11/03/2004 09:51 FAX 031/008

Full Search

FIRST AMERICAN CLIENT:	Delaware Title Company Attn: John M. Blowin, IV, Esquire 4 East 7th Street Wilmington, DE 19801
INDEX DATE:	August 23, 2004
LEGAL DESCRIPTION:	1118 West 3rd Street, City of Wilmington
PARCEL NUMBER:	26-034.20-129
OWNER:	Ruth N. Cintron and Orlando Cintron
PURCHASER:	Vickie C. Savage • **Attorney to call New Castle County and local municipality to verify tax and sewer information**
COUNTY TAXES:	New Castle County taxes: $257.83 - Due Assessment: $17,000.00 City of Wilmington: $222.14 Municipal Taxes and other charges to be determined by attorney.
COUNTY SEWER:	N/A
MORTGAGES:	Mortgage from Antonio Lopez and Magaly Lopez to Sovran Mortgage Corporation dated January 13, 1986, securing the sum of $20,600.00 and recorded January 14, 1986, in the Office of the Recorder of Deeds, New Castle County, in Mortgage Book 426, page 61. (copy attached) Last Assignment: 139-9 Mortgage Agreement: NONE Mortgage from Orlando Cintron and Ruth N. Cintron to PNC Mortgage Corp. of America dated September 30, 1996, securing the sum of $34,608.00 and recorded October 1, 1996, in the Office of the Recorder of Deeds, New Castle County, in Mortgage Book 4344, page 72. (copy attached) Last Assignment: NONE Mortgage Agreement: NONE Mortgage from Orlando Cintron and Ruth N. Cintron to Wilmington Housing Partnership dated September 30, 1996, securing the sum of $2,736.00 and recorded October 1, 1996, in the Office of the Recorder of Deeds, New Castle

Outstanding Mortgage (cont'd)



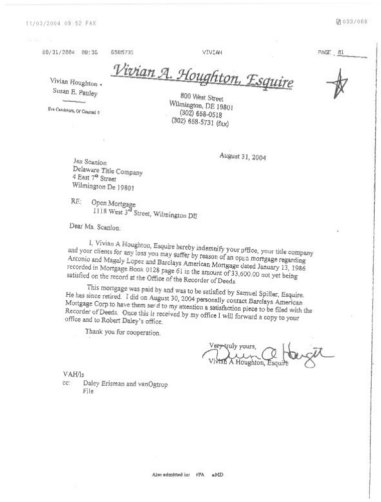
11/03/2004 09:52 FAX 002/008

County, in Mortgage Book 4044, page 61. (copy attached)
Last Assignment: NONE
Mortgage Agreement: NONE

FINANCING STATEMENTS:	None
FEDERAL TAX LIENS:	None
JUDGMENTS:	None
FEDERAL JUDGMENTS:	None
BANKRUPTCIES:	None
MECHANICS LIENS:	None
CHANCERY:	None
MISCELLANEOUS:	Alley privileges as referenced in Deed 2188-336. *** "But deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent such covenants, conditions, or restrictions violate 42 U.S.C. § 3604 (c)", if applicable.
SOURCE OF TITLE:	Being the same lands conveyed to Ruth N. Clinton and Orlando Clinton by Deed from Charles H. Selke, dated September 30, 1996, and recorded October 1, 1996 in the Office of the Recorder of Deeds in and for New Castle County in Deed Book 2176, page 338.

FIRST AMERICAN TITLE INSURANCE COMPANY hereby certifies that, based solely upon the examination of the record evidence of the title and the making of appropriate searches from the public records, the premises herein described are subject to the liens, encumbrances and conditions affecting the basic fee. Liability hereunder is assumed by the Company solely in the capacity as an abstractor for its negligence, mistakes or omissions in a sum not exceeding One Thousand Dollars ($1,000.00).

Outstanding Mortgage (cont'd)



11/03/2004 09:52 FAX 030/008

08/31/2004 09:35 6585731 VIVIAH PAGE 01

Vivian Houghton •
Susan E. Paisley

Vivian A. Houghton, Esquire

800 West Street
Wilmington, DE 19801
(302) 658-0018
(302) 658-5731 (Fax)

August 31, 2004

Jan Stanton
Delaware Title Company
4 East 7th Street
Wilmington De 19801

RE: Open Mortgage
1118 West 3rd Street, Wilmington DE

Dear Ms. Stanton.

I, Vivian A Houghton, Esquire hereby indemnify your office, your title company and your clients for any loss you may suffer by reason of an open mortgage regarding Antonio and Magaly Lopez and Barclays American Mortgage dated January 13, 1986 recorded in Mortgage Book 0128 page 61 in the amount of 33,600.00 not yet being satisfied on the record at the Office of the Recorder of Deeds.

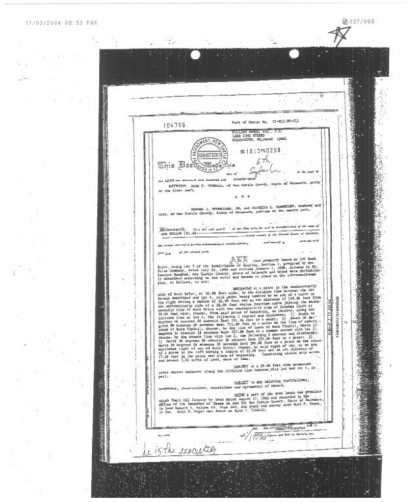
This mortgage was paid by and was to be satisfied by Samuel Spiller, Esquire. He has since retired. I did on August 30, 2004 personally contact Barclays American Mortgage Corp to have them see it to my attention a satisfaction piece to be filed with the Recorder of Deeds. Once this is received by my office I will forward a copy to your office and to Robert Daley's office.

Thank you for cooperation.

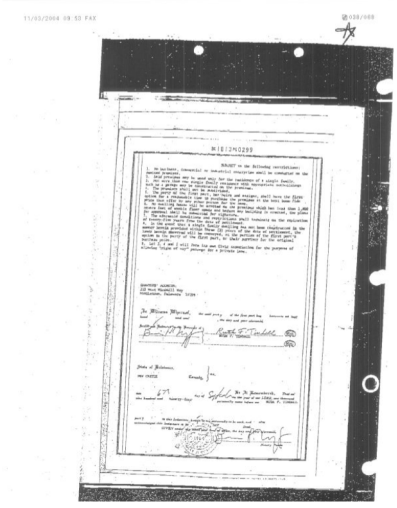
Very truly yours,
Vivian A Houghton, Esquire

VAH/ls
cc: Daley Eriksen and vanOstrop
File

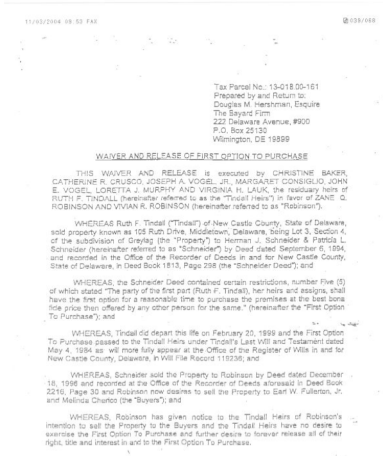
Options/Right of First Referrals



Options/Right of First Referrals



Options/Right of First Referrals



Tax Parcel No.: 13-018.00-161
Prepared by and Return to:
Douglas M. Hershman, Esquire
The Bayard Firm
222 Delaware Avenue, #900
P.O. Box 25130
Wilmington, DE 19899

WAIVER AND RELEASE OF FIRST OPTION TO PURCHASE

THIS WAIVER AND RELEASE is executed by CHRISTINE BAKER, CATHERINE R. CRUSCO, JOSEPH A. VOGEL, JR., MARGARET CONSIGLIO, JOHN E. VOGEL, LORETTA J. MURPHY AND VIRGINIA H. LAUK, the residuary heirs of RUTH F. TINDALL (hereinafter referred to as the "Tindall Heirs") in favor of JANE Q. ROBINSON AND VIVIAN R. ROBINSON (hereinafter referred to as "Robinson").

WHEREAS Ruth F. Tindall ("Tindall") of New Castle County, State of Delaware, sold property known as 105 Ruth Drive, Middletown, Delaware, being Lot 3, Section 4, of the subdivision of Greylag (the "Property") to Herman J. Schneider & Patricia L. Schneider (hereinafter referred to as "Schneider") by Deed dated September 6, 1994, and recorded in the Office of the Recorder of Deeds in and for New Castle County, State of Delaware, in Deed Book 1813, Page 298 (the "Schneider Deed"); and

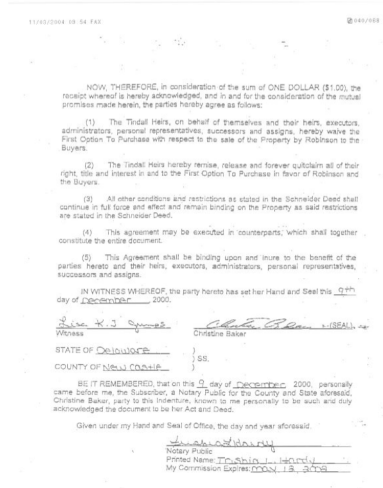
WHEREAS, the Schneider Deed contained certain restrictions, number Five (5) of which stated "The party of the first part (Ruth F. Tindall), her heirs and assigns, shall have the first option for a reasonable time to purchase the premises at the best bona fide price then offered by any other person for the same." (hereinafter the "First Option To Purchase"); and

WHEREAS, Tindall did depart this life on February 20, 1999 and the First Option To Purchase passed to the Tindall Heirs under Tindall's Last Will and Testament dated May 4, 1984 as will more fully appear at the Office of the Register of Wills in and for New Castle County, Delaware, in Will File Record 119336; and

WHEREAS, Schneider sold the Property to Robinson by Deed dated December 18, 1996 and recorded at the Office of the Recorder of Deeds aforesaid in Deed Book 2210, Page 30 and Robinson now desires to sell the Property to Earl W. Fullerton, Jr. and Melinda Chirico (the "Buyers"); and

WHEREAS, Robinson has given notice to the Tindall Heirs of Robinson's intention to sell the Property to the Buyers and the Tindall Heirs have no desire to exercise the First Option To Purchase and further desire to forever release all of their right, title and interest in and to the First Option To Purchase.

Options/Right of First Referrals



NOW, THEREFORE, in consideration of the sum of ONE DOLLAR ($1.00), the receipt whereof is hereby acknowledged, and in and for the consideration of the mutual promises made herein, the parties hereby agree as follows:

(1) The Tindall Heirs, on behalf of themselves and their heirs, executors, administrators, personal representatives, successors and assigns, hereby waive the First Option To Purchase with respect to the sale of the Property by Robinson to the Buyers.

(2) The Tindall Heirs hereby remise, release and forever quitclaim all of their right, title and interest in and to the First Option To Purchase in favor of Robinson and the Buyers.

(3) All other conditions and restrictions as stated in the Schneider Deed shall continue in full force and effect and remain binding on the Property as said restrictions are stated in the Schneider Deed.

(4) This agreement may be executed in counterparts, which shall together constitute the entire document.

(5) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, personal representatives, successors and assigns.

IN WITNESS WHEREOF, the party hereto has set her Hand and Seal this 9th day of December 2000.

Witness — Christine Baker (SEAL)

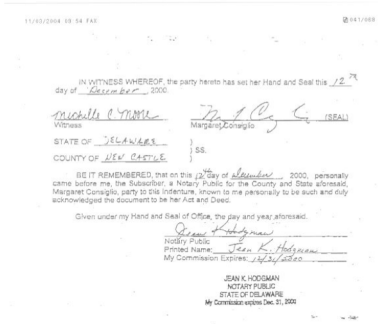
STATE OF Delaware }
COUNTY OF New Castle } SS.

BE IT REMEMBERED, that on this 9 day of December 2000, personally came before me, the Subscriber, a Notary Public for the County and State aforesaid, Christine Baker, party to this Indenture, known to me personally to be such and duly acknowledged the document to be her Act and Deed.

Given under my Hand and Seal of Office, the day and year aforesaid.

Notary Public
Printed Name: Tonia J. Handy
My Commission Expires: May 13, 2004

Options/Right of First Referrals



11/03/2004 09:54 FAX 041/068

IN WITNESS WHEREOF, the party hereto has set her Hand and Seal this 12th day of December, 2000.

Witness: Michelle C. Marr — Margaret Consiglio (SEAL)

STATE OF DELAWARE }
COUNTY OF NEW CASTLE } SS.

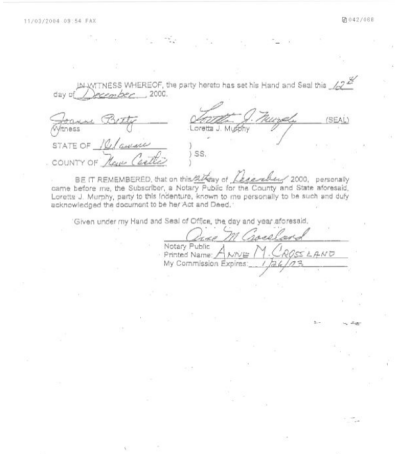
BE IT REMEMBERED, that on this 12th day of December, 2000, personally came before me, the Subscriber, a Notary Public for the County and State aforesaid, Margaret Consiglio, party to this indenture, known to me personally to be such and duly acknowledged the document to be her Act and Deed.

Given under my Hand and Seal of Office, the day and year aforesaid.

Notary Public: Jean K. Hodgman
Printed Name: Jean K. Hodgman
My Commission Expires: 12/31/2000

JEAN K. HODGMAN
NOTARY PUBLIC
STATE OF DELAWARE
My Commission expires Dec. 31, 2000

Options/Right of First Referrals



11/03/2004 09:54 FAX 042/068

IN WITNESS WHEREOF, the party hereto has set his Hand and Seal this 12th day of December, 2000.

Witness: Joanne Berry — Loretta J. Murphy (SEAL)

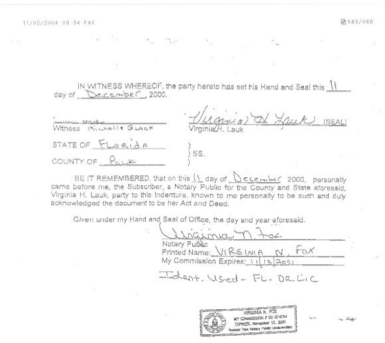
STATE OF Delaware }
COUNTY OF New Castle } SS.

BE IT REMEMBERED, that on this 12th day of December, 2000, personally came before me, the Subscriber, a Notary Public for the County and State aforesaid, Loretta J. Murphy, party to this indenture, known to me personally to be such and duly acknowledged the document to be her Act and Deed.

Given under my Hand and Seal of Office, the day and year aforesaid.

Notary Public: Anne M. Carrelland
Printed Name: Anne M. Carrelland
My Commission Expires: 1/24/05

Options/Right of First Referrals



IN WITNESS WHEREOF, the party hereto has set his Hand and Seal this 11 day of December, 2000.

Witness Michelle Glass — Virginia H. Lauk (SEAL)

STATE OF Florida }
} SS.
COUNTY OF Polk }

BE IT REMEMBERED, that on this 11 day of December 2000, personally came before me, the Subscriber, a Notary Public for the County and State aforesaid, Virginia H. Lauk, party to this Indenture, known to me personally to be such and duly acknowledged the document to be her Act and Deed.

Given under my Hand and Seal of Office, the day and year aforesaid.

Notary Public
Printed Name: VIRGINIA N. FOX
My Commission Expires: 11/13/2001
Ident. Used - FL. DR. LIC

Options/Right of First Referrals

IN WITNESS WHEREOF, the party hereto has set her Hand and Seal this 15th day of December, 2000.

Witness — Catherine R. Cruaco (SEAL)

STATE OF Delaware }
} SS.
COUNTY OF Kent }

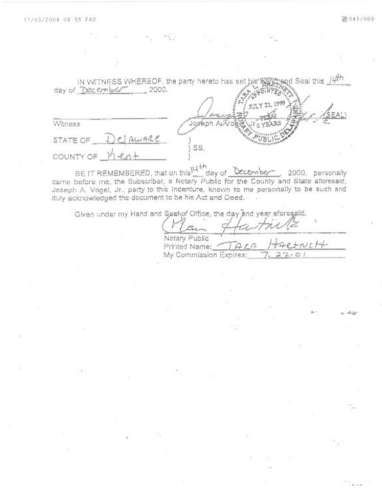
BE IT REMEMBERED, that on this 15th day of December 2000, personally came before me, the Subscriber, a Notary Public for the County and State aforesaid, Catherine R. Cruaco, party to this Indenture, known to me personally to be such and duly acknowledged the document to be her Act and Deed.

Given under my Hand and Seal of Office, the day and year aforesaid.

Notary Public
Printed Name: Brian S. Johnson
My Commission Expires: April 27, 2004

Brian S. Johnson Notary Public State of Delaware My Commission Expires April 27, 2004

Options/Right of First Referrals



11/03/2004 09:55 FAX 045/068

IN WITNESS WHEREOF, the party hereto has set his Hand and Seal this 14th day of December, 2000.

Witness

Joseph A. Vogel (SEAL)

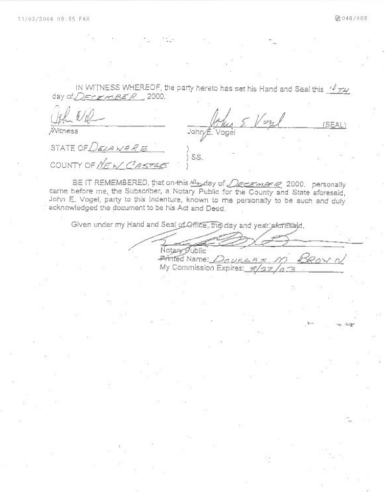
STATE OF Delaware }
COUNTY OF Kent } SS.

BE IT REMEMBERED, that on this 14th day of December, 2000, personally came before me, the Subscriber, a Notary Public for the County and State aforesaid, Joseph A. Vogel, Jr., party to this Indenture, known to me personally to be such and duly acknowledged the document to be his Act and Deed.

Given under my Hand and Seal of Office, the day and year aforesaid.

Notary Public
Printed Name: TARA HOLSWITH
My Commission Expires: 7-23-01

Options/Right of First Referrals



11/03/2004 09:55 FAX 046/068

IN WITNESS WHEREOF, the party hereto has set his Hand and Seal this 4TH day of DECEMBER, 2000.

Witness

John E. Vogel (SEAL)

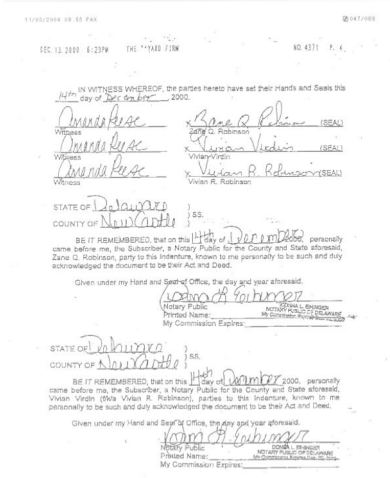
STATE OF DELAWARE }
COUNTY OF NEW CASTLE } SS.

BE IT REMEMBERED, that on this 4th day of December 2000, personally came before me, the Subscriber, a Notary Public for the County and State aforesaid, John E. Vogel, party to this Indenture, known to me personally to be such and duly acknowledged the document to be his Act and Deed.

Given under my Hand and Seal of Office, the day and year aforesaid.

Notary Public
Printed Name: DAWNA M. BRAND
My Commission Expires: 8/27/03

Options/Right of First Referrals



DEC. 13. 2000 8:23PM THE **YARD FIRM NO. 4371 P. 4

14th IN WITNESS WHEREOF, the parties hereto have set their Hands and Seals this day of December 2000.

Witness — Zane G. Robinson (SEAL)
Witness — Vivian Virdin (SEAL)
Witness — Vivian R. Robinson (SEAL)

STATE OF Delaware
COUNTY OF New Castle } SS.

BE IT REMEMBERED, that on this 14th day of December 2000, personally came before me, the Subscriber, a Notary Public for the County and State aforesaid, Zane G. Robinson, party to this Indenture, known to me personally to be such and duly acknowledged the document to be their Act and Deed.

Given under my Hand and Seal of Office, the day and year aforesaid.

Notary Public
Printed Name:
My Commission Expires:

STATE OF Delaware
COUNTY OF New Castle } SS.

BE IT REMEMBERED, that on this 14th day of December 2000, personally came before me, the Subscriber, a Notary Public for the County and State aforesaid, Vivian Virdin (f/k/a Vivian R. Robinson), parties to this Indenture, known to me personally to be such and duly acknowledged the document to be their Act and Deed.

Given under my Hand and Seal of Office, the day and year aforesaid.

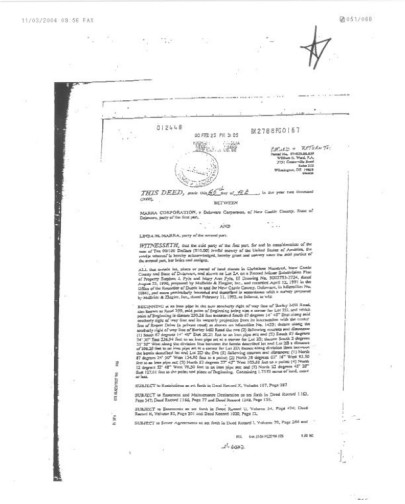
Notary Public
Printed Name:
My Commission Expires:

Deed Execution

- No Seal! No Big Deal!

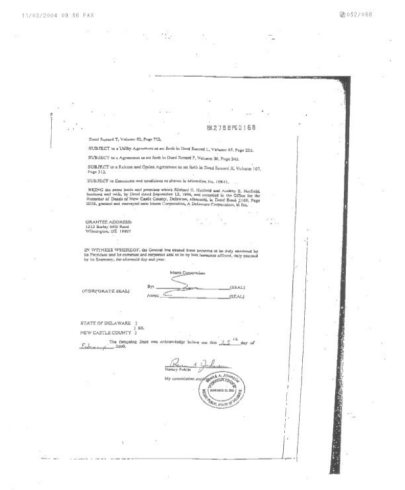
Deed Execution

- No Seal! No Big Deal!



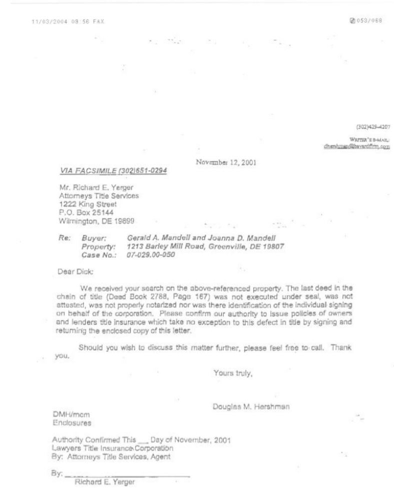
Deed Execution

- No Seal! No Big Deal!



Deed Execution

- No Seal! No Big Deal!



11/03/2004 09:56 FAX 053/088

(302)429-4207

WRITER'S E-MAIL:
dhershman@bayardfirm.com

November 12, 2001

VIA FACSIMILE (302)651-0294

Mr. Richard E. Yerger
Attorneys Title Services
1222 King Street
P.O. Box 25144
Wilmington, DE 19899

Re: Buyer: Gerald A. Mandell and Joanna D. Mandell
Property: 1213 Barley Mill Road, Greenville, DE 19807
Case No.: 07-029.00-050

Dear Dick:

We received your search on the above-referenced property. The last deed in the chain of title (Deed Book 2788, Page 167) was not executed under seal, was not attested, was not properly notarized nor was there identification of the individual signing on behalf of the corporation. Please confirm our authority to issue policies of owners and lenders title insurance which take no exception to this defect in title by signing and returning the enclosed copy of this letter.

Should you wish to discuss this matter further, please feel free to call. Thank you.

Yours truly,

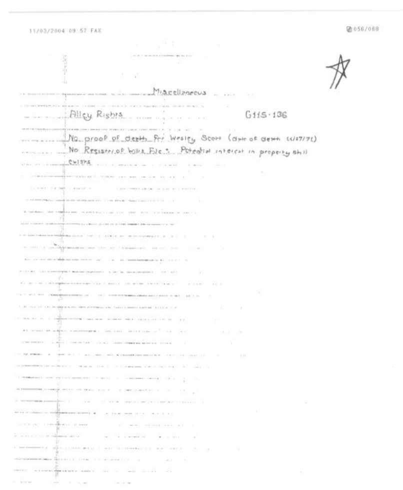
Douglas M. Hershman

DMH/mcm
Enclosures

Authority Confirmed This ___ Day of November, 2001
Lawyers Title Insurance Corporation
By: Attorneys Title Services, Agent

By: ______________________
Richard E. Yerger

No Proof of Death/ Joint Tenants



11/03/2004 09:57 FAX 056/088

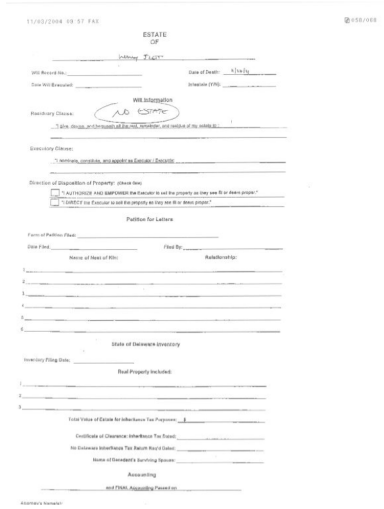
Miscellaneous

Alley Rights G115-136

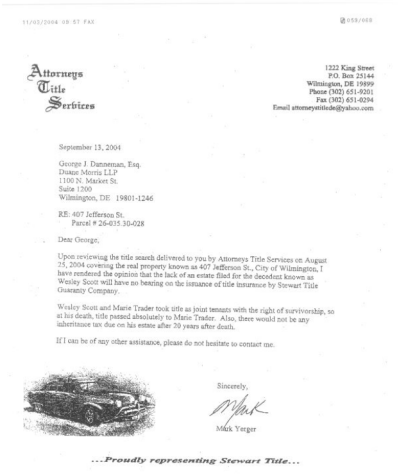
No proof of death for Wesley Scott (date of death 11/27/71)
No Register of Wills File *. Potential interest in property still exists

No Proof of Death/ Joint Tenants

No Proof of Death/ Joint Tenants



No Proof of Death/ Joint Tenants



Attorneys Title Services

1222 King Street
P.O. Box 25144
Wilmington, DE 19899
Phone (302) 651-9201
Fax (302) 651-9204
Email attorneytitlede@yahoo.com

September 13, 2004

George J. Danneman, Esq.
Duane Morris LLP
1100 N. Market St.
Suite 1200
Wilmington, DE 19801-1246

RE: 407 Jefferson St.
Parcel # 26-035.30-028

Dear George,

Upon reviewing the title search delivered to you by Attorneys Title Services on August 25, 2004 covering the real property known as 407 Jefferson St., City of Wilmington, I have rendered the opinion that the lack of an estate filed for the decedent known as Wesley Scott will have no bearing on the issuance of title insurance by Stewart Title Guaranty Company.

Wesley Scott and Marie Trader took title as joint tenants with the right of survivorship, so at his death, title passed absolutely to Marie Trader. Also, there would not be any inheritance tax due on his estate after 20 years after death.

If I can be of any other assistance, please do not hesitate to contact me.

Sincerely,

Mark Yerger

...Proudly representing Stewart Title...

Power of Attorney

- Who Signed Your Deed?
- Who Is Signing the Deed?

Property Descriptions

How many parcels are you buying?

Survey Issues

- Encroachments
- Driveways

Land Use Regulations

Richard "Shark" Forsten, Esquire
Saul Ewing Arstein & Lehr LLP

Fundamentals of Zoning and Land Use©

©2021, Richard A. Forsten, Esquire
Saul Ewing Arnstein & Lehr

1. **A Very Short Introduction to Zoning**
2. **The Board of Adjustment**
3. **Land Use Litigation**
4. **Eminent Domain & Takings**
5. **Articles/Columns/Excerpts**

   A. "Want Affordable Housing? Build More Homes," by Larry Salzman, *The Dispatch*, Sept. 20, 2021 (available at https://thedispatch.com/p/want-affordable-housing-build-more).

   B. "Goodbye Connecticut – Darien Resident Says Gift Tax Forcing Him To Leave," by David Delucia, *Hartford Courant*, April 9, 2017

   C. "How a Michigan County Road Got Stuck in Regulation Purgatory," by Mark Miller and Mike Pattwell, *Wall Street Journal*, March 20, 2017

   D. "How the West (and the Rest) Got Rich," by Deirdre N. McCloskey, *Wall Street Journal*, May 26, 2016

   E. *The* Noblest Triumph, *Property And Prosperity Through The Ages*, by Tom Bethell (St. Martin's Press, 1998)

   F. *The* Great Degeneration, by Niall Ferguson (The Penguin Press, 2012)

"Give a man the secure possession of a bleak rock, and he will turn it into a garden; Give him a nine years' lease of a garden, and he will convert it into a desert. . . . The magic of property turns sand into gold."
Arthur Young as quoted in *Laws of Creation, Property Rights in the World of Ideas,* by Ronald A. Cass and Keith N. Hylton (Harvard Univ. Press, 2012)

"The small amount of land available for individual farmers to produce goods for their own account – less than three percent of the land used for agriculture – generated more than half the produce consumed in the [last days of the Soviet Union]."
Property Rights in the World of Ideas, by Ronald A. Cass and Keith N. Hylton (Harvard Univ. Press, 2013)

Richard "Shark" Forsten is a partner with the law firm of Saul Ewing Arnstein & Lehr. A graduate of the University of Virginia McIntire School of Commerce and the University of Virginia School of Law, he has practiced for over thirty years in the areas of land use and land use litigation, and has been involved in several significant land use cases, including *Wilmington Materials, Inc. v. Town of Middletown*, the first Delaware case to award attorneys' fees to a successful developer/plaintiff under 42 *U.S.C.* §1988, *Council of Civic Organizations of Brandywine Hundred v. New Castle County*, the first Delaware case to dismiss a land use challenge for failure to join an indispensable party, *Farmers For Fairness v. Kent County*, holding that overlay zones are not permitted under Delaware law and invalidating a massive downzoning of farmland in eastern Kent County, *Tony Ashburn & Son v. Kent County Regional Planning Comm'n*, holding that when a subdivision plan complies with applicable regulations, it must be approved, and *Chase Alexa, LLC v. Kent County Levy Court,* reaffirming the principle that zoning codes are interpreted in favor of property owners. In addition to land use and land use litigation, Mr. Forsten also practices in the areas of administrative law, commercial real estate, commercial transactions and general litigation in the Superior Court, the Court of Chancery, and the Delaware Supreme Court.

A believer in public service, he currently serves on the Appoquinimink School Board and on two boards for the Ministry of Caring in Wilmington, Delaware. He is also a past President of the Delaware State Bar Association, a past President (and current Vice-President) of the Everett Theatre in Middletown, Delaware, a past board member of the Ronald McDonald House of Delaware, and a past board member of Goodwill of Delaware.

In addition, Mr. Forsten serves as a member of the Supreme Court Rules Committee, and is a past member of the Access to Justice Commission, where he co-chaired the Subcommittee on Promoting Greater Private Sector Representation of Underserved Litigants. In 2017, he was appointed by Governor John Carney to co-chair the Administrative Law Task Force Review Committee. The Delaware Supreme Court recognized Richard for Exemplary Pro Bono Publico service in 2006, and in 2019 he received a Delaware Outstanding Volunteer award from Governor John Carney.

A frequent lecturer on land use and other legal topics, Mr. Forsten also writes a monthly book review for *In Re:*, the monthly publication of the Delaware State Bar Association.

A Very Short Introduction to Zoning

1. In Delaware, zoning is a county and municipal function.

2. The City of Wilmington adopted the first zoning code in Delaware in 1924. New Castle County first adopted a zoning code in 1954. Kent County adopted an interim zoning code in 1969, and a permanent code in 1972. Sussex County adopted a zoning code in 1971.

3. Although zoning is a local governmental function, the authority to adopt zoning and subdivision codes comes from the State. Specifically, Article II, Section 25 of the Delaware Constitution states:

> The General Assembly may enact laws under which municipalities and the County of Sussex and the County of Kent and the County of New Castle may adopt zoning ordinances, laws or rules limiting and restricting to specified districts and regulated therein buildings and structures according to their construction and the nature and extent of their use, as well as the use be made of land in such districts for other than agricultural purposes; and the exercise of such authority shall be deemed to be within the police power of the State.

4. Because zoning codes restrict the free use of property and are contrary to the common law, zoning codes are interpreted in favor of property owners. *See, e.g., Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148 (Del. 2010); *Mergenthaler v. State*, 293 A.2d 287, 288 (Del. 1972).

5. Zoning codes have their roots in the common law doctrine of nuisance. In 1926, the United States Supreme Court first upheld zoning laws, explaining:

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. . . . [T]he question of whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or the thing considered apart, but by considering it in connection with the circumstance and the locality. *A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.*

Village of Euclid v. Amber Realty Co., 272 U.S. 365, 387-88 (1926) (emphasis added).

6. Comprehensive Plans. Each county and municipality is required to have a comprehensive development plan, setting forth the long term vision and land use goals for the county or municipality. The zoning code and zoning maps must be in compliance with this plan. Comprehensive plans, though, are not detailed plans to be read like a statute, and they often include competing goals. While a rezoning must comply with the comprehensive plan, it need

not comply in every detail, given the general nature of those plans. *See Cain v. Sussex County Council*, 2020 WL 2122775 (2020).

7. Boards of Adjustment. Oftentimes, the strict application of a zoning code requirement (setback, height limitation, etc.) will work a hardship on a property owner or otherwise impede the use or development of a property. The General Assembly requires each county and all municipalities to have Boards of Adjustment to hear and decide applications from property owners seeking relief from such requirements. *See* 9 *Del.C.* § 1311, 4913, 6913; 22 *Del.C.* §321.

8. An Overview of the Land Development Process in New Castle County.

Each county or municipality has authority to promulgate ordinances governing subdivision or land developments within its jurisdiction. (*See* 9 Del. C. §2601; §4901; §6902 and 22 Del. C. §301). The levels of review and technical filings increase with the complexity of the proposed project. Each jurisdiction establishes its own review procedures.

New Castle County Subdivision/Land Development Process.

A. REZONINGS. Standards for a rezoning are set forth in UDC §40.31.410 which requires that the following criteria be considered for any rezoning:

- Consistency with the Comprehensive Development Plan and the purposes of the Chapter. In areas of new development, consistency with the Comprehensive Development Plan shall be considered to meet the two standards listed immediately below, unless compelling evidence indicates the proposed amendment would threaten public health, safety, and general welfare;
- Consistency with the character of the neighborhood;
- Consistency with zoning and use of nearby properties;
- Suitability of the property for the uses for which it has been proposed or restricted;
- Effect on nearby properties; and
- Recommendations by the Department of Land Use.

B. MINOR PLANS. Generally speaking, all plans that do not meet the definition of a major plan are processed under the procedures applicable to minor plans. Minor plan is defined in Article 33 of the UDC as a plan proposing one of more of the following:

- Subdivision of land resulting in five or less lots and not creating new streets or rights of way;
- Except for single family dwellings and accessory structures on fee simple lots, land development proposing new buildings or additions of 1,000 sq. ft. of Gross Floor Area ("GFA") or greater, and meeting one or more of the following criteria: (a) proposing a building of less than 20,000 sq. ft. GFA; (b) on lots containing at least 20,000 sq. ft. GFA of existing development, any number of expansions are permitted (including expansions in excess of 20,000 sq. ft. GFA), provided the cumulative total of all expansions does not exceed

50,000 sq. ft. GFA. Any subsequent plan or submission proposing a new building or expansion exceeding 50,000 sq. ft. shall be reviewed as a major plan;

- Apartment or Multi-Family Development of less than ten (10) dwelling units;
- Development that would be considered major land development in industrial office parks for which a previous record major plan has been recorded to establish lots and otherwise to depict the overall limits of development, provided no special studies are required for approval; and/or
- Expansion of institutional facilities, provided no special studies are required, e.g., Critical Natural Areas ("CNA"), environmental impact assessment report, etc.

C. MAJOR PLANS. A major plan is defined as a plan that proposes one or more of the following:

- A new public or private street or dedication of public use of an existing street;
- Building or expansions that exceed the limits of the minor land development definition;
- A subdivision of land resulting in more than five (5) lots; and/or
- Apartment or multi-family development of ten (10) or more dwelling units.

NEW CASTLE COUNTY DELAWARE LAND USE APPROVAL PROCESS*

Step	Description of Task
1	Pre-application sketch plan review conference with New Castle County Department of Land Use (NCCDLU)
2	Meeting with/outreach to District Councilperson
3	Meeting with Department of Transportation to discuss traffic issues/entrance(s)
4	Submission of Exploratory Major Land Development Plan to NCCDLU
5	Submission of preliminary traffic information
6	Issuance of Exploratory Plan Initial Report by NCCDLU
7	Submission of Application to Office of State Planning for Preliminary Land Use Service (PLUS) review upon receipt of verification from New Castle County that Exploratory Plan submission is complete
8	PLUS meeting to review plan submission
9	Scoping meeting with Department of Transportation (DelDOT) and NCCDLU for Traffic Impact Study (TIS)
10	Receipt of PLUS Report from Office of State Planning
11	Meeting with community
12	Submission of Traffic Impact Study to DelDOT
13	Introduction of Rezoning Ordinance
14	Submission of revised Exploratory Plan to NCCDLU responding to comments
15	Receipt of DelDOT Final Comments and Recommendations re: TIS
16	Issuance of Exploratory Plan Final Report by NCCDLU
17	New Castle County Planning Board public hearing on rezoning request and exploratory plan
18	Planning Board/NCCDLU business meeting
19	Possible Application to Resource Protection Area Technical Advisory Committee (RPATAC) in connection with wetlands impacts (if applicable)
20	Hearing before RPATAC/other boards (if applicable)
21	Receipt of RPATAC approval/receipt of other board approvals (if applicable)
22	Presentation to New Castle County Council Land Use Committee for rezoning approval
23	Rezoning hearing and decision of New Castle County Council
24	Prepare Record Plan and Construction Plans
25	Obtain letter of approval from DelDOT/State Fire Marshal/Approval for sewer/Approval of drainage and stormwater design
26	Record Plan submission to NCCDLU
27	Receipt of Record Plan Review Report from NCCDLU
28	Submission of revised Record Plan to NCCDLU
29	Receipt of NCCDLU approval of Record Plan
30	New Castle County Council Land Use Committee meeting to approve Record Plan
31	New Castle County Council meeting to approve Record Plan
32	Recordation of Record Plan

* Note that this document outlines the general process for approval of a rezoning and record major plan for development. While the steps listed are in the order in which they need to occur, a number of them may be able to take place concurrently.

24302266.3

THE BOARD OF ADJUSTMENT ©

Saul Ewing Arnstein & Lehr

A. Statutory Authority

B. Jurisdiction and Powers

C. Variances

   1. Area

   2. Use

D. Special Exceptions/Conditional Use Permits

E. Appeals Involving Errors of Enforcement Officials

F. Confirmation or Extension of Nonconforming Uses

G. Rehearings/Reapplications

H. Judicial Review

THE BOARD OF ADJUSTMENT

A. **Statutory Authority**. Local governments have no inherent authority to regulate land use. Constitution of Delaware, Art. II, § 25. *New Castle County Council v. B.C. Dev.* Del. Supr., 567 A.2d 1271 (1989). Authority comes from the legislature.

1. New Castle County: 9 *Del.C.* §§ 1311, et seq.

2. Kent County: 9 *Del.C.* §§ 4913, et seq.

3. Sussex County: 9 *Del.C.* §§ 6913, et seq.

4. Municipalities: 22 *Del.C.* §§ 321, et seq.

B. **Jurisdiction and Powers**.

1. Variances

2. Special Exceptions/Conditional Use Permits

3. Appeals

4. Confirmation or extension of nonconforming use status.

C. **Variances**.

Types of Variances

Under Delaware law, property owners can receive relief from the strict requirements of a zoning code through the grant of a variance. There are two types of variances: (1) an area variance, which provides relief from some dimensional requirements of the zoning code (such as setback, height, etc.), and (2) a use variance, which allows for a use to occur which would otherwise be prohibited (such as a commercial restaurant in a residential zone).

Some uses are permitted in a zoning district, but additional requirements (such as greater setbacks) are imposed on such uses. Relief from these special requirements are still properly considered "area" variances. *See, e.g.*, *Dempsey v. New Castle County Bd. of Adjustment*, Del. Super., C.A. No. 01A-10-004, Gebelein, J. (April 17, 2002); *Mesa Communications Group, L.L.C. v. Kent County Bd. of Adjustment*, Del. Super., C.A. No. 00A-03-003, Witham, J. (Oct. 31, 2000).

With any variance request, the burden is on the applicant to present sufficient evidence to warrant the granting of the variance. *Julian v. Highlands Place Co. L.L.C.*, Del. Super., C.A. No. 93A-11-4, Herlihy, J. (May 10, 1994).

1. Area Variance (e.g., lot size, set backs, height, lot width, etc.)

a. "Exceptional Practical Difficulty" standard applicable to counties. *Board of Adjustment v. Kwik-Check Realty, Inc.*, Del. Supr., 389 A.2d 1289 (1978). 9 *Del.C.* §§ 1313(a)(3), 4917(3), 6917(3). In considering whether an "exceptional practical difficulty" exists, the Board should consider four factors:

(1) the nature of the zone in which the property lies,

(2) character of the immediate vicinity and uses therein,

(3) effect of variance on other properties if granted, and

(4) effect of not granting variance on applicant.

Kwik-Check, 389 A.2d at 1291.

May municipalities apply the more stringent "unnecessary hardship" standard? 22 *Del.C.* § 327(a)(3) allows for "exceptional practical difficulty" test, but 22 *Del.C.* § 307 allows municipalities to adopt more stringent tests. *See City of Lewes v. Nepa*, 212 A.3d 270 (Del. 2019); *Dale v. Town of Elsmere Board of Adjustment*, Del. Super., C.A. No. 87A-JA-4, Poppiti, J. (April 20, 1988). Note also that 9 *Del.C.* § 6917(3) seems to set forth a test slightly different than *Kwik-Check*. All of this is quite unfortunate. There should only be one test – *Kwik-Check* and the General Assembly should remedy this situation.

b. Economic advantage alone is insufficient. *Searles v. Darling*, Del. Supr., 83 A.2d 96 (1951); but, economic and competitive reasons are relevant factors in support of area variance. *See, e.g., Kwik-Check*, 389 A.2d 1289; *Rivers v. Turner*, Del. Super., C.A. No. 90A-11-11, Del Pesco, J. (Oct. 1, 1991), *aff'd without op.*, Del. Supr., 609 A.2d 669 (1992) (Table).

c. Variance should be minimal, but "characterization of the deviation from zoning requirements as 'minimal' or 'not minimal' is not a talisman for success one way or the other. It is simply one of the equities to be weighed when determining whether or not the standard is satisfied." *Doebling v. City of Lewes Board of Adjustment*, Del. Super., C.A. No. 86A-FE1, Chandler, J. (Apr. 20, 1987).

d. The fact that an applicant has prior knowledge of the existing zoning regulation does not preclude the right to a variance. "If prior knowledge of the zoning regulations acted as a bar to variance applications, it would be virtually impossible to obtain a variance." *Mackes v. Bd. of Adjustment of the Town of Fenwick*

Island, Del. Super., C.A. No. 06A-03-001-RFS, Stokes, J. (Feb. 8, 2007) (2007 WL 441954).

e. Difficulties must be inherent in the land rather than peculiar to individual owner. *Id.* Notwithstanding this "truism" of variance law, many variances are granted and approved with no discussion of any inherent difficulties. For many house additions, there is no difficulty "inherent in land" other than property owner's desire to build something for which he needs a variance.

f. Self-imposed difficulties/hardships are not a basis for the granting of a variance. *Vassallo v. Penn Rose Civic Ass'n.*, Del. Supr., 429 A.2d 168 (1981); *Weaver v. New Castle County Bd. of Adjustment*, Del. Super., C.A. No. 90A-078-10, Toliver, J. (Oct. 28, 1991); *see also* 9 *Del.C.* § 6917(3)(c). However, the Supreme Court has stated that there is not a *per se* prohibition against a variance where hardship is self-imposed. *CCS Investors, LLC v. Brown*, 977 A.2d 301 (Del. 2009). However, the Delaware courts routinely uphold Board decisions to deny variances on the basis of self-created hardship. *See, e.g., Kazemzadeh v. Board of Adjustment of Sussex County*, 2014 WL 7466540 (Del.Super.); *Little Italy Neighborhood Association v. City of Wilmington Zoning Board of Adjustment*, 2010 WL 2977989 (Del.Super.).

2. Use Variance

a. "Unnecessary Hardship" standard. *Kwik-Check*, 389 A.2d 1289; *Baker v. Connell*, Del. Supr., 488 A.2d 1303 (1985); *Janaman v. New Castle County*, Del. Super., 364 A.2d 1241 (1976).

b. "It is settled Delaware law that the basic prerequisites of a finding of unnecessary hardship are that: (1) the property cannot yield a reasonable return when used for a permitted purpose; (2) the plight of the owner is due to unique circumstances; and (3) the use authorized will not alter the essential character of the locality." *Homan v. Lynch*, Del. Supr., 147 A.2d 650, 654 (1959).

c. In New Castle County, a use variance must be approved by County Council. 9 *Del.C.* § 1352(b). In Sussex County, use variances are apparently not permitted. 9 *Del.C.* § 6917(3); *Dawson v. Sussex County Bd. of Adjustment*, Del. Super., Lee, J. (Aug. 20, 1993).

d. Vehicular access and the problem of split zoning. *Leager v. Board of Adjustment*, Del. Super., C.A. No. 84A-FE-6, O'Hara, J. (June 25, 1985), *aff'd*, Del. Supr., No. 272, 1985 (Jan. 22, 1986); *Turner v. Richards*, Del. Supr., 366 A.2d 833 (1976); *Searles v. Darling*,

Del. Supr., 83 A.2d 96 (1951); *Lewis v. Board of Adjustment*, Del. Super., C.A. No. 88A-MY-2, Gebelein, J. (May 22, 1989).

(1) A practical solution - dedication of public street.

e. Character of the neighborhood/detriment to the public good. *W.E. Cleaver & Sons, Inc. v. New Castle County Bd. of Adjustment*, Del. Super., C.A. No. 86A-NO-8, Gebelein, J. (Jan. 14, 1988).

f. For a good example of what is necessary to obtain a use variance, *see Hanley v. City of Wilmington Bd. Of Adjustment*, Del. Super., C.A. No. 01A-07-007, Carpenter J. (June 27, 2002).

D. **Special Exceptions/Conditional Use Permits**.

1. "Special Exceptions" or "Conditional Use Permits" allow for uses in a particular zone, subject to the approval and review of the Board of Adjustment.

E. **Appeals to Board of Adjustment where error alleged in any order or decision of zoning enforcement official. 9 *Del.C.* §§ 1313(a)(1), 4917(1), 6917(1).**

1. Interpretation of permitted uses. *Beaston v. Board of Adjustment of Sussex County*, Del. Super., 89 A-OC2, Graves, J. (Sept. 16, 1991).

2. Building permits wrongfully granted or denied. *Beiser v. Board of Adjustment of Dewey Beach*, Del. Super., C.A. No. 90A-JN6, Lee, J. (Oct. 25, 1991); *see also Acierno v. Mitchell*, 6 F.3d 970 (3d Cir. 1993); *Hamm v. City of Wilmington Zoning Board of Adjustment*, 2010 WL 547413 (Del. Super.).

a. Can the Board consider the doctrine of equitable estoppel? *See Voshell v. Board of Adjustment of Kent County*, Del. Super., C.A. No. 95A-03-003, Ridgely, J. (June 30, 1995) where Superior Court found the doctrine did not apply. The question of the Board's jurisdiction was not addressed. However, if you have an equitable estoppel claim, go to the Court of Chancery. *Eastern Shore Environmental, Inc. v. Kent County Dep't of Planning*, C.A. No. 1464-K, Jacobs, V.C. (Feb. 1, 2002) (2002 WL 244690).

3. Exhaustion of administrative remedies. Is appeal to the Board the only relief? *Leeds v. Delaware City*, Del. Super., C.A. No. 88M-JL-12, Poppiti, J. (Dec. 18, 1990); *Wiggin v. Mummert*, Del. Ch., C.A. No. 8556, Hartnett, V.C. (May 20, 1992), *aff'd*, 1993 Del. LEXIS 30 (Jan. 11, 1993). *See* 9 *Del.C.* §§ 2609(d), 4919(b), 6919(d).

4. Mistakenly Issued Zoning Certification. Decision to revoke upheld when department discovered a protected use (a church) located impermissibly

close to proposed adult use. *Fantasia Restaurant & Lounge, Inc. v. New Castle County Bd. of Adjustment*, Del. Super., C.A. Nos. 97A-03-017, 97A-09-012, Alford, J. (Nov. 20, 1998), *aff'd*, Del. Supr., 734 A.2d 641 (1999) (Table)

5. Interpretation of zoning code. Denial of building permit to construct a bulkhead. Court upheld building inspector interpretation of the zoning code that a bulkhead is a structure and is prohibited within 10 feet of the rear property line. *Silver Line, LLC v. Board of Adjustment of City of Rehoboth Beach*, 2010 WL 113881 (Del. Super.)

6. Note also that in any appeal involving an interpretation of a zoning ordinance, Delaware courts have long held that zoning laws are to be interpreted in favor of property owners. *Mergenthaler v. State*, Del. Supr., 293 A.2d 287 (1972); *see also Commissioners of Bellefonte v. Coppola*, Del. Ch., C.A. No. 6005, Brown, C. (March 2, 1982) ("it is well settled that since zoning ordinances are in derogation of one's common law right to use his property as he sees fit, they must be construed in case of any doubt in favor of the unrestricted use of the land"); *Cardillo v. Council of South Bethany*, Del. Super., C.A. Nos. 86A-NO2, 86C-OC23, 86M-OC8, Lee, J. (May 24, 1991) (citing *Mergenthaler* and *Coppola* and reversing Town's decision against property owners; "[t]he ordinance is ambiguous and it will therefore be interpreted in favor of the [property owners'] free use of land").

F. **Confirmation or Extension of Nonconforming Uses**.

1. Determination of nonconforming use status and true location of district boundaries. *Mettler v. New Castle County Bd. of Adjustment*, Del. Super., C.A. No. 91A-02-3-1-AP, Gebelein, J. (Aug. 21, 1991).

   a. What happened on this property when zoning code or change to zoning code became effective? (note--in New Castle County, the former zoning code became effective on September 28, 1954. The new UDC became effective December 31, 1997).

   b. Is the use still ongoing and has it ever been interrupted?

   c. Is equitable estoppel a factor? *See Dragon Run Farms, Inc. v. Board of Adjustment*, Del. Super., C.A. No. 88A-JA-2-1-AP, Stiffel, P.J. (Aug. 11, 1988) where Superior Court found that County was equitably estopped from prohibiting use; obviously, though, equitable estoppel is not a factor in determining whether a use is non-conforming; it is a factor in determining whether a zoning restriction may be enforced against a property owner.

2. Expansion or extension of nonconforming uses. In Delaware, "a non-conforming use may be intensified where normal growth and expansion reasonably require such intensification." *Minquadale Civic Assoc. v. Kline*, Del. Ch., 212 A.2d 811 (1965).

3. The sale of alcoholic beverages on the premises of a non-conforming restaurant was not allowed since such an expansion would "constitute the introduction of a new and entirely different product and activity in which the inn was not engaged at the time the city's zoning ordinance was enacted." *Hooper v. Delaware Alcoholic Beverage Control Comm'n*, Del. Supr., 409 A.2d 1046, 1050 (1979).

4. Expansion of a non-conforming gasoline service station to a retail convenience store selling gas, groceries and sandwiches permitted under Sussex County Zoning Code. *Peninsula Oil Co. v. Sussex County Bd. of Adjustment*, Del. Super., C.A. No. 87A-MR-2, Lee, J. (Jan. 25, 1988).

5. Expansion of concrete products plant to add third concrete mixer for use in plant and to manufacture wet concrete for direct delivery to customers in concrete trucks permitted as expansion and was not an impermissible new use. *KC2, L.L.C. v. Town of Middletown*, Del. Super., C.A. No. 97C-05-033, Babiarz, J. (Feb. 5, 1999).

6. Addition of an outdoor patio did not constitute an extension of the premises of a restaurant so restaurant did not lose non-conforming status. *Stingray Rock, LLC v. Board of Adjustment of City of Rehoboth Beach*, 2013 WL 493327 (Del. Super.)

G. **Rehearings/Reapplications**.

1. Stability provisions range from 12 months for Limited Uses, Zoning Permits, and Exploratory and Preliminary Plans to 60 months for Record Plans. UDC § 13.390 & Table 31.390. The new stability provisions replace Section 2-257(e) of the former New Castle County Code. An applicant may withdraw an application at any time prior to a decision by the Board. UDC § 31.320(e). The former code did not allow withdrawal of a filed application except upon majority vote of the board. New Castle Co. Code § 2-257(d) (superseded).

2. In absence of code provision, general rule is that there must be a change in circumstances before Board can reconsider. *Kollock v. Sussex County Bd. of Adjustment*, Del. Super., 526 A.2d 569 (1987); *Joseph v. Board of Adjustment of The Town of Laurel*, C.A. No. 87A-APZ, Del. Super., Chandler, J. (Apr. 29, 1988).

H. **Judicial Review**.

1. Appeal to Superior Court by statutory writ of certiorari. 9 *Del.C.* §§ 1314(a), 4918(a), 6918(a); 22 *Del.C.* § 328(a).

   a. Record on appeal not same as record for common law writ of certiorari. *Searles v. Darling*, Del. Super., 83 A.2d 96 (1951). The record must enable the Court to review the Board's decision, and the Board must have stated the reasons(s) for its decision. Transcript of hearing below is commonly provided. In *Barbour v. Town of Bethany Beach Bd. of Adjustment*, Del. Super., C.A. No. 92A-05-006, Graves, J. (Sept. 28, 1992), *aff'd*, Del. Supr., 630 A.2d 1102 (1993), the Court held that a transcript of the hearing must be included in the record.

   b. Must file appeal within 30 days after Board's *written* decision. *See McDonald's Corp. v. Zoning Bd. of Adjustment For the City of Wilmington*, Del. Super., C.A. No. 01A-05-011, Goldstein, J. (Jan. 10, 2002) (court without jurisdiction where appeal filed prior to written decision); *Kostyshyn v. Commissioners of the Town of Bellefonte*, Del. Super., C.A. No. 05A-05-014 (CLS), Scott, J. (Jan. 6, 2006) (2006 WL 1520199) (must file within 30 days after written opinion filed in office of board; unfiled letter by board addressed "To Whom It May Concern" insufficient to trigger running of 30-day period).

   c. Variance applicant should be made a party or appeal faces dismissal. *See Hackett v. Board of Adjustment of City of Rehoboth Beach*, 794 A.2d 596 (Del. 2002); *Sheridan v. Bd. of Adjustment of City of New Castle*, Del. Super., C.A. No. 06A-01-005-PLA, (Aug. 18, 2006) (2006 WL 2382800), *aff'd*, 919 A.2d 339 (Del. 2007); *Kostyshyn v. Board of Adjustment (Town of Bellefonte)*, Del. Super., C.A. No. 07A-01-004 (CLS), Scott, J. (Aug. 17, 2007) (2007 WL 3380126).

   d. Notwithstanding the above, failure to name applicant as party does not *always* result in dismissal. *See Brown v. City of Wilmington Zoning Bd. of Adjustment,* Del. Super., C.A. No. 06A-10-005-JRS, Slights, J. (June 25, 2007) (2007 WL 1828261), *interlocutory appeal denied,* Del. Super., C.A. No. 06A-10-005, Slights, J. (July 23, 2007) (2007 WL 2122046), *aff'd, City of Wilmington Zoning Bd. of Adjustment v. Brown*, Del. Supr., C.A. No. 371, slip. op. (Aug. 3, 2007) (2007 WL 2229213) (necessary party not named in appeal during 30-day period, but Court permitted amendment and relation back where, among other things, forms posted on Superior Court's web site left only one space for one defendant and praecipe called for service on necessary party). For a detailed discussion of the *Brown* case, see p. 9, *infra*. *See also Preston v. Board of Adjustment of New Castle County*, 772 A.2d 787 (Del. 2001)

(limited participation in stay hearing constituted "constructive intervention" and appeal not subject to dismissal for failure to join indispensable party); *Riedinger v. Board of Adjustment in Sussex County*, Del. Super., C.A. No. 99A-03-003, Graves, J. (Sept. 26, 2000) (where property owner "constructively intervened" through *amicus* briefing, appeal would not be dismissed). Moral of the story: if you're not named in the appeal, but should have been, don't go to the courthouse.

e. Complaint must be verified, although lack of verification not a grounds for dismissal absent prejudice. *Di's Inc. v. McKinney*, Del. Supr., 673 A.2d 1199 (1996).

f. Discussion on the difference between the standard of review for a common law writ of certiorari versus the standard of review on statutory appeals which reference certiorari. *Hoey v. City of Wilmington Zoning Bd. of Adjustment*, 2011 WL 7063243 (Del. Super).

2. Standard of review.

a. Correct errors of law.

b. Determine whether substantial evidence supports findings of fact and conclusions of law.

Janaman v. New Castle County Bd. of Adjustment, Del. Super., 364 A.2d 1241 (1976), *aff'd without op.*, Del. Supr., 379 A.2d 1118 (1977). "Substantial evidence" is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . [it] is 'more than a scintilla but less than a preponderance.'" *Olney v. Cooch*, Del. Supr., 425 A.2d 610, 614 (1981) (citations omitted). Substantial evidence need not include expert testimony. *Bethany Beach Volunteer Fire Co. v. Board of Adjustment of the Town of Bethany Beach*, Del. Super., C.A. No. 97A-07-002, Graves, J. (Sept. 18, 1998).

Arguments not made to the Board below will be deemed waived on appeal. *See, e.g., Preston v. board of Adjustment of New Castle County*, Del. Super., C.a. No. 00A-02-006, Jurden, J. (Feb. 21, 2002) (objectors did not challenge notice before Board and could therefore not raise on appeal); *Lowe's Home Centers, Inc. v. Sussex County Bd. of Adjustment*, Del. Super., C.A. No. 99A-04-002, Witham, J. (Nov. 30, 2001) (equitable estoppel argument not made to Board, so could not be made on appeal); *Cingular Wireless LLC v. Sussex County Bd. of Adjustment*, Del. Super., C.A. No. 05A-12-003-RFS, 2007 WL 15248, Stokes, J. (Jan. 19, 2007) (traffic study submitted by applicant following public hearing held inadmissible).

3. Remedy: Court can reverse, affirm or modify but not remand. 9 *Del.C.* §§ 1314(e), 4918(f), 6918(f); 22 *Del.C.* § 328(c). Court can take additional evidence. *Id.; Mellow v. New Castle County Bd. of Adjustment*, Del. Super., 565 A.2d 947 (Del. Super. 1988), *aff'd*, 567 A.2d 422 (Del. 1989). There is only one example of the court modifying a Board's decision to deny a special use exception by, effectively, overruling the Board's decision and granting the applicant's application. *AT&T v. Sussex County Board of Adjustment*, Del. Super., C.A. No. S14A-04-001, Brady, J. (April 30, 2015).

4. An appeal does not stay the matter, but the Court may, upon application and notice, issue a restraining order on due cause shown. The standards are approximately the same as those for preliminary injunctive relief in Chancery Court. 9 *Del.C.* §§ 1314(c), 4918(c), 6918(c); 22 *Del.C.* § 328(b); *see Beatty v. New Castle County Bd. Of Adjustment*, Del. Super., C.A. No. 98A-05-001, Carpenter, J. (July 8, 1999) (denying request for stay). *MacDonald v. Board of Adjustment of Town of Dewey Beach*, Del. Super., Chandler, J. (Dec. 2, 1988); *Brandywine Park Condominium Council v. City of Wilmington Bd. Of Adjustment*, Del. Super., 534 A.2d 286 (1987).

5. Burden of persuasion is on party bringing the appeal. *Profita v. New Castle County Bd. of Adjustment*, Del. Super., C.A. No. 92A-08-013, Barron, J. (Dec. 11, 1992); *Brandywine Park Condominium Council v. City of Wilmington Bd. Of Adjustment*, Del. Super., 534 A.2d 286, 291 (1987); *Mobil Oil Corp. v. Board of Adjustment of Town of Newport*, Del. Super., 283 A.2d 837, 839 (1971); *Cingular Wireless LLC v. Sussex County Bd. of Adjustment*, Del. Super., C.A. No. 05A-12-003-RFS, Stokes, J. (Jan. 19, 2007) (2007 WL 15248).

6. Elihu Root's advice -- don't bring frivolous appeals. *Melta, Inc. v. New Castle County Bd. of Adjustment*, Del. Super., C.A. No 90A-MY-12, Barron, J. (April 18, 1991).

LAND USE LITIGATION IN DELAWARE©

Saul Ewing Arnstein & Lehr

A. Theories and Causes of Action

   1. Vested Rights

   2. Equitable Estoppel

   3. Appeal of a Rezoning Decision

   4. Appeal of a Subdivision Decision

   5. Substantive Due Process

   6. Procedural Due Process

   7. Equal Protection

B. Suing the Enemy —— Can You Sue Competitors and Opponents?

C. Attorneys' Fees

D. Are You Out of Time, Suing Too Soon, Or In The Right Place? – Procedural Issues And Other Things To Consider

A. Theories And Causes of Action

1. Vested Rights.

Under Delaware law, a landowner may acquire "vested rights" to a particular zoning classification or intended use. The question of whether a zoning change affects the right of a property owner to proceed with a previously planned use is one of "substantial reliance." In *Shellburne v. Roberts*, Del. Supr., 224 A.2d 250 (1966), the Court stated:

> [a]s to the time of the zoning change, there must have been a substantial change of position, expenditures, or incurrence of obligations, made lawfully in good faith under the permit, before the landowner becomes entitled to complete the construction and to use the premises for a purpose prohibited by a subsequent zoning change.

Id. at 254. *See also Raley v. State*, Del. Supr., No. 95, 1991 (Sept. 16, 1991) (Order); *Wilmington Materials v. Town of Middletown*, Del. Ch., C.A. No. 10392, Jacobs, V.C. (Dec. 16, 1988); *Raley v. Stango*, Del. Ch., C.A. No. 1047-S, Berger, V.C. (July 28, 1988), *reh'g denied*, (Sept. 14, 1988); *New Castle County v. Mitchell*, Del. Ch., C.A. No. 6231, Marvel, C. (May 25, 1982 and Nov. 25, 1981).

In obtaining vested rights, the central focus is on the amount of good faith expenditures. **"What level of expenditure will suffice to constitute substantial reliance cannot be determined by any magic formula. That inquiry is necessarily fact specific and must take into account all relevant circumstances."** *Wilmington Materials*, slip op. at 21 (emphasis added). In *Wilmington Materials*, expenditures of approximately $80,000 were found to create vested rights. In *Raley v. Stango*, $5,500 did not establish vested rights. In *Acierno v. New Castle County*, D.Del., C.A. No. 92-385, Robinson, J. (May 23, 2000), $38,500 was deemed insufficient for equitable estoppel to apply.

Historically, there had been some question of whether a landowner must obtain a building permit or other permit before rights vest. *See Acierno v. Cloutier*, 40 F.3d 597 (3d Cir. 1994). *Shellburne* dealt with a situation where a permit had been issued. In *Wilmington Materials*, *New Castle County v. Mitchell* and *Raley v. Stango*, no permit had been issued. However, in *Kejand v. Town of Dewey Beach*, Del. Super., C.A. No. 91A-05-006, Ridgely, P.J. (Nov. 1, 1993), the Court indicated, in *dicta*, that vested rights cannot be acquired until a permit issues. *See also Delaware River & Bay Authority v. Delaware Outdoor Advertising*, Del. Ch., C.A. No. 15922, Jacobs, V.C. (Feb. 20, 1998), (rights could not vest because even though property owner submitted application for permit, law was changed before permit issued).

However, in *The Village, L.L.C. v. Delaware Agricultural Lands Foundation*, 808 A.2d 753 (Del. 2002), the Delaware Supreme Court, in a unanimous *en banc* decision, held that receipt of a building permit was *not* required in order to establish

vested rights. Rather, the question is solely one of good faith, substantial reliance. The Court explained that:

> the issuance of a building permit is not dispositive of the question of vested rights. Equally non-dispositive, in our view, is the lack of a building permit if the land owner has demonstrated reliance on the requirements currently in effect and has pursued compliance in good faith.

808 A.2d at 757. The Court went on to state:

> [this] case illustrates the essential unfairness in a rigid application of the "permit plus" rule without taking into consideration the complexity of present day real estate development. While *Shellburne's* "permit plus" standard may continue to have viability in situations where the obtaining of a building permit is a mechanical process accomplished in a short period of time, it is not dispositive of the issue of vested rights in situations such as we confront here involving a development that could only be approved after the completion of each stage of a defined process . . .
>
> **In the final analysis, good faith reliance on existing standards is the test.** In a given situation, the issuance, or non-issuance, of a building permit may be evidence of reliance, or lack thereof. In cases, as here, where developers expend large sums of money on the pre-permit process, it would be inequitable to leave an applicant to the vagaries of the unanticipated actions of other governmental entities during the extended process required by local authorities.

Id. at 757, 758 (emphasis added).

2. **Equitable Estoppel.**

If a county, town, or other zoning authority engages in conduct which initially encourages a landowner to rely on existing zoning regulations and then later attempts to prohibit that same landowner's plans by changing the zoning code, or by acting in bad faith, or by passing new regulations designed to thwart a landowner's intended use, the zoning authority may be equitably estopped from applying the new regulations to the landowner. Equitable estoppel focuses on the conduct of the government and whether it would be inequitable to allow a government to repudiate its own conduct; vested rights, by comparison, focus on whether a landowner acquired rights which the government cannot take away by regulation.

In Delaware, several cases have discussed or applied the doctrine of equitable estoppel. *See, e.g., Disabatino v. New Castle Co.*, Del. Ch., C.A. No. 12714, Jacob, V.C. (March 29, 2000) (County's approval of subdivision of lot into two lots, and plaintiffs' reliance thereon, estopped County from denying building permits), *aff'd*, Del. Supr., 781 A.2d 687 (2001); *Miller v. Board of Adjustment of Dewey Beach*, Del. Super., 521 A.2d 642 (1986) (denying relief to landowner who knew of government mistake); *City of Rehoboth Beach v. Shirl Ann Associates*, Del. Ch., C.A. No. 1552, Chandler, V.C. (Aug. 31, 1993) ($7,000 sign erected in reliance on illegal permit could not be lit but could remain); *Beiser v. Board of Adjustment of Town of Dewey Beach*, Del. Super., C.A. No. 90A-JN6, Lee, J. (Oct. 25, 1991) (no equitable estoppel against town for erroneous issuance of permit where landowner should have realized mistake); *Dragon Run Farms, Inc. v. Board of Adjustment of New Castle County*, Del. Super., C.A. No. 88JA21AP, Stiftel, J. (Aug. 11, 1988) (issuance of opinion letter by County attorney formed part of basis for estoppel); *Wilmington Materials, Inc. v. Town of Middletown*, Del. Ch., C.A. No. 10392, Jacobs, V.C. (Dec. 16, 1988) (town estopped from changing zoning code to prohibit landowner's intended use); *see also Amico v. New Castle County*, 101 F.R.D. 472 (D. Del. 1984), *aff'd without op.*, 770 F.2d 1066 (3d Cir. 1985).

Generally, a local government exercising its zoning powers will be estopped when a property owner,

(1) relying in good faith,

(2) upon some act or omission of government,

(3) has made such a substantial change in position or incurred such extensive obligations and expenses,

(4) that it would be highly inequitable and unjust to destroy the rights which he has acquired.

See Eastern Shore Environmental, Inc. v. Kent County Dept. of Planning, Del. Ch., C.A. No. 1464-K, Jacobs, V.C. (Feb. 1, 2002) at 15 and cases cited therein.

In *Wilmington Materials*, the Chancery Court prohibited the Town of Middletown from applying a zoning code amendment which would have prohibited the landowner's intended use. The amendment was adopted after the landowner's plan submission. Prior to plan submission, the landowner had several meetings with town officials, had received an opinion from the town solicitor, and had expended funds based on such meetings. The Court concluded that it would be inequitable to allow the town to prohibit the landowner's use.

In *Shirl Ann Associates*, a hotel owner received a permit to construct neon sign (6' x 12') at cost of $7,000. Unfortunately, sign was not permitted under zoning code. The court weighed equities and found in favor of town with respect to illumination, but allowed sign to remain so long as not lit at night.

In *Disabatino*, the Chancery Court prohibited the County from denying building permits for lots which were created by a subdivision plan erroneously approved by the County. An earlier subdivision plan contained a note prohibiting further subdivisions. In finding the County estopped, the Court considered the full purchase price of the lots in determining whether the plaintiffs had made a substantial change in position. The Court explained that while the usual rule is to ignore land acquisition costs, an exception exists for any premium paid for the intended use.

Generally speaking, Chancery Court is the proper forum for an equitable estoppel claim. In *Eastern Shore Environmental, Inc. v. Kent County Dept. of Planning*, Del. Ch., C.A. No. 1464-K, Jacobs, V.C. (Feb. 1, 2002), the Court of Chancery denied a motion to dismiss an equitable estoppel claim for failure to exhaust administrative remedies. The Court explained:

> Eastern Shore is not contending that an "error in any order, requirement, decision or refusal of a county official" has occurred [meaning that an appeal would lie to the Board of Adjustment]. Rather, it claims that the County has changed its position regarding what zoning for the facility is legally required, and that because Eastern Shore relied, detrimentally and in good faith, on earlier representations by the County to the contrary, the County is estopped – and must be enjoined – from enforcing its changed position against Eastern Shore.

Mem. Op. at 20.

3. **Appeal Of A Rezoning Decision.**

The most common cause of action relating to a rezoning, and perhaps the most difficult, is a simple facial challenge to the rezoning itself. These lawsuits are brought by either disappointed property owners, or disappointed opponents. So long as the zoning authority's decision is not arbitrary and capricious, the decision will be upheld. Some points to remember:

(1) Court will not substitute its judgment for judgment of legislative body. *See Willdel Realty, Inc. v. New Castle County*, Del. Supr., 281 A.2d 612, 614 (1971) ("If the reasonableness of a zoning change ... is 'fairly debatable,' the judgment of the legislative body must prevail; and it thereupon becomes the duty of the courts to affirm even though there may be disagreement as to the wisdom of the change").

(2) The Court's role in reviewing a zoning decision is limited to reviewing the record to determine whether the decision is supported by substantial evidence and if so, whether the decision was arbitrary and capricious. *See, e.g., Deski v. County Council of*

Sussex County, Del. Ch., C.A. No. 2066-S, Jacobs, V.C. (Dec. 7, 2001) at 12.

(3) Legislative body's reasoning must be on the record, *BC Development Associates v. New Castle County*, Del. Supr., 567 A.2d 1271 (1989), or obvious from the record. *Lowenstein v. County Council of Sussex County,* Del. Ch., C.A. No. 1033 (Sussex), Walsh, J. (Nov. 13, 1985), *aff'd*, Del. Supr., No. 396, 1985 (Feb. 19, 1986) (Order).

(4) Individual statements made by councilmembers matter and can be the basis to overturn a successful rezoning or garner a new hearing and vote on an unsuccessful rezoning. *See Barley Mill, LLC v. Save Our County, Inc.,* 2014 WL 1220394 (Del.) (rezoning reversed where councilmember who voted yes for rezoning stated that he would have liked to have had traffic data but was erroneously told that he could not consider traffic data in voting for rezoning); *O'Neill v. Town of Middletown*, Del. Ch., C.A. No. 2197-N, Noble, V.C. (July 10, 2006) (2006 WL 2041279) (rezoning reversed where reasons given by councilmembers for commercial rezoning were not legitimate land use reasons for changing the property's zoning); *see also TD Rehoboth LLC v. Sussex County Council*, 2017 WL 3528391 (Del.Ch.) (where reasons for one councilmember's vote were unclear from his statements, and reasons for another councilmember's vote was contrary to the record evidence, denial of rezoning was voided and a new vote on the rezoning was ordered).

(5) Procedural irregularities are the usual basis for challenging rezonings, and depending on procedural problem, may result in rezoning being reversed. *See, e.g., Green v. County Council of Sussex County*, 415 A.2d 481 (Del.Ch. 1980), *aff'd sub nom.*; *Carl M. Freeman Assocs., Inc. v. Green*, 447 A.2d 1179 (Del. 1982); *Fields v. Kent County*, Del. Ch., C.A. No. 1096-K, Noble, V.C. (Feb. 2, 2006).

(6) *Shevock v. Orchard Homeowners Ass'n.*, Del. Supr., 621 A.2d 346 (1993), represents the first and only instance where a rezoning has been overturned for substantive reason and not simply failure to state reasons on the record.

(7) Legislative body must consider, but is not bound by, state agencies' commentary submitted for consideration under Land Use Planning Act. *Concerned Citizens of Cedar Neck, Inc.*, Del. Ch., No. 1893-S, Lamb, V.C. (Aug. 14, 1998).

(8) Challenge possible on basis that rezoning decision did not comply with comprehensive plan. *See, e.g., Green v. County*

> *Council of Sussex County*, 508 A.2d 882 (Del. Ch.), *aff'd*, 516 A.2d 480 (Del. 1986) (per curiam) (rezoning invalid for inconsistency with comprehensive plan); *O'Neill v. Town of Middletown*, Del. Ch., C.A. No. 1069-N, Noble, V.C. (Jan. 18, 2006).

Needless to say, it is extremely difficult to reverse a rezoning decision "on the merits." As the Superior Court recently explained:

> The zoning authority must explain its rezoning decisions. But as a matter of law, zoning decisions are presumed valid. Before a court can overturn a rezoning, the appellant must clearly show that the decision was arbitrary and capricious. A zoning decision is arbitrary and capricious if it is not a result of a winnowing or sifting process, or if it is made without consideration of, or disregard for, the facts. The court cannot re-weigh the evidence and make its own findings of fact. Nor may the court reach its own conclusion about what is best for the public's health, safety and welfare . . .
>
> The court appreciates Appellants' claim that the proposed office is out of place . . . The decision, however, does not rest with the court. The rezoning was heavily debated. Whether the court thinks the Council got it right, or not, it is clear that Council seriously considered both sides' evidence and arguments. The presumption in favor of the Council's decisions has not been overcome.

Woznicki v. New Castle County, Del. Super., C.A. No. 02A-05-011-F55, Silverman, J. (June 30, 2003), Mem. Op. at 8, 17.

Shevock v. Orchard Homeowners Association, Del. Supr., 621 A.2d 346 (1993), represents the first and, to date, only case where a rezoning was reversed on substantive grounds, rather than failure to follow some procedural requirement. In *Shevock*, property was rezoning to a C-1 classification for a use prohibited in a C-1 zone. The Court concluded: "it was error for the County Council to approve the rezoning application for a C-1 district *on the sole basis of* a use expressly prohibited by that zoning classification." 621 A.2d at 350 (emphasis in original). *Shevock* is undoubtedly a unique set of facts.

4. **Appeal Of A Subdivision Decision.**

Except in the case of Kent County (*see* 9 *Del. C.* § 4818 specifying that all subdivision decisions of Kent County are appealable to Superior Court), there is no statutory provision for appeals of subdivision issues. Typically, such challenges are brought in Superior Court under a writ of certiorari or writ of mandamus. *See, e.g.*, *Delta Eta Corp. v. City Council of City of Newark*, Del. Super., C.A. No. 02A-07-009-WCC, Carpenter, J. (Mar. 19, 2003). *Hundley v. O'Donnell*, Del. Ch., C.A. No. 16359, Steele,

V.C. (Dec. 1, 1998) (*citing* Wooley); *East Lake Partners v. City of Dover Planning Comm'n*, Del. Super., 655 A.2d 821 (1994); *but see Starfusky v. Co. Council of Sussex Co*, Del. Ch., C.A. No. 1242, Allen, C. (Aug. 12, 1987) (plaintiff brought action in Chancery Court seeking declaratory judgment that County's approval of subdivision plan was invalid).

There is no statute of limitations applicable to a petition for writ of certiorari, however, the Court applies a 30-day time period as a matter of common law. Because the 30-day time period is not jurisdictional, the Court may, under appropriate circumstances, consider a petition brought more than 30 days after the challenged action. *See Dover Historical Society v. City of Dover Planning Comm'n*, Del. Super., C.A. No. 03A-06-002, Witham, J. (July 30, 2004) (2004 WL 1790164).

In subdivision cases, several factors are critical:

(1) did the plan comply with all subdivision requirements?

(2) is there any discretion as to whether a plan must be approved?

(3) Do opponents of a subdivision approval have standing to appeal? *See Cave v. New Castle County Council*, Del. Super., C.A. No. 02A-11-006, Del Pesco, J. (July 21, 2003); *petition for reargument denied*, (Aug. 5, 2003), *decision following remand*, 850 A.2d 1128, *aff'd*, 854 A.2d 1158 (Del. 2004); *LeMay v. New Castle Co.*, Del. Ch., C.A. No. 12462, Berger, V.C. (May 6), *aff'd*, 610 A.2d 726 (Del. 1992) (Table) (neighboring landowners lacked standing to challenge alleged violations of subdivision code); *but see Calagione v. City of Lewes Planning Comm'n*, Del.Ch., C.A. No. 2814-CC, Chandler, C. (Nov. 13, 2007); *Concord Towers, Inc., v. McIntosh Inn of Wilmington, Inc.*, Del. Ch., C.A. No. 15656-NC, Balock, V.C. (July 22, 1997) (questioning *LeMay*).

Note that in other states, competitors are denied standing. *See, e.g., Eastern Service Centers, Inc. v. Cloverland Farms Dairy, Inc.*, Md.Ct.Sp.App., 744 A.2d 63 (2000) (person whose sole reason for appealing decision is to prevent competition with established business lacks standing to appeal).

With respect to the question of discretion, the *East Lake Partners* Court stated as follows:

> The Planning Commission may not reject a site plan for a permitted use on the grounds that the project will adversely effect [sic] the general neighborhood. When people purchase land zoned for a specific use, they are entitled to rely on the fact that they can implement that use provided the project complies with all of the specific criteria found in the ordinances and subject to reasonable conditions which the Planning Commission may impose in order to minimize

> any adverse impact on nearby landowners and residents. To hold otherwise would subject a purchaser of land zoned for a specific use to the future whim or caprice of the Commission by clothing it with the ability to impose ad hoc requirements on the use of land not specified anywhere in the ordinances. The result would be the imposition of uncertainty on all landowners respecting whether they can safely rely on the permitted uses conferred on their land under the zoning ordinances.

655 A.2d at 826. In *Delta Eta Corp.*, the Court cited *East Lake Partners* with approval and rejected the city's argument that it could deny approval to a subdivision plan based on language in the "purpose" section of the code relating to general welfare. The Court observed:

> if the Court was to accept the respondents' argument, it would turn the concept of a planned logical zoning process into one left to political whim. As such, a professionally developed plan to logically build a community in the best interest of all its citizens taking into account that community's health, safety, morals and general welfare would return to a hodge podge of construction that simply lets the fancy of those in political power at the moment to determine what is appropriate. This situation would foster corruption and make the zoning process meaningless.

Order at 10. In fact, Delaware courts have consistently held that a subdivision plan which conforms to the applicable regulations *must* be approved. *See Tony Ashburn & Son, Inc. v. Kent County Regional Planning Comm'n*, 962 A.2d 235 (Del. 2008) (en banc); *East Lake Partners, supra; Delta Eta, supra; Cave v. New Castle County*, 850 A.2d 1128 (Del. Super.) *aff'd*, 854 A.2d 1158 (Del. 2004); *Daniel D. Rappa, Inc. v. Buck*, 275 A.2d 795 (Del. Super. 1971); *DiFrancesco v. Mayor and Town Council of Elsmere*, Del. Super., C.A. No. 06A-06-001-JOH, Herlihy, J. (June 28, 2007); *JNK, LLC v. Kent County Regional Planning Comm'n*, Del. Super., C.A. No. 06C-03-066 (RBY), Young, J. (July 11, 2007). *See also Gibson v. Sussex County Council*, 877 A.2d 54 (Del. Ch. 2005).

5. **Substantive Due Process.**

42 U.S.C. § 1983 ("Section 1983") has been construed by the courts to create several causes of action, including claims for violations of substantive due process and procedural due process. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990). These violations are related, but distinct. An action brought under Section 1983 may proceed in either state or federal court. *Kerns v. Dukes*, Del. Supr., 707 A.2d 363, 368 (1998).

A violation of substantive due process is one in which the government's actions interfered with a zoning applicant's constitutional or legal right in an "arbitrary or capricious" manner. For example, the refusal to issue a driver's license to a qualified individual for no lawful reason is a denial of substantive due process. *See Mosolygo v.*

Edgar, 613 F. Supp. 772 (N.D. Ill. 1985). In other words, a substantive due process violation occurs when a plaintiff's right is denied or interfered with for no legitimate reason. The focus of a substantive due process claim is on the interference and the basis for such interference. If there is no legitimate basis for the interference or decision, then the defendant's actions are "arbitrary and capricious" and a substantive due process violation has occurred.

The "elements" of a substantive due process claim are:

(1) a person acting under color of state law;

(2) denies a right, privilege or immunity secured by the Constitution or state or federal law; and

(3) the denial is "arbitrary and capricious."

42 U.S.C. § 1983.

In determining whether a substantive due process violation has occurred, the first element is easily proven in a land use context. A municipality or county is a "person" for purposes of Section 1983. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1977).

The second element, that of a right, can be problematic. Traditionally one had to demonstrate entitlement to a permit or approval (*i.e.*, no discretion), before a right protected by substantive due process could be said to exist. For example, in *Wilmington Materials*, the property owner was entitled to use his property in accordance with his submitted plans.

The Third Circuit, though, announced a significant easing of this burden in *DeBlasio v. Township of West Amwell Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir.), *cert. denied*, 516 U.S. 937 (1995). In *DeBlasio*, a property owner was denied a variance for allegedly improper reasons. As the grant of a variance is highly discretionary, one might think that no "right" protectable by substantive due process existed. The Third Circuit, though, found that the property owner's ownership interest in its property was an interest protected by substantive due process. The Court stated:

> [o]wnership is a property interest worthy of substantive due process protection. Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended use was arbitrarily or irrationally reached.

Id. at 601 (citations omitted). The Third Circuit's view, however, is not shared by other circuits, which apply an "entitlement" standard and will not find a substantive due process violation where the government retains any discretion to deny a permit or plan. *See, e.g., DeBlasio*, 53 F.3d at 605 (dissent); *Triumphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir.), *cert. denied*, 516 U.S. 816 (1995); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995).

The final element necessary to establish a substantive due process violation is "arbitrary and capricious" behavior. Numerous cases hold that the interference with a person's right to use land in a lawful manner for no legitimate reason represents a violation of substantive due process. *See, e.g., Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), *cert. denied*, 488 U.S. 868 (1988); *Bateson v. Geiss*, 857 F.2d 1300 (9th Cir. 1988); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), *cert. denied sub. nom, Baranick v. County of Marin*, 493 U.S. 894 (1989).

In *Elsmere Park Club Ltd. Partnership v. Town of Elsmere*, 771 F. Supp. 646 (D. Del. 1991), *cert. denied*, 516 U.S. 816 (1995), the District Court found that the Town of Elsmere violated an apartment owner's substantive due process rights when it refused to consider a request for a building permit and then amended its zoning code to prohibit the owner's intended use. In the *Elsmere Park* case, the property owner's basement apartments had been damaged by flooding and declared unsanitary and unfit for occupancy. When the owner sought a building permit to repair the apartments, the Town of Elsmere refused to consider the request until it could consider changing its zoning code. Subsequently, the Town amended its zoning code to prohibit basement apartments. In finding a substantive due process violation, the Court observed:

> under the zoning ordinance in effect at the time Elsmere Park requested a building permit, Elsmere Park was entitled to repair the flooding damage . . . . The Town possessed no legal authority to defer this request until the law could be rewritten. Consequently, the town council's actions constituted unlawful delay in violation of substantive due process.

Id. at 650. In reaching its decision, the Court relied upon *Bello*, 840 F.2d 1124, and *Southern Coop. Dev. Fund v. Driggers*, 696 F.2d 1347 (11th Cir.), *cert. denied*, 463 U.S. 1208 (1983).

In *Bello*, 840 F.2d 1124, the Third Circuit considered the issue of the interference with the building permit process by city council members, acting in their official capacity, for partisan political reasons unrelated to the merits of the application. The court concluded, "[t]hese actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation." *Id.* at 1129-1130; *see also Southern Cooperative*, 696 F.2d at 1356 (due process violation where county commission refused to approve conforming subdivision plan); *Bateson*, 857 F.2d at 1303 (refusal to issue conforming building permit by town council constitutes substantive due process violation). In *Scott*, 716 F.2d 1409,

the Court concluded that the developer's property interest "was taken from him by manifest arbitrariness and unfairness." *Id.* at 1421.

The United Artists Case

In an opinion with potentially major implications, a divided Third Circuit panel held that the proper test to apply to land use cases was not whether the conduct at issue was the subject of an "improper motive" but henceforth would be whether the conduct "shocks the conscience" of the Court. *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003). The Court thus overruled a long series of Third Circuit cases, such as *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), which held that municipal officials (and local governments) would be liable where the officials acted with improper motives.

In so doing, the majority of the panel noted that:

> Instead of demanding conscience-shocking conduct, the Bello line of cases endorses a much less demanding "improper motive" test for governmental behavior. Although the District Court opined that there are "few differences between the [shocks the conscience] standard and improper motive standard," we must respectfully disagree. The "shocks the conscience" standard encompasses "only the most egregious official conduct." In ordinary parlance, the term "improper" sweeps much more broadly, and neither Bello nor the cases that it spawned ever suggested that conduct could be "improper" only if it shocked the conscience.

316 F.3d at 400 (citations omitted). The majority went on to state that:

> Application of the "shocks the conscience" standard in this context also prevents us from being cast in the role of a "zoning board of appeals." . . . Land-use decisions are matters of local concern and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with "improper" motives.

Id. at 402 (citations omitted).

Judge Cowen dissented, and his dissent bears study:

> tossing every substantive Due Process egg into the nebulous and highly subjective "shocks the conscious" basket is unwise. It leaves the door ajar for intentional and

> flagrant abuses of authority by those who hold the sacred trust of local public office to go unchecked. "Shocks the conscience" is a useful standard in high speed police misconduct cases which tend to stir our emotions and yield immediate reaction. But it is less appropriate, and does not translate well, to the more mundane world of local land use decisions, where lifeless property interests (as opposed to bodily invasions) are involved. . . .
>
> I agree with the Majority that land use decisions are generally issues of "local concern." But those very same decisions necessarily assume constitutional dimension when the calculated, intentional and deliberate abuse of government power is at hand. **The concern that the federal Judiciary will become a local zoning board takes a permanent back seat to the federal Judiciary's obligation to protect the core constitutional freedoms of the American public from deliberate and intentional governmental deprivation.**

316 F.3d at 408 (emphasis added; citations and footnotes omitted). In the concluding paragraph of his dissent, Judge Cowen ends with his view of whether the conduct described "shocks the conscience," and one can only hope that his view will become the view not only of the District Court on remand, but of future courts in general:

> Even if "shocks the conscience" is the language we must employ to the exclusion of any other (which it is not), **the alleged behavior in this case resolutely shocks the conscience. Public officials, sworn to uphold the law, deliberately extracted money, knowing that it was improper for them to do so.** In contemporary America, under compelling norms of basic human decency, it would be shocking that such officials improperly and illegally obtained money in matters that come before them. There is little if any distinction between the taking of money for the purposes alleged in this case, and money taken to line the officials' individual pockets.

Id. at 408 (emphasis added). Too many times, it seems, local officials, knowing full well that a plan (or other permit request) complies with the applicable regulations will nevertheless delay or ultimately deny approval. Where local officials elected to uphold the law nevertheless refuse to follow the law, a courts' conscience should always be shocked. Anything less only invites further disrespect for the law and further erosion of the rule of law.

One final note about the *United Artists* case – it is a federal case. Delaware state courts are not bound by federal district court or court of appeals decisions,

only Supreme Court decisions. *See Wilmington Materials, Inc. v. Town of Middletown*, Del. Ch., C.A. No. 10392, Jacobs, V.C. (July 14, 1994).

Post-*United Artists*

Since the *United Artists* case, two more recent Third Circuit decisions suggest that, ultimately, the "shocks the conscience" standard may not ultimately survive.

In *Blain v. Township of Radnor*, 2006 WL 358550 (3d Cir. 2006) (not selected for publication), a township wrongly denied subdivision plan approval for a small project. The property owner obtained reversal in state court, and then brought a substantive due process claim in federal court. The District Court dismissed, and the Third Circuit upheld the dismissal.

In the final footnote of the opinion, the Court noted as follows:

> Judge Cowen reluctantly joins this opinion of the Court. He does so by reason of Internal Operating Procedure of the United States Court of Appeals for the Third Circuit 9.1 which binds every panel to follow prior decisions of the court unless the case goes *en banc*. He observes in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), that the Court of Appeals for the Third Circuit for the first time by a vote of 2-1 elevated the applicable standard to review the conduct of a planning board to "shocks the conscience." Prior to *United Artists*, the standard for such conduct was "improper motive" pursuant to this Court's decision in *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988). Judge Cowen observes that under the improper motive standard, there was ample, indeed overwhelming evidence, in which a jury could reasonably conclude that the appellees engaged in official misconduct in an effort to hinder, obstruct, and delay the approval of Blain's development plan. Accordingly, Judge Cowen joins the opinion of the Court in this matter but hopes that the standard enunciated in *United Artists* is shortly reviewed by the United States Supreme Court.

More recently, in *County Concrete Corp. v. Township of Roxbury*, 442 F.3d 159 (3d Cir. 2006), the Third Circuit distinguished between "executive" action and "legislative" action. "Executive" action, which is involved in reviewing plans, granting permits, etc., is executive in nature and therefore subject to the "shocks the conscience" standard. However, "legislative" action, such as rezoning property is not "executive" in nature and therefore not subject to the "shocks the conscience" standard. Rather, "legislative" action will violate substantive due process if it is arbitrary or irrational. In *County Concrete*, the plaintiffs alleged a downzoning aimed solely at them and unrelated to land use planning. The Third Circuit held that this stated a claim, and reversed dismissal of the lawsuit.

The Court quoted an opinion by then Judge and now Justice Alito: "typically, a legislative act will withstand substantive due process challenge if the government 'identifies the legitimate state interest that the legislature could rationally conclude was served by the statute.'" 442 F.3d at 169.

Judge Kozinski's Dissent Regarding the Second Amendment

In *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003), the Ninth Circuit denied a rehearing *en banc* on the issue of whether the Second Amendment grants a personal right to bear arms. Judge Kozinski dissented, and his reasoning should apply with equal force to the Federal courts' obvious distaste for the rights of property owners:

> Judges know very well how to read the Constitution broadly when they are sympathetic to the right being asserted. We have held, without much ado, that "speech or . . . the press" also means the Internet, *see Remo v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and that "persons, houses, papers, and effects" also means public telephone booths, *see Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases -- or even the white spaces between lines of constitutional text. *See, e.g., Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). But, as the panel amply demonstrates, when we're none too keen on a particular constitutional guarantee, we can be equally ingenious in burying language that is incontrovertibly there.
>
> It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. As guardians of the Constitution, we must be consistent in interpreting its provisions. If we adopt a jurisprudence sympathetic to individual rights, we must give broad compass to all constitutional provisions that protect individuals from tyranny. If we take a more statist approach, we must give all such provisions narrow scope. Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences.

To date, the Third Circuit has yet to find any land use denial or other activity which "shocks the conscience."

Indeed, in *Gould v. Council of Bristol Borough*, 2014 WL 296944 (E.D. Pa.), the District Court held that a borough's intentional misapplication of its zoning code did not "shock the conscience," explaining:

> The facts alleged in Gould's complaint suggest, at the very most, that local zoning authorities exerted special effort, and intentionally misapplied Bristol Borough's zoning law, to prevent Gould from developing his property as he wished. This does not rise to the level of a constitutional violation.

6. **Procedural Due Process.**

A procedural due process violation can be said to occur when a person is deprived of his property or rights without access to the procedural safeguards necessary to protect his rights. For example, a person may be required to surrender or give up his driver's license for certain reasons, but only after he has been afforded certain procedural safeguards. *Bell v. Burson*, 402 U.S. 535, (1971); *Plumer v. Maryland*, 915 F.2d 927 (4th Cir. 1990). If the required procedural safeguards (such as a meaningful hearing and opportunity to be heard) are not provided, then a procedural due process violation can be said to have occurred even if the surrender of the license is justified. The focus of a procedural due process claim is on the procedures available to a citizen to defend his rights. In such a claim, the claimant alleges the defendant (most often the state but also a municipality) has unlawfully interfered with a protected liberty or property interest by failing to provide adequate procedural safeguards. *Metcalf v. Long*, 615 F. Supp. 1108, 1118 (D. Del. 1985); *Schiller v. Strangis*, 540 F. Supp. 605, 613 (D.C. Mass. 1982). Substantive due process differs from procedural due process because it is not a claim of procedural deficiency but rather a claim that the state's conduct is inherently impermissible. *Id.*

The elements necessary to prove a procedural due process violation are:

(1) person acting under color of state law;

(2) engages in conduct which deprives a person of rights, privileges or immunities secured by the Constitution or laws of the United States; and,

(3) the person deprived of right, privilege or immunity was not afforded an adequate opportunity to defend or safeguard his rights.

Before lawfully depriving a citizen of his property or rights, the state must afford procedures assuring the citizen an adequate opportunity to defend or safeguard the property or rights. In other words, the state must afford a person due process. The

fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Goldberg v. City of Rehoboth Beach*, Del. Super., 565 A.2d 936, 942 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)), *aff'd*, 567 A.2d 421 (1989).

In *Goldberg*, Del. Super., 595 A.2d 936, the Delaware Superior Court reviewed the elements considered in determining whether due process has been afforded. The Court stated:

> [i]n order to determine the requirements for any given situation, the United States Supreme Court has articulated a balancing test which considers three factors: first, the private interest affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value of any additional procedural safeguards; and third, the government's interest, including the various burdens the additional procedural requirements would entail. The following safeguards have been identified as elements of due process, any or all of which may be required in a given situation depending upon the outcome of the balancing test: (1) notice of the basis of the governmental action; (2) a neutral arbiter; (3) an opportunity to make an oral presentation; (4) a means of presenting evidence; (5) an opportunity to cross-examine witnesses or to respond to written evidence; (6) the right to be represented by counsel; and (7) a decision based on the record with a statement of reasons for the result.

Id. at 942 (citations omitted). The exact elements or procedures which satisfy due process will vary on a case-by-case basis. *Id.*

Other courts have recognized the importance of procedural due process, and the severe hardship caused by unjustified delay in the land use context. For example, in *Mindich Developers, Inc. v Hunziker*, 622 F. Supp. 1513 (S.D.N.Y. 1985), the city council wrongfully withheld a building permit in an attempt to force the applicant to change its building plans. In finding a procedural due process violation, the court observed that "[m]ost such building is done on the basis of building loan commitments with time deadlines, and requires coordinating the work schedule of subcontractors in the various trades. **Any delay is deadly**." *Id.* at 1517 n.3 (emphasis added); *see also De Botton v. Marple Township*, 689 F. Supp. 477 (E.D. Pa. 1988) (failure to follow procedures set forth in planning code states a procedural due process claim).

In pursuing a procedural due process claim, it should be noted that the "mere" misapplication of state or county law by a local body will not ordinarily give rise to a procedural due process claim. Procedural due process is ordinarily satisfied when a state "affords a full judicial mechanism with which to challenge the administrative decision." *See, e.g., Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 680 (3d Cir. 1991). However, notwithstanding the availability of review in state courts, a

procedural due process violation may occur where some sort of pre-deprivation notice was possible or the defendant otherwise acted in an unfair manner procedurally. *See Acierno v. New Castle County*, D.Del., C.A. No. 93-579-SLR, Robinson, J. (Feb. 11, 1994) (plaintiff denied procedural due process for lack of pre-deprivation notice), *rev'd on other grounds*, 40 F.3d 645 (3d Cir. 1994); *see also Acierno v. New Castle County*, D.Del., C.A.No. 93-579-SLR, Robinson, J. (Nov. 1, 1995) (granting summary judgment to plaintiff on his procedural due process claim).

7. **Equal Protection.**

With an equal protection claim, the question is whether the governmental body has irrationally distinguished between two similarly situated classes. *Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3d Cir. 1980). There are essentially two elements to such a claim: (1) that the challenging property owner is similarly situated as other property owners who are treated differently, and (2) if the properties are similarly situated, can the government justify the difference in treatment -- is the distinction rationally related to a legitimate government purpose? *County Concrete Corp. v. Township of Roxbury*, 442 F.3d 159 (3d Cir. 2006).

B. **Suing The Enemy — Can You Sue Competitors And Opponents?**

It is always tempting to sue the opposition, particularly where the developer believes half-truths and disinformation are being purposely spread, or opponents appeal land use decisions solely to delay or hinder a project.

Types of actions which might be brought include:

(1) slander or libel;

(2) tortious interference with contract;

(3) tortious interference with prospective business relationship;

(4) malicious prosecution;

(5) antitrust.

Before any action is bought, though, careful consideration must be given to the various immunities and defenses available to opponents. Certain actions may be perfectly lawful. In addition, the General Assembly has enacted certain provisions severely limiting the types of actions which may be brought.

The Citizens Bill of Rights Act. Subchapter III, Chapter 26, Title 9 of the Delaware Code is entitled the "Citizens Bill of Rights Act." Passed in 1987, the Act provides a broad, absolute immunity to those challenging land use decisions as follows:

> [a]ny individual or association of individuals that challenges or opposes a zoning, subdivision or other land

> use application, and seeks judicial review of a decision concerning the application *in a manner prescribed by statute*, shall not be liable to any other party to the judicial review for seeking such a review, except for such costs as are expressly provided for by the rules of court.

9 *Del. C.* § 2699 (emphasis added). Although this statute grants an absolute immunity from liability, it does so only for actions brought "in a manner prescribed by statute." This language suggests then, that the immunity granted by this statute only applies to appeals and lawsuits specifically authorized by a statute. For example, the appeal of a variance is specifically created and governed by statute. *See, e.g.*, 9 *Del. C.* § 1358. However, no specific right to appeal a rezoning or a subdivision approval is created by statute.

Anti-SLAPP Suit Legislation. A SLAPP suit is a "Strategic Lawsuit Against Public Participation." SLAPP suits are typically filed by developers against individuals and civic groups alleging slander and libel in an effort to silence those groups. In 1992, the General Assembly added three sections to chapter 81 of title 10, designed to discourage the filing of SLAPP suits.[1] 10 *Del. C.* §§ 8136, 8137, 8138. These sections do two things to make SLAPP suits more difficult to bring.

> First, section 8136(b) states that:
>
> [i]n an action involving public petition and participation [which is defined to be any lawsuit by a permit or land use applicant materially related to any efforts to challenge or oppose the application], damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

10 *Del.C.* § 8136(b). Thus, for any libel or slander claim against an individual or association, the plaintiff must meet the same reckless disregard standard applicable to

---

[1] The adoption of Delaware's anti-SLAPP legislation was apparently inspired by a 1990 lawsuit filed in the United States District Court for Delaware. *Berman v. Beideman*, C.A.No. 90-245. In that case, the president of the Sussex County Mobile Home Tenants Association sent a letter to the residents of a mobile home park critical of the park's owner. The owner then sued. In June, 1992, the *News-Journal* ran an article about the case and editorialized in support of the anti-SLAPP legislation then pending in the General Assembly. That legislation became sections 8136, 8137 and 8138 of tTtle 10. Ironically, the legislation probably would not have prohibited the *Berman* suit.

newspapers. If the claim does not turn on the falsity of a statement, though, then this subsection does not apply.

Second, section 8138 further discourages SLAPP suits by providing that a defendant will be entitled to damages, costs and attorneys' fees if the defendant can demonstrate that the action was "commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." 10 *Del.C.* § 8138(a). Furthermore, section 8138 provides that punitive damages may be recovered where the defendant can demonstrate that the lawsuit was commenced or continued "for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights." 10 *Del.C.* § 8138(b). Although it may difficult for a defendant to make either of these showings, nevertheless, Section 8138 is clearly intended to further deter an applicant from suing those opposing a request for a permit or zoning change.

Although the language of Delaware's anti-SLAPP legislation is fairly broad, the Court of Chancery has read its application narrowly. In *Agar v. Judy*, 151 A.3d 456 (Del.Ch. 2017), the Court of Chancery held that the legislation did not apply to a libel suit arising from statements made during a proxy contest, but was more limited to lawsuits in which developers and others brought suit against those objecting to land use applications and permit requests. *See also Grant & Eisenhofer, P.A. v. Brown*, C.A. No. 17-5968, 2018 WL 3816721, at *4 (C.D. Cal. Feb. 16, 2018) (Delaware's anti-SLAPP statute "is narrowly limited to petitioning activity concerning land use permits and the like").

The Noerr-Pennington Doctrine. The *Noerr-Pennington* doctrine, named for two Supreme Court cases,[2] essentially holds that participation in judicial and administrative proceedings, as well as lobbying activities, are protected from antitrust liability unless the participation is "objectively baseless" and therefore a "sham." *Professional Real Estate Investors, Inc. v. Columbia Partners Indus., Inc.*, 508 U.S. 49 (1993). The *Noerr-Pennington* doctrine has since been applied in other contexts, beyond antitrust, to shield persons from liability for state law torts as well. *See, e.g., Village Supermarket, Inc. v. Mayfair Supermarkets, Inc.*, 634 A.2d 1381 (1993) (competitor's opposition to variance requests protected under *Noerr-Pennington*); *City of Newark v. Delmarva Power & Light Co.*, 497 F. Supp. 323 (D. Del. 1980) (dismissing DP&L's anti-trust claim against municipalities based upon municipalities' intervention before Federal Power Commission). Given the difficult hurdle imposed by the "objectively baseless" standard, many suits are dismissed. *See, e.g., Barnes Found. v. Township of Lower Merion*, 927 F. Supp. 874 (E.D. Pa. 1996) (dismissing claims against neighbors/opponents); *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993) (environmental suit financed by rival mall developer not a "sham"), *cert. denied*, 513 U.S. 818 (1994).

---

2 *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

Who's Funding The Enemy? Not all lawsuits that arise from the grassroots are necessarily funded by the grassroots. For example, although the Council of Civic Organizations of Brandywine Hundred filed a lawsuit challenging a rezoning permitting a new regional mall, the Brandywine Town Center, it was reported (and never denied) that the citizen's group received a substantial contribution from JMB Properties, the owners of the nearby Concord Mall. In *Pennsylvania Envtl. Enforcement Project, Inc. v. Keystone Cement Co.*, D. Del., C.A. No. 96-588-Envtl. LON, Longobardi, J. (June 23, 1997) (Order), the Court allowed the release of documents which were subject to a confidentiality order and which showed that a competitor funded a citizens group challenge to certain permits. The Court observed:

> "when a corporation attempts to use the litigation process to injure a competitor under the guise of a public interest lawsuit, the Court will remove the shield of confidentiality protecting that masquerade and allow the public to judge the merits of the dispute with full knowledge of the debate's participants."

C. Attorney's Fees.

1. Standard For Awarding Attorney's Fees Generally.

It is well settled in Delaware that a prevailing party may not recover attorneys' fees as part of costs. Under the "so-called American Rule . . . a prevailing party is responsible for the payment of his own counsel fees in the absence of statutory authority or contractual undertaking to the contrary." *Tandycrafts, Inc. v. Initio Partners*, Del. Supr., 562 A.2d 1162, 1164 (1989); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, (1975) (noting "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser"); *U.S. Indus. Inc. v. Gregg*, 457 F. Supp. 1293, 1302 (D. Del. 1978), *cert. denied*, 444 U.S. 1076 (1980); *Walsh v. Hotel Corp. of Am.*, Del. Supr., 231 A.2d 458 (1967); *Maurer v. International Reinsurance Corp.*, Del. Ch., 95 A.2d 827 (1953).

This general rule has "a number of nonexclusive but narrow exceptions." *Child Support Enforcement v. Smallwood*, Del. Supr., 526 A.2d 1353, 1356 (1987). The two most predominantly raised exceptions are the corporate "common fund" exception, *see, e.g., Tandycrafts, Inc.*, 562 A.2d at 1164-65; *Mauer*, 95 A.2d at 830; *Weinberger v. UOP, Inc.*, Del. Ch., 517 A.2d 653, 654 (1986), and the discretionary "equity" exception, *see, e.g.*, 10 *Del. C.* § 5106. *Child Support Enforcement*, 526 A.2d at 1356; *Ableman v. Katz*, Del. Supr., 481 A.2d 1114, 1121 (1984) *overruled on other grounds sub. nom., In re Melson*, Supre., 71 A.2d 783, 788 (1998); *Cranston v. Capano Dev., Inc.*, Del. Ch., C.A. No. 6184, Berger, V.C., slip op. at 6 (Oct. 6, 1986). Other exceptions include interpleader suits, trustees or executors seeking instruction from the court, and appointed counsel. *See Maurer*, 95 A.2d at 830-31. However, "Delaware courts have been very cautious in granting exceptions" to the general rule that each party shoulder their own attorney's fees. *CM & M Group, Inc. v. Carroll*, Del. Supr., 453 A.2d 788, 795 (1982); *Weinberger*, 517 A.2d at 654.

The "common fund" exception provides that "when the efforts of one member litigant of a class result in the creation of property as a 'common fund' which inures to the benefit of all members of the class, the successful litigant is entitled to an allowance of counsel fees to be paid from the fund or property which his efforts have created." *CM & M Group*, 453 A.2d at 795.

The other exception to the general rule, the "equity" exception, is based upon 10 *Del. C.* § 5106, which provides, "the Court of Chancery shall make such order concerning costs in every case as is agreeable to equity." The statute has been interpreted to grant an equity court complete discretion in imposing counsel fees on the losing party. *CM&M Group*, 453 A.2d at 795. The court closed by noting that "[i]n the ordinary adversary litigation the losing party is not assessed the counsel fees of his opponent unless the action was fraudulent." *Id.* (citing *Hutchinson*, 204 A.2d at 753.).

In *Dover Historical Society, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084 (Del. 2006), the Supreme Court affirmed lower court's refusal to award fees where opponents of project had obtained reversal and remand of Planning Commission's decision to grant permit. However, in same decision (relating to a second appeal), Court held that property owner's decision to tear down buildings after second appeal filed would justify an award of fees under "bad faith" exception.

One other land use case where attorneys' fees were awarded was *Judge v. City of Rehoboth Beach*, Del. Ch., C.A. No. 1613, Chandler, V.C. (Apr. 29, 1994). In that litigation, the plaintiff sought to access its property through certain paper streets, but the city refused to allow the owner to use the still valid (but theretofore never built) streets. In awarding fees, the court stated that:

> the record here supports a finding that defendants have acted in bad faith and vexatiously . . . the record shows that defendants were faced with a mountain of evidence, including legal opinions, legal authority and judicial declarations, demonstrating the City's obligation to grant plaintiffs access.

Id. at 2. In the absence of such clear evidence, though, it seems unlikely that courts will award fees.

2. **42 U.S.C. § 1988.**

42 U.S.C. § 1983 is an important federal statute designed, in part, to protect citizens from arbitrary and capricious governmental interference with their rights. Because Congress considers the protection of these rights so important, Congress also passed 42 U.S.C. § 1988 ("Section 1988"). Section 1988 provides in part that:

> [i]n any action or proceeding to enforce a provision of . . . [Section 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

42 U.S.C. § 1988(b). While the language suggests that a court has wide discretion in awarding fees, the United States Supreme Court has interpreted Section 1988 narrowly to *require* an award of attorneys' fees, "unless special circumstances would render such an award unjust." *Smith v. Robinson*, 468 U.S. 992 (1984), *superseded by statute as stated in, Board of Educ. v. Diamond*, 808 F.2d 987 (3d Cir. 1986); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *see also Staten v. Housing Auth. of City of Pittsburgh*, 638 F.2d 599, 604-05 n.12 (3d Cir. 1980) (quoting remarks of Representative Seiberling, original congressional sponsor of Section 1988, that "awards [of attorneys' fees] should be automatic except in the most extraordinary circumstances"); *Amico v. New Castle County*, 654 F. Supp. 982, 990 (D. Del. 1987) (prevailing party presumptively entitled to attorneys' fees).

Often however, when a plaintiff brings a number of claims, including Section 1983 claims, a court will be able to resolve a case without reaching the Section 1983 claims. In enacting Section 1988, Congress anticipated this situation and provided that fees should nevertheless be awarded. The House Judiciary Committee Report states in part that:

> [t]o the extent a plaintiff joins a claim under one of the statutes enumerated in [Section 1988] with a claim that does not allow attorney's fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. In such cases, if the claim for which fees may be awarded meets the "substantiality" test, attorney's fees may be allowed even though the court declines to enter judgment on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact."

H.R. Rep. No. 1558, 94th Cong., 2d. Sess., 4 n.7 (1976) (citations omitted). In light of these statements, courts have long recognized that

> [t]he legislative history of Section 1988 and the unanimous weight of authority [support the] position that Congress intended the award of fees for work performed relating to state-law claims if unaddressed federal claims are substantial and arise out of the same operative facts.

Anderson v. Redman, 474 F. Supp. 511, 515 (D. Del. 1979); *see also Plott v. Griffiths*, 938 F.2d 164 (10th Cir. 1991); *Williams v. Thomas*, 692 F.2d 1032 (5th Cir. 1982), *cert. denied sub nom., Dallas County v. Williams*, 462 U.S. 1133 (1983). Thus, in 1984, the Delaware Supreme Court held that "fees may be awarded in cases where a pendent constitutional claim is raised, even if the claim on which the party prevailed . . . is one for

which fees cannot be awarded under [Section 1988]." *Slawik v. State*, Del. Supr., 480 A.2d 636, 640 (1984).

In several instances, Delaware Courts have awarded fees under Section 1988. In *Wilmington Materials, Inc. v. Town of Middletown*, Del. Ch., C.A. No. 10392, Jacobs, V.C., (July 14, 1994), the Court awarded fees to the plaintiff who had prevailed on his state law claims, thereby eliminating the need for the Court to consider the plaintiff's federal claims. In *Heite v. The Camden-Wyoming Sewer and Water Authority*, Del. Ch., C.A. No. 12089, Allen, C. (May 21, 1993), the Court awarded fees in the amount of $12,780 (out of $31,054.50 requested).

The Chancery Court also awarded fees in *Mirzakhalili v. Chagnon*, Del. Ch., C.A. No. 18143, Strine, V.C. (Nov. 9, 2000), where the plaintiff prevailed on state law grounds and Court did not need to reach the Section 1983 claims. The Court observed:

> Where a court has decided a case in favor of the plaintiffs on state law grounds and avoided reaching the merits of a § 1983 claim, fees may nevertheless be awarded under § 1988 if the "pleaded-but-undecided claim meets the 'substantiality' test of *Hagans v. Lavine*, 415 U.S. 528, 39 L. Ed. 2d 577, 94 S. Ct. 1372 (1974)." That test requires: (1) that the undecided constitutional claim and the adjudicated state claims arise out of a common set of facts; and (2) that the undecided constitutional claims must not be "too insubstantial to confer subject matter jurisdiction in a federal court,' meaning that those claims cannot be 'wholly insubstantial' or 'obviously frivolous.'" To the extent that the substantiality test is satisfied, an award of attorneys' fees to the plaintiffs should be made "'unless special circumstances would render such an award unjust.'"

Most recently, in *The Village, L.L.C. v. Delaware Agricultural Lands Foundation*, Del. Super., C.A. No. 98C-02-021-WLW, Witham, J. (May 30, 2003), the Court held that a property owner who was successful on his state law claims was entitled to attorneys' fees under 42 U.S.C. § 1988. In doing so, the Court cited *Wilmington Materials* and *Mirzakhalili*.

Note that it is not a "special circumstance" (meaning that fees can be denied) merely because a property owner has sufficient resources to retain counsel and seek review of this challenged action. *See Wilmington Materials* and *The Village*.

In *First State Enterprises, Inc. v. Canby*, U.S. Del., C.A. No. 95-170-LON, Trostle, M. (April 2, 1996), the Delaware District Court also awarded attorneys' fees under 42 U.S.C. § 1988. In *First State*, the Court found that the Delaware Department of Transportation arbitrarily and capriciously imposed surety requirements on a contractor and in doing so violated the contractor's due process rights.

Fees may also be awarded to a successful Section 1983 defendant where the plaintiff's claim was "frivolous, unreasonable, or without foundation." *Marker v. Talley*, Civ. No. 83C-DE-33, Del. Super., Martin, J. (Apr. 16, 1986).

D. Are You Out Of Time, Suing Too Soon, Or In The Right Place Procedural Issues And Other Things To Consider.

1. Statutes of Limitation.

10 *Del.C.* § 8126 is the primary statute of limitations for state law claims. It sets forth a 60-day time period in which to file suit -- which runs from the date of publication by the governing body of notice of its action. Newspaper accounts do not trigger the start of the 60-day period, only an advertisement or other published notice by the government. *See Council of South Bethany v. Sandpiper Development Corp.*, Del. Ch., Jacobs, V.C. (Dec. 8, 1986). Note that if a municipality publishes more than one notice, at least one Court has measured the 60-day period from the last notice. *See Shevock v. Colonial East Limited Partnership*, Del.Ch., C.A. No. 3237-CC, Chandler, C. (Nov. 30, 2007).

Failure to file within the 60-day period would bar any state law claim. The statute is one of repose, and cannot be waived. *See, e.g., Admiral Holding v. Town of Bowers*, Del. Super., C.A. No. 04A-03-002, Witham, J. (Oct. 18, 2004).

Federal claims are subject to a longer statute of limitations. Due process and equal protection claims follow a state's statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261 (1985). Thus, in Delaware, federal claims are subject to Delaware's two-year statute of limitations. 10 *Del.C.* § 8119.

2. Indispensable Parties.

It would seem clear that in any challenge to a permit or rezoning that the property owner and the applicant should be made parties. If, however, they are not, and the statute of limitations has run, then an action challenging the permit or rezoning will be dismissed. If, though, the property owner or applicant intervenes in the action, or "constructively intervenes," then the action may not be dismissed.

See Davis v. Sussex County Planning and Zoning Comm'n, Del. Super., C.A. No. 05A-05-001 (THG), Graves, J. (Jan. 17, 2006); *Southern New Castle County Alliance, Inc. v. New Castle County Council*, Del. Ch., C.A. No. 18752-NC, Jacobs, V.C. (July 20, 2001); *Council of Civic Organizations of Brandywine Hundred v. New Castle County*, Del. Ch., C.A. No. 12048, Hartnett, V.C. (Sept. 21, 1993), *aff'd without op.*, Del. Supr., 637 A.2d 826 (1993).

3. Ripeness/Exhaustion.

Is your claim ripe? Have you exhausted administrative remedies? Generally speaking, a claim is not ripe until there has been a final determination;

however, exhaustion of administrative remedies is not a jurisdictional requirement, it is a matter of judicial discretion.

4. Chancery v. Superior Court v. Board of Adjustment.

Cases involving rezoning have, traditionally, always been heard and decided in Chancery Court. *See Reinbacher v. Conly*, 141 A.2d 453 (Del. Ch. 1958).

Cases involving review and approval (or non-approval) of subdivision plans are heard in Superior Court by way of writ of certiorari.

Cases challenging decisions made by zoning and other governmental officials are typically heard by the appropriate Board of Adjustment (or Planning Commission in some instances).

5. Standing.

Do the plaintiffs have standing?

In *Barry v. Town of Dewey Beach*, Del. Ch., C.A. No 1083-S, Noble, V.C. (June 8, 2006), plaintiffs were held not to have interest sufficient to confer standing where they sought to challenge a zoning code text amendment. Nothing distinguished their interest from that of public.

In *O'Neill v. Town of Middletown*, Del. Ch., C.A. No. 1069-N, Noble, V.C. (Jan. 18, 2006), Court held that there was no standing (and no private right of action) to pursue alleged violations of PLUS statute.

In *Dale v. Town of Elsmere*, 702 A.2d 1219 (Del. 1997), the Supreme Court held that adjoining property owner lacked property interest sufficient for substantive due process. Question: did property owner have standing to bring a nuisance claim?

A SHORT INTRODUCTION TO PROPERTY TAKINGS AND EMINENT DOMAIN©

Saul Ewing Arnstein & Lehr

A. Condemnation.

Title 10, Chapter 61 sets forth the procedures governing condemnation under the power of eminent domain "exercised by any authority whatsoever, governmental or otherwise." 10 *Del. C.* §6101. Prior to instituting a condemnation action, government must comply with the Real Property Acquisition Act, 29 *Del. C.* §§ 9501-9506. Takings must be for a "public use," and such use "does not include the generation of public revenues, increase in tax base, tax revenues, employment or economic health, through private land owners or economic development." 29 *Del.C.* §9501A(a).

1. Superior Court has exclusive jurisdiction. 10 *Del. C.* §6102.

2. Process begun with filing of complaint.

3. Initial hearing held on possession; before taking possession, plaintiff (the condemning authority) must deposit estimated just compensation with the Court. This sum may be withdrawn by defendants at any time, but if actual award lower, excess sum must be returned. A challenge regarding the amount of the deposit is not a basis to challenge the condemnation itself. *State v. CEH/WH Trust*, 2006 WL 2666216 (Del. Super.)

4. After possession awarded, matter proceeds to trial on issue of just compensation.

5. The just compensation to which the owners are entitled is the fair market value of the property at the time of the taking in view of all available uses and purposes of the property at that time. *Wilmington Housing Authority v. Harris*, 93 A.2d 518 (Del. 1952); *16.50, 10.04629, 3.34, 1.84, etc. Acres of Land v. State*, 208 a.2d 55 (Del. 1965); *Wilmington Housing Authority v. Greater St. John Baptist Church*, 291 A.2d 282 (Del. 1972). Fair market value is the price a willing buyer would pay a willing seller, taking into account all relevant factors, neither party being under any compulsion to sell. *See, e.g., 0.744 of An Acre of Land v. State*, 251 A.2d 341 (Del. 1969).

   In determining market value of the property, the commissioners may not consider any value peculiarly personal to the owners, or the unwillingness of the owners of the property to dispose of it. *Harris*, 93 A.2d at 521, 522. Moreover, just compensation cannot be measured by the value of the land to the condemning authority or by its needs for the particular property. *Id.* Therefore, any special circumstances or costs imposed on the condemning

authority in connection with its use of the property, including special mitigation of wetlands, should not be considered in a determination of just compensation. *See also State v. Catawba*, 2005 WL 481390 (Del. Super.) (lost profits of business could not be considered in determining lost value to property remaining after a partial taking).

Delaware condemnation law distinguishes between a "total taking" and a "partial taking." In a "total taking," a landowner is paid only for the land taken. The landowner receives the fair market value of the property taken as of the date of the taking. A "total taking" occurs when an entire tract of land is taken, leaving no other adjacent property owned by the same landowner. A "partial taking," in contrast, occurs when the State (or other condemning authority) takes only a portion of a property. With a "partial taking," the landowner receives the difference between the fair market value of the property as a whole before the taking and the fair market value of the remainder after the taking. *0.089 of An Acre of Land v. State*, 145 A.2d 76 (Del. 1958); *State ex rel. State Highway Dept. v. Morris*, 93 A.2d 523 (Del. 1952). This method of compensation is sometimes referred to as the "before and after" test. *See, e.g., City of Milford v. .2703 Acres of Land*, 256 A.2d 759 (Del. 1969); *see also State v. Roseann H. Harkins Revocable Trust*, 732 A.2d 246 (Del. Super. 1997) (in determining value of remaining property, property owner could use loss of lots, or the "subdivision" approach, to determine diminution in value).

6. Counterclaims dealing with issues other than "just compensation" are not properly brought in a condemnation action and must be brought in a separate suit. *See State of Delaware v. 0.9951 Acres Of Land*, 2000 WL 1211507 (Del. Super.).

7. Defenses not raised in an answer are lost. *See State of Delaware v. Baynard*, 2001 WL 238116 (Del. Super.) (uneconomic remnant argument waived because not raised in answer).

8. Discovery and Civil Procedure. Insofar as applicable, the Rules of the Superior Court govern all condemnation proceedings of real property except as otherwise provided in Chapter 61 of Title 10. 10 *Del. C.* §6103. Superior Court Civil Rule 81 states that the procedure in condemnation and eminent domain actions shall conform to the Rules as far as practicable and to the extent that they will not contravene any applicable statute.

There are no applicable statutory provisions in Chapter 61 governing discovery in condemnation actions. Therefore, the procedures and rights set forth in the Superior Court Civil Rules apply to such proceedings. Superior Court Rule 26(b) states that

parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. It is not grounds for objection that the information would be inadmissible at trial if such information appears reasonably calculated to lead to the discovery of admissible evidence. Pursuant to Rule 26(a), discovery methods would include requests for admissions and for the production of documents, written interrogatories and the taking of depositions. The subject matter involved in a condemnation hearing is the just compensation to which the owner is entitled. Accordingly, any evidence as to valuation would be relevant and discoverable.

Complete and comprehensive discovery should be taken in any condemnation proceeding just as in any other civil action. In *Ableman v. State*, 297 A.2d 380 (Del. 1972), the landowners sought to set aside an award in condemnation. Among other arguments, the appellants argued that after the trial they discovered that the Department of Highways and Transportation (the "Department") had one or more appraisals at a higher figure than the appraisal testified to at trial by the Department's expert. Appellant argued that since the Department had evidence in its possession more favorable to the owners, it was duty bound to disclose it. The Court held that the law of this State is to the contrary and stated:

> The burden of proving fair market value is placed upon the owner. (citation omitted). The Superior Court has consistently held that the current rules of the Superior Court do not require the production of appraisals in the possession of the condemnor which are not offered in evidence. The appellants made no motion under Rule 26 of the Superior Court for production, nor propounded an interrogatory to the Highway concerning it. The point was, therefore, not properly preserved, and it comes too late in this Court.

Id. at 383.

9. Commissioners. The commissioners in a condemnation action hear all the evidence presented by the parties and determine the just compensation for the condemned property. Pursuant to 10 *Del. C.* §6108(b), prior to the trial date the Superior Court will submit to the parties a list of eleven proposed commissioners, who are "impartial, disinterested and judicious citizens" of the County where the real property is situated. Thereafter, at a place and time designated by the Court, the plaintiff will strike out one of the names, and then the defendant will strike out another until 3 names

remain. If a party refuses to strike a name or does not attend the striking, the Court or the Prothonotary will strike for the party refusing to strike or attend. The 3 names remaining at the conclusion of the process will be the commissioners in the action.

10. Hearing.

(a) Viewing the Premises. Pursuant to 10 *Del. C.* §6108(d), the Court has discretion to determine whether the commissioners may view the premises. If ordered, the view will be conducted under the supervision of the Court by the bailiffs. The purpose of the view is to enable the commissioner to better understand the evidence presented at the hearing and more intelligently to apply such evidence to the determination of just compensation. The view is not evidence and the commissioners may consider the evidence presented before them at trial in the light of the view but they must make their determination from the evidence alone. *Wilmington Housing Authority v. Harris*, 93 A.2d 518, 522 (Del. 1952). No testimony may be taken at the view; however, this restraint does not prevent the parties from designating and identifying the property during the view.

(b) Evidence. At trial, any party may present competent and relevant evidence upon the issue of just compensation. 10 *Del. C.* §6108(e). Section 6108(e) provides that all evidence must be given in the presence of the Court and the commissioners. During the course of the trial, the Court will determine all questions of law and the admissibility of all evidence.

Pursuant to Delaware Rules of Evidence Rule 403, all relevant evidence is admissible unless its probative value is substantially outweighed by its propensity to create confusion or unfair prejudice. Rule 401 defines relevant evidence as evidence having any tendency to make the existence of any consequential fact more or less probable. Evidence which provides for an independent source of valuation is relevant to the issue of just compensation. *Newton v. City of Rehoboth*, 593 A.2d 590 (Del. 1991) (Table) (text in Westlaw, 1991 WL 78489). Admissible evidence in a condemnation hearing includes expert testimony, appraisals and the testimony of the owners of the property if they can "establish familiarity with the elements of value." *State v. Dan's Concrete of Delaware, Inc.* ("*Dan's Concrete*"), 355 A.2d 883 (Del. 1976). Evidence as to the purchase paid by the owner for the

property taken is admissible provided that the transaction was bona fide and voluntary and took place within a reasonable time of the taking. *Harris*, 93 A.2d at 522.

Evidence of sales of other similar property in the neighborhood is admissible; however, the relevancy of such evidence must be established to the Court's satisfaction by a preliminary showing that (1) the other property was sufficiently similar to the property taken as to improvements, size, location and general adaptability, (2) the other property was sold within a reasonable time of the taking, and (3) that the other sale was a willing buyer - willing seller transaction. *Harris*, 93 A.2d at 522. Evidence of sales to the condemning authority of similar property is not admissible. *Id.*

Generally, evidence of an unaccepted offer to purchase is not admissible on the issue of the market value in condemnation cases. In *State v. Parcel No. 1-1.6401 Acres of Land*, 248 A.2d 709 (Del. 1968), the Court held that an unaccepted offer to purchase, whether by a third party or the condemning authority is inadmissible in a condemnation case. The Court reasoned that an unaccepted offer for land amounts to hardly more than the opinion as to value of one person of unproved qualifications and constitutes a class of evidence much safer rejected than received. *Id.* at 711.

(c) Award. After all the evidence is presented and the commissioners have been charged by the Court with the applicable law, they will arrive at a determination of the amount to be awarded as just compensation and then announce their award in open court. The award will be confirmed by the Court unless the commissioners have been guilty of misconduct or they have made an improper award based on an error of fact or law. In which event, the Court may, upon its own motion, or a motion of any party filed and served within 5 days of the award, set aside the erroneous award in whole or in part or modify it to conform to the facts or laws. In any event, at least 5 days must pass before an award is confirmed. *See 9.6 Acres of Land v. State ex rel. McConnell*, 109 A.2d 396 (Del. 1954).

11. Burden of Proof. The burden of establishing market value of the property is upon the owner of the property and not upon the condemning authority. The standard of proof in any condemnation proceeding is by a preponderance of the evidence, as in any other civil action. *Harris*, 93 A.2d at 522.

12. Post-Taking Changes/Other Uses. In general, those cases dealing with post-taking regulatory changes which affect the value of the land relate to the issue of rezoning. As previously stated, in ascertaining the market value, the commissioners may consider the best and most valuable use for which the property is reasonably adaptable. *Board of Education of Claymont Special School District v. 13 Acres of Land in Brandywine Hundred*, 131 A.2d 180, 183 (Del. 1957). If the possibility or probability of the land being put to its highest and best use enhances the market value of the property, then such enhancement may be taken into account in determining just compensation. *Id.* In this connection, the commissioners may consider the adaptability and availability of the property for a certain purpose or use, notwithstanding the fact that the property is never put to such purpose or use. However, no consideration may be given to any remote imaginary or purely conjectural uses.

Although the general rule is that market value must ordinarily be determined by consideration of the uses for which the land is adapted and for which it is available, there is an exception to the general rule. If the land is not presently available for a particular use by reason of a zoning ordinance, but if the evidence tends to show a reasonable probability of a change in the zoning ordinance in the near future, then the effect of such probability upon the minds of purchasers generally may be taken into consideration in arriving at market value. *Id.*

13. Appeal to Supreme Court. Pursuant to 10 *Del. C.* §6112, there is a right of review in every condemnation action from the final confirmed award of the Superior Court to the Supreme Court in the manner provided for review of any other final civil judgment. *Newton, supra.* Any such review must be instituted within one month from the time of entry of the final confirmed award of the Superior Court.[1]

The award of a condemnation commission is similar in nature to the verdict of a jury, and the findings of a commission, like those of a jury, will not be disturbed by the Supreme Court if there is competent evidence in the record to support them. *Del-Tan Corp. v. Wilmington Housing Authority*, 297 A.2d 34 (Del. 1972). The Supreme Court may set aside an award only if it is erroneous as a matter of law or if there is no competent evidence to support the Commission's finding. *Abelman*, 297 A.2d at 362. The Supreme Court examines the trial court's decision to admit evidence for an abuse of discretion. *Newton, supra.* A court abuses its discretion

[1] The term "one month" is not defined in the statute. Therefore, in order to ensure compliance, an appeal should be filed within 30 days of the date of the confirmed award.

when it exceeds the "bounds of reason" under all circumstances or "ignores recognized rules of law or practice." *Firestone Tire and Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

Assuming the trial court abuses its discretion, the Supreme Court must inquire whether the errors were so credulous as to deny the appellant of a fair trial. *Id.* The Supreme Court will not overturn a civil award "unless it is so grossly excessive as to shock the Court's conscience and sense of justice and unless the injustice is clear." *Delmarva Power and Light v. Stout*, 380 A.2d 1365, 1368 (Del. 1977).

14. "The costs of any condemnation proceeding . . . shall be borne and paid for by the plaintiff or plaintiffs in the proportions determined by the Court. 10 *Del. C.* §6111.

"Costs" include ordinary witness fees and may also include expert witness fees. *State v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966); *State v. Lot Nos. 133, 134 and 135*, 238 A.2d 837, 838 (Del. 1968). The determination of the allowance of expert witness fees is within the discretion of the court. *9.88 Acres of Land v. State*, 274 A.2d 139, 141 (Del. 1971). In determining the appropriateness of expert witness fees, the court shall consider reasonable time for travel, waiting in the courthouse for the call to testify and testifying. *Lot Nos. 133, 134 and 135*, 238 A.2d at 838.

B. <u>Inverse Condemnation.</u>

The purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

"Inverse condemnation is a means of bringing suit against a governmental defendant to recover the value of property which has in fact been taken by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted. The basis of this action is the constitutional guaranty against the taking of private property for public use without compensation." *Scott v. City of Harrington*, 1987 WL 11461 (Del. Super.) (Order) (citation omitted).

Delaware law provides that a property owner may institute an inverse condemnation action, and that the owner should receive reimbursement for reasonable costs and fees, including reasonable attorneys' fees, incurred. 29 *Del. C.* §9504.

Note that because Delaware allows inverse condemnation actions, a property owner must exhaust state remedies before bringing a federal

claim. *See Abbis v. Delaware Dep't of Transportation*, 712 F.Supp. 1159 (D.Del. 1989).

Note further that in order to bring an inverse condemnation a claim must be "ripe." "A landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." *See Buckson v. Town of Camden*, Del. Ch., C.A. No. 1438-K, Noble, V.C. (Oct. 31, 2002) (available on Lexis, 2002 Del.Ch. Lexis 126) *citing Palazzolo v. Rhode Island*, 533 U.S. 606, 620-21 (2001) (dismissing without prejudice claim that 25% open space requirement constituted a taking because property owner had not yet sought development approvals).

Two types of takings claims:

(1) if the ordinance denies an owner economically viable use of his land; or

(2) the *Penn Central* test which considers: (i) the economic impact of the regulation on the landowner, (ii) the extent to which the regulation has interfered with the owner's reasonable investment backed expectations, and (iii) the character of the governmental action.

1. Key Federal Cases.

Knick v. Township of Scott, 139 S.Ct. 2162 (2019)

Facts: Property owner alleged inverse condemnation by Township and brought action in federal court, but court dismissed for failure to pursue remedies in state court.

Held: Overruling *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), Court held that action could be brought in federal court upon the taking of the property, without need to exhaust state remedies.

Koontz v. St. John's River Management & Authority, 570 U.S. 595 (2013)

Facts: Government would only approve development of 1 acre of 14.2 acre tract if property owner imposed conservation easement and did off-site improvements 4.5 and 7 miles away. Property owner sought to develop 3.7 acres and would not do off-site improvements. Permit denied. Property owner brought takings claim.

Held: Denial of permit could form basis for takings claim. Monetary exactions and off-site improvements subject to *Nollan/Dolan* analysis (i.e. rough proportionality to impact of proposal development).

San Remo Hotel L.P. v. San Francisco, 545 U.S. 323 (2005)

Facts: Property owner brought state court inverse condemnation claim but specifically reserved its federal claims. After losing in state court, pursued federal action in federal court.

Held: "As applied" federal takings claim was substantively similar to state law claim and therefore federal claim precluded. a facial challenge to the ordinance could have been brought in federal court immediately (no ripeness requirement) or could have been reserved.

The upshot is that no "as applied" takings claim can be pursued in federal court.

Palazzolo v. Rhode Island, 533 U.S. 606 (2001)

Facts: Property owner owned 18 acres of marsh and upland. Property had been subdivided in 1959, but owner had never sought to develop lots until early eighties. Current owner, Mr. Palazzolo, had received title in 1978 when his corporation dissolved for failure to pay franchise taxes.

Held: (1) Claim was ripe, even though less intensive development not pursued. (2) Fact that wetlands regulations pre-dated owner's taking title did not preclude takings claim. (3) Property retained value because at least one residence could be built; but, case remanded for application of *Penn Central* test.

Dolan v. City of Tigard, 512 U.S. 374 (1994).

Facts: Property owner sought necessary permit to expand plumbing store. City would grant only if owner agreed to dedicate 10% of 1.7 acre parcel for improvements to City's flood control system and a bicycle pathway. City claimed these requirements justified because increased store size and parking lot would lead to increased water run-off and increased traffic. Oregon Supreme Court upheld city's actions.

Held: By a 5-4 vote, city's actions constituted a taking. In *Dolan*, Supreme Court refined the test for regulatory takings as

two-part test: (1) an "essential nexus" between the state's interest and the regulatory action (permit requirement); and (2) a "rough proportionality" between the required dedication and the impact of the development. In this case, the city's actions satisfied the "essential nexus," but failed the "rough proportionality" test.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

Facts: Owner purchased vacant oceanfront property intending to construct two houses. Two years later, South Carolina adopted statute which prohibited erection of any permanent structures within an erosion zone, which zone included owner's property. Owner brought inverse condemnation action, arguing his property rendered valueless. Trial court awarded $1.2 million. South Carolina Supreme Court reversed and set aside award, finding that because regulation designed to protect the public from serious harm, no compensation required.

Held: Court recognized at least two categories of compensable regulatory action: (1) where the regulation compels the property owner to suffer a physical "invasion" of his property, and (2) where a regulation denies all economically beneficial or productive use of land. A regulation designed to prevent harm would still amount to a taking if it wholly eliminated the value of the owner's land, unless the proscribed use was not part of the landowner's bundle of rights when he acquired the property. The Court remanded to determine whether prohibition on building would have been sustainable under common law doctrine of nuisance.

Agins v. City of Tiburon, 447 U.S. 255 (1980).

Facts: After landowner acquired five acre parcel of land, city modified existing zoning requirements, thereby restricting use of landowner's property. Landowner appealed, alleging inverse condemnation.

Held: No compensable taking. Landowner could still make use of property (1-5 residential dwellings). Zoning ordinance advanced legitimate state interests.

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

Facts: Coal companies brought action challenging state statute requiring that 50 percent of coal beneath certain structures be left in ground to provide surface support as an inverse condemnation.

Held: Court found that statute advanced a legitimate state interest, and that diminution in value was not so great as to effect a taking.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

Facts: Landowner filed complaint alleging inverse condemnation and sought damages from imposition of regulations which prevented property owner from rebuilding after flood. Regulation was rescinded and property owner rebuilt. California Court of Appeals held damages available only for period after date of the Court's determination that a taking occurred and California Supreme Court affirmed.

Held: Temporary takings are compensable. The Constitution requires damages during the entire period owner was deprived of use.

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

Facts: In order to receive building permit, landowner required to grant public easement to reach the beach over his property. Landowner claimed requirement was a taking.

Held: Access requirement does not serve same public purposes as permit requirements (i.e., no nexus), and therefore State must pay if it wants easement.

Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978)

Facts: New York City Landmarks Commission denied a permit to erect a 55-story office tower above Grand Central Station.

Held: Mere reduction in value not sufficient to prove a takings. Court held that a fact specific, case-by-case approach would need to be followed which considers the "district investment-backed expectations" of the property owner and the "character" of the challenged governmental action.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

Justice Holmes: "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . **We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.**" (emphasis added).

2. Key Delaware Cases.

Lawson v. State, 74 A.2d 84 (Del. 2013)

Facts: DelDOT made offer to purchase property based on flawed appraisal and, when property owner wouldn't sell, initiated condemnation proceedings. Property owner challenged condemnation for failure to comply with Real Property Acquisition Act.

Held: DelDOT failed to comply with RPAA because it should have known appraisal flawed.

Key Properties Group, LLC v. City of Milford, 995 A.2d 147 (Del. 2010)

Facts: City condemned for sewer easements to serve adjoining property owner. Owner claimed not a public purpose and failed to comply with RPAA.

Held: Condemnation was for public purpose. RPAA is directory not mandatory, and compliance would have been futile.

Wilmington Hospitality, LLC v. New Castle County, Del. Super., C.A. No. 03C-07-213, Johnston, J. (Aug. 4, 2004)

Wilmington Hospitality, LLC v. New Castle County, 2004 WL 2419157 (Del. Super.)(Order)

Wilmington Hospitality, LLC v. New Castle County, 2005 WL 1654024 (Del. Super.)

Facts: New Castle County refused to issue certificates of occupancy for hotel that greatly exceeded square footage shown on record plan. Property owner brought inverse condemnation claim.

Held: Court *dismissed* Wilmington Hospitality's claim for inverse condemnation stating:

> It is undisputed that WH now has sold the property at issue to a third party. In order to sustain a claim for inverse condemnation, WH must show that it has been deprived by NCC of *all economic value* of the property by NCC's zoning regulations. Even assuming for purposes of this decision that NCC's actions prevented WH from ever opening the hotel, the property *a fortiori* retained some economic value as clearly evidenced by the recent sale. This is not a case in which a governmental entity has capriciously deprived an individual of the ability to utilize land in a manner that presents irreparable harm to the individual. The principals of WH are sophisticated developers. The property was developed for commercial use. Accepting as true WH's claims of severe financial loses, the property still retained some economic value. Therefore, WH has failed to state a claim for inverse condemnation based upon zoning regulation.

Slip op. at 12 (footnote omitted). On motion for reargument:

> Plaintiff . . . asserts that the Court misapprehended the law by finding that Plaintiff must demonstrate denial of all economically viable use of the property. Therefore, the case should not be dismissed. Instead, Plaintiff should be given the opportunity to present evidence to a finder of fact on the issue of the economic effect of Defendant's actions upon Plaintiff. This argument was made by Plaintiff in support of its Motion to Dismiss. The Court previously considered *Palazzolo v. Rhode Island*, in which the United States Supreme Court held: "[A] regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. . . . Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.
>
> As a matter of law, Plaintiff has failed to show the existence of a regulatory taking sufficient to require an evidentiary hearing for the purpose of

> consideration of the *Penn Central* factors. Plaintiff's cause of action is based upon the theory of a categorical or complete regulatory taking. In its Complaint, Plaintiff alleges that Defendant denied Plaintiff *"all economically viable use of the hotel property."* The law is clear that a categorical taking only occurs when there has been a complete elimination of value or a total loss. Plaintiff has conceded that to the extent it received debt relief when it surrendered the property, it received some financial benefit.

Order at 1-2 (footnotes omitted). Finally, on a motion to amend the complaint:

> [Wilmington Hospitality] has now filed a Motion to Amend Complaint. . . . [Plaintiff now alleges that] to the extent [New Castle County's] actions fall short of denying [Wilmington Hospitality] all economically viable or beneficial use of the hotel property, [New Castle County] nonetheless effected a temporary or permanent taking at [Wilmington Hospitality's] property without just compensation based upon the economic effect of [New Castle County's] actions by interfering with [Wilmington Hospitality's] reasonable investment-back expectations. . . .
>
> [Wilmington Hospitality] has failed to set forth any facts, disputed or otherwise, that present a *prima facie* case that [Wilmington Hospitality] had any legitimate investment-backed expectations of economic benefit from construction of a hotel exceeding the Record Plan by 38,000 square feet. [Wilmington Hospitality's] reasonable expectation was a property interest in a hotel not to exceed 118,805 square feet.

2005 WL 1654024 *2,3.

IN RE: 244.5 Acres of Land, 2000 WL 303345 (Del. Super.).

Facts: Property owner obtained preliminary plan approved for residential project, expending approximately $312,479.88. Adjoining property owner submitted its property into Agricultural Preservation District, which created a 50' setback requirement on adjoining properties. As a result, several lots in the subdivision rendered unbuildable, and

value of others significantly impaired. Property owner then brought multi-count complaint, including a count for inverse condemnation under 29 *Del. C.* §9504.

Held: Section 1983 claims, and other claims, premature until inverse condemnation decided. Therefore all counts, except inverse condemnation, would be stayed.

State v. Rehoboth Marketplace Associates, 1992 WL 52154 (Del. Super.), *aff'd*, 625 A.2d 279 (Del. 1993) (Table).

Facts: Developer sought entrance permit. State refused to grant permit unless developer set aside land for expansion of roadway unrelated to entrance request.

Held: Date of taking was date permit granted, not date of condemnation action or date of state taking possession of set aside property.

Bayville Shore Dev. Corp. v. County Council of Sussex County, 1991 WL 202182 (Del.Ch.).

Facts: Landowner appealed denial of rezoning, also alleged inverse condemnation by failure to rezone.

Held: No taking; property could still be used at density of one residence per half acre.

Delmarva Power & Light Co. v. City of Seaford, 575 A.2d 1089 (Del.), *cert. denied*, 498 U.S. 855 (1990).

Facts: Seaford annexed land and proceeded to take over supply of electricity to annexed lands from DP&L. DP&L sought compensation for lost customers.

Held: A taking had occurred; DP&L entitled to compensation.

Brandywine Transmission Service, Inc. v. Justice, 577 A.2d 751 (Del. 1990) (Order) (text in Westlaw, 1990 WL 72591).

Facts: Road widening interfered with property access; Superior Court held no inverse condemnation claim.

Held: "Highway construction that drastically alters the accessibility of a business establishment may impair business to such an extent as to require compensation."

Want Affordable Housing? Build More Homes.

Ronald Reagan offered solutions decades ago that are still relevant and useful today.

Larry Salzman Sep 20

There is agreement today across the ideological spectrum that the cost of housing is too high. The share of all Americans paying more than 30, 40, or even 50 percent of their monthly income on housing has been growing for a very long time, and the cost of housing nearly everywhere has outpaced income growth year-over-year for decades.

One can marshal many alarming statistics about the cost of housing, but I will rely on an anecdote from my hometown of San Diego. In the 30-mile stretch between the coastal cities of

La Jolla and Carlsbad—an area with about 300,000 residents—there is not a single detached home for sale this month under $1 million. Let that sink in.

The high cost of housing hits the poor hardest, of course. It tends to stop the young or unemployed from moving where better jobs are available. Homelessness is way up. Even among upper middle-class families, one now hears a common lament: Their kids and grandkids are moving away to places where they can afford an independent life. Housing costs are a problem.

Leftist activists frequently blame the problem on developers or capitalism while offering plans for more public housing, rent control, or command-and-control style mandates on builders to produce politically-favored forms of housing. In response, conservatives are reticent and sometimes defensive in discussions about housing affordability.

But a long time ago, the Reagan administration sought to lead the debate. A 1982 Presidential Commission on Housing identified regulation that blocked the production of housing as a primary source of the problem. It emphasized property rights, freedom in land use, and unleashing private enterprise to build homes as solutions.

Although much of the commission's work has been ignored, many of its recommendations might achieve bipartisan support now. The Biden administration now notes that "the empirical literature finds [that] restrictive land use regulations [relate to] higher house prices."

The way to make housing more affordable is to build more of it. Housing is scarce because laws have made so much of it illegal to build or created costly regulatory hurdles. Thus, Reagan's plan asked: "How can government regulations be simplified, thus lowering the cost of housing?"

At the heart of its report, the commission proposed a radical simplification of land use laws, and the elimination of many laws. It recommended (among other ideas):

- That the density of home building be left to the marketplace, rather than central planning;
- Allowing more manufactured housing be built;
- Freedom to build (and live in) smaller homes;
- Repeal of laws forbidding property owners from converting farmland to housing;

- Fewer federal environmental regulations blocking the production of homes (particularly regulation under the Clean Water Act and Endangered Species Act);
- Simpler procedures for securing building permits from local governments.

Summarizing, the commission urged that "all decisions related to size of lot, size or type of housing, percentage of multifamily, or other housing types and locations ... be left to the market" unless regulation was needed to protect a "vital and pressing governmental interest." These are words that could be repeated today by cross-ideological members of the "Yes in My Backyard" (YIMBY) movement. They are also policies consistent with the principled defense of property rights that conservatives often profess.

Some of the commission's strongest words pertained to the abuse of zoning laws, calling exclusionary zoning "one of the most indefensible" forms of regulation. In many counties, "large-lot" zoning outlaws building more than one home per acre. Some cities prohibit any multi-family homes, including modest apartment or condo buildings, except in small corridors of land. Elsewhere, building a manufactured home is illegal. To "protect property rights," the commission recommended that:

> all State and local legislatures should enact legislation providing that no zoning regulations denying or limiting the developing of housing should be deemed valid [by courts] unless their existence or adoption is necessary to achieve a vital and pressing government interest. In litigation, the governmental body seeking to maintain or impose the regulation should bear the burden for proving it.

A follow-on report commissioned by President George H.W. Bush's Department of Housing and Urban Development in 1991 took even stronger aim at "exclusionary, discriminatory, and unnecessary government regulations at all levels [that] substantially restrict the ability of the private housing market to meet the demand for affordable housing."

Some of the commission's recommendations have in fact come to pass, with good effect. The commission recommended that building permit fees be charged in amounts no more than needed to offset the public costs of the proposed development, and not used as a novel form of tax for other general governmental purposes. The Supreme Court essentially ruled that this was mandated by the Constitution in *Koontz v. St. Johns Water Management District* (2013), litigated by my organization, Pacific Legal Foundation (PLF).

And 35 years before California (among other states) enacted state laws securing a homeowner's right to build a "granny flat" or accessory dwelling unit alongside a primary residence, the

commission encouraged the same. Since the reform in 2017, ADUs have accounted for tens of thousands of new homes in California and turned thousands of single-family homeowners into landlords and entrepreneurs with a stake in property rights and economic freedom. Similar trends appear to be occurring in Oregon and parts of other states where they are allowed.

But ADUs are just one of the many types of low-cost housing that were once common all over America and became increasingly illegal to build in most places during the past 70 years: single-room occupancy hotels, boarding houses, duplexes, triplexes, or four-plex units within residential neighborhoods, and apartment buildings, and large-scale suburban "greenfield" developments adequate to meet the demand for homes at every level of income.

The Reagan plan recognized that housing affordability was a problem because we made it illegal to build homes in the locations and varieties needed to serve people at all incomes. It recommended ways to undo the damage.

It remains true that the affordability crisis is almost entirely a function of regulation. We do not need rent controls, subsidies, or more government mandates to make housing more affordable. We need freedom in land use. Conservatives may find a path forward on the issue by looking back to the Reagan administration's past, ignored ideas.

Larry Salzman is director of litigation at Pacific Legal Foundation, a nonprofit legal organization that defends Americans' liberties when threatened by government overreach and abuse.

Goodbye Connecticut — Darien Resident Says Gift Tax Forcing Him To Leave

On July 1, 2016, Tolland, Middlesex and Hartford counties' combined population was 1,206,836. The figure was lower than the year prior. (Sandra Gomez-Aceves)

By DAVID DELUCIA

MARCH 31, 2017, 6:00 AM

I am a born-and-raised Connecticut Yankee. I have been extremely fortunate to have lived the American dream. When I was 18, I left my parents' apartment in New Haven with two plastic suitcases, not a cent to my name and a dream. Through hard work, a fine education at UCLA and some luck, I began my career in investments in New York City. Twenty-five years later I retired a rich man — many would say extremely rich.

The question I keep asking myself is why should I stay in Connecticut? About 10 years ago, I had 25 to 30 super-wealthy friends here. Today, all but one has moved, most to Florida for tax reasons. I've been retired for 16 years — within the next two years, I will be an empty nester — and I am looking for a residence outside our state.

In fact, in March, I signed with a real estate agent to put my Darien home up for sale in May. When I die, and we all do, should I be thinking of what the costs will be to my heirs? I believe I have a responsibility to give them what I can and am asking myself a few questions.

First, as an American, have I paid my fair share? I think most objective people would say yes, as all my money was earned and taxed as ordinary income at the highest marginal tax rates (50 percent in all). When I die, another 40 percent (federal estate tax) of the remainder will go to the government and 12 percent to Connecticut up to $20 million paid. I have used the one-time gift exemption that the federal government allows.

So, over my lifetime, for every dollar that I earned, saved and wish to give to my heirs, I will have paid 76 percent to some government entity and my heirs will get 24 percent.

Is that not paying your fair share?

I can honestly say it never bothered me to pay my taxes. I'm proud to be an American and thankful that I had an opportunity to compete in such a great country. Nonetheless, I would like to leave as much as possible to my heirs.

I have read that it is better to give my wealth away than to die with it. Those familiar with the tax law understand why this is so. When you give money (more than $14,000 a year) to others there is a federal gift tax of 40 percent. Connecticut, however, is the only state in America that has a gift tax, which is 12 percent.

I can understand the state estate tax more than the state gift tax. Why? Because states around Connecticut also have an estate tax (even though this too is changing as they realize the folly of having high estate taxes, which risks pushing out their super wealthy people).

To be the only state that has a gift tax for its extremely wealthy citizens is paramount to erecting a huge sign that reads, "We don't care if you leave our state. Go!" How much net revenue is raised by the gift tax vs. the loss of tax revenue when your wealthiest residents leave?

Wealthy people have options, especially mobility. If I sell my Connecticut home, move to any other state and then make gifts of my wealth to my heirs, I save them millions of dollars. My super wealthy friends call this the "free move." You can move out of Connecticut and the gift tax savings more than offsets the cost of the move and the new home purchase. Why wouldn't anyone do this?

The vast majority of my very wealthy empty nester friends have done this and others in the same position will move when the time is right. It is simply too high a price to stay.

Once a person, family or corporation moves out of state it is almost impossible to get them back. The revenue from their move is gone.

When very wealthy people move, their spending moves with them. Wealthy people are great for the local economy. They shop a lot, buy expensive cars, big homes, expensive jewelry, eat at fancy restaurants and hire many local workers like landscapers, plumbers, electricians, etc.

The political logic in Connecticut seems to be, "When one rich family leaves another will take its place." That may be true but why not think expansively and ask, "Wouldn't it be better for Connecticut and our tax base if we could keep all the wealthy families here?"

States try to keep corporations for obvious reasons. Shouldn't the same logic be used for super-wealthy families? As time goes on, Connecticut's expenses will only rise and our tax base will decline? Why? Corporations like GE will slowly leave the state for lower tax states and wealthy families will leave too.

I tried on a number of occasions to reach out to Gov. Dannel P. Malloy's office, Commissioner of Revenue Services Kevin Sullivan's office and U.S. Rep. Jim Himes, my local congressman, but no one returns my calls.

Connecticut politicians seem wedded to their simple strategy of, "Let's keep raising taxes on the remaining corporations and the wealthy so they can all pay their fair share." This one-trick pony only works for so long and, I might add, when you put on too much weight, even a strong pony collapses.

David DeLucia lives in Darien.

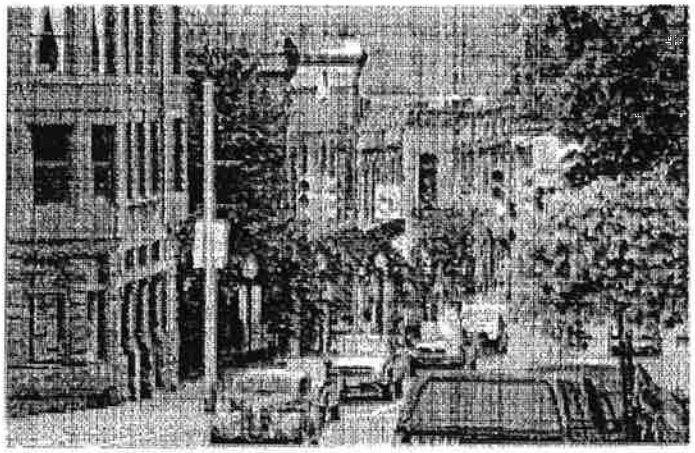
THE WALL STREET JOURNAL.

https://www.wsj.com/articles/how-a-michigan-county-road-got-stuck-in-regulation-purgatory-1488585470

OPINION | COMMENTARY | CROSS COUNTRY

How a Michigan County Road Got Stuck in Regulation Purgatory

Building a direct path to a new mine makes perfect environmental sense, but the EPA hasn't budged.



Downtown Marquette, Mich. *PHOTO: ALAMY STOCK PHOTO*

By MARK MILLER and MIKE PATTWELL
March 3, 2017 6:57 p.m. ET

Marquette, Mich.

President Trump renewed his call for a $1 trillion infrastructure package during his speech Tuesday to Congress. But if that money is to do any good, Washington must first get out of the builders' way. A good example of a shovel-ready project trapped in regulation purgatory is Michigan's County Road 595, which has been blocked for years by the Environmental Protection Agency.

The project has its roots in a "eureka" moment eight years ago. A large deposit of nickel and copper was discovered in the state's Upper Peninsula at what is now known as the Eagle Mine. This presented Marquette County with a new

economic opportunity, but also a dilemma. The mine is only 22 miles from the nearest refinery as the crow flies, but the trip is nearly three times as long via existing roads. The usual route would send processions of heavy, noisy trucks through commercial and residential areas in small towns, as well as along the edge of campus at Northern Michigan University.

The proposed solution was to construct a new county road, a direct path from the mine to the mill. That would allow the trucks to bypass busy city streets and groggy college students.

State and local officials in both parties broadly support the project, since they see it as critical for the community's safety and environmental health. Both houses of the Michigan Legislature have even passed resolutions backing County Road 595, noting that the direct route would conserve resources, while building it would create jobs.

The problem is the federal permits. In 2012, the state's Department of Environmental Quality announced it intended to approve the new road, which complied with all federal and state laws. That's when the Obama administration stomped in.

The project required a wetland-fill permit, which the EPA vetoed in December 2012 with a vague warning about dangers to the environment. Agency officials have never provided the kind of details that would allow their putative concerns to be objectively assessed, but they have stuck to their objections tenaciously. The county has suggested many compromises: In October 2012, it offered to preserve 26 acres of wetlands for every acre that the project affected. The EPA refused.

Frustrated by Washington's continued inflexibility, the Marquette County Road Commission, which we represent, appealed to the courts in 2015, asking a judge to determine whether the EPA was correct to scuttle the project. But the EPA contended that its veto was immune from judicial review. Last spring a Michigan federal court bought that argument. Judge Robert Holmes Bell held that the EPA's veto lacked "finality" because the county could theoretically work up a new permit proposal—directed this time to the Army Corps of Engineers—and start the long and expensive process over.

This might have been the end of the trail. But shortly thereafter the Supreme Court issued a landmark ruling that punctured the bureaucrats' pretensions. In *U.S. Army Corps of Engineers v. Hawkes* (2016), the justices unanimously held

that when federal regulators label property as "wetlands," the affected parties have an immediate right to challenge that designation in court. Following the logic of *Hawkes*, the road commission has now brought its case against the EPA to the Sixth U.S. Circuit Court of Appeals.

The irony is that the EPA is blocking a project that would be environmentally beneficial. "When trucks can travel 22 miles one way rather than 50-plus miles one way, that's a savings of almost 500,000 gallons of fuel annually," Jim Iwanicki, the engineer for the county road commission, told Marquette's legal team last fall. "On top of that savings of fossil fuel, County Road 595 would significantly reduce the amount of carbon dioxide those trucks are putting out, since they'd be driving 1.5 million miles less a year."

The public-safety arguments are even more compelling. "Those trucks come barreling down the street and are turning right next to campus," Eli Groupille, a student at Northern Michigan University, said in an interview about the case. "The trucks weigh 164,000 pounds, and when students cross the road sometimes they don't understand it can be hard to quickly slow those trucks down."

It is scandalous that the federal bureaucracy can arbitrarily thwart such a valuable state-approved project—and then insist it needn't answer for its decisions. On Monday the county and the EPA will participate in court-ordered mediation to resolve the dispute. The EPA should settle this litigation and allow County Road 595 to be built. That would be a fitting down-payment on Mr. Trump's promise to rebuild America—and to keep Washington bureaucrats from getting in the way.

Mr. Miller, a managing attorney with Pacific Legal Foundation, and Mr. Pattwell, a litigator with Clark Hill PLC, are representing the Marquette County Road Commission at the Sixth Circuit.

Appeared in the Mar. 04, 2017, print edition.

THE WALL STREET JOURNAL.

http://www.wsj.com/articles/why-the-west-and-the-rest-got-rich-1463754427

LIFE | IDEAS | THE SATURDAY ESSAY

How the West (and the Rest) Got Rich

The Great Enrichment of the past two centuries has one primary source: the liberation of ordinary people to pursue their dreams of economic betterment

A statue of Adam Smith in Edinburgh, Scotland *PHOTO: ALAMY*

By DEIRDRE N. MCCLOSKEY
May 20, 2016 10:27 a.m. ET

Why are we so rich? An American earns, on average, $130 a day, which puts the U.S. in the highest rank of the league table. China sits at $20 a day (in real, purchasing-power adjusted income) and India at $10, even after their emergence in recent decades from a crippling socialism of $1 a day. After a few more generations of economic betterment, tested in trade, they will be rich, too.

Actually, the "we" of comparative enrichment includes most countries nowadays, with sad exceptions. Two centuries ago, the average world income per human (in present-day prices) was about $3 a day. It had been so since we lived in caves. Now it is $33 a day—which is Brazil's current level and the level of the U.S. in 1940. Over the past 200 years, the average real income per person—including even such present-day tragedies as Chad and North Korea—has grown by a factor of 10. It is stunning. In countries that adopted trade and economic betterment wholeheartedly, like Japan, Sweden and the U.S., it is more like a factor of 30—even more stunning.

And these figures don't take into account the radical improvement since 1800 in commonly available goods and services. Today's concerns over the stagnation of real wages in the U.S. and other developed economies are overblown if put in historical perspective. As the economists Donald Boudreaux and Mark Perry have argued in these pages, the official figures don't take account of the real benefits of our astonishing material progress.

RELATED READING

- The Secret of Immigrant Genius (http://www.wsj.com/articles/the-secret-of-immigrant-genius-1452875951) (Jan. 15, 2016)
- The Myth of Basic Science (http://www.wsj.com/articles/the-myth-of-basic-science-1445613954) (Oct. 23, 2015)
- Has the World Lost Faith In Capitalism? (http://www.wsj.com/articles/has-the-world-lost-faith-in-capitalism-1446833869) (Nov. 6, 2015)

Look at the magnificent plenty on the shelves of supermarkets and shopping malls. Consider the magical devices for communication and entertainment now available even to people of modest means. Do you know someone who is clinically depressed? She can find help today with a range of effective drugs, none of which were available to the billionaire Howard Hughes in his despair. Had a hip joint

replaced? In 1980, the operation was crudely experimental.

Nothing like the Great Enrichment of the past two centuries had ever happened before. Doublings of income—mere 100% betterments in the human condition—had happened often, during the glory of Greece and the grandeur of Rome, in Song China and Mughal India. But people soon fell back to the miserable routine of Afghanistan's income nowadays, $3 or worse. A revolutionary betterment of 10,000%, taking into account everything from canned goods to antidepressants, was out of the question. Until it happened.

What caused it? The usual explanations follow ideology. On the left, from Marx onward, the key is said to be exploitation. Capitalists after 1800 seized surplus value from their workers and invested it in dark, satanic mills. On the right, from the blessed Adam Smith onward, the trick was thought to be savings. The wild Highlanders could become as rich as the Dutch—"the highest degree of opulence," as Smith put it in 1776—if they would merely save enough to accumulate capital (and stop stealing cattle from one another).

A recent extension of Smith's claim, put forward by the late economics Nobelist Douglass North (and now embraced as orthodoxy by the World Bank) is that the real elixir is institutions. On this view, if you give a nation's lawyers fine robes and white wigs, you will get something like English common law. Legislation will follow, corruption will vanish, and the nation will be carried by the accumulation of capital to the highest degree of opulence.

MORE SATURDAY ESSAYS

- In China, Xi Embraces Mao's Radical Legacy (http://www.wsj.com/articles/in-china-xi-embraces-maos-radical-legacy-1463153126) May 13, 2016
- Hard Truths About Race on Campus (http://www.wsj.com/articles/hard-truths-about-race-on-campus-1462544543) May 6, 2016
- Brazil's Giant Problem (http://www.wsj.com/articles/brazils-giant-problem-1461359723) April 22, 2016
- The Next Conservative Movement (http://www.wsj.com/articles/the-next-conservative-movement-1460741085) April 15, 2016
- Taxation Without Exasperation (http://www.wsj.com/articles/taxation-without-exasperation-1460129434) April 8, 2016

But none of the explanations gets it quite right.

What enriched the modern world wasn't capital stolen from workers or capital virtuously saved, nor was it institutions for routinely accumulating it. Capital and the rule of law were necessary, of course, but so was a labor force and liquid water and the arrow of time.

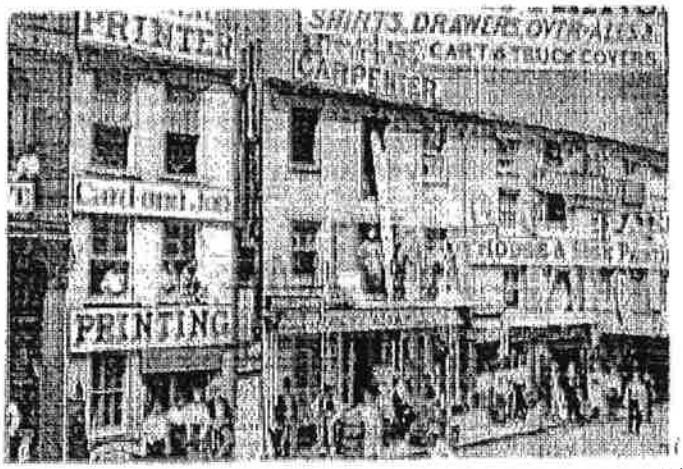
The capital became productive because of ideas for betterment—ideas enacted by a country carpenter or a boy telegrapher or a teenage Seattle computer whiz. As Matt Ridley put it in his book "The Rational Optimist" (2010), what happened over the past two centuries is that "ideas started having sex." The idea of a railroad was a coupling of high-pressure steam engines with cars running on coal-mining rails. The idea for a lawn mower coupled a miniature gasoline engine with a miniature mechanical reaper. And so on, through every imaginable sort of invention. The coupling of ideas in the heads of the common people yielded an explosion of betterments.

Look around your room and note the hundreds of post-1800 ideas embedded in it: electric lights, central heating and cooling, carpet woven by machine, windows larger than any achievable until the float-glass process. Or consider your own human capital formed at college, or your dog's health from visits to the vet.

The ideas sufficed. Once we had the ideas for railroads or air conditioning or the modern research university, getting the wherewithal to do them was comparatively simple, because they were so obviously profitable.

If capital accumulation or the rule of law had been sufficient, the Great Enrichment would have happened in Mesopotamia in 2000 B.C., or Rome in A.D. 100 or Baghdad in 800. Until 1500, and in many ways until 1700, China was the most technologically advanced country. Hundreds of years before the West, the Chinese invented locks on canals to float up and down hills, and the canals themselves were much longer than any in Europe. China's free-trade area and its rule of law were vastly more extensive than in Europe's quarrelsome fragments, divided by tariffs and tyrannies. Yet it was not in China but in northwestern Europe that the Industrial Revolution and then the more consequential Great Enrichment first happened.

Why did ideas so suddenly start having sex, there and then? Why did it all start at first in Holland about 1600 and then England about 1700 and then the North



Storefronts along Hudson Street in New York City, circa 1860 to 1900. *PHOTO: FOTOSEARCH/GETTY IMAGES*

American colonies and England's impoverished neighbor, Scotland, and then Belgium and northern France and the Rhineland?

The answer, in a word, is "liberty." Liberated people, it turns out, are ingenious. Slaves, serfs, subordinated women, people frozen in a hierarchy of lords or bureaucrats are not. By certain accidents of European politics, having nothing to do with deep European virtue, more and more Europeans were liberated. From Luther's reformation through the Dutch revolt against Spain after 1568 and England's turmoil in the Civil War of the 1640s, down to the American and French revolutions, Europeans came to believe that common people should be liberated to have a go. You might call it: life, liberty and the pursuit of happiness.

To use another big concept, what came—slowly, imperfectly—was equality. It was not an equality of outcome, which might be labeled "French" in honor of Jean-Jacques Rousseau and Thomas Piketty. It was, so to speak, "Scottish," in honor of David Hume and Adam Smith: equality before the law and equality of social dignity. It made people bold to pursue betterments on their own account. It was, as Smith put it, "allowing every man to pursue his own interest his own way, upon the liberal plan of equality, liberty and justice."

And that is the other surprising notion explaining our riches: "liberalism," in its original meaning of "worthy of a free person." Liberalism was a new idea. The English Leveller Richard Rumbold, facing the hangman in 1685, declared, "I am sure there was no man born marked of God above another; for none comes into the world with a saddle on his back, neither any booted and spurred to ride him." Few in the crowd gathered to mock him would have agreed. A century later,

advanced thinkers like Tom Paine and Mary Wollstonecraft embraced the idea. Two centuries after that, virtually everyone did. And so the Great Enrichment came.

Not everyone was happy with such developments and the ideas behind them. In the 18th century, liberal thinkers such as Voltaire and Benjamin Franklin courageously advocated liberty in trade. By the 1830s and 1840s, a much enlarged intelligentsia, mostly the sons of bourgeois fathers, commenced sneering loftily at the liberties that had enriched their elders and made possible their own leisure. The sons advocated the vigorous use of the state's monopoly of violence to achieve one or another utopia, soon.

Intellectuals on the political right, for instance, looked back with nostalgia to an imagined Middle Ages, free from the vulgarity of trade, a nonmarket golden age in which rents and hierarchy ruled. Such a conservative and Romantic vision of olden times fit well with the right's perch in the ruling class. Later in the 19th century, under the influence of a version of science, the right seized upon social Darwinism and eugenics to devalue the liberty and dignity of ordinary people and to elevate the nation's mission above the mere individual person, recommending colonialism and compulsory sterilization and the cleansing power of war.

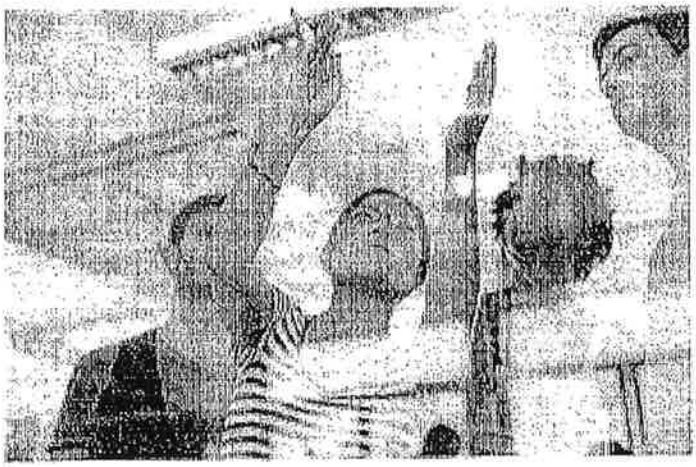
On the left, meanwhile, a different cadre of intellectuals developed the illiberal idea that ideas don't matter. What matters to progress, the left declared, was the unstoppable tide of history, aided by protest or strike or revolution directed at the evil bourgeoisie—such thrilling actions to be led, naturally, by themselves. Later, in European socialism and American Progressivism, the left proposed to defeat bourgeois monopolies in meat and sugar and steel by gathering under regulation or syndicalism or central planning or collectivization all the monopolies into one supreme monopoly called the state.

While all this deep thinking was roiling the intelligentsia of Europe, the commercial bourgeoisie—despised by the right and the left, and by many in the middle, too—created the Great Enrichment and the modern world. The Enrichment gigantically improved our lives. In doing so, it proved that both social Darwinism and economic Marxism were mistaken. The supposedly inferior races and classes and ethnicities proved not to be so. The exploited proletariat was not driven into misery; it was enriched. It turned out that ordinary men and women didn't need to be directed from above, and when honored and left alone, became immensely creative.

The Great Enrichment is the most important secular event since human beings first domesticated wheat and horses. It has been and will continue to be more important historically than the rise and fall of empires or the class struggle in all hitherto existing societies. Empire did not enrich Britain. America's success did not depend on slavery. Power did not lead to plenty, and exploitation was not plenty's engine. Progress toward French-style equality of outcome was achieved not by taxation and redistribution but by the Scots' very different notion of equality. The real engine was the expanding ideology of classical liberalism.

The Great Enrichment has restarted history. It will end poverty. For a good part of humankind, it already has. China and India, which have adopted some of economic liberalism, have exploded in growth. Brazil, Russia and South Africa, not to speak of the European Union—all of them fond of planning and protectionism and level playing fields—have stagnated.

Economists and historians from left, right and center cannot explain the Great Enrichment. Perhaps their sciences need revision, toward a "humanomics" that takes ideas seriously. Humanomics doesn't abandon the economics of arbitrage or entry, or the math of elasticities of demand, or the statistics of regression analysis. But it adds the study of words and meaning and their stunning contribution to our enrichment.



Over 200 years, average world income per person has soared from about $3 a day to a stunning $33 a day.
PHOTO: GETTY IMAGES

What public policy to further this revolution? As little as is prudent. As Adam Smith said, "it is the highest impertinence...in kings and ministers to pretend to watch over the economy of private people." We certainly can tax ourselves to give

a hand up to the poor. Smith himself gave to the poor with a liberal hand. The liberalism of a Christian, or for that matter of a Jew, Muslim or Hindu, recommends it. But note, too, that 95% of the enrichment of the poor since 1800 has come not from charity but from a more productive economy.

Rep. Thomas Massie, a Republican from Kentucky, had the right idea in what he said to Reason magazine last year: "When people ask, 'Will our children be better off than we are?' I reply, 'Yes, but it's not going to be due to the politicians, but the engineers.' "

I would supplement his remark. It will also come from the businessperson who buys low to sell high, the hairdresser who spots an opportunity for a new shop, the oil roughneck who moves to and from North Dakota with alacrity and all the other commoners who agree to the basic bourgeois deal: Let me seize an opportunity for economic betterment, tested in trade, and I'll make us all rich.

Dr. McCloskey is distinguished professor emerita of economics, history, English and communication at the University of Illinois at Chicago. This essay is adapted from her new book, "Bourgeois Equality: How Ideas, Not Capital or Institutions, Enriched the World," published by the University of Chicago Press.

The

NOBLEST TRIUMPH

PROPERTY AND PROSPERITY
THROUGH THE AGES

TOM BETHELL

> farmed primarily by Berber peasants and other small-holders such as retired soldiers who had been granted private property rights in plots of land. . . . With land held privately, there was an incentive to conserve vegetation, rather than to treat it as a free good. . . . Following the decline of Roman rule, the system of private property in land reverted to that of tribal ownership, [and the consequences] are written in the encroaching sands of the Libyan desert today.[55]

Nomadic herding is itself an indicator both of tyranny and of insecure property. An inefficient and arduous way of life, it is likely to be replaced by farming when private property is secure. In *The Arab World*, William R. Polk wrote, the nineteenth-century Ottomans did periodically induce tribesmen to settle: "Purchase of land was made extremely easy, bedouin and peasants were assisted with government loans." But then, with a "return to government exploitative practices," the peasants would again "abandon their newly acquired lands." Polk revealingly adds: "It was only as the bedouin could be induced to settle and invest in immovable objects that they could be controlled."[56] For "controlled" read "taxed," which is to say: expropriated.

Nomadic tribesmen are sometimes praised as "independent." As we might put it today, they preferred to evade their rulers by remaining in the "underground economy," that is, in the desert, where they were difficult to track down. There they would set up their own rules, establishing who grazed where and when. With their animals, they would add to the expansion of the desert, and then move on in timely fashion to other areas not yet reduced to dust.

C. S. Jarvis was not entirely wrong about the goat, as has been shown more recently in Israel. By 1967, the West Bank border was plainly visible from the air as a "green line," with farmland on one side and barren ground on the other. This border is known in Israel as the Green Line. In biblical times, the hills of Judea and Samaria were cultivated and terraced, which protected the top soil when heavy rains came. But with the arrival of the Arabs, everything began to deteriorate. Their goats would uproot young trees and vegetation, thereby damming the terraced hills. Rainwater would build up and then burst through, washing away soil and stones and patiently accumulated labor. After the creation of Israel, in 1948, the old terraces were restored, and by the Six Day War the Green Line was visible.

Goats have flourished in the Arab world precisely as a result of insecure property. The goat is a portable scavenger that can be sent out to forage on communal land, where it finds sustenance in the rockiest soil. It will return to specific owner when called, and if necessary it can be kept indoors at night, here it will be safe from rival herdsmen and assorted enemies and thieves. The fact thereby enables its owner to "privatize" whatever meager resources may be available on the most inhospitable terrain. It will also contribute to its further

destruction. But no one minds that when no one owns the land anyway. On the other hand, where fencing is inexpensive, and the policing of property is regarded as an important function of the state, sheep and cows will usually be preferred to goats for the provision of wool, meat and milk. But in an unpoliced, beggar-thy-neighbor commons sheep and cows will be either very expensive or downright impossible to keep in private possession. So a healthy demand for goats has arisen in the Arab world.[37]

A pentagon in the desert provides an appropriate conclusion to the story of property in Araby. A satellite photograph taken in the 1970s and published in NASA's *LANDSAT Views of the World* unexpectedly showed a green pentagon, 400 square miles in area, in the North African Sahel. For some reason, not explained in the NASA volume, the area had a private owner, who divided the pentagon into five parts, each consisting of a fenced triangle with its apex at the center. Animals were allowed to graze only in one triangle at a time, while the grass was growing back in the others. There is some rainfall in the region (just south of the Sahara), but not much. Vast areas around the pentagon had been turned into desert by common (tribal) ownership.[38] That land belonged to everybody, and therefore to nobody. Along with everything else that we have learned, the satellite image leaves us with the suspicion that the considerably "deserted" character of the Arab world may indeed not be a coincidence.

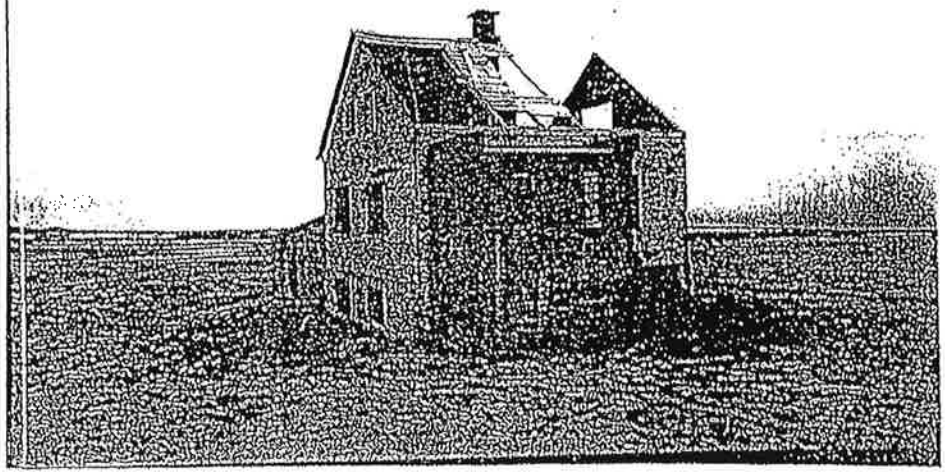
NIALL FERGUSON

Author of THE ASCENT OF MONEY

THE GREAT DEGENERATION

HOW INSTITUTIONS DECAY

and ECONOMIES DIE



culture". But there is a real risk of cherry-picking here. Somehow no really terrible Western ideas like, say, witch-burning or communism ever get mentioned, though they seem just as plausibly the products of Judaeo-Christian culture as the spirit of capitalism. In any case, while culture may instil norms, institutions create incentives. Britons versed in much the same culture behaved very differently depending on whether they emigrated to New England or worked for the East India Company in Bengal. In the former case we find inclusive institutions, in the latter extractive ones.

Glorious Institutions

The debate about the causes of the great divergence is of more than merely historical interest. Understanding Western success helps us to frame some rather more urgent questions about the recent past, the present and possible futures. One reason the institutional argument is so compelling is that it also seems to offer a good explanation for the failure of most non-Western countries, until the later twentieth century, to achieve sustained economic growth. Acemoglu and Robinson illustrate the power of institutions relative to geography and culture by describing the city of Nogales, which is bisected by the US–Mexican border. The difference in living standards between the two

halves is shocking.[9] The same point can be made with regard to the two great experiments run during the Cold War. Essentially, we took two peoples – the Koreans and the Germans – and divided them in two. South Koreans and West Germans got capitalist institutions; North Koreans and East Germans got communist ones. The divergence that occurred in the space of just a few decades was enormous. Their analysis makes Acemoglu and Robinson sceptical that China has yet made the decisive breakthrough to sustainable growth. In their view, Chinese market reforms remain subject to the decisions of an exclusive and extractive elite, which continues to determine the allocation of key resources.

Development economists – notably Paul Collier – have been thinking in these terms for some time.[10] The case of Botswana seems to illustrate the point that even a sub-Saharan African economy can achieve sustained growth if its people are not plagued by chronic corruption and/or civil war like, say, the Democratic Republic of Congo. Unlike most post-colonial African states, Botswana succeeded in establishing inclusive not extractive institutions when it gained its independence. The Peruvian economist Hernando de Soto is another who has been arguing for years that institutions are what matter.[11] By slogging away in the shanty towns of Lima, Port-au-Prince, Cairo and Manila, he and his researchers established that, though their incomes are low, the poor of the world have a surprisingly large amount of property. The problem is that this property is not legally

recognized as theirs. It is nearly all held 'extra-legally'. This is not because the poor are tax-dodgers. As de Soto makes clear, the black economy has its own kind of taxation – protection rackets and the like – which make legality positively attractive. It is just that getting legal title to a house or a workshop is well-nigh impossible.

As an experiment, de Soto and his team tried to establish a small garment workshop on the outskirts of Lima on a legal basis. It took them a staggering 289 days to do so. And when they tried to secure legal authorization to build a house on state-owned land, it took even longer: six years and eleven months, during which they had to deal with fifty-two different government offices. Dysfunctional institutions like these, de Soto argues, are what force the poor to live outside the law. We should not imagine that the extra-legal economy is marginal. One of the most memorable findings of de Soto's book *The Mystery of Capital* is that the total value of the real estate held (but not legally owned) by the poor of developing countries amounts to $9.3 trillion. Yet, in the absence of legal titles and a working system of property law, this is all so much 'dead capital': 'like water in a lake high up in the Andes – an untapped stock of potential energy'. It cannot be efficiently used to generate wealth. Only with a working system of property rights can a house become collateral, can its value be properly established by the market, can it easily be bought and sold.

Since de Soto published *The Mystery of Capital*, revolutions in countries like Tunisia and Egypt have provided

compelling evidence in support of his approach. He sees the 'Arab Spring' primarily as a revolt by frustrated would-be entrepreneurs against corrupt, rent-seeking regimes that preyed on their efforts to accumulate capital. The prime example is the story of the twenty-six-year-old Tarek Mohamed Bouazizi, who burned himself to death in front of the governor's offices in the town of Sidi Bouzid in December 2010.[12] Bouazizi killed himself precisely one hour after a policewoman, backed by two municipal officers, had seized from him two crates of pears, a crate of bananas, three crates of apples and a second-hand electronic weight scale worth $179. Those scales were his only capital. He did not have legal title to his family's home, which might otherwise have served as collateral for his business. His economic existence depended on the 'fees' he paid to officials to allow him to operate his fruit-stand on two square yards of public land. Their arbitrary act of expropriation cost Mohamed Bouazizi his livelihood and his life. But his self-immolation sparked a revolution – though how glorious a revolution remains to be seen. It will depend on how far new constitutional arrangements in countries like Tunisia and Egypt achieve the shift from an extractive to an inclusive state, from the arbitrary power of rent-seeking elites to the rule of law for all.

If de Soto's approach is right, then it does make a great deal of sense to explain the success of the West after the 1500s in terms of institutions, and particularly the rule of law. For what was at the heart of England's seventeenth-century

Relationship Between Attorneys and Title Companies

James F. Harker, Esquire
Cohen Seglias Pallas Greenhall & Furman PC

COHEN SEGLIAS
PALLAS GREENHALL & FURMAN PC

Delaware State Bar Association

FUNDAMENTALS OF REAL ESTATE 2021

THE RELATIONSHIP OF ATTORNEYS AND TITLE INSURANCE COMPANIES

By: James F. Harker, Esq.

ATTORNEY AS TITLE INSURANCE AGENT
(James F. Harker)

I. Relationship of Title Company and Attorney Agent

a) History of Title Searching and Title Opinions (then and now)

b) Legal Relationship, Agency Applications, and Contracts

c) Earning a Title Commission

II. Legal and Ethical Obligations

a) Issuing Title Policies as the Practice of Law (Mid-Atlantic Case)

b) The Attorney Report of Title

c) Removing Title Exceptions

d) The Practice of Law v. Insuring Title (The Moose Lodge example)

III. Liabilities to Title Company (Law suits against agents happen!)

IV. Selected Disciplinary Actions

Appendix:

A Thin Slice of History

Conditions and Stipulations of Approved Attorney

Document List for Agency

Issuing Agent Contract

Attorney's Preliminary Report on Title

A THIN SLICE OF RECORDING HISTORY

DATE	EVENT
1626	English colony of Virginia enacts first recording acts for land sales.
1646	First officially recorded land title in Delaware.
1655-1664	Dutch West Indies Company was proprietor of what was to become Delaware and deeds were recorded in Holland.
1673-1674	Deeds kept in multiple places including Sweden, Holland, England, New Amsterdam, Philadelphia, and Annapolis.
1681 W	illiam Penn becomes proprietor of Pennsylvania and the three lower counties.
1682 W	illiam Penn enacts Statute of Enrollment requiring land transactions to be recorded in a public enrollment office in each County.
1738-1747 1792	Delaware enacts a law requiring an Office of Record in each County known as the "office of the recording of deeds". 1792 Constitution empowers Governor to appoint recorder of deeds for each County
1868	The case of Watson v. Muirhead, 57 Pa. 162 is decided holding that a conveyancer was not liable for the loss of the property for failing to report judgments to a purchaser upon good faith reliance of his attorney's advice.
1876	First title insurance company founded in Pennsylvania, Commonwealth Land Title Company.
1897	The recorders of deeds becomes an elective office in Delaware.
2002	Mike Kozikowski elected as New Castle County Recorder of Deeds.

PLEASE READ THE FOLLOWING STATEMENTS CAREFULLY BEFORE SIGNING.

In recognition and consideration of the benefits to me as an Approved Attorney and the obligations which Chicago Title Insurance Corporation, Commonwealth Land Title Insurance Company and Fidelity National Title Insurance Company (the Company) will assume in reliance upon my professional service, I hereby agree that if I am appointed as an Approved Attorney, the following conditions and stipulations shall apply:

1. **Attorney-Client Relationship**
   My relationship with the Company shall be that of attorney and client in all matters of transactions in which I render my attorney's opinion or advice, or provide other professional services directly to or for the benefit of the Company in the operation of its business of insuring real estate titles and closing real estate transactions, regardless of whether the request for such services was made directly by the Company or by some other person or party.

2. **Approved Attorney - Definition and Scope**
   I understand that my designation as an Approved Attorney of the Company indicates that my certificates of title are acceptable to the Company as a basis for the issuance of its title insurance policies. I agree to certify title to an Agency or Service Office of the Company using only current authorized certification forms. I further agree the certifications will state the inclusive date and time through which title is certified.

   In rendering such opinions, I will comply with all rules and procedures furnished me from time to time by Company. In addition, I understand that my activities in closing real estate transactions insured or to be insured by Company may subject Company to liability under its €Insured Closing Service or €Closing Protection Service.

   I also understand that I am not the Company's agent for any purpose and will not represent myself as such. However, I may represent myself orally and in writing to other persons as an Approved Attorney of the Company, and the Company may represent to other persons that I am an Approved Attorney.

3. **Conflict of Interest**
   I will promptly notify the Company in writing of any conflict of interest which arises out of my obligations to the Company and other clients, and will not continue, thereafter, to represent or act on behalf of the Company as to such matters without prior written approval of the Company.

4. **Compensation**
   The Company shall not be responsible to me for the payment or collection of my fees, expenses or other charges unless the same are specifically authorized and agreed upon by the Company.

5. **Separate Accounts**
   I will keep safely in accounts separate from my (or my firm's) personal or operating accounts, all funds received by me from any source in connection with transactions in which the Company's title insurance is involved, including customer funds for escrow or closing, and I will disburse said funds for the purposes for which the same were deposited with me (or my firm), and reconcile all such accounts not less than monthly.

6. **Transaction Files**
   I will prepare, maintain and preserve a file related to the liabilities of the Company for each title opinion and settlement service provided as an Approved Attorney for the Company. Such file shall include all supporting documents and information necessary for services rendered, including, but not limited to title searches, surveys, affidavits, settlement or escrow instructions, lien pay-off or assumption statements and settlement statements.

7. **Examination of Records**
   I agree that at any reasonable time or times the Company may examine and copy my files, books and accounts and other records related to liabilities of the Company and professional services provided by me as an Approved Attorney for the Company. Such right to examination may continue to be exercised after termination of my status as an €Approved Attorney in the event of a claim. I agree to provide evidence of three-way reconciliation of accounts containing funds collected in connection with transactions in which the Company's title insurance is involved. I also agree that the Company may make inquiries into my personal and employment history, as well as any matters related thereto. I authorize employers, schools, firms, or persons to release information in response to such pre- and/or post-association inquires, and I hereby release same from liability in responding to such inquires.

EXHIBIT A

8. Limitations of Authority

I agree that in connection with transactions being insured by Company, I shall not, without written approval of the Company:

- *A) Provide settlement services for transactions exceeding my per claim amount under my Professional Liability Policy.*
- *B) Accept settlement instructions which will expose the Company to a risk which the Company has by its rules determined to be an extraordinary or extra-hazardous risk.*
- *C) Adjust any claim for loss which the Company may become liable.*
- *D) Accept service of process on the Company.*
- *E) Incur bills or debts chargeable to the Company.*
- *F) Close a real estate transaction in which there is a disputed title or a dispute between the parties to a settlement or escrow.*
- *G) Provide services for the periodic disbursement of construction loan funds for the payment of construction costs.*

9. Maintenance of Professional Liability Policy

I agree to maintain my Professional Liability Policy at a level of coverage not less than the amount shown on the attached insurance declaration so long as I am an Approved Attorney for the Company, and I will notify the Company in the event such insurance is cancelled or I no longer maintain it. I agree to provide the Company with a copy of the Declarations page of said Policy within thirty (30) days of its annual renewal.

My liability to the Company for any loss, cost or damage which the Company may sustain arising out of the performance of my professional services, shall be based upon the standards of professional conduct and service of attorneys in my community without regard to whether or not my Professional Liability Policy provides such coverage.

In addition, I agree to indemnify the Company against any and all loss, cost or damage which the Company may sustain on account of the following acts or failure to act by me or by any employee of mine: (a) fraud, (b) negligence, (c) willful disregard or the Company's rules and instructions, or (d) loss or misapplication of customer's funds entrusted to me.

10. Claims

If a claim is made to me, if I receive notice of a potential claim, or if I receive notice of litigation which may result in a claim arising out of professional services provided by me for the Company, I agree to give prompt notice to the Company and shall lend all reasonable assistance, without charge to the Company, in investigating or contesting such claims.

11. Duties of the Company

The Company shall:

- *A. Furnish guidance to the Approved Attorney on matters of title insurance.*
- *B. Determine promptly all risk assumption questions submitted by me.*

12. Duties of Approved Attorney

I agree that I shall:

- *A. Obtain the title search and/or commitment from the Company.*
- *B. Obtain a title update within one (1) day prior to closing the transaction.*
- *C. Satisfy all requirements set forth on the title insurance commitment and the updates in a timely, prudent and ethical manner with due regard to recognized title insurance underwriting practices.*
- *D. Follow closing instructions for the transaction provided by the lender and/or customer to be insured.*
- *E. Collect at closing and remit 100% of the title insurance premium.*
- *F. Promptly record the closing documents, and within thirty (30) days of closing the transaction, provide to the Company the marked-up title commitment, the necessary documents to evidence satisfaction of the commitment requirements including the recording of documents, and remit the premium for the policies to be issued by the Company.*
- *G. Promptly deliver the title insurance policies from the Company to the insured(s).*

13. Claims

If a claim is made to me, if I receive notice of a potential claim or if I receive notice of litigation which may result in a claim arising out of professional services provided by me for you, I agree to give prompt written notice to the Company within three (3) business days from the date I receive the claims, potential claims, or notice of claim or litigation and all lend all reasonable assistance, without charge to the Company, in investigating or contesting such claims.

14. Termination

My status as an Approved Attorney may be terminated by either of us upon written notice, but such termination shall not affect any obligation or liability incurred by me as your Approved Attorney. Notice to me may be given at the address on my application or the latest address supplied by me to you. I further understand that if I should be considered as an Approved Attorney, any false, misleading, or omitted information in my application, resume, or on this form, may disqualify me from approval. Also, in the event of approval, I understand that false, misleading, or omitted information in my application, resume or on this form may result in the immediate termination of said approval.

15. Other Agreements Void

I understand and agree that this Agreement sets forth all the promises, agreements, conditions, and understandings between me and the Company and that there are no promises, agreements, conditions, or understandings, either oral or written, between us other than as are herein set forth.

16. Non-waiver of Rights

The failure of the Company to enforce strictly the performance by the Approved Attorney of any provision of this Agreement or to exercise any rights or remedy following from the Approved Attorney's breach of any condition or the acceptance by the Company of any payment, remittance, or other performance during the Approved Attorney's failure to perform or during the Approved Attorney's breach shall not be a waiver by the Company of its rights under this Agreement and shall not be construed to be an amendment or modification of this Agreement.

17. Renewal of Agreement

I understand that this agreement will expire one (1) year after the effective date stated below, or at the annual renewal date of my Professional Liability Policy. This Agreement shall automatically renew each year, for a one year term, with my submission of a copy of my Professional Liability Policy renewed Declarations page and copies of two months of escrow account bank statements and reconciliations.

_____ _____

Date **Approved Attorney Signature**

COMPANY

APPROVED ATTORNEY APPLICATION APPROVAL

OFFICE: _____

STATE MANAGER APPROVAL: _____

DATE: _____

FIDELITY NATIONAL TITLE GROUP

Strength. Expertise. Service.

DELAWARE AGENCY

nationalagency.fnf.com/de

The following documents are required when submitting a new agency application in Delaware. Please email your Agency Representative.

1. Copy of the Declarations page from your E&O policy
2. Copy of your individual and business entity license with the Delaware Department of Insurance
3. Copy of you Bar card (attorneys only)
4. Copies of 3 months of bank reconciliations from your real estate and escrow account including bank account statements, corresponding bank account reconciliations, corresponding trial balances, corresponding outstanding deposit ad check listings, corresponding cleared deposit and check listings including voided and canceled checks (this is not required for brand new entities).
5. Completed Personal Information Sheet
6. Completed disclosure regarding background investigation and Release Authorization Form
7. Completed Customer Detail Sheet

EXHIBIT B

FIDELITY NATIONAL TITLE GROUP

Strength. Expertise. Service.

DELAWAREAGENCY

nationalagency.fnf.com/de

General Rules for Delaware Agents

Pursuant to the Delaware Supreme Court Opinion Letter and Fidelity National Title Insurance Company's policy in the State of Delaware, no policy can be issued by an agent unless the settlement, removing of exceptions and the disbursement of funds are handled by a member of the Delaware Bar.

ISSUING AGENCY CONTRACT

This Issuing Agency Contract ("Contract") is made and entered into this day of , by and between Fidelity National Title Insurance Company, hereafter referred to as "Principal" and , hereafter referred to as "Agent."

In consideration of the promises and the mutual covenants herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Principal and Agent agree as follows:

The Schedules indicated below are attached and incorporated by reference, if checked:

- ☐ Schedule A: Effective date, Term, Territory, Liability Limit, Compensation
- ☐ Schedule B: Corporate Agent's Bond and Insurance Requirements
- ☐ Schedule C: Attorney Agent's Bond and Insurance Requirements
- ☐ Schedule D: Personal Guaranty
- ☐ Schedule E: Other

1. **APPOINTMENT OF AGENT.** Principal hereby appoints Agent as a policy issuing agent of Principal for the sole purpose of issuing title insurance commitments, policies, endorsements and other title assurances as approved by Principal and all required regulatory authorities, now in existence or hereafter developed, relating to real property located as described in Schedule A.

   Notwithstanding the foregoing, pertaining to the referenced geographic area, Principal, its affiliates and subsidiaries have, and shall retain, the right to service directly any customer, and Principal, its affiliates and subsidiaries may, without limitation, do any of the following:

   A. issue directly, from any of its offices, or from any location nationwide, commitments, policies, endorsements, or any other title assurance or evidence, search or real estate information product, or any other product whatsoever, now in existence or hereafter developed (all of the foregoing are hereafter collectively referred to as "Information");

   B. purchase or otherwise obtain from any source any search data or Information.

2. **CONTRACT TERM.** The term of this Contract shall commence on the Effective Date shown on Schedule A and may be terminated by either party giving notice to the other pursuant to the terms of Paragraph 9.

3. **DUTIES OF PRINCIPAL.** Principal shall:
   A. Furnish Agent forms of commitments, policies, endorsements and other forms required for transacting Agent's title insurance business.
   B. Furnish Agent guidelines and instructions for Agent's transaction of title insurance business.
   C. Resolve all risk assumption questions submitted by Agent.
   D. Arrange for reinsurance where required, to the extent such reinsurance is available.

4. **DUTIES OF AGENT.** Agent shall:
   A. Receive and process applications for title insurance in a timely, prudent and ethical manner with due regard to recognized title insurance underwriting practices and in accordance with Principal's bulletins, manuals and other instructions.
   B. Base each policy issued on behalf of Principal upon a determination of insurability of title which includes
      (i) a search from earliest public records or in accordance with applicable state law and/or Principal's written instructions; and

EXHIBIT C

(ii) an examination of all documents affecting title to the subject property.

C. Prepare, preserve and maintain in Agent's possession a separate title file for each application for title insurance containing all documents upon which Agent relied to make its determination of insurability, including, but not limited to: affidavits, maps, plats, lien waivers, surveys, title reports, searches, examinations, and work sheets, together with a copy of each commitment, policy, endorsement and other title assurance issued. Upon termination of this Contract: (i) ownership of, and title to, the title files shall vest in Principal, and (ii) upon the written request of Principal, Agent shall deliver such title files to Principal. Agent hereby grants to Principal the right to enter upon the premises of Agent or other locations where such title files are maintained, during business hours, for purposes of obtaining possession thereof. Agent shall further keep and maintain a separate closing file, which closing file shall contain, without limitation, closing statements, disbursement worksheets, copies of all checks disbursed and receipted, deposit slips, escrow agreements and any other instruments or documents executed or created at Closing. Principal's rights to audit and examine Agent's title insurance business shall extend to both the title files and the closing files and any related documents or records. The title and closing files shall be preserved in accordance with applicable State document retention requirements, or in the case of a legal hold order, in accordance with instructions of Principal. In the event that Agent destroys or disseminates the files for any reason, Agent shall maintain and protect any confidential or private information contained in such files in accordance with applicable state and federal law.

D. Send to Principal information regarding each policy, endorsement and other title assurance issued by Agent, by voucher or magnetic or electronic format, as instructed by Principal

E. Maintain a policy register in a form approved by Principal showing the disposition of all policies and other pre-numbered forms furnished by Principal. Upon request by Principal, Agent shall furnish a statement accounting for all such forms and shall return all spoiled, obsolete or canceled policies and forms to Principal. Agent shall safely maintain and store all forms furnished by Principal and hereby assumes liability for loss or damage suffered by Principal by reason of Agent's wrongful or negligent use or storage of such forms.

F. Perform such services and render such assistance as Principal may reasonably request in connection with any examination, claim or litigation arising from a commitment, policy, endorsement or other title assurance issued by Agent, or by Principal on behalf of Agent, or on account of any conduct of Agent, whether such claim or litigation is instituted during the term of this Contract or following termination thereof. In addition, Agent shall promptly forward to Principal:

(i) all documents received by Agent in which Principal is a party to any administrative and/or judicial proceedings;

(ii) all written complaints or inquiries made to any regulatory agency regarding transactions involving title insurance policies, endorsements, commitments or other title assurances of Principal;

(iii) any information alleging a claim involving a policy, commitment, endorsement or other title assurance of Principal or a transaction for which Principal may be liable; and

(iv) all original documentation and work papers associated with the transaction or conduct giving rise to any examination, claim or complaint.

G. For any real estate transaction involving a closing and/or receipt and disbursement of the funds of others, Agent shall:

(i) maintain such funds safely in accounts fully insured by the Federal Deposit Insurance Corporation (FDIC) and in accordance with applicable state laws;

(ii) maintain separate from Agent's personal or operating accounts all funds received by Agent from any source in connection with transaction(s) in which Principal's title insurance is involved;

(iii) disburse such funds only for the purposes for which they were entrusted;

(iv) maintain an escrow ledger for each title insurance order involving fiduciary funds, which ledger shall separately reflect the escrow activity for each order;

(v) maintain a control account showing total fiduciary liability for each escrow bank account; and

(vi) reconcile monthly the control account and ledger records to the monthly bank statement.

Principal shall have the right to examine, audit and approve Agent's accounting procedures to assure compliance with Principal's Escrow Accounting Manual, a copy of which is being made available to Agent.

H. Comply with all applicable laws and regulations relating to the conduct of Agent's business.

I. Comply with all bulletins, manuals and other instructions furnished to Agent by Principal in writing, by facsimile or other electronic transmission. If any reasonable doubt exists with regard to the insurability or marketability of title or as to whether a particular risk is extra-ordinary or extra-hazardous, Agent shall contact Principal or Principal's designated underwriting counsel for guidance and approval.

J. For purposes of this Contract, "Closing" is defined as the handling and disbursement of settlement funds and/or the provision of escrow services that involve the handling or disbursement of the funds of third parties. The parties hereto acknowledge that Agent is not an agent of Principal for purposes of conducting a Closing, and Agent agrees that it will not hold itself out to the public in such a manner as to suggest that it is the agent of the Principal for Closings. However, because Principal may be subject to allegations of liability for acts of Agent with regard to Agent's Closings, Agent shall cooperate with Principal in the performance of audits of Agent's escrow records, accounts and procedures. In addition, Agent agrees to provide to Principal, within thirty (30) days following receipt, a copy of any audit conducted by any accounting firm with respect to Agent's escrow records, accounts or procedures.

K. Agent acknowledges and agrees that Principal, from time to time, shall conduct audits of the Agent's escrow accounts pursuant to paragraphs 9, 10 and 21 of this Contract and issue a report(s), and that the audits are intended for internal use by the management of Principal, a subsidiary of Fidelity National Financial, Inc. Due to corporate reporting requirements, a copy of any report(s) may be forwarded to the Audit Services Department of Fidelity National Financial (FNF) and disclosed to other subsidiaries or affiliates of FNF, and from time to time the Audit Services Department of Fidelity National Financial (FNF) may conduct audits of your escrow accounts under the same conditions as Principal under the terms of the Contract and disclose its report(s) to subsidiaries and affiliates of FNF.

L. Timely furnish the insured with a title insurance policy and other title assurances Agent is obligated to issue.

M. Provide Principal, on an annual basis, such Fair Credit Reporting Act authorization forms as may be requested by Principal, such authorization forms and credit reports to be kept confidential by Principal.

N. Maintain in confidence the terms and conditions of this Contract.

5. **RATES AND REMITTANCES.** Agent shall quote, charge and collect the Published Rates, as defined herein and in Schedule A. Agent shall report and remit premiums to Principal on a monthly basis as collected on behalf of Principal. If Schedule A discloses a minimum annual remittance amount, failure to remit said amount annually shall be considered a default under this contract. Agent assumes full responsibility for the collection of all premium and fees collected on behalf of Principal, and shall hold the same safely and segregated in an FDIC insured trust account, for the use and benefit of the Principal until paid to Principal. Said account shall be subject to audit by Principal. "Published Rates" shall mean either the rates promulgated or dictated by the regulatory body in the Agent's state of operation, the rates in Principal's filed rate manual, as amended from time to time, or the rates that Principal distributes and/or publishes as its standard rates (card rates), as applicable.

6. **INSURANCE.** Agent shall maintain Insurance as shown on Schedule B or C, as appropriate, attached hereto.

7. **LIMITATIONS ON AGENT'S AUTHORITY.**

A. Agent shall not, without prior written approval of Principal, commit Principal to a risk in excess of the amount shown in Schedule A. This limit shall include not only the commitment, policy, endorsement and/or other title assurance immediately being issued, but also risks where:

(i) Agent knows or has reason to believe that additional title insurance will be ordered covering substantially the same real property; or

(ii) the aggregate liability will exceed the referenced limit, such as condominium and time share projects (hereafter referred to as the "Risk Limit").

B. Agent shall not commit Principal to insure a title involving a risk which, if disclosed to Principal, would have been determined to be extra-ordinary or extra-hazardous, or which Agent knew or could have discovered, through the exercise of reasonable diligence, to have been based upon a disputed title. The provisions hereunder shall apply notwithstanding the fact that the dollar amount of the transaction or the risk is less than the Risk Limit referred to in Paragraph 7A hereof.

C. Agent shall not, without prior written approval of Principal, alter the printed language of any commitment, policy, endorsement or other form furnished by Principal, or commit Principal to any particular interpretation of the terms or provisions thereof or issue any policy, endorsement or other title assurance which has not been approved for use by all required state regulatory agencies and by Principal.

D. Agent shall not, without prior written approval of Principal, adjust or otherwise settle or attempt to settle any claim, litigation or examination finding or penalty for which Principal may become liable or engage counsel to represent Principal or the insured.

E. Agent shall not, without prior written approval of Principal, accept service of process or notice of administrative proceeding on Principal. Agent shall immediately notify Principal of any attempted service of process or notice of administrative proceeding upon Agent for Principal. Agent shall also immediately notify Principal of any matter that is or may become a claim against Principal of which Agent has knowledge.

F. Agent shall not, without prior written approval of Principal, incur bills or debts chargeable to Principal.

G. Agent shall not, without prior written approval of Principal, commit Principal to a risk with respect to a transaction in which Agent, a member of Agent's immediate family, a partner, member or shareholder of Agent or a member of the immediate family of a partner, member or shareholder of Agent has or will have a legal or an equitable interest.

H. Agent shall not, without prior written approval of Principal, handle escrow funds or conduct a settlement or closing of a transaction in which Agent, a member of Agent's immediate family, a partner, member or shareholder of Agent or a member of the immediate family of a partner, member or shareholder of Agent has or will have a legal or an equitable interest.

I. Agent shall not, without prior written approval of Principal, insure or commit to insure any property for an amount other than the fair market value of the estate or interest to be insured or the amount of the mortgage or portion thereof and other indebtedness secured thereby to be insured.

J. Neither Agent nor any Affiliated Attorney of Agent will represent any insured against the interests of Principal. The term "Affiliated Attorney" as used herein shall mean any attorney who is an employee, associate, member, shareholder, or partner of Agent or any law firm that owns any legal or beneficial interest in Agent.

8. **LIABILITY OF AGENT.** Agent shall be liable to and agrees to indemnify and to save harmless Principal for all fines, penalties, attorneys' fees, court costs, administrative and other expenses and loss or aggregate of losses (collectively, "Loss") resulting from any one or more of the following:

A. Errors or omissions in any commitment, policy, endorsement or other title assurance which were disclosed by the application, by the abstracting, examination or other work papers or which were known to Agent or which, in the exercise of due diligence, should have been known to Agent;

B. Errors and/or omissions in any commitment, policy, endorsement or other title assurance caused by the abstracting or examination of title by Agent, Agent's employees, Agent's subcontractors or Agent's independent contractors;

C. Failure of any title insurance commitment, policy, endorsement or other title assurance to correctly reflect the status of title, the description of the insured real property or the vesting of title;

D. Failure of Agent, its officers and employees to comply with the terms of this Contract or with the guidelines, regulations or instructions given to Agent by Principal;

E. Any improper Closing or attempted Closing by Agent, Agent's employees, Agent's subcontractors, Agent's independent contractors, or any person or entity retained by Agent, including but not limited to:

(i) loss or misapplication of customer funds, documents, or any other thing of value entrusted to Agent in any custodial or fiduciary capacity resulting in loss to Principal;

(ii) failure to disburse properly or close in accordance with escrow and/or closing instructions;

(iii) misappropriation of escrow or closing funds by Agent, its officers, subcontractors or employees;

(iv) any loss pursuant to a Closing Protection Letter issued by Principal on behalf of Agent; or

(v) failure to disburse immediately available funds.

F. Issuance of a commitment, policy, endorsement or other title assurance insuring an extra-ordinary risk, extra-hazardous risk, or a risk Agent knew or should have known to be based upon a disputed title, not approved in writing by Principal in advance of the issuance by Agent of documents committing Principal to insure.

G. Any act or failure to act by Agent or its employees, officers, agents, independent contractors or subcontractors which results in allegations of liability with respect to Principal or which results in Principal being liable for punitive, contractual or extra-contractual damages.

H. Assessment of a fine against Principal by the State Department of Insurance or the entity which supervises title insurance as a result of Agent's violation of any regulations of the State Department of Insurance or State laws or regulations applicable to title insurance.

I. Failure of Agent to timely furnish insured with a title policy which Agent is obligated to issue.

Agent agrees to immediately notify its fidelity bond carrier or errors and omissions insurance carrier of any claim for which Agent may be liable to Principal.

9. TERMINATION OF ISSUING AGENCY CONTRACT.

A. Either party hereto may cancel this Contract by giving to the other party thirty (30) days written notice by registered or certified mail, private delivery service and/or by overnight delivery or courier of intent to cancel. In the event of a material breach of this Contract by either party hereto, the non-breaching party may terminate immediately by giving notice in the manner set forth above in this paragraph. Material breach on the part of the Agent shall include, but is not limited to: (i) any shortage or irregularity in Agent's escrow accounts and (ii) any violation or breach by the Agent of paragraphs 4 and 7 of this Contract.

B. Upon expiration or termination of this Contract, Agent shall immediately furnish to Principal a true, correct and complete accounting of all remittances due hereunder, all orders involving Principal's title assurances which have not closed, all orders involving Principal's title assurances which have closed but for which no policy has been issued and all commitments, policies, endorsements and other title assurances of Principal which have been issued but not reported to Principal. Agent shall also provide Principal access to all forms and all files relating to commitments, policies and other title assurances of Principal. Agent shall promptly make an accounting of and deliver to Principal all unused title insurance forms, manuals, advertising, promotional materials, other supplies exhibiting Principal's name or any variation thereof and all other supplies furnished by Principal to Agent, except those which Principal authorizes Agent to retain for purposes of completing pending transactions. In the event this contract is terminated, the obligations to make any payments, including without limitation the Agent's liability for loss under Paragraph 8 herein, to provide notification as to claims and to provide access to records and files shall continue beyond the date of termination.

10. **EXAMINATION OF RECORDS.** Agent agrees to provide to Principal access for examination purposes at any reasonable time or times to all files, books and accounts and other records of Agent relating to the business carried on hereunder and relating to the closing of transactions involving a commitment to issue Principal's title assurances. Such right of examination may also be exercised after termination of this Contract.

11. **SHORTAGE OF FUNDS.** In the event a shortage is revealed or discovered in Agent's accounts of funds entrusted to Agent by others or in the remittances due Principal, hereunder, then Principal may declare immediately due and payable any debts owed by Agent, including any funds for which Principal may be responsible or have a liability therefore, and Agent grants to Principal a lien on all property of Agent as security for the repayment thereof. On demand by Principal, Agent shall immediately make good the shortage or convey and deliver possession of such property to Principal. A conveyance of such property shall not of itself relieve Agent of further liability for such shortage but may be utilized to mitigate the liability of Agent.

12. **ADVERTISING.** Agent agrees that it will not use any trade names, trademarks, service marks, registered marks or variations thereof of Principal or any of its subsidiaries or affiliated entities in connection with any marketing or advertising without the prior written approval of Principal.

13. **CLAIMS.** If a policy claim is made to Agent, if Agent receives notice of a potential claim, or if Agent receives notice of litigation which may result in a claim, Agent shall, immediately, by facsimile transmission or overnight mail, give notice of same to Principal and shall lend all reasonable assistance, without charge to Principal, in investigating, adjusting or contesting said claim. Agent is not authorized to act as or to provide counsel in connection with said claim; however, Principal may seek Agent's assistance in the selection of counsel.

14. **NOTICES.** Except as otherwise specifically set forth in this Contract, all notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given when delivered by hand or when mailed first class postage prepaid, certified or registered mail, return receipt requested, or by private delivery service or overnight or next day air delivery, as shown on Schedule A, or to such other address or addresses as each of the parties may communicate in writing to the other.

15. **NON-WAIVER BY PRINCIPAL.** The failure of Principal to enforce strictly the performance by Agent of any provision of this Contract or to exercise any right or remedy following from Agent's breach of any condition herein or the acceptance by Principal of any payment, remittance or other performance during Agent's failure to perform or during Agent's breach shall not be deemed a waiver by Principal of its rights under this Contract as written and shall not be construed to be an amendment or modification of this Contract as written.

16. **ENTIRE AGREEMENT; PRIOR AGREEMENTS.** This Contract, together with the Schedules and Exhibits attached hereto, set forth the entire understanding and agreement between the parties hereto with respect to the subject matter hereof. No terms, conditions, or warranties, other than those contained herein, and no amendments or modifications hereto shall be valid unless made in writing and signed by the parties hereto. This Contract supersedes all prior understandings of any kind, whether written or oral, with respect to the Contract and the subject matter hereof.

17. **ASSIGNMENT; BINDING EFFECT.** This Contract is not assignable by Agent except upon written consent of Principal. This Contract is, however, binding on and inures to the benefit of any corporate successor, parent corporation, affiliate or wholly owned subsidiary of Principal. The duties and obligations of Agent and any signatory or guarantor hereunder shall survive any merger, consolidation, dissolution or change in ownership or structure of Agent. If Agent is a corporation, limited liability corporation or partnership, disclosure must be made to Principal of any change in a significant interest in said entity within five (5) business days of the change. A change in significant interest shall be deemed to occur when an equity interest

of more than five percent (5%) is sold to an outside party or when there is a sale of substantially all of Agent's assets.

18. **INVALID PROVISIONS.** If any provision of this Contract or the other documents contemplated hereby is held to be illegal, invalid, or unenforceable under present or future laws, such provisions shall be fully severable; the appropriate documents shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part hereof or thereto; and the remaining provisions hereof or thereof shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision. There shall be added automatically as a part hereof or thereto a provision as similar in terms to such illegal, invalid or unenforceable provision as may be possible and still be legal, valid and binding.

19. **GOVERNING LAW.** As shown on Schedule A attached hereto.

20. **ATTORNEY'S FEES. COSTS. VENUE.** If a legal action or other proceedings are brought for the enforcement of this Contract, or because of any alleged dispute, breach, default or misrepresentation in connection with any of the provisions of this Contract, the prevailing party shall be entitled to recover reasonable attorneys' fees, administrative costs and other costs incurred in that action or proceeding in addition to any other relief to which it may be entitled. In the event of a material breach by Agent, Principal shall be entitled to recover all costs and loss associated with resolving the matter giving rise to such material breach. Venue for any such proceeding shall be a location of Principal's choice.

21. **ELECTRONIC POLICY FORMS.** Principal and Agent hereby agree that Agent may produce and issue electronically, in accordance with the terms of the Contract, Principal's policy forms and schedules and/or pre-numbered policy jackets, including logos, seals, signatures and other identifying information and forms generated electronically using policy number ranges or groups provided to Agent or generated by a Principal approved system (hereafter collectively "Forms"), subject to the following:

A. Principal, during the term of this Contract and thereafter, at reasonable times during customary business hours, shall have access and the right to examine the software applications and databases, operating systems, network and communications facilities, hardware and procedures used by Agent, together with any ledgers, registers or other records (whether maintained electronically or otherwise) to confirm the adequacy and security of the electronic production and delivery system used by or for Agent and to confirm that Principal's Forms are adequately protected from misuse and fully accounted for at all times; and

B. Agent agrees to maintain, either manually or electronically, a policy register pertaining to the Forms. For each policy of title insurance, the policy register shall contain the following information: (i) the policy number; and (ii) Agent's file number; and (iii) the Date of Policy and (iv) the gross title insurance premium collected. Principal shall have the right to inspect such policy register as provided in Paragraph 21A; and

C. Agent agrees to implement, or cause to be implemented, safety and security procedures satisfactory to Principal, such procedures to be hereafter mutually agreed to by Principal and Agent. Such procedures shall include, without limitation: restricting access to Forms (including without limitation logos, seals, signatures and policy numbers) and maintaining all of the foregoing in a secure, safe and restricted place and/or environment; and

D. For purposes of Paragraphs 21A, 21B and 21C above (Principal's right of access and examination) only, the term "Agent" shall include any Member of Agent, if Agent is a limited liability company. Agent agrees to indemnify and hold Principal harmless for any loss, damage or expense sustained by Principal by reason of (1) any loss or misuse of Principal's Forms, including loss or misuse by any employee or contract worker of (a) Agent, (b) any Member of Agent, or (2) the failure of Agent to comply with this Paragraph 21.

22. **OTHER AGREEMENTS VOID.** It is expressly understood and agreed by and between the parties hereto that this Contract sets forth all the promises, agreements, conditions and understandings between Principal and Agent with respect to this Contract and the subject matter hereof. Pertaining to such Contract, there are no promises, agreements, conditions or understandings, either oral or written, between them other than as are herein set forth.

23. **COUNTERPARTS.** This Contract may be executed in counterparts, which shall collectively constitute a single agreement.

24. **CONTRACT.** The terms and conditions of this Contract shall apply only to Principal named herein and shall not apply to any company now or hereafter affiliated with Principal or with Principal's parent, Fidelity National Financial, Inc.

IN WITNESS WHEREOF, this Contract is executed this day of , .

AGENT:

By: _____

Its:

By: _____

Its:

PRINCIPAL: Fidelity National Title Insurance Company

By: _____

Its:

FIDELITY NATIONAL TITLE GROUP

☐ Fidelity National Title Insurance Company
☐ Chicago Title Insurance Company
☐ Commonwealth Land Title Insurance Company

AUTHORIZATION REQUEST TO ISSUE COMMITMENT/POLICY

Agent Name _____ Date _____
Address _____ Order No _____
_____ Telephone _____

1. Owner: _____ Owner's Policy: $ _____
   Purchaser: _____ Loan Policy: $ _____
   Lender: _____ Leasehold Policy: $ _____

2. **Location of Land**
   Address: _____
   Borough, City or Township: _____
   County and State: _____

3. **Condition of Land** (Please check all items that are applicable) ☐ Unimproved ☐ Existing
   ☐ Proposed New Construction ☐ New Construction ☐ Single Family ☐ Multi Family
   ☐ Industrial ☐ Commercial ☐ Condominium/PUD

4. **SEARCH** Title was examined by _____, who is an ☐ Employee,
   ☐ Approved Attorney, or ☐ Agent.
   Was a starter or back title used? _____ If yes explain on back or separate sheet.
   Title insured previously by _____ on _____ for $ _____

5. **Wetlands** Is there a wetland problem? _____ Explain on back or separate sheet if necessary.

6. **Riparian Rights**: Provide details, including location, title and navigability of any creek, river, lake or other body of water, now or formerly included within or abutting premises. Please furnish map survey or sketch.
   _____

7. **Mechanics Liens**: Has this coverage been requested? _____ If yes, please attach copies of any documents relied upon.

8. **Special Coverage**: Has any special coverage or affirmative coverage been requested? _____ . If yes, please describe: _____

9. **Endorsements:** What endorsements have been requested? _____
   _____

10. **Special Title Risks** Describe any special or unusual title risks to be assumed: _____
    _____

11. **Access**: Does the land abut an open or dedicated public road? _____
    If not, was title to the easement that affords access examined? _____

12. **Closing**: Proposed Closing Date: _____ Proposed Closing Representative: _____
    Method of Closing: _____

POLICY ISSUING AGENT:

I recommend issuance of the Commitment/Policy indicated above: _____ _____
(Agent Signature) **Date**

APPROVAL IS GIVEN SUBJECT TO THE FOLLOWING: _____
_____
_____

_____ TITLE INSURANCE CO.

APPROVED BY: _____ DATE: _____

NOTE: A "proposed" commitment or binder is to be attached to this request.

EXHIBIT D

Protecting Your Escrow Account

Brian F. Funk, Esquire
Brian Frederick Funk, P.A.

Using and Protecting Your Escrow Accounts

Brian F. Funk, Esq.

October 2021

IOLTA Accounts

1. Duty to Use [Rule 1.15(g)]
2. Prohibition on attorney retention of interest earned on funds not belonging to the attorney [Rules 1.15(f) and 1.15(g)]
3. Banks eligible to hold IOLTA eligible funds [Rule 1.15(h); Rule 1.15A(b)]

Duty to Invest Funds

1. Initial Determination – A Practical Evaluation

2. Periodic Reevaluation

Notice to Owner of Funds; Duties to Promptly Deliver and Account

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Designation of Accounts

(1) Fiduciary Accounts (i.e. accounts holding funds of third parties)
- "Rule 1.15A Attorney Escrow Account"
- "Rule 1.15A Attorney Trust Account"

(2) Non-Fiduciary Accounts (i.e. accounts for funds of the attorney)
- "Attorney Business Account"
- "Attorney Operating Account"

Records and Reconciliation of Escrowed Funds

- *A lawyer engaged in the private practice of law in this jurisdiction, whether in an office situated in this jurisdiction or otherwise, must maintain on a current basis financial books and records relating to such practice, and shall preserve the books and records for at least five years following the completion of the year to which they relate, or, as to fiduciary books and records, five years following the completion of that fiduciary obligation.*
- See this entire rule for detailed requirements relating to the attorney's duties to keep and maintain records and to perform regular reconciliations to insure the accuracy of the records of such accounts.

Good Funds

1. Types of Good Funds
2. Types of Checks
3. Distinguish “Good Funds” from Funds that are Actually Good

Practical Considerations

- Attorney escrow accounts and business accounts do not get all of the same federal banking protections as *consumer* accounts; therefore, it’s is critical that you actively monitor all of your accounts online.
- ALTA Best Practices will someday soon mandate that you go above and beyond what Rule 1.15 requires.

ALTA Best Practices

- Block all types of ACH transactions coming out of your escrow accounts. Many of the major title insurance companies now require that you have your bank implement this feature. (i.e. you disburse by escrow check or a wire only)
- Implement Positive Pay (and sleep better at night)

Positive Pay

- What is it?
- How does it work?
- How much effort on my end as the attorney?
- How much does it cost?
- When will I be forced to implement it?

Commercial Remote Deposit

- Deposit until 8pm daily; therefore, you know of any issues faster and the funds become available faster.
- How does it work?
- How much does it cost?
- What kind of effort to implement?

Good Funds vs. Available Funds vs. Cleared Funds

- Good Funds
- Available Funds
- Cleared Funds
- No Funds

Depository Scams

- We could talk for hours about the nightmares, but Remote Deposit will at least let you know if you have a problem one day faster if you're doing a 5:30pm settlement.

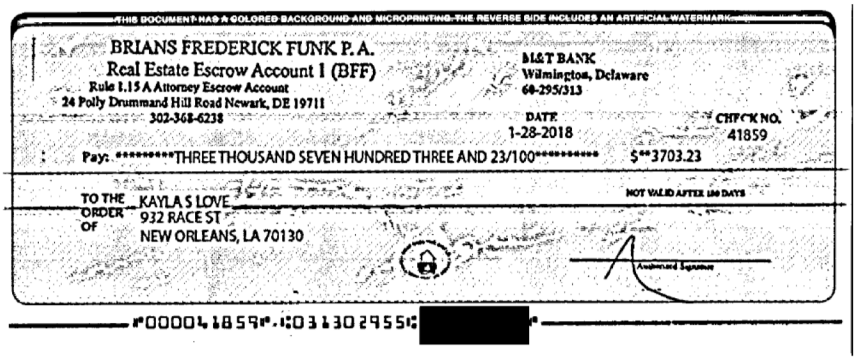
Checks and Payoffs

- You should reconcile your escrow accounts immediately. It's easy if you are using your real-estate settlement software correctly.
- Payoff checks – You should monitor these daily to avoid an awful situation. I would encourage you to send a wire for payoffs to major lenders.

Check, Wire, and ACH Scams

- It would be nice if they would do a second "Catch Me If You Can" that could add a whole new dynamic thanks to the Internet.
- Fake Payoffs
- Social-Engineered Emails
- Bogus Wiring Instructions

Sample Counterfeit Check (caught with Positive Pay and rejected immediately)


THIS DOCUMENT HAS A COLORED BACKGROUND AND MICROPRINTING. THE REVERSE SIDE INCLUDES AN ARTIFICIAL WATERMARK

BRIANS FREDERICK FUNK P.A.
Real Estate Escrow Account I (BFF)
Rule 1.15 A Attorney Escrow Account
24 Polly Drummand Hill Road Newark, DE 19711
302-368-6238

BL&T BANK
Wilmington, Delaware
60-295/313

DATE 1-28-2018

CHECK NO. 41859

Pay: **********THREE THOUSAND SEVEN HUNDRED THREE AND 23/100********** $**3703.23

TO THE ORDER OF KAYLA S LOVE
932 RACE ST
NEW ORLEANS, LA 70130

NOT VALID AFTER 180 DAYS

Authorized Signature

⑈00004185⑈ ⑆031302955⑆ [redacted]⑈

The Delaware Lawyers' Rules of Professional Conduct

RULE 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated solely for funds held in connection with the practice of law in this jurisdiction. Except as provided in (g) with respect to IOLTA-eligible funds, such funds shall be maintained in the state in which the lawyer's office is situated or elsewhere with the consent of the client or third person. Funds of the lawyer that are reasonably sufficient to pay financial institution charges may be deposited in the separate account; however, such amount may not exceed $1,000 and must be separately stated and accounted for in the same manner as clients' funds deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the completion of the events that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer engaged in the private practice of law in this jurisdiction, whether in an office situated in this jurisdiction or otherwise, must maintain on a current basis financial books and records relating to such practice, and shall preserve the books and records for at least five years following the completion of the year to which they relate, or, as to fiduciary books and records, five years following the completion of that fiduciary obligation. The maintenance of books and records must conform with the following provisions:

> (1) All bank statements, cancelled checks (or images and/or copies thereof as provided by the bank), records of electronic transfers and duplicate deposit slips relating to fiduciary and non-fiduciary accounts must be preserved. Records of all electronic transfers from fiduciary accounts shall include the name of the person authorizing transfer, the date of transfer, the name of recipient and confirmation from the banking institution confirming the number of the fiduciary account from which the funds are withdrawn and the date and time the request for transfer was completed.
>
> (2) Bank accounts maintained for fiduciary funds must be specifically designated as “Rule 1.15A Attorney Trust Account” or “1.15A Trust Account” or “Rule 1.15A Attorney Escrow Account” or “1.15A Escrow Account,” and must be used only for funds

held in a fiduciary capacity. A designation of the account as a "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," must appear in the account title on the bank statement. Other related statements, checks, deposit slips, and other documents maintained for fiduciary funds, must contain, at a minimum, a designation of the account as "Attorney Trust Account" or "Attorney Escrow Account."

(3) Bank accounts and related statements, checks, deposit slips, and other documents maintained for non-fiduciary funds must be specifically designated as "Attorney Business Account" or "Attorney Operating Account," and must be used only for funds held in a non-fiduciary capacity. A lawyer in the private practice of law shall maintain a non-fiduciary account for general operating purposes, and the account shall be separate from any of the lawyer's personal or other accounts.

(4) All records relating to property other than cash received by a lawyer in a fiduciary capacity shall be maintained and preserved. The records must describe with specificity the identity and location of such property.

(5) All billing records reflecting fees charged and other billings to clients or other parties must be maintained and preserved.

(6) Cash receipts and cash disbursement journals must be maintained and preserved for each bank account for the purpose of recording fiduciary and non-fiduciary transactions. A lawyer using a manual system for such purposes must total and balance the transaction columns on a monthly basis.

(7) A monthly reconciliation for each bank account, matching totals from the cash receipts and cash disbursement journals with the ending check register balance, must be performed. The reconciliation procedures, however, shall not be required for lawyers using a computer accounting system or a general ledger.

(8) The check register balance for each bank account must be reconciled monthly to the bank statement balance.

(9) Copies of retainer and compensation agreements with clients shall be maintained and preserved as required by Rule 1.5.

(10) Copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf shall be maintained and preserved.

(11) Copies of records showing disbursements on behalf clients shall be maintained and preserved.

(12) With respect to all fiduciary accounts:

(A) A subsidiary ledger must be maintained and preserved with a separate account for each client or third party in which cash receipts and cash disbursement transactions and monthly balances are recorded.

(B) Monthly listings of client or third party balances must be prepared showing the name and balance of each client or third party, and the total of all balances.

(C) No funds disbursed for a client or third party must be in excess of funds received from that client or third party. If, however, through error funds disbursed for a client or third party exceed funds received from that client or third party, the lawyer shall transfer funds from the non-fiduciary account in a timely manner to cover the excess disbursement.

(D) The reconciled total cash balance must agree with the total of the client or third party balance listing. There shall be no unidentified client or third party funds. The bank reconciliation for a fiduciary account is not complete unless there is agreement with the total of client or third party accounts.

(E) If a check has been issued in an attempt to disburse funds, but remains outstanding (that is, the check has not cleared the trust or escrow bank account) six months or more from the date it was issued, a lawyer shall promptly take steps to contact the payee to determine the reason the check was not deposited by the payee, and shall issue a replacement check, as necessary and appropriate. With regard to abandoned or unclaimed trust funds, a lawyer shall comply with requirements of Supreme Court Rule 73.

(F) No funds of the lawyer shall be placed in or left in the account except as provided in Rule 1.15(a).

(G) No funds which should have been disbursed shall remain in the account, including, but not limited to, earned legal fees, which must be transferred to the lawyer's non-fiduciary account on a prompt and timely basis when earned.

(H) When a separate real estate bank account is maintained for settlement transactions, and when client or third party funds are received but not yet disbursed, a listing must be prepared on a monthly basis showing the name of the client or third party, the balance due to each client or third party, and the total of all such balances. The total must agree with the reconciled cash balance.

(I) Only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account.

(J) Withdrawals from a client trust account shall be made only by check payable to a named payee and not to cash, or by authorized electronic transfer.

(13) If a lawyer maintains financial books and records using a computer system, the lawyer must cause to be printed each month a hard copy of all monthly journals, ledgers, reports, and reconciliations, and/or cause to be created each month an electronic backup of these documents to be stored in such a manner as to make them accessible for review by the lawyer and/or the auditor for the Lawyers' Fund for Client Protection.

(e) A lawyer's financial books and records must be subject to examination by the auditor for the Lawyers' Fund for Client Protection, for the purpose of verifying the accuracy of a certificate of compliance filed each year by the lawyer pursuant to Supreme Court Rule 69. The examination must be conducted so as to preserve, insofar as is consistent with these Rules, the confidential nature of the lawyer's books and records. If the lawyer's books and records are not located in Delaware, the lawyer may have the option either to produce the books and records at the lawyer's office in Delaware or to produce the books and records at the location outside of Delaware where they are ordinarily located. If the production occurs outside of Delaware, the lawyer shall pay any additional expenses incurred by the auditor for the purposes of an examination.

(f) A lawyer holding client or third-person funds must initially and reasonably determine whether the funds should or should not be placed in an interest or dividend-bearing account for the benefit of the client or third person. In making such a determination, the lawyer must consider the financial interests of the client or third person, the costs of establishing and maintaining the account, any tax reporting procedures or requirements, the nature of the transaction involved, the likelihood of delay in the relevant proceedings, and whether the funds are of a nominal amount or are expected to be held by the lawyer for a short period of time such that the costs incurred to secure income for the client or third person would exceed such income. A lawyer must at reasonable intervals consider whether changed circumstances would warrant a new determination with respect to the deposit of client or third-person funds. Except as provided in these Rules, interest or dividends earned on client or third-person funds placed into an interest or dividend-bearing account for the benefit of the client or third person (less any deductions for service charges or other fees of the depository institution) shall belong to the client or third person whose funds are deposited, and the lawyer shall have no right or claim to such interest or dividends, and may not otherwise receive any financial benefit or other economic concessions relating to a banking relationship with the institution where any account is maintained pursuant to this Rule.

(g) A lawyer holding client or third person funds who has reasonably determined, pursuant to subsection (f) of this Rule, that such funds need not be deposited into an interest or dividend-bearing account for the benefit of the client or third-person must establish and maintain one or more pooled trust/escrow accounts in a financial institution in Delaware for the deposit of all client or third person funds held in connection with the practice of law in this jurisdiction that are nominal in amount or to be held by the lawyer for a short period such that the costs incurred to secure income for the client or third person would exceed such income (IOLTA-eligible funds). This requirement shall not apply to a lawyer who either has obtained inactive status pursuant to Supreme Court Rule 69(d) or has obtained a Certificate of Retirement pursuant to Supreme Court Rule 69(f). Each pooled trust/escrow account must be established as a pooled

interest or dividend-bearing account (IOLTA Account) in compliance with the provisions of this Rule, except those accounts exempted under section (h)(7) below. The lawyer shall have no right or claim to such interest or dividends, and may not otherwise receive any financial benefit or other economic concessions relating to a banking relationship with the institution where any account is maintained pursuant to this Rule.

(h) Lawyers may maintain IOLTA Accounts only in financial institutions that are approved by the Lawyers Fund For Client Protection pursuant to Rule 1.15A of these Rules, and are determined by the Delaware Bar Foundation (the Foundation) to be "eligible institutions". Eligible institutions are defined as those institutions that voluntarily offer a comparable interest rate on IOLTA Accounts and meet the other requirements of this Rule. A comparable interest rate on IOLTA Accounts means a rate that is no less than the highest rate of interest or dividends generally available from the institution to its non-IOLTA customers when IOLTA Accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any. In determining the comparable interest rate or dividend, an eligible institution may consider factors, in addition to the IOLTA Account balance, customarily considered by the institution when setting rates of interest or dividends for its customers, provided that such factors do not discriminate against IOLTA Accounts.

(1) An eligible institution may satisfy the comparable interest rate requirement by electing one of the following three options:

(A) establish the IOLTA Account as the comparable interest rate product;

(B) pay the comparable interest rate on the IOLTA Account in lieu of actually establishing the IOLTA Account as the comparable interest rate product; or

(C) pay the "Safe Harbor Rate" on the IOLTA Account (as posted on the Foundation's website). Until redetermined by the Foundation, the Safe Harbor Rate is the higher of 0.65% per annum or 65% of the Federal Funds Target Rate as of the first day of the IOLTA Account earnings period, net of Allowable Reasonable Service Charges and Fees (as defined in section (h)(5) below). The Safe Harbor Rate shall be reevaluated periodically, but no more frequently than every six months, by the Foundation to reflect an overall comparable interest rate offered by financial institutions in Delaware and may be redetermined by the Foundation following such revaluation. Upon any such redetermination, the Foundation shall give at least 90 days advance written notice of the effective date of such redetermination to all eligible institutions maintaining any IOLTA Accounts and by posting on its website. Election of the Safe Harbor Rate is optional and eligible institutions may instead choose to satisfy compliance with this Rule by electing instead either option (A) or (B) above.

(2) IOLTA Accounts may be established as:

(A) a business checking account with an automated investment feature in overnight daily financial institution repurchase agreements or money market funds. A daily financial institution repurchase agreement shall be fully collateralized by U. S. Government Securities (meaning U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States government), and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in U.S. Government Securities, or repurchase agreements fully collateralized by U.S. Government Securities, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(B) a checking account paying preferred interest rates, such as market based or indexed rates;

(C) a public funds interest-bearing checking account such as an account used for governmental agencies and other non-profit organizations;

(D) an interest-bearing checking account such as a negotiable order of withdrawal (NOW) account; or business checking with interest; or

(E) any other interest or dividend-bearing account offered by the eligible institution to its non-IOLTA customers, which is commercially reasonable to use for a pooled account of short term or nominal amount funds.

(3) Nothing in this rule shall preclude an eligible institution from paying a higher rate of interest or dividends on IOLTA Accounts than described above or electing to waive service charges or fees on IOLTA Accounts.

(4) Interest and dividends on IOLTA Accounts shall be calculated in accordance with the eligible institution's standard practice for non-IOLTA customers.

(5) "Allowable Reasonable Service Charges or Fees" for IOLTA Accounts are defined as per check charges, per deposit charges, an account maintenance fee, automated transfer ("sweep") fees, FDIC insurance fees, and a reasonable IOLTA administrative fee for the direct costs of complying with the reporting and payment requirements of this rule. Allowable Reasonable Service Charges or Fees may only be deducted from interest or dividends on an IOLTA account at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No service charges or fees other than Allowable Reasonable Service Charges and Fees may be assessed against or deducted from the interest or dividends on an IOLTA Account. No Allowable Reasonable Service Charges or Fees on an IOLTA Account for any reporting period shall

be taken from interest or dividends earned on other IOLTA Accounts, or from the principal balance of any IOLTA Account. Any fees and services charges (other than Allowable Reasonable Service Charges and Fees deducted from interest on an IOLTA Account), including but not limited to bank overdraft fees, wire transfer fees, remote deposit fees and fees for checks returned for insufficient funds, shall be the sole responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA Account. Nothing in this Rule shall prohibit a lawyer or law firm maintaining an IOLTA account from recouping fees charged to their IOLTA account from the appropriate client on whose behalf the fee was incurred and as otherwise provided for in the Rules of Professional Conduct.

(6) Lawyers or law firms depositing client or third party funds in an IOLTA Account under this paragraph (h) shall direct the eligible institution:

(A) to remit interest monthly, or, with the consent of the Foundation, quarterly (net of any Allowable Reasonable Service Charges or Fees), computed on the average monthly balance in the account or otherwise computed in accordance with the institution's standard practices, provided that the eligible institution may elect to waive any or all such charges and fees;

(B) to transmit with each remittance to the Foundation a report in a form and through any reasonable manner of transmission approved by the Foundation showing the name of the lawyer or law firm on each IOLTA Account whose remittance is sent, the IOLTA Account number for each account, the amount of interest attributable to each IOLTA Account, the time period covered by the report, the rate of interest or dividend applied, the amount and type of Allowable Reasonable Service Charges or Fees deducted, if any, the average account balance for the period for which the report was made, the net amount of interest remitted for the period and such other information as may be reasonably required by the Foundation; and

(C) to transmit to the depositing lawyer or law firm a statement in accordance with normal procedures for reporting to depositors of the eligible institution.

(7) Any IOLTA account which has not or cannot reasonably be expected to generate interest or dividends in excess of Allowable Reasonable Service Charges or Fees, may, under criteria established by the Foundation, be exempted by the Foundation from required participation in the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. The lawyer or law firm whose account has been exempted will annually certify to the Supreme Court, as part of its Annual Certificate of Compliance, that the lawyer or law firm expects no material increase in activity in its exempted trust/escrow account during the 12 months following the date of the filing of the Certificate. The Foundation will review exempted accounts and may revoke the

exemption if it determines that the account can generate interest or dividends in excess of Allowable Reasonable Service Charges and Fees.

(8) In order for the Foundation to be able to determine that all pooled trust/escrow accounts are properly identified by the eligible institutions, each lawyer or law firm that maintains a pooled trust/escrow account is deemed to have authorized the Foundation to have access to the pooled trust/escrow account-related information contained within its Annual Certificate of Compliance, filed annually with the Supreme Court. In addition, when a lawyer or law firm requests an eligible institution to open an IOLTA account, the lawyer or law firm will submit the request in writing to the institution, using the designated form letter located on the Foundation's website, with a copy of said letter to be sent to the Foundation by the lawyer or law firm.

(9) Should the Foundation determine that an IOLTA Account of a financial institution has failed to comply with the provisions of this Rule, the Foundation shall notify the affected lawyer or law firm and the financial institution of such failure to comply, specifying the corrective action needed, with a reasonable time specified by the Foundation for the compliance to be achieved, but no longer than 90 days. Should compliance not be achieved within the time specified, the Foundation shall notify the affected lawyer or law firm, the financial institution and the Office of Disciplinary Counsel.

(i) The funds transmitted to the Foundation shall be available for distribution for the following purposes:

(1) To improve the administration of justice;

(2) To provide and to enhance the delivery of legal services to the poor;

(3) To support law related education;

(4) For such other purposes that serve the public interest.

The Delaware Bar Foundation shall recommend for the approval of the Supreme Court of the State of Delaware, such distributions as it may deem appropriate. Distributions shall be made only upon the Court's approval.

(j) Lawyers or law firms, depositing client or third party funds in a pooled trust/escrow account under this paragraph shall not be required to advise the client or third party of such deposit or of the purposes to which the interest accumulated by reason of such deposits is to be directed."

(k) A lawyer shall not disburse fiduciary funds from a bank account unless the funds deposited in the lawyer's fiduciary account to be disbursed, or the funds which are in the lawyer's unrestricted possession and control and are or will be timely deposited, are good funds as hereinafter defined. "Good funds" shall mean:

(1) cash;

(2) electronic fund (“wire”) transfer;

(3) certified check;

(4) bank cashier's check or treasurer's check;

(5) U.S. Treasury or State of Delaware Treasury check;

(6) Check drawn on a separate trust or escrow account of an attorney engaged in the private practice of law in the State of Delaware held in a fiduciary capacity, including his or her client's funds;

(7) Check of an insurance company that is authorized by the Insurance Commissioner of Delaware to transact insurance business in Delaware;

(8) Check in an amount no greater than $10,000.00;

(9) Check greater than $10,000.00, which has been actually and finally collected and may be drawn against under federal or state banking regulations then in effect;

(10) Check drawn on an escrow account of a real estate broker licensed by the state of Delaware up to the limit of guarantee provided per transaction by statute.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[4] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[5] The extensive provisions contained in Rule 1.15(d) represent the financial recordkeeping requirements that lawyers must follow when engaged in the private practice of law in this jurisdiction. These provisions are also reflected in a certificate of compliance that is included in each lawyer's registration statement, filed annually pursuant to Delaware Supreme Court Rule 69.

[6] Compliance with these provisions provides the necessary level of control to safeguard client and third party funds, as well as the lawyer's operating funds. When these recordkeeping procedures are not performed on a prompt and timely basis, there will be a loss of control by the lawyer, resulting in insufficient safeguards over client and other property.

[7] Rule 1.15(d)(12)(I) and (J) enumerate minimal accounting controls for client trust accounts. They also enunciate the requirement that only a lawyer admitted to the practice of law in Delaware or a person who is under the direct supervision of the lawyer shall be the authorized signatory or authorize electronic transfers from a client trust account. While it is permissible to grant limited nonlawyer access to a client trust account, such access should be limited and closely monitored by the lawyer. The lawyer has a non-delegable duty to protect and preserve the funds in a client trust account and can be disciplined for failure to supervise subordinates who misappropriate client funds. See, Rules 5.1 and 5.3 of the Delaware Lawyers Rules of Professional Conduct.

[8] Authorized electronic transfers shall be limited to

(1) money required for payment to a client or third person on behalf of a client;

(2) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation;

(3) money transferred to the lawyer for fees that are earned in connection with the representation and are not in dispute; or

(4) money transferred from one client trust account to another client trust account.

[9] Some of the essential financial recordkeeping issues for lawyers under this Rule include the following:

(a) *Segregation of funds*. Improper commingling occurs when the lawyer's funds are deposited in an account intended for the holding of client and third party funds, or when client funds are deposited in an account intended for the holding of the lawyer's funds. The only exception is found in Rule 1.15(a), which allows a lawyer to maintain $500 of the lawyer's funds in the

fiduciary account in order to cover possible bank service charges. Keeping an accurate account of each client's funds is more difficult if client funds are combined with the lawyer's own funds. The requirement of separate bank accounts for lawyer funds and non-lawyer funds, with separate bookkeeping procedures for each, is intended to avoid commingling.

(b) *Deposits of legal fees*. Unearned legal fees are the property of the client until earned, and therefore must be deposited into the lawyer's fiduciary account. Legal fees must be withdrawn from the fiduciary account and transferred to the operating or business account promptly upon being earned, to avoid improper commingling. The monthly listing of client and third party funds in the fiduciary account should therefore be carefully reviewed in order to determine whether any earned legal fees remain in the account.

(c) *Identity of property*. The identity and location of client funds and other property must be maintained at all times. Accordingly, every cash receipt and disbursement transaction in the fiduciary account must be specifically identified by the name of the client or third party. If financial books and records are maintained in this manner, the resultant control should ensure that there are no unidentified funds in the lawyer's possession.

(d) *Disbursement of funds*. Funds due to clients or third parties must be disbursed without unnecessary delay. The monthly listing of client funds in the fiduciary account should therefore be reviewed carefully in order to determine whether any balances due to clients or third parties remain in the account.

(e) *Negative balances*. The disbursement of client or third party funds in an amount greater than the amount being held for such client or third party results in a negative balance in the fiduciary account. This should never occur when the proper controls are in place. However, if a negative balance occurs by mistake or oversight, the lawyer must make a timely transfer of funds from the operating account to the fiduciary account in order to cover the excess disbursement and cure the negative balance. Such mistakes can be avoided by making certain that the client balance sufficiently covers a potential disbursement prior to making the actual disbursement.

(f) *Reconciliations*. Reconciled cash balances in the fiduciary accounts must agree with the totals of client balances held. Only by performing a reconciliation procedure will the lawyer be assured that the cash balance in the fiduciary account exactly covers the balance of client and third party funds that the lawyer is holding.

(g) *Real estate accounts*. Bank accounts used exclusively for real estate settlement transactions are fiduciary accounts, and are therefore subject to the same recordkeeping requirements as other such accounts, except that cash receipts and cash disbursements journals are not required.

[10] Illustrations of some of the accounting terms that lawyers need to be aware of, as used in this Rule, include the following:

(a) Financial books and records include all paper documents or computer files in which fiduciary and non-fiduciary transactions are individually recorded, balanced, reconciled, and totaled. Such

records include cash receipts and cash disbursements journals, general and subsidiary journals, periodic reports, monthly reconciliations, listings, and so on.

(b) The cash receipts journal is a monthly listing of all deposits made during the month and identified by date, source name, and amount, and in distribution columns, the nature of the funds received, such as “fee income” or “advance from client,” and so on. Such a journal is maintained for each bank account.

(c) The cash disbursements journal is a listing of all check payments made during the month and identified by date, payee name, check number, and amount, and in distribution columns, the nature of funds disbursed, such as “rent” or “payroll,” and so on. Such a journal is maintained for each bank account. Cash receipts and cash disbursement records may be maintained in one consolidated journal.

(d) Totals and balances refer to the procedures that the lawyer needs to perform when using a manual system for accounting purposes, in order to ensure that the totals in the monthly cash receipts and cash disbursements journal are correct. The cash and distribution columns must be added up for each month, then the total cash received or disbursed must be compared with the total of all of the distribution columns.

(e) The ending check register balance is the accumulated net cash balance of all deposits, check payments, and adjustments for each bank account. This balance will not normally agree with the bank balance appearing on the end-of-month bank statement because deposits and checks may not clear with the bank until the next statement period. This is why a reconciliation is necessary.

(f) The reconciled monthly cash balance is the bank balance conformed to the check register balance by taking into account the items recorded in the check register which have not cleared the bank. For example:

Account balance, per bank statement	$2,000.00
Add -- deposits in transit (deposits in check register that do not appear on bank statement)	$1,500.00
Less -- outstanding checks (checks entered in check register that do not appear on bank statement)	(1,800.00)
Reconciled cash balance	$1,700.00

(g) The general ledger is a yearly record in which all of a lawyer's transactions are recorded and grouped by type, such as cash received, cash disbursed, fee income, funds due to clients, and so on. Each type of transaction recorded in the general ledger is also summarized as an aggregate balance. For example, the ledger shows cash balances for each bank account which represent the accumulation of the beginning balance, all of the deposits in the period, and all of the checks issued in the period.

(h) The subsidiary ledger is the list of transactions shown by each individual client or third party, with the individual balances of each (as contrasted to the general ledger, which lists the total balances in an aggregate amount “due to clients”). The total of all of the individual client and

third party balances in the subsidiary ledger should agree with the total account balance in the general ledger.

(i) A variance occurs in a reconciliation procedure when two figures which should agree do not in fact agree. For example, a variance occurs when the reconciled cash balance in a fiduciary account does not agree with the total of client and third party funds that the lawyer is actually holding.

[11] Accrued interest on client and other funds in a lawyer's possession is not the property of the lawyer, but is generally considered to be the property of the owner of the principal. An exception to this legal principle relates to nominal amounts of interest on principal. A lawyer must reasonably determine if the transactional or other costs of tracking and transferring such interest to the owners of the principal are greater than the amount of the interest itself. The lawyer's proper determination along these lines will result in the lawyer's depositing of fiduciary funds into an interest-bearing account for the benefit of the owners of the principal, or into a pooled interest-bearing account. If funds are deposited into a pooled account, the interest is to be transferred (with some exceptions) to the Delaware Bar Foundation pursuant to the Delaware Supreme Court's Interest On Lawyer Trust Accounts Program (“IOLTA”).

[12] Implicit in the principles underlying Rule 1.15 is the strict prohibition against the misappropriation of client or third party funds. Misappropriation of fiduciary funds is clearly a violation of the lawyer's obligation to safeguard client and other funds. Moreover, intentional or knowing misappropriation may also be a violation of Rule 8.4(b) (criminal conduct in the form of theft) and Rule 8.4(c) (general dishonest or deceptive conduct). Intentional or knowing misappropriation is considered to be one of the most serious acts of professional misconduct in which a lawyer can engage, and typically results in severe disciplinary sanctions.

[13] Misappropriation includes any unauthorized taking by a lawyer of client or other property, even for benign reasons or where there is an intent to replenish such funds. Although misappropriation by mistake, neglect, or recklessness is not as serious as intentional or knowing misappropriation, it can nevertheless result in severe disciplinary sanctions. See, e.g., Matter of Figliola, Del. Supr., 652 A.2d 1071, 1076-78 (1995).

The Delaware Lawyers' Rules of Professional Conduct

RULE 1.15A TRUST ACCOUNT OVERDRAFT NOTIFICATION

(a) Every attorney practicing or admitted to practice in this jurisdiction shall designate every account into which attorney trust or escrow funds are deposited either as a "Rule 1.15A Attorney Trust Account" or "Rule 1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," pursuant to Rule 1.15(d)(2).

(b) Bank accounts designated as "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," pursuant to Rule 1.15(d)(2) shall be maintained only in financial institutions approved by the Lawyers' Fund for Client Protection (the "Fund"). A financial institution may not be approved as a depository for attorney trust and escrow accounts unless it shall have filed with the Fund an agreement, in a form provided by the Fund, to report to the Office of Disciplinary Counsel ("ODC") in the event any instrument in properly payable form is presented against an attorney trust or escrow account containing insufficient funds, irrespective of whether or not the instrument is honored.

(c) The Supreme Court may establish rules governing approval and termination of approved status for financial institutions and the Fund shall annually publish a list of approved financial institutions. No trust or escrow account shall be maintained in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days notice in writing to the Fund.

(d) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument to the ODC no later than seven (7) calendar days following a request for the copy by the ODC.

(2) In the case of instruments that are presented against insufficient funds, but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby.

(e) Reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor. If an instrument presented against insufficient funds is honored, then the report shall be made within seven (7) calendar days of the date of presentation for payment against insufficient funds.

(f) Every attorney practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(g) Nothing herein shall preclude a financial institution from charging a particular attorney or law firm for the reasonable costs of producing the reports and records required by this rule.

(h) The terms used in this section are defined as follows:

(1) “Financial institution” includes banks, savings and loan associations, credit unions, savings banks and any other business or persons which accept for deposit funds held in trust by attorneys.

(2) “Properly payable” refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of Delaware.

(3) “Notice of dishonor” refers to the notice which a financial institution is required to give, under the laws of Delaware, upon presentation of an instrument which the institution dishonors.

Using and Protecting Your Escrow Accounts
October 2021

PART I: ETHICAL OBLIGATIONS – RULE 1.15

Rules 1.15 and 1.15A of The Delaware Lawyers' Rules of Professional Conduct provide guidance and requirements for the establishment and use of accounts in which the attorney collects and disburses funds not belonging to the attorney.

A. IOLTA Accounts

1. Duty to Use [Rule 1.15(g)]

A lawyer holding client or third person funds who has reasonably determined, pursuant to subsection (f) of this Rule, that such funds need not be deposited into an interest or dividend-bearing account for the benefit of the client or third-person must establish and maintain one or more pooled trust/escrow accounts in a financial institution in Delaware for the deposit of all client or third person funds held in connection with the practice of law in this jurisdiction that are nominal in amount or to be held by the lawyer for a short period such that the costs incurred to secure income for the client or third person would exceed such income (IOLTA-eligible funds).

Practical Recommendations:

- If you are doing more than a handful of real-estate settlements a year, you should have a *separate* REAL-ESTATE escrow account that is tied into your real-estate settlement software (i.e. TitleExpress, SoftPro, Ramquest, etc.) so that the reconciliation is easiest. (Trying to do settlements with miscellaneous, non-real estate escrow management software—the stuff you may use for retainers and disbursing a personal injury settlement—is a huge mistake.)
- You can buy and obtain a one-user license for a professional real-estate settlement software (RESS) for around $600 a year.
- When you first start using new software, make sure you do the reconciliations yourself so you know how the system works *before* you pass it off to a bookkeeper.

2. Prohibition on attorney retention of interest earned on funds not belonging to the attorney [Rules 1.15(f) and 1.15(g)]

Except as provided in these Rules, interest or dividends earned on client or third-person funds placed into an interest or dividend-bearing account for the benefit of the client or third person (less any deductions for service charges or other fees of the depository institution) shall belong to the client or third person whose funds are deposited, and the lawyer shall have no right or claim to such interest or dividends, and may not otherwise receive any financial benefit

or other economic concessions relating to a banking relationship with the institution where any account is maintained pursuant to this Rule. [Rule 1.15(f)]

The lawyer shall have no right or claim to such interest or dividends, and may not otherwise receive any financial benefit or other economic concessions relating to a banking relationship with the institution where any account is maintained pursuant to this Rule. [Rule 1.15(g)]

3. Banks eligible to hold IOLTA eligible funds [Rule 1.15(h); Rule 1.15A(b)]

Lawyers may maintain IOLTA Accounts only in financial institutions that are approved by the Lawyers Fund For Client Protection pursuant to Rule 1.15A of these Rules, and are determined by the Delaware Bar Foundation (the Foundation) to be "eligible institutions". Eligible institutions are defined as those institutions that voluntarily offer a comparable interest rate on IOLTA Accounts and meet the other requirements of this Rule. [Rule 1.15(h)]

A financial institution may not be approved as a depository for attorney trust and escrow accounts unless it shall have filed with the Fund an agreement, in a form provided by the Fund, to report to the Office of Disciplinary Counsel ("ODC") in the event any instrument in properly payable form is presented against an attorney trust or escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. [Rule 1.15A(b)]

B. Duty to Invest Funds [Rule 1.15(f)]

1. Initial Determination – A Practical Evaluation

A lawyer holding client or third-person funds must initially and reasonably determine whether the funds should or should not be placed in an interest or dividend-bearing account for the benefit of the client or third person. In making such a determination, the lawyer must consider the financial interests of the client or third person, the costs of establishing and maintaining the account, any tax reporting procedures or requirements, the nature of the transaction involved, the likelihood of delay in the relevant proceedings, and whether the funds are of a nominal amount or are expected to be held by the lawyer for a short period of time such that the costs incurred to secure income for the client or third person would exceed such income.

2. Periodic Reevaluation

A lawyer must at reasonable intervals consider whether changed circumstances would warrant a new determination with respect to the deposit of client or third-person funds.

Practical Considerations:

- There are two 3 main reasons why you may hold funds after a settlement has occurred:
    - Escrowing funds relating to an open mortgage, judgment, or lien.

- Escrowing funds for an open estate (i.e. creditor claims period needs to expire and the estate should be closed at the Register of Wills).
- Post-settlement issues between the parties (i.e. repair escrow).

- If the post-settlement escrow amount is significant and could earn reasonable interest over an expected long period of time, then you probably want to look into an interest-earning escrow account. Thankfully, most post-settlement escrows are smaller and tend to not be held for more than a few months.

C. Notice to Owner of Funds; Duties to Promptly Deliver and Account [Rule 1.15(b)]

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

D. Designation of Accounts [Rule 1.15(d)(2); Rule 1.15A(a)]

1. Fiduciary Accounts (i.e. accounts holding funds of third parties)

Bank accounts maintained for fiduciary funds must be specifically designated as "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," and must be used only for funds held in a fiduciary capacity. A designation of the account as a "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," must appear in the account title on the bank statement. Other related statements, checks, deposit slips, and other documents maintained for fiduciary funds, must contain, at a minimum, a designation of the account as "Attorney Trust Account" or "Attorney Escrow Account." [Rules 1.15(d)(2)]

Every attorney practicing or admitted to practice in this jurisdiction shall designate every account into which attorney trust or escrow funds are deposited either as a "Rule 1.15A Attorney Trust Account" or "Rule 1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," pursuant to Rule 1.15(d)(2). [Rule 1.15A(a)]

2. Non-fiduciary Accounts (i.e. accounts for funds of the attorney or law firm)

Bank accounts and related statements, checks, deposit slips, and other documents maintained for non-fiduciary funds must be specifically designated as "Attorney Business Account" or "Attorney Operating Account," and must be used only for funds held in a non-fiduciary capacity. A lawyer in the private practice of law shall maintain a non-fiduciary account for general operating purposes, and the account shall be separate from any of the lawyer's personal or other accounts. [Rule 1.15(d)(3)]

E. Records and Reconciliation of Escrowed Funds [Rule 1.15(d)]

A lawyer engaged in the private practice of law in this jurisdiction, whether in an office situated in this jurisdiction or otherwise, must maintain on a current basis financial books and records relating to such practice, and shall preserve the books and records for at least five years following the completion of the year to which they relate, or, as to fiduciary books and records, five years following the completion of that fiduciary obligation.

See this entire rule for detailed requirements relating to the attorney's duties to keep and maintain records and to perform regular reconciliations to insure the accuracy of the records of such accounts.

F. Good Funds [Rule 1.15(k)]

1. Types of good funds

A lawyer shall not disburse fiduciary funds from a bank account unless the funds deposited in the lawyer's fiduciary account to be disbursed, or the funds which are in the lawyer's unrestricted possession and control and are or will be timely deposited, are good funds as hereinafter defined. "Good funds" shall mean:

(1) cash;

(2) electronic fund ("wire") transfer;

(3) certified check;

(4) bank cashier's check or treasurer's check;

(5) U.S. Treasury or State of Delaware Treasury check;

(6) Check drawn on a separate trust or escrow account of an attorney engaged in the private practice of law in the State of Delaware held in a fiduciary capacity, including his or her client's funds;

(7) Check of an insurance company that is authorized by the Insurance Commissioner of Delaware to transact insurance business in Delaware;

(8) Check in an amount no greater than $10,000.00;

(9) Check greater than $10,000.00, which has been actually and finally collected and may be drawn against under federal or state banking regulations then in effect;

(10) Check drawn on an escrow account of a real estate broker licensed by the state of Delaware up to the limit of guarantee provided per transaction by statute. The limit is currently $25,000.00. See 24 Del. C. §2922(a).

2. Types of Checks

a. Cashier's Check. A cashier's check is a draft for which the drawer and drawee are the same bank. 6 Del. C. §3-104(a)

A. A Drawee is a person ordered in a draft to make payment. §3-103(a)(2).

B. A Drawer is the person who signs or is identified in a draft as a person ordering payment. §3-103(a)(3).

C. A Draft is an unconditional order to pay a fixed amount of money if it is payable to an identified person and is payable on demand or at a definite time. §3-104(a), (b) and (e); 3-109(b).

b. Certified Check. A certified check is a checked accepted by the bank on which it is drawn. Acceptance can occur by (1) the drawee's signed agreement, written on the draft, to pay a draft as presented or (2) by stating on the check that it is certified. §3-409.

c. Teller's Check. A teller's check is a draft drawn by a bank (a) on another bank or (b) payable at or through a bank. §3-104(h).

d. Official Check. An "Official Check" is not defined in the UCC. Most Official Checks that I have seen are issued by a bank and are payable by a different bank. This type of check is a teller's check. A teller's check is not included in Rule 1.15 in the definition of good funds. However, it probably should be considered to be good funds since payment of this type of check is guaranteed by a bank. The Commentary to the Regulations in 12 CFR Part 229 states as follows: "Teller's checks generally are sold by banks to substitute the bank's credit for the customer's credit and thereby enhance the collectability of the checks."

G. Distinguish "Good Funds" from funds that are actually good

Although Rules 1.15(k) specifies the class of funds that are considered "good funds" by the Supreme Court, such funds may not actually be good and collectible or available to draw on. Examples of good funds that are not collectible or available to draw on include:

1. A regular check for, say, $7,500, that is not be honored by the bank upon which it is drawn because of lack of available funds in the account.

2. A Cashier's check of an out-of-state bank for which the funds may not be available for a few days.

PART II: PRACTICAL CONSIDERATIONS FOR PROTECTING YOUR ESCROW ACCOUNT

1) Rule 1.15 in a Nutshell: Lawyers have a duty to reasonably protect and safeguard all client property. In a real-estate transaction world, this generally means making sure the funds in your escrow account are appropriately disbursed in a timely fashion; however, in the age of counterfeit checks being made on the internet and remote deposit being available on a smart phone, it's no longer sufficient to simply think "well, if my account is breached, the bank will take care of it."

2) Rule 1.15 is fairly obvious and easy to read; however, this section is designed to go beyond what the Delaware rules require so that you sleep better at night. The American Land Title Association (ALTA) has promulgated what are known as its "Best Practices" for real-estate settlements and it has recommendations that are essentially becoming the *de facto* requirements when major lenders nationwide refuse to allow settlements to take place at firms not following the Best Practices.

3) As part of the Best Practices, title insurance companies now mandate that your firm has your bank **implement a "block" on ACH withdraws** and outgoing international wires. I have heard that some banks simply cannot block outgoing international wires; however, most can implement the ACH block.

4) **Positive Pay is highly recommended by the Best Practices**; however, it is not yet required. However, I predict it will be mandatory for all attorney escrow accounts any day now.

    a) Positive Pay is a service implemented on your account through your bank that directs the bank not to pay any checks that are not pre-authorized without your express permission.

    b) The pre-authorization comes from your real-estate settlement software that generates and uploads a file of authorized checks after each settlement to your bank. The software also generates a file when checks are voided so that the bank knows of those voids as well. The upload usually takes place at your bank's secure website that receives the file after someone from your firm logs into the system.

    c) When your bank processes your checks at night, if a check comes in where the check number and amount do not match, a flag is thrown immediately. Some banks even go further to use OCR technology to match the "payee name".

    d) If a check is received from your bank that is not pre-authorized, then your bank sends you an alert the next business day (called an "exception") that gives you around five hours to

decide to pay or reject that check by a certain time that day. The default and safest way is to reject a non-authorized check if you fail to act on it within five hours; however, I have had "exceptions" come in for reasons as simple as the check number being read wrong and there are valid reasons why you would simply want to let that check go through.

e) The major advantage of Positive Pay is that it protects your accounts so that you know immediately if there is an issue and it allows you to reject any fraudulent checks immediately (instead of when you or your bookkeeper happens to notice a problem).

f) After I saw how easy this system was to implement with our real-estate account, I also easily implemented it with our business and miscellaneous escrow accounts as well. I generally spend no more than 3-5 minutes each day dealing with Positive Pay.

5) **INCOMING FUNDS AND DEPOSITS:**

A) It may not seem obvious, but I would strongly recommend putting a clause in your new client letter and seller letter that your office will not accept actual cash in currency form for a real-estate settlement without prior notification and the hiring of a professional service to verify and transport the cash. Since the federally mandated settlement statement actually says "Cash from Buyer" at the bottom, it would not be the first time that someone actually tried to bring a large denomination of currency to a settlement. I'm not sure about your law office, but mine does not have a security guard sitting downstairs—like in the show Breaking Bad—to protect such funds. Furthermore, as attorneys sitting in our conference room, we have no way of actually verifying each bill to ensure it's not counterfeit. It's one thing to accept a few hundred dollars cash; it's a sleepless night if someone shows up to your office for a late 5pm settlement with eighty thousand in large bills.

B) Check Clearing for the 21st Century Act (or Check 21 Act): After 9/11 occurred and airplanes were grounded for a few days, paper checks that used to be overnighted for clearing between the banks were also grounded. Congress got involved and passed the Check21 Act. The act effectively eliminated the return of your paper checks by the year 2009, but it created the ability of "Remote Deposit".

C) **Commercial Remote Deposit**: My recommendation is that you have your bank set your office up with it as soon as possible. It's safe, effective, and makes your job easier.

I) And no, I am not talking about depositing checks with your smart phone after settlement. Most banks now offer to businesses Remote Deposit with no limitations on the dollar amount and the funds are made available just as quickly as if you walked into a branch. Essentially, you install what is essentially the same type of teller check-scanner at your desk that you see at the bank branch.

II) I have been using Commercial Remote Deposit since 2010 and I have never had a problem with the service. The only time I have to go to the bank to deposit anything

is in the rare case that someone pays in cash or delivers me a check that has poor ink on it (e.g. the toner on the cashier's check was dying when the bank issued it).

III) The major advantages of Remote Deposit for a real-estate attorney are as follows:

(1) You can deposit until 6pm every business day (and some banks going as late as 8pm).
(2) The faster you get the deposit into your account, the sooner the funds become available (or know if there is a problem such a bad check).

IV) Remote Deposit Also Made Things Trickier for Us:

(1) So while businesses can utilize this great new tool for us to use, the important point everyone here needs to be aware of is this: consumers can now deposit your escrow checks at your settlement table using their smart phones. All the major banks now have apps that allow anyone to deposit a check by simply using their camera phone.

(2) If you give someone a check at settlement and that check disappears from your view, then always do a stop payment on that check before reissuing another one or simply sending a wire. The fraud to be aware of is someone taking your check out into your parking lot, depositing it, then walking back into your office and telling your assistant that he'd prefer a wire. Be aware that most banks take 24 to 48 hours to process a stop payment and legally these stop payments under the UCC only last for six months. Positive Pay can also help here, too.

D) "Good Funds" vs. "Available Funds" vs. "Cleared Funds"
I) Good Funds – For the purposes of this analysis, the term "good funds" means anything funds deposited that are permissible to be accepted under Rule 1.15.
II) Available Funds – After you deposit funds to an escrow account, your bank will generally make the funds available to you within 1 to 3 business days depending on the type of deposit. Most major banks will give its preferred business customers faster access to the money than a typical consumer account. For example, when I deposit a cashier's check into my escrow account, M&T Bank never takes longer than two days to consider that deposit "available funds" in my escrow account. With that being said, the check probably will not technically "clear" for three to five days. On the back side of things, it is my understanding that the banks are clearing checks much faster within the United States from all depositories.
III) Cleared Funds – Funds that have successfully been moved from the check issuer's bank to your bank account (this might be 3-10 days for personal domestic checks and 20 days for foreign checks). I can't think of one time in my life where I have ever accepted a foreign check at the office.
IV) No Funds – It's important to realize that just because someone gives you a personal check under the 10k limit, it could very well bounce and your bank has done nothing wrong. It will be up to you to cover the difference while your local police department investigates the person who gave you the bad check. Technically, you could have

deposited what Rule 1.15 allows us to consider "Good Funds" and those funds could still bounce for a variety of technical reasons. I have seen a cashier's check bounce when a credit union failed to properly upload its checks to its own positive pay system.

E) Depository Scams:

I) The depository scam variations are endless; however, I want to hit on a few.

II) You have a buyer who wants to pay cash for a house. The buyer sends you a check in advance of the settlement. All of the sudden, the deal falls through and the buyer demands immediate repayment of the funds. The problem is that the check hasn't cleared your account. If you return the funds without waiting for the check to fully clear, then you are on the hook.

III) Same as above—except the check is counterfeit and drawn on someone else's bank account. Dad saw something like this a few years back where there was a buyer's realtor unknowingly involved. You have the foreign buyer who enlists a realtor to find a house to buy for cash. The buyer sends a nice looking counterfeit check 30 days before settlement. The problem is that the check was completely counterfeit on an active account of a third party. When dad called the company to verify the check, the company was very grateful that dad did his due diligence. Positive Pay would have protected this company's account if they were using it.

IV) "SOCIAL ENGINEERING": The latest fraud is that criminals are hacking into lenders and realtors email accounts to get access to their calendar. The criminal then creates a similar-looking email account and attempts to get someone to wire money (i.e. loan funds, buyer's funds due at closing) directly to their bogus account.

V) SELLER WIRING INSTRUCTIONS: Consider a policy that requires all wiring instructions to be notarized and sent back with the deed package if Sellers are not attending. Ensure that any outgoing Seller wires require their names be on the account. Refuse to send international wires.

6) **<u>CONTROLLING THE CHECKS AND DISBURSEMENTS:</u>**

A) I would recommend that you take all necessary steps to ensure that your accounts are reconciled within 2-3 days after the statement is issued by your bank. Most banks will allow you to download the statement online within this time frame after the close of the month. The sooner you reconcile, the faster you will be able to address any issue and the higher your chances of making a recovery from a fraud. Most banks will deny any liability if you do not notify the bank within 30 days of the statement being issued.

B) **<u>Ensuring Your Payoffs Actually Clear:</u>** Aside from explaining the paperwork to your client, I can think of no higher responsibility of a settlement attorney than clearing the liens off of the real property that your client is purchasing or refinancing.

I) Six Months Is Too Long? Six Days May Be Too Long!

(1) Rule 1.15(d)(9)(E) essentially says that all checks outstanding after 6 months must be addressed by the Lawyer, including but not limited to: contacting the payee, issuing a replacement check, and taking other steps as necessary and appropriate.

(2) ALTA Best Practices: In the real-estate world, six months is an eternity if a payoff check is outstanding. An outstanding payoff (even a week or two) could throw off a payoff. You should be going through your outstanding check report monthly and confirming what you have outstanding. In reality, the best practice for mortgage and lien payoffs is sending a wire.

(a) Maintain a list of trusted wiring instructions for outgoing payoffs.

7) Check, Wire, and ACH Scams:

A) It used to be that it took some level of tools and sophistication to make a counterfeit check—special ink, fonts, etc. Thanks to the internet, you no longer have to be a slick as in the movie "Catch Me If You Can". With Remote Deposit, anyone with an internet connection can create a very real looking counterfeit check and attempt to deposit it with their cell phone.

B) You should block all ACH transactions from your escrow account. You would never have a valid reason for using an ACH in a real-estate transaction. We send our payoffs by wire or escrow check. You do not want a third-party taking your check information and trying to use an ACH to pull money from the account.

I) Example: A few years back, we had an insurance agent that tried to convert one of dad's escrow checks into an ACH. All the person needs is your bank account number and your ABA/routing number. At that point, it would be up to the good graces of your bank to catch it and deny it (unless you have flat out blocked all ACH transactions).

C) Check Scam:

I) In 2014, my father rose from the grave and a completely counterfeit check was presented up in Philadelphia for about 8k. The check was completely bogus but luckily the bank caught it and we had no loss. At that point, I immediately implemented positive pay on our business and escrow accounts. I had the police pull the surveillance footage and a copy of the purported check. The 'gentleman' attempted to deposit this check at an ATM while wearing an obnoxious hat, hoodie, sunglasses, and a fake beard.

II) The problem with real-estate escrow accounts is that you aren't dealing with just your own clients whom you try to vet as best you can. With real-estate transactions, we're dealing with sellers who sometimes inherit real property and vendors who get our checks as well.

III) Since 2014, counterfeit check scams appear regularly and in waves. My personal belief is that the criminals take the check images off social media posts when folks brag about their latest flip, then put these on the dark web. After they learn that your accounts are protected, they'll move on to a different target.

Real Estate Settlements

Deborah J. Galonsky, Esquire
Giordano Delcollo Werb & Gagne LLC

RESIDENTIAL REAL ESTATE SETTLEMENT

Delaware Bar Association
Fundamentals of Real Estate Seminar
Presented By: Deborah J. Galonsky, Esq.
Giordano, DelCollo, Werb & Gagne, LLC
debi@gdwlawfirm.com
302-225-3900

I. PRE-SETTLEMENT MATTERS

A. Initial Client Contact

i. Identify Parties

1. Legal names as they are to appear on deed; and
2. Relationship between buyers
3. First-Time Home Buyer: 30 Del. C §5401 defines a "First-time home buyer" as the following:
    1. A natural person who has at no time held any direct legal interest in residential real estate, wherever located, and who intends to occupy the property being conveyed as his or her principal residence within 90 days following the transaction.
    2. Spouses purchasing as joint tenants or tenants by the entirety, when neither spouse has ever held any direct legal interest in residential real estate, wherever located, and both of whom intend to occupy the property being conveyed as their principal residence within 90 days following the transaction.
    3. Individuals purchasing as joint tenants or cotenants, when none of the individuals has ever held any direct legal interest in residential real estate, wherever located, and both of whom intend to occupy the property being conveyed as their principal residence within 90 days following the transaction.

ii. Identify Property – address and tax parcel number(s) also verify that the address provided on the Agreement of Sale matches the address in county records.

iii. Confirm Lender

B. Identify Potential Conflicts of Interest - Supreme Court Interpretive Guideline No.1 Regarding Residential Real Estate Transactions:

> Buyers are to be informed in writing of any potential conflict if the lawyer was a referral made by real estate agent, lender, seller, etc. Buyer shall be given opportunity to make an informed decision after Buyer becomes aware of any potential conflict. Any letter to Buyer may also be used to inform the Buyer of any other matters regarding the transaction.

C. Review:

i. Residential Agreement of Sale ("AOS")

1. Proper Names of Parties
2. Purchase Price & Deposits
3. Settlement Date
4. Inclusions/Exclusions
5. Inspections & Time Frames
6. Real Estate Commissions

ii. Seller Disclosure Form

iii. Lead Paint Disclosure Form/Radon Disclosure Form

iv. Re-Sale Certificate of Condo/HOA Disclosures

v. Good Faith Deposit Funds

1. Deposit Funds are generally placed with real estate broker
2. Deposit held by attorney – IOLTA pooled account vs. separate account.

1. Requirements for Handling of Escrow by Delaware Attorneys – Delaware Lawyers Rules of Professional Conduct Rule 1.15 Safekeeping Property.
2. Requirements for Good Funds – DLRPC 1.15(k) and Trust Account Overdraft Notification – DLRPC 1.15A.

vi. Title Work – generally a 60-year search of the history of the property is completed by a title searcher. The search will also include a search on buyer and seller. Search will identify any judgments, liens, etc. against the property, the buyer and/or seller.
    1. Select Title Insurance Company & Review Title Insurance Premiums
    2. Review Title Search & Title Commitment
    3. Discuss Title Issues with Client, Real Estate Agents, Seller and/or Other Necessary Party
    4. Obtain & Review Copies of Restrictions of Record
    5. Clear any Title Issues to Ensure Good & Marketable Title Passes
    6. USA Patriot Act Search
    7. Estate as Seller:
        1. Review the Last Will – who inherits
        2. Is the Estate open with Register of Wills
        3. Inventory & Accounting done
        4. Has the 8 Month Creditor Claim period expired
        5. Proper parties signing

vii. Survey
    1. Confirms Land Boundaries
    2. Denotes Setbacks
    3. Denotes Easements
    4. Review and Discuss any Issues with Client

viii. Other Lender Requirements:

1. Closing Protection Letter (CPL or ICL) from Title Insurance Company
2. Lender's Title Insurance Coverage
3. Owner's Title Insurance is Optional, but Highly Recommended
4. Hazard Homeowner's Insurance
5. Escrows for Taxes & Insurance
6. Mortgagee Clause

ix. Preparation of Deed – must conform to filing requirements of the Office of the Recorder of Deeds for each county samples for New Castle, Kent and Sussex Counties are attached as Exhibit "F"

1. Determine Form of Tenancy/ownership:
    1. Tenants in Common
    2. Joint Tenancy
    3. Tenants by the Entireties
    4. Trust
    5. Corporate Entity
2. Legal Description of Property – Compare Metes & Bounds within Legal Description with the Survey
3. Tax Parcel Number and Street Address
4. Name(s) on Deed Must Match Mortgage
5. Special Warranty Deed –language of conveyance "grant and convey"
6. Return to address – Grantee's address
7. Chain of Title
8. "Subject to" Clauses
9. "Being Clause"
10. Review Lender's Closing Instructions & Verify Incoming Wire

x. Closing Disclosure Statement ("CDS") – Lenders Usually Prepare Buyer CDS & the Attorney's Office Prepares Seller CDS. The Lender Prepared

CDS Should be Reviewed for Accuracy and all sums must balance before settlement. Samples are Attached as Exhibit "G"

xi. Closing Disclosure Statement: Accounting of Buyer and Seller Debits and Credits

1. Purchase Price, Deposit and Seller Credit
2. Interest Rate
3. Loan Amount
4. Details monthly payment amount and term in years
5. Seller Charges:
    i. Mortgage Payoff
    ii. Judgments Related to Seller
    iii. Real Estate Commissions
    iv. Late Fees on any Taxes, Sewer or Other Utilities

6. Buyer Charges
    i. Lender Fees
    ii. Property Insurance
    iii. Recording Charges
    iv. Title Search Fee
    v. Title Insurance Premiums
    vi. Attorney's Fee
    vii. Judgment Related to Buyer payoffs
    viii. Miscellaneous Fees: mortgage insurance, HOA fees, broker admin fee, any other fee lender requires (e.g. car payoff)

7. Prorations Between Buyer and Seller
    i. Property Taxes
    ii. Transfer Taxes
    iii. Water and Sewer Charges
    iv. Fuel Oil and/or Propane
    v. Condo Association or Homeowner Association Dues

II. CLOSING

A. Verify Identity of Individuals Signing (Valid Government Issued Photo I.D.)

B. Review CDS by all Parties

C. Confirm Receipt of Lender

D. Confirm Incoming Funds are Good Funds

E. Seller to:

i. Execute Deed

ii. Execute State, County, Or Municipal Transfer Tax Form & Form 5403

iii. Execute an Owner's Affidavit

iv. Sign Closing Disclosure Form

v. Complete 1099S Reporting Form

vi. Confirmation of receipt of good funds from Buyer

vii. Seller to Handover Keys, Garage Access Codes or Openers

viii. Provide Forwarding Address and SSN for 1099S Form and/or Sign 1099 Certification Form.

F. Buyer will:

i. Execute Name and Signature affidavit(s)

ii. Execute CDS

iii. Execute County or Municipal Transfer Tax Forms and any First Time Home Buyer Exemption Forms.

iv. Execute all Loan Documents

v. Review Survey

G. Absence of a necessary party - proper use of Durable Power of Attorney forms; Power of Attorney must be in recordable form and power of attorney language must be included in the Deed and approved by the mortgage company.

III. **CLOSINGS AND COVID-19** – The COVID 19 pandemic changed the real estate closing process in many ways. During the nationwide shutdown, Buyers and Sellers were generally not at settlement at the same time or if at the same time, not in the same room. Real Estate agents, loan officers and family members of the Buyer or

Seller were not allowed. Settlements were done in many unique ways, including, outside in the parking lot and via Zoom or Facetime.

IV. **REMOTE NOTARIZATION**: During the COVID-19 pandemic the Governor of Delaware, John Carney, signed the Eleventh Modification to the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat which among other things, permitted the limited use of remote notarization of documents in connection with real estate transactions. The Eleventh Modification stated that "any notarial act required under Delaware law is authorized to be performed…by utilizing audio-visual technology" if the following conditions were satisfied:

A. Notarization is done by licensed Delaware Attorney in good standing ("Authorized Notarial Officer")

B. The Authorized Notarial Officer and all persons signing MUST be located within the State of Delaware at the time of signing. Parties must all affirmatively state that they are physically in Delaware.

C. The Authorized Notarial Officer must confirm the identity of the parties through personal knowledge and/or review of government issued photo identification, just as the attorney would in a traditional in-person closing.

Any document wherein the remote notarization was used, the Authorized Notarial Officer must include a Certificate of Notarial Act which includes language affirming the document(s) was/were "notarized and/or witnessed pursuant to the 11th Modification of the Declaration of a State of Emergency for the State of Delaware Due to Public Health Threat approved on April 15, 2020 and provide the Authorized Notarial Officer's name and Bar Number/License Number."

The Eleventh Modification also ordered the Recorder of Deeds to accept any remotely notarized document for recordation.

V. **POST CLOSING RESPONSIBILITIES**

A. Payment of Transfer Taxes

B. Recordation of Deed &Mortgage – Delaware is a pure race state.

C. Lender's package of documents plus lender's title commitment to be sent overnight

D. Payoff checks to be mailed by overnight delivery service or sent by wire

E. All taxes to be paid

F. Title Insurance Policies to be prepared and sent to Buyer and mortgage company

G. Satisfaction of Seller's Mortgage

Ethics and Real Estate Law

Charles Slanina, Esquire
Finger and Slanina, LLC

William Patrick Brady, Esquire
The Brady Law Firm, P.A.

Kathleen M. Vavala, Esquire
Office of Disciplinary Counsel

David A. White, Esquire
Office of Disciplinary Counsel

Mortgage and Residential Financing

Jenna L. Stayton, Esquire
Giordano Delcollo Werb & Gagne LLC

Mortgages and Residential Financing

Mortgages, generally

Definition: A lien against property that is granted to secure an obligation (such as a debt) that is removed upon payment or performance according to stipulated terms

Considered "high security for the payment of a debt"

- Malsberger v. Parsons

Parts: the debt itself and security for the debt

Security for the Debt

Borrower to sign a promissory note (which creates the debt) and a mortgage document (security instrument that specifies the property used as collateral)

Security instrument is recorded in County where property is located and tied to specific parcel ID

In case of default, lender can sue on the promissory note and foreclose on the mortgage lien, essentially "take back" the parcel itself.

- If loan is paid in full, Lender/Mortgagee signs and records "Satisfaction" to remove lien

Lien Theory v. Title Theory

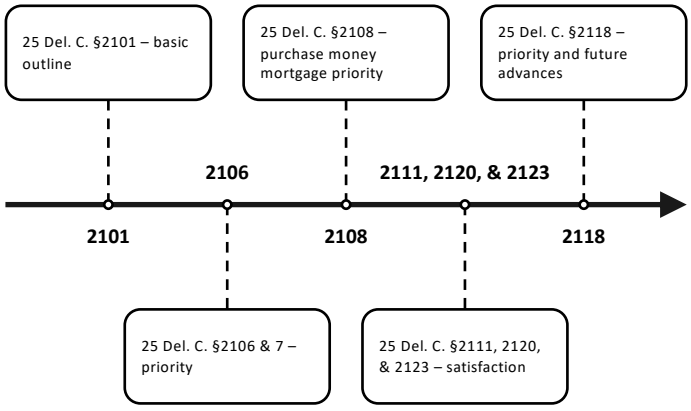
Delaware is a Lien Theory state

- Borrower/Mortgagor retains both legal and equitable title to property securing the debt.
- If Borrower/Mortgagor defaults on terms, Lender/Mortgagee must go through formal foreclosure process to get legal title

Title Theory

- Mortgage document itself transfers title

Relevant Statutory Sections



Recording & "Pure Race" Model

Priority based on time of recording, not date on document (unless mortgages are recorded at the same time)
• Handler Constr., Inc. v Corestates Bank

First in time, first in right
• Exception to Purchase Money Mortgages (25 Del C. §2108)

Purchase Money Mortgages

- Super Priority!
- Will always have 1st priority if recorded within 5 days of deed recording that secures the property to the mortgage
- Comes directly from Seller of property (Seller providing financing to Buyer/Borrower for purchase – Seller acts as mortgage lender and accepts payment)
- Requirements: IDENTITY, PURPOSE, TIMELINESS

Recording Requirements: §2101

Names of all parties	Amount of loan	Legal description/address	Signed & Sealed
Date	Notary Acknowledment	Parcel ID, "Prepared By" and "Return To"	

Assignment – 25 Del. C. §2109

Mortgage will automatically follow correctly transferred promissory note

Transfer from Mortgagee to another Mortgagee

- Endorse ORIGINAL note to another and deliver it; OR
- Execute a separate document of assignment (more common)

Transfer by Borrower/Mortgagor

- Sale of property and mortgage remains
- Liability – new owner assumes mortgage – both old and new owner personally liable for debt
  - If takes "subject to the mortgage" only original/old owner liable

Subordination of Mortgages

Generally, the ranking of multiple mortgages on the same parcel in order of importance

Why does this matter?

In foreclosure situation, may not have enough equity to pay off all creditors

Process of Subordination & Refinancing

Document prepared by lender to give to other lender

Refi notes:

- By paying off original loan, any home equity lines (HELOC) take 1st position
- Subordination is prepared to keep HELOC in second position

Be careful of making material modifications

- Can subordinate first mortgage to second
  - Examples: reduction in number of payments, but NOT reduction of interest rate

Release/Satisfaction – 25 Del. C. §2111

- Mortgage holder (Mortgagee/Lender) must record written document acknowledging payment of the debt in full
- If partial release – must reference prior recorded instrument number of recorded mortgage
- MUST INCLUDE:
  - (1)ID of parcel number, (2) property address, (3) specific request to "enter satisfaction of, and cancel of record", (4) names of Mortgagor & Mortgagee, (5) names of any assignees, if applicable, (6) book & page (recorded instrument number) of recorded mortgage, (7) Signature and SEAL of Mortgagee or Assignee
- Fines can apply if satisfaction isn't recorded within 60 days of payment

Satisfaction by Affidavit in Practice

25 Del. C. §2120

- Attorney authorization to force satisfaction
  - Must affirm with statement that
    1. Payoff statement was received
    2. Payoff was relied upon
    3. Attorney made or sent payment to pay the outstanding debt
- 60 days after debt paid, must give creditor 15 days to record their own satisfaction

25 Del. C. §2123

- Satisfaction after lapse of time
- 20/50 Rule:
  - Attorney can satisfy consumer mortgage after 20 years from date of maturity OR 50 years after date of latest recording.
    - Similar affidavit to §2120
- May soon be a 10/40 Rule

Types of Residential Mortgage Loans

Main Types

Conventional	Government Backed Securities • FHA • VA • USDA	Seller Financing
203k / Construction Loans	HELOC	Blanket

Conventional Loans

- "Most secure" as LTV ratios are lowest – 80/20 or as high as 97% LTV
- LTV – Loan to value – ratio of debt to the value of the property
- Loans with >80% LTV typically require private mortgage insurance (PMI) to be paid monthly to protect lender's interest in the property
  - "insurance policy" to provide lender with funds if borrower defaults
- Homeowner's Protection Act (HPA) – Lender required to automatically remove PMI at 78% LTV in conventional loans
- NOT Government insured

FHA Loans

- "Federal Housing Administration"
- Operates under HUD and is insured by HUD
- Borrower MUST pay 3.5% of sales price in closing costs, allows Seller to contribute up to 6% of sales price
- Mortgage insurance required to be paid monthly for the entire loan term
  - EXCEPT if borrower pays 10% down, mortgage insurance falls off after 10 years.
- Must have inspection and appraisal meet FHA standards

VA Loans

- Department of Veterans Affairs – loan too assist veterans with little to NO downpayment
- VA issues rules & regs on qualification, loan limits, etc.
- Must have VA-approved appraisal or "Certificate of Reasonable Value"
- Borrower responsible loan origination fees and funding fee to VA (% of loan amount) except in specific circumstances
- Seller allowed to pay up to 4% of loan amount if contracted
- Important note in practice: WDI & Broker Fees for Realtors

USDA Loans

- Guaranteed by Dept. of Agriculture
- 100% financing available for borrowers who haven't served in the military
- Available in "rural" areas – broad term
  - Rare in NCC, almost all of Kent & Sussex eligible
  - Generally, areas of less than 35k people
- Income limits per county:
  - New Castle - $111,100 (1-4)
  - Kent/Sussex - $90,300 (1-4)

Seller Financing

PMM & Super Priority!

25 Del. C. §314 – Contract Requirements for Seller Financing

- MUST include Amortization schedule, principal portion of each payment, remaining balance after each payment
- Buyer MUST acknowledge receipt of amortization schedule

Usually includes execution of deed in lieu (DIL) of foreclosure to protect Seller/Lender interest on property in case of default

- In practice: preparation of extra deed package and transfer affidavits

203(k) Construction Loans

Finance	Homeowner can finance purchase and cost of property rehab with 1 mortgage product
Loan	Max loan amount: purchase price (or appraised value of existing residence) + rehab amount… 96.5% of that total.
Rehab & repair	Rehab & repair done after closing, payment to contractors comes directly from lender on draw schedules • Lender must approve contractor choice and inspect work!

Home Equity Line of Credit (HELOC)

- Using the equity in the existing residence to your advantage
- HELOC becomes subordinate to original mortgage
- Usually a higher interest rate
- Can be a fixed loan amount or line of credit

Blanket Loans

More than 1 parcel or lot

Must reference all parcel ID's included!

Typically used by developer to finance subdivisions

Mortgage will have "partial release" clause to allow one parcel to released from mortgage at a time when sold.

Release/satisfaction of each parcel is recorded – document usually prepared by Mortgagee

The Delaware State Housing Authority (DSHA)

- 2nd mortgage on the property – signed at the time of closing for down payment help
  - Additional promissory note and mortgage executed
- No interest!
- Loan amount based on percentage of initial "primary" loan – usually 2-5%
- Record 2nd mortgage immediately after original primary mortgage
  - Don't forget to account for recording fees in Closing Disclosure!

Real Estate Legislation

Truth in Lending Act & Regulation Z (TILA)

Ensures borrowers know true costs of borrowing money

- Must be informed of all finance charges, like origination fees, service charges, points paid, interest, etc. BEFORE closing occurs.

Regulation Z enacted to help enforce TILA and applies to most lending types, including HELOC's, refinances, and even credit cards.

Created refinance "right of recission" period.

Real Estate Settlement Procedures Act (RESPA)

- Applies to ANY residential transaction involving new mortgage, specifically all federally regulated mortgage loans.
  - Does not apply to: business loans, loans for commercial or agricultural purposes, construction loans or temporary financing, loans on 25+ acres, vacant land (unless house will be built within 2 years), transaction financed solely by Seller's PMM
- Purpose: Have all parties be fully informed of all costs related to closing
- Prohibits kickbacks and fee-splitting for referrals in settlement services

RESPA continued…

- Prohibits Seller forcing Buyer to get title insurance from a particular company of Seller's choosing.
- Prohibits lender from collecting excessive amounts into escrow for property taxes and hazard insurance (Agg Adjustment on CD)
- Lender must provide borrower with info/notice of any servicing transfers within 15 days of transfer
  - If borrower makes payment to old servicer within 60 days of transfer, cannot be penalized.

TILA-RESPA Integrated Disclosure Rule (TRID)

- "Know before you owe" rule
- Required disclosure of Loan Estimate and Closing Disclosure to borrower
  - Required for transactions originating after 10/3/15
- Closing Disclosure
  - Replaced the HUD-1 ☹
  - Itemizes all charges to Buyer & Seller
  - Buyer MUST acknowledge preliminary closing disclosure sent by Lender at least 3 business days prior to closing, or closing cannot occur.
    - Changes in balancing that increase APR by more than 0.125% trigger a need to re-disclose a CD for acknowledgement.

Exhibit A

Assignment of Mortgage (Redacted)

20[redacted]00
Pages: 1 F: $42.00
07/[redacted] 08:29:13 AM
T20110[redacted]
Michael E. Kozlkowski
New Castle Recorder ASG

Parcel Tax ID: 26-[redacted]

Record & Return To and Prepared By:
CT Lien Solutions
100 Wood Hollow Drive, Suite 170
Novato, CA 94945
[redacted]
Loan #:[redacted]
Deal Name: [redacted]
[redacted]S22293ASG
DE, New Castle

ASSIGNMENT OF MORTGAGE

FOR VALUE RECEIVED, the receipt and sufficiency of which is hereby acknowledged, the undersigned, **WILMINGTON TRUST COMPANY** 1100 N MARKET STREET, WILMINGTON, DE 19890 herein ("Assignor") , does hereby grant, sell, assign, transfer and convey, without recourse unto **M&T BANK**, 1 Fountain Plaza, Buffalo, NY 14203 herein ("Assignee") that certain MORTGAGE referenced below;

Borrower: [redacted]
Recorded: 03/21/2003 Instrument: [redacted] **in New Castle, DE.**
Loan Amount: $68,[redacted]
Property: [redacted]**, WILMINGTON, DE 19801**

Together with the note(s) and obligations therein described or referred to, the money due and to become due thereon, with interest, and all rights accrued or to accrue under said document referenced above.
TO HAVE AND TO HOLD the same unto Assignee, its successors and assigns, forever, subject only to the terms and conditions of the document above-described.

IN WITNESS WHEREOF, Assignor has caused this Assignment to be executed and delivered, effective 07/08/[redacted].

WILMINGTON TRUST COMPANY

By:
Name: [redacted]
Title: Vice President

State of New York
County of Erie

On the 07/08/[redacted] before me, the undersigned, personally appeared Mark J. Crisafulli, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

[redacted]
Notary Public: [redacted]
My Commission Expires: [redacted]

[redacted]
No. [redacted]
Notary Public, State of New York
Qualified in Erie County
My Commission Expires [redacted]

Exhibit B

Sample Subordination Agreement

Tax Parcel No.:_____
Prepared by/Return to:
Giordano, DelCollo, Werb & Gagne, LLC
Jenna L. Stayton, Esquire
90 Lantana Drive
Hockessin, DE 19707

MORTGAGE SUBORDINATION AGREEMENT

THIS AGREEMENT made this _____ day of _____, 2021, between **_____**, (hereinafter called "Mortgagor"), of the one part, **and WILMINGTON SAVINGS FUND SOCIETY, FSB,** (hereinafter called "Mortgagee"), of the other part:

WHEREAS, Mortgagor granted Mortgagee a mortgage as collateral security for loans made by Mortgagee to Mortgagor. Said mortgage being dated _____ and recorded in the Office of the Recorder of Deeds, in and for the County of New Castle, Delaware, in Instrument No. _____, and said mortgage encumbering the following parcel of ground:

LEGAL DESCRIPTION

AND WHEREAS, _____ have requested that the aforesaid mortgage lien be made subordinate and Junior to a first mortgage lien to be recorded by Wilmington Savings Fund Society, FSB, in the amount of $_____ that will be dated _____, 2021 and is intended to be forthwith recorded in Delaware in the Recorder of Deeds Office in and for New Castle County.

NOW THIS AGREEMENT WITNESSETH, that the parties hereto, intending to be legally bound hereby, in consideration for the sum of One Dollar ($1.00) lawful money of the United States of America and certain other valuable consideration, the Mortgage, does Subordinate and makes Junior its mortgage lien as aforesaid described and duly recorded in the Recorder of Deeds in New Castle County to Wilmington Savings Fund Society, FSB. However, this subordination shall be limited solely to the mortgaged property described herefore.

WE HEREBY AGREE that this agreement shall be binding upon the party hereto, their heirs, executors, administrators, successors, and assigns.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first written above.

WILMINGTON SAVINGS FUND SOCIETY, FSB

BY: _____(SEAL)

ATTEST: _____(SEAL)

STATE OF DELAWARE :
: ss
COUNTY OF _____:

BE IT REMEMBERED that on the _____ day of _____, 2021, personally came before me, a Notary for the State and County aforesaid _____, who acknowledged _____self to be the _____ President of WILMINGTON SAVINGS FUND SOCIETY, FSB, a Federal Savings Bank, and that he as such officer, being authorized to do so, executed to foregoing instrument for the purposes herein contained by signing the name of the Corporation by _____self as _____ President.

_____
Notary Public
My Commission expires:_____

MORTGAGOR: _____(SEAL)

MORTGAGOR: _____(SEAL)

STATE OF DELAWARE :
: ss
COUNTY OF NEW CASTLE :

BE IT REMEMBERED that on the _____ day of _____, 2010, personally came before me, a Notary for the state an county aforesaid personally _____**,** known to me (or satisfactorily proven) to be the persons whose name are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.

_____
Notary Public
My Commission expires:_____

Exhibit C

Sample Mortgage Satisfaction

TAX PARCEL NO. _____
Prepared by and Return to:
Giordano, Delcollo, Werb & Gagne, LLC
5315 Limestone Road
Wilmington, DE 19808

MORTGAGE SATISFACTION PIECE

YOU ARE HEREBY requested and authorized to enter satisfaction of, and cancel record of, the following mortgages:

Mortgagor(s):

Mortgagee(s):

Date:

Amount: $

Address of Property:

Mortgage of Record: Document No. _____

IN WITNESS WHEREOF the said Mortgagee has executed this Mortgage Satisfaction Piece this _____ day of October, 2021.

Witnessed in the
Presence of:

_____ BY:_____
Witness Printed Name of Mortgagee

STATE OF)
) SS:
COUNTY OF)

This instrument was acknowledged before me on this _____ day of October, 2021 by _____, Mortgagee.

_____
NOTARY PUBLIC.
My Commission Expires: _____

MORTGAGES AND RESIDENTIAL FINANCING

Delaware State Bar Association
Fundamentals of Real Estate CLE Seminar
Jenna L. Stayton, Esquire
Giordano, DelCollo, Werb & Gagne, LLC
jenna@gdwlawfirm.com
302-234-6855

1. Mortgages
    a. Generally
        i. Definition:
            1. A lien against property that is granted to secure an obligation (such as a debt) that is removed upon payment or performance according to stipulated terms.
            2. Considered "high security for the payment of a debt, or for performance of some other condition…" Malsberger v. Parsons, Del Super., 75 A 698, 701 (1910).
        ii. In order to satisfy the Statute of Frauds, MUST be in writing.
        iii. Parts:
            1. The debt itself
            2. Security for the debt
                a. Borrower must sign a promissory note (financing instrument – creates the debt) and a mortgage (security instrument – specifies the property used as collateral)
        iv. A mortgage is a lien on the real property of the borrower/debtor/mortgagor.
            1. Borrower received a loan in return for the signing of a promissory note and mortgage to the lender (AKA Mortgagee)
        v. Voluntary, specific lien on the property itself, which is recorded in the County the property is located and is tied to the parcel identification number (parcel ID).
        vi. If borrower defaults, the lender can sue on the promissory note and foreclose on the mortgage lien, and "take back" the parcel itself.

vii. If loan is paid in full, the Lender/Mortgagee signs and records a "satisfaction" of mortgage, releasing the lien on the property. The typically one-page document that is recorded is evidence of the removal of the Lender/Mortgagee's security interest in the property.

viii. Foreclosure occurs when borrower/debtor defaults on loan or its terms.

b. Lien Theory v. Title Theory

i. Delaware is a LIEN THEORY State. See, In re Agostini, Del. Super., 33 A.2d. 306 (1943); Malsberger v. Parsons, Del. Super., 75 A. 698 (1910).

ii. Lien Theory:

1. Borrower/Mortgagor retains both legal and equitable title to the property that serves as security to the debt.
    a. The lien on the property (recorded mortgage) held by Lender/Mortgagee serves only as collateral for the loan.
    b. If Borrower/Mortgagor defaults, Lender/Mortgagee must go through formal foreclosure proceedings to obtain legal title.
2. Mortgagee/Lender has a lien secured against the property, which can pass to heirs/assigns upon death to executor.

iii. Title Theory:

1. The mortgage document itself transfers legal title of the property to the Lender/Mortgagee who retains it until the mortgage has been satisfied or foreclosed upon.
    a. Think – receiving the title to your car in the mail after it is paid off.

2. Relevant Statutory Sections

a. 25 Del. C. §2101, et. seq.

i. §2101 – basic outline/description of mortgage language

1. Must be 18 years old and have legal capacity
    a. In practice, I have borrower execute an affidavit stating this, which I notarize.

ii. §2106 & §2107 – priority of mortgages at time of recording

iii. §2108 – priority of Purchase Money Mortgages

iv. §2111, 2120, & 2123 – Satisfaction requirements and tools

v. §2118 – priority of mortgages and instruments securing future advances/modification

3. Recording

   a. Delaware follows the "Pure Race" Recording model

      i. 25 Del. C. §2106: "A mortgage, or a conveyance in the nature of a mortgage, of lands or tenements shall have priority according to the time of recording it in the proper office, without respect to the time of its being sealed and delivered, and shall be a lien from the time of recording it and not before."

         1. Priority (ranking) of mortgages or liens are determined based on time of recording – NOT date of mortgage, unless mortgages are recorded at the same time.

            a. See, Handler Constr., Inc. v Corestates Bank, Del Supr., 633 A.2d 356 (1993).

         2. "First in time, first in right."

            a. See, First Mortgage Co. of Pennsylvania v. Fed. Leasing Corp., 456 A.2d 794, 795 (Del. 1982).

      ii. **Exception**: Purchase Money Mortgage (PMM)

         1. Super Priority!
         2. PMM's will always have 1st priority if recorded within 5 days from the date the deed to the property secured by the mortgage is recorded, even if other liens or judgments were recorded first.

            a. See Winchester v. Parm, Del Ch. 141 A. 271 (1928); Masten Lumber and Supply Co. v Suburban Builders, Inc., Del Super. 269 A.2d 252 (1970).

         3. These type of mortgages come DIRECTLY from the seller, i.e. Seller financing – NOT a standard mortgage lender.
         4. Subordination agreements are allowed – no "magic language" necessary.
         5. Requirements to create:

a. Identity – Seller of property must provide the loan to the Buyer
b. Purpose – mortgage is given for the purpose of securing the purchase money for the property for Buyer
c. Timeliness – recording of mortgage MUST be within 5 days of Buyer's recorded deed.

b. Recording Requirements of Mortgages
    i. 25 Del. C. §2101 – Form of Mortgages & Recording Requirements
        1. Names of parties
            a. Mortgagor/Borrower & Lender/Mortgagee
        2. Amount of loan AKA principal amount
        3. Legal description of parcel & address
            a. Legal is typically separate page at end of document
        4. Signature & Seal of Borrower/Mortgagor
        5. Date
        6. Acknowledgement
            a. Typically via notary.
            b. Defective acknowledgment on a mortgage can be rendered valid via 25 Del. C. §132
        7. Mortgage document must include:
            a. Tax Parcel ID.
                i. i.e. 08-024.40-070
            b. Name and address of who prepared document
            c. Name and address of where to return document after recording
c. E-filing in all three counties now available
d. "Seal"
    i. Printing (SEAL) next to a signature is sufficient
        1. Mortgages **NOT** executed under seal are not enforceable at law, but **ARE** enforceable in equity (few legal defenses available to borrower, but can raise ALL equitable defenses)

e. IN PRACTICE: if a parcel straddles two counties, documents must be recorded in both.

4. Assignment
    a. Statutory requirements – 25 Del C. §2109
        i. 1 witness, SEAL acknowledgment
        ii. Mortgage will automatically follow a properly transferred promissory note.
    b. Transfer of promissory note to another Mortgagee/Lender
        i. Can occur by:
            1. Endorsing the ORIGINAL note and delivering to new mortgagee
                a. New mortgagee becomes "holder in due course" meaning new mortgagee can take note free of any personal defenses that could have been raised against the original note holder (lender)
            2. Executing a separate document of assignment.
                a. Exhibit A
    c. Transfer by Borrower/Mortgagor
        i. Sale of property – Mortgage remains on parcel if properly recorded and not satisfied.
        ii. Liability of debt
            1. If new owner assumes the mortgage, both new and old owner are personally liable for the debt.
            2. If new owner takes "subject to the mortgage", only original owner is liable.

5. Subordination of Mortgages
    a. Definition
        i. Generally, the ranking of mortgage loans on a parcel or order of priority or importance. With more than 1 mortgage lien on a property, both are secured by collateral (property itself) at the same time – so lien position needs to be assigned to all loans.
        ii. In a foreclosure situation, home equity may not be enough to pay off all loans, thus the importance of priority – as typically only the first is able to

be paid off completely. Second lien (and each other further down the subordination chain) is paid off with any/all excess.

b. Process
    i. Document prepared by the lender to provided to the other lender for execution.
        1. Reference names of all parties, parcel number, recorded instrument number of original mortgage.
    ii. Recorded at time of new mortgage recording.
        1. IN PRACTICE: If lender asks attorney to record, be sure to collect for recording costs.
c. Exhibit B
d. How Subordination can affect Refinancing
    i. By paying off original mortgage, any home equity lines of credit (HELOC) automatically bump up into first lien position, and new mortgage would become second lien.
        1. Shockingly, this doesn't sit well with the new mortgage lender, so a subordination agreement is prepared and allows the new mortgage to take first lien position and HELOC moves to second position.
e. Material Modifications to the Mortgage & Subordination
    i. If a change/modification to the first mortgage occurs AFTER the date of recording of a second mortgage, the change/modification will subordinate the first mortgage to the second.
        1. A "material modification" example is a reduction in the number of payments or advances, but not a reduction in interest rate.

6. Release/Satisfaction
    a. Statutory Requirements – 25 Del. C. §2111 (Exhibit C)
        i. Mortgage holder (Mortgagee/Lender) must record written document acknowledging payment of the debt in full
        ii. When a full or partial release of the mortgage is recorded, it must reference the prior recorded instrument number of recorded mortgage.
        iii. MUST INCLUDE:

1. Identification of tax parcel number
2. Property address
3. Specific request to "enter satisfaction of, and cancel of record" the mortgage
4. Names of both Mortgagor and Mortgagee
5. Name of Assignee, if applicable
6. Book and Page (recorded instrument number) of the recorded mortgage
7. Signature and SEAL of Mortgagee or Assignee

iv. Fine of "not more than $1,000.00" for failure to record satisfaction piece by Mortgagor within 60 days of payment.

v. All 3 counties require the tax parcel number to appear on the top portion of the document, along with names and addresses of who prepared the document and where it is to be returned after recording.

b. 25 Del. C. §2118 - Priority of mortgages and other instruments securing future advances and certain other advances; modifications of mortgages and other instruments.

i. Generally, a mortgage only secures the debt which is existing at the time the mortgage is executed/delivered/recorded.

1. Mortgage document must EXPRESSLY state the intention to include future advances
    a. The lien status of the entire debt, including any future advances, will relate back to the date of mortgage recording.
2. Allows the recorded mortgage to have priority and also to use funds to pay for escrowed items: taxes, insurance payments, etc. that may have priority over the mortgage debt in a default situation.

c. 25 Del. C. §2120 – Attorney authorization to satisfy mortgage

i. Attorney can file affidavit to force satisfaction of mortgage

ii. Must reference recording identification number of mortgage to be satisfied and statement from attorney who paid off the mortgage at settlement that:

1. There was a payoff statement received

2. The payoff statement was relied upon
3. Attorney made or sent payment to pay the outstanding debt

iii. Can file after 60 days after debt has been paid

iv. Must give 15 days notice via certified mail to creditor and give opportunity to record their own satisfaction piece.

d. 25 Del. C. §2123 – Satisfaction After Lapse of Time

i. Commonly referred to 20/50 rule in practice

ii. Attorney can satisfy a consumer mortgage after the lapse of 20 years from the date of maturity OR 50 years after the date of latest recording (if there is no mentioned or fixed maturity date)

iii. Must record similar affidavit as described in §2120

1. Attorney must send via certified mail to last Mortgagee of record a request to immediately satisfy mortgage – 60 days must pass – and mortgage still appears on title.
2. Affirm that last Mortgagee of record has not responded or instructed that mortgage is still valid/current or not satisfied.
3. That the appropriate passage of time (20 years after maturity or 50 years from last recording) has come and gone.

iv. **NOTE**: Real Estate Bar Section is currently trying to amend this to change maturity to **10** years and **40** years after latest recordation, and to restrict this to mortgages NOT from a State Agency, i.e. The Delaware State Housing Authority.

7. Types of Residential Mortgage Loans

a. Generally classified by loan to value ratio (LTV)

i. Ratio of debt to the value of the property

1. Therefore, the lower the ratio of debt to value, the higher the borrowers down payment or cash brought to closing.
2. For the lender, a larger down payment means a more secure loan, minimizing their risk.

ii. **Value can mean the sales price or the appraised value, whichever is lower.

b. Conventional
    i. Viewed as most "secure" loans because LTV ratios are typically the lowest.
        1. Generally an 80/20 LTV
        2. Can be as high as 97% LTV
            a. Loans with more than 80% LTV typically require private mortgage insurance (PMI) to be paid monthly to guarantee and protect the lender's interest in the property.
            b. PMI – essentially an insurance policy that provides lender with funds in the event a borrower defaults on the loan.
                i. Allows lender to assume more risk for LTV ratios to be higher in a conventional loan scenario.
                ii. The Homeowner's Protection Act of 1998 (HPA) requires the lender to automatically terminate PMI in conventional loans when the borrower reaches 78% LTV.
                    1. Buyer can order cancelation at 80% of the original purchase price or 75% LTV after 3-5 years, and 80% LTV after 5+ years if you use new home value.
                    2. Must ask in writing, prove home is at 80% LTV (usually requires an appraisal or analysis of comparable homes in the area), and have good payment history.
    ii. NOT government insured or guaranteed
c. Government Backed Securities
    i. FHA – "Federal Housing Administration"
        1. Operates under the Department of Housing and Urban Development (HUD) and is insured by HUD.
        2. Borrower MUST pay at least 3.5% of sales price in closing costs, Seller can contribute up to 6% of sales price in closing costs.

3. Mortgage insurance is required to be paid monthly for the entire loan term.
    a. Except: If borrower pays 10% down on FHA loans the PMI goes away (falls off or is removed from monthly payment) after 10 years
4. FHA can sometimes limit lender fees and specify how closing costs paid by the Seller and the down payment may be paid.
    a. An upfront mortgage insurance premium (MIP) is also charged at the time of closing, in addition to the monthly MI.
        i. Typically 1.75% of loan amount up front (loan amount less than $625k)
            1. .85% annually (1/12th collected each month) if LTV is >95%
            2. .80% annually (1/12th collected each month) if LTV is <90%
5. FHA Loan limits in Delaware differ per county
    a. New Castle: $431,250 (currently)
    b. Kent: $356,362 (currently)
    c. Sussex: $356,362 (currently)
6. Must have an appraisal conducted by an approved FHA approved appraiser
7. FHA loan can be "assumed" by qualified buyer/borrower, but assumption rules vary, depending on the date of the original loan origination.

ii. VA Loans

1. Dept. of Veteran's Affairs – assists veterans with little to no down payment
2. VA issues rules and regulations needed to qualify, loan limitations, and conditions under which the loan can be guaranteed.
    a. i.e. – Borrower must use residence as primary residence and apply for certificate of eligibility.

i. The certificate provides maximum guarantee to which veteran is entitled but must still qualify for the loan with the lender to ensure repayment.
ii. If you have "full" eligibility, the veteran may not have ANY closing costs at the time of closing, and sometimes can receive back their earnest money deposit.

3. Must have VA-approved appraisal, called a "Certificate of Reasonable Value" (CRV)
4. Borrower pays loan origination fees to lender and a funding fee (percentage of loan amount) to the Dept. of Veteran's Affairs.
    a. No funding fee for the following circumstances:
        i. Veteran is receiving VA compensation for a service-related disability
        ii. Veteran who would be entitled to receive compensation for a service-connected disability if the veteran didn't receive retirement or active duty pay, or
        iii. The surviving spouse of a veteran who died in service or from a service-connected disability.
5. Borrower veteran is NOT allowed to pay for wood destroying insect (WDI) inspections OR Realtor broker fees.
    a. WDI is reimbursed by Seller on Closing Disclosure
6. Seller allowed to pay up to 4% of loan amount in prepaid closing costs for veteran if contracted that way.

iii. USDA

1. United States Department of Agriculture guarantees the loan
2. Another $0 down option for borrowers who haven't served in the military (100% financing available)
3. Available only in "rural" areas – this term is relatively broad, as many suburbs can be considered rural.

a. Most of NCC is excluded, almost all of Kent and Sussex can qualify
b. Generally, must be area of less than 35,000 people.

4. Income limits apply, different in each of Delaware's counties.
    a. New Castle: $111,100 (1-4 people)
    b. Kent: $90,300 (1-4 people)
    c. Sussex: $90,300 (1-4 people)

d. Seller Financing
    i. Purchase Money Mortgage & Super Priority
    ii. Seller, in some way, allows Buyer/Borrower to borrow money used for the purchase of the Seller's property.
    iii. 25 Del. C. §314
        1. Contract Requirements for Seller Financing
            a. MUST include Amortization Schedule for all payments to be made
                i. MUST include principal and interest portion of each payment, and remaining principal balance after each payment
            b. There are online tools that you can use to create this if necessary
            c. Failure to have Buyer/Borrower "acknowledge" (sign a document saying amortization schedule was received and reviewed) CAN MAKE CONTRACT VOIDABLE by either party prior to settlement. ☹
    iv. Typically, a Deed in Lieu (DIL) of Foreclosure is executed
        1. DIL – somewhat of an "equitable" concept, where Mortgagor/Borrower signs a deed to the property as collateral for the borrowed funds from the Mortgagee/Lender. Deed from borrower back to lender/seller/mortgagee is recorded if borrower defaults on loan terms prior to mortgage satisfaction.

e. 203(k) AKA Construction Loan

i. Enables homeowners to finance both the purchase and cost of rehabilitation of existing home with a single mortgage product OR finance the rehab of their existing home.
ii. Maximum loan amount is calculated by taking purchase price (or appraised value of existing residence) PLUS the rehab amount – can borrow up to 96.5% of that amount.
iii. Rehab and repair work is done after closing
    1. Loan amount is held in lender's escrow account – paid out according to a draw schedule directly to contractor as contractor completes work.
    2. Lender MUST approve licensed contractors that are going to do the rehab work.
    3. Lender typically inspects work before draws are made and disbursed, contractors usually provide waivers for mechanics liens for work covered by each draw payment.

f. Home Equity Line of Credit (HELOC)
    i. Source of funds is the equity built up in a home
    ii. Original mortgage remains in place, HELOC is junior to original mortgage
    iii. Typically a higher interest rate, but only amount borrowed is subject to this higher rate.
    iv. Can be a fixed loan or a line of credit
        1. Line of credit can be used at the will of the borrower

g. Blanket Loans
    i. Covers more than one parcel or lot
    ii. Usually used by developer to finance a subdivision
    iii. Mortgage document typically includes "partial release" clause to allow developer to pay off one specific parcel (as it is developed, home is built, and subsequently sold) at a time.
    iv. Mortgagee will provide settlement attorney specific documentation to "release" a specific parcel, release is recorded.

8. Delaware Specific Loan Products

a. Delaware State Housing Authority
    i. A second mortgage on the residence, signed at the time of closing for down payment assistance
        1. Second mortgage has no interest – amount of loan is based on percentage of original "primary" loan amount – usually between 2-5% of overall loan amount
    ii. Eligibility based on income (difference between New Castle and Kent/Sussex), minimum credit score (620), and maximum loan amount on "primary" loan is $417,000.00.
    iii. Additional documents at closing – 2nd promissory note and second mortgage signed.
    iv. This second mortgage must be repaid (but at 0% interest!) upon the sale, transfer, refinance of the original loan, or when the home is no longer your primary residence.
    v. IN PRACTICE: Remember to account for additional recording fees in Buyer/Borrower's closing disclosure for DSHA Mortgage.

9. Real Estate Legislation
    a. Truth in Lending Act & Regulation Z (TILA)
        i. Enacted by the Federal Reserve Board to ensure that borrowers are aware of the true cost of borrowing money and obtaining credit.
            1. Now enforced by the Consumer Financial Protection Bureau (CFPB)
        ii. Under TILA, borrower must be fully informed of all finance charges before the transaction is completed, including fees for origination, service charges, points, and interest.
        iii. Regulation Z was enacted to help enforce TILA and applies to mortgages, HELOC's, reverse mortgages, credit cards, refinances, etc.
        iv. Creates strict rules for advertising in media
            1. Can get around this with a general phrase like "flexible terms available"
        v. Allows for borrower's 3 day "right of recission" in a refinance.

b. Real Estate Settlement Procedures Act (RESPA)
    i. Applies to any residential transaction involving a new first mortgage loan or a second/other subordinate mortgage, specifically all federally regulated mortgage loans
        1. Does not apply to business loans, loans for a commercial or agricultural purpose, construction loans or temporary financing, loans on large properties (25+ acres), vacant land (unless a house will be put on the property in 2 years), a transaction financed solely by a Seller's PMM
    ii. Designed to ensure that the buyer AND seller are fully informed of all costs related to the closing
    iii. Prohibits kickbacks and fee-splitting for referrals of settlement services (Section 8)
    iv. Prohibits Seller from requiring Buyer to get title insurance from a particular company (Section 9)
    v. Prohibits lender from requiring excessive escrow deposits for property taxes and homeowners' insurance (Section 10)
        1. Lender can only hold up to $1/6^{th}$ of annual disbursements of escrow as "cushion" in escrow account.
        2. Lender is required to preform annual escrow analysis, must return any sum over $50 in excess to borrower
    vi. Must provide borrower with information of servicing transfer of note within 15 days of transfer, and if borrower makes payment to old servicer within 60 days of transfer, borrower cannot be penalized.
c. TILA-RESPA Integrated Disclosure Rule (TRID)
    i. "Know before you Owe" rule
    ii. Requires disclosure of two prepared forms: Loan Estimate and Closing Disclosure
    iii. Required for transactions originating after October 3, 2015
    iv. Responsibility of lender to implement the forms and the timed disclosure of them requires cooperation between the lender and settlement attorney.

v. Closing Disclosure:
    1. Replaces the HUD-1 document
    2. Itemizes all charges paid by both the Buyer and Seller, whether the are required to be paid by the lender or someone else.
    3. Borrower MUST receive a preliminary Closing Disclosure 3 business days prior to closing, which MUST be acknowledged or signed by the borrower.
        a. If borrower fails to acknowledge or sign CD, the 3 day period starts over.
        b. If charges on the closing disclosure through the "balancing" process increase the APR by more than 0.125%, there must be a new CD issued for acknowledgement.
    4. IN PRACTICE: when title work is sent to the lender, have your Closing Disclosure be as complete as possible to avoid surprises to the borrower, and this can reduce the time of balancing.
        a. Technically, TRID's 3 day rule applies only to the Borrower and their mortgage company, and not the Seller. However, Seller's often ask for a copy of their Closing Disclosure in advance of closing.
        b. Try to avoid providing a "non-balanced" Closing Disclosure to the Borrower or their realtor – as it is the mortgage company's responsibility to issue final documents and final amounts needed for closing. Avoid the confusion if you can; there is nothing worse than a Borrower coming to your office with incorrect amounts of money because you told them one number and a lender finalized something different.

Liens on Real Estate

Thomas P. Carney, Esquire
T. Carney Sussex Law, LLC

SUMMARY OF LIENS AGAINST REAL PROPERTY

AND LEGISLATIVE UPDATES

Judgment lien – a judgment lien results from a monetary judgment entered by a court. The judgment itself can be entered by any court of competent jurisdiction. The judgment becomes a lien when it is entered in Office of the Prothonotary in a county in which property owned by the defendant is located.

A judgment does not have life expectancy. It is eternal, like the sun and the moon. However, there is a common law presumption of payment after twenty years.

A judgment does have a statutory limitation as a lien against real estate. According to 10 *Del.C.* §4711 a judgment is a lien against real estate for a period of ten years unless prior to the expiration of the term, the judgment is renewed. When renewed, the lien continues for an additional term without interruption and the priority of the judgment lien relates back to the original date of entry. The judgment can also be renewed after its expiration; however, the priority of the lien does not relate back and, instead, the priority date is the date of renewal. 10 *Del.C.* §§4712, 4714.

There are exceptions. This subchapter does not defeat a writ of execution if it was issued prior to the expiration date and it does not defeat a judgment upon a mortgage or mechanic's lien. 10 *Del.C.* §4716(a).

Delaware is a race recording statute. If a property is encumbered by more than one lien, and the property is sold at sheriff's sale in execution of a judgment or mortgage, the proceeds will be used to pay the liens in order of seniority regardless of which lienholder is foreclosing except liens which have been created by mortgages. *CACH,*

LLC v. Eastern Savings Bank, FSB, N10A-08-015 WCC (2011); Affirmed and remanded Eastern Savings Bank, FSB, v. CACH, LLC, Supreme Court, 88-2012.

Judgment for fines costs and restitution – a judgment for fines, costs and restitution imposed by a court in a criminal proceeding can be entered in the civil judgment docket of the Superior Court. 11 *Del.C.* §4101(b). That section also provides that the judgment is exempt from the expiration and renewal provisions of 10 *Del.C.* §4711, but it does not apply any other expiration and renewal provisions. (*See Legislative Updates section on proposed amendments hereto.*)

Tax liens – Tax liens can be imposed for any number of federal, state and local taxes. The method and priority vary according to the tax.

Federal Tax – A federal tax lien is imposed for nonpayment of federal taxes by filing a notice in the Office of the Recorder of Deeds. The lien lasts for period of ten years and one month from the date of assessment of the tax, not the filing of the notice. A single notice can be filed for a variety of taxes and a range of tax years, so portions of the lien can expire over time.

The lien is effective as of the date of filing even though there may be multiple tax assessment dates.

What about the application of a federal tax lien to property owned by a married couple as tenants by the entirety? Under traditional state law doctrine, a judgment lien must be against the married couple collectively to attach to a property held as tenants by the entireties. However, the Internal Revenue Service has overruled state laws regarding ownership of property and attached the property interest of one spouse even if the property is held as tenants by the entirety. *United States v Craft*, 535 U.S 122 (2002). In

his dissenting opinion to the 6-3 decision, Justice Thomas noted that the decision "(a) ignored the primacy of state law, (b) eviscerated the distinction between 'property' and 'rights to property' that was drawn by [26 U.S.C §] 6321, and (c) conflicted with an unbroken line of authority from the Supreme Court, the lower courts, and the IRS;…". The majority had a difficult time comprehending the concept of entireties, concluding that if the property did not belong to husband and did not belong to wife, then it belonged to no one.

State Tax – The State of Delaware can also file a notice of lien for unpaid taxes. 30 *Del.C.* §554. This section also exempts the judgment from the ten-year expiration and renewal provisions of 10 *Del.C.* §4711, and, it imposes a twenty-year expiration date. Like the federal lien, the state lien has priority only as of the date of its recording. Unlike the federal government, the State recognizes the unity of marriage and the usual rules of property owned by tenants by the entirety apply.

Property Tax – Liens for delinquent county and municipal property taxes are filed by tax monitions. Unpaid taxes have a lien priority with respect to the specific property for which the tax is due and have priority as a general judgment lien with respect to other property of the same defendant. Local governments can also impose liens for claims relating to other issues, such as failing to maintain property in compliance with building and maintenance codes, or for maintaining an abandoned or unoccupied property (i.e. City of Wilmington). Unpaid fees for government utilities can also be liens against the serviced real estate.

Common Element Fees – Condominiums own common elements which are maintained by the condominium owners through the condominium council. Many older

non-condominium residential developments and almost all new developments have some type of common interest ownership property generally in the nature of active or passive open space.

By virtue of condominium or maintenance covenants, the governing body of the development is authorized to assess property owners for the costs of maintaining the common elements. The unpaid fees for a particular unit or lot create a lien against that unit or lot.

Generally the covenants provide that the lien is subordinate to a lien of mortgage, but under certain conditions the Delaware Uniform Common Interest Ownership Act grants a priority to the association for an amount not to exceed the aggregate customary common expense assessment against such unit for six months. 25 *Del.C.* §81-316(b)

Uniform Commercial Code – Security interests in real estate can be created by UCC-1 financing statements ranging from fixtures to crops to extracted minerals to mobile homes.

Mechanic's Lien –A person who provides labor a material for a structure and is owed payment may obtain a lien against the structure and property on which the structure is located.

The mechanic's lien is a creation of statute. Since the mechanic's lien statute is in derogation of the common law, the statute is strictly construed. The timing and filing requirements are specific and precise compliance with the code is required.

The right to a mechanic's lien cannot be waived as part of the contract or agreement. Any such provision is against public policy and unenforceable. 25 *Del.C.*§2706(b).

In addition, the code has been amended, most importantly from our standpoint, with respect to limitation for filing. Lien actions must be filed within 120 or 180 days of certain events. 25 *Del.C.*§2711. Those events, though specified, are not always observable in life.

Since a buyer or buyer's attorney or title insurer may not know at time of settlement if lien times have expired, protection is always required. 25 *Del.C.*§2707 provides a good faith buyer protection for residential properties and the question is: what constitutes good faith. Many attorney's would take the same precautions in residential as in non-residential and that is insist upon the release of liens as specified in 2702(2). But the statute specifies that a buyer can accept a signed release of liens **or** an affidavit of payment. For reference, see *Swift Flooring Contracting, LLC v. Zeccola Builders, Inc.,* K10L-02-006 JTV (September 5, 2010).

The other significant event with respect to a mechanic's lien is the date the work was commenced or materials first delivered. It is this date that determines the priority of the lien.

Of course, no good rule lacks an exception. Regardless of the priority of a mechanic's lien, it will be subordinate to a mortgage if at least one-half of the proceeds of the mortgage were used to pay for labor and materials in the structure. *25 Del.C.* §2718

Mortgage – Everyone here is familiar with a mortgage. Although the topic of mortgages was covered in previous sections of the seminar, it nevertheless comprises a large section of liens on real estate so we will quickly cover the basics of mortgage. I have heard a mortgage defined two ways, as a conditional conveyance of the subject real estate and as a conveyance of a security interest in the subject real estate. The acceptable

form of mortgage is set forth in 25 *Del.C.* §2101 although it is not exclusive. *Handler Construction Inc. v. CoreStates Bank, N.A.*, 633 A.2d 356 (Del. 1993). There are typically two areas of screw-ups (legal term) in mortgages: 1.) The proper parties did not sign; 2.) there is no legal description attached.

The names on the mortgage must be the same as the names of the party or parties who hold title to the property. For various reasons, the borrower may not be identical to the title holder. John and Betty Smith own the real estate, but only John is the borrower. The note will be in John's name, but both parties must be mortgagors. Bank computers do not have the ability to figure this one out. It may also be that one of the property owners died. If there is no estate to establish the death and the survivor interest, an estate should be filed. I have actually seen a mortgage document to be signed by "John A. Smith, deceased". Fortunately, the person conducting the closing did not attempt to comply.

As unbelievable as it may seem, sometimes mortgages get recorded without descriptions. In a footnote in *Handler*, the Supreme Court held that certain substantive defects may render a document entirely unenforceable as a mortgage including a grossly inadequate description of the premises. The court did not define "grossly inadequate". The general rule is whether the identity of the property can be discerned from the information contained with the four corners of the document.

A mortgage was held invalid where it included no metes and bounds description, no street address, no tax parcel number and no reference to a recorded instrument which could provide the missing information. *In re Poteat,* 176 B.R. 734 (Bankr. D. Del. 1995). But valid when the description provided that the property was at the intersection of

Chestnut and VanBuren Streets but did not identify the city, county or state. *In the Matter of 1025 Associates,* 106 B.R. 805 (Bankr. D. Del. 1989).

The Chancery Court was presented with a deed that had no description nor any other information that would have enabled a reader to identify the property being conveyed. There was a handwritten tax parcel number which was added after execution. The court never decided the issue of the sufficiency of the tax parcel number as an adequate description since it voided the deed on other grounds. *Faraone v. Kenyon,* C.A 18956 (Del. C. 2004, Jacobs).

If there are defects in the mortgage which could jeopardize its viability, it may be better to file an equitable foreclosure in the Court of Chancery since Chancery has the power to disregard the defects while the court of law does not. But the plaintiff must choose, and once chosen, the other avenue is considered to have been constructively abandoned. *Monroe Park v. Metropolitan Life Ins. Co,* 457 A.2d 734 (Del. 1983).

One defect which previously consigned a mortgage proceeding to Chancery was the fact that the document was not under seal. The code has recently been amended to grant jurisdiction to Superior Court.

Purchase Money Mortgage – In Delaware, a purchase money mortgage is defined by 25 *Del.C.* §2108 as a mortgage from the buyer to the seller securing a portion of the purchase price. It has priority over judgment liens against the mortgagor and over any other lien created or suffered by the mortgagor with respect to the purchased property if it is recorded within five days of the recordation of the deed. Satisfaction of the statutory identity and timeliness requirements can be presumptively proven by reference to the recorded deed and mortgage instruments. The presumption can be overcome, but

the burden is on the party opposing the presumption to plead and prove the mortgage is not a purchase money mortgage i.e the funds were loaned for a purpose other than the to finance the buyer's purchase of the property. *Galantino v. Baffone*, 46 A.3d 1076 (Del. 2012)

Confusion – There are two court decisions pertaining to mortgages which warrant attention; *Gamles Corp. v. Gibson* Supreme Court 96, 2007 (Superior Court 93J-03-251J) and *Iacono v. Pennington*, N11L-03-216 CLS.

Gamles Corp. v. Gibson – It used to be that the note and the mortgage securing the note created different rights and obligations. Each gave rise to a separate remedy, the note an in personam action and the mortage an in rem action. After *Gamles v. Gibson*, this distinction appears to have evaporated. Gamles held a note from both Gibsons, father and son and secured by a mortgage on property owned by son. On default by Gibson, Gamles sued on the note and obtained a judgment against both Gibsons. Gibson Jr. died. Gamles executed on the judgment by filing a wage attachment against Gibson the elder. After ten years, a dispute arose regarding the judgment and the collection. On appeal, the Supreme Court ruled, among other issues, that since the judgment was based upon a mortgage note, pursuant to §4716 the judgment was exempt from the limitations of §4711.

Iacono v. Pennington – There is no written opinion from the court on this one, but the record gives a fairly good presentation of the history and decision. Mr. Pennington bought a home for $345,000.00. The deed was dated April 7, 2006 as was the $280,000.00 note and mortgage in favor of GMAC which was subsequently assigned to Greentree. Pennington also executed a note in favor of Iacono in the amount of

$80,000.00 secured by a mortgage, presumably on the same property, but there was no description contained in the mortgage. The Iacono note and mortgage were dated April 13, 2006 and the mortgage was recorded on April 19, 2006. For reasons known to God, the deed and the GMAC mortgage were not recorded until April 25, 2006. Both Iacono and Greentree filed foreclosures. Pennington filed for bankruptcy and things were held up a while, but on September 24, 2013, Pennington and Iacono entered a stipulation of judgment which, among other things, agreed that the mortgage was a valid mortgage against the property. The title company on behalf of Greentree intervened and filed a motion to stay the sheriff's sale asserting that the Iacono mortgage was invalid. Iacono argued first in time first in right based on time of recording. The property was sold at sheriff's sale for $175,000.00. Greentree opposed confirmation. The Court ruled on February 18, 2014 issuing a two sentence order: The sheriff's sale is confirmed. The Iacono mortgage is a valid first lien and has priority over subsequent mortgages. There are circumstances of this case which support the position that this is a unique decision and applicable only to this case and not to be broadly relied upon.

Gamles v. Gibson background information

In 1991 Selma Goldstein was successful bidder at sheriff's sale of 5 Center Street, Hamilton Park, New Castle

Selma assigned her bid to Donald Gibson, Jr.

Sheriff executed and delivered the deed for 5 Center Street to Donald Gibson, Jr, assignee of Selma Goldstein. Deed Record 1163, Page 207

Donald, Jr. executed a mortgage in favor of Selma Goldstein securing a debt in the amount of $40,000.00. Mortgage Book 1921, Page 344. Looks like note was executed by both Donald, Jr. and Donald, Sr.

August 31, 1993, Gamles filed a Rule 58.1 confession of judgment action against both Donalds. It was granted then vacated because the "Defendant showed up late" but did show up. Then judgment was entered and execution was thereafter initiated by wage attachment. There was no foreclosure filed and no execution against the real estate.

On February 19, 2002 Donald, Jr. died. The Supreme Court concluded in its opinion that "…Gibson Jr. died intestate resulting in Gibson, Sr. being the sole owner of the subject property, 5 Center Street." There is an estate opened for a Donald J. Gibson who died on February 19, 2002, in Register of Wills File No. 139541. The estate was opened in 2006 by filing the affidavits of no tax due and affidavit of surviving joint owner. The affidavits were filed by Janetta I. Gibson and identified 1105 Chestnut Street as the jointly owned property. 5 Center Street is not listed. The Deed for Chestnut Street in 1996 conveyed title to Donald J. Gibson and Janetta I. Gibson, husband and wife. There is no estate file showing any disposition of 5 Center Street and Parcelview™ still showed Donald Jr. as the owner until 2009 when it was inherited by Marie Gibson and subsequently sold at sheriff's sale to a third party in 2016, although there is not a recorded deed conveying title listed in Parcelview™.

On February 7, 2006, Gibson Sr. filed a motion to satisfy the judgment. The motion was filed pro se. The basis for the motion was' "Judgment has expired. Judgment paid in full. In 1996 my wages were garnished. As of 2005 the order has been paid in full."

Gamles responded and opposed the motion. It is interesting though that Gamles admits, **"Although the judgment continues to exist, Plaintiff does acknowledge that its judgment lien was not renewed within ten years of entry and has lapsed. 10 Del.C.§4711."**

LEGISLATIVE UPDATES

1. MORTGAGE SATISFACTION AMENDMENT
    a. AN ACT TO AMEND TITLE 25 OF THE DELAWARE CODE CONCERNING THE SATISFACTION OF MORTGAGES AFTER A LAPSE OF TIME.
2. CRIMINAL JUDGEMENT LIEN REFORM
    a. AN ACT TO AMEND TITLE 11 AND TITLE 10 OF THE DELAWARE CODE CONCERNING THE REAL PROPERTY LIEN OF CRIMINAL-RELATED JUDGMENTS