

SUBDIVISION STREET DISCLOSURE & WORKING WITH BUYER AS SELLER AGENT 2014-2015 GENERAL UPDATE

Outline:

- ◆ [Subdivision Street Disclosures](#)
- ◆ [Working with a Buyer as a Seller Agent Only](#)

Learning Objective: To remind licensees of:

- 1) their duty to discover and disclose the status of streets within any particular subdivision;
and
- 2) how they may work with a buyer acting only as a seller agent.

SUBDIVISION STREET DISCLOSURE

The Commission receives complaints from consumers alleging that brokers failed to disclose who was responsible for maintaining the streets that abut their property. It is an important question that agents should ask. Who has what duties and how can a broker discover whether streets are publicly or privately maintained?

G.S. 136-102.6, titled “*Compliance of subdivision streets with minimum standards of the Board of Transportation required of developers,*” requires that:

- any time a tract of land is subdivided into two or more lots *for residential purposes*
and
- involves either changing an existing street or construction of a new street

the owner must record a final map or plat with the Register of Deeds prior to conveying any portion of the parcel. The plat must designate the streets as private or public, and any designation as “public” is “...conclusively presumed to be an *offer* of dedication to the public of such street.” [G.S. 136-102.6(b).] The statute (reprinted in its entirety at the end of this Section) further states in subparagraph (f): *(italics added)*

Prior to entering an agreement or any conveyance with any prospective buyer, the developer and seller shall prepare and sign, and the buyer of the subject real estate shall receive and sign an acknowledgment of receipt of a separate instrument known as the subdivision street disclosure statement...[which] statement shall fully and completely disclose the status (whether public or private) of the street upon which the house or lot fronts.

Private versus Public

A **public street** must be constructed in accordance with the minimum right-of-way and construction standards established by the Department of Transportation (hereafter DOT). ***Before the plat may be recorded in the Register of Deeds office***, it must be reviewed and approved by a Review Officer in the Division of Highways. The Review Officer must certify that the right-of-way, construction and drainage plans for any public streets meet the minimum DOT standards for acceptance into the State highway maintenance system. Another statute prohibits the Register of Deeds from recording a plat, if it doesn't have a certificate of approval. G.S. 47-30.2(b) states that, subject to a few limited exceptions:

... the register of deeds shall not accept for recording any map or plat required to be submitted to the Review Officer unless the map or plat has the certification of the Review Officer affixed to it. A certification shall be in substantially the following form:

State of North Carolina
County of _____

I, _____, Review Officer of _____ County,
certify that the map or plat to which this certification is affixed meets all statutory requirements for recording.

Review Officer

Date

NOTE too that the subdivision street disclosure statute expressly states "*The certificate of approval shall not be deemed an acceptance of the dedication of the streets on the subdivision plat or map.*"

[G.S. 136-102.6(d).]

A **private street** is a street that *has not been accepted by the State or municipality for maintenance as a public street*. It may or may not be designed and constructed in accordance with minimum DOT standards. The maintenance responsibilities of a private street fall to the owners' association or the property owners once the developer leaves. Thus, state law requires developers/sellers to include in the subdivision street disclosure statement:

"... an explanation of the consequences and responsibility as to maintenance of a private street, and shall fully and accurately disclose the party or parties upon whom responsibility for construction and maintenance of such street or streets shall rest, and shall further disclose that the street or streets will not be constructed to minimum standards, sufficient to allow their inclusion on the State highway system for maintenance."

Dedication versus Acceptance

Dedication

A developer/owner indicates his/her willingness to dedicate streets to public use by designating the streets as public on the plat map, obtaining the required certificate of approval by the Review Officer, and recording the plat in the Register of Deeds office. Dedication occurs upon the recording of the plat. **Understand** however that the developer designating the streets to public use is merely an *offer* of public use and **does not mean** that the North Carolina Division of Highways or any municipality has agreed to accept the offer of public dedication and assume responsibility for maintaining the streets. *Dedication to public use by the owner on a plat is not equivalent to acceptance of street maintenance responsibilities by the State or municipality.*

Acceptance

Acceptance occurs when the offer of public dedication is formally accepted on behalf of the public by either the State or a municipality in a recognized legal manner and by a proper public authority. Upon accepting the offer of dedication, the State or city contemporaneously accepts responsibility for maintaining the streets.

In addressing the issue of dedication versus acceptance, the North Carolina Court of Appeals has held:

... A dedication of a road is a revocable offer until it is accepted on the part of the public in some recognized legal manner and by a proper public authority. A proper public authority is a governing body having jurisdiction over the location of the dedicated property, such as ... an incorporated town ... or any public body having the power to exercise eminent domain over the dedicated property. Accepting in some recognized legal manner includes both express and implied acceptance. *Kraft v. Town of Mount Olive*, 183 N.C. App. 415, 420-421, 645 S.E.2d 132, 137 (2007).

Express versus Implied Acceptance

In a 1992 case, the Court of Appeals stated the following regarding **express and implied acceptance** “in some recognized legal manner.”

... Express acceptance may take the form of, *inter alia*, a formal ratification, resolution, or order by proper officials, the adoption of an ordinance, a town council’s vote of approval, or the signing of a written instrument by proper authorities. Acceptance of an offer of dedication is implied in North Carolina when the dedicated property is used by the general public coupled with control of the road by public authorities for a period of twenty years or more. *Bumgarner v. Reneau*, 105 N.C.App. 362, 367 (1992).

Thus, **express acceptance** requires a writing and **implied acceptance** requires two elements:

1) use by the general public **and** 2) *exercise of control* by public authorities *for a twenty year period*.

Waterway Drive Property Owners' Association, Inc. v. Town of Cedar Point, et.al.

Whether a municipality ever accepted an offer of dedication was the issue in the 2012 North Carolina Court of Appeals case of *Waterway Drive Property Owners' Association, Inc. v. Town of Cedar Point, et.al.*. The **facts** as found by the appellate court included the following:

- 1) In 1936, property owner John S. Jones filed a subdivision plat in Carteret County dedicating a fifty foot wide right-of-way along the Intracoastal Waterway named Front Street to the public.
- 2) From the 1950s to the 1970s a section of the right-of-way was used for vehicular traffic; general public use stopped in the early 1970s, but property owners along the street continued to use it to access their properties.
- 3) In 1978 Carteret County contracted with a cable television company to install cable along various public streets, including Front Street. The town of Cedar Point incorporated in 1988 and contracted with a water company to install and maintain a water main system that included Front Street and a fire hydrant on Front Street.
- 4) In 1989, the town of Cedar Point adopted a resolution granting the mayor the authority to accept dedications of certain streets, *but it failed to name Front Street*. In 1990, the Town recorded a Notice of Acceptance claiming that it previously had accepted several dedicated streets, including Front Street.
- 5) Additional actions of Cedar Point as to Front Street/Waterway Drive included: clearing debris after a hurricane in 1996; installing an additional fire hydrant in 1998; patching asphalt in 2006 and 2010, and contracting for garbage trucks to use the street to pick up residents' garbage.
- 6) From the 1970s through the 1990s, the property owners abutting Front Street paid for maintenance and repairs to the street from their personal funds. Around 1990, these property owners paved a portion of the street at their own expense, renamed it Waterway Drive (without petitioning Cedar Point for permission to change the name), and posted a sign reading "Private Road" at the entrance. Upon forming the owners' association, the members enacted bylaws and created a street maintenance agreement for Waterway Drive which they viewed as a private street. The town of Cedar Point didn't object to any of these actions.
- 7) Neither the DOT nor Carteret County had any records of maintaining Front Street/Waterway Drive. Additionally, there was evidence by both a deed and in town minutes that a private easement existed on Waterway Drive for the use of property owners.

In 2006, Cedar Point notified the property owners that it previously had accepted the 1936 public dedication and that it intended to make improvements to the street. Following numerous discussions between the property owners and the Town over the next two to three years, the property owners' association petitioned the Town to abandon the street and acknowledge that it was a private street. After a public hearing, the Town declined to release its claim to the street, so the Association filed a lawsuit against the Town seeking to withdraw the 1936 offer of public dedication.

The trial court granted summary judgment in favor of the Association, and Cedar Point appealed. A majority of the Court of Appeals affirmed the trial court's ruling, finding that the Town had never formally accepted **in writing** Mr. Jones' offer of public dedication and since the offer was never accepted, it could be withdrawn. In addition to citing the two court opinions quoted above regarding evidence of express acceptance, the Court, addressing the implied acceptance by public control issue, quoted a 1989 case holding that: "Merely providing municipal services to homeowners in a subdivision within a municipality does not constitute an implied acceptance by the municipality of dedication of a road when the homeowners have paid for those services by the payment of their *ad valorem* taxes." It held that the few acts by the Town (see #3-#5 above) neither constituted sufficient control by public authorities nor for the requisite 20 year period to sustain an implied acceptance argument.

Reasonable Inquiry and Recommended Practices

Brokers should ask the owner who is responsible for maintaining the streets that provide access to their property and provide that information to prospective buyers and their lenders. While the statute only requires the developer and seller to disclose the status of the street abutting the front of the property, *prudent brokers should inquire about maintenance duties for all streets adjacent to the property*. The issue of who bears responsibility for maintaining the roads that provide ingress and egress to a property is a **material fact**. ***Don't assume that public dedication leads to automatic governmental acceptance for road maintenance and repairs because it doesn't.***

If the streets are private, the matter of repair and maintenance should be in the restrictive covenants or owners' association rules. If there are no signs of public maintenance, a broker has an increased obligation to investigate or at least caution the buyer to do so. The broker might suggest that the buyer confer with an attorney. ***Both listing and selling brokers should look for "red flags"***. If there is no property owners' association, then brokers should inquire about a private road maintenance agreement. If such an agreement exists, a broker should attempt to obtain and deliver a copy of it to prospective buyers *no later than* the point when the buyer makes an offer on the property. If there isn't a road maintenance agreement for the streets, then the broker should inform the buyer of the potential consequences of owning property on a road without a road maintenance agreement and/or strongly suggest that the buyer confer with an attorney.

How does someone learn whether the state or city has accepted maintenance responsibilities for a particular address? You may contact your local municipal transportation field services office or city street department to ask about a particular street or subdivision. Typically, *the municipal office will have a list of streets accepted by the municipality for maintenance as well as a list of streets the state has accepted for maintenance within the municipality*. If the road is not located within a municipality, you may contact the District Engineer's Office for DOT's Division of Highways for that district to discover whether the State has accepted maintenance duties for the road in question.

Disciplinary Action

The facts of one disciplinary action are as follows. Respondents included a listing agent who listed and sold a new house in a subdivision without delivering a written subdivision disclosure statement. The listing agent represented to the buyer that the streets were built to State Standards and would be taken over by the State at some point. Seven months after closing, the buyer learned that, with the exception of one street, the residents were responsible for maintaining the streets until the North Carolina Department of Transportation accepted the streets into the State system. The Real Estate Commission found that:

- The broker listed and sold lots in the subdivision.
- The broker failed to provide a street disclosure as required by law that would have disclosed that the streets had not been accepted for maintenance by the Department of Transportation, but rather by the HOA of the subdivision.
- The North Carolina Department of Transportation had not accepted responsibility for the maintenance of said roads.

As a result the broker was suspended for a period of 3 months with the entirety of the suspension stayed if the licensee completed certain courses specific to the transaction.

Subdivision Street Disclosure Form

The North Carolina Association of REALTORS®, in collaboration with the North Carolina Bar Association's Real Property Section, is in the process of drafting a proposed Subdivision Street Disclosure Statement. It is hoped that the form should be available in 2015. The subdivision street disclosure statute is reprinted at the end of this Section, but the proposed Disclosure Form is not, since it is neither finalized nor approved.

WORKING WITH BUYERS AS A SELLER AGENT

How can a listing company retain the entire listing commission without acting as a dual agent? Work with a buyer as a listing/seller agent only. A very seasoned, honest broker who had few if any affiliated brokers contacted the Commission for confirmation concerning disbursing the earnest money deposit in a transaction that didn't close. He indicated that he was the listing broker for an unimproved parcel for which the list price was \$15,000. He was contacted by an unrepresented buyer. He provided and reviewed with the buyer the mandatory *Working with Real Estate Agents* brochure, explained that he already represented the seller and could not provide advice, but that he could show her the property and answer any questions, and that she was free to hire her own buyer agent. He checked the seller agent disclosure box on the bottom of the disclosure form and proceeded to show the buyer the property.

Of course the buyer became interested in the property and wanted to write an offer. The broker again suggested she hire her own broker and that he would gladly share his fee with her buyer agent. She indicated that she felt comfortable working with the broker and saw no need to seek independent representation. Thus, *because she wanted to write an offer*, the broker entered into a written buyer agency agreement with her that also authorized dual agency (not designated dual) which the seller also had authorized in the listing agreement. As a dual agent, the broker proceeded to complete the preprinted Offer and Contract for Vacant Land. The buyer wanted to offer \$15,000, no financing conditions, and a \$5000 earnest money deposit. The broker told her that she didn't need to offer that much for earnest money, but she confirmed the amount. She also shared with the broker that she was retiring and she was going to cash-out some retirement investment and use the proceeds to pay the balance of the purchase price.

The seller accepted the buyer's offer and the parties went under contract. The parties agreed to a thirty day extension of the closing date as the buyer hadn't received the funds from the retirement investment. The buyer failed to close by the extended settlement date and stopped communicating with the broker, not responding to his messages or emails. Thirty days after the extended closing date, the seller requested release of the earnest money deposit to him. The broker felt divided loyalties - he felt sorry for the buyer, but recognized his seller's legal entitlement to the earnest money. He called Commission staff.

After Commission staff suggested a procedure to allow the broker to disburse the earnest money, he was asked why he had not considered staying a seller agent only and avoiding the "two masters and one agent" conflicting interests situation. Many brokers fail to understand that *they can work with a buyer, including filling out a preprinted fill-in-the-blanks offer and contract form with terms dictated by the buyer, without crossing into buyer/dual agency territory.* It may not prevent sympathy for a party, but the broker's fiduciary duties would be owed to only one party, rather than both.

Scope of Permissible Acts

So long as a broker does the following things, s/he may work with an unrepresented buyer as a seller agent only.

- Provide and explain the *Working with Real Estate Agents* brochure, particularly the section on buyers working with seller agents and the duties a seller agent owes a buyer. Inform the buyer that nothing s/he tells the broker is confidential and that the broker is required by agency law to relay to the seller any information the broker receives that may influence the seller's decision. Tell the buyer that s/he has the option of hiring a broker as a buyer agent.
- If the buyer is comfortable proceeding without representation, then the broker should complete the disclosure information in the WREA brochure, check the seller agent box and ask the buyer to initial it. The listing agent may then proceed to show the buyer the property.
- The broker must disclose all material facts to the buyer, provide any required seller disclosures (such as the RPOADS), and be honest in their dealings with the buyer. ***The broker may not advise or counsel the buyer as to the proposed terms of any offer.***
- If the buyer wants to make an offer, the listing/seller agent may:
 - provide the buyer with any guidelines explaining the standard offer to purchase form, but may not provide the buyer with a blank NCAR Standard Form 2-T;
 - write in proposed terms dictated by the buyer; (*preferred practice* might be to suggest the buyer confer with his/her closing attorney to obtain the form and prepare an offer.)
 - present the offer to the seller and assist the seller in evaluating the offer, counseling the seller on various options, sharing any information that may influence the seller's decision, and negotiating on the seller's behalf;
 - deliver all offers, contracts and other documents in a prompt and timely manner.

§ 136-102.6. Compliance of subdivision streets with minimum standards of the Board of Transportation required of developers.

(a) The owner of a tract or parcel of land which is subdivided from and after October 1, 1975, into two or more lots, building sites, or other divisions for sale or building development for residential purposes, where such subdivision includes a new street or the changing of an existing street, shall record a map or plat of the subdivision with the register of deeds of the county in which the land is located. The map or plat shall be recorded prior to any conveyance of a portion of said land, by reference to said map or plat.

(b) The right-of-way of any new street or change in an existing street shall be delineated upon the map or plat with particularity and such streets shall be designated to be either public or private. Any street designated on the plat or map as public shall be conclusively presumed to be an offer of dedication to the public of such street.

(c) The right-of-way and design of streets designated as public shall be in accordance with the minimum right-of-way and construction standards established by the Board of Transportation for acceptance on the State highway system. If a municipal or county subdivision control ordinance is in effect in the area proposed for subdivision, the map or plat required by this section shall not be recorded by the register of deeds until after it has received final plat approval by the municipality or county, and until after it has received a certificate of approval by the Division of Highways as herein provided as to those streets regulated in subsection (g). The certificate of approval may be issued by a district engineer of the Division of Highways of the Department of Transportation.

(d) The right-of-way and construction plans for such public streets in residential subdivisions, including plans for street drainage, shall be submitted to the Division of Highways for review and approval, prior to the recording of the subdivision plat in the office of the register of deeds. The plat or map required by this section shall not be recorded by the register of deeds without a certification pursuant to G.S. 47-30.2 and, if determined to be necessary by the Review Officer, a certificate of approval by the Division of Highways of the plans for the public street as being in accordance with the minimum standards of the Board of Transportation for acceptance of the subdivision street on the State highway system for maintenance. The Review Officer shall not certify a map or plat subject to this section unless the new streets or changes in existing streets are designated either public or private. The certificate of approval shall not be deemed an acceptance of the dedication of the streets on the subdivision plat or map. Final acceptance by the Division of Highways of the public streets and placing them on the State highway system for maintenance shall be conclusive proof that the streets have been constructed according to the minimum standards of the Board of Transportation.

(e) No person or firm shall place or erect any utility in, over, or upon the existing or proposed right-of-way of any street in a subdivision to which this section applies, except in accordance with the Division of Highway's policies and procedures for accommodating utilities on highway rights-of-way, until the Division of Highways has given written approval of the location of such utilities. Written approval may be in the form of exchange of correspondence until such times as it is requested to add the street or streets to the State system, at which time an encroachment agreement furnished by the Division of Highways must be executed between the owner of the utility and the Division of Highways. The right of any utility placed or located on a proposed or existing subdivision public street right-of-way shall be subordinate to the street right-of-way, and the utility shall be subject to regulation by the Department of Transportation. Utilities are defined as electric power, telephone, television, telegraph, water, sewage, gas, oil, petroleum products, steam, chemicals, drainage, irrigation, and similar lines. Any utility installed in a subdivision street not in accordance with the Division of Highways accommodation policy, and without prior approval by the Division of Highways, shall be removed or relocated at no expense to the Division of Highways.

(f) Prior to entering any agreement or any conveyance with any prospective buyer, the developer and seller shall prepare and sign, and the buyer of the subject real estate shall receive and sign an acknowledgment of receipt of a separate instrument known as the subdivision streets disclosure statement (hereinafter referred to as disclosure statement). Said disclosure statement shall fully and completely disclose the status (whether public or private) of the street upon which the house or lot fronts. If the street is designated by the developer and seller as a public street, the developer and seller shall certify that the right-of-way and design of the street has been approved by the Division of Highways, and that the street has been or will be constructed by the developer and seller in accordance with the standards for subdivision streets adopted by the Board of Transportation for acceptance on the highway system. If the street is designated by the developer and seller as a private street, the developer and seller shall include in the disclosure statement an explanation of the consequences and responsibility as to maintenance of a private street, and shall fully and accurately disclose the party or parties upon whom responsibility for construction and maintenance of such street or streets shall rest, and shall further disclose that the street or streets will not be constructed to minimum standards, sufficient to allow their inclusion on the State highway system for maintenance. The disclosure statement shall contain a duplicate original which shall be given to the buyer. Written acknowledgment of receipt of the disclosure statement by the buyer shall be conclusive proof of the delivery thereof.

(g) The provisions of this section shall apply to all subdivisions located outside municipal corporate limits. As to subdivisions inside municipalities, this section shall apply to all proposed streets or changes in existing streets on the State highway system as shown on the comprehensive plan for the future development of the street system made pursuant to G.S. 136-66.2, and in effect at the date of approval of the map or plat.

(h) The provisions of this section shall not apply to any subdivision that consists only of lots located on Lakes Hickory, Norman, Mountain Island and Wylie which are lakes formed by the Catawba River which lots are leased upon October 1, 1975. No roads in any such subdivision shall be added to the State maintained road system without first having been brought up to standards established by the Board of Transportation for inclusion of roads in the system, without expense to the State. Prior to entering any agreement or any conveyance with any prospective buyer of a lot in any such subdivision, the seller shall prepare and sign, and the buyer shall receive and sign an acknowledgment of receipt of a statement fully and completely disclosing the status of and the responsibility for construction and maintenance of the road upon which such lot is located.

(i) The purpose of this section is to insure that new subdivision streets described herein to be dedicated to the public will comply with the State standards for placing subdivision streets on the State highway system for maintenance, or that full and accurate disclosure of the responsibility for construction and maintenance of private streets be made. This section shall be construed and applied in a manner which shall not inhibit the ability of public utilities to satisfy service requirements of subdivisions to which this section applies.

(j) The Division of Highways and district engineers of the Division of Highways of the Department of Transportation shall issue a certificate of approval for any subdivision affected by a transportation corridor official map established by the Board of Transportation only if the subdivision conforms to Article 2E of this Chapter or conforms to any variance issued in accordance with that Article.

(k) A willful violation of any of the provisions of this section shall be a Class 1 misdemeanor. (1975, c. 488, s. 1; 1977, c. 464, ss. 7.1, 8; 1987, c. 747, s. 21; 1993, c. 539, s. 996; 1994, Ex. Sess., c. 24, s. 14(c); 1997-309, s. 4; 1998-184, s. 3.)