



2008 Changes in the Law Regarding Rerecording Prerequisites, Electronic Recording Verification, Indexing, and the Fee for Recording Deeds of Trust

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In 2008 the General Assembly made significant changes to the statutes affecting register responsibilities. The statutes governing a register's acceptance of electronic records and previously recorded documents were revised and clarified, and the statute describing the register's responsibility for complying with technical indexing requirements was clarified. In addition, the fee for recording a deed of trust or mortgage was increased. This Bulletin describes these changes.

Rerecording Prerequisites

G.S. 47-14(a) requires registers to verify the presence of a proof or acknowledgment on an instrument that requires one, which includes most commonly recorded real estate instruments—such as deeds, deeds of trust, satisfaction instruments, leases, contracts to convey, and powers of attorney. Registers have understood this requirement as involving confirmation that a presented document is the same document that was signed before an authorized official—not a copy unless a statute specifically allows a copy to be recorded. Once verified and recorded the same document, or a certified copy of it, may be recorded again without having to be verified a second time. G.S. 47-14(a); G.S. 47-36.1.

The register's verification of an acknowledgment on documents that are being submitted for the first time is a long-standing practice with two principal functions, both of which protect the interests of bona fide grantees of real estate interests. The first function reflects the historic requirement that presented transactional instruments must appear to have basic elements of genuineness. Most real estate instruments are presented for registration not by the grantors who executed them, but by the grantees to whom the instruments were delivered or their representatives. Possession and presentation of a document that bears direct evidence of the grantor's execution is some assurance of authenticity. Registers enable grantees to make a public record of such bona fide conveyance instruments. Once registered, the presence of the document on the public record is an indication that the

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presenter satisfied the authenticity prerequisites for recording. Verification is a link in authentication of the record of a real estate transaction. The second principal function of verification is confirmation that an instrument submitted for registration has a completed acknowledgment, which is a requirement for instruments of conveyance to be properly registered and for them to be effective against third parties claiming competing interests.

Once a document requiring verification has been verified and recorded there is no logical reason to subject that same document to a second verification if it is submitted for rerecording. Someone may wish to record the same document in another county, or to rerecord it in the same county to put it in a different sequence of recording with other documents. The logic of the exception from verification does not apply if the presented document is different than what was previously recorded. For example, if a previously recorded document has been altered to describe different or additional property, or different parties or interests, the presented document expresses a different conveyance and logically requires verification in the same manner as any other document not previously recorded. If the previously recorded document incorrectly expressed the grantor's intent, it is the grantor who must express the correct intent on the record, with a newly signed and acknowledged corrective instrument or a re-signed and re-acknowledged altered instrument, both of which are subject to verification. Without the grantor's signature and an acknowledgment the instrument may be legally invalid as a conveyance. *See, e.g., Moelle v. Sherwood*, 148 U.S. 21 (1892) (deed with altered property description not valid against subsequent purchasers); *In re Hudson*, No. COA06-345 (N.C. Ct. App. April 3, 2007) (foreclosure petition dismissed when property description was added to deed of trust after its execution); William A. Campbell, *Correction Deeds and Deeds of Trust*, Land Records Bulletin No. 6 (Sept. 1984) ("To summarize, changes in a recorded instrument should be made by preparing and recording a correction deed. An attempt to short-cut this procedure by altering the original instrument results in a new instrument that the register of deeds should not record unless it is re-executed and re-acknowledged. If it is recorded anyway, the recording is invalid and does not give constructive notice.").

Occasionally someone wishes to record something to give notice that an error was made in a previous recording. This may be appropriate, for example, if a minor technical mistake is made in a deed that does not materially change the grantor's expression of intent, such as a minor error in a property description. Prior to 1986, the two methods for correcting minor errors in a recorded instrument were to record a new instrument executed by the grantor and acknowledged, or to make a change on the instrument and have it re-executed by the grantor and acknowledged. William A. Campbell, *Correction Deeds and Deeds of Trust*, Land Records Bulletin No. 9, Institute of Government (July 1986). In 1986, G.S. 47-36.1 was enacted in response to growing concerns about unauthorized and unattributed altered documents. It allowed original instruments with "an obvious typographical or other minor error" to be rerecorded provided the changes are "clearly set out on the face of the instrument" and initialed by the grantor or drafting attorney, and a "statement of explanation" is attached. Registers have encountered interpretative and practical problems with respect to G.S. 47-36.1. They frequently have been presented with documents that do not comply with the statute, or as to which application of the statutory requirements is unclear. The requirement that a statement of explanation be "attached" is unclear about whether "attached" means on the previously recorded pages or in a separate newly attached page, and if a separate page is allowed it is unclear what can be "attached" and still be considered part of a statement of explanation. The statute required changes to be initialed, which clearly was intended to require all changes to be shown and attributed, yet presenters commonly attempted to attach pages without initials or attribution on those pages. The requirement that the grantor or drafting attorney initial

changes and sign the explanation leads those who are neither the grantor nor a drafting attorney, such as a bank employee who prepared the instrument, to conclude that there is no means of showing a minor error on the record, yet such a preparer could record an affidavit to give notice of an error, for whatever legal effect it might have. The requirement that a statement of explanation be used only for “an obvious typographical or other minor error” is not a matter for register enforcement, but its inclusion in the statute gave some the impression that such a determination is a prerequisite to registration. Some practitioners have had the wrong impression that because the General Statutes authorized use of a statement of explanation, such an instrument has the effect of providing constructive notice of the corrected information as of the date of the original flawed recording, when the statement only provides notice of the information it contains as of the date it is recorded, as the final clause in G.S. 46-36.1 expressly states, and as is consistent with basic recording law.

These interpretive problems were further complicated in 2006 when G.S. 47-14(a) was amended to state that a document or certified copy could be “rerecorded” “regardless of whether it has been changed or altered.” Session Law 2006-259, § 502(a)-(b); S.L. 2006-264 § 40(c). This change was intended to clarify that a register is not responsible for examining documents submitted as rerecordings to see if changes were made since recording. However, the statute still requires registers to verify acknowledgments on documents that are not the same documents previously recorded. In attempting to fulfill this responsibility registers have encountered difficulties interpreting what is a document that must be acknowledged and therefore verified and what could be a permissible “altered” rerecording. Documents submitted as “rerecordings” are among the most problematic documents that registers have encountered, often involving obviously unauthorized and legally ineffective changes.

Session Law 2008-194 simplifies the law describing the register’s responsibilities for handling rerecordings. The apparent confusing permission to record documents altered after they were acknowledged is eliminated. Effective October 1, 2008, to rerecord an original document without verification the presenter must mark it on its first page as a “rerecording,” a representation on which the register may rely. The register checks for this mark and for recording information that shows it is a previously recorded document. The register has no responsibility to check for alterations on such pages. The statutes also have been revised to remove the confusing indication of permission to record “altered” certified copies. When a document is submitted for recording as a certified copy the register checks only to see that it is a document with a *record keeper’s* “certified copy” mark. The register is not responsible for looking for alterations that make the document different than what was certified by the record keeper – in other words, not truly a certified copy. G.S. 47-31(a).

Notice of a minor error, previously usually given with a statement of explanation, can be given with an affidavit of correction, also known as a scrivener’s affidavit, which is commonly used in other jurisdictions. Information about errors stated in an affidavit clearly are attributable to the affiant and do not involve the many registration interpretative issues entailed with G.S. 47-36.1. Registers have no role in reviewing an affiant’s capacity or the affidavit’s contents. Anyone can submit an affidavit of correction (they need not be attorneys) to make a record of typographical or minor errors, and those who give affidavits can attach any exhibits they want to explain or show the correction, including marked up copies of the corrected document. Registers verify the notary certificate the same as any other affidavit. Although affidavits already could be recorded without need for legislative action, as revised G.S. 47-36.1 notes the possibility of use of an affidavit and expressly preserves the notice effect of statements of explanation previously recorded. It also provides guidance about indexing. If an affidavit is conspicuously identified as a “corrective” or

“scrivener’s” affidavit in its title, the register indexes the affiant’s name, the names of the original parties to the document described in the affidavit, and the recording information for the document being described, if and as this information is provided in the affidavit.

The changes in Session Law 2008-194 regarding recording documents noted as a “rerecording” and statements of explanation take effect on October 1, 2008. The clarification regarding the recordability of altered certified copies took effect when the bill became law on August 8, 2008. Although documents with un-notarized statements of explanation are not recordable on or after October 1, 2008, attorneys, grantors, and others may give the same kind of notice of a correction by using an affidavit with an appropriate form of notarized jurat.

In summary, effective October 1, 2008,

1. The statutes no longer apparently authorize recording of “altered documents.”
2. The statutes no longer authorize recording of altered documents with un-notarized “statements of explanation.”
3. If a document is submitted as a recording of an original document the register checks for (A) recording information indicating it was previously recorded, and (B) conspicuous marking on the first page that it is a rerecording.
4. If a document is submitted as a certified copy of a previous recording the register checks for the recording office marks indicating that it is a certified copy.
5. A document conspicuously identified as a corrective or scrivener’s affidavit in its title is verified the same way as any affidavit, and it is indexed as a subsequent instrument (which includes indexing information in the affidavit identifying the affiant and the parties to the instrument being corrected and its recording information).

Electronic Recording Verification

In 2005 the North Carolina General Assembly enacted the Uniform Real Property Electronic Recording Act (URPERA) to facilitate use of electronic documents for public real estate records. G.S. 47-16.1 to – 16.7. URPERA provides that “[i]f a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying” the laws governing electronic records. G.S. 47-16.3(a). URPERA thereby provided a framework for recordation of real estate documents in electronic format. URPERA also provides a framework for use of electronic signatures by providing that “[i]f a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.” G.S. 47-16.3(b). Some real estate records must be acknowledged by notaries or other authorized officials before they may be recorded, and URPERA provides that “[a] requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to notarize, acknowledge, verify, witness, or administer the oath, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.” G.S. 47-16.3(c). This provision authorized use of acknowledgments in electronic form but did not specify what information a register must check before accepting an electronic record.

In 2005, the North Carolina General Assembly enacted the Electronic Notary Act, and pursuant to this law the North Carolina Secretary of State adopted standards for electronic notarization.

N.C. Admin. Code tit. 18, ch. 07C, §§ .0101-.0604. These standards describe what a notary must do to perform an electronic notarization, and among other things require that the notary's signature and seal be "attached or logically associated with the document, linking the data in such a manner that any subsequent alterations to the underlying document or electronic notary certificate are observable through visible examination." *Id.* §§ .0401(d), .0402(d). The Electronic Notary Standards also prescribed requirements for those who supply the mechanisms for electronic notarization. The Secretary of State also adopted Electronic Recording Standards that were developed by the Electronic Recording Council pursuant to URPERA. G.S. 47-16.5. The Electronic Recording Standards provide guidance to registers and electronic document submitters about the format and procedure for electronic record submissions and for the maintenance of electronic records. Among other things, the standards provide that registers should establish a memorandum of understanding with each submitter to describe the rights and responsibilities of the register and the authorized submitter. Report from the North Carolina Electronic Recording Council Part Three, ¶ 4 (Apr. 12, 2007).

These laws and rules addressed many aspects of electronic document completion and the register's authority to accept them. They did not specifically address the register's role in verifying the components of an electronic signature or notarization before accepting them for recording. The register's verification responsibility is set forth in G.S. 47-14(a). This statute requires that a register verify the presence of a proof or acknowledgment on an instrument that requires one, which includes most commonly recorded real estate instruments such as deeds, deeds of trust, satisfaction instruments, leases, contracts to convey, and powers of attorney. Registers have understood this requirement as involving confirmation that the presented document is the same document that was signed before an authorized official—not a copy unless a statute specifically allows a copy to be recorded. With paper documents, registers look for original signatures, which is consistent with the Notary Public Act, which states that "[w]hen notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate." G.S. 10B-35. Session Law 2008-194 clarifies the register's responsibility with respect to verifying the components of an electronic document, and it describes the representations that are being made by trusted submitters regarding the originality and authenticity of electronic documents they submit.

Effective October 1, 2008, G.S. 47-14 authorizes registers who wish to accept electronic documents requiring acknowledgments to do so if they can confirm that the acknowledgments have been completed. They can accept electronic documents from two kinds of submitters: the government, or a "trusted submitter." Someone could become a "trusted submitter" only by agreeing to the register's requirements in a memorandum of understanding. When such an agreement is in place the register is not required by statute to check for originality of electronically submitted documents unless they chose to make it a condition. The *submitter* is responsible for complying with the originality requirements. The statutes do not require any register to accept electronic submissions nor do they require registers who decide to allow electronic documents to accept them from anyone other than whom the register authorizes.

The amended statute requires that documents submitted by trusted submitters include the following statement that will appear on the public record:

Submitted electronically by _____ (submitter's name) in compliance with North Carolina statutes governing recordable documents and the terms of the submitter agreement with the _____ (insert county name) County Register of Deeds.

The record will therefore show who was entrusted to comply with the recording requirements for documents submitted electronically by trusted submitters. The revised statute makes

clear that the register may rely on the trusted submitter's representation of compliance with the requirements.

If a document originates in electronic form submitters are responsible for complying with North Carolina electronic recording and notary statutes and rules. They are also responsible for not electronically recording a document that originated as paper unless the paper document would have been recordable in that form. For example, a submitter could not properly scan a copy of a document and submit it electronically if the copy is not recordable in its paper form. Also, a submitter could not properly record an altered document that does not conform to the paper document rerecording requirements.

In summary, effective October 1, 2008, the register's verification responsibilities for electronic submissions requiring a proof or acknowledgment involve confirming the following:

1. The submitter was authorized by the register to record electronically;
2. The submission complies with any agreements with the register;
3. The notary elements required for paper documents are completed (the statutes do not require the register to check for an original ink signature or validate an electronic signature—this is the submitter's responsibility under the statute; and
4. If submitted by a trusted submitter it has the following completed statement that will appear on the recorded document image:
Submitted electronically by ____ (submitter's name) in compliance with North Carolina statutes governing recordable documents and the terms of the submitter agreement with the ____ (insert county name) County Register of Deeds.

Note: These are the steps for verification only. The document must also comply with other applicable recording requirements, such as but not limited to payment of fees, indication of drafter's name, or tax office certification.

Indexing

Indexing and registration are important to the validity of instruments conveying valuable real estate interests. This state's unusual race recording law provides that no instrument of conveyance "shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration . . . but from the time of registration thereof in the county where the land lies." G.S. 47-18(a) (deeds and certain other instruments); G.S. 47-20 (security instruments); G.S. 47-27 (easements). By operation of this law, an otherwise valid instrument given in good faith could be subordinated to another interest if it is deemed not to have attained the status of being "registered" even though it was presented to a register. Prior to enactment of Session Law 2008-194, G.S. 161-22(h) stated that "[n]o instrument shall be deemed registered until it has been indexed as provided in this section." G.S. 161-22(g), which authorizes use of county-specific recording rules, stated that "[f]rom and after the effective date of such rules, a registered instrument shall be deemed properly registered only when it has been indexed according to the rules." These two clauses could have been interpreted as invalidating a document's registration based on a technical noncompliance with an indexing rule.

Registers maintain indexes of the names of parties to recorded instruments to enable examiners to locate instruments affecting particular property owned by those parties. There are no registration restrictions on the types of instruments that may be recorded, who may be considered to be parties to them, or how the parties are to be identified within the instruments. Registers

must examine each presented instrument to extract the indexing information according to their best understanding of what the instrument purports to be and how the indexing laws and rules apply to it. Sometimes the identity of the parties to even the most basic real estate instrument is unclear. The task is made more difficult by dozens of other provisions in the General Statutes with requirements for indexing specific kinds of instruments. In addition, pursuant to G.S. 161-22.3, indexing must be according to the Minimum Standards for Indexing Real Property Instruments. The standards address a myriad of variations but cannot possibly address everything. Registers commonly do not have any clear guidance and must rely on judgment to index the instrument in a manner that can reasonably be expected to enable a title examiner to find it with ordinary care. Title examiners similarly must rely on their reasonable understanding of how any particular instrument would be indexed.

Under the approach common in state law, instrument indexing is sufficient if a reasonably careful and prudent examiner would find the instrument as indexed. North Carolina's courts have applied this approach. For example, in *West v. Jackson*, 198 N.C. 693, 153 S.E. 257 (1930), the North Carolina Supreme Court rejected a strict interpretation that "the [indexing] statute should be complied with to the exact letter," noting that "the underlying philosophy of all registration is to give notice, and that hence the ultimate purpose and pervading object of the statute is to produce and supply such notice." Session Law 2008-194 revises the indexing statutes to reflect the courts' approach. It makes clear that the legal effect of indexing is based on the reasonableness standard, stating as follows: "No instrument shall be deemed registered until it has been indexed in a manner to put a reasonably careful and prudent examiner on notice upon inquiry, and, if upon inquiry, the instrument would have been found." G.S. 161-22(h). Session Law 2008-194 also makes other changes to G.S. 161-22 to reflect current indexing requirements as set forth in other statutes.

Recording Fee for Deeds of Trust and Mortgages

Section 29.7 of the 2008 Appropriations Act increased the fee for "filing a deed of trust or mortgage" from \$12 to \$22 for the first page, and \$3 for each additional page. Session Law 2008-102, § 29.7. The fee applies to a deed of trust or mortgage registered on or after October 1, 2008, regardless of the date on which the instrument was executed or acknowledged. The statute makes no distinction based on whether the deed of trust or mortgage was previously recorded, so the extra fee apparently applies to a rerecording of a deed of trust or mortgage. The statute specifically refers to "a deed of trust or mortgage," which indicates that the extra fee would not apply merely because a different kind of document is related to an already recorded deed of trust or mortgage, such as would be the case with a satisfaction instrument or an amendment to a recorded deed of trust.

From this recording fee the additional \$10 must be forwarded to the county finance officer, who in turn forwards it to the Department of Crime Control and Public Safety to be credited to the Floodplain Mapping Fund. The additional \$10 amount is not retained by the county so this portion of the recording fee would not be subject to the Automation Enhancement and Preservation Fund set aside pursuant to G.S. 161-11.3.

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