

# Registers of Deeds, Land Records, and Notaries

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

## Rerecording Prerequisites

G.S. 47-14(a) requires registers to verify the presence of a proof of acknowledgment on instruments that require one, which include most commonly recorded real estate instruments—deeds, deeds of trust, satisfaction instruments, leases, contracts to convey, and powers of attorney. Registers have understood this requirement to involve 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.<sup>1</sup>

The register's verification of an acknowledgment on a document being submitted for the first time is a long-standing practice with two principal functions, both of which protect 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 authenticity. 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 a document is registered, its presence on the public record is an indication that the 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, the grantor 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.<sup>2</sup>

1. G.S. 47-14(a); G.S. 47-36.1.

2. 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

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 such errors in a recorded instrument were recording a new instrument executed by the grantor and acknowledged, or making a change on the instrument and having it re-executed by the grantor and acknowledged.<sup>3</sup> 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 as to 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. The requirement that the grantor or drafting attorney initial changes and sign the explanation leads those who are neither grantors nor drafting attorneys, such as bank employees who prepare the instruments, to conclude that there is no means of showing a minor error on the record; however, such a preparer could record an affidavit to give notice of an error, for whatever legal effect that affidavit 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.

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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 (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, September 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").

3. William A. Campbell, "Correction Deeds and Deeds of Trust," *Land Records Bulletin* No. 9 (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, July 1986).

Some practitioners have had the wrong impression that, because the General Statutes authorize use of a statement of explanation, such an instrument provides constructive notice of the corrected information as of the date of the original flawed recording. These statements only provide notice of the information they contain as of the date they are recorded, however, as the final clause in G.S. 47-36.1 expressly states, and as is consistent with basic recording law.

The problems interpreting the verification and rerecording laws were further complicated in 2006 when G.S. 47-14(a) was amended to provide that a document or certified copy could be "rerecorded" "regardless of whether it has been changed or altered."<sup>4</sup> This change was intended to clarify that a register is not responsible for examining a document submitted as a rerecording to determine if changes were made to it since its prior 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 deciding 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 that registers have encountered, often involving obviously unauthorized and legally ineffective changes as discussed above.

S.L. 2008-194 (H 545) simplifies the law describing the register's responsibilities for handling rerecordings. The apparent confusing authorization 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 the document on its first page as a "rerecording," thus denoting that it is the same unaltered document as previously recorded. This mark is a representation on which the register may rely. The register checks for this mark and for recording information showing the document is a previously recorded document. The register has no responsibility to check for alterations. 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.<sup>5</sup>

The purposes of giving notice of a minor error, previously usually made with a statement of explanation, can be accomplished with an affidavit of correction, or a "scrivener's affidavit," which is commonly used in other jurisdictions. Information about errors identified in an affidavit clearly

4. S.L. 2006-259, secs. 502(a)–(b); S.L. 2006-264, sec. 40(c).

5. G.S. 47-31(a).

is attributable to the affiant and does 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 contents of an affidavit. Anyone can submit an affidavit of correction (they need not be attorneys) to record typographical or minor errors, and those who present affidavits can attach any exhibits 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, 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 S.L. 2008-194 regarding recording documents identified as "rerecordings" or statements of explanation were effective October 1, 2008. The clarification regarding the recordation of altered certified copies was effective 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.

## 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.<sup>6</sup> 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.<sup>7</sup> URPERA thereby provides a framework for recordation of real estate documents in electronic format. URPERA also sets out a framework for use of electronic signatures by providing in G.S. 47-16.3(b) that "[i]f a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature." 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."<sup>8</sup> This provision authorizes use of acknowledgments in electronic form but does 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.<sup>9</sup> 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."<sup>10</sup> The Electronic Notary Standards also prescribe requirements for those who supply the mechanisms for electronic notarization. In addition, the Secretary of State adopted Electronic Recording Standards developed by the Electronic Recording Council pursuant to URPERA.<sup>11</sup> These standards provide guidance to registers and submitters of electronic documents 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.<sup>12</sup>

These laws and rules address many aspects of electronic document completion and the register's authority to accept them. They do not specifically address the register's role in verifying the components of an electronic signature or notarization before accepting a document for recording. The register's verification responsibility is set forth in G.S. 47-14(a). When verifying paper documents, registers look for original signatures. This 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."<sup>13</sup> S.L. 2008-194 (H 545) clarifies the register's responsibility with respect to verifying the components of an electronic document, and it describes the representations to be made by trusted submitters regarding the originality and authenticity of electronic documents they present.

6. G.S. 47-16.1 to 16.7

7. G.S. 47-16.3(a).

8. G.S. 47-16.3(c).

9. 18 NCAC 07C .0101–.0604.

10. *Id.* §§ .0401(d), .0402(d).

11. G.S. 47-16.5.

12. *Report from the North Carolina Electronic Recording Council*, Part Three, ¶ 4, April 2007.

13. G.S. 10B-35.

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 may accept electronic documents from two types of submitters: the government or a “trusted submitter.” Someone can 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 the register has chosen to make this requirement a condition of the agreement. The submitter is responsible for complying with the originality requirements. The statutes do not require any register to accept electronic submissions nor do the statutes require registers who decide to accept 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 *county name* County Register of Deeds.

The record will then 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 in paper form unless the paper document would have been recordable in that form. For example, a submitter cannot properly scan a copy of a document and submit it electronically if the copy is not recordable in its paper form. Also, a submitter cannot properly record an altered document that does not conform to the paper document rerecording requirements.

## 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.”<sup>14</sup> By operation of this law, an otherwise valid instrument given in good faith could be subordinated to another interest if that instrument is deemed not to have attained the status of being “registered” even though it was presented to a register. Prior to enactment of S.L. 2008-194 (H 545), 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 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 further complicated by dozens of other General Statutes requirements for indexing specific kinds of instruments. In addition, pursuant to G.S. 161-22.3 indexers must follow rules established by the Minimum Standards for Indexing Real Property Instruments. These standards address a myriad of indexing possibilities but cannot possibly address all name variations. Registers commonly do not have any clear guidance and must rely on their best 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 and applied in North Carolina courts, instrument indexing is sufficient if a reasonably careful and prudent examiner would find the instrument as indexed. 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.” S.L. 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: “No instrument shall be deemed

14. G.S. 47-18(a) (deeds and certain other instruments); G.S. 47-20 (security instruments); G.S. 47-27 (easements).

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.”<sup>15</sup> S.L. 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 [S.L. 2008-102 (H 2436)] increases the fee for recording any deed of trust or mortgage from \$12 to

15. G.S. 47-14(h).

\$22 for the first page and \$3 for each additional page, effective October 1, 2008. 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 is not retained by the county and therefore would not be subject to the Automation Enhancement and Preservation Fund set aside pursuant to G.S. 161-11.3.

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