Coates' Canons Blog: This Deed is Subject to … Huh?

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Article: https://canons.sog.unc.edu/this-deed-is-subject-to-%e2%80%a6-huh/

This entry was posted on February 01, 2010 and is filed under Miscellaneous, Purchasing, Construction, Property Transactions

Once upon a time, deeds had property descriptions that actually described the property being conveyed. They would give distances and directions that could be sketched into recognizable geometries, and they would tell about neighbors' recorded rights that affected the property, such as someone's logging road or a shared well. Today, North Carolina deeds, especially for residential property, typically do not give nearly as complete a picture. They are more likely to refer to a different document—a plan—for the boundaries, and instead of specifically mentioning others' rights, the deed more likely just says something like: "subject to easements, covenants, and restrictions of record." While these features have become common and apparently acceptable practices within the conveyancing community, they present significant dangers for those who rely solely on the deed and do not further investigate the records for others' rights.

When a deed refers to a plan for the boundary description, the plan needs to be examined to see the land configuration. Too often a purchaser, lender, or land use official stops at the deed without looking to see if the identified plan shows the property as it is understood to be. Looking at the plan also may be important for another reason: sometimes matters on a plan affect the nature of the rights to the property. Plans commonly show such things as driveways and sewer lines. They also have notes, sometimes in tiny print, that may describe rights or restrictions. These notes may be part of the original development scheme, or they may be added during the land use approval process. If the deed refers to the plan for the property description, then restrictions on the plan are likely to be part of the property being conveyed, for better or worse.

Potentially even more problematic is language in a deed, usually just above the seller's signature at the end, that says the property is "subject to easements, covenants, and restrictions of record." The potential significance of such a clause shocks most people when they understand what it could mean. Most real estate purchasers and mortgage lenders want to know the full extent of rights being acquired, including associated limitations and obligations. These could include such things as others' rights to maintain driveways or sewer lines, obligations to pay for common areas, or minimum setbacks or a restriction to single-family residential use. Sometimes such matters are obvious and often they are beneficial, but sometimes they are surprising and deleterious. In any event someone making an investment in real estate and paying closing costs may expect to have been fully apprised of such matters. They may also expect to have legal recourse for surprises. Not so fast.

Suppose it turns out that the back half of someone's newly acquired property is subject to a recorded utility easement. Suppose also that the new owner only found out about the easement when visited by the utility's representative after the owner had installed a beautiful in-ground swimming pool. The easement may have been granted by a previous owner of the property and duly recorded at the register of deeds office, but not specifically noted in the deed. If the easement had been brought to the pool-lover's attention, another property may have been the better choice. But if the deed says the property was conveyed "subject to easements, covenants, and restrictions of record," what recourse does the current owner have? The current owner probably has no recourse against the seller, absent some actual fraud, because the utility easement was "of record" and the current owner took "subject" to it.

A major reason why conveyancing practices have changed in recent decades is the emergence of title insurance. What does title insurance cover? A policy is issued only after the public records have been searched for possible adverse claims. If such claims are identified they are not covered by the policy. Instead they are listed as an exception to coverage. The benefit to the purchaser or lender is the ability to review the title policy's property description and listed exceptions before closing and decide whether the property is as expected. If the proposed policy discloses matters that are unacceptable—as the utility easement may have been to the owner dreaming of cool blue waters—the issue can be addressed before the investment is consummated. If the issue of record was not picked up and disclosed in the policy, then the title insurer must provide a defense against the claim or indemnity against loss. But if the title policy also says

“subject to easements, covenants, and restrictions of record,” the owner or lender insured by the policy may have no coverage when the previously identified easement instrument is discovered. The lesson here is that the policy must be reviewed before the closing is consummated.

So if you want to know what easements, covenants, and restrictions may apply to the property, and to have much of a chance of indemnity from a seller or title insurance company if previously unidentified matters arise, beware of the “subject to” clause. You may be stuck with whatever turns up in the public records.