

**OWNER/CONTRACTOR AFFIDAVIT, INDEMNITY AND LIEN SUBORDINATION AGREEMENT
(CONSTRUCTION IN PROCESS OR IMMEDIATELY CONTEMPLATED)**

[LENDER COVERAGE ONLY]

PARTIES: All parties identified in this section must execute this Agreement, including any Contractors required to sign Additional Signature Pages which must be attached hereto and are hereby incorporated herein and made a part hereof by reference, as applicable (herein the "Agreement").

Owner: _____
(NOTE: There can be more than one Owner if the Property has been owned by multiple parties or has been conveyed within the 120-Day Lien Period. A separate Agreement is required for each successive owner in the 120-Day Lien Period and the Contractors who have contracted or dealt with that Owner.)

Contractor(s): _____
(NOTE: There can be more than one Contractor contracting or dealing with an Owner. All Contractors must be named and execute this Agreement.)

Attached: ADDITIONAL SIGNATURE PAGE(S) for all Contractors providing or who have provided Labor, Services or Materials within the 120-Day Lien Period.

PROPERTY: _____

(Insert street address or brief description and/or attach a description as Exhibit A. Include here any real estate that is a portion of a larger, previously unsegregated tract when that area is reasonably necessary for the convenient use and occupation of Improvements on the larger tract.)

DEFINITIONS: The following capitalized terms as used in this Agreement shall have the following meanings:

- **Improvement:** All or any part of any building, structure, erection, alteration, demolition, excavation, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways on the Property as defined below.
- **Labor, Services or Materials:** Labor or professional design (including architectural, engineering, landscaping) or surveying services or materials or rental equipment for which a lien can be claimed under NCGS Chapter 44A, Article 2.
- **Contractor:** Any person or entity who has performed or furnished or has contracted to perform or furnish Labor, Services or Materials pursuant to a contract, either express or implied, with the Owner of real property for the making of an Improvement thereon. (Note that services by architects, engineers, landscapers, surveyors, furnishers of rental equipment and contracts for construction on Property of Improvements are often provided before there is visible evidence of construction.) (CAUTION: IF AN OWNER OF THE PROPERTY ALSO ACTS AS A CONTRACTOR, OR IF A CONTRACTOR IS ALSO AN AGENT OF AN OWNER, THEN ALL OTHER CONTRACTORS WHO ENTER INTO A CONTRACT WITH THAT OWNER/CONTRACTOR DIRECTLY OR THROUGH SUCH AGENT FOR IMPROVEMENTS TO THE PROPERTY MUST EXECUTE THIS AGREEMENT. IF A CONTRACTOR IS SUBSTANTIALLY RELATED TO THE OWNER, CONSULT UNDERWRITING COUNSEL WITH THE TITLE INSURER PRIOR TO CLOSING. DO *NOT* RELY ON CONSTRUCTION LICENSING DEFINITIONS.)
- **120-Day Lien Period:** The 120 days immediately preceding the date of recordation of the Deed of Trust in the Office of the Register of Deeds of the county in which the Property is located.
- **Owner:** Any person or entity, as defined in NCGS Chapter 44A, Article 2, who has or has had any interest in the Property within the 120-Day Lien Period. For the purposes of this Agreement, the term Owner includes: (i) a seller of the Property or a borrower under a loan agreement secured by the Property; (ii) a person with rights to purchase the Property under a contract and for whom an Improvement is made and who ordered the Improvement to be made; and (iii) the Owner's successors in interest and agents of the Owner acting within their authority.
- **Company:** The title insurance company providing the title policy for the transaction contemplated by the parties herein.
- **Lender - INSERT NAME(S):** _____, and its/their successor and/or assigns.
- **Deed of Trust:** The real estate security instrument(s) to be executed by Owner and to encumber the Property in the currently contemplated transaction and any currently contemplated or future extensions, renewals, modifications, amendments or reinstatements thereof.
- **Property:** The real estate described above or on Exhibit A and any leaseholds, tenements, hereditaments, and improvements placed thereon.
- All defined terms shall include the singular or plural as required by context.

AGREEMENT: Construction of an Improvement to the Property is contemplated or is in process. Owner has obtained or will obtain a loan (including any transaction within the definition of Deed of Trust as defined above) made by Lender and secured by the Deed of Trust encumbering the Property which Deed of Trust is or will be recorded in the office of the Register of Deeds of the county in which the Property is located.

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and as an inducement to the making of a loan by Lender secured by the Deed of Trust encumbering the Property and the issuance of a title insurance policy or policies by Company insuring the priority of the lien of the Deed of Trust as an encumbrance on the Property without exception to liens for Labor, Services or Materials; Owner and Contractor(s), first being duly sworn, depose, say and agree, respectively:

1. Owner's Certifications:

Owner certifies that (i) every Contractor with whom Owner has dealt or contracted for Improvements within the 120-Day Lien Period is identified and a signatory herein, including every Contractor that may be providing punch list or warranty work post-closing pursuant to a contract for Labor, Services or Materials previously furnished; (ii) there are no other outstanding actual or potential liens (filed or unfiled) for Labor, Services or Materials for Improvements on the Property; (iii) Owner has not received any Notice of Claim of Lien upon Funds from any other person or entity; (iv) Owner has no knowledge of any other type of claim outstanding which would entitle the holder thereof to claim a lien on or interest in the Property including retention of title agreements or security interests for any materials, appliances, fixtures or furnishings placed upon or installed on the Property. Any such matter in (i) through (iv) shall be deemed not to exist if either the claimant has completed all Improvements of that claimant and been paid in full (and satisfactory evidence of such payment is provided herewith) or the claimant has waived or released (if Labor, Services or Materials are completed) or subordinated (if Labor, Services or Materials are not yet completed) the claimant's claim, provided that the subordination, waiver or release is in writing and such writing is acceptable to and is furnished to the Company.

2. Contractor's Certifications - Subordination of Potential Liens:

Each Contractor certifies that (i) such Contractor has signed this Agreement in the correct legal capacity and has the authority to sign this Agreement; (ii) there are no outstanding actual or potential liens (filed or unfiled) for Labor, Services or Materials for Improvements on the Property by anyone claiming by, through, or under such Contractor; and (iii) such Contractor has not received any Notice of Claim of Lien upon Funds or Claim of Lien on Real Property from any other person or entity.

In addition, each Contractor certifies that, to the best of such Contractor's knowledge and belief, (i) all parties known by such Contractor to have dealt or contracted with Owner for Improvements made within the 120-Day Lien Period or who such Contractor knows may be providing punch list or warranty work post-closing pursuant to Labor, Services or Materials previously furnished are identified herein (though such Contractor makes no representation regarding their waiver, subordination or payment unless claiming by through or under such Contractor) and (ii) such Contractor has no knowledge of any other type of claim outstanding by anyone claiming by, through, or under such Contractor which would entitle the holder thereof to claim a lien on or interest in the Property including retention of title agreements or security interests for any materials, appliances, fixtures or furnishings placed upon or installed on the Property.

Each undersigned Contractor hereby subordinates to the lien of the Deed of Trust such Contractor's right and that of anyone claiming by, through, or under such Contractor to file a lien for Labor, Services or Materials on the Property. Each Contractor agrees that the Deed of Trust shall constitute a superior and paramount lien for all amounts which have been or may hereafter be advanced under the Deed of Trust. Each Contractor further warrants that such Contractor has not assigned and will not assign such Contractor's claim for payment or right to perfect a potential lien on the Property and that such Contractor has the right to execute this subordination.

3. Reliance and Indemnification:

This Agreement may be relied upon by Lender to make a loan secured by the Deed of Trust encumbering the Property and by Company in issuance of a title insurance policy or policies insuring priority of the lien of the Deed of Trust on the Property without exception to matters certified in this Agreement. The provisions of this Agreement shall survive the disbursement of funds and closing of this transaction and shall be binding upon Owner and Contractor (and anyone claiming by, through or under them).

Owner and Contractor agree to indemnify and hold Lender and Company harmless of and from any and all loss, cost, damage and expense of every kind, and attorney's fees, costs and expenses, which the purchaser, Lender or Company shall or may incur or become liable for, directly or indirectly, as a result of reliance on the respective certifications of the Owner and Contractor made herein or in enforcement of the Company's rights hereunder.

NOTE: Notwithstanding the foregoing, no party to this Agreement assumes liability for certifications made by another party.

4. NCLTA Copyright and Entire Agreement:

This Agreement and any attachments hereto represent the entire agreement between Contractor(s) and Company, and no prior or contemporaneous agreement or understanding inconsistent herewith (whether oral or written) pertaining to such matters is effective.

THIS IS A COPYRIGHT FORM and any variances in the form provisions hereof must be specifically stated in the blank below and agreed to in writing by the Company.

No modification of this Agreement, and no waiver of any of its terms or conditions, shall be effective unless made in writing and approved by the Company.

PROVIDING A FALSE AFFIDAVIT IS A CRIMINAL OFFENSE

EXECUTION BY OWNER

| | | |
|--|---|--------------------------------|
| _____ (SEAL) By: _____ Printed or Typed Name/Title: _____ By: _____ Printed or Typed Name/Title: _____ | State of _____ County of _____ Signed and sworn to (or affirmed) before me this day by _____ _____ [insert name(s) of principal(s)]. Date: _____ _____, Notary Public My Commission Expires: _____ | (Affix Official/Notarial Seal) |
|--|---|--------------------------------|

EXECUTION BY SOLE CONTRACTOR

(THIS EXECUTION SECTION APPLIES ONLY IF UNDERSIGNED IS THE ONLY PERSON OR ENTITY CONTRACTING DIRECTLY WITH THE OWNER OF THE PROPERTY WITHIN THE 120-DAY LIEN PERIOD AND IS NOT THE OWNER OF THE PROPERTY. IF THIS CONTRACTOR IS SUBSTANTIALLY RELATED TO THE OWNER, CONSULT UNDERWRITING COUNSEL FOR TITLE INSURER/COMPANY PRIOR TO CLOSING.)

| | | |
|--|---|--------------------------------|
| _____ (SEAL) By: _____ Printed or Typed Name/Title: _____ By: _____ Printed or Typed Name/Title: _____ | State of _____ County of _____ Signed and sworn to (or affirmed) before me this day by _____ _____ [insert name(s) of principal(s)]. Date: _____ _____, Notary Public My Commission Expires: _____ | (Affix Official/Notarial Seal) |
|--|---|--------------------------------|

NOTE: ATTACH ADDITIONAL SIGNATURE PAGE(S) IF THERE ARE MULTIPLE CONTRACTORS AS DEFINED HEREIN.

OWNER/CONTRACTOR AFFIDAVIT, INDEMNITY AND LIEN SUBORDINATION AGREEMENT
 (CONSTRUCTION IN PROCESS OR IMMEDIATELY CONTEMPLATED)
(ADDITIONAL SIGNATURE PAGE FOR CONTRACTORS)

WITH RESPECT TO PROPERTY:

- DESCRIBED AS _____
- OWNED BY _____

In accordance with the provisions of Paragraph 2 of this affidavit, each undersigned Contractor hereby subordinates to the lien of the Deed of Trust (as defined on Page 1) such Contractor's right and that of anyone claiming by, through, or under such Contractor to file a lien for Labor, Services or Materials on the Property.

| NAME OF CONTRACTOR | LABOR, SERVICES OR MATERIALS FURNISHED | SIGNATURE OF AUTHORIZED REPRESENTATIVE |
|--------------------|--|--|
| _____ | <u>Surveyor/Engineer</u> | _____ (SEAL) |
| _____ | <u>Architect</u> | _____ (SEAL) |
| _____ | <u>General Contractor</u> | _____ (SEAL) |
| _____ | <u>Clearing/Grading</u> | _____ (SEAL) |
| _____ | <u>Foundation/Masonry</u> | _____ (SEAL) |
| _____ | <u>Framing</u> | _____ (SEAL) |
| _____ | <u>Roofing</u> | _____ (SEAL) |
| _____ | <u>Electrical</u> | _____ (SEAL) |
| _____ | <u>Plumbing</u> | _____ (SEAL) |
| _____ | <u>Insulation</u> | _____ (SEAL) |
| _____ | <u>Paving</u> | _____ (SEAL) |
| _____ | <u>HVAC</u> | _____ (SEAL) |
| _____ | <u>Sheet rock</u> | _____ (SEAL) |
| _____ | <u>Cabinetry</u> | _____ (SEAL) |
| _____ | <u>Finish Carpentry</u> | _____ (SEAL) |
| _____ | <u>Painting</u> | _____ (SEAL) |
| _____ | <u>Materials</u> | _____ (SEAL) |
| _____ | <u>Landscaping</u> | _____ (SEAL) |
| _____ | Other: _____ | _____ (SEAL) |
| _____ | Other: _____ | _____ (SEAL) |
| _____ | Other: _____ | _____ (SEAL) |

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**NOTE: THE SIGNATURE BLOCKS PROVIDED ABOVE ARE NOT INTENDED TO BE COMPREHENSIVE.
 ALL CONTRACTORS WHO HAVE CONTRACTED OR DEALT WITH THE OWNER (as defined herein) MUST EXECUTE THIS AGREEMENT.
 ATTACH ADDITIONAL SIGNATURE PAGES AS NEEDED.**

**OWNER/CONTRACTOR AFFIDAVIT, INDEMNITY AND LIEN SUBORDINATION AGREEMENT
(CONSTRUCTION IN PROCESS OR IMMEDIATELY CONTEMPLATED)**

1. This Owner/Contractor Affidavit, Indemnity and Lien Subordination Agreement (the "Agreement") form is for use with any title insurer (the "Company") regarding lender coverage for construction transactions affecting title to particular real estate in North Carolina (the "Property"), a description of which must be included in this Agreement.

2. This form is for obtaining title insurance of priority of the Lender's Deed of Trust regarding liens for Labor, Services or Materials for current or immediately contemplated Improvements (all terms as defined in the Agreement) based on subordination herein by Contractors to:

- a. Lender's Deed of Trust or for extensions, renewals, modifications, amendments and restatements thereof, and/or
- b. extensions, renewals, modifications, amendments and restatements of a previously existing loan involving construction in process or immediately contemplated.

THIS FORM DOES NOT PROVIDE COVERAGE TO AN OWNER who is contracting for Improvements since that is the Owner's contract, excluded by the standard ALTA exclusions from coverage, and is not covered by the policy. With regard to potential protection of a purchaser if the Owner will be conveying the Property to a purchaser mid-construction, it will be important to determine the relationship of both the Owner (now seller) and of the purchaser with any of the Contractors providing Labor, Services or Materials on the Property. The closing attorney should consult with title insurance counsel in order to determine from whom waivers (on Owner-seller's contracts) will be required, and if owner's coverage is available for those potential liens, and from whom subordinations (for purchaser's contracts) will be required.

The closing attorney must *notify underwriting counsel for the Company prior to closing* regarding any filed Claim of Lien on Real Property or Notice of Claim of Lien upon Funds, or any Notice of Claim of Lien upon Funds known by the attorney or Owner to have been delivered to the Owner, whether on the Property or on *any* property in the state of North Carolina, as this may affect the Company's decisions about whether to insure and on what basis.

At the very least, any **filed Claim of Lien on Real Property** must be paid in full and canceled of record. **Any delivered or filed Notice of Claim of Lien upon Funds** (by a subcontractor) must be paid in full and subordination or waiver obtained from the subcontractor. The attorney must discuss any questions or issues regarding these with underwriting counsel for the Company prior to closing.

3. **Contractors** who must sign: This form uses the terminology found in the North Carolina mechanic's lien statute, NCGS Chapter 44A, Article 2 (the "Statute") for liens for Labor, Services or Materials (as defined). The use of the term "General Contractor" has been intentionally *avoided* because the term is not used in the Statute and this lien Statute does *not* follow the same usage as the licensing statute, NCGS Chapter 87. The term General Contractor is commonly used to describe a Contractor who enters into a contract with the Owner to construct Improvements on the Owner's Property and through whom all other Contractors are engaged ("Subcontractors"). The Statute, in defining who is entitled to a lien on real property, does not distinguish between "General Contractors" and "Contractors", but rather draws on the simple distinction of those Contractors who deal directly with the Owner and those who deal with another Contractor as a Subcontractor.

Common scenarios are set forth below with explanation:

SCENARIO #1 – OWNER HAS ARMS-LENGTH CONSTRUCTION CONTRACT WITH ONLY ONE INDEPENDENT CONTRACTOR PROVIDING/CONTRACTING FOR ALL LABOR, SERVICES OR MATERIALS (as defined in the Definitions, including materials suppliers, services by "subcontractors", survey, architect and engineering services, and lease of rental equipment):

In the event *all* Improvements to the Property have been and will be made pursuant to a contract with a single party or entity which is not the Owner or an agent or affiliate of the Owner, that person or entity should execute the Agreement as the "Sole Contractor" in the appropriate signature block.

SCENARIO #2 – OWNER HAS CONTRACTED DIRECTLY WITH MULTIPLE PROVIDERS OF LABOR, SERVICES OR MATERIALS:

If the Owner is also the builder, even if the Owner is a licensed "General Contractor", the Owner can only sign in the capacity of Owner. **FOR LIEN PURPOSES, THE OWNER OF THE PROPERTY CANNOT BE THE "CONTRACTOR". DO NOT RELY ON CONSTRUCTION LICENSING DEFINITIONS.** The Contractors who must sign this Agreement include all providers of Labor, Services or Materials (as defined in this Agreement) within the 120-Day Lien Period who are considered Contractors for purposes of this Agreement and who have contracted or dealt directly with the Owner or the Owner's agent. These may include those sometimes generically called "subs", such as the framer, mason, electrician and landscaper as well as the surveyor, architect, engineer, rental equipment lessor or supplier of materials.

SCENARIO #3 – "AGENT" OF OWNER CONTRACTING WITH PROVIDERS OF LABOR, SERVICES OR MATERIALS:

The Statute includes in the definition of Owner a separate entity acting as agent of the Owner. A party referred to as "Contractor" may actually be acting as an agent of the Owner and again all parties contracting with that entity have dealt directly with the Owner and they must execute this Agreement. For example, if a developer corporation, ABC Land Company, creates a subsidiary corporation, ABC Construction, who in turn hires all the other Contractors needed to complete construction; then all Contractors who enter into a contract with ABC Construction could be treated as though they have dealt directly with the Owner by having dealt with its "agent" and, if so, they would be required to execute this Agreement.

NOTE: DO NOT ASSUME that affiliated parties may be sufficient sole signatories. The closing attorney must obtain *prior approval* of underwriting counsel for the Company, based on such factors as independently negotiated construction contracts, separate management, separate maintenance of corporate existence, accounting and formalities or other relevant information regarding independence and arms-length negotiation.

SCENARIO #4 – MULTIPLE PARTIES (“GENERAL CONTRACTOR” & OTHER PROVIDERS OF LABOR, SERVICES OR MATERIALS) HAVE CONTRACTED DIRECTLY WITH OWNER:

A Contractor that one may refer to as a “General Contractor” may not be the only Contractor dealing directly with the Owner. If the Owner contracts directly with a surveyor, architect, engineer, supplier, and/or equipment lessor as well as an unrelated licensed “General Contractor” and the “General Contractor” then further contracts with Subcontractors such as the framer, mason, electrician and landscaper; then the surveyor, architect and engineer, supplier and equipment lessor (as the case may be) must execute this Agreement, but not the framer, mason, electrician or landscaper, which truly are Subcontractors in this case. As a general rule, the Subcontractors in this scenario are effectively “cut off” by the waiver or subordination of the Contractor with whom the Owner dealt for that Subcontractor’s Labor Services or Materials.

4. The list of potential Contractors provided above is not intended to be exclusive or exact. There may be more than one Contractor in a listed category or there may be Contractors in categories not listed in the Additional Signature Page. Any Contractor providing Labor, Services or Materials pursuant to a contract with the Owner must execute this Agreement. Any additional Contractors should be included in the blocks marked Other and the Labor, Services or Materials (as defined in the Agreement) provided should be specified. Additional Contractors might include, but are not limited to, those providing Labor, Services or Materials for:
 - Security Systems
 - Sound Systems
 - Specialty Masonry
 - Sewer/Septic Systems
 - Appliances
 - Water/Well Systems
 - Water Softening or Heating Systems
 - Termite/Pest Control
 - Specialty Fixtures (Lighting, Plumbing, Kitchen)
5. Each Contractor that executes the Agreement must sign in the same legal capacity in which they contracted with the Owner (individual, corporation, LLC, etc.)
6. The name of the entity and the actual signer must be clearly determinable. If the signature is not legible, the name must be printed in the space provided.
7. Any variances in execution of this form or in parties signing must be approved by underwriting counsel for the Company prior to closing.