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Texas City Attorneys Association 2009 Summer Conference  
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## **REAL ESTATE FAQ'S FOR CITY ATTORNEYS**

**(OR "WHAT IS THE DIFFERENCE BETWEEN A  
RIGHT-OF-WAY AND AN EASEMENT?")**

**Presented by:**

**Kevin B. Laughlin**  
**Nichols, Jackson, Dillard, Hager & Smith, L.L.P.**  
**Dallas, Texas**

**Texas City Attorneys Association 2009 Summer Conference**  
**South Padre Island, Texas**  
**June 10-12, 2009**

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Station 5

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**Question: What is the difference between a right-of-way and an easement?**

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# ANSWER:

As a general premise.....



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**City Engineer:** We have a new waterline for a development on the west side that needs to cut across Farmer Jones' acreage. Can you prepare a right of way agreement for me?

**City Attorney:** Sounds like you need a utility easement. I'll get started on it.

**City Engineer:** No, I said a right of way! This is for a pipeline, and I need a right of way for it!

**City Attorney:** Fine. I will prepare a document that will get you the right to build the line.

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- Easement does not convey full title
- Non-possessory interest
- Holder authorized to use the owner's property for a particular purpose
- Utility, street and other public easements are usually "easement in gross"
- A right-of-way is merely a type of easement.

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**Question: "We have an existing easement with a 16-inch water line in it. Can we replace the 16-inch line with a new 24-inch water line in the same easement?"**

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**Answer:**

**Depends on what the easement says.**

**YOU MUST READ THE EASEMENT!**





As a general premise, the grantee of an easement may only use an easement for the purposes described in the easement and those things necessary to allow the permitted use to occur.

**EXAMPLE.....**

Easement says *“construction, reconstruction, repair, maintenance, replacement, or removal of a 16-inch water line....”*



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*What can we build in this easement?*

- ✓ 16-inch water line
- ✓ 8-inch water line
- ✗ 16-inch sewer line
- ✗ Two 8-inch water lines

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**Practice Tip:** *Write the use description as broadly as you can get away with in order to provide as much flexibility to your successors 40 years from now!*

...the right of ingress, egress, and regress therein, to erect, construct, reconstruct, install, replace, repair, operate, use, inspect, modify, remove and maintain certain water, wastewater, and/or other public utility lines and appurtenances, together with all lines, pipes, conduits and other facilities, equipment, improvements, and appurtenances used in connection with such said public utilities as deemed necessary thereto by said Grantee, over, along, across, under, into and through the Property.

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**Question:** There's a fence down the middle of the drainage easement in Blackacre Estates. Can we take it down without liability?

**Answer:**

**See answer to previous question!  
 READ THE EASEMENT!**

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- The owner of the land on which an easement has been granted has the right of full use of the land not inconsistent with the reasonable enjoyment of the easement. *Rhodes v. Whitehead*, 27 Tex. 304, 1863 WL 2837 (Tex. 1863)
- The owner of the property burdened by the easement does, however, owe a duty to use his or her property in a manner that will not impair or destroy the paramount right of use allowed in the easement. *Jones v. Fuller*, 856 S.W.2d 597 (Tex. App. Waco 1993, writ denied).

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**Practice Tip:** *Don't depend on the common law rule to help you out with respect to conflicts between the city use of the easement and the use by the property owner. Include in the easement document specific language regarding use and removal of improvements placed there by third parties...especially the grantor of the easement!*

**Sample Drainage Easement Language:** *Grantor retains all rights to the Easement Property, provided that the Grantor's exercise of such rights does not interfere with the Grantee's rights under this easement. Grantor agrees not to interfere with the Grantee's ability to use or maintain the drainage facilities. Interference includes, but is not limited to, physically modifying the Easement Property such as altering topography; installing fences, structures, rockeries, walls or other like improvements; planting of difficult to restore landscaping; piling or storage of dirt, trash, garbage, debris or other materials. Grantor shall, upon receipt of written notice from the Grantee, remove cited interference from the Easement Property which prevents proper use of the Easement Property for the purposes intended herein. Grantee may grant written permission to the Grantor to physically modify the Easement Property upon receipt of a written request.*

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**Question:** *We don't need that street any more and would like to vacate it. How do we do it, and who gets the property back?*



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**When abandoning right of way, always ask and obtain a satisfactory answer to the following questions:**

- **How was the right of way originally acquired?**
- **Who owns the underlying fee title, if not the city?**
- **If the ROW is on the edge of a subdivision, did it come wholly out of that subdivision or in part from adjacent land?**
- **Do I have a clear legal description of what is being abandoned/vacated so that it can be identified on the ground?**
- **If the property is owned in fee by the city, have I complied with all requirements, if any, of Tex. Loc. Govt. Code §272.001 regarding the sale of property?**
- **If the property was acquired through the exercise of eminent domain, is it necessary to comply with Tex. Prop. Code §21.101 regarding offering the property back to the original owner?**
- **Does the city need to retain any easement for utilities, drainage, or other purposes?**
- **After the formal action has taken place to approve vacating the ROW, has the appropriate document noting the vacation been filed in the real property records in the county clerk's office?**

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**Question: *I can pay the title company \$150 to prepare an abstract certificate or a little bit more and get a title opinion from a title attorney. Do I really need an owner's policy of title insurance?***

**Answer:**

**Possibly and, in many instances, probably.**

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## Abstract of Title.....

is a compilation of the history of the documents affecting the title to property.

**IT IS NOT A TITLE OPINION!!!**

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## Attorney's Opinion of Title...

an opinion of an attorney (hopefully from an attorney who is actually experienced in examining property records) with respect to the ownership of the subject property and any defects in title.

***Good for updates on title previously insured, but cannot provide compensation for defects in title learned of later.***

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**ALAMO TITLE COMPANY**

# Title insurance...

protects you and your lender if someone challenges your title to your property because of title defects that were unknown when you bought the policy.

**stewart**  
TITLE

SOLUTIONS FOR

Texas Department of Insurance



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| COMMITMENT  |   | 1 COMMITMENT NUMBER | 2 POLICY TYPE | 3 EFFECTIVE DATE |
|-------------|---|---------------------|---------------|------------------|
| 08R24346-01 | C | 121                 |               | 07/30/2008       |

First American Title Insurance Company  
SCHEDULE A

Effective Date: July 30, 2008 OF No. 08R24346 CB4  
 Commitment No. 08R24346-01 Issued August 7, 2008, 08:30 AM.

1. The policy or policies to be issued are:

(a) OWNER POLICY OF TITLE INSURANCE (Form T-1) \$ To Be Determined.  
 (Not applicable for improved one-to-four family residential real estate)  
 Proposed Insured:  
 DEKORON COUNTY TRANSPORTATION AUTHORITY

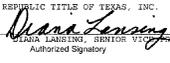
(b) TEXAS RESIDENTIAL OWNER POLICY OF TITLE INSURANCE - ONE TO FOUR FAMILY RESIDENCES (Form T-1R) \$  
 Proposed Insured:

(c) MORTGAGEE POLICY OF TITLE INSURANCE (Form T-2) \$  
 Proposed Borrower:

(d) TEXAS SHORT FORM RESIDENTIAL MORTGAGEE POLICY OF TITLE INSURANCE (Form T-2R) \$  
 Proposed Borrower:

(e) MORTGAGEE TITLE POLICY BINDER ON INTERIM CONSTRUCTION LOAN (Form T-13) \$  
 Proposed Insured:  
 Proposed Borrower:

(f) OTHER \$  
 Proposed Insured:

REPUBLIC TITLE OF TEXAS, INC.  
 Countersigned at DALLAS, TEXAS   
 DIANA LANSING, SENIOR VICE PRESIDENT  
 Authorized Signatory

This commitment is invalid unless the following conditions are met:  
 1. This is a bona fide purchase.  
 2. This is a bona fide mortgage.  
 3. This is a bona fide deed.  
 4. This is a bona fide lease.  
 5. This is a bona fide contract.  
 6. This is a bona fide agreement.  
 7. This is a bona fide arrangement.  
 8. This is a bona fide understanding.  
 9. This is a bona fide intention.  
 10. This is a bona fide purpose.  
 11. This is a bona fide object.  
 12. This is a bona fide aim.  
 13. This is a bona fide end.  
 14. This is a bona fide result.  
 15. This is a bona fide consequence.  
 16. This is a bona fide effect.  
 17. This is a bona fide production.  
 18. This is a bona fide issue.  
 19. This is a bona fide matter.  
 20. This is a bona fide affair.  
 21. This is a bona fide business.  
 22. This is a bona fide concern.  
 23. This is a bona fide interest.  
 24. This is a bona fide participation.  
 25. This is a bona fide share.  
 26. This is a bona fide part.  
 27. This is a bona fide portion.  
 28. This is a bona fide partake.  
 29. This is a bona fide partake in.  
 30. This is a bona fide partake of.  
 31. This is a bona fide partake with.  
 32. This is a bona fide partake by.  
 33. This is a bona fide partake for.  
 34. This is a bona fide partake to.  
 35. This is a bona fide partake from.  
 36. This is a bona fide partake out.  
 37. This is a bona fide partake against.  
 38. This is a bona fide partake through.  
 39. This is a bona fide partake by means of.  
 40. This is a bona fide partake by way of.  
 41. This is a bona fide partake by virtue of.  
 42. This is a bona fide partake by reason of.  
 43. This is a bona fide partake by means and way of.  
 44. This is a bona fide partake by means and virtue of.  
 45. This is a bona fide partake by means and reason of.  
 46. This is a bona fide partake by means and way and virtue of.  
 47. This is a bona fide partake by means and way and reason of.  
 48. This is a bona fide partake by means and virtue and reason of.  
 49. This is a bona fide partake by means and way and virtue and reason of.  
 50. This is a bona fide partake by means and way and virtue and reason of.

Schedule A-Page 1  
 DATE: 08/08/2008 TIME: 11:13 PM

First American Title Insurance Company

GF Number: 08R24346 08R24346-01

SCHEDULE A

2. The interest in the land covered by this Commitment is:  
FEE SIMPLE

3. Record title to the land on the Effective Date appears to be vested in:  
EPIC DEVELOPMENT, INC., a Delaware corporation

4. Legal description of land:  
BEING a tract of land situated in the D. Hough Survey, Abstract No. 646 and the D. Lambert Survey, Abstract No. 784, Denton County, Texas, and to be more particularly described upon receipt of acceptable survey.

Schedule A--Page 2

Texas Dept. of Insurance Form No. 1-1      DATE: 06/15/2009      TIME: 1:13 PM

GF Number: 08R24346 08R24346-01

First American Title Insurance Company  
COMMITMENT FOR TITLE INSURANCE NO. \_\_\_\_\_  
SCHEDULE B

EXCEPTIONS FROM COVERAGE

In addition to the Exclusions and Conditions and Stipulations, your Policy will not cover loss, costs, attorney's fees and expenses resulting from:

1. The following restrictive covenants of record itemized below (We must either insert specific recording data or delete this exception):
  - a. Restrictive covenants described in instrument recorded in Volume 5156, Page 1186, Real Property Records of Denton County, Texas. Any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604(c), is deleted. [28]
2. Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements. May be amended to read Shortages in Area in owner policy upon receipt of approved survey and additional premium, no charge for amendment in mortgagee policy.
3. Homestead or community property or survivorship rights, if any, of any spouse of any insured. (Applies to the Owner Policy only.)
4. Any titles or rights asserted by anyone, including, but not limited to, persons, the public, corporations, governments or other entities:
  - a. to tidelands, or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs or oceans, or
  - b. to lands beyond the line of the harbor or bulkhead lines as established or changed by any government, or
  - c. to filled-in lands, or artificial islands, or
  - d. to statutory water rights, including riparian rights, or
  - e. to the area extending from the line of mean low tide to the line of vegetation, or the rights of access to that area or easement along and across that area.
 (Applies to the Owner Policy only.)
5. Standby fees, taxes and assessments by any taxing authority for the year 2008, and subsequent years, and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership, but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.52, Texas Tax Code, or because of improvements not assessed for a previous tax year. (If Texas Short Form Residential Mortgage Policy (T-2R) is issued, that policy will substitute "which become due and payable subsequent to Date of Policy" in lieu of "for the year 2008, and subsequent years".)
6. The terms and conditions of the documents creating your interest in the land.
7. Materials furnished or labor performed in connection with planned construction before signing and delivering the lien document described in Schedule A, if the land is part of the homestead of the owner. (Applies to the Mortgage Title Policy binder on Inmate Construction Loan only, and may be deleted if satisfactory evidence is furnished to us before a binder is issued.)
8. Liens and leases that affect the title to the land, but that are subordinate to the lien of the insured mortgage. (Applies to Mortgage Policy (T-2) only.)
9. The Exceptions from Coverage and Express Insurance in Schedule B of the Texas Short Form Residential Mortgage Policy (T-2R). (Applies to Texas Short Form Residential Mortgage Policy (T-2R) only. Separate exceptions 1 through 8 of this Schedule B do not apply to the Texas Short Form Residential Mortgage Policy (T-2R).)

(CONTINUED ON NEXT PAGE)

Texas Dept. of Insurance Form No. 1-1      DATE: 06/15/2009      TIME: 1:13 PM

QP Number: 08R24346 First American Title Insurance Company

COMMITMENT FOR TITLE INSURANCE NO. 08R24346-01

SCHEDULE B

Page 3

m. Easement granted by Epic Development, Inc., to the City of Denton, dated 08/12/2005, filed 11/10/2005, cch 2005-140626, Real Property Records of Denton County, Texas. [44]

n. Easement granted by Epic Development, Inc., to the City of Denton, dated 08/12/2005, filed 11/10/2005, cch 2005-140631, Real Property Records of Denton County, Texas. [47]

o. Easement granted by Epic Development, Inc., to the City of Denton, dated 08/12/2005, filed 11/10/2005, cch 2005-140635, Real Property Records of Denton County, Texas. [48]

p. Easement granted by Epic Development, Inc., to the City of Denton, dated 08/12/2005, filed 11/10/2005, cch 2005-140636, Real Property Records of Denton County, Texas. [49]

q. Easement granted by Epic Development, Inc., to the City of Denton, dated 08/12/2005, filed 11/10/2005, cch 2005-140637, Real Property Records of Denton County, Texas. [50]

r. Easement granted by Epic Development, Inc., to the City of Denton, dated 02/17/2008, filed 04/16/2008, cch 2008-40683, Real Property Records of Denton County, Texas. [51]

s. Easement granted by Epic Development, Inc., to the City of Denton, dated 08/12/2005, filed 11/10/2005, cch 2005-140634, Real Property Records of Denton County, Texas. [52]

t. Mineral estate and interest, and all rights incident thereto, described in instrument recorded in Volume 5158, Page 1186, Real Property Records of Denton County, Texas. Title to said interest not checked subsequent to the date thereof. [61]

u. Mineral lease, and all rights incident thereto, to Multibrands, Ltd. Co., described in instrument filed 05/23/2003, recorded in Volume 5339, Page 292, Real Property Records of Denton County, Texas. Title to said interest not checked subsequent to the date thereof. [42]

v. Mineral lease, and all rights incident thereto, to Multibrands, Ltd. Co., described in instrument filed 01/20/2004, cch 2004-7015, Real Property Records of Denton County, Texas. Title to said interest not checked subsequent to the date thereof. [43]

w. Mineral lease, and all rights incident thereto, to Multibrands, Ltd. Co., described in instrument filed 07/15/2004, cch 2004-9312, Real Property Records of Denton County, Texas. Title to said interest not checked subsequent to the date thereof. [44]

x. Mineral estate and interest, and all rights incident thereto, described in instrument filed 10/03/2009, recorded in Volume 278, Page 376, Real Property Records of Denton County, Texas. Title to said interest not checked subsequent to the date thereof. [55]

Real Prop. of Insurance Form No. 1-7 (CONTINUED ON NEXT PAGE) 04/11/08/001010 1044 1113 76

QP Number: 08R24346 First American Title Insurance Company

COMMITMENT FOR TITLE INSURANCE NO. 08R24346-01

SCHEDULE C

Your Policy will not cover loss, costs, attorneys fees, and expenses resulting from the following requirements that will appear as Exceptions in Schedule B of this Policy, unless you dispose of these matters to our satisfaction, before the date the Policy is issued:

- Documents creating your title or interest must be approved by us and must be signed, notarized and filed for record.
- Satisfactory evidence must be provided that:
  - no person occupying the land claims any interest in that land against the persons named in paragraph 3 of Schedule A,
  - all standby fees, taxes, assessments and charges against the property have been paid,
  - all improvements or repairs to the property are completed and accepted by the owner, and that all contractors, subcontractors, laborers and supplies have been fully paid, and that no mechanic's, laborer's or materialmen's liens have attached to the property,
  - there is legal right of access to and from the land,
  - (on a Mortgage Policy only) restrictions have not been and will not be violated that affect the validity and priority of the insured mortgage.
- You must pay the seller or borrower the agreed amount for your property or interest.
- Any defect, lien or other matter that may affect title to the land or interest insured, that arises or is filed after the effective date of this Commitment.
- In accordance with Section 11.008 of the Texas Property Code, all deeds and deeds of trust transferring an interest in real property to or from an individual and disclosing that individual's social security number or driver's license number must include the following notice on the top of the first page of the instrument in 12 point bold or uppercase font:  
NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER. [27]
- Company requires current survey. [37]
- Require satisfactory evidence of authority to act on behalf of record owner. [38]
- Company requires additional research with respect to minerals that may affect the proposed insured land. This commitment is subject to such additional exceptions that such research indicates. [39]
- Excluding the language "Shortages in Area", item 2 of Schedule B will be deleted, provided that we are furnished with an acceptable survey and applicable premium and that exception may be made in the Policy to matters shown by the survey. [53]
- Require Affidavit as to Deeds and Deeds and Parties in Possession in substantially the form attached executed by owner at or prior to closing. [54]

Real Prop. of Insurance Form No. 1-7 (CONTINUED ON NEXT PAGE) 04/11/08/001010 1044 1113 76

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**What is the cost for title insurance?**

- \$10,000 policy (min) = \$229.00**
- \$50,000 policy = \$503**
- \$100,000 policy = \$843**
- \$500,000 policy = \$2979**
- \$1 million policy = \$5649**

*Same premium no matter where in the state or which title company!*

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**TDI Basic Owner's Rate Schedule:**

<http://www.tdi.state.tx.us/orders/titlerates2004.html>

**Basic Premium Rate Calculator:**

<http://www.stewartnorthtexas.com/premium-rates>

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**Question: What is the difference in a special warranty deed, general warranty deed, a deed without warranty, and a quitclaim deed, and which is preferable when?**

- **General Warranty Deed** – warranty of title obligates the grantor to indemnify the grantee against any loss resulting from a title defect or from any encumbrances that arose before the conveyance.
- **Special Warranty Deed** – warranty of title obligates the grantor to indemnify the grantee only as to defects in title caused by the grantor and not the grantor's predecessors in title.
- **Deed Without Warranty** – There is no warranty of title provided by the grantor to the grantee, but at least there is a conveyance of the quality and quantity of title described in the deed. In the case of a deed without warranty, it is possible to obtain after acquired title if the grantor did not have full title to the property conveyed at the time of the conveyance, but obtains it later.
- **Quitclaim Deed** – This is not really a "deed" at all, but serves to convey to the grantee whatever interest the grantor may own on the date of the conveyance.

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**Practice Tip: *When buying property, always try to get a general warranty deed. When selling, always try to give only a special warranty deed. Never accept a quitclaim deed unless you already know you are getting good title from another source but are trying to cure a potential contingent title issue from a third party not directly involved in the transaction. However, if that third party actually owns an undivided interest in fee, that third party needs to be a grantor on a warranty deed conveying his or her undivided interest. Don't take a quitclaim for someone's undivided fee interest.***

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**Question: My finance office is calling me about a property tax bill we received from the tax collector's office for property we bought in February. I thought we are tax exempt. What do we do with the bill?**

**Answer: PAY IT!!!**

Take advantage of Tex. Tax Code §26.11!

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**Additional Real Estate Issues....**

- ***Make sure you are dealing with the real owner of the property....***
- ***Make sure you have a good, full legal description of the property....***
- ***When dealing with a seller that is not an individual, check to verify the entity is in good standing to conduct business in the State of Texas....***
- ***When running a public works project owned by the city across city property, you do not need to prepare an easement...and don't let your city engineer whine about it.***

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 100 Grand Beach Resort (Formerly the Racoon Resort)

**When asked to prepare and/or negotiate a real estate contract, remember to ask up front....**

1. What is the name of the other party?
2. What is the other party's address and other contact information?
3. If not an individual, what kind of entity?
4. Is a survey required and who pays?
5. Is a title policy required and who pay?
6. Who pays title company escrow fees?

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7. Will earnest money be deposited with title company and how much?
8. What is the legal description of the property?
9. Will an environmental assessment be required and who pays?
10. How long will the inspection period be before the buyer is locked in to buying the property?
11. Is there a real estate broker involved?
12. If title policy being purchased, which title company?

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**When asked to prepare and/or negotiate a real estate contract, remember to ask up front....**

**13. Are there any special provisions relating to the transaction such a conditions to be satisfied prior to closing (plat approval or zoning change)?**

**14. What is the desired closing date?**

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