

AN ACT TO AMEND THE LAWS GOVERNING BUSINESS TRUSTS

G.S. §§ 39-44 and 39-46

Proposed by the North Carolina Bar Association Real Property Section

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Executive Summary:

Conveyances into and out of business trusts, such as Massachusetts business trusts, Illinois land trusts, Delaware Statutory Trusts or real estate investment trusts (REITs), are governed in North Carolina under Chapter 39, Article 8, Business Trusts. This act is somewhat out of step with changes in the law regarding other entities, specifically corporations, and in the rescission of the “seal” requirement on conveyances. This can create confusion because of the variance of requirements among entities. Therefore, the below proposal is made to bring the business trust provisions more consistent with that for other entities, such as corporations. In addition, the below provisions will provide for protection of innocent third parties reasonably relying upon the filed authority documents, similar to G.S. 47-18.3 in the case of corporations.

Talking Points:

- The definition of business trusts is broadened to include Illinois land trusts and Delaware Statutory Trusts.
- Changes in the law regarding seals for corporations did not apply to business trusts and this change brings business trusts in line with requirements for corporations and other entities.
- The statute has been revised to allow innocent third parties to reasonably rely on filed authority documents in the same way that innocent third parties can rely on corporate documents.
- The statute will allow an authorized agent to sign on behalf of the business trust, provided that the appropriate resolution is filed with the document or recorded separately that gives appropriate authority to the authorized agent.

1 therein in accordance with the provisions of said conveyance; provided, however, that with
2 respect to any such conveyance, encumbrance or other disposition effected after June 28, 1977,
3 there must be recorded in the county where the land lies a memorandum of the written
4 instrument or declaration of trust referred to in G.S. 39-44. As a minimum such memorandum
5 shall set forth the name, date and place of filing, if any, of such written instrument or declaration
6 of trust, and the place where the written instrument or declaration of trust, and all amendments
7 thereto, is kept and may be examined upon reasonable notice, which place need not be a public
8 office. Such memorandum may include designation of trustees and duly authorized officers, and
9 the authority granted thereto, with regard to real estate matters, pursuant to subsection (b)
10 hereafter.

11 (b) Any business trust may convey or encumber an interest in real property which is transferable
12 by instrument which is duly executed by either an officer of said business trust other than one of
13 its trustees, its president, a vice-president or other authorized agent identified in the recorded
14 memorandum or declaration of trust described in (a) above, if said conveyance has attached
15 thereto a signed resolution adopted by the board of directors as certified by an officer authorized
16 to make such certifications of said business trust authorizing the said officer to execute, sign,
17 seal, and deliver deeds, conveyances, or other instruments. This section shall be deemed to have
18 been complied with if a resolution is recorded separately in the office of the register of deeds in
19 the county where the land lies, which said resolution shall be applicable to all instruments
20 executed subsequently thereto and pursuant to its authority.

21 Notwithstanding the foregoing, this section shall not require a signed resolution adopted by the
22 board of directors as certified by an officer authorized to make such certifications trustees of the
23 business trust to be attached to an instrument or separately recorded in the case of an instrument

1 duly executed by the one of its trustees, its president, or a vice-president of the business trust. All
2 deeds, conveyances, or other instruments which have been heretofore or shall be hereafter so
3 executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the
4 real or personal property described therein. Notwithstanding anything to the contrary in the trust
5 agreement, and absent any provision otherwise in the recorded memorandum or declaration of
6 trust required under subsection (a) above, when it appears on the face of an instrument registered
7 in the office of the register of deeds that the instrument was signed in the ordinary course of
8 business on behalf of a business trust by at least one of its trustees, its president, a vice-president
9 or an assistant vice-president, such an instrument shall be as valid with respect to the rights of
10 innocent third parties for value without notice of a defect or breach of fiduciary duty as if
11 executed pursuant to authorization from the board of trustees, unless the instrument reveals on its
12 face a potential breach of fiduciary obligation. The subsection shall not apply to parties who had
13 actual knowledge of lack of authority or of a breach of fiduciary obligation.

14 (c) Nothing in this section shall be deemed to exclude the power of any representatives of a
15 business trust to bind the corporation pursuant to express, implied, inherent or apparent authority,
16 ratification, estoppel, or otherwise.

17 (d) Nothing in this section shall relieve trustees or officers of a business trust from liability to the
18 business trust or from any other liability that they may have incurred from any violation of their
19 actual authority.