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TITLE AND TITLE INSURANCE: A Brief Summary of What to Expect

The issues of “title” and “title insurance” are common to developers of land. What is it that you need to do and how do you need to do it? This brief summary will attempt to answer these questions.

Before Purchasing the Property – Title Commitment

You should begin the property development process by talking with a title company in order to obtain title insurance. This should be done before you acquire the property and as soon as possible after you enter into a purchase agreement or otherwise obtain the right to acquire the property.

Before a title company will issue a title insurance policy, it will research the property’s title using maps and public records, such as deeds and other documents previously recorded with the Register of Deeds. Through this research, the title company will determine whether the person selling or donating the property really owns the title or interest in the property and whether the buyer is getting all the rights to the property that he or she is expecting.

The title company begins by issuing a **title commitment**, which contains the results of its title search. The title commitment is a preliminary promise by the title company to issue a title insurance policy insuring your title in the condition indicated in the title commitment. If the commitment lists a number of liens, easements or other encumbrances, then

Working with a Title Company

Select a title company as early as possible in the process of acquiring property. The title company can help you decide whether and how potential problems with the property’s title may be resolved before the transaction is complete. This allows you to decide whether the expense necessary to clear the title will exceed the value of the property and if the time estimated to clear the title will create problems for the project.

In selecting a title company, you should consult with other nonprofit organizations or developers who work in your area. Make sure to ask the title company whether it has any experience dealing with common problems, particularly tax-reverted property and notice problems. Be sure to get prices for title commitments and title insurance in advance.

Most title companies charge between \$125–\$200 per property for a title commitment, although discounted services may be available for nonprofit organizations. Depending on your agreement with the title company, this cost might be deductible from the eventual title insurance premiums.

Title companies are specifically equipped to perform the type of detailed search necessary to identify clouds on your property interests. It is essential for nonprofit organizations to utilize the expertise of the title company to identify and resolve potential title problems.

the title company is committing to insure the title subject to those exceptions.

What is clouded title?

When someone other than the owner of a property has (or claims to have) an interest in the property, the property owner's title may have a "cloud" on it. These clouds may limit the property owner's rights to the property. Some of the more common clouds are:

- Insufficient Notice to Interested Parties
- Mortgage Liens
- Property Tax Liens
- Federal Tax Liens
- Demolition Liens and Lis Pendens
- Construction or Mechanic's Liens
- Judgment Liens
- Utility Liens
- Easements and Licenses

The title commitment will list any clouds on the title. Certain clouds must be removed before the title is marketable and can be insured. If title is marketable, it means that a reasonable person would not object to the condition of title. Without marketable title, development financing becomes riskier for financiers, and thus almost impossible to obtain due to the risk of potential claims on the property.

Not all third-party interests, however, constitute clouds. While clouds must be removed, some interests may not threaten yours and may in fact benefit the property. For example, a utility easement over your property allows the

power company to provide electricity to the structure on the property. These interests should be identified and located on the property, but may not need to be eliminated as long as they are compatible with your intended use. They should not make your title unmarketable or prevent you from obtaining a development loan.

It is essential to not only know about the existence of clouded title but also to understand its effects. Overlooking just one judgment, lien, or other cloud could be very costly and even result in the loss of your rights in the property. This risk is what the title research process is designed to uncover and title insurance is designed to protect against.

Dealing with clouded title

If clouds appear in the commitment, the title company may be able to help remove them. This is typically done by providing documentation that addresses the concern that the cloud creates. For

example, if the cloud is a mortgagee interest (a lender's interest, such as a bank), the title company will remove it if you provide evidence of a discharge of the mortgage. Using the title commitment as a guide and working with the title company, you can take steps to resolve these and other problems. Some title companies may be willing to

A **title commitment** includes the results of a title search and is a report on the state of the title, including identification of the current owner. It provides a snapshot of the current status of title and the title company's preliminary promise, if certain requirements set forth in the commitment are satisfied, to insure the title subject to those other interests identified by its search

A **title search** alone provides the history of title without the title company's conclusion as to ownership or its promise to issue title insurance.

work with you free of charge, while other businesses will help to clear title for a fee. It is also possible to negotiate with the title company to remove a defect as an exception to the coverage (i.e., the defect remains, but you now have insurance over the defect). Finally, you can always obtain additional title commitments from other title companies. The risk created by a defect in title may be viewed as a risk by one title company, but not another.

As a general rule, the goal is to obtain title to the property free from other interests. Some interests may remain on your title as exceptions to the title insurance commitment. These interests should only be those you are willing to live with, such as utility easements or uniform building restrictions that protect values in a neighborhood.

Special Circumstances: Tax-Foreclosed Property

In Michigan, as in many states, it may be difficult to obtain title insurance for properties that have reverted to the government due to failure to pay property taxes. Thus, it is very important that you proceed with caution when purchasing or accepting tax-reverted property.

The most common problem associated with these properties stems from the State (or other governmental unit) failing to provide adequate notice of tax foreclosure to those interests entitled to notice. The due process provisions of the Michigan and United States Constitutions require that everyone with a documented interest in a property be notified in a specific way before the property can be foreclosed upon. This usually means that this person or corporation (also known as an “interest”) must be notified in writing by the governmental unit taking the property and must be informed of their right to redeem the property.

If someone has an interest in a piece of property and did not receive proper notice of tax foreclosure proceedings, he or she could potentially bring a lawsuit asserting their rights to the property long after the property has been tax-reverted. Unfortunately there is no clear answer as to what will happen in those future legal proceedings. Each case is decided based on specific facts and circumstances.

Much of the tax-foreclosed property in Michigan suffers from notice defects. It is important, therefore, that you research and receive expert advice on notice issues when dealing with a tax-foreclosed property.

Tax Lien Due Process Certification

Tax lien foreclosure due process certification is the process of certifying the accuracy and completeness of the tax lien foreclosure due process in order to be able to receive title insurance for the sale and/or mortgaging of tax foreclosed properties. This process is an alternative to a quiet title court action. Only a few companies provide this certification (e.g., LaMont Title (Detroit) and Tax Title Services (Costa Mesa, CA).

Your title insurance commitment should help in revealing whether all the relevant parties were properly noticed. The interests or potential claims of parties who were not adequately noticed, as determined by the title company when reviewing the records, will appear as “clouds” on the title. It is also a good idea to visually inspect property you are interested in acquiring, as someone living on the property may have rights to it and may need to be “noticed.”

Quiet Title Actions

Perhaps the most misunderstood of all the issues relating to title is the quiet title action. A quiet title action, also referred to in Michigan as an “action to determine interests in land” under MCR 3.411, is a court proceeding initiated to establish the state of title. Any adverse or potentially adverse parties aware of the proceedings must establish their claim during this process, or they will be forever prevented from asserting it. The property owner can expect to spend several hundred dollars in court filing fees and attorney fees. Additionally, it will take several months before a quiet title action can be completed as court dockets are often backlogged.

A nonprofit developer will require the assistance of an attorney in order to file a quiet title action. Filing such an action is not tremendously complex, but it requires legal skills in both real estate and litigation. Private attorneys may charge thousands of dollars to file and complete a quiet title action. Nonprofit organizations, however, may be able to obtain free legal assistance through Community Legal Resources and its pro bono referral program.

The quiet title action can be useful when there is a known party who claims an adverse interest in the property but has no solid foundation on which to base their claims. A quiet title action provides judicial approval that everything necessary to establish title has been done successfully. However, if you obtained tax-reverted property and the original noticing process was inadequate, a quiet title action will not cure this problem; unnoticed parties will need to be properly noticed (see above, Providing Notification). Filing a quiet title action will establish the current state of the title; this action does not extinguish legitimate property rights of parties. Depending on the circumstances, some title insurers will not offer insurance solely on the basis of a quiet title action.

Your title company should advise you when a quiet title action is an acceptable approach that will result in insurable title.

Acquiring the Property – Title Insurance

Once you have resolved some or all of the clouds found in your title commitment, you will then request title insurance for your property. You should seek to have title insurance at the closing of your purchase of the property. Without title insurance, you could lose your investment and your property if someone brings a successful lawsuit. For example, if you obtain a mortgage on the property and then someone successfully claims an ownership interest (thereby taking away your interest in the property), you are

still liable to pay the mortgage lender even though you can no longer legitimately claim title to the property. If there are prior liens, judgments, claims, back taxes or other clouds on your property, you may be held fully accountable for them even if you had no actual knowledge of their existence.

If a covered claim against your property does arise, the title insurance will protect your interests up to the limits of the policy. Title insurance indemnifies only against actual loss. Consequently, there will be no coverage if there was no actual loss because of the defect in the title. For example, if you receive the property for free and eventually lose it because of a cloud on the title, there may have been no actual loss. If you plan to make significant improvements to the property, such as building a five-unit apartment complex, then you should consider purchasing extra coverage related to your investment in the improvements. If additional coverage is not purchased, the existing title insurance may only cover the value of the property before the improvements were made. Similarly, if the property experiences a great deal of appreciation, you should evaluate if your current coverage remains adequate or whether additional coverage should be purchased.

The fee for title insurance is a one time fee at issuance of the insurance. Unlike property insurance or automobile insurance, this one fee provides coverage for so long as you own the property.

When Something Goes Wrong - Using Title Insurance

If an individual or corporation claiming to have an interest in your property that is not listed in your title commitment later contests your rights, or asserts its rights, your title insurance policy should protect your interests in the property. The title insurance company will pay to defend your rights against such contests and it bears the burden of either clearing up the title problems or paying your losses up to the policy limits. It does not insure you in any way against the clouds or exceptions listed in the policy.

Contact the title company holding the insurance policy immediately upon learning about a challenge to your rights to a property for which you have insurance.

For more information regarding this topic:

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