

TITLE ISSUES

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LAND DEVELOPMENT AND THE TITLE COMPANY

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Title company services may provide valuable assistance when a land developer is considering the purchase of a potential development site. These services may help a developer identify at an early stage issues that may prevent or hinder a contemplated development. In addition, the title company may provide title insurance on the development site and title searches and title commitments on adjacent or nearby properties. Title company services may assist in dealing with local governments on annexation and zoning matters. Finally title company escrow services may facilitate acquisition, construction and ultimate sales of the development. This article will describe how title company special searches, title commitments and joint order escrow services may be used by a land developer when considering a development of property. Title company forms and product information may be found at our websites, including: <http://www.cmetro.ctic.com> (Chicago Title - Chicago Metro Website) and <http://www.ntiweb.com> (Chicago Title - National Title Information Website). The *Title Issues* publications are also found at these websites and contain much valuable

information on topics relating to title insurance and real estate law.

HYPOTHETICAL

We will use a hypothetical situation to illustrate the value of title company services. Mary Ladd is a developer who wishes to purchase 50 acres in unincorporated Lauren County, Illinois. She plans to seek annexation of the land to the Village of Carlin and develop the land with single family homes on 25 acres, townhomes on five acres, commercial business on 8 acres and the remaining 12 acres to be used for streets and a park.

Mary believes the 50 acre tract presently has 5 ownerships: 45 acres of vacant farmland; 2 acres used as a feed store and three 1-acre residential lots all improved with homes. Mary intends to raze the 3 homes and the feed store to accomplish her development. The existing homes and the feed store all lie in the area that is contemplated for the commercial part of the development.



SPECIAL SEARCHES

Special searches from the title company may provide independent verification of ownership of a site so that a potential developer will know it is dealing with the record owner of that site. Special searches may also provide the developer with a listing of recorded liens affecting the site and the names of lien holders. Special searches may be purchased from Chicago Title's sister company Property Insight. These searches list the last deed(s) of record on a tract of land, unreleased liens and leases of record that affect the land. Compare the coverage provided by a tract search to that of a title commitment discussed below.

Our developer Mary Ladd receives current title commitments for all the ownerships except the farm parcel. She is satisfied she is dealing with the proper persons. As to the farm, she has been dealing with Bill Price, who does not wish to purchase any title search or commitment. Mary's attorney orders an ownership search on the 45 acre farm parcel and discovers the ownership is split among 4 family members: Bill Price, May Price, Sam Price and Bob Lentz. Bill Price, while often speaking fondly of May and Sam, develops a frown when Mary starts to ask about Bob. Mary instructs her attorney to be sure that all 4 family members sign off on any agreements she makes relating to the farm parcel.

In evaluating a site for development, the developer may engage an environmental engineering company to report on environmental conditions on the land. While the title company can make no assurances as to the environmental or other physical condition of the land, the developer or the environmental company may order special searches from Property Insight for the purpose of checking historical records to determine past owners and users of the land. These searches may go back a number of years – often 50 years or more. The searches may be for all recorded deeds and leases relating to the land or full listing searches which list all

documents recorded against the land. For a discussion of recent changes in environmental due diligence, including chain of title issues, see C. Northrup, New Federal Rules Change Illinois Law on Environmental Due Diligence, 94 Ill. B.J. 550 (Oct. 2006).

Mary's environmental consultant has already ordered tract searches to help it prepare its environmental report. The searches reveal that a past owner of the feed store parcel was Martens Coal, Ice and Fuel Oil. Mary's consultant prepares to do additional investigation of the site based on this knowledge.

Annexation and rezoning of land will be required. Typically, adjacent and nearby owners must be notified of hearings relating to rezoning of the land. The zoning code of the municipality where the land is or will be located will be used by the developer to determine what radius must be searched. Zoning or Radius searches may be obtained from Property Insight. These searches provide record ownership information on all parcels within the requested radius of the development site.

The Village of Carlin requires a 250 foot radius "skipping streets." Mary guessed that there would be only 15 or 20 ownerships within this 250 foot radius, but the special search reveals 35 ownerships. Mary's attorney uses this information in preparing the rezoning petition and the necessary notices.

TITLE COMMITMENTS

Mary now has obtained title commitments on the farm parcel owned by Bill Price and his relations, the feed store parcel owned by Tom Keller, and the 3 residences. The residential parcels are owned by: 1) John Dryden, 2) Ray Bliss and Linda Jones and 3) Winny Abercrombie.

A title commitment is an offer to insure title to specified land. The offer will except (that is, raise exceptions for) matters over which the title company is not willing to insure, unless disposed of satisfactorily. Among other matters, exceptions include instruments recorded at the recorder's office in the county where the land is located which affect title to the land described in the commitment. A title commitment will also show the title holder to the land, a legal description that the title company will insure, and exceptions for liens (including real estate taxes, mortgages, mechanics liens, government liens and judgments) and other documents and matters that might affect title to the land. The developer's land surveyor will often review the title commitment when preparing an accurate survey. Among other things, an accurate survey will reflect easements and other matters, whether shown in the public records or visible on the land. The title commitment is the basis for issuing the title insurance policy to the purchaser and to the purchaser's lender as well.

A buyer of land will typically require that the seller clear, prior to or at closing, all present liens except real estate taxes or special assessments not yet due and payable. However, non-lien and certain future lien title exceptions typically will remain as exceptions on the title policy that is ultimately issued. A land developer will want to review the title to the land well in advance of any closing to see if any of these non-lien or future lien title exceptions will affect the contemplated development.

Some recorded documents or title exceptions that may be of particular importance to developers, engineers and surveyors are noted below.

Annexation agreements: Landowners or developers may enter into annexation agreements with local government bodies. These agreements may contain requirements or covenants restricting land uses or other aspects of a contemplated development. Future costs or obligations for a developer

may also be disclosed in annexation agreements.

Boundary line and legal description issues: These may be disclosed by survey. The surveyor may find unrecorded easements, possession issues, monument position issues or record legal description issues. In some instances, the title company may discover record inconsistencies in the legal descriptions of adjacent parcels, resulting in a title exception for a gap or overlap. For a good resource on boundary line, legal description and survey issues, see R. Bales and M. Filipski, *Residential And Commercial Surveys In Illinois* (Illinois Institute for Continuing Legal Education, 2004).

Covenants and restrictions: Recorded covenants and restrictions may affect types of uses or improvements on the land, easements, rights of use, costs, maintenance and many other issues. Special covenants in favor of government bodies or non-profit organizations may appear, including items relating to archaeology, conservation, historic structures, open space or wetlands. Covenants and restrictions, unless they contain specific time limits, are perpetual. Customer requests to consider waiving or insuring over existing covenants or restrictions will trigger an investigation of facts and circumstances and careful title company risk analysis.

Drainage districts: These entities, established by court proceedings (see 70 ILCS 605/1-1 et seq.) may, from time to time, incur costs to improve drainage in an area. These districts may impose a tax or assessment on landowners in that area. A drainage district tax or assessment is a lien on the land. Some drainage districts are active and make annual assessments, while others are inactive from time to time and may be difficult to contact for questions or for payment of prior delinquent assessments. Some districts have their assessments included as line items on the general real estate tax bill, and some districts issue

separate bills. Information on drainage districts, if available, may be obtained from the local title company office, township officials or the county clerk. Some active drainage districts maintain websites. See for example the North Shore Sanitary District (Lake County, Ill.) www.nssdist.org

Easements: Easements may run in favor of adjoining landowners, municipalities, utilities, pipeline companies or other private or public parties. Recorded easement instruments give notice of the rights of these persons or entities in the burdened land. The developer may need to consider relocation of easements or the redesign of a project to accommodate existing easements burdening the development site.

Environmental restrictions or notices: Recorded notices may alert the developer to environmental issues that must be dealt with or to possible restrictions on use of the land. For example, recorded No Further Remediation Letters issued by the Illinois Environmental Protection Agency may contain specific land use restrictions.

Highways: Recorded documents will describe the part of the land subject to highway dedication. There may also be highways or roads created by prescriptive use that are excepted on the title commitment. Both recorded and unrecorded road and highway rights may create servitudes on the land that may affect the design of a proposed development. In addition a developer should consider the presence of roads or highways when negotiating a real estate contract that fixes the purchase price of land in terms of acreage. The contract should be carefully drafted to state clearly whether land lying in roadways, whether dedicated or prescriptive, is included in the acreage used for calculating the purchase price.

Recapture agreements: Recorded recapture agreements give notice that a recapture fee may be due to a municipality or a private party. These fees are often payable upon development of land, recording of a plat

or issuance of a building permit. The fees are intended to reimburse an earlier developer for extension of infrastructure improvements for the benefit of the subject land.

Special service areas: Recorded special service area ordinances give notice that the land is in a special service area and that the land is or will be taxed accordingly. Some special service areas actively tax, while others are dormant, that is, they only impose taxes if an owner's association fails to provide specified services. The municipality or the county should be contacted as to active or dormant status. A special service area tax may be a line item on the general real estate tax bill. In some cases, a separate bill may be issued by the government body. In many cases, the developer may not encounter special service areas when acquiring the development site. Rather, the municipality will enact a special service area ordinance (for an active or dormant special service area) in conjunction with approving the contemplated development.

Other title exceptions may also appear that do not fit into the above categories. A purchaser of land for development may wish to review copies of any recorded documents or contact the title company for explanation.

In our hypothetical situation, the title commitment on the Price farm parcel reveals an underground natural gas pipeline easement across the land. Fortunately for Mary, her surveyor reports that this easement falls in the future park area. The local park district is aware of this easement and finds it acceptable because it is keeping most of the park as a natural area.

The title commitment on the Keller feed store parcel sets forth a recorded No Further Remediation letter which has restricted use to non-residential purposes only. As the parcel lies in Mary's future

commercial development area, she will continue to pursue purchase of this parcel.

The title commitment on the residential parcel owned by John Dryden reveals 4 mortgages and two pending foreclosure lawsuits. Mary offers to close quickly with John Dryden and, because of his financial situation, he soon agrees to a contract with Mary at a sales price she likes.

The title commitments on the Ray Bliss-Linda Jones and Winny Abercrombie residential parcels each show utility easements on a side lot line. These easements, if utilized by the utility companies, would interfere with the commercial component of Mary's development. The project engineer advises Mary that he believes the easements are not presently in use. Mary asks her attorney to contact the utility companies named in the easement to try to secure terminations of their easement rights. She makes a note to have any contract with Ray and Linda and Winny contingent on obtaining these terminations.

The title commitments on the 3 residential parcels indicate restrictions limiting use of the land to residential use only. Mary plans to include these parcels in her commercial area. She asks her attorney to review the documents of record and investigate the matter with the title company. She wants to find out the exact terms of the document, who is benefited by the restriction, and how can the restriction be terminated. Mary knows she does not want to pursue her development if these restrictions can be enforced against her.

All the commitments reveal the same recorded recapture agreement between the Village of Carlin and Yep Development. Yep installed water and sewer mains for its own nearby development and extended the lines to benefit the land in our hypothetical. Mary contacts the Village to obtain a payoff amount to release the obligation imposed on the subject land by the agreement. She finds the payoff amount acceptable in the event she goes through with her project.

Mary may also wish to order title commitments on land adjoining her contemplated acquisition. She may need to obtain easements from owners of adjoining land for drainage or for public utilities to serve the development site. The additional title commitments may disclose existing easements of record that might be utilized to serve the new development. It would also show the owners and lienholders whose consent would be needed to create any new easements.

The municipality may also require a title commitment on adjoining properties as evidence of ownership if it plans to enter into an annexation agreement with Mary and others.

A developer may also wish to order a title commitment on a street adjacent to a development parcel to find out the status of title of the street. This may be of importance in the event the developer requests the municipality to vacate the street or wishes to run easements through the street.

The municipality may also wish to order necessary parties for condemnation title commitments in the event it needs to acquire adjacent land for roads, easements or other purposes through the eminent domain power. Recent legislation in Illinois, The Equity in Eminent Domain Act, effective January 1, 2007, and codified at 735 ILCS 30/1-1-1 et seq, will govern new eminent domain proceedings. For a discussion of this new Illinois law, see J. Healy, *The New Eminent Domain Law: Protections for Landowners, Hurdles for Government* 94 Ill. B.J. 596 (Nov. 2006).

Fortunately for Mary, the subject land is already contiguous to the Village of Carlin (thereby satisfying a condition for annexation), and no new utility easements or roads over adjoining properties will be necessary to accomplish her development.

For guides to Illinois law on annexation, annexation agreements, zoning, eminent domain, new subdivisions, special service areas and other related topics, see various handbooks by the Illinois Institute for Continuing Legal Education, such as: Annexation, Zoning and Regulatory Authority (Municipal Law handbook, 2006 Edition); Land Use Law (2004 Edition); Commercial Real Estate Law (2004 Edition); and Residential Real Estate Law (2003 Edition, with 2005 Supplement).

JOINT ORDER ESCROWS

Mary decides that it is in her best interest to put up her earnest money for the 5 contemplated transactions in joint order escrows with the title company. She will set up a separate joint order escrow for each acquisition transaction. She thus includes in all her contracts provisions that the earnest money will be kept at the title company in a joint order escrow and that the money will be invested by the title company for her benefit according to her direction.

A joint order escrow is an agreement between three parties—buyer, seller and an escrowee, which, in this case, is the title company. The title company as escrowee holds funds or documents in the escrow. A typical joint order escrow requires that buyer and seller must agree in writing on how to direct the escrowee to distribute or release the funds or documents from the escrow. If buyer and seller cannot agree as to distribution or release of funds or documents, then the title company must await a proper court order to disburse the funds or documents.

Even before she has acquired all the parcels involved, Mary has a potential buyer of 20 residential lots. The potential buyer, Max Eisen, will need a replacement property for a 1031 exchange, so Max has to close very quickly, even before Mary can complete her road improvements. Mary's attorney suggests a joint order escrow to help provide security to Max as to the completion of the roads by the developer. Mary and Max agree to enter into

a joint order escrow agreement depositing a portion of the buyer's purchase funds with the title company. Once the road is completed, the seller and buyer will sign a joint direction to the title company as to an agreed upon payment of funds in the escrow.

The title company may invest funds held in escrow, provided all needed investment instructions and required tax payer forms are given to the title company. Forms of joint order escrow agreements, investment options and fees for these services may be obtained from the title company.

Before accepting an escrow, the title company may require revisions of escrow instructions, especially if the provisions deviate from standard forms, are ambiguous or require subjective judgments by the title company. The title company may also decline to accept an escrow if it appears too long in duration or is otherwise too burdensome to administer. Unusual escrow situations should be discussed with a senior escrow officer or title underwriter to see if the title company will accept the escrow and what fees may be charged.

CONCLUSION

Title company services such as special searches, title commitments and joint order escrows may be of great assistance to a developer of real estate in deciding whether to proceed with a contemplated development. The title company will also work with the developer in providing title policies, closing and construction escrow services relating to the acquisition of the development parcel, construction of improvements on the parcel and sale of buildable lots or completed homes or commercial units. Developers and their attorneys are invited to discuss their projects and to obtain pricing from the title company.

And, good luck to Mary Ladd in her new project!

Dedication: This article is dedicated to my gracious and caring co-worker Mary Johnson of Chicago Title's Geneva, Illinois office.

Mary is a courageous person and a good friend.

We welcome your topic suggestions for future Title Issues. If you are interested in submitting your ideas, please e-mail us at: Patrick.quist@ctt.com or complete this form and mail to:



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