TITLE INSURANCE AND COMMON ENDORSEMENTS

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Maximizing Coverage:

Commercial real estate purchasers title insurance—a contract of insurance between a title company and the purchaser—to protect their ownership interests from claims or losses that result from certain defects in the title. This article provides a brief description of the architecture of a standard title insurance policy along with the risks that are covered and not covered. This article then explores the addition of endorsements to the title policy and how they provide additional protection for the purchaser. Last, the article reviews the endorsements most commonly requested by purchasers of shopping center developments.

Title insurance insures the status of title to the purchased real estate as of the title policy's "effective date". The typical form of owner's policy used is the American Land Title Association ("ALTA") Owner's Policy (6-17-06) although some states have their own state-specific forms. The standard title insurance policy contains five sections: (1) Covered Risks, (2) Exclusions from Coverage, (3) Schedule A, (4) Schedule B, and (5) the Conditions.

The first section, "Covered Risks", lists the risks against which the policy insures. These covered risks are, however, subject to the exclusions and exceptions from coverage, and the conditions sections contained in the title policy. There are ten basic covered risks contained in the ALTA owner's title policy. Some of the more important risks covered include: (1) title to the estate (risk that someone else owns the real estate); (2) defects, liens or encumbrances (risk that a defect or encumbrance on the title exists as a result of fraud or forgery, or there is a lien on the real estate for unpaid taxes); (3) unmarketability of title (risk that you are unable to sell the real estate because of a defect in title); and (4) lack of access to and from the land.

The second section, "Exclusions from Coverage", lists five items that are expressly excluded from coverage. The items listed in this section deal with issues that are outside the title company's control or reasonable ability to research. The exclusions from coverage include risks from changes in laws, ordinances or government regulations or the government's right of eminent domain. Also excluded from coverage are defects or encumbrances created by the insured or known by the insured but not disclosed to the title company, or matters created subsequent to the effective date of the title policy. Additionally, certain bankruptcy claims and tax liens on title to the real estate attaching between the date of the title policy and date the deed is recorded are excluded from coverage.

Schedule A of the title policy provides basic information about the real estate and the policy. Items included in Schedule A are the name of the insured, the interest in the real estate that is insured by the title policy, the person or entity insured, and a legal description of the real estate insured. Also included is the title company's information, the date of the title policy, and the amount of the insurance.

Any defects to the title found by the title company after performing its title search are excepted from coverage and listed in Schedule B of the title policy. Common exceptions to coverage include outstanding mortgages on the real estate, taxes, easements, and other items that would prevent the title company from issuing a "clean" title policy. The exceptions listed on Schedule B are not insured under the title policy and the title company will not pay any costs or expenses arising from such exceptions.

The final section, the Conditions, sets forth the defined terms found in the title policy as well as provisions addressing how a claim is handled, the rights and duties of the insured and the title company in the event of a claim, and the determination and extent of damages of a claim and resolution thereof.

As mentioned earlier, the Covered Risks section of the title policy states what risks are covered under the title policy while the Exclusions from Coverage section and Schedule B list what risks are not covered. The title policy coverage is based on an examination of the public records of the county in which the real estate is located. A standard coverage title policy would not cover any risks found in the public records. The standard title policy would also not insure against matters that could be disclosed by actual inspection or a survey of the real estate. Further, the standard title policy does not insure against certain matters that would not be discovered from searching the public records such as unrecorded liens (i.e., mechanics' liens), unrecorded rights of way or encroachments, and other types of nonrecorded encumbrances like claims for adverse possession or prescriptive easements.

There are numerous situations in which a standard, unendorsed policy may be insufficient. Each piece of property and every transaction are unique and have their own set of risks and circumstances, and some transactions will require expanded coverage. In order to maximize the purchaser's standard protection coverage against any of the potential risks excluded or excepted from coverage discussed above, the purchaser has two options: (1) extend the title policy's coverage by having the title company delete the standard exceptions found in the title policy, and/or (2) request the title company to add certain endorsements to the title policy that insure against certain risks associated with the particular transaction.

Endorsements are amendments to the title insurance contract. The endorsements can modify any part of the policy, although endorsements are most typically used to extend, expand or otherwise modify the coverage of a title insurance policy for more comprehensive coverage in order to address specific title issues or risks.

The range of available endorsements differs from state to state. Some states allow an array of endorsements while other states regulate insurance to the point that no endorsements outside of the standard title policy are allowed. In addition, the purchaser should be aware that most endorsements will require additional costs and a review by the underwriter. As a consequence, the purchaser may be required to provide additional documents such as affidavits or indemnification agreements. Counsel should be aware of which endorsements are needed and available and make requests to the title company for such endorsements.

Selecting the right endorsements for the purchaser's title policy is a critical part of protecting the purchaser's interest in the real estate. When the purchaser orders title insurance, it should provide as much detail about the transaction as possible so that the underwriter can assist in determining potentially applicable endorsements and make appropriate recommendations.

Some endorsements are commonly requested for commercial real estate transactions, including shopping center developments, while other endorsements are specific to the transaction. Below is a list of the more common endorsements requested for an owner's title policy related to the purchase of a shopping center development.

1. <u>Access Endorsements</u>. Sometimes, the ability of, or manner in which, the owner or its guests or customers access the real estate is a critical element of the real estate's value. In any shopping center development, access to the right street can be the difference between

success and bankruptcy. The Land Abuts Street endorsement assures that the described land abuts a specific physically open public street and that nothing is disclosed to prohibit access from the land to the public street. A certified survey by a professional land surveyor can also verify this fact. This endorsement differs from the standard "access" coverage in that it covers a particular street instead of any public access. In other words, it begins to insure the quality of the access and not just its availability. Two other access endorsements commonly requested by purchasers of commercial real estate include Endorsement Form 17 (Access and Entry) and Endorsement Form 17.1 (Indirect Access and Entry). The Access and Entry Endorsement insures against loss resulting from the following conditions: (1) the real estate does not abut a public street; (2) the street was not physically opened and maintained; (3) the insured had no actual vehicular or pedestrian access; or (4) the land had no existing curb cuts or entries. The Indirect Access and Entry Endorsement is similar to the Access and Entry Endorsement but is used when a private easement provides access to the real estate.

2. <u>Survey Endorsements</u>. These endorsements cover the insured against loss arising from defects that affect the title of the real estate and would have been discovered by an up-to-date and accurate survey. Examples include the location of easements, boundary lines, encroachments, and setback violations. The Land “Same As” Survey Endorsement insures a purchaser that the real estate described in the title policy is the same real estate that is shown on the survey that is obtained as part of the transaction and made a part of the title policy.

3. <u>Comprehensive Endorsements</u>. The Comprehensive Endorsements (ALTA 9.1, 9.2, and 9.5) provide a series of protections that typically provide coverage from losses due to

violations of covenants and restrictions of record, encroachments of existing improvements across the boundary lines of the subject property, and excepted mineral rights.

4. Zoning Endorsements. The zoning endorsements (ALTA 3.0-Zoning Unimproved; ALTA 3.1-Zoning with Structure) provide assurance that the real estate and any structures are located within certain zoning areas and are zoned for the type of use proposed by the purchaser. As indicated by their names, ALTA 3.0 is used for real estate that is unimproved, while ALTA 3.1 is used for improved real estate.
5. Leasehold Endorsement. This endorsement (ALTA 13) would be used by a party acquiring a leasehold interest in the real estate. It protects a tenant from losses that arise from a loss of possession of the property or if the tenant loses its ability to use the real estate for the use permitted under its lease agreement.
6. Contiguity Endorsements. These endorsements (ALTA 19-06 and ALTA 19.1-06) provide insurance coverage against loss or damage if multiple parcels of real estate are not contiguous to each other. The endorsements insure that there are no gaps separating the contiguous boundary lines along the common boundary of the parcels. ALTA 19-06 insures contiguous boundaries of two parcels covered under the same title policy, while ALTA 19.1-06 provides insurance coverage that one parcel of land that is described in the title policy is contiguous to another parcel that is not described in the title policy. The Contiguity Endorsements can be important in situations involving shopping center developments because a new purchaser may be relying on an access easement to reach a public road from its parcel. This endorsement should also be requested when a purchaser

is buying multiple parcels of land to build a single development such as a shopping center.

7. Shopping Center Endorsement. This endorsement is typically requested in connection with the purchase of real estate that is located in a shopping center development with multiple property owners. Normally, the property owners of the of the shopping center reach an agreement under which covenants are made to benefit the entire shopping center, such as restrictions on use, improvements, maintenance and payment of taxes. This endorsement provides coverage that the covenants and restrictions agreed upon by the property owners will be binding on all the shopping center property owners and their successors in ownership.

Whether a purchaser decides to add endorsements to its title policy will vary on a case by case basis. The purchaser, upon advice from counsel, should analyze the cost of adding an endorsement versus the risk associated with not obtaining the additional coverage. In additional, the purchaser should discuss the cost, availability and advisability of coverage endorsements with the title insurance company to further support of the insurance analysis.

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