

Real Property: More Than Meets the Eye

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May 30, 2018



Each parcel of real property is a unique asset.

It is typically well understood that location is paramount, and that size, elevation, and other physical characteristics are other important factors. Nonetheless, there are several other intangible factors that relate to each parcel and which impact the parcel's utility and, therefore, value.

Title

With most assets, one generally expects that possession equates to title, subject only to obvious liens from a financing party that are often evident on the title certificate itself. For example, you can determine the titleholder of a particular automobile using the Vehicle Identification Number ("VIN") associated with it.

Real property assets are different. Someone can take possession of a parcel of land with a relatively poor (or no) interest in the actual legal title to the parcel. And, while some matters that impact title are objectively and universally understood (for example, a deed of trust lien for a certain amount of money), other encumbrances may mean much more to one owner or buyer than another.

For example, an easement or restrictive covenant may have no impact at all on the owner's current use of a parcel of land, but may negatively impact the buyer's planned use of the same parcel. Another example that frequently arises is the quality and nature of leases that allow others rights to use the owner's real property. The allocations of risk, rental income rights, obligations of the landlord, and other specific nuances of a lease may be subjectively acceptable to one owner and not to another.

Title Due Diligence

In the pre-revolutionary period, the King or Queen of England "owned" all the land in the "New World," and subjects or citizens acquired it via all sorts of interesting measures—grants, races, auctions, lotteries, and the like. In those initial purchases, there was little reason to question the quality of title to the land acquired. Since then, essentially all real property has been owned by someone else for some period of time (in most circumstances, several "someone elses"), and with each transfer, there is always the potential that there has been an impact on the property's title.

So, first and foremost, a buyer should ask: Does the seller hold fee simple title to the real property the seller proposes to sell? Again, the mere possession or occupation of land does not equate to ownership. In fact, the

mere presence on the public records of a deed to the possessor or purported owner does not guarantee ownership. Many a fake or mistaken deed can be found in the public records. Therefore, research beyond the presence of a deed is necessary to confirm true legal ownership.

Another consideration is a parcel's boundaries, which are often the subject of dispute. A fence line and a property line are not necessarily the same thing. A buyer should carefully evaluate the chain of title to any real property to determine whether the seller, in fact, holds fee simple title to all of the property encompassed within the boundaries the buyer intends to acquire.

Any potential buyer also needs to evaluate the limitations on title to the desired property. These typically come in the form of easements, restrictions, covenants, rights or options, and liens that constitute the rights of others to use, restrict the use of, or potentially acquire the subject property. Rare is the tract of land that is free from any encumbrance at all.

Not only should a buyer understand the encumbrances applicable to a parcel of land, but also the implication of those encumbrances. For example, an express but unutilized easement, or an aged, but not yet expired judgment against the current landowner, could create an unpleasant surprise for the buyer after the acquisition.

Another area that warrants careful consideration is the presence and impact of any restrictive covenants, conditions, or options applicable to the real property. While buyers typically understand that a planned community or condominium arrangement may impose an obligation on the owner to pay regular assessments, that is rarely the end of the story. Due diligence should include a careful analysis of all of the restrictive covenants and the buyer's opportunity to understand the implication of those restrictive covenants on the buyer's intended use of the land.

Land Use Regulation

Real property is also typically subject to meaningful regulation by governmental entities. For example, local zoning regulations and state and federal environmental regulations will impact an owner's freedom to utilize the subject real property. Therefore, an evaluation of the regulations applicable to a particular parcel of land relative to the owner's or buyer's intended use of the parcel is also a critical component of due diligence.

A common misconception with regard to commercial, or even residential, uses is that a neighbor's use of land for a particular purpose will ensure that an owner can use its land for the same purpose. However, this is not always the case. Demarcation between different zoning districts sometimes runs along the property lines of immediate neighbors. And, it's entirely possible that a neighbor's use of property is non-conforming but permitted for reasons unique to that neighbor's land, and that are not applicable to the subject property. Therefore, evaluation of the specific regulations applicable to a specific parcel of land is a critical component of understanding the nature of that particular parcel.

Conclusion

In addition to evaluation of the more obvious physical characteristics of a parcel of land, the location, soil quality, boundary size, and the like, a buyer should carefully consider the other factors that make the subject tract unique.

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