

Why it is important to have a good real estate lawyer? Save you time, money and aggravation

June 21, 2012 - Spotlights

So you just purchased your new home and not only did you pay legal fees to the lender's counsel to certify title, but you took the wise extra precaution of buying an owner's policy of title insurance to protect you even further and now you can sleep soundly in your new surroundings. Well not so fast. In a recent opinion from the Mass. Appeals Court, Lyon v. Duffy, involving an Order of Conditions under the Wetlands Protection Act which regulates disturbing wetland areas, the Court ruled that the certification that an attorney is required to give to a home purchaser under the provisions of M.G. L. ch 93 sec. 70, does not cover governmental approvals even when such approvals are subject to onerous requirements and burdens. The court ruled that an encumbrance of title, which the statute covers, is a "legal obstruction to the purchaser to exercise that dominion over the land, to which the lawful owner is entitled." Or in English, a governmental permit, which an Order of Conditions, is a good thing as it allows you to do something even when weighed down with a lot of restrictions and obligations but is not an encumbrance.

No problem, the home owner purchased a policy of title insurance and thus the day was saved. Again not so fast. Title insurance policies specifically exclude from coverage anything that could be characterized as a governmental regulation including permits. In the case of Somerset Bank v. Chicago Tile involving building in a former railroad right of way (which cannot be done without the permission of the Ma Department of Transportation) the owner sued the title insurance company partially on the basis that the title search should have revealed that the property was a former railroad right of way. The court ruled in favor of the title company. You may have seen policies that state "while excluded from coverage the following matter or record is noted." Whether that is in the policy or not the title company will not protect the owner from those claims. In the Duffy case the home owner ended up paying approximately \$100,000, presumably out of their own pocket, to comply with the wetlands permit.

What can home purchasers do to protect themselves? Notice I said home purchasers. In commercial transactions it is normal for a potential buyer to conduct a lot more due diligence, hire more experts and do more digging both literally and figuratively.

The first thing to do is make sure that the attorney you hire is not only an expert in negotiating agreements but also in title and other due diligence matters. Title analysis is a specialized discipline which requires great expertise and you should try to insist that your attorney, who you obviously trust, also be the one doing the title search and analysis for the lender. In the Duffy case the Order of Conditions was properly filed with registered land but the buyer claimed they were not informed. But even with the most knowledgeable attorney, it may not be possible to find the order at the registry of deeds as they are often issued in names other than the record title holder such as a company in which the owner does business. Also the precise property that the orders cover is often

difficult to ascertain as the commissions do not refer to recorded plans at the registry when they determine the area of the wetlands.

What you need to do to protect yourself in consultation with your attorney is determine which kind of governmental permits may affect your property, and while an expert title examination and analysis most likely will disclose many of those permits it may be advisable to check with the governmental entity itself which issues those permits to determine if any exist and whether there has been compliance with any obligations.

The lesson from this should be that you want an attorney with good title expertise protecting your interest to uncover all that can be uncovered but double checking with the appropriate agencies could save you time, money and aggravation.

Neil Golden, Esq., is a partner at Gilmartin, Magence & Ross LLP, Boston, Mass.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540