

Title Chat

Volume 17, April 2003



Why Title Insurance? --continued

When Is It Safe to Assume that One Can Rely on What Neighbors Have Done With Their Property which May Violate Some Restriction or Condition and Do the Same Thing?

We continue with our discussion of actual cases where a person may benefit by having title insurance.

Assume that a person (Henry) has just found the vacant land to purchase to build his “dream” house on. After he purchased the land and was nearing completion of the home, he received a letter from the homeowner’s association telling him that he had failed to have his plans approved by the association and--by the way--the house violates a front yard set back restriction contained in the deed from the developer to Henry’s seller. The association then filed a lawsuit seeking injunctive relief against Henry and six other owners in the subdivision whose homes also violated the restriction. We do not know if Henry knew of the approval requirement or the set back requirement or if they were contained in recorded documents. During the course of the litigation Henry acquired additional land to bring his home into conformity with the set back restriction.

These facts are set forth in the Florida case entitled *Payne v. Cudjoe Gardens Property Owners Association*, 837 So. 2d 458 decided December 18, 2002. While the decision revolves around the association’s claim that Henry could not assert his defenses to the litigation because he had failed to obtain the association’s approval of his plans; and Henry’s attempts to discover the number of homes that violated the set back restriction and who had obtained variances allowing the violation of the set back restriction to remain, the appellate court noted:

In the instant case, the Record is clear that appellants (Henry) are not the only property owners whose property was in violation of the set back requirements Appellants (Henry) identified other property owners, approximately 68, many of whom are current and past board members of the association, who are in violation of the set back requirement. Some have variances, but it is not clear whether others obtained their variance, if at all, before construction. In short, the purpose of the restriction, where 68 properties are in violation, is difficult to defend at this juncture.

The inference is that if the case comes back to the court on the merits, the court may find it difficult to enforce the restriction.

This is one case where Henry probably would not benefit from having title insurance. Why? Two reasons: First, some of the issues are those Henry created himself and are therefore excluded from coverage in a title insurance policy, i.e. not having his plans approved; second, if the policy contained the set back restriction as an exception to title, there would be no coverage. If the policy did not have such an exception, there may be some coverage as to that issue. In a broader scope, if we look at the other 68 properties that also violate the restriction, it is possible to assume that on resales of these homes, insurance as to the violation of the set back restriction could have been given through approved endorsements based upon the apparent number of violations. If the coverage had been given before the litigation commenced, the owner would have his cost of defense covered by the insurance policy and would be indemnified for any actual loss incurred.

* * * * *

Things seem to be happening on the RESPA front, so we may be updating the November 2002 *Chat* on that topic next month. Otherwise we will continue “Why Title Insurance?”

Title Chat is published monthly by North American Title Insurance Corporation, a member of the North American Title Group of companies for distribution to North American Title Group’s employees and customers. Topics will include closing issues, title and title insurance issues and title insurance business issues; and are intended to make the reader aware of the issues discussed. It should not be construed as giving a legal opinion on the issues being discussed; but rather as addressing situations encountered in its business and sometimes offering solutions based upon applicable case or statutory law that the reader may be unaware of. North American Title Insurance Corporation assumes no liability for any incorrect statements made herein

North American Title Insurance Corporation
305-559-5656

760 N.W. 107 Avenue, Suite 110, Miami, Florida 33172
FAX 305-229-6540