

2009 Lecture Series – Speaker Profile



KAREN DECKER, LL.B.

Stewart Title Guaranty Company
Senior Counsel
Vice President – Underwriting & Legal

*Presenting:
Latest Underwriting Updates*

As Senior Counsel and Vice President – Underwriting, Karen Decker is responsible for underwriting large commercial transactions, introducing policy and underwriting changes and developing new underwriting products. Her team of underwriters has extensive experience in dealing with both residential and commercial transactions in all provinces and territories.

In addition Ms. Decker recently assumed the role of V.P. – Legal. As head of Stewart Title’s Canadian legal department, she is responsible for all corporate legal matters.

Ms. Decker joined Stewart Title in 1998 as Counsel for Underwriting and Business Development. In this role, she was responsible for both underwriting transactions and educating real estate lawyers about the benefits of title insurance.

Prior to joining the management team of Stewart Title, Ms. Decker was a sole practitioner in Toronto, Ontario focusing on real estate law.

Ms. Decker holds a Bachelor of Commerce Degree from Carleton University. She earned her LL.B. from Osgoode Hall Law School in Toronto and she was called to the Bar in 1997.

TITLE INSURANCE – KEY UNDERWRITING & COVERAGE ISSUES

TOPIC 1 – Building and Zoning Coverage

TOPIC 2 – Title Insuring Cottage Properties – things you need to know

TOPIC 3 – Septic System Endorsement

TOPIC 4 – Super Priority Lien Coverage

TOPIC 5 – Selecting Title Qualifications for Schedule B

TOPIC 6 – Survey Coverage

TOPIC 7 – Stewart's Fraud Mitigation Questions – Why We Ask Them

TOPIC 1 – Building and Zoning Coverage

One of the most valuable areas of coverage found in a title insurance policy is with respect to building and zoning matters. Frequently the coverage provided is beyond that which could have been obtained through the assurances of a lawyer's opinion. The building permit coverage is one such example.

Policy Coverage:

Residential Policy

Owner:

15. Your Land is unmarketable, which allows another person to refuse to perform a contract to purchase, lease or make a mortgage loan because:
 - (c) your Land violates an existing zoning by-law or ordinance

20. You are forced by a Governmental Authority (or in the case of 20(a) hereunder, you are forced by the affected neighbour or a party who benefits from the Easement) to remove or remedy your existing structure(s), or any portion thereof, other than a boundary wall or fence, because:
 - (c) it violates an existing zoning by-law or ordinance;
 - (f) any portion of it was built without obtaining a building permit from the proper Governmental Authority, provided a building permit would have been required by such Governmental Authority at the time of construction of the structure or relevant portion thereof.

29. Any adverse circumstance affecting the Land which would have been disclosed by a Local Authority Search of the Land at the Policy Date.

Lender:

13. (b) the failure of the Land to comply with the applicable zoning by laws; or (c) the failure of the land to be zoned to permit a single family residential structure or, if stated in Schedule A, a condominium.

15. Failure of the existing residential structure, any portion thereof, or a modification thereto or replacement thereof constructed after Date of Policy, to have been constructed with a valid building permit from the appropriate local government issuing office, provided a building permit would have been required by such office or agency at time of construction, modification or replacement of the structure;

28. Any adverse circumstance affecting the Land which would have been disclosed by a Local Authority Search of the Land at Date of Policy.

Multi-Unit Endorsement

Our residential policy jackets refer to "single family residential dwelling unit or condominium". Accordingly, if coverage is sought for zoning with respect to more than one unit, a multi-unit endorsement must be attached to the policy. This endorsement will amend the policy jackets to refer to the number of units in the insured property instead of single family.

This endorsement is attached to lender policies where there are 2 to 6 units without the need for a zoning search. For owner policies, the endorsement is attached for 2 to 6 units provided a zoning search has been conducted which confirms the number of legally permissible units.

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If the zoning search is not conducted exceptions for zoning matters are added to the owner policy only. If the zoning search is conducted and it reveals zoning non compliance, an exception is added to the owner policy. Depending on the circumstance, the lender may receive coverage. Custom underwriting should be sought in that case.

Key Factors to Keep in Mind with Respect to this Coverage

- Future changes to zoning bylaws that may render the property non compliant are not covered
- The coverage relates to the use of the property at the policy date – future changes to use are not covered. Therefore, it is prudent to investigate zoning if the client wants to change the use or at least obtain a specific acknowledgement that you are not providing any opinion and that the title insurance policy does not insure that the purchaser can change the use.
- Where “forced removal” is a component of the covered risk, the relevant governmental body must be taking affirmative action to require the insured to remedy the zoning deficiency before coverage is triggered. i.e. mere knowledge of the fact that the property is zoned for only 2 units when you have 3 units does not trigger a claim.
- For owner policies of 2 to 6 units – if the multi-unit endorsement is not being attached, the coverage is only for use as single family residence. In that case, it is prudent to obtain appropriate acknowledgements from purchaser clients with respect to exceptions in schedule B and the limitations of the zoning coverage.
- If your property has more than 6 units – you must obtain a commercial policy.

Commercial Policy

The policy jacket has coverage in covered risk 5 as set out below. However, it is the zoning endorsement that is key to the coverage in commercial policies.

Owner:

5. The violation or enforcement of any law, bylaw, code, notice, ordinance, permit or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to:
 - (a) the occupancy, use, or enjoyment of the Land;
 - (b) the character, dimensions, or location of any improvement erected on the Land; or
 - (c) the subdivision of landif a notice, describing any part of the Land, is registered in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

Lender

5. The violation or enforcement of any law, bylaw, code, notice, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to:
 - (a) the occupancy, use, or enjoyment of the Land;
 - (b) the character, dimensions, or location of any improvement erected on the Land; or
 - (c) the subdivision of land

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if a notice, describing any part of the Land, is registered in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.

Zoning Endorsement (commercial)– both owner and lender

Please see the attached examples of the standard zoning endorsements provided for owner policies (\$0-\$2million and \$2million to \$10 million) and lender policies (\$0-\$10 million). This endorsement is provided without the need to conduct a zoning search for owner and lender policies with a policy amount up to \$10,000,000 and for lender policies with a policy amount from \$10,000,001 to \$50,000,000 provided the loan to value ratio is no greater than 75% and a suitable statutory declaration is obtained.

It is possible to obtain a zoning endorsement that references the specific zoning designation of the property and permitted use(s). However, to obtain that endorsement the zoning search must be conducted. This endorsement, which we call our zoning 3.1.1 endorsement, is most often used for vacant land where the owner or lender wants confirmation that the land is specifically zoned for a particular use as at the date of policy. Of course, no coverage is afforded if the municipality changes the zoning after the date of policy.

The commercial Zoning Endorsement stands as a good example of how endorsements fit together with the balance of a commercial policy and the context in which they should be read. The first clause in paragraph one of the endorsement, which states:

The Company insures the Insured against loss or damage sustained or incurred by reason of the failure of the use of the land at Date of Policy to be a permitted use under applicable zoning bylaws.

is intended to indicate that the lands are zoned for the *type of use* currently being made of the property. For example, if a hotel is located on the property, the coverage provides that the zoning allows for a hotel.

The second paragraph in the first section of the Zoning Endorsement defines and clarifies what an insurer does *not* cover respecting zoning:

There shall be no liability if the use or uses are not allowed as a result of any lack of compliance with any conditions, restrictions or requirements contained in the applicable zoning bylaw(s) and amendments thereto, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.

This section indicates that if the current structure does not comply with zoning because of its failure to comply with zoning restrictions, etc., that is *not* covered. For example, an insurer would not cover that the particular hotel on the property is in compliance with zoning restrictions or bylaws.

Although it seems that the endorsement gives coverage for zoning then takes it away, the first section of the endorsement needs to be read in conjunction with section two, which adds specific coverage back in:

The Company further insures against loss or damage arising from a final judgment or order of court of competent jurisdiction:

(a) prohibiting the use of the land, with any structure presently located thereon; or

(b) *requiring the removal or alteration of the structure on the basis that at Date of Policy, the applicable zoning bylaw(s) and amendments thereto have been violated with respect to any of the following matters:*

- (i) *Area, width or depth of the land as a building site for the structure;*
- (ii) *Floor space area of the structure;*
- (iii) *Setback of the structure from the property lines of the land;*
- (iv) *Height of the structure; or*
- (v) *Number of parking spaces. (note: the number of parking spaces is included in the zoning endorsement for all lenders and for owners up to \$2 million)*

There shall be no liability under this endorsement based on the invalidity of the applicable zoning bylaw(s) and amendments thereto until after a final judgment or order of a court of competent jurisdiction adjudicating the validity, the effect of which is to prohibit the use or uses.

This section adds coverage back in for specific items that may be within the zoning bylaws that an insurer is willing to cover. Using the earlier example, an insurer would provide coverage if the hotel is in violation of area, width or depth of the land as a building site for a structure, floor space, area of the structure, setback of the structure from the property lines of the land, height of the structure, or number of parking spaces.

Key Factors to Keep in Mind with Respect to this Coverage

- Future changes to zoning bylaws that may render the property non compliant are not covered
- The coverage relates to the use of the property at the policy date – future changes to use are not covered. Therefore, it is prudent to investigate zoning if the client wants to change the use or at least obtain a specific acknowledgement that you are not providing any opinion and that the title insurance policy does not insure that the purchaser can change the use.
- Stewart's zoning endorsement for owners and lenders includes coverage for loss in marketability – i.e. at the time of a future sale, if the prospective purchaser refuses to close due to matters that are set out as covered in the zoning endorsement, the owner may make a claim. Note – many title insurers do not include loss in marketability in their owner zoning endorsement.
- Recall that number of parking spaces is included in the zoning endorsement for owners up to \$2 million and all lenders regardless of policy amount.
- Given the limited amount of zoning information that a standard zoning compliance search reveals, obtaining the Zoning Endorsement is often the best option for clients.

Property Specific Building and Zoning Issues Where Coverage May be Modified

1. *Legal Non Conforming Use* – where you are aware that the zoning does not allow the current use an underwriting decision should be sought. In order to provide coverage to any owner, the typical criteria for satisfying legal non conforming use are examined – i.e. current use having been continuous since prior to the zoning bylaw and appropriate evidence that substantiates that use.

2. *Former Grow Houses* – These properties present additional potential risk for a variety of items – including work done without building permits, taxes and utility arrears. Accordingly we have established special search criteria.

On a purchase transaction, where you know that the building was at one time a Grow House/Drug manufacturing house we ask you to:

- ☒ Conduct a Hydro Search for arrears and work orders;

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- ✎ Conduct a Building & Zoning Search.
- ✎ Obtain a Tax certificate

We do not require the above searches on a refinance.

However, in cases where you are aware that the house has not been remediated you should speak to Stewart underwriting before closing.

With respect to the owner policy since the standard building and zoning search will not reveal if work was done without a permit, this risk is expressly removed from the wner coverage with the addition of an exception to Schedule B. In addition final hydro meter readings are not covered.

Owner Exception:

“Covered Title Risk 20(f) is expressly deleted from coverage. The Company assumes no liability for any matters falling within Covered Title Risk 20(f) of this Policy. There is also no coverage for loss or damage sustained as a result of any outstanding amounts owing resulting from final hydro meter reading charges.”

This is consistent with the fact that a former grow house is usually sold “as is”.

No exception for permit issues is added to a lender policy unless a specific problem is found while conducting the required searches noted above.

3. *Farms* – it is important to determine whether to purchase a residential or a commercial policy when you are dealing with a farm. Stewart has established the following guidelines.
 - 1- With respect to farm properties that are zoned agricultural with a policy amount of \$2 million or less, Stewart Title offers the option of either a commercial or residential policy.
 - 2- An exception to this option is properties that are clearly zoned commercial. These types of properties must be insured with a commercial policy. According, zoning coverage would be found in the zoning endorsement.
 - 3- For those properties with a policy amount of \$2 million or less, where a residential policy is being issued and there is a residential house on the property, a farm residential endorsement is attached.
 - a. This endorsement contains Stewart Title’s septic endorsement and specifies that the septic coverage applies only to septic systems serving the residential dwelling located on the property. In the event the septic system services structures in addition to the residential dwelling, coverage for the septic system is not available. Coverage for continuation of present use as residential and/or agricultural land is provided. The endorsement also states that there is no coverage for legislation related to farming operations, including but not limited to Assessment Act matters regarding the Farm Property Class Tax Rate Program.
 - 4- To obtain a farm endorsement there must be a residence on the property.
 - 5- If the farm does not contain a residence, and is under \$2million, a residential policy with a vacant land endorsement (instead of the farm endorsement) may be issued.
 - 6- For farms with a policy amount of over \$2 million a commercial policy is used. No farm endorsement is attached.

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ENDORSEMENT TO TITLE POLICY

Attached to and forming part of Policy No(s). O-7761

Charge \$Nil
05/06/2008 - Owner

ISSUED BY

STEWART TITLE GUARANTY COMPANY

HEREIN CALLED THE COMPANY

ZONING ENDORSEMENT – COMPLETED STRUCTURE (\$0-\$2 Million)

1. The Company insures the Insured against loss or damage sustained or incurred by reason of the failure of the use of the Land at Date of Policy to be a permitted use under applicable zoning bylaws.

There shall be no liability if the use or uses are not allowed as a result of any lack of compliance with any conditions, restrictions, or requirements contained in the applicable zoning bylaw(s) and amendments thereto, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.

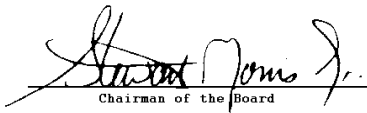
2. The Company further insures against loss or damage arising from a final judgment or order of court of competent jurisdiction:

- a) prohibiting the use of land, with any structure presently located thereon; or
- b) requiring the removal or alteration of the structure on the basis that, at Date of Policy, the applicable zoning bylaw(s) and amendments thereto have been violated with respect to any of the following matters:
 - i) area, width or depth of the Land as a building site for the structure;
 - ii) floor space area of the structure;
 - iii) set back of the structure from the property lines of the Land;
 - iv) height of the structure; or
 - v) number of parking spaces.

There shall be no liability under this endorsement based on the invalidity of the applicable zoning bylaw(s) and amendments thereto until after a final judgment or order of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses.

Loss or damage as to the matters insured against by this endorsement shall include loss or damage sustained or incurred by reason of the refusal of any person to purchase, lease or lend money on the estate or interest covered by this policy.

This Endorsement is made a part of the policy and is subject to all the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, this Endorsement neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and prior endorsements, nor does it increase the face amount thereof. Signed under seal for the Company, but this Endorsement is to be valid only when it bears an authorized countersignature, dated 4 January, 2010.


Chairman of the Board




President

Countersigned:



Authorized Countersignature

Stewart Title Guaranty Company

Company

Toronto, Ontario, Canada

City, Province

ENDORSEMENT TO TITLE POLICY

Attached to and forming part of Policy No(s). M-7762

Charge \$Nil
05/06/2008 - Loan

ISSUED BY

STEWART TITLE GUARANTY COMPANY

HEREIN CALLED THE COMPANY

ZONING ENDORSEMENT (Lender \$0-\$10 Million)

1. The Company insures the Insured against loss or damage sustained or incurred by reason of the failure of the use of the Land at Date of Policy to be a permitted use under applicable zoning bylaws.

There shall be no liability if the use or uses are not allowed as a result of any lack of compliance with any conditions, restrictions, or requirements contained in the applicable zoning bylaw(s) and amendments thereto, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.

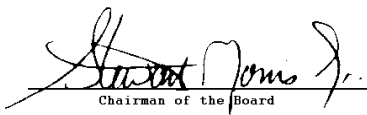
2. The Company further insures against loss or damage arising from a final judgment or order of court of competent jurisdiction:

- (a) Prohibiting the use of Land, with any structure presently located thereon; or
- (b) Requiring the removal or alteration of the structure on the basis that, at Date of Policy, the applicable zoning bylaw(s) and amendments thereto have been violated with respect to any of the following matters:
- (i) Area, width or depth of the Land as a building site for the structure;
 - (ii) Floor space area of the structure;
 - (iii) Set back of the structure from the property lines of the Land;
 - (iv) Height of the structure; or
 - (v) Number of parking spaces.

There shall be no liability under this endorsement based on the invalidity of the applicable zoning bylaw(s) and amendments thereto until after a final judgment or order of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses.

Loss or damage as to the matters insured against by this endorsement shall include loss or damage sustained or incurred by reason of the refusal of any person to purchase, lease or lend money on the estate or interest covered by this policy.

This Endorsement is made a part of the policy and is subject to all the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, this Endorsement neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and prior endorsements, nor does it increase the face amount thereof. Signed under seal for the Company, but this Endorsement is to be valid only when it bears an authorized countersignature, dated 4 January, 2010.


Chairman of the Board




President

Countersigned:



Authorized Countersignature

Stewart Title Guaranty Company

Company

Toronto, Ontario, Canada

City, Province

ENDORSEMENT TO TITLE POLICY

Attached to and forming part of Policy No(s). O-7761

Charge \$Nil
05/06/2008 - Owner

ISSUED BY

STEWART TITLE GUARANTY COMPANY

HEREIN CALLED THE COMPANY

ZONING ENDORSEMENT – COMPLETED STRUCTURE (\$2-\$10 Million)

1. The Company insures the Insured against loss or damage sustained or incurred by reason of the failure of the use of the Land at Date of Policy to be a permitted use under applicable zoning bylaws.

There shall be no liability if the use or uses are not allowed as a result of any lack of compliance with any conditions, restrictions, or requirements contained in the applicable zoning bylaw(s) and amendments thereto, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses.

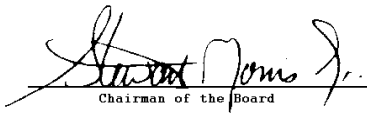
2. The Company further insures against loss or damage arising from a final judgment or order of court of competent jurisdiction:

- (a) Prohibiting the use of land, with any structure presently located thereon; or
- (b) Requiring the removal or alteration of the structure on the basis that, at Date of Policy, the applicable zoning bylaw(s) and amendments thereto have been violated with respect to any of the following matters:
 - (i) Area, width or depth of the Land as a building site for the structure;
 - (ii) Floor space area of the structure;
 - (iii) Set back of the structure from the property lines of the Land; or
 - (iv) Height of the structure.

There shall be no liability under this endorsement based on the invalidity of the applicable zoning bylaw(s) and amendments thereto until after a final judgment or order of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses.

Loss or damage as to the matters insured against by this endorsement shall include loss or damage sustained or incurred by reason of the refusal of any person to purchase, lease or lend money on the estate or interest covered by this policy.

This Endorsement is made a part of the policy and is subject to all the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, this Endorsement neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and prior endorsements, nor does it increase the face amount thereof. Signed under seal for the Company, but this Endorsement is to be valid only when it bears an authorized countersignature, dated 4 January, 2010.


Chairman of the Board




President

Countersigned:



Authorized Countersignature

Stewart Title Guaranty Company

Company

Toronto, Ontario, Canada

City, Province

TOPIC 2 – Title Insuring Cottage Properties – things you need to know

Cottage conveyancing involves a number of items that are not likely to be part of the considerations on a residential home transaction in a municipality. Many of these items impact the coverage in a title insurance policy and searches required.

Here are some of the key items to consider:

- *Does the property front on water?*

If yes, when ordering the policy – select the following title qualification:

Water - Property abutting a body of water
Title to that portion of the property lying below the high mean water mark.

Riparian or water rights, claims or title to water whether or not shown by the public records.

Rights, if any, of the public to use as a public beach or recreation area, any part of any lands abutting any of the subject property which lies between the body of water and the subject property.

This title qualification essentially indicates that the policy does not insure ownership of land lying below the high mean water mark. Nor does it insure that the insured has riparian or water rights and if there is a public beach located between the property and the water, there is no coverage for ownership of that land.

- *Is there a shore road allowance?*

If yes, when ordering the policy – select the following title qualification:

Shore Road Allowance
There is a shore road allowance lying between the Property and the body of water adjacent to the shore road allowance. Coverage under this policy does not extend to said shore road allowance or any matter relating thereto unless specifically provided for in this Schedule.

This is consistent with the policy itself which indicates that the policy does not insure ownership of land outside of that contained in the legal description set out in Schedule A.

Please note: when this qualification is selected, our standard title qualification “ Water – Property abutting a body of water” should not be used unless you are aware (e.g. upon review of an existing survey) that the old shoreline road allowance is under water and the property does, therefore, in fact, abut the body of water.

If you are aware of structures that encroach onto the shore road allowance, coverage should be sought for those encroachments. Our general guidelines in that regard are:

Encroachment Guidelines:

These rules should be applied to all encroachment title qualifications.

- i) You must contact Stewart Title where you or the Insured are aware that the principal dwelling encroaches 1 foot or more over the lot lines or if a shed, garage or ancillary improvement appears to encroach more than 3 feet onto neighbouring lands (or a shore road allowance).
- ii) Please do not include fences and/or boundary walls, as they are not covered under the policy. Please see “Fence not on lot line” title qualification.

iii) Please select the "Encroachment onto subject property" title qualification for all items that encroach onto the subject property.

Accordingly, if the cottage encroaches by less than a foot onto the shore road allowance, you can select the standard encroachment onto neighbouring land title qualification as follows:

Encroachment onto neighbouring lands. (Loan Policy)
An encroachment of the _____ onto neighbouring lands.

This Policy insures the Insured against loss or damage which the Insured shall sustain by reason of the enforced removal of that portion of the above noted item(s) which encroaches onto neighbouring lands and also provides coverage regarding any loss in marketability as a result of such encroachment.

Encroachment onto neighbouring lands (Owner Policy)
An encroachment of the _____ onto neighbouring lands.

This Policy insures the Insured against loss or damage which the Insured shall sustain by reason of the enforced removal of that portion of the above noted item(s) which encroaches onto neighbouring lands, however this coverage shall not extend to any loss in marketability as a result of such encroachment. The Company hereby commits to insuring this matter for future purchases on the same basis as set out herein at the then applicable premium.

If the cottage encroaches more than a foot (or may be entirely on the shore road allowance) please contact underwriting prior to closing to determine what coverage may be available.

- *Does the property have a boathouse?*

The existence of a boathouse raises three main issues with respect to searches to be performed on purchase transactions. Where appropriate searches are not conducted Stewart should be conducted for an underwriting decision.

a) if the boathouse has living accommodation then it is considered to be a multi-unit property and the building and zoning and fire department work order searches should be conducted for the purpose of owner coverage.

b) certain boathouses may be subject to Crown lease requirements. Inquiries should be made with Ministry of Natural Resources if the boathouse has a second storey (regardless of its use), it contains living accommodation, is located remotely from the owner's privately owned upland property. These boathouses must obtain approval of the Crown and pay annual rent.

c) The Ministry of Natural Resources and Parks Canada (for the Rideau and Trent-Sever waterways) impose work permit requirements for certain types of docks and boathouses. A good resource as to these requirements is found at the MNR's website:

http://www.mnr.gov.on.ca/en/Business/CrownLand/2ColumnSubPage/STEL02_165788.html

Where dealing with a boathouse or dock where a permit would be required an inquiry should be made if owner coverage is sought.

Why is it important to conduct these searches? In many cases purchasers of cottage properties choose which cottage to buy based on features like a boathouse. Thus, despite the comprehensive coverage found in a title insurance policy, if the government is requiring the removal of the boathouse (and will not accept any other remedy), the financial compensation

provided by the title insurance coverage may still not satisfy a purchaser unhappy with losing the key feature of their cottage property.

- *Is there legal access?* (i.e. a municipal road or properly created right of way)

One of the most common problems for cottage properties is the lack of legal access. Access is often by way of a dirt road that all of the cottagers have been using for a long time but for which there is no legal right (other than perhaps a prescriptive easement).

This is one of the most frequent areas where we can provide affirmative underwriting which facilitates the closing of a transaction.

Our underwriting analysis involves asking the following questions:

- 1- Who has legal title to the road being used to access the property?
- 2- Who maintains the road?
- 3- Is there a registered or non registered agreement between cottage owners respecting the road? Has that agreement been complied with? Are any dues, if any, paid to date?
- 4- How long has the road been used for access to the cottage?
- 5- Approximately, how many cottages use the road for access?
- 6- Where is the insured cottage located with respect to the other cottages i.e. is it in the middle or the end of the cottages?
- 7- What, if anything, did the Agreement of Purchase and Sale say about access?
- 8- Did the vendor provide a declaration of possession? If yes, did it mention access?
- 9- Is anyone disputing the current use of the access road?
- 10- Is the road shown on a survey? i.e. how can we identify the road we are referring to?
- 11- Are there any parts of the road for which there are registered rights of way?
- 12- Does the Road Access Act apply?

Key factors include the length of use, number of users of the road, and who are the registered owners of the land being used for access.

When underwriting is provided to the owner the policy will generally insure against loss or damage if legal access to the property via the existing access road is denied and will commit to reinsuring future purchasers on the same basis at the then applicable premium. The owner policy will specifically except coverage for loss in marketability of title. Lenders generally will get full marketability of title coverage, particularly if there is sufficient equity.

- *Is the property serviced by a septic system? A well?*

Both owners and lenders of residential cottage properties can obtain a septic endorsement. [more fully discussed in the next topic] A water potability endorsement is available for lenders only. The potability endorsement for lenders provides coverage in the event that the water is not potable as at the date of closing. Similar to a water potability test, it is a "point in time" specific and does not guarantee that the water will be potable in the future.

* The above applies to residential cottage properties only. If you are dealing with a commercial cottage property involving multiple cottages please consult with underwriting as to the nature of the policy to be issued and coverage available.

TOPIC 3 – THE SEPTIC ENDORSEMENT

One of the most frequently requested endorsements that Stewart offers is our septic endorsement. It is available for residential policies only – i.e. residential properties of 1 to 6 units. We do not offer the septic endorsement on commercial policies – accordingly, it is important when ordering a policy that you request the correct form of policy. For example, a trailer park may have a residential use, but someone purchasing the whole park should be obtaining a commercial policy and there would be no septic endorsement available.

What does the endorsement cover?

The most important matter to keep in mind is that the endorsement does not provide a functionality warranty. Septic systems wear out over time and need replacing. It is not our intention to install a new system because the existing one is past its useful life. Rather, the endorsement deals with matters for which a lawyer could conduct some due diligence to determine the legal status of the septic system.

The owner policy endorsement has three main components of coverage described in clauses 1 and 2 of the endorsement as set out below:

1. The Company insures the Insured against loss or damage arising from any outstanding notice of violation, deficiency notice or work order issued as of the Policy Date affecting the septic system which services the land.
2. The Company also insures the Insured against loss or damage in the event that a local authority search would have disclosed:
 - a) that the certificate of approval and/or the use permit issued for the private septic system servicing the land does not conform with the current as-built nature of construction; or
 - b) that a certificate of approval and/or a use permit had not been issued at the time the system was constructed and a certificate and/or use permit was required at the time of construction.

Clause 1 confirms that if the governmental authority having jurisdiction over septic systems has placed a work order or deficiency notice against the property which relates to the septic system coverage exists. The work order or notice must have been in existence as at the policy date. Accordingly, work orders issued after the policy date (i.e. the registration date of the deed to the owner) are not covered. This is consistent with the fact that title insurance is intended to cover matters that are discoverable prior to the policy date.

Clauses 2 (a) and 2(b) introduce the concept of a “local authority search” into the coverage. As defined in our policy jacket, “local authority search” means any search of local government records pertaining to the land which would customarily be required by a solicitor qualified to practice law in the jurisdiction in which the lands are located in the normal course of a real estate transaction. Accordingly, if the standard letter inquiry search would have revealed the certificate of approval and/or the use permit issued for the private septic system servicing the land did not conform with the current (i.e. as of the policy date) as-built nature of construction then coverage is available. Similarly, if such a search would have revealed that a certificate of approval and/or use permit was not issued for the septic system and one would have been required at the time of installation then coverage is available.

Of course, any determination of coverage is contingent on their being a loss to the insured and that no exclusions or exceptions apply.

Clause 3 of the endorsement is a reminder that functionality is not covered. It states: "The Company does not insure against any loss or damage related to the functionality and/or age of the system unless such loss or damage arises from an issue covered under paragraphs 1 and 2 above." Thus, an issue covered in 1 or 2 may lead to a functionality problem which would be covered by virtue of the coverage afforded in clause 1 and 2.

The final two clauses of the endorsement deal with two matters.

Clause 4 states that "Item 29 under the Covered Title Risks section of the Gold Owner's Policy shall not apply in respect to any septic systems save and except as set out in this Endorsement. " Item 29 is the covered title risk in the residential owner policy jacket that reads as follows: "Any adverse circumstance affecting the land which would have been disclosed by a local authority search of the land at the Policy Date." The intention is to reflect the fact that only those matters specifically listed in the endorsement are covered. It also addresses the fact that the mere fact that a compliance search would reveal a "no record" response is not an adverse circumstance for which compensation could be sought.

Clause 5 reads "Coverage under this Endorsement applies provided that the governmental authority having jurisdiction over the regulation of the septic system would respond to requests for certificates of approval, use permits and/or work orders, if requested." Essentially what this says is that for coverage to exist there has to be a governmental entity that would respond to a written request for information regarding the septic system. This fits logically with the notion that the coverage in the endorsement deals with matters of legal status.

Example of a Typical Septic Claim

While all claims are viewed on their own merit, below are two examples of septic claims and how the coverage in the endorsement was applied.

Facts

A year after purchasing a cottage property, the owner receives a notice of a requirement for an inspection by the local authority. Complying with the notice, the owner arranges for the inspection. The inspection report indicates a problem with the septic bed and a work order is placed against property requiring an upgrade to the septic system. The owner contacts Stewart for a determination as to coverage

Claims Review

The claims department will review the policy coverage issued to the insured, including the covered title risks, septic endorsement, schedule B exceptions and the exclusions in the policy jacket.

The issuance of the work order does not in itself trigger a claim – because the work order is a post policy date matter. As clause 1 of the septic endorsement indicates, only pre-policy date work orders that are unknown to the insured are covered.

However, the analysis will not end there provided that the insured owner is able to provide evidence that establishes coverage under the endorsement. In this case, the owner was able to establish the age of the system and that there was a permit required at the time of installation and that the local governmental records did not have a record of a permit being issued. The claims

department then reviewed the evidence in light of the coverage under clause 2(b) of the endorsement.

In this case, further investigation revealed that the septic bed problem stemmed from the system being improperly installed (rather than poor maintenance by the owner for example) and therefore coverage was granted and a new septic bed installed.

Facts

The septic system began to back up after closing. The owner investigated the municipal records and obtained copy of the use permit issued 1976 for a septic system for a 4 bedroom and 1 bathroom home. When the owner purchased the property had 5 bedrooms and 2 bathrooms. A licensed septic contractor provided the owner with a letter, stating that "The existing system simply does not meet code requirements and was not designed to comply with the additional bedrooms and bathroom".

Claims Review

The claims department reviewed this claim in the context of clause 2(a) of the septic endorsement. In light of the evidence provided by the owner the claim was covered. The owner was requested to obtain 3 quotes for completing the work required to install a new septic system and forward them to Stewart. Stewart chose one of the contractors and new septic was installed.

ENDORSEMENT TO TITLE POLICY

Attached to and forming part of Policy No. O-7763

Charge \$Nil

ISSUED BY

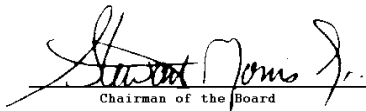
STEWART TITLE GUARANTY COMPANY

HEREIN CALLED THE COMPANY

SEPTIC ENDORSEMENT Owner Policy

1. The Company insures the Insured against loss or damage arising from any outstanding notice of violation, deficiency notice or work order issued as of the Policy Date affecting the septic system which services the land.
2. The Company also insures the Insured against loss or damage in the event that a local authority search would have disclosed:
 - a) that the certificate of approval and/or the use permit issued for the private septic system servicing the land does not conform with the current as-built nature of construction; or
 - b) that a certificate of approval and/or a use permit had not been issued at the time the system was constructed and a certificate and/or use permit was required at the time of construction.
3. The Company does not insure against any loss or damage related to the functionality and/or age of the system unless such loss or damage arises from an issue covered under paragraphs 1 and 2 above.
4. Item #29 under the Covered Title Risks section of the Gold Owner's Policy shall not apply in respect to any septic systems save and except as set out in this Endorsement.
5. Coverage under this Endorsement applies provided that the governmental authority having jurisdiction over the regulation of the septic system would respond to requests for certificates of approval, use permits and/or work orders, if requested.

This Endorsement is made a part of the policy and is subject to all the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, this Endorsement neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and prior endorsements, nor does it increase the face amount thereof. Signed under seal for the Company, but this Endorsement is to be valid only when it bears an authorized countersignature, dated 4 January, 2010.


Chairman of the Board




President

Countersigned:



Authorized Countersignature
Stewart Title Guaranty Company
Toronto, Ontario, Canada

TOPIC 4 – Super Priority Liens

The Canada Revenue Agency (“CRA”) has the ability to assess a lien which has a super-priority for unremitted source deductions such as CPP and EI payments.

This super priority lien takes priority over the interest that a lender obtains through its registered mortgage. Accordingly, it would seem prudent when dealing with a commercial loan transaction to inquire with the CRA as to whether the borrower is in default of its source deductions and whether the CRA is claiming a lien. Unfortunately, the CRA does not generally respond to such inquiries on a timely or informative basis.

How then is a lawyer to protect the interest of his or her clients? One way is to obtain title insurance.

Both residential and commercial title insurance policies provide coverage for CRA super priority liens if such liens cause a loss to an insured lender. Coverage is provided for those sums that are due and payable to the CRA up to the date of policy.

Here is a typical example:

- a lender provides a \$500,000 loan to a company secured by a mortgage against its commercial property;
- unbeknownst to the lender or its lawyer, the company has not remitted its source deductions to the CRA for the past year
- the loan goes into default a year later
- the lender attempts to enforce its security and discovers that the CRA is claiming a super priority lien for \$75,000 in unremitted source deductions.
- the property sells for \$500,000
- the lender has to pay \$75,000 to the CRA leaving only \$425,000 in proceeds
- the lender can make a claim to Stewart for the \$75,000 deficiency that is the result of the super priority lien claim

TOPIC 5– SCHEDULE B OF A TITLE INSURANCE POLICY – WHAT YOU AND YOUR CLIENTS NEED TO KNOW

Schedule B of a title insurance policy contains the list of exceptions from coverage. Exceptions from coverage fit into two categories – i) the standard pre-printed exceptions that are found on every policy; and ii) the property specific matters that are expressly underwritten into the policy.

The pre-printed exceptions vary based on the policy type – i.e. the residential owner schedule B is different than the commercial owner schedule B. In fact, commercially, the schedule B pre-printed exceptions vary based on the policy amount with the schedule B pre-printed exceptions for owners, for example, differing for policy amounts over \$10 million.

In order for a policy to properly reflect the property specific matters, it is crucial that the law firm ordering the policy advises Stewart of the state of title and of any known survey or other defects. This is regardless of whether the law firm orders through our software or by phone or fax. In fact, our software contains a list of boilerplate title qualifications from which it is simple to select the appropriate items and the wording will automatically pre-populate into schedule B.

What Title Qualifications Are Necessary?

To determine what title qualifications need to be added to your schedule B first look to the standard list of title qualifications contained in the software (if you are using our software) otherwise consult the list attached to this material.

The following items are the most frequently selected and would be known as a result of your title search:

Airport Zoning Regulations

Easement

Municipal Agreements

Notice of Chattel Lease/Security interest

Restrictions

Right of Re-entry

Right of Way - lands subject to

With respect to survey related items, the most frequently are:

Encroachment onto neighbouring lands

Fence – Not on the lot line

Of course, if you do not have a survey, then these survey related matters are not known and would not be selected.

The title qualifications are essentially the matters which affect the title of the owner and for which it would be prudent to inform the owner of their existence in an opinion on title. Since, when obtaining title insurance, lawyers no longer provide opinions on title, it is through Schedule B of the policy that insured owners are made aware of those matters that affect their title. Lawyers should advise their clients in advance of closing of the results of their searches whether it be by providing a copy of Schedule B or otherwise so that clients are fully aware before they close a

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transaction of what encumbrances affect title. Easements, rights of way, and restrictions are arguably the most important items to inform clients of their existence. Failure to do so may result in a client being upset to learn that their plans to build an addition may be hampered because of an easement.

In addition to the boilerplate title qualifications, there are occasions where a title search reveals an unusual item – such as a court order or a “subject to” reference in the legal description on the parcel abstract – these are matters for which a lawyer would generally seek to resolve by requisition or would at least qualify his/her opinion on title. Accordingly, as this will also affect the coverage in the title insurance policy, the lawyer should contact an underwriter prior to closing to determine the available underwriting. A good rule of thumb is that if an item is not listed on the boilerplate title qualifications then an underwriter should be consulted.

Are There Items That Do Not Need to Be Listed on Schedule B?

Yes, there are items that are optional. These items are covered for compliance up to the policy date regardless of whether listed in the policy. They are:

- subdivision and development agreements
- for condominiums only – agreements where the municipality, developer, builder, a utility, or the condominium corporate are a party *except* private restrictive covenants, encroachment agreements, and shared use and common element agreements registered after the condominium declaration

Other items that do not affect the marketability of title and are not an encumbrance on title do not need to be added – generally speaking these would include part lot control exemption bylaws that have not expired and applications general – such as to change a corporate name.

What Do Lawyers Need to Know about the Wording of the Title Qualifications?

An exception is a matter that is not covered in the title insurance policy. However, for many of the boilerplate title qualifications, as well as custom underwriting, there is coverage brought back into the policy by way of affirmative assurance language.

The affirmative assurance language used for airport zoning regulations, municipal agreements, restrictions and rights of re-entry is referred to as “compliance coverage” and typically reads: **“The Company insures the Insured against loss or damage sustained by reason of any violations on the land of any enforceable terms, conditions or obligations contained within the above noted instrument number, up to the policy date.”**

Accordingly, the existence of the agreement on title is not covered nor the content of what the terms state. However, we are insuring against loss in the event that the terms of the agreement have not been complied with up to the policy date.

Easements and rights of way to which the property is subject have specific affirmative assurance language that states **“The Company insures the Insured against loss or damage sustained by reason of the owner of the dominant tenement having, prior to the policy date, claimed a legal interest in the title to the servient tenement that is greater than the legal interest provided for in the above noted instrument number.”**

Similarly the existence of the easement is not covered. Thus, an insured will not be successful in claiming a loss due to their title being encumbered by the easement. However, what is covered is if the party having the benefit of the easement has claimed to have the legal right to use more than what the easement entitles him/her to.

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For example, if a easement provides for a right to use 4 feet, but the party having the benefit actually claims to have the right to use 6 feet, loss or damage related to the use of the extra 2 feet is covered.

Lawyers should keep the following three points in mind with respect to schedule B:

- its wording may impact the coverage otherwise found in the policy jacket
- the affirmative assurance language brings back into the policy the extent of the coverage that the insurer is willing to provide for a particular issue – that wording may vary between owner and lender
- the boilerplate title qualifications are an important part of the title insurance policy and should be selected on every transaction

What Do Clients Need to Know about the Wording of the Title Qualifications?

By informing clients of the matters listed on schedule B, the lawyer is protecting him or herself from the potential allegation that the client was not fully informed about the property he or she was purchasing and the extent of the coverage being provided in the title insurance policy. This is particularly important if you are obtaining Stewart's Closing Protection Letter endorsement for owner policies. In that case, the purchaser is required to sign an acknowledgment confirming, among other things, his or her knowledge that schedule B contains exceptions.

If custom underwriting is being provided for an unusual matter the client should be informed of the content of that underwriting, particularly if it does not include coverage for loss in marketability of title. For example, where coverage is given for an old undischarged mortgage on title, it is prudent that the client be advised that when he or she goes to sell the property in the future, that the title insurance company will not remove that mortgage at that time. Instead if a commitment to re-insure is given in the underwriting coverage, the client can indicate the title insurer's willingness to provide the same coverage to prospective purchasers.

Title Qualifications

Where you are dealing with an Instrument or title matter which does not fall into one of our Title Qualification categories below (for example, an Encroachment Agreement with the Municipality), please contact an Underwriter for assistance.

Access by Water only

Access is by Water only. Notwithstanding anything else contained in this policy, this policy does not cover lack of pedestrian and vehicular access to and from the land.

Airport Zoning Regulations

Airport Zoning Regulations registered as Instrument Number(s) _____.

The Company insures the Insured against loss or damage suffered in the event that Airport Zoning Regulations contained within the above noted Instrument Number(s) have not been complied with, up to the policy date.

Assignment of Rents – Active (Owner Policy)

Assignment of Rents registered as Instrument Number _____.

Assignment of Rents – Active (Loan Policy)

Assignment of Rents registered as Instrument Number _____.

Where an Assignment of Rents is being registered in conjunction with the insured mortgage, coverage is provided for said Assignment of Rents as if it were included in Schedule A, Paragraph 4 (or Paragraph 3 of the Extension Certificate if this policy is being issued by way of Extension Certificate).

Assignment of Rents – Expired (Owner Policy)

Assignment of Rents registered as Instrument Number _____.

The Company insures the Insured against loss or damage sustained as a result of the assignee in the above referenced instrument attempting to enforce the above Assignment of Rents, provided, however, that the Company will not otherwise cover any costs associated with removing this Instrument from title. Although coverage for this issue does not extend to loss in marketability in relation thereto, the Company does hereby commit to offering coverage in the same manner at the then applicable premium to subsequent Insureds.

Assignment of Rents – Expired (Loan Policy)

Assignment of Rents registered as Instrument Number _____.

The Company insures the Insured against loss or damage sustained as a result of the assignee in the above referenced instrument attempting to enforce the above Assignment of Rents, provided, however, that the Company will not otherwise cover any costs associated with removing this Instrument from title, and also provides coverage regarding any loss in marketability as a result of the existence of said Assignment of Rents.

By-Law

This title qualification should only be used where upon your review of the by-law you are not aware of any non-compliance.

By-Law registered as Instrument Number(s) _____.

The Company insures the Insured against loss or damage sustained by reason of any violations on the land of any enforceable terms, conditions or obligations contained within the above noted Instrument Number(s), up to the policy date.

Common Elements Condominium (Owner Policy)

When setting out the legal description on Schedule A of the policy, be sure to include reference to the Parcel of Tied Land (POTL) and the Common Elements Condominium Corporation (including both PIN references).

Terms, Conditions, Agreements, Covenants, Restrictions, Obligations, Reservations, and Easements created by or contained in the Condominium Declaration, including the By-laws and Rules and Regulations annexed thereto, as same may be (further) amended. Items disclosed by the Status Certificate, including but not limited to, adequacy of the reserve fund. This does not limit the coverage in paragraph 11(c) of the Gold Comprehensive Protection Owner's Policy.

Common Elements Condominium Endorsement is annexed to this policy and applies only to the lands of the Common Elements Condominium and not to the POTL.

Common Elements Condominium (Loan Policy)

When setting out the legal description on Schedule A of the policy, be sure to include reference to the Parcel of Tied Land (POTL) and the Common Elements Condominium Corporation (including both PIN references).

Terms, Conditions, Agreements, Covenants, Restrictions, Obligations, Reservations, and Easements created by or contained in the Condominium Declaration, including the By-laws and Rules and Regulations annexed thereto, as same may be (further) amended.

Common Elements Condominium Endorsement is annexed to this policy and applies only to the lands of the Common Elements Condominium and not to the POTL.

Condominium (Owner Policy)

Terms, Conditions, Agreements, Covenants, Restrictions, Obligations, Reservations, and Easements created by or contained in the Condominium Declaration, including the By-laws and Rules and Regulations annexed thereto, as same may be (further) amended. Items disclosed by the Status Certificate, including but not limited to, adequacy of the reserve fund. This does not limit the coverage in paragraph 11(c) of the Gold Comprehensive Protection Owner's Policy.

Condominium Endorsement is annexed to this policy.

Condominium (Loan Policy)

Terms, Conditions, Agreements, Covenants, Restrictions, Obligations, Reservations, and Easements created by or contained in the Condominium Declaration, including the By-laws and Rules and Regulations annexed thereto, as same may be (further) amended.

Condominium Endorsement is annexed to this policy.

Construction Mortgage (Loan Policy)

Notwithstanding the Date of Policy shown in Schedule A, the policy date applicable for all terms and conditions of this policy, including survey coverage, shall be the date of the most recent advance of funds by the Insured.

Pending disbursement of the full proceeds of the loan secured by the mortgage described in Schedule A, this Policy insures only to the extent of the amount actually disbursed, but increases as each disbursement is made in good faith and without knowledge of any defects in or objections to the title, up to the face amount of the Policy. Nothing contained in this paragraph limits any exception or any printed provision of this Policy.

Development Agreement (Optional)

Development agreement registered as Instrument Number(s) _____.

The Company insures the Insured against loss or damage sustained by reason of any violations on the land of any enforceable terms, conditions or obligations contained within the above noted Instrument Number(s), up to the policy date.

Easement

Easement registered as Instrument Number(s) _____.

The Company insures the Insured against loss or damage sustained by reason of the owner of the dominant tenement having, prior to the policy date, claimed a legal interest in the title to the servient tenement that is greater than the legal interest provided for in the above noted Instrument Number(s).

Easement - unregistered

The property is subject to an unregistered easement.

The Company insures the Insured against loss or damage sustained by reason of the owner of the dominant tenement having, prior to the policy date, claimed a legal interest in the title to the servient tenement that is greater than the legal interest provided for in the unregistered easement.

Encroachment Guidelines

These rules should be applied to all encroachment boilerplate exceptions.

- i) You must contact Stewart Title where you or the Insured are aware that the principal dwelling encroaches 1 foot or more over the lot lines or if a shed, garage or ancillary improvement appears to encroach more than 3 feet onto neighbouring lands.*
- ii) Please do not include fences and/or boundary walls, as they are not covered under the policy. Please see "Fence not on lot line" title qualification.*
- iii) Please select the "Encroachment onto subject property" title qualifications for all items that encroach onto the subject property.*

Encroachment onto the subject property.

An encroachment of the _____ onto the subject property.

Encroachment onto neighbouring lands (Owner Policy)

An encroachment of the _____ onto neighbouring lands.

This Policy insures the Insured against loss or damage which the Insured shall sustain by reason of the enforced removal of that portion of the above noted item(s) which encroaches onto neighbouring lands. Although coverage for this issue does not extend to loss in marketability in relation thereto, the Company does hereby commit to offering coverage in the same manner at the then applicable premium to subsequent Insureds.

Encroachment onto neighbouring lands. (Loan Policy)

An encroachment of the _____ onto neighbouring lands.

This Policy insures the Insured against loss or damage which the Insured shall sustain by reason of the enforced removal of that portion of the above noted item(s) which encroaches onto neighbouring lands, and also provides coverage regarding any loss in marketability as a result of such encroachment.

Encroachment - setback violation (Owner Policy)

An encroachment of the _____ onto setback requirements.

This Policy insures the Insured against loss or damage which the Insured shall sustain by reason of the enforced removal of that portion of the above noted item(s) which encroaches onto setback requirements. Although coverage for this issue does not extend to loss in marketability in relation thereto, the Company does hereby commit to offering coverage in the same manner at the then applicable premium to subsequent Insureds.

Encroachment - setback violation (Loan Policy)

An encroachment of the _____ onto setback requirements.

This Policy insures the Insured against loss or damage which the Insured shall sustain by reason of the enforced removal of that portion of the above noted item(s) which encroaches onto setback requirements, and also provides coverage regarding any loss in marketability as a result of such encroachment.

Execution or Judgment

Similar or same name Judgments/Executions are not required to be listed in Schedule B of the policy, if you obtain the appropriate affidavits. Please retain an original of the affidavit/declaration for your files. Where there are Judgments/Executions against the actual person, these are not covered and must be listed as an exception on Schedule B.

FOR JUDGMENTS \$50,000 OR LESS:

We will insure over similar or a same name execution (but not the actual person) if you obtain an Affidavit signed by the individual against whom there is a similar or same name execution stating that they are not one and the same person as the judgment debtor.

FOR JUDGMENTS GREATER THAN \$50,000:

We will insure over similar or same name executions (but not the actual person) if you obtain an Affidavit signed by a Solicitor stating that the insured is not one and the same person as the judgment debtor.

Executions/Judgment Not Clear

The Company does not insure against loss or damage arising from Judgments/Executions.

Farm Endorsement

For use only where:

- i) the policy amount is up to \$2 million;*
- ii) the property is NOT specifically zoned commercial; and*
- iii) the property contains a residential house.*

If the property is specifically zoned commercial and/or the Policy Amount is over \$2 million, then a commercial policy must be obtained directly from Stewart Title. If there is no residential house located on the property, the property will be considered vacant land and should be insured according to the guidelines for vacant land set out herein.

Farm Endorsement is annexed to this Policy.

Fence – Not on the lot line

The location of a fence does not correspond to the location of the boundary line of the Property. This policy does not insure against loss or damage which arises from claims relating to title to and/or possession of that portion of the lands between the fence and the boundary line, which loss or damage includes but is not limited to claims arising from loss of use, loss in marketability, and defence of title; furthermore, this policy does not insure against loss or damage arising from the removal or rebuilding of the fence.

Improvement Endorsement (Owner Policy only)

If your client is constructing improvements that will increase the value of the land, you may select the Improvement Endorsement if:

- i) construction is to commence within 6 months of closing; **AND***
- ii) a written estimate as to the future value of the land including the improvements is available. This estimate may be in the form of a **certified** appraisal or an executed construction contract. (**Please note:** a letter of opinion is **NOT** an acceptable form of appraisal for valuing the improvement when the improvement is not yet built.)*

The policy amount will be increased to include the estimated future value. Additional premiums may apply should the value of the improvements increase the total policy amount to a higher premium pricing threshold.

*If construction will not commence until 6 months after closing or a valuation of the improvements cannot be obtained at closing, then the Improvement Endorsement **should not** be selected at this time. Instead, after 6 months, the purchaser may contact Stewart Title to request that the Improvement Endorsement be issued then. An administrative fee will be charged as well as any applicable additional premium should the value of the improvements increase the total policy amount to a higher premium pricing threshold. Once the improvement has been constructed, we will accept a realtor's letter of opinion/appraisal.*

Estimated future value of property, including improvements = \$_____. The policy amount is hereby amended by replacing the policy amount listed in Schedule A of the Owner Policy by the amount as noted above.

Improvement Endorsement is annexed to this Policy.

Lease/Liens – Expired (Owner Policy)

Terms and provisions of the lease/lien registered as Instrument Number(s) _____, which lease/lien is no longer in effect.

The Company insures the Insured against loss or damage arising from a claim against the Property by the lessee/lien claimant in the above noted Instrument Number(s) arising from rights contained in said lease/lien, provided, however, that the Company will not otherwise pay to remove said Instrument(s) from title. Although coverage for this issue does not extend to loss in marketability in relation thereto, the Company does hereby commit to offering coverage in the same manner at the then applicable premium to subsequent Insureds.

Lease/Liens – Expired (Loan Policy)

Terms and provisions of the lease/lien registered as Instrument Number(s) _____, which lease/lien is no longer in effect.

The Company insures the Insured against loss or damage arising from a claim against the Property by the lessee/lien claimant in the above noted Instrument Number(s) arising from rights contained in said lease/lien, provided, however, that the Company will not otherwise pay to remove said Instrument(s) from title. The Company also provides coverage regarding any loss in marketability as a result of the existence of said lease/lien.

Mineral and Mining Interest

Terms and provisions of oil, gas and mineral leases. Mineral and unpatented mining claims, and the royalties, bonuses, rentals and all other rights in connection with these interests, together with the appurtenant rights to use the surface. The Company makes no representation as to the present ownership of these interests.

Multi-Unit Residential Buildings (2 to 6 units)

*Where an Owner's Policy is being obtained for a property of 2 to 6 residential units, clear **building and zoning and fire work order searches** are required for coverage for these matters. Additionally, if your property is located in a municipality where two unit properties must be registered, you must determine if your units are properly registered. For transactions of 2 to 6 residential units*

where only a Lender's Policy is being obtained, or where the owner does not want coverage for building and zoning or fire work order matters, these searches are not required.

Please note, multi-unit residential use includes: duplexes, triplexes, "granny" suites, self-contained basement suites, two single family residences (e.g. main cottage dwelling and ancillary dwelling or a property where the second unit is a boathouse with living accommodation), etc. If you are unsure as to whether your transaction classifies as a multi-unit residential dwelling, please contact an Underwriter for further instructions.

Multi-Unit Residential Endorsement is annexed to this policy

Municipal Agreement

*This title qualification is to be used only with standard agreements with the Municipality. You should review the agreement and ensure that there is no non-compliance with the terms and conditions of the agreement. Please **do not** use this title qualification if you are dealing with an Encroachment Agreement with the Municipality; contact an Underwriter for further instructions.*

Municipal Agreement registered as Instrument Number(s) _____.

The Company insures the Insured against loss or damage sustained by reason of any violations on the land of any enforceable terms, conditions or obligations contained within the above noted Instrument Number(s), up to the policy date.

Notice of Chattel Lease/Security interest

Notice of Chattel Lease/Security Interest registered as Instrument Number(s) _____.

Outstanding Taxes

Outstanding taxes plus applicable penalties and interest.

Restrictions

Restrictions as more fully set forth in Instrument Number(s) _____.

The Company insures the Insured against loss or damage sustained by reason of any violations on the land of any enforceable restrictive covenants contained within the above noted Instrument Number(s), up to the policy date.

Right of Re-entry

Right of Re-entry registered as Instrument Number(s) _____.

The Company insures the Insured against loss or damage sustained by reason of any violations on the land of any enforceable terms, conditions or obligations contained within the above noted Instrument Number(s), up to the policy date.

Right of Way - lands subject to

Right of Way registered as Instrument Number(s) _____.

The Company insures the Insured against loss or damage sustained by reason of the owner of the dominant tenement having, prior to the policy date, claimed a legal interest in the title to the servient tenement that is greater than the legal interest provided for in the above noted Instrument Number(s).

Right of Way - mutual

*With a mutual right of way, the together with (t/w) and subject to (s/t) reference must be separately noted on our policies. Any and all **subject to** rights of way must be noted on Schedule B of the policy. Please add these rights of way using the **'Right of Way – lands subject to'** title qualification. Any and all **together with** rights of way must be noted on Schedule A of the policy as part of your legal description. For example, Lot 8, Plan 4M-654, together with right of way as in Instrument No. LT210519.*

Seasonal Property

Only for use where the property has been zoned for seasonal use.

The zoning by-law permits residential use for recreational purposes throughout the year but only continuous residential use during summer months.

Septic System

Select for properties with a septic system.

Septic Endorsement is annexed to this policy.

Shoreline Road Allowance/Crown Reservation Abutting Water

Where the subject property lies next to a body of water and a Crown Reservation/shoreline road allowance is retained, our Shoreline Road Allowance/Crown Reservation Abutting Water title qualification must be selected as Stewart Title does not provide coverage for legal title to same. Where cottages or accessory buildings or structures are known to encroach onto the reservation/allowance, please contact an Underwriter as custom underwriting is required for these matters.

Please note: when this qualification is selected, our standard title qualification "Water – Property abutting a body of water" should not be used unless you are aware (e.g. upon review of an existing survey) that the old shoreline road allowance is under water and the property does, therefore, in fact, abut the body of water.

There is a Shore Road Allowance/Crown Reservation lying between the Property and the body of water adjacent to the shore road allowance. Coverage under this policy does not extend to said shore road allowance or any matter relating thereto unless specifically provided for in this Schedule.

Subdivision Agreement - (Optional)

Subdivision Agreement registered as Instrument Number(s) _____.

The Company insures the Insured against loss or damage sustained by reason of any violations on the land of any enforceable terms, conditions or obligations contained within the above noted Instrument Number(s), up to the policy date.

Survey - improvements not shown (Owner Policy)

This title qualification is to be used when an item is not shown on a survey and the purchaser/mortgagor or lawyer is aware that the improvement either:

- i) did not have a permit; or*
- ii) there is non compliance with zoning by-laws/regulations.*

This coverage is for survey related issues only. There is NO coverage for the lack of a permit or zoning non compliance. You MUST contact a Stewart Title underwriter prior to closing for an underwriting decision with respect to whether coverage can be given for the lack of a permit or zoning non compliance.

A _____ not shown on the survey for which there was no building permit and/or for which there is non-compliance with zoning by-laws/regulations.

This Policy insures the Insured against loss or damage which the Insured shall sustain by reason of the enforced removal of the above noted item(s) in the event that said item(s) encroach onto setback requirements, easements or onto neighbouring lands. Although coverage for this issue does not extend to loss in marketability in relation thereto, the Company does hereby commit to offering coverage in the same manner at the then applicable premium to subsequent Insureds.

Survey - improvements not shown (Loan Policy)

For use when an improvement is not shown on a survey and the purchaser/mortgagor or lawyer is aware that the improvement either:

- i) did not have a permit; or*
- ii) there is non compliance with zoning by-laws/regulations.*

This coverage is for survey related issues only. There is NO coverage for the lack of a permit or zoning non compliance. You MUST contact a Stewart Title underwriter prior to closing for an underwriting decision with respect to whether coverage can be given for the lack of a permit or zoning non compliance.

A _____ not shown on the survey for which there was no building permit and/or for which there is non-compliance with zoning by-laws/regulations.

This Policy insures the insured against loss or damage which the insured shall sustain by reason of the enforced removal of the above noted item(s) in the event that said item(s) encroach onto setback requirements, easements, or onto neighbouring lands, and also provides coverage regarding any loss in marketability as a result of such encroachments.

Tenanted – any portion (Owner Policy)

For use on duplex, triplex etc. properties, and/or single family residences where any portion is not owner occupied.

Non-owner occupied premises. The Company does not provide coverage for any retrofit issues, Residential Tenancies Act 2006, or successor or related legislation issues, any present and future loss in rental income, any necessary eviction procedures, parking requirements, or rental deposits and interest thereon.

Tenanted – any portion (Loan Policy)

For use on duplex, triplex etc. properties, and/or single family residences where any portion is not owner occupied.

Non-owner occupied premises. The Company does not provide coverage for Residential Tenancies Act 2006, or successor or related legislation issues, any present and future loss in rental income, any necessary eviction procedures, parking requirements, or rental deposits and interest thereon.

Vacant Land Endorsement

This endorsement is for residential vacant land for both owner and lender. The Vacant Land Endorsement is to be attached to vacant land properties and a residential policy will be issued where:

- i) the policy amount is up to \$2 million and the zoning is NOT commercial or industrial; or*
- ii) the policy amount is over \$2 million and the land is specifically zoned residential.*

If the property does not fit within i) or ii) above, the policy should be a commercial policy and you must order it directly from Stewart Title.

Vacant Land Endorsement is annexed to this policy.

Vacant Land Condominium (Owner Policy)

Terms, Conditions, Agreements, Covenants, Restrictions, Obligations, Reservations, and Easements created by or contained in the Condominium Declaration, including the By-laws and Rules and Regulations annexed thereto, as same may be (further) amended. Items disclosed by the Status Certificate, including but not limited to, adequacy of the reserve fund. This does not limit the coverage in paragraph 11(c) of the Gold Comprehensive Protection Owner's Policy.

Vacant Land Condominium Endorsement is annexed to this policy.

Vacant Land Condominium (Loan Policy)

Terms, Conditions, Agreements, Covenants, Restrictions, Obligations, Reservations, and Easements created by or contained in the Condominium Declaration, including the By-laws and Rules and Regulations annexed thereto, as same may be (further) amended.

Vacant Land Condominium Endorsement is annexed to this policy.

Water Potability Endorsement (Loan Policy only)

To be attached to a Lender's policy only where the following criteria are met:

- i) The Land is a residential single family home.*
- ii) The well is in existence at the Date of Policy.*

***** PLEASE NOTE: THERE IS NO COVERAGE FOR OWNERS FOR WATER POTABILITY. *****

Water Potability Endorsement is annexed to this policy.

Water - Property abutting a body of water

This title qualification should be used only where the Property abuts a body of water. If there is a shoreline road allowance/Crown Reservation lying between the Property and the water, this clause should not be selected. Please contact a Stewart Title underwriter prior to closing to discuss the shoreline road allowance and the underwriting required for it.

Title to that portion of the property lying below the high mean water mark.

Riparian or water rights, claims or title to water whether or not shown by the public records.

Rights, if any, of the public to use as a public beach or recreation area, any part of any lands abutting any of the subject property which lies between the body of water and the subject property.

TOPIC 6 – Surveys – Requirements – Coverage - What to Disclose

Requirements

Both Stewart's residential owner and residential lender policies will be issued without the need for a survey to be available for the insured property.

Stewart will provide survey coverage on all commercial lender policies regardless of the policy amount. A survey endorsement is attached to commercial owner policies up to \$12 million. For owner policies over that threshold each decision is case by case depending on whether an existing survey or other satisfactory evidence is available.

Coverage

Residential – Owner

15. Your Land is unmarketable, which allows another person to refuse to perform a contract to purchase, lease or make a mortgage loan because:

(b) of adverse matters that would have been disclosed by an up-to-date Survey;

20. You are forced by a Governmental Authority (or in the case of 20(a) hereunder, you are forced by the affected neighbour or a party who benefits from the Easement) to remove or remedy your existing structure(s), or any portion thereof, other than a boundary wall or fence, because:

(a) it extends on to adjoining land or on to any Easement (even if the Easement is excepted in Schedule B);

21. Someone else, after the Policy Date, builds a structure – other than a boundary wall or fence—which encroaches on to your Land.

Residential – Lender

16. Any violation, variation, or adverse circumstance affecting the Land that would have been disclosed by an accurate survey, including but not limited to any encroachment of existing improvements located on the Land onto adjoining land and any encroachment onto the Land of existing improvements located on adjoining land, other than boundary walls or fences;

Commercial – Owner

Coverage is found in the survey endorsement, if attached to the policy. [see sample attached]

Commercial – Lender

Stewart's most current commercial lender policy jackets include the survey coverage for lenders.

2. Any defect in, charge, lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from:

(c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

Key Points with respect to Survey Coverage:

- The survey coverage is generally accepted in lieu of an up to date survey by lenders
- Known encroachments will be underwritten specifically into the policy on schedule B – encroachments onto adjoining land (other than fences and boundary walls) generally receive positive affirmative coverage for both owner and lender (only the lender receives marketability of title coverage); encroachments onto the subject property are generally excepted from coverage
- Where an encroachment is not known at closing – coverage will include marketability of title for both the owner and lender
- Fences not on the lot line – are excepted from coverage on schedule B when known

Frequently Asked Questions

1 – Q - If I have a survey do I have to look at it?

A – Yes, you have an obligation to review the survey and determine what deficiencies, if any, are apparent from a visual review.

2 - Q – If I don't have a survey do I have to try to get one?

A – If the agreement of purchase and sale calls for the production of a survey you should ask for it. Not only does this assist in properly underwriting the title insurance policy, but it ensures that the right to a survey [and the information contained there] bargained for by the purchaser is enforced.

3 - Q – What do I need to disclose to Stewart?

A – You need to disclose any deficiencies that are apparent by the survey – such as encroachments, fences not on the lot line, shore road allowances, and easements. If you are using Stewart's software to order policies, most of these items are contained in the boilerplate title qualifications and can be selected by the law firm without further consultation with Stewart.

4 - Q – When should I obtain a new survey?

A – There may be circumstances with respect to a particular transaction and the unique needs of a client that would merit the obtaining of an up-to-date survey. A common example is where the client has future plans to add an addition. While there remains great value in the title insurance policy, it may be in this case that a survey will compliment the coverage.

5 - Q – What if there is an improvement on the property that is not shown on the survey that I have?

A – Unless you are aware that the improvement did not have a permit or that it does not comply with zoning requirements, you do *not* need to mention it in the policy.

For situations where there is an improvement not shown on the survey AND you are aware that there was no permit for the improvement or that the improvement does not comply with zoning then you should do the following:

- Select the "Survey – Improvement Not Shown" boilerplate title qualification, which will deal with survey related underwriting

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- Contact a Stewart underwriting to discuss coverage for the lack of a permit and the zoning contravention

Below are the instruments from our boilerplate title qualification list.

Survey - improvements not shown (Loan Exception)

For use when an improvement is not shown on a survey and the purchaser/mortgagor or lawyer is aware that the improvement either:

- a) did not have a permit; or*
- b) there is non compliance with zoning by-laws/regulations. This coverage is for survey related issues only.*

There is NO coverage for the lack of a permit or zoning non compliance. You MUST contact a Stewart Title underwriter prior to closing for an underwriting decision with respect to whether coverage can be given for the lack of a permit or zoning non compliance.

A _____ not shown on the survey.

This Policy insures the insured against loss or damage which the insured shall sustain by reason of the enforced removal of the above noted item(s) in the event that said item(s) encroach onto setback requirements, easements, or onto neighbouring lands, and also provides coverage regarding any loss in marketability as a result of such encroachments.

Survey - improvements not shown (Owner Exception)

For use when an improvement is not shown on a survey and the purchaser/mortgagor or lawyer is aware that the improvement either:

- a) did not have a permit; or*
- b) there is non compliance with zoning by-laws/regulations. This coverage is for survey related issues only.*

There is NO coverage for the lack of a permit or zoning non compliance. You MUST contact a Stewart Title underwriter prior to closing for an underwriting decision with respect to whether coverage can be given for the lack of a permit or zoning non compliance.

A _____ not shown on the survey.

This Policy insures the Insured against loss or damage which the Insured shall sustain by reason of the enforced removal of the above noted item(s) in the event that said item(s) encroach onto setback requirements, easements or onto neighbouring lands, however this coverage shall not extend to any loss in marketability as a result of such encroachment. The Company hereby commits to insuring this matter for future purchases on the same basis as set out herein at the then applicable premium.

ENDORSEMENT TO TITLE POLICY

Attached to and forming part of Policy No(s). O-7761

Charge \$Nil
05/06/2008 - Owner

ISSUED BY

**STEWART TITLE
GUARANTY COMPANY**

HEREIN CALLED THE COMPANY


SURVEY ENDORSEMENT (\$0-\$12 Million)

The Company hereby insures the Insured against loss or damage by reason of any violation, variation, encroachment or adverse circumstance affecting the Title that is or would have been disclosed by an accurate survey, including violation of any building setback requirements of any applicable zoning by-law.

The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the land of existing improvements located on adjoining land.

This endorsement does not provide coverage for removal or reconstruction of boundary walls or fences.

This Endorsement is made a part of the policy and is subject to all the terms and provisions thereof and of any prior endorsements thereto. Except to the extent expressly stated, this Endorsement neither modifies any of the terms and provisions of the policy and any prior endorsements, nor does it extend the effective date of the policy and prior endorsements, nor does it increase the face amount thereof. Signed under seal for the Company, but this Endorsement is to be valid only when it bears an authorized countersignature, dated 4 January, 2010.


Chairman of the Board




President

Countersigned:



Authorized Countersignature

Stewart Title Guaranty Company

Company

Toronto, Ontario, Canada

City, Province

TOPIC 7– Stewart’s Fraud Mitigation Questions

Why We Ask Them?

Stewart has extensive experience from both a claims and underwriting perspective in the area of title fraud. Our claims experience has enabled us to “dissect” the information in lawyer’s files for transactions that turned out to be fraudulent. This has then allowed us to identify certain common characteristics that we should be looking out for.

Each month in Ontario we flag and review over 1000 files – a relatively small percentage of our overall monthly orders, but a crucial set to scrutinize. This have provided our underwriters with the insight to know what information we need to review to give us comfort to insure a transaction or which might give us cause for concern.

As an insurance company it is imperative that we implement prudent risk management measures to minimize our exposure to the very large dollar amount payouts that fraud claims involve. For law firms, the extra 10 -15 minutes on a file could result in saving many hours of scrutiny by investigators if a transaction turns out to be fraudulent.

The fraud mitigation questions that we have implemented are designed to flag transactions that may need extra scrutiny. We work hard to ensure that any disruption to the flow of your real estate transaction is minimized and that you receive a timely response in advance of your closing. Most transactions can be reviewed and a decision made based on the initial information gathering process. For those few files that require extra due diligence it is helpful if you have ordered your policy at least several days prior to the closing date.

We also believe that we are assisting in maintaining the integrity of Ontario’s conveyancing system through our vigilance and through the vigilance of the lawyers and law clerks that are our clients.

What Are We Looking For?

On each file that is flagged our underwriter’s thought process involves considering:

1st – how many risk factors does the file contain? i.e. just one flag item (no photo ID) or many (ex. high interest rate, short term mortgage, power of attorney involved, recent transfer for nominal consideration)

2nd – what are the key items on your file that we want evidence concerning to allow the deal to be insured? ex. if a deposit was paid to the vendor do we have a copy of a certified cheque? Or is the key issue whether a legitimate power of attorney is being abused?

3rd – what independent evidence exists to validate the explanation received with respect to the risk factors?

4th – are we comfortable with identity of the parties involved having been verified?

5th – we always consider who stands to gain financially if the deal is a fraud

6th – Could we justify our decision to insure a transaction if it turned out that the file was actually a fraud and you approved it?

ID question – the root of most frauds is the use of a fraudulent identity. Accordingly, we want to ensure that we have strong evidence of the identity of the parties to the transactions. This is particularly important where there are multiple flags on a file. Increasingly with the prevalence of

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the use of powers of attorney, we attempt to determine if ID of the donor and attorney was obtained at the time the power of attorney was prepared.

Deposits Paid Directly to the Vendor – One has to question why someone would give a large sum of money to a complete stranger on the promise that if the real estate deal does not close that the deposit funds will be refunded. This appears to happen most frequently on private deals. A private deal may also raise flags because of the lack of realtors to be additional “gatekeepers” in the transaction. For fraudulent transactions that we have seen where a deposit is paid to the vendor, there actually is no money paid to the vendor. The purchaser and vendor are colluding in order to defraud a lender. To the lender it looks as though the purchaser is contributing equity to the purchase when this is not actually happening.

Mortgage Funds Being Paid to Anyone Other than the Borrower or an existing lender or party to whom the lawyer has proof of debts owing – When mortgage proceeds are paid to a party with no apparent connection to the property one has to ask the question why? In fraudulent situations this is done in order to ensure that that criminal party who is the “mastermind” obtains the proceeds, not the person who is merely acting as an imposter.

We suggest that lenders are also expecting to be advised when the borrower is not the party benefiting from the loan. Accordingly, from both the lender and title insurer’s perspective this situation requires additional inquiry. In particular, who is the party obtaining the funds, why, and what evidence exists as to a debt owing?

Transfers or Discharges Registered in the Last 6 Months – i) Recent Transfers – we are looking for an extraordinary large increase in the purchase price – could this be a sign of a value fraud (i.e. flip) – hence we are looking for evidence that the current purchase price is the fair market value – were realtors involved? was there an MLS listing? Is there an appraisal? Is the lender aware of this recent transaction? If renovations were the reason for the increase – what evidence exists that they actually occurred? [also gives rise to the question of whether permits were obtained]; Or was there a nominal consideration transfer –our experience shows that criminals will transfer the property by explaining that there is an interfamily transfer or a trustee to beneficiary situation – title is then in the name for which ID is available and a sufficient credit rating to facilitate the obtaining of a mortgage. Thus, we look for evidence to back up the reason given for the transfer – a trust agreement for example (that was prepared at the time of the title going into the name of the trustee, not just last week). We look to determine which law firm registered the transfer – is this the same firm acting now? If not, why?

ii) Recent Discharges – how did the individual obtain the funds to pay out an existing mortgage *before* obtaining sale proceeds or the proceeds of a refinance? We look to who registered the discharge. In many cases, we can simply clear the flag when we receive a copy of the discharge and see it was registered by the lender itself or another entity for which we are familiar. If the discharge was registered by a law firm we attempt to confirm whether a discharge statement was obtained and funds paid to the lender. We are concerned where a discharge is registered simply on instructions from a new client and no funds are actually being paid to the lender.

Powers of Attorney Being Used in a Transaction – the use of forged powers of attorney is something that we have seen on the rise. Often family members are defrauding other family members although it is not unheard of for a criminal to use a forged power of attorney as a vehicle to transfer or mortgage a property.

Our major area of concern is for powers of attorney that were not prepared by an Ontario lawyer and the donor and donee are unknown to the lawyer. In fact, we have recently changed our due diligence procedures to reduce our scrutiny of powers of attorney that were prepared by a lawyer in good standing in Ontario.

Our first step in our review is to read the power of attorney and confirm that it has legal validity (ie. proper witnesses, grants the power to sell or mortgage etc.). We also want to ensure that the lender is aware that a power of attorney is involved due to the requirements that some lenders impose in these situations.

Basic details about the parties helps to understand the transaction – are the donor and donee related? Why is the POA being used? By asking these types of questions, a lawyer is in a position to be able to properly make law statements and this type of conversation will help the lawyer assess the validity of the transaction.

Since the donee is not entitled to benefit personally from use of the power of attorney we want to know if the proceeds from the sale or mortgage are being paid into the name of the donor. Many frauds we have seen involved the lawyer being directed to pay the proceeds into the name of the donee.

We ask to review the parcel page so that we can have a clear understanding of the state of title – is the property mortgage free? How long has the donor owned the property? Are there signs of multiple use of the power of attorney on title? (i.e. are there mortgages being registered and discharged on a regular basis?)

Certainly it is not just Stewart Title that is concerned about powers of attorney. The Law Society of Upper Canada (“LSUC”) “Guidelines on Powers of Attorney in Real Estate Transactions” the LSUC advises that “to the extent that lawyers are able to, they should avoid the use of powers of attorney.” Further, in the LSUC practice tips for fighting real estate fraud it warns that last minute registrations under a power of attorney should be scrutinized.

Private Lender Mortgage involving vacant land, mortgage free land, or where the most recent transfer was non arm’s length – Additional due diligence for these types of transactions is being introduced due to several million in claims involving private lender frauds in the last six months. Traditionally private lenders rely on the amount of equity as the main lending criteria. Criminals have recognized this and have targeted private lenders. Criminals do not have any intention of paying back the mortgage so they do not care about extremely high interest rates, short terms, large penalties, or onerous fees. This is also an area where commercial properties can be targeted with the resulting large mortgage amounts involved.

Why do we look at vacant land? - this type of property is not monitored by owners in the same way that a building or home is? i.e. no one is physically there all the time. Therefore, appraisers can attend without raising suspicion.

Why do we look at mortgage free properties? Criminals love to target these properties because the entire mortgage proceeds is payable to them and because of the amount of equity that a private lender will see in the property.

Why do we look at whether the most recent transfer is for nominal consideration? This is a potential sign that the criminal is putting the property into a name for which ID and a positive credit rating is available. This is particularly of concern where title is transferred from a corporate owner to an individual who purports to be the owner of the shares. We have seen several cases where corporate records are fraudulently changed with the ministry to replace corporate officers or directors with new individuals who are not at all involved with the corporation. We strongly recommend that when asked to act on a transaction involving a corporate borrower for whom you have never acted before that you obtain a corporate profile report rather than just a corporate status report so that you can ascertain if there have been any recent changes.

Other title insurer refused - this question is self evident. Underwriting standards are similar between title insurers – if one company has refused to issue a policy it is a sign that a detailed look at the transaction will likely lead to concern.

Flag Fraud “True” Story

Below is an example of a transaction that was flagged for review as a result of the questions.

1 - A file was flagged because it involved a private lender and mortgage free property. (It was also vacant land). The property had been purchased in 2005 for over \$1 million. The law firm acting at the time of the purchase was a large downtown Toronto firm. The deed listed the address for service of the purchaser as being in Hong Kong.

The current transaction was a mortgage of over \$700,000. The borrower did not return to the downtown Toronto law firm, instead the borrower was using a lawyer for which the borrower was unknown to him. Upon speaking with the borrower’s lawyer it was determined that the mortgage funds were not to be paid to the borrower but to several other individuals using several cheques.

We declined to issue a policy after our review and we were told the next day that indeed our decision was correct as the transaction was a fraud.

What were factors in our decision? - We reviewed the parcel abstract and the deed to the borrower. That permitted us to become aware that the property was purchased for cash and to determine which law firm acted on the purchase and to see that the borrower apparently resided in Hong Kong. This led to questions such as:

- Why is the borrower not using the same law firm as when the property was purchased? We suggested that the law firm contact the firm who acted to determine if the property owner was still their client (and could speak to the client to determine if a mortgage was being placed at this time)
- Did the borrower’s lawyer know the borrower? If not, how was the transaction referred to him?
- Was the borrower coming to Canada to sign the mortgage documents? What evidence of identity exists?
- Why is the borrower, who apparently had cash in 2005, mortgaging now with a high interest private lender? [i.e. why not an institutional lender?]
- Why are the mortgage funds not being paid to the borrower directly? Who are the individuals to whom the money is being directed and what relationship do they have to the property?