FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

Documents with "Personal Identifying Information" May Be Rejected by the Counties

Counties across New York State are taking steps to prevent "Personal Identifying Information", such as social security numbers, dates of birth, and driver's license numbers, from appearing on public records. The Five Boroughs and Suffolk County have stated that documents bearing such information will be rejected. Westchester and Monroe Counties have warned that such documents "may be rejected" unless the filer insists on their recording "as is." Since counties tend to imitate each other's policies and because the New York State Legislature is currently considering a bill to suppress personal identifying information from the public records, check the current status of the local law and practice before submitting any documents with said information for recording.

Arrested for Forging Sign-Offs of Department of Buildings Requirements

Dennis Canales, 47, a plans draftsman, was arrested for forging the initials of an employee of the Department of Buildings ("DOB") on an official DOB document to show that certain objections to his plans had been approved. Canales submitted the forged document to the DOB and collected his fee for resolving the issues. He has now been charged with Forgery, Possession of a Forged Instrument, and Grand Larceny. If convicted, he faces up to seven years in jail.

Seinberg v. Linzer, 2004-01000 (2nd Dept, 3-07-06)

Plaintiff was the purchaser and defendant the seller in contract for sale of real estate. The purchaser ordered a new survey, and it disclosed a fence traversing the premises into an adjacent parcel. The title company accordingly excepted said portion of the premises from coverage deeming it out of possession. The purchaser refused title subject to it, and rescinded the contract. When the seller refused to return the down payment, litigation ensued. The Supreme Court awarded summary judgment to the purchaser-plaintiff, but the Appellate Division reversed on appeal. The court held that there were triable issues of fact, namely, if there was in effect an out-of-possession situation or if it simply appeared so from the survey; and if there was, the extent of it, and if the defect was curable within a reasonable time.

Homeside Development Corp. v. Dassa Brill LLC [3-09-06 NY Slip Op 01711]

A restriction on real estate to use it solely for "Community Facility Use", and thus permitting neither residential nor commercial use, is not a defect of title and the purchaser has no claim against the seller, if said restriction was a matter of public record not concealed by the seller.

Perfecting the Closing

Air Rights: Three Different Concepts under One Name

Much grief and confusion, not to mention fear, has been caused by the term "air rights". The reason for this is that the industry uses it to refer to three unrelated concepts, and oftentimes the parties to a conversation are at odds as to what is meant. By "air rights" the industry refers to: *air resources* in connection with acceptable pollution levels, *negative covenants* to prevent an owner from blocking the neighbor's light and air, and *zoning development rights*, which determine the maximum square footage that may be built on a tract of land.

Air Resources

Air resources are the most straightforward of the three. The Air Pollution Control Act and its regulations determine the maximum amount of pollution a factory or any other private enterprise may emit. Violating the legal standard results in liens docketed against the owner and the real estate involved. While title companies can search the records to find these violations, these searches suffer the same handicap as all other environmental searches: violations that have not been discovered by the administration as of the date of the search could later appear of record and the corresponding lien would take priority over all other liens and transfers for consideration. In order to protect one's client against environmental liens, standard practice calls for an engineer's report in addition to the record search.

Negative Covenants

Negative covenants in relation to air rights are also called easements for light and air. The value of a house may be substantially diminished if the owners of the adjoining lots erect taller buildings depriving it from natural light, or if its view to the sea or to a park is subsequently blocked. Clients who purchase real estate in new neighborhoods or areas that are being re-developed may be reasonably concerned as to what may become of the adjoining properties. A negative covenant is the only private device that effectively curbs building rights.

A negative covenant is a restriction in the deed chain. For our purposes, the restriction in a deed could read:

> "PROVIDED that the premises be used only for residential purposes and that no structure is ever built less than 15 feet away from the street, less than 25 feet from the rear lot line, not less than 10 feet from the adjoining lot lines, and not more than 15 feet in height."

A restriction such as the above runs with the land and therefore binds all subsequent purchasers or transferees. Developers tend to include such restrictions in their deeds to convince their purchasers that the neighborhood involved will remain residential and will not be built to its maximum capacity. An owner of a property thus encumbered is legitimized to enforce the covenants on a breaching neighbor. There is no requirement that the aggrieved and breaching parties be next-door neighbors. Sometimes the covenant only protects a specific party:

> "TOGETHER with an easement for light and air in favor of the premises immediately adjoining on the easterly side not to block its windows and natural light."

While the above covenant would suffer from specificity as to what is forbidden, it is clear that only one specific party is intended to have rights under it. It is important to note that, unlike an easement for a right of way, or overhead wires, a negative easement can never be obtained by prescription. In other words, it does not matter how long an owner has benefited from a pleasant view and natural light. In principle, no right to the windows facing the adjoining lot may be acquired by the mere passage of time.

Zoning Development Rights

Zoning Law determines the maximum square footage and height that may be built on a tract of land. Different neighborhoods allow for different densities of population and consequently for different zoning development rights. One of the meanings of "air rights" refers to the right to build "in the air"; i.e. to add extra stories to an existing building or to demolish it altogether and build a new, taller building. As cities grow, zoning boards and municipalities relax zoning standards to allow for more population density. By a simple change in zoning rules, a one family house may sky rocket and become prime retail real estate, or if it is to remain residential, an apartment building.

In New York City the zoning development rights carry another caveat: Unused development rights may be transferred to adjoining lots. Oftentimes a developer wishes to demolish a structure and erect a much taller one in its place. The problem lies in that the new building may violate the maximum square footage allowed by zoning. A developer may solve this problem by purchasing the unused development rights from the adjoining owners.

> Example: The developer D buys a house planning to build an apartment building. According to the current zoning regulations, the house only uses 75% of the maximum square footage. However, the plans for the apartment building will require twice the amount, or 150% of the maximum allowable. D realizes that both adjoining properties have houses just like hers, and that therefore, each one uses only 75% of the maximum as well. D buys each owner's unused 25% of the development rights, and together with her 100%, reaches the desired 150%, allowing her to fulfill her plans.

The transfer of development rights is realized by merging the zoning lots. The adjoining owners file an application requesting the City to treat the parcels as simply one zoning lot. Following the example, the result would not be three zoning lots, two for 75% and one for 150% of the maximum square footage, but a lot three times the size for 300%. The City requires that merging lots share a minimum boundary line of ten feet, and that all parties in interest, including mortgagees and easement beneficiaries, consent to it. Merging zoning lots has no consequence on the tax lots, and each lot continues to pay its own taxes. Likewise, instruments continue to be recorded against the lots separately.

At times the adjoining lots do not have any spare development rights. Suppose one of the adjoining lot owners in the above example exhausted his development rights and has none to sell. The developer is allowed to buy the following adjoining lot's rights if the middle one joins in the merge. In other words, lots to be merged must adjoin each other, but it is not required that each have any development rights left. In this way, the middle lot could be used as a stepping-stone into the purchase of the rights of the lot two doors down. The only limitation to the merger of lots is that all must be part of the same block. The City has only made an exception to this limitation when the City subsequently prohibits further construction in a certain area. The owners that would have otherwise been able to build more square footage are sometimes allowed to transfer those rights to a lot in another block. As for the price of the development rights, one can only say the free market rules.

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