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Title Insurance Coverage Changes that Relate to Declarations and Development Limitations

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Court cases interpreting title insurance coverage originate in various jurisdictions around the United States and are typically relied on or distinguished readily by other courts that have not faced the same question before. Although one court's consideration of another jurisdiction's precedent is not unusual in American jurisprudence, it seems to happen more frequently in title insurance cases given the popularity of the "standard form" American Land Title Association ("ALTA") form of title insurance policy. The form of ALTA title insurance policy is widely used in real estate purchase and finance transactions throughout the United States and so the interpretation by various courts of the standard form of policy, inclusions and exclusions from coverage tend to get a lot of attention from courts that have not faced a particular question or issue.

A recent case decided in November, 2018, by the Supreme Court of New York, Suffolk County, 2018 WL 6055884 (2018) is interesting because the New York Court found that a declaration of covenants and restrictions recorded against a real estate development (which was not disclosed as an exception to coverage on "Schedule B" of the title insurance policy) was not a lien or encumbrance against the property, but was in fact a zoning and government restriction on the use of the property and therefore an exclusion from coverage. For general reference, the ALTA standard form policy excludes from coverage "[a]ny law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land..." (*Id.* at ¶2).

The record in the subject case reflected that there was a 140 home maximum restriction on the development of certain residential property pursuant to a declaration that had been recorded against the property as part of a prior owner's efforts to obtain zoning approval for the construction of a golf course on the property *Id.* at ¶2. Initially, a 218 lot residential subdivision had been approved for construction and subsequent thereto the then owner requested a zoning change to add recreational use to the property (a golf course) and was willing to reduce the number of residential building lots to 140 instead of the 218 *Id.* at ¶3. That change and restriction was deemed a zoning change as it was approved by resolution of the town council *Id.* In passing that resolution approving the limitation on the number of houses to be built on the property the court found that the town was exercising its power to regulate zoning matters; and while a resolution is not a law or an ordinance it is a *government regulation* (emphasis added) *Id.* at ¶3. The declaration which reflected the granting of a zoning

change and limitation of residential units was recorded against the property and the court found it significant that ". . . the Declaration indicates that it was recorded in connection with the Town of Riverheads approval of the site plan for the Property." *See generally Id.*

Although the Declaration in the subject case was not disclosed on Schedule B as an exception to coverage, the court held that the Declaration was not a defect in title or a lien or encumbrance, but a zoning regulation and therefore was an exception to coverage under standard exclusions from coverage.

What is interesting under the holding of the subject case, is that it is possible a court could interpret any type of site plan approval, subdivision approval and development plans that are approved by a municipal resolution as a government regulation and therefore, even if not excepted under Schedule "B" there is no coverage over such matters. Therefore, a purchaser of land which has been subject to a prior municipal site plan and development approval would need to continue to be diligent in reviewing not only the documents recorded against the property, but also being well aware of restrictions that are applied to the property pursuant to zoning and land use regulations as exclusions from title insurance coverage.

The topic becomes even more complicated when a purchaser obtains additional policy endorsements such as a "subdivision compliance endorsement" and "survey endorsement." Note that the court made a distinction between marketability of title which concerns impairments on title such as unencumbered right of ownership and possession versus marketability which is not affected by the legal public regulation of the use of the property *Id.* at ¶2. The court further stated that zoning regulates the manner in which a parcel of property is able to be used and zoning regulations are not deemed an encumbrance on title because land use regulations do not render title and marketable, they only control and regulate the use.

The subject case is an interesting result and therefore practitioners and purchasers of real estate are cautioned to continue to be well aware of zoning approvals, site plan approvals and the finding that at least the Declaration referenced in this case (because there was a tie back to a municipal resolution) was not a lien or encumbrance, but simply a regulation on use.