



CHICAGO TITLE INSURANCE COMPANY

TOPIC: EASEMENTS APPURTENANT

TITLE SEARCH & CLOSING RULES:

1. If an appurtenant easement is to be insured, it must be specifically described in the property description (whether as “Parcel #__” or “Together with”).
2. A title opinion must be provided by the attorney, just as with any other parcel of land. This may involve tacking to a prior policy *on the easement or the tract the easement crosses* (the “burdened tract”). Or the prior policy on the fee may have included the easement already created of record in a prior transaction. Typically, this will cover the period of time when the burdened land was owned by others (whether full search, tacking, developer search, etc.), up until the time of recording of the document that creates the easement – whether a deed of easement, a plat showing easements or an easement conveyed or reserved in a deed. Once the easement is created of record as an appurtenance to the primary tract, the easement title automatically continues with the fee parcel.
 - a. Exception #1: If an amendment to the easement is needed (for example, because the fee owner will be subdividing and increasing the burden), then the title to the burdened tract itself will need to be updated to include joinder of any new owners or lenders in the revised easement, along with taking exception to any new record items.
 - b. Exception #2: Since property taxes are a super-priority lien, if the appurtenant easement is not owned by an owners’ association, the taxes of the owner of the burdened property must be searched to assure that the taxing authorities are current. Otherwise, they could foreclose on the burdened parcel, cutting off the easements.
3. The title insurance policy must take exception to all matters affecting the easement parcel, even if they are designated under separate headings or by a note on the exception that it affects only the easement parcel.
4. The closing attorney should carefully look at surveys or, for property in the county, determine the location of wells, septic tanks and access. These are often located on other nearby property and the use of the insured property is critically dependent on these easements!

TITLE INSURANCE REQUIREMENTS, EXCEPTIONS AND COVERAGE:

Plats often show roads, common areas and other matters affecting the subdivision and the insured lot. Legally, by conveying the property by referencing the plat, an owner or lender may be entitled to an implied private or public dedication of these easements. (These are typically referred to as “easements by implied dedication”) However, title policies do not automatically insure these appurtenant easement rights specifically unless they are specifically included in the title search of the attorney and are specifically itemized in Schedule A.

In addition, more commonly in commercial contexts, property descriptions may include appurtenant easements for access, private sewer or utility lines, or reciprocal easements across shopping centers, for example. These are “express easements” created by and subject to the terms and conditions of recorded instruments. If these instruments provide that these easements are “appurtenant” to the tract to be insured, then in future conveyances the easement rights will run with the land of the insured tract. However, as with the platted easements above, title policies do not automatically insure these appurtenant easement rights specifically unless they are specifically included in the title search of the attorney and are specifically itemized in Schedule A.

In most residential transactions, the attorney is only concerned about insurance of the lot itself. However, periodically a specific easement is critical to using the lot, so the attorney should request that the insured property in Schedule A include the main lot “together with” certain easements shown on the plat and perhaps reflected in a separate recorded easement instrument as well. The underwriter would consider each parcel (whether the fee simple lot or each separate easement to be insured) as a separate tract and must make sure to have a certification of title and exceptions for each of the properties to be included in Schedule A. In addition, exception must be taken for the terms and conditions of the recorded easement instrument as well as the recorded plat.

Therefore, for example, if a specific easement is needed for a private well on another tract, the attorney’s opinion on title must include the fee parcel, the easement for the well easement parcel and the easement for the lines connecting the two. In most residential transaction, the back titles would be the same since both the lot and the easements would have been carved out of the same acreage tract purchased and developed by the developer. But this may not always be so. This will be the responsibility of the attorney certifying title to determine. (See Separate Topic “Easements” and “Title Insurance”)

In addition to title opinions, if easements are to be insured, they should also be clearly identified on and covered by the survey. Otherwise, counsel should be consulted to determine if survey coverage is available.

FORMS:

None

LEGAL DISCUSSION:

See related topics on “Plats and Surveys,” “Road and Access Issues” and “Restrictive Covenants”.