FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

NYC – Recordings on Partial Tax Lots

Last month New York City declared that it would discontinue its practice of recording deeds and mortgages against partial tax lots. The City has now relaxed its rules by allowing mortgages to be recorded against unapportioned tax lots.

Tax lot apportionment means two different things in the industry: (1) the creation of an entity with a tax lot number in the Clerk's recording office, and (2) the re-assessment of the taxes on the new lots and the end of taxation on the base lot. For the purposes of recording a deed on a new lot, the City is satisfied if (1) is complied with. In other words, the fact that the taxes do not show an apportionment does not necessarily mean that a deed cannot be recorded.

In order to find out if your new tax lot exists for recording purposes, log onto ACRIS and run a search under the new tax lot. If anything shows of record -such as a Declaration in the case of a condominium-, the tax lot has been created. If nothing shows of record, the tax lot might not exist. Check with the title company.

Perfecting the Closing

Water Charges in New York City

In New York City water is a tax, and as such, all charges automatically become a lien when billed. Water charges frequently disrupt real estate closings and surprise the uninformed months afterwards. What makes water a difficult item is (1) it is a retrospective tax, (2) the uncertainty of the liability, and (3) NYC's penchant for adjusting and charging past periods. This article will explore all three of the above and explain why title insurance does not protect the purchaser.

Water charges are paid at the end of the term because they are based on consumption, which can be measured or estimated when billed. If you are closing at the end of the term but before billing, there is no open amount to request from the Seller. The first reaction to this common

occurrence is to find the last billed amount and base the adjustment on it, on the assumption that the next charges will be somewhat similar. This course of action is probably the source of most post-closing work on residential real estate transactions.

The Department of Environmental Protection ("DEP") has three ways of billing charges. The charges can be "ESTIMATE", "ACTUAL", or "FINAL." FINAL charges are levied when an inspector investigates the water meter thoroughly. ACTUAL charges are levied when the inspector carries a cursory inspection by merely reading the meter. Understandably, DEP does not have the personnel to check every water meter every three months. Therefore, DEP levies ESTIMATE charges by looking at the last actual reading and assuming that the charges must be somewhat similar. Going back to the closing table, if the last bill reads ESTIMATE, that means that the DEP has done the same thing as you to calculate the charges.

The DEP reserves the right to adjust retroactively any water charges once an actual reading is done. Relying on the last estimate bill means that the meter has not been read in over three months. If the seller has been living in the property and there has been no substantial change in the occupancy, it might be safe to rely on the estimate. But what if you are closing in July and there is a swimming pool? The pool might have been cleaned and refilled in the interim. What if a basement apartment was created or the occupancy has been increased otherwise? The single most recurrent case is that of the undetected leak: Say you are closing in April and the last actual reading is from November. In cold winters water pipes have a tendency to explode and create leaks, which can be difficult to detect. If the meter is not read, such leaks accrue charges over months until the DEP visits the premises and the current owner receives a hefty bill for past periods.

Adjustments should be done with the last actual reading in mind, not only the amount shown, but also how long ago the meter was read. An actual reading within the last three months is typically the best possible scenario. It is usually considered prudent for an attorney to rely on that last actual reading when no intervening circumstances are known. If the last actual reading is over three months old it becomes a question of risk management: one should look into the occupancy and commercial use, and the specific circumstance known about the premises. For example, a survey may disclose the existence of a fountain or a pool, an appraisal may indicate leaks and mold, and the client may have personal knowledge of the condition of the property or of common problems in the neighborhood.

Attorneys usually feel safe by depositing funds in escrow with the Seller's attorney and waiting for the next actual reading. This conservative approach has two problems: (1) an actual reading may take a long time to appear, and (2) since the actual reading will post-date the closing, the Seller may disagree on which charges are her responsibility, leading to a renewed discussion. Finally, since these issues arise on closed files they are usually not treated as diligently as on open files. All this results in an open water account accruing new charges and penalties and in an increasingly frustrated client involved in an issue that may know no end.

A much healthier but not generally used approach is to collect a straight credit from the Seller. Instead of requesting a certain amount to be held in escrow, the Seller might agree on giving a smaller amount as an unconditional credit. Of course one suffers the risk of having taken too small a credit, but holding escrow is no more certain if the Seller will argue the charges, and the advantages of a clean credit may overcome this. First, neither attorney is expected to work unpaid hours to negotiate an escrow release. Second, no late charges accrue while negotiating

the issue. Third, if the client is reasonable and agrees on the credit at closing, the relationship with the client is spared.

There is a common misconception that buying title insurance will protect the new owner from all bills of the prior owner's. This is not true. Title insurance protects the buyer from most prior owner issues, and it specifically makes an exception on water charges: An Owner's Policy insures no open charges as of the day of the last actual reading. For example, if you are closing in April and the last actual reading is from November, the Owner's Policy will except charges from November on, leaving the buyer exposed to any bills not reflected on the estimated charges. The fact that the title closer may collect money from the Seller to cover estimated billings does not imply protection under the policy. That is the reason why it is important for all closing attorneys to study the rules concerning water in New York City.

Actual readings used to be unwavering and reliable until the DEP discovered that some homeowners tamper with their meters to reduce the amount of consumption shown. In response, the DEP now reserves the right to adjust actual charges when an inspector studies the meter thoroughly to ensure non-manipulation. The DEP calls this inspection a final reading. There are a few reasons why this might not be of great concern: First, most homeowners do not know how to manipulate their meters. Second, title insurance will insure the period between the last final reading and the last actual reading greatly reducing the risk. Third, final readings are very rare and cannot be counted on at closing. It is unrealistic to expect the Seller to set up an escrow fund to cover potential changes in final readings; there is no telling when one will be done, nor whose charges it will reflect. The industry regularly relies on the last actual reading. That being the case, an attorney that follows the industry standard is most likely to be spared malpractice liability if no special circumstances apply.

The first lesson to be learned from this article is that certainty cannot be expected when dealing with water adjustments. A prudent attorney would be wise in explaining the situation to the client at closing and disclosing that the buyer's water credit is based on an estimate and that it is a bit of a gamble. Both sides, Buyer and Seller, ought to be prepared to accept minor losses. The second lesson to be drawn is that in some instances it might be a better alternative to accept a straight credit from the Seller as opposed to leaving money in escrow. The third and final lesson is that when actual charges are old, an attorney should disclose all the known circumstances to her client so that the client may reach her own determination of how much risk to take. Water in New York City is a troublesome issue on which disagreements and minor losses are to be expected. With that in mind it is better to start and finish the discussion at closing than to let it extend through the following months.

Industry Curiosities

When did the first title insurance company come into existence?

The first efforts to insure title were done by the "Law and Property Assurance Society" in Pennsylvania in 1853. Pennsylvania issued the first rules governing the industry in 1874, and the first title company as we know it was "The Lawyer's Title Insurance Corporation" in 1876, which is the predecessor of Commonwealth Land Title Insurance Company.