

# WHAT COMMERCIAL REAL ESTATE INVESTORS SHOULD KNOW ABOUT TITLE INSURANCE

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## What is Title Insurance?

Title Insurance is a unique policy of insurance that provides compensation to a landowner or their lender for title related risks that existed at the time the landowner acquired the property or when the landowner completed the financing transaction (in the case of a mortgage transaction only) and for some limited issues that arise after the policy is issued. It is designed to cover unknown, unpredictable or undetectable issues such as title defects, errors in surveys, encroachments, errors in public records, fraud and forgery - all of which can affect rights of ownership.

If there is a problem with any of these issues that becomes known after closing, the title insurer will provide direct compensation to the landowner or the lender. Title insurance, however, does not fix the problem. It provides funds to compensate you for losses or for the costs incurred to fix the problem up to the amount of insurance purchased, which can potentially end up saving you thousands of dollars.

## Why Would I Need Title Insurance?

Traditionally, many purchasers and their lenders have relied on a “lawyer’s opinion” on whether or not they have good and marketable title to their property. The lawyer would conduct his or her searches and inquiries with respect to the property and would inform the purchaser and its lender of any outstanding issues that may affect title to or usage of the property.

However, a lawyer CANNOT provide you with complete assurance regarding outstanding issues that may affect title to a property. Government or town/city records could contain errors. There is the possibility that there may be undisclosed claims to a property. And with the increasing fraud these days, signatures of previous parties involved in transactions concerning the property could have been forged. All of these factors affect title. With title insurance, you can now purchase complete assurance.

There are also instances when title insurance is not an option and is mandatory, including when there is no up-to-date survey for the property or a lender requires it as a condition of financing. Transactions are often completed on a rush basis and there is not always sufficient time to conduct all the necessary searches on a property and have replies prior to closing. Some lenders may also require title insurance to cover issues such as encroachments, easements or expired

agreements on title or even just as extra assurance to protect their interest in the property and to move the risk away from them and to the title insurance company.

As a general rule, most commercial lenders and real estate practitioners are insisting on title insurance on commercial deals. Title insurance transfers the risk of things going wrong from the owner, lender and lawyers involved to the insurance company, especially for the myriad of items that even hard working and diligent lawyers cannot guarantee which include current or pre-existing fraud, document error, unregistered interests, survey problems, and clerical errors in government offices.

## **What Types of Properties Can Be Title Insured?**

Title insurance can be obtained for many types of commercial properties such as office buildings or plazas, industrial buildings, vacant commercial land, multi-unit residential and mixed use (commercial/residential) properties.

## **What Does Title Insurance Cover? Not Cover?**

It is always important to read your policy carefully and familiarize yourself with it to determine what coverage is provided. Depending on the type of property being insured coverage will vary and there are additional endorsements that can be added depending on the situation. Also, depending on what the underwriter learns about your property during the underwriting process, your title insurer can build in specific exclusions in your policy.

A title insurance policy will typically provide financial compensation for losses arising from:

- Unknown title defects (these are title issues that prevent you from having clear ownership of the property);
- Mortgages paid out but not discharged;
- Expired agreements or leases;
- Lack of right of access to and from the property;
- Non-compliance with zoning by-laws with respect to the present use of the property only;
- Unregistered utility easements;
- Non-compliance with subdivision/development/site plan agreements;
- Encroachment issues (would result if a structure on your property needs to be removed because it is on your neighbor's property);
- Boundary disputes;
- Title fraud;
- Errors in existing surveys and in public records;
- Inaccurate responses received from off-title government enquiry searches with respect to the property.

In addition to the policy coverage, the policyholder will be covered for payment of legal fees and costs that it incurs in addressing these issues.

It also important to read your policy carefully to make yourself aware of exclusions and exceptions listed.

Common examples of issues not covered by title insurance include:

- Known title defects that were revealed to you prior to you purchasing the property;
- Environmental hazards (such as soil contamination);
- Native land claims;
- Problems that would only be discovered by a new survey or inspection of the property;
- Matters that result in no loss to you;
- Matters disclosed in an inspection or disclosed in building inspection reports obtained by you;
- Zoning by-law violations from changes, renovations or additions to the property that you are responsible for creating.

Title insurance also does not protect you from non-title related claims such as general wear and tear of the property, theft or damages due to flooding and fire for instance.

## **How Much Will It Cost?**

The cost of title insurance will vary depending on the purchase price or the amount of the mortgage. There is a one-time premium that is paid at the time of closing and there is no deductible when you or a lender makes a claim.

If you are planning a significant improvement or renovation to your property after you buy it, you should investigate whether you can buy a policy in keeping with the final, improved value of your property which could be significantly more than what you paid for the property to begin with.

## **Should I Get Title Insurance In All Cases?**

In most commercial mortgage situations of any significant size the lenders are insisting on title insurance to protect their interests. If you want to borrow their money you need to buy the insurance.

However, even if you do not have a lender insisting on title insurance it is an issue that you should risk review with your lawyer when planning your transaction. Issues you should consider include the nature of the property, the nature of the registered title, your proposed use of the land, prior land uses, who you are buying from and under what circumstances, whether you have a current survey or not, how much time your lawyer has to obtain results from her or his own enquiries, and the cost of the insurance compared to the amount you are investing.

It is fair to say that title insurance in commercial real estate transactions of any size is now the norm, and proceeding with a commercial real estate transaction without title insurance is an exception that should only be implemented when it is clear that the risks faced to not justify it or

the transaction simply cannot afford it. Like any insurance product, title insurance is all about passing risk to a third party insurance company. Considering the significant risks that are usually associated with commercial real estate investment it is a tool that investors and owners should take advantage of unless there is a good reason not to.