

## What Is This Thing Called Marketable Title?

By Judith I. Johannsen

When a buyer buys property and receives title to that property, the buyer's expectation is that the title is good, that he or she has a legal right to use the property any way he or she wants under the law, and that there will be no questions as to who owns the property. A buyer assumes these things because the purchase and sale contract states that the seller is to convey a good and sufficient warranty deed, conveying good, insurable, marketable title, free from all encumbrances, except as may be acceptable to buyer and buyer's lender.

A purchase and sale contract also generally specifies encumbrances the seller knows are against his or her title and which usually existed when the seller bought the property. Such encumbrances typically include zoning ordinances, subdivision map notes, building restrictions, use restrictions and easements of record.

The buyer's assumption when he or she receives title, then, is that the property's title is clear and there are no encumbrances. What most buyers don't understand, though, is that marketable title is not the same thing as a title with no encumbrances.

Marketable title is title to property that is not subject to a claim or defect that would present a real and substantial probability of litigation or loss that would prevent the property from being sold at a fair price to a reasonable purchaser or mortgaged to a reasonably prudent party as security for a loan. In layman's terms, this means that buyers of property expect to receive a title free from reasonable doubt, allowing that buyer to hold and use the land in peace, free from the likelihood of litigation, and that the title to the property is clear enough to be sold at fair market value or pledged as security for a loan without hassle.

What, then, are encumbrances? Encumbrances are anything that affect or limit the fee simple title to a property. Fee simple title is the maximum and best possible right of ownership of real property, as contrasted with a life estate or a leasehold interest. Examples of encumbrances include mortgages, unpaid tax liens, mechanic's liens, judgments, zoning ordinances, subdivision map notes, building restrictions, use restrictions and easements. All of these are usually recorded on the land records except for the zoning ordinances and building restrictions as they are usually part of the municipality's regulations.

Encumbrances can be separated into two groups. The first group includes those encumbrances that a seller is powerless to remove and that can restrict the use of the land, but normally do not render title unmarketable. These would commonly include building restrictions such as setbacks, zoning ordinances, subdivision map notes, and easements for such things as ingress and egress, a pedestrian walkway to access a beach, or even parking, and are the kind that a buyer agrees to accept. While such rights or interests may not prevent the transfer of fee simple title, they could diminish the value of a property.

Furthermore, while building restrictions, zoning ordinances, subdivision map notes and easements can restrict the use of one's land, their existence normally does not render title unmarketable; however, substantial, existing violations of zoning ordinances do render title unmarketable.

The second group includes those encumbrances a seller has the power to remove or cure and includes mortgages, unpaid tax liens, mechanic's liens and judgments. How does a seller cure these or have them removed as encumbrances? The seller satisfies them by coming to an agreement with the person or entity that filed the lien or judgment or by paying the monies owed and then recording a satisfaction or a release of the obligation on the land records.

Why is any of this important? If you are a buyer submitting an offer on a property, you might want to make your offer contingent upon your acceptance of the status of the property's title. How does a buyer learn what encumbrances affect the title? There are several ways. A buyer can always ask the seller about encumbrances on the title, but few property owners are aware of exactly what and/or how many encumbrances affect their title. Even if the buyer requested to see the seller's title policy received when the seller bought the property, he or she would find only those encumbrances existing at that time and nothing since. A buyer could also research the property's title through the town's land records, but if inexperienced, could miss important information.

The best way to learn what and how many encumbrances/easements affect a property's title before becoming bound to purchase is through a title search performed during the attorney approval period. Why is this the best way? It's a timing thing. Typically, an attorney performs a title search just a few days before closing, at which time the various inspections and financing contingencies have been met and the deal is set to close. If some unwanted encumbrance is found, there's not a lot of time to resolve the issue and it's probably too late and costly to back out of the deal. Two days before the closing is not the best time to learn of and object to newly-discovered and unwanted encumbrances. Therefore, conditioning one's purchase and sale contract on a satisfactory title status before becoming irretrievably bound by contract is a prudent move.

In sum, if you are a buyer, you need to know that the marketable title promised to you in your purchase and sale agreement does not mean the seller must give you a title free and clear of all encumbrances. It means that the title will be free and clear of liens, judgments and mortgages, unless agreed otherwise.

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