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Workshop 14

Sleepless…What Keeps Title Agents and Underwriters Up at Night in 2019?

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by:

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At a recent "Legislative Luncheon" hosted by the Greater Providence Chamber of Commerce, a significant portion of the time was spent addressing the question of whether the Rhode Island should decriminalize adult recreational use of marijuana. "We will be surrounded soon. We have to do something" replied Michael McCaffrey, the state's Senate Majority Leader. Currently, 11 States and the District of Columbia have decriminalized both medical and adult use. In addition, all states but South Dakota and Idaho have enacted laws permitting some use of either CBD, Medical Marijuana, Medical Hemp or CBD oils. This trend has created new markets and influenced many traditional industries. The somewhat sudden open presence of lawful marijuana cultivation, production, storage and distribution operations has had an impact on commercial and residential real estate. Given the somewhat complex legal landscape these facilities operate in, closing cannabis related transactions present unique challenges.

Understanding the inconsistent legal landscape is key to recognizing the challenges unique to these transactions. While over half the states have authorized, subject to proper permitting and licensure among other requirements, operating facilities for the manufacture, storage and sale of cannabis, marijuana remains a Schedule I drug under the Controlled Substance Act, 21 USC sec 800 et seq. Schedule I drugs are those the statute describes as having a high potential for abuse or no currently accepted medical use or lack of accepted safety for use under medical supervision. While there have been some indications at the Federal level that certain marijuana related offenses are not a priority for the Department of Justice, use, possession or distribution of marijuana remains a federal crime. Also, there have been attempts in the litigation arena to deschedule marijuana. To date, attempts to get a court to rule have been unsuccessful. Most recently, however the Second Circuit was a bit more aggressive when presented with the issue. While the appellate court voted 2-1 to uphold a lower court ruling refraining for ordering Cannabis to be removed from Schedule I, the court said that the DEA should acted quickly on the issued of Schedule I status. (See *Washington v. Barr* 18-859 cv (2d Cir. 2019)

Given the illegality of cannabis at the federal level, state-level cannabis real estate transactions face major hurdles. Because banks may not participate in or aid criminal activity, checks and credit cards are not viable payment methods, making the cannabis business virtually an all cash business. This leads to heightened security concerns at these locations, as well as vulnerability to illegal activity. Banks and the marijuana businesses themselves may be required to file Suspicious Activities Reports (SARs) or Currency Transaction Reports (CTRs) for cash transactions of more than $10,000. Real Estate Title and Escrow Companies must also report transactions involving currency transactions greater than $10,000 on FinCEN Form 8300 (Report of Cash Payments Over $10,000 Received in a Trade or Business). If banks wish to open accounts with cannabis businesses, they must comply with regulations issued by the Financial Crimes Enforcement Network (FinCEN). These regulations are stringent and the demands upon the bank are so strict (and in some cases subjective), that few banks are willing to take the plunge.

Financing a real estate transaction involving a marijuana business can be equally as difficult. Federally chartered banks and credit unions are precluded from financing such deals, since to do so would facilitate a business which violates federal law. Other major investor channels are often constrained when attempting to invest in cannabis businesses. Funds governed by ERISA may be precluded as are certain endowments which with by regulation, statute or internal by-law are precluded from investing in businesses which are illegal or are so-called "sin businesses." (Interesting side note: In the "Opportunity Zone program created by the Tax Cuts and Jobs Act of 2017, Cannabis Cultivation is not called out a "sin-business"). However, some progress in this area is emerging, and the impediments to doing business with cannabis operations are being viewed as "temporary and resolvable."[1] Further while Federal banks are currently barred, state-chartered institutions, including savings banks and credit unions have been helping to fill the void. Treasury Secretary Steven Mnuchin has stated that Treasury is looking at the FinCEN regulations and trying to bring them in-line with the current climate for cannabis businesses[2]. Beyond the lending markets, much of the financing for cannabis deals have come from Venture Capital

[1] Parker, Karen A. et als "Risk management within the cannabis industry: Building a framework for the cannabis industry" Financial Markets, Inst & Inst. 2019, 28:3-55 wileyonlinelibrary.com/journalfmii, P32
[2] Id. at p. 33

and Private Equity. These markets are attracted to what is perceived as ground floor entry into an industry with significant potential.

Once a real estate transaction is moving forward, there are other obstacles to overcome. Most investors in real estate transaction will not invest in a position if their investment is subject to loss due to title defects. As of the time of this writing, none of the four largest families of title insurance underwriters in the US are willing to insure cannabis deals. These four families accounted for 85% of all title insurance written in 2017[3]. Much like the state chartered banks have helped fill the void in the financing arena, regional title insurers have found methods to insure cannabis deals. There are limitations, though. Most insurers require an exception in the policy to be issued against any enforcement action based on the violation of CSA. Further, title insurers who are willing to underwrite these matters will generally not agree to act as the escrow agent for the funds, nor will they provide Closing Protection Letters for agents who do hold funds in these transactions. In states where an ALTA Zoning Endorsement may be issued, often times underwriters will not issue them on cannabis deals. In many ways, what most insurers who agree to work at all on these deals provide is a structure that insures most of the "non-cannabis" related risks, and assume no liability for the cannabis related matters at all.

In 2008, came the subprime mortgage loan crisis, the Lehman Brothers Chapter 11 bankruptcy filing and the financial meltdown. Numerous borrowers defaulted on commercial real estate financings, leaving many failed construction projects in their wake. As a result, title insurers have reevaluated the manner in which they underwrite mechanics' lien risk. This article will discuss current approaches to underwriting inchoate mechanics' liens. An inchoate mechanic's lien is one that has not yet been filed, but once it is filed, its priority date relates back in time to the date upon which the work performed or materials furnished first commenced.[4]

An existing mechanics' lien claim is illustrative of the kinds of tactics being employed today by certain indemnitors to evade their contractual liability.

A mixed use project consisting of three towers closed in April of 2007. The cost of construction was to be $124 million dollars, comprised of a $97 million dollar loan secured by an insured mortgage and $27 million dollars of borrower's equity. Since construction had already started, the "broken priority" of the mortgage to be insured was a concern. "Broken Priority" means that any inchoate liens could prime (i.e. gain priority over) the lien of the mortgage securing the construction loan.

A title insurance company's underwriters reviewed the borrower's financial information and took an indemnity from the local developer (now in bankruptcy) and its principal, Mr. X, individually. Mr. X is a businessman who owns a large company. At closing, he had a purported net worth of $750 million dollars. Mr. X also gave the mortgage lender a personal guaranty on the loan for $44 million dollars. (As of this writing, the lender has already obtained a judgment against Mr. X for $40 million)-Guess where this is going….

In July, 2008, due to cost overruns and a market decline (no condo sales), construction stops. The first tower is complete. The second tower is framed with 2/3 of its outside skin in place and the third tower is excavated only. $25 million dollars in mechanics' liens are promptly filed.
To date, the title insurer has spent $2 million in defense costs and will end up paying millions of dollars more to settle all of the claims.

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[3] Industry Financial Data American Land Title Association www.ALTA.org

[4] Portions of this article were co-written by Steven G. Rogers, senior vice president and managing director, Northeast region, for New York office of First American Title Insurance Company's national commercial services division.

The insurer is now suing Mr. X to honor his indemnity. He contends that 1) all of his assets are community property under state law and, since his wife did not sign the indemnity, the assets can't be executed on, and 2) the indemnity may be invalid or void because the title insurer owed him a duty to disclose that there were liens or potential liens against the project at the time of closing (there were notices of commencement but no actual liens recorded) and that the insurer should have obtained subordination agreements from these potential lien claimants prior to closing.

The title insurance company has since discovered that the cost to construct may have been artificially low due to side profit sharing agreements with some of the subcontractors where the subs agreed to discount the amount they would charge for their work in exchange for which they would be repaid the discount plus an additional payment upon completion of the project.

The title insurer has a hearing scheduled to amend its complaint against Mr. X to include fraud/misrepresentation. Adding insult to injury, one of the largest liens against the project belongs to a company owned and/or controlled by Mr. X.

In light of such unsatisfactory indemnity experiences, how are title insurance companies modifying their underwriting practices to address today's increased inchoate mechanic's lien risk?

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Nationwide, there are essentially three different types of statutory schemes governing the attachment and establishment of the priority of mechanics' and construction liens: 1) priority established by the date on which materials or labor are first provided (or the commencement date), so long as an inchoate lien is filed or recorded ("Type 1") ; 2) priority established by the date of filing of a notice of commencement or the lien itself("Type 2") ; or
3) priority established by the initiation of judicial action ("Type 3").

The majority of jurisdictions, including New York, fall within scheme Type 1. In these States, upon the commencement of the furnishing of materials or performance of labor, as set forth in the particular statute, the mechanics' or construction lien is inchoate until the filing or recording of the notice of lien in the manner prescribed by statute.

Once perfected, the lien in these states attaches as of the date of the commencement, though not so in New York due to the lien clause required by Section 13 of New York's lien law. In New York, a lienor has a period of eight months following the completion of the improvements or furnishing of materials (four months if a single family residential property) in which to file their notice of lien. Any conveyance instrument filed subsequent to the commencement of the improvement would be subject to the validly filed notice of lien unless it contains a covenant similar to the following:

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

Alternatively, a statement as simple as, "subject to the trust fund provisions of section thirteen of the lien law" may be used.

The party taking delivery of the instrument containing this covenant can rely upon the record in determining the status of title and those matters that affect it. They are not vulnerable to an inchoate lien being filed following the conveyance which springs into priority ahead of the interest conveyed to them. It adds an element of predictability for the purchaser not found in the other States that make use of scheme Type 1.

As a result of the Lien Law § 13(5) trust fund, the underwriting practices of title insurers of New York property in connection with inchoate mechanics' liens are somewhat different from those of title underwriters of property located in other States. So long as the instruments of conveyance contain the lien clause, inchoate mechanics' liens need not be addressed since the purchaser and/or lender will be conveyed their interests free of the same for the reasons set forth above.

Generally, the only mechanics' liens of concern are those duly filed in the county clerk's office that should be disclosed during a search of the clerk's records. Nor are inchoate liens a concern in those States that follow scheme Types 2 or 3. This is not the case, however, in the majority of jurisdictions.

When real property located in any States with scheme Type 1 (other than New York) is to be conveyed, the issue of inchoate liens is always of concern, especially in the case of commercial properties such as shopping centers or office buildings that are constantly undergoing repairs and renovation. It is often difficult to accurately pinpoint just what labor or materials may have been provided to the premises prior to closing. When closing a transaction involving a property in one of these jurisdictions, the issue is addressed by furnishing the title insurer with affidavits and/or indemnities.

The owner of the premises will generally provide an affidavit which states that the improvements on the real estate were completed, and that no new construction or major repair work has been performed thereon for at least the period within which the inchoate lien could be filed in the particular jurisdiction.

Further, the affidavit will state that the owner of the premises has not contracted for any labor or materials to be furnished that might become the subject of a lien or that such labor or materials, if furnished, has been paid for in full. If the owner cannot make those representations, then an indemnity in favor of the title insurer will be necessary in order for a title insurance policy to be issued without raising an exception to coverage with regard to inchoate liens which may take priority over the interest insured.

What other approaches are title insurance underwriters taking to get comfortable with inchoate mechanics' lien risks today? To the extent such a risk is a quantifiable dollar amount, an escrow account funded with some multiple of that amount may be required. Alternatively a bond or a letter of credit could be posted. Given the prohibitive cost of any of these solutions, a borrower's initial approach to the underwriter's concerns should be proactive cooperation with the underwriter's diligence efforts to accurately quantify the risk in question. Often what first may appear to be open-ended risk can be reduced to a tolerable

contingency by a thorough and transparent presentation of the facts. Additionally, title insurers routinely are declining to insure mechanics' lien risks arising after the date of the title insurance policy by only issuing the FA 61 endorsement, which provides affirmative coverage against mechanics liens only up to the date of the policy.

Just as lenders reeling from their losses today have adopted more conservative lending standards, so title insurers are more cautious in light of recent history.

"Type 1" States: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin

"Type 2" States: Florida, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Nebraska, New Jersey, Rhode Island, South Carolina

Type 3" States: Maryland, New Hampshire

Lien Law § 10
Lien Law §13(5)
Standard N.Y.B.T.U. Form 8002
Lien Law §13(5)

Green Energy

Green Energy deals occupy a growing presence in real estate transactions. This deal are unique in many ways and present novel challenges to title counsel and underwriters.

1. Off-Shore Considerations (Or what's a dirt lawyer to do in the Ocean?)

Land based wind farms have become ever more common in the US. The growth of the industry means many of the most desirable locations have are already either completed, in development or tied up. However, the nation's off-shore capability barely has been touched. Many states have adopted renewable energy mandates for energy production. At present, there are off-shore wind farms slated for development in at least 10 states. Most owners an lenders will insist on traditional title assurance for their investment, but novel issues are presented.

A. Title Searching. As with all title due diligence, location is everything in determining what kind of searches need to be performed. For sires within 3 miles of a state's shoreline, searching and recording should be done at state registries. But which registries? Ocean waters along a state's coastline are generally considered to belong to the state itself. But what records impart constructive notice. Do the municipalities adjoining the water control? Most states do not have a statewide land evidence repository, so would one record in the secretary of state's office? Or every land registry in the state?

   Outside the 3 mile mark, the oceans are considered federal. Since these areas are not a part of any state, how is one satisfied with land evidence and assurance? There are no federal registries for land evidence? Given that it is critical that the correct Federal agencies are consulted, and their records relied upon. Since 2009 the Bureau of Energy Management has controlled the regulatory and permitting for all offshore with deals.

B. Survey issues. It's hard to get a level and transit on the ocean floor. In addition, there are no ALTA/ACSM standards for surveys in the water. Again, the call will also come ("I need the survey exception removed" or "I need a same a survey endorsement") asking for items routinely given. As there is no survey, these items require careful though. This industry is so new that these projects are "hammer and chisel" jobs for the time being. Developers have may mapping tools available to them but the very nature of the project prohibits the level of precision relied upon in land based deals.

C. The Nature of the interest. Unlike land based deals, the developer's interest in the "property" is quite different in off-shore deals. The water itself (and the sand beneath it) is usually (always?) owned by either the state of federal government. For state owned areas, often the "public-trust doctrine" applies. This doctrine holds that a state's tidal flowed waters are held in trust by the state for the benefit of its citizens. Also, the constitution of many coastal states provides for strong protection of the peoples rights to use and enjoy its waters. As such, the ability of the state to grant rights in these waters is heavily restricted. Often times the strongest interest which may be granted is a license. Given that licenses are general not considered real property interests, how then can said rights be insured (See Deepwater Wind example).

2. Permitting/Public input/siting considerations

As a general proposition, energy production facilities are not permissible as a right on most local zoning ordinances. As such almost always either a zone change or special use permit (or similar) is required to build either a solar or wind facility. These processes usually include a public comment component. Typical issues brought up in the process is noise, flicker and bird/animal injury. When asked to issue a zoning endorsement (in state's where zoning endorsements are allowed) it's critical to examine the basis for the permission (e.g. zone change, special use permit), and be certain all appeal possibility has been exhausted. Often groups opposing these projects are well organized and funded. If there are avenues of appeal left, often appeals will be taken.

Sites at the borders of municipalities present other risks. Often the permitting process does not afford notice to residents of neighboring towns, etc. even if those properties are close enough to the site that they would have received notice if they were within the host town. Actions to stop a development (or even tear down fully operational projects) have been launched by neighbors across the line from a relevant political subdivision.

Also, the use permit obtained will almost always contain certain conditions. It is critical that these conditions be carved out of any title insurance provided for zoning. Typical conditions may include a limit on the hours of operation, limit on production capacity and even a sunset on the authorization upon certain time limits, obsolescence or destruction. A right to rebuild shouldn't be assumed and all insurance should be limited to authority in place at the date of policy.

3. Easements and other considerations

Assuming your solar/wind project is up and running, the energy produced must flow somewhere. Appurtenant easements al almost always needed to link the production to the grid. This will often require other searches/assurances across lands beyond footprint of the project. Use of private rights of way may be fraught. Often trying to use them as a right can be problematic. The rights of way in general may be just that…areas for ingress and egress and not energy transmission. Further, if these easements cross certain developments wherein streets are privately maintained, getting reliable rights from the HOA may be difficult. Bylaws are frequently unclear, associations are loosely organized, and constituents will have differing views as to the appropriateness of granting easements. Often there are restrictive covenants which forbid any business use of the lands within certain developments.

Further, adjoining lands may have negative covenants prohibiting the use of subject property for green energy developments. Developers of nearby wind farms will sometimes negotiate for negative easements on adjoining areas to prevent interference with wind patterns. Also, many areas which have great wind energy production capability may be subject for air, light and view easements. Tall wind turbines will often violate these covenants. Thus, title diligence is routinely required in areas far beyond the footprint.

Cyber Fraud: A case study

There is lots of talk about cyber theft and related crimes. Virtually every day there is a posting somewhere about it. In the real estate world most of the news stories and postings are about attempts (successful or not) in the residential world. However, cyber criminals can and do attack commercial closings. This will be a real life tour through an actual transaction where there was an attempt to divert over $15,000,000.00 in payoff funds

1) Not your father's economic crime

I blame the laser printer. In the 90's and early '00's, the laser printers and graphic softer became incredibly advanced and increasingly inexpensive. At the time standard practice in residential closings was for buyers to deliver cashier's checks to escrow. New printers and software combined with a then very unguarded internet gave folks with bad intentions all the needed tools to attempt a fraud. As a result, the residential practice moved to requiring "good funds" at closings, which, in effect meant wiring. This, in my opinion, is significant for our discussion because now substantially all closings were funding through the same system. Emails and wires were the order of the day whether the closing was for a $150,000 starter house or a $15,000,000 apartment building. It took no more sophistication or effort for a thief with a laptop to hack an enormous commercial deal or a small residential one.

2) The house has many doors and windows

Briefly put, most cyber diversions of closing funds occur the same way. The email account of a party to a transaction gets hacked. This doesn't need to be a party who is handling or moving money, just someone on the email string. Once viewing the email traffic the hacker knows the names and dates and amounts and can go about faking emails and creating the necessary personas to make the situation work. In the case we are dealing with, there were major law firms and two regional banks involved. There were also the developer mortgage brokers, insurance folks and guarantors. Some emails were to personal consumer driven type accounts. It is probably safe to assume the banks and law firms had strong safeguards against intrusion, but that is by no means guarantee. All that is known is that the hacker learned the parties, got the details down and then went to town. A quirk in this deal may have helped safeguard this deal. Specifically, the party which was ultimately to do the disbursing wasn't actively involved early on, so the hacker had seen that parties information. Once the disbursing agent was brought in, the attempt was uncovered.

3) Horse shues & Hand Grenades (Yes, I meant that typo)

Once in the hacker creates a persona and goes to work. In this case, hacker pretended to be an officer from the lender to be paid off. He mocked up an email account and at first glance nothing was remarkable about it. A full reading would cause some suspicion, but the glitches were in areas not typically looked by the reader. The largest portion or the bank's logo was virtually perfect. Except the name of the bank below the graphic was misspelled (one double letter missing). The title of the officer was awkward at best. The lender was a regional bank located exclusively in the northeast and yet the area codes for phones and faxes were west coast. Still at first blush, it would pass.

The hacker's story was somewhat plausible. Specifically, the existing loan had been sold to a "foreign investor" but the assignment not yet recorded in the land records. He baked in enough details presumably garnered from email he had read to make the story believable. In this specific case the hacker went so far as to call the party he thought was disbursing to be helpful. He said he would fax wiring instructions on the morning of the closing, for security reasons.

4) Ghosts are real, and then they are gone

On the day before the closing the escrow agent gets involved. EA starts picking at this and discovers the scam. Borrower, Law firm and lenders are alerted. The thought is to not alert the scammer that his plot was uncovered, to identify him and turn him over to law enforcement. Of course, not long after the plot was discovered the scammer stopped communicating. He was left off emails, but it is believed whomever' s email had been compromised was still being monitored. What is remarkable is that virtually at the time the scam was discussed, the hacker disappeared.

ENDORSEMENT

Attached to Policy No. _____ ("Policy")
Issued by

_____ TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the Insured by reason of:

(1) damage to an existing building located on the Land, or

(2) enforced removal or alteration of an existing building located on the Land,

as a result of the exercise of the right of use or maintenance of the easement referred to in Exceptions 7as Easement in Book_____ at Pager ____,of Schedule B for the purpose for which it was granted or reserved.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

_____TITLE INSURANCE COMPANY

By: _____
Montalbano, Belliveau & St. Sauveur, LLP

Easement - Damage or Enforced Removal 28-06

ENDORSEMENT

Attached to Policy No. MP ("Policy")

Issued By

_____Title Insurance Company

The Company insures against loss or damage sustained by the insured if, at Date of Policy (i) the Land does not abut and have both actual vehicular and pedestrian access to and from _____ Road, or (ii) the Streets are not physically open and publicly maintained, or (iii) the insured has no right to use existing curb cuts or entries along that portion of the Streets abutting the Land.

This endorsement is made a part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements to it.

_____ Title Insurance Company

By: _____
Company

Endorsement 17-06 (Access and Entry)

ENDORSEMENT

Attached to Policy No. _____

Issued by

TITLE INSURANCE COMPANY

1. For purposes of this endorsement:

    a. Improvement" means a building, structure, road, walkway, driveway, curb, subsurface utility or water well existing at Date of Policy or to be built or constructed according to the Plans that is or will be located on the Land, but excluding crops, landscaping, lawns, shrubbery, or trees.
    b. Plans" means those site and elevation plans made by _____ Engineering, Dated _____, designated as "ALTA/NSPS Land Title Survey, _____, Assessor's Plat 2XX, Lot XXX, Providence, Rhode Island 1"=30', Sheet 1 of 1".

2. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy

    a. according to applicable zoning ordinances and amendments, the Land is not classified Zone D-1-100;
    b. the following use or uses are not allowed under that classification: Office
    c. There shall be no liability under paragraph 2.b. if the use or uses are not allowed as the result of any lack of compliance with any condition, restriction, or requirement contained in the zoning ordinances and amendments, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses. This paragraph 2.c. does not modify or limit the coverage provided in Covered Risk 5.

3. The Company further insures against loss or damage sustained by the Insured by reason of a final decree of a court of competent jurisdiction either prohibiting the use of the Land, with any existing Improvement, as specified in paragraph 2.b. or requiring the removal or alteration of the Improvement, because of a violation of the zoning ordinances and amendments in effect at Date of Policy with respect to any of the following matters:

    a. Area, width, or depth of the Land as a building site for the Improvement
    b. Floor space area of the Improvement
    c. Setback of the Improvement from the property lines of the Land
    d. Height of the Improvement, or
    e. Number of parking spaces.

4. There shall be no liability under this endorsement based on:

    a. the invalidity of the zoning ordinances and amendments until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses;
    b. the refusal of any person to purchase, lease or lend money on the Title covered by this policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls.

Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

TITLE INSURANCE COMPANY

By: _____

Zoning 3.2

ENDORSEMENT

Attached to Policy No.

_____TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the Insured by reason of an environmental protection lien that, at Date of Policy, is recorded in the Public Records or filed in the records of the clerk of the United States district court for the district in which the Land is located, unless the environmental protection lien is set forth as an exception in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

_____TITLE INSURANCE COMPANY

By: _____

Authorized Signatory

Attached to and made a part of Title Insurance Company Policy No.

PROFORMA

SPECIAL VALUATION ENDORSEMENT

The Company hereby assures the Insured that in the event of loss by reason of any occurrence, defect, lien or encumbrance otherwise insured against by this policy, the loss or damage incurred by the Insured shall be deemed to be the difference between (1) the value of the estate or interest insured under this policy taking into consideration the use of the estate or interest hereby insured as a site for solar generation & transmission at the time of loss without such occurrence, defect lien or encumbrance, and (2) the value of the estate or interest insured under this policy at the time of loss subject to such defect, occurrence, lien or encumbrance.

The Company will consider, in computing loss or damage compensable under the policy, the income actually generated by the going concern located on the land at the time of loss, and the effect of such income on the value of the estate insured by this policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

IN **WITNESS WHEREOF,** the Company has caused this Endorsement to be signed with the facsimile signatures of its President and Secretary and sealed as required by its By-Laws.

Countersigned:

Issued at:

_____

Authorized Signatory

Endorsement (6/17/06)

_____ TITLE INSURANCE COMPANY

The Company insures against loss or damage sustained by the Insured by reason of the lack of a right of access to the following utilities or services**:**

X Water service	X Natural gas service	X Telephone service
X Electrical power service	X Sanitary sewer	X Storm water drainage

either over, under or upon rights-of-way or easements for the benefit of the Land because of:

(1) a gap or gore between the boundaries of the Land and the rights-of-way or easements;
(2) a gap between the boundaries of the rights-of-way or easements ; or
(3) a termination by a grantor, or its successor, of the rights-of-way or easements.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of

Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

_____ TITLE INSURANCE COMPANY

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By: _____Insurance Company

ALTA Form 17.2-06 Utility Access