SESSION 101

Fundamentals of Title in Minnesota

Nancy K. Landmark
Commercial Partners Title LLC
Minneapolis

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Fundamentals of Title in Minnesota

Real estate is the foundation of wealth in the United States. Minnesota, with vast tracts of land suitable for farming, significant metropolitan development around the state, and great resources for recreation and beauty, is no different. Because of the important role real estate plays, special rules govern its transfer, whether by sale or gift. Minnesota's Statute of Frauds provides:

> No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the parties creating, granting, assigning, surrendering, or declaring the same, or by their lawful agent thereunto authorized by writing. This section shall not affect in any manner the power of a testator in the disposition of real estate by will; nor prevent any trust from arising or being extinguished by implication or operation of law.

Minnesota Statutes Section 513.04. Similarly, Section 513.05, makes it clear that any agreement to sell real property must also be in writing.

> Every contract for the leasing for a longer period than one year or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the lease or sale is to be made, or by the party's lawful agent thereunto authorized in writing; and no such contract, when made by an agent, shall be entitled to record unless the authority of such agent be also recorded.

In order to satisfy the Statute of Frauds, the purchase agreement must:

1. be written
2. be signed by the party to be bound (or against whom it is to be enforced)
3. contain an adequate legal description to identify, in the context of the transaction, the property to be sold
4. set forth the terms and conditions of the sale, including the purchase price.

Doyle v. Wohlrabe, 243 Minn. 107, 66 N.W.2d 757 (Minn. 1954). See, Bouten v. Richard Miller Homes Inc., 321 NW2nd 895 (Minn. 1982) and Rose v. Guerdon Indus, 374 N.W.2d 282 (Minn. App. 1985).

A contract for the sale of land, to be enforceable, must be sufficiently definite so that all the terms can be determined from the information given by the contract. Lake Co. v. Molan, 131 NW2nd 734 (1964); Collins Truck Lines v. Metropolitan Waste Control Comm'n, 274 NW2nd 123 (Minn 1979). A contract in which the land to be conveyed is left to future agreement is incomplete, and therefore unenforceable. Scanlon v. Oliver 44 NW 1031 (1890). Similarly, a description of the land merely as a certain number of acres in a specified larger tract is insufficient. Brockway v. Frost, 41 NW 411 (1889).

A legal description is sufficient if it will enable a surveyor to readily locate the land. Paynesville Land Co. v. Grabow, 200 NW 481 (1924). Unless a deed contains a valid description, it fails for lack of one of the essential elements of a conveyance. McRoberts v. McArthur, 62 Minn. 310, 64 NW 903 (1895)

A description which is insufficient to provide notice to third parties is binding as between the parties if it can be made certain by a surveyor referring to extrinsic evidence. Daly v. Duwane Const. Co. 259 Minn. 155, 106 NW2nd 631 (1960). Good record title, however, is dependent upon the ability to evaluate the description without reference to any extrinsic evidence. A legal description provides constructive notice if the property can be identified "with reasonable certainty." Bank of Ada v. Gullikson, 64 Minn. 91, 94, 66 N.W. 131, 132 (1896), or if it is apparent from the record that there is a defect in the description. Howard, McRoberts & Murray v. Starry, 382 N.W.2d 293, 296 (Minn. App. 1986). See also, Mattson Ridge, LLC v. Clear Rock Title, LLP, 824 N.W.2d 622 (Minn., 2012).

Most purchase agreements call for conveyance of "marketable title" or "marketable record title." Marketable title is title which a reasonably prudent person would be willing to accept. Basye, Clearing Land Titles (3rd Ed. 2012). A marketable title is "one that is free from reasonable doubt; one that a prudent person, with full knowledge of all the facts, would be willing to accept." City of N. Mankato v. Carlstrom, 212 Minn. 32, 36, 2 N.W.2d 130, 133 (1942) (quoting Hubachek v. Maxbass Sec. Bank, 117 Minn. 163, 169, 134 N.W. 640, 642 (1912)). It is important to note that to be "marketable" title need not be "perfect" but will be "so free from all fair and reasonable doubts that they [courts] would compel a purchaser to accept it in a suit for specific performance." Patton and Palomar, §48. Evaluating whether or not title is marketable requires an examination of the real estate records pertaining to that land. In addition, it is important to be familiar with statutes and case law which govern title to real estate. The Minnesota Title Standards, produced by the Real Estate Section of the Minnesota State Bar Association, are also a useful resource when examining title or evaluating the status of title for the purpose of raising objections, as well as for resolving title objections.

Minnesota utilizes two real estate recording systems. The "abstract" system, which is governed by Minnesota Statutes Chapters 507 and 386, is administered by the County Recorder (previously referred to as the Register of Deeds). The "Torrens" title system, which is governed by Minnesota Statutes Chapters 508 and 508A, is administered by the County Registrar of Titles. The Torrens title system in Minnesota is referred to as "registered land."

The purpose of the registered land system is to establish an indefeasible title free from any and all rights or claims not registered with the Registrar of Titles, with certain exceptions, so that any one may deal with the property with the assurance that the only rights or claims of

which one need take notice are those so registered. In re: Juran, 226 N.W. 201, 178 Minn. 55 (Minn. 1929).

Until Minnesota adopted the registered land system in 1901, all real property in the state was unregistered and referred to as abstract property. Hersh Props., LLC v. McDonald's Corp., 588 N.W.2d 728, 733 (Minn.1999). Under the abstract system, transactions that affect real property are recorded with the County Recorder in the county where the property is located. The recorded documents become public records and are a source for prospective purchasers to ascertain the status of title. These documents are typically summarized in a single document, called an Abstract of Title, so that prospective purchasers, mortgagors, mortgagees, and others may have a source to research the status of the title. In addition to the recorded documents, under the abstract system, a title may be affected by factors which are not reflected in the recorded documents, such as judgments and tax liens. A prospective purchaser or mortgagee, therefore, must carefully investigate a property's history and condition in order to ascertain marketability of the title to that property.

The Minnesota Supreme Court noted that "[t]he purpose of the Registered land system was to create a title registration procedure intended to simplify conveyancing by eliminating the need to examine extensive abstracts of title by issuance of a single certificate of title." Hersh Props., LLC v. McDonald's Corp., 588 N.W.2d 728, at 733 (Minn.1999). Under the registered land system, the purchaser of registered land may, subject to limited exceptions, determine the status of title by inspecting the certificate of title. In re Collier, 726 N.W.2d 799 (Minn. 2007). In fact, even where due to a clerical error by the Registrar of Titles, the purchaser of Torrens property need not investigate behind the current certificate of title. In the Matter of Petition of Walther, A05-1113 (Minn. 2005). In this case, the Registrar had inadvertently dropped the memorial of

an easement from the certificate of title. After the property was conveyed to Walther, this was discovered and the easement was added as a memorial. Walther brought action to have the easement deleted. Although it is a harsh result for the party whose interest was terminated, the Court indicated that this was required under the Torrens Act. Id.

Because the Registrar of Titles is, in many ways, the protector of the integrity of this system, the Registrar's office has the responsibility to verify that voluntary documents are granted by the registered owner of the property and that all conveyances of the property use the registered legal description for the property. Involuntary transfers, on the other hand, must be addressed through a court proceeding.

The certificate of title is the backbone of the registered land system. All interests in a given parcel of registered property must be shown on the Certificate of title, either as a recital or as a memorial. As documents are recorded after issuance of a certificate of title, they are registered by adding a memorial to the current certificate of title. No items will be deleted from the current certificate of title, but, upon issuance of a new certificate of title, memorials that have been released will not appear on the new certificate of title.

Under the Registered land system, after Registration, any conveyance, lien, instrument, or proceeding that would affect the title to the registered land must be recorded with the Registrar of Titles in the county where the property is located in order to affect the title to the property. Minn. Stat. §508.25. It is important to bear in mind, however, that if a purchaser has actual notice of an adverse interest in the real estate (even though it is registered property), the purchaser will take subject to that adverse interest. In re Collier, 726 N.W.2d 799 (Minn. 2007). Every conveyance, lien, attachment, order, decree, or judgment, or other instrument or proceeding, which would affect the title to unregistered land under existing laws, if recorded

with the County Recorder, shall, in like manner, affect the title to registered land if recorded with the registrar in the county where the real estate is situated, and shall be notice to all persons from the time of such registering or recording of the interests therein created. Minn. Stat. §508.48. A deed, mortgage, or other instrument, and all instruments assigning, extending, discharging, releasing, or otherwise dealing with the same, shall be registered and take effect upon the title only from the time of registration. Minn. Stat. §508.54. When the mortgage deed or other instrument to be registered is presented to the registrar, the registrar enters a memorial of the instrument upon the affected certificate(s) of title, indicating the exact time of recording, and its document number. The registrar also notes upon the registered instrument the time of recording and a reference to the volume and page where it is registered. Minn. Stat. §508.55. In Imperial Developers, Inc., v. Lind, 775 N.W.2nd 895 (Minn. App. 2009), the Court held that a mortgage was not a lien on the real property until the time it was made a memorial upon the certificate of title, relying on Minn. Stat. §508.55 as the controlling statute. The operative question was what constitutes "registration." Other cases have argued that

> "to hold that a clerical error of failing to memorialize a registered and filed mortgage has the same effect as never having registered or filed at all would create an unwarranted burden on the holder of a mortgage against registered land to continually inspect the state of his investment."

McCrossan, Inc. v. Builders Finance Co., 304 Minn. 538, 232 N.W.2nd 15 (1975).

Voluntary instruments by parties who appear by memorial may convey or assign their interest. Involuntary instruments, such as judgments, notices of lis pendens, mechanic's liens, resolutions vacating streets and eminent domain final certificates, which are in recordable form may be recorded, but may require advance approval of the examiner of titles to permit recording. In order to maintain the reliability and conclusiveness of certificates of title, certain transfers of

title and other alterations to the certificates of title must be directed, certified or approved in writing by the examiner of titles, or by court order.

All property in Minnesota that is not registered land is "abstract property." Recording of documents in the abstract property system is governed by Minnesota Statutes, Chapter 507 and the role of the County Recorder and the recorder's obligations are governed, as well, by Chapter 386. Originally, this office was known as the "Register of Deeds", but in 1976, the title was officially changed to "County Recorder."

It is not the responsibility of the County Recorder to determine if the document submitted for recording affect abstract or registered land. The party submitting the document for recording is responsible to determine the appropriate office to which it submits its documents. The County Recorder may reasonably rely on the affirmative representation of the party presenting instruments for recording as to whether the land described in the instruments or any part of it is registered or unregistered. Minn. Stat. §386.071. A document is properly recorded in the office of the County Recorder when it bears the certificate of the County Recorder. Minn. Stat §356.41.

Minnesota Statutes Chapter 386 requires that the County Recorder maintain three separate indexes of documents that are recorded: the grantor/grantee index, the numerical index, and the tract index. Documents indexed in any of these indexes are the basis for constructive notice of a document and its contents. MidCountry Bank, f/k/a/ First Federal fsb v. Krueger, 762 N.W.2nd 278 (Minn. App. 2009). As a result, in evaluating marketability of title, it is important to know that both the grantor/grantee index and the tract index have been searched.

The grantor/grantee index contains the following information with respect to each document received for recording: date of reception, year, month, day, hour and minute, grantor

and grantee, where situated, to whom delivered after recording, fees received, instrument number, and kind of instrument. Minn. Stat. §386.03. This index is maintained in alphabetical order, and every document must be entered under the grantor's surname, and under the grantee's surname, and all such entries shall appear in the index consecutively and in the order as to time in which the instruments were received. Minn. Stat. §386.03.

Since 2005, the County Recorder as also been required to maintain a tract index, so as to allow information to be arranged or retrieved by the description of each section of land or sectional lot, and town or city lot and block arranged in numerical order. This tract index is kept as one of the records in the County Recorder's office, and the Recorder notes in the tract index the date, time, and minute of every instrument affecting the title to any land recorded, listed opposite to each parcel of land the title to which may be affected by the instrument. Minn. Stat. §386.05.

The duties and responsibilities of the County Recorder include verifying that the documents accepted for recording meet the requirements set forth in Minnesota Statute §507.091, 507.092, 507.093 and 507.24, discussed elsewhere in this chapter. If a document does not meet these requirements, it is appropriate for the documents to be "rejected," or refused for recording purposes. Although it is important to review these standards periodically, the basic requirements are:

1. Signature. Unless otherwise provided by law, an instrument affecting real estate that is to be recorded must contain the original signatures of the parties who execute it and of the notary public or other officer taking an acknowledgment or jurat. Minn. Stat. §507.24.
2. Acknowledgment. Any conveyance, power of attorney, or other instrument affecting real estate must be executed, acknowledged by the parties executing the same, and the acknowledgment certified. Minn. Stat. §507.24. A financing statement, recording as a recording pursuant to Minn. Stat. §337.9-502(b) need not contain the signatures of the debtor or secured party or an acknowledgement.
3. Accurate legal description. It is necessary that every document recorded adequately describe the real property affected by the document. It is not, however, the responsibility

of the County Recorder to verify that the legal description is accurate. Because of this it is critical when drafting or reviewing documents that the attorney take responsibility to review the legal description for accuracy.

4. Drafted By Statement. Any instrument, other than a decree, order, judgment or writ of any court, a will or death record, must include the name and address of the person who, or corporation which, drafted the instrument printed, typewritten, stamped or written on it in a legible manner. Minn. Stat. §507.091.
5. Legible (no visible alterations. A document presented for recording must be sufficiently legible to reproduce a readable copy using the County Recorder's or Registrar of Titles' current method of reproduction. In addition, no additional sheet should be attached or affixed to a page that covers up any information or printed part of the form. Minn. Stat. §507.093.
6. Miscellaneous Requirements. All documents submitted for recording, except plats, must be on paper no larger than 8.5 inches by 14 inches. Minn. Stat. §507.093. The form of the document shall be printed, typewritten, or computer generated in black ink on white paper of not less than 20-pound weight and the print cannot be smaller than 8-point type. Minn. Stat. §507.093. The first page of the document must have a 3-inch top margin and a border of one-half inch on each side and the bottom. The right half of the blank space shall be reserved for recording information and the left half shall be reserved for tax certification. Minn. Stat. §507.093. The title of the document shall be prominently displayed at the top of the first page below the blank space Minn. Stat. §507.093 Failure to comply with this requirement will not result in a document being rejected. It will, however, require that an administrative cover page be added. The statute permits any party to add the necessary cover page.

Attention to detail of the recording standards can prevent delays in recording, protecting the client from unanticipated adverse interests.

The purchase agreement will also call for conveyance by a particular type or form of deed. When drafting or reviewing purchase agreements, it is important to understand the difference between these types of deed to help evaluate the best way to advise your client. A Quit Claim Deed merely conveys whatever interest the grantor has, subject to any and all adverse claims as of the time of the conveyance. A Limited Warranty Deed (sometimes called a Special Warranty Deed) is a quit claim that also conveys after acquired title. To the extent it contains a warranty, it is only as to the acts of the Grantor. A Warranty Deed also includes the statutory warranties:

1. the grantor is lawfully seized of the premises in fee simple and has good right to convey the same;
2. that the premises are free from all encumbrances other than those excepted or permitted;
3. that the grantor warrants to the grantee, and to the grantee's heirs and assigns, the quiet and peaceable possession thereof;
4. that the grantor will defend the title to the real property conveyed against all persons who may lawfully claim the same.

Minn. Stat. Section 507.07. While a Quit Claim Deed is often preferable to a seller, the buyer often prefers the Warranty Deed.

A purchase agreement will also address how real estate taxes and special assessments are to be paid as between the parties. Both of these interests are liens that have priority over mortgages and impact BFPs. Special assessments are imposed by local government authorities to pay for public improvements that benefit particular properties. These improvements may include road maintenance and improvements, installation of sidewalks, or the installation and/or improvement of water or sewer mains or other similar work. The improvements are made at the behest of the local government authority. The cost of the improvement is spread across the benefitted properties.

In general, when a local government unit undertakes a public improvement of this nature, it will begin the process with a public hearing at which the nature and extent of the public improvement is discussed, along with the anticipated cost of such improvements. Notice of this hearing is given to all owners of property benefitted by the improvement. This gives the property owners the opportunity to be heard with respect to whether or not the improvement should be made, as well as to obtain information about the project. After the public hearing, the local government unit will determine whether to proceed with the proposed improvement, based on the totality of the circumstances. Once they vote to proceed and approve the improvement,

they will identify that there is a "pending assessment" that affects the benefitted properties. This is only an estimate, not a final number. It cannot be paid at this point. Once the improvement is completed and final costs known, the local government unit often holds a second public hearing at which the final cost is disclosed and participants can learn about the reason the costs were higher or lower than originally anticipated. Once again, property owners will have been given notice of this hearing. After the hearing, the local government unit will take action once again – they will set a final assessment amount for each property and "approve" the assessments, both as to amount and term over which they must be paid. At this point, the assessments are considered levied and are immediately a lien upon the real estate. It is also important to note that as soon as the assessment is levied, the local government unit can begin collecting interest on the unpaid portion of the assessment. Each year, the relevant portion of the assessment is "certified" by the local government unit to the county for collection with the real estate taxes, unless it has been paid in full prior to that date. The amount certified will include the interest to be collected for that year.

Once a purchase agreement has been executed, the buyer and counsel must move forward through the due diligence process and towards closing. This often involves a myriad of studies, inspections, projections and other matters that must be reviewed. With respect to title to the real estate, generally the first step is to obtain evidence of title. The responsibility to provide (and/or pay for) this evidence and what qualifies as evidence of title are matters that can be negotiated and addressed in the purchase agreement. If the agreement is silent, custom and practice in Minnesota call for the Seller to provide either an updated abstract of title or a commitment for an Owner's Policy of title insurance. In the more metropolitan areas of Minnesota, the Title Commitment is the more common form of title evidence, while updated Abstracts of Title are

more common in some more rural areas. If a currently certified Abstract of Title is provided, it may be examined by an attorney who will provide a title opinion, or may be used by an examiner to produce a Title Commitment, at the buyer's discretion.

If a Title Commitment is provided as evidence of title, it is important to review the Commitment to understand what it represents and how the Commitment and Title Policy will protect your client. While the buyer's counsel reviews looking for objectionable matters, Seller's Counsel should also review in order to evaluate what must be done to provide marketable title, if called for in the Purchase Agreement. A Title Commitment will always consist of four parts: the Jacket, Schedule A, Schedule B – Section I, and Schedule B – Section II. The Commitment is binding for a limited period of time, as disclosed in the Jacket. In addition, various conditions to the issuance of the Title Policy are disclosed in the Jacket.

Schedule A represents a snapshot of the transaction that is contemplated. It reveals details about the transaction that should be consistent with your understanding. If matters are inconsistent, it is important to contact the title insurance provider to seek clarification or correction. The effective date identified on Schedule A of the Commitment is a date that is determined by the County where the property is located and the date upon which a search is performed. Most county recorders and registrars of title in Minnesota promptly record documents and add them to the indexes and/or certificates of title as quickly as possible. Because of the large number of documents processed, however, the indexes are not always processed through the current or immediately prior day. The recording process takes time, which results in a "gap" between the date to which the County records are certified and the date upon which a search is performed. The search effective date, and therefore the effective date of the title Commitment, therefore, is the date through which the county records are certified.

The second section of Schedule A identifies the buyer and/or lender involved in the transaction as the "Proposed Insured" for the Owner's Policy and Loan Policy, respectively. It is important to make sure that the proposed insured is correctly spelled, and completely identified, as often times documents are drafted consistent with these references. This should be consistent with the purchase agreement, or an assignment of the purchase agreement with respect to the buyer. Likewise the lender should be correctly and completely identified. The initial lender, who will be the mortgagee, may be simultaneously assigning the mortgage to another entity. If that is the case, the proposed insured clause may identify either or both of these entities. In the same section, the financial aspect of the transaction is reflected. In general, the amount of the proposed Owner's Policy will be the purchase price of the real estate and the amount of the proposed Loan Policy will be the amount of the mortgage. This section will also identify what type of Title Insurance Policy is being issued. The appropriate type of policy will vary, depending on the type of transaction you are viewing.

The third section of Schedule A describes the interest in the Land that the Commitment is addressing, usually fee simple, while the fourth identifies the individual(s) or entity that has current record title to the Land. This information should exactly match the grantee on the vesting instrument. Again, this should be consistent with the transaction, as you understand it: the owner should be the same party as the seller in the purchase agreement, or the borrower, in the case of a refinance. Occasionally, title will be held by a different party or entity, so if this information is inconsistent with your understanding of the transaction, it is important to investigate to determine if the discrepancy is significant.

Finally, Section 5, of Schedule A describes the Land to which the Commitment applies. This legal description should be consistent with the vesting deed or certificate of title, although it

may also include other interests, such as an appurtenant easement. If a survey is obtained (see below) the legal description on the survey should match the legal description on the Title Commitment.

Schedule B – Section I describes the requirements with which the parties must comply before the title company will issue its Title Policy in the form represented. This may include a detailed list of interests that must be released, deeds or other documents which must be recorded and affidavits, surveys and other documents which must be provided to the title insurer in order to consummate the transaction as described.

Schedule B – Section II describes or lists those matters which affect or burden the title described on Schedule A, to which the buyer or lender will take subject if they are not removed through appropriate remedial action. Often times, these types of exceptions to title can be broken down into five types of exceptions: the Standard Exceptions; Taxes and Assessments; Financial Liens; Easements, Covenants and Restrictions; and Miscellaneous Exceptions.

The standard exceptions are those matters which affect title, but would not be readily identifiable from the public real estate records. These include the "gap," parties in possession, survey matters, and mechanic's liens. The "gap" exception relates to any matters which may have been placed of record after the effective date of the Commitment, and prior to the recording of the documents creating the interest to be insured. The "parties in possession" and "mechanic's lien" exceptions relate to items that are likely to be apparent if the buyer makes a physical inspection of the property. The survey exception reads "Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land." This exception encompasses a great many issues, including, but not limited to, adverse claims related to easements by

prescription, adverse possession, and boundary line disputes. Generally speaking, an ALTA/ACSM Survey is required to delete this exception, although specific matters identified through reviewing the survey may be reflected as specific exceptions. These surveys comply with a national standard for what must be included and the accuracy with which information must be measured and conveyed. The standards also provide various elements that the person requesting the survey can add to provide additional information. In addition to eliminating the survey exception to coverage under the title policy, reviewing the survey will give you a better understanding of the Land and how the various exceptions to title affect your client's planned use of the property.

Financial Liens, separate from real estate taxes and assessments, which have been described above, will often include mortgages, judgments, tax liens and recorded mechanic's liens. These liens can all be satisfied by the payment of money, at which point a release or satisfaction must be provided by the lien holder.

Other exceptions, whether easements, restrictions, covenants, or other types of exceptions to title should be reviewed carefully to determine whether these matters affect your client's intended use of the property.

After reviewing title, it is important to raise appropriate exceptions to title, in a timely manner, as described in the Purchase Agreement. All such objections should be made in writing. If the objection is to a matter which makes title unmarketable, it may provide a basis to terminate the Purchase Agreement. Most purchase agreements permit the seller a limited amount of time in which to cure any such title objections, or to inform the buyer that they will not be doing so. Discuss with the title company what may be done to resolve title objections. An excellent title team can be one of your best resources in working through title issues.

Assuming due diligence pans out and the client wants to move forward with the purchase, the next step will be the closing. The closing agent, or escrow agent, is the neutral third party who will take delivery of all relevant documents for establishing and clearing title, as well as relevant loan documents and funds from buyer, lender and seller. Often, the parties will provide written escrow instructions to the closing agent, which set forth the terms under which the escrow agent is holding the documents and/or funds. The closing agent will also prepare the settlement statement, which should reflect both incoming sources of funds and all expenses being paid as part of the transaction. Once all documents have been executed and delivered to the escrow agent and all funds received by the escrow agent, the various parties to the transaction must authorize release of both documents and funds. Once this has been done, the transaction is deemed "closed," although the escrow agent will have numerous administrative tasks which still must be completed. These will include delivery of documents pursuant to the various instruction letters received; release of payments authorized and reflected on the settlement statement, including making loan payoffs, recording of the relevant documents in the real estate records and a wide variety of other transaction specific tasks.