



Any savvy real estate investor will tell you that reviewing the state of title, and determining which title risks are acceptable, is a critical step in diligencing a manufactured housing park (MHP) opportunity. Like flossing, it requires some discipline upfront, but the payoff in the dentist chair (and, frankly, beyond) is always worth it. Here are five common title issues affecting MHPs, as well as practical approaches to reviewing title evidence.

Common Title Issues

Few real estate transactions close without a title insurance policy. And, in many cases, the purchaser is unwilling to close without the insurer's agreement to provide coverage for a title problem that otherwise would cause the deal to collapse. Although every deal presents its own flavor of issues and challenges, a prospective buyer of a MHP probably will encounter one or more of the following issues. It's important to know how to nip them in the bud upfront.

- 1. Mechanic's liens recorded against the property** - a contractor, subcontractor or supplier that performs work on, or delivers supplies to, the MHP and who has not been paid for the work or materials, often may record a lien against the real property. A title report or commitment will shed light on any recorded mechanic's liens and may inform you of additional red flags with the MHP. For example, the seller may have misrepresented in the purchase contract that no improvements were made to the MHP. Parties often resolve mechanic's liens by using the seller's sale proceeds to discharge and remove the lien of record at the closing. **Buyer Tip:** Devote sufficient time during the diligence review period to identify the issue, and then to negotiate an acceptable resolution with the seller and the title issuer, well ahead of the closing.
- 2. A pre-existing right of first offer/refusal** - it is not uncommon for a third party to have an existing right to purchase the MHP under a right of first offer, right of first refusal or similar agreement. When this happens, an existing preferential right will trump your contractual right to acquire the property (even if you've signed a purchase agreement with the seller). If the seller fails to disclose the preferential right and the purchaser fails to discover it, and the parties subsequently close, the party benefitted by the agreement could sue to unwind the sale. This could put the seller in hot water for an indemnity claim if the seller breached a representation under the purchase contract. **Seller Tip:** When drafting the purchase contract, the seller should give itself flexibility to extend the closing as necessary to satisfy any preferential rights agreements. The seller should also require satisfaction of all preferential rights agreements as a condition for it to proceed to the closing.
- 3. Improvements encroaching on adjacent lands** - this refers to a building, structure or similar improvement on the MHP property that extends either onto a neighboring property owner's land or into an area of the MHP with an easement or right-of-way (such as for a utility or pipeline). An American Land Title Association (ALTA) survey will typically disclose encroachments, as well as any improvements that are non-conforming with local zoning laws. If, for example, an improvement is built within a zoning setback the park owner may be required to obtain zoning board approval and a variance. Both can be expensive and may be denied by the zoning board. If the application is denied, the zoning board may require the removal of the structure. If an improvement encroaches onto a neighboring property owner's land, the park owner may have to contend with

Survey and Title Review: 5 Common Issues and Practical Tips to Solve Them Cont.

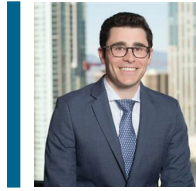
costly litigation over adverse possession or other rights.

Buyer Tip: Obtain a zoning report early on in the diligence period and make certain the surveyor plots zoning setback lines (and any nearby improvements) on the survey.

- 4. Park Owned Homes affixed to the ground** - this issue occurs when a Park Owned Home (POH) is cemented or otherwise affixed to the ground such that it is no longer moveable. When this happens, the local jurisdiction may convert the POH's tax classification from personal property to real property. If a POH converts to real property the park owner will not be able to sell the POH to a tenant without first conveying a deed. Although it is possible in some jurisdictions to re-convert the POH to personal property, the process is both timely and expensive. **Buyer Tip:** inspect every POH certificate of title against the local assessor's tax records to confirm the POHs can be transferred as personal property.

- 5. Property is subject to restrictive covenants and other cost-sharing agreements** - a title report and survey can also disclose the existence of easements, rights-of-way and cost-sharing agreements. In a recent transaction, the seller failed to disclose the existence of a private road shared with several adjoining properties. At first glance, the road appeared to be a public right-of-way, the maintenance of which would have been the town's responsibility. In the normal course of due diligence, the title report and survey revealed a private road and that the maintenance obligations were shared by the various property owners. This prompted further inquiry and it was soon discovered that substantial repairs, including re-grading and constructing culverts under the road, were scheduled to be performed after the closing. It also revealed that the seller had failed to fund its proportionate share of such expenses. The buyer was able to negotiate a reduction in the purchase price and required the seller to fund into escrow at closing a maintenance reserve to cover the repair costs. **Buyer Tip:** Always obtain estoppel certificates from third parties under easement of record rather than rely on the seller's word about defaults and monetary obligations. Remember that you will step into the seller's shoes after the closing and will be liable for prior agreements that "run with the land" (those that are recorded in the real property records affecting the MHP and which provide that same are binding on successors and assigns).

The issues described above are but some of the many potential title risks that lurk beneath the surface. Should you find yourself on either side of a real estate transaction, it is critical to have as much information about the property - and as early in the process - as possible. Allotting time to a thorough and complete title and survey review will help make for an easy and pleasant real estate transaction experience, setting you up for long-term success.



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Glossary

A brief overview of terminology you likely will run into during the title review process.

Existing Title Work or Current Owner's Policy - refers to the current policy of title insurance issued by a title company to the current park owner (the Seller). As a practice tip, always ask the Seller to furnish as soon as commercially practical (in other words, up front) the most recent policy of owner's insurance. Not only will this expedite the title company's preparation of the preliminary title commitment, but it will also give you an early look at the condition of title. This same logic applies to the Seller's existing survey.

Title Report or Title Search - this is a detailed report on the current status of title. However, it does not include the assurance of policy insurance provided by a title commitment (more on that below). A title report contains information such as existing liens affecting the property (i.e. mechanic's liens, mortgages, tax liens and judgments), a list of covenants, restrictions and other easements that restrict how the real property may be used, and the current owner's legal information.

Title Insurance Commitment - often confused with a title report, a preliminary commitment for title insurance is a contract in which the title company agrees to issue a policy subject to certain conditions, exceptions and exclusions shown in the commitment. A commitment is valid generally for six months and contains information such as the proposed insured, the premium amount, legal description, and the Schedule B matters.

Pro Forma Policy - this is a specimen of the actual policy to be issued after the land closing. It is important to remember that a pro forma policy takes time for the issuer to prepare and to negotiate its coverage. As a practice tip, do not ignore the title commitment and its requirements for policy issuance or forget that work must continue on eliminating exceptions during the due diligence phase. A sophisticated purchaser will work to have all title issues resolved to its satisfaction before "going hard" on a deal once the due diligence period expires. For this reason, give yourself enough runway during diligence to perform a thorough review of title.

Extended Policy - an ALTA title policy comes in standard and extended forms. A policy becomes "extended" by removing some or all of the general exceptions (i.e. right of parties in possession, encroachments, boundaries and other matters that an accurate survey would disclose, easements not shown in the public records, and mechanic's liens).