

Nuts and Bolts of Real Estate Due Diligence

Due diligence review of real estate tests the proposition of whether or not your acquisition or development vision is doable based on the particular property you are targeting. Making your vision come true can be derailed by a large number of potential problems; therefore, the task of the due diligence review is to unmask the problems and their potential costs to solve.

Introduction

- **Land Use** - review governmental restrictions or regulations applicable to the property
- **Title** - status of ownership and existence of liens, easements and private restrictions
- **Survey** - confirm property lines, abutting public roads, and location of buildings, fences, utilities and easements
- **Environmental** - physical characteristics of the property; review existence of hazardous substances and protected environmental areas (e.g. wetlands, protected species habitat)
- **Utilities** - determine utility availability to the property (e.g. water, sewer, electricity)
- **Site Usage** – tying together land use, title, survey, environmental and utilities to lay out a usable site plan (also possibly a plat depending on permitting requirements)

Initial Considerations

When to Incur Costs - There is always a tension between the undesirability of going out of pocket yourself to pay professionals for a comprehensive due diligence review at the earliest point possible vs doing the minimum amount possible until the finish line of a financing closing is within sight. To the extent you lean towards the latter, the more likely you can have a surprise problem at or just before closing which kills the deal.

Provide Solutions - As a general rule, you will be able to overcome problems more cheaply if (i) you uncover them yourself or with your consultants and (ii) you disclose them to your financing partner/lender (iii) with your proposed solution. If you leave review of the due diligence materials to the financing partner/lender and then let them totally dictate the solution, then the cost to solve the issue could run higher.

Pre Contract Matters - Certain issues need to be fleshed out even to sign a purchase agreement. For instance, if development of the property is going to require rezoning, then you need to know that in order to properly insert a zoning contingency into the purchase agreement.

Land Use

- **Jurisdiction** – city or county; who calls the shots?
- **Zoning** – types of uses and allowable densities; site performance requirements
- **Comprehensive Plan** – future land use map
- **Site Plan/Platting Requirements** – simple site plan approval vs recordation of plat with planning commission and city/county commission approval
- **Determine Support and Resistance** – Do the staff and council support you? Nearby residents?

Title

- **Schedule A** -

- Proposed insured
- Amount of insurance
- Existing title holder (needs to be your seller)
- Legal description (needs to match your contract legal description)

- **Schedule B-I** – requirements to close

- Documents for delivery to create insured interest(s)
 - generally deed and mortgage
- Corporate formality document requirements for seller
- Lien/mortgage release requirements – check amounts of liens and mortgages

- **Schedule B-II** – title exceptions
- **Standard exceptions**
 - taxes for the year of closing and thereafter
 - parties in possession (delete – owner’s affidavit)
 - matters which would be shown on a survey (delete survey)
 - unrecorded easements (delete – survey)
 - lien rights and unrecorded liens (delete – owner’s affidavit)
- mineral rights – (delete as standard exception; note specific recorded documents – generally OK if no right to exploration)

- **Specific exceptions**

- easements – blanket easements over the entire property can be a problem; specifically described easements are a problem if location impacts building location

- restrictions - understand what activities are prohibited and who enforces requirements

- agreements - cable TV, utility service agreements, etc.

- existing plats - any restrictions?

Survey

- Match legal description to title commitment and purchase agreement
- Locate access – public road or easement? If easement, make sure the easement is part of the insured legal description on title commitment
- Encroachments – check for encroachments from adjacent property onto subject property and from subject property onto adjacent property
- Locate utilities - must enter property from public right of way or utility easement. Beneficial utility easements, plus drainage easements, should be part of insured legal description on title commitment
- Locate easements from title commitment
- Ask surveyor to show building setback lines

Environmental and Physical Characteristics

- **Soils** - will the soils support development/buildings?
- **Topography** - need to move much dirt to make the site work? Steep slope could require expensive retaining walls or extensive site work.
- **Wetlands** - determine size of any existing wetlands. May have an ability to mitigate.
- **Protected Species or Habitats** – take into account the existence of any protected species such as gopher tortoises or bald eagles
- **Hazardous Substances** - most lenders or financing partners will require a Phase I Environmental Audit or perhaps more if the Phase I is not free from concern.

Site Usage

Based on the results of all the other due diligence investigations, the project engineer will lay out the proposed site plan. Using the example of an apartment project, the inquiry into applicable zoning will yield a maximum density, or total units per acre. Actually plotting those units on the property will be impacted by the shape of the site, building setbacks, unbuildable soils, wetlands, size of stormwater retention areas, and existing or proposed easements. The challenge is to place enough units on the property to make it economically viable after taking into account all the various site constraints.

Agent File Number: Waterside
FAST File Number: 1062-2719614

- 1. Effective Date: March 29, 2012 @ 8:00 A.M.
- 2. Policy or Policies to be issued: Proposed Amount of Insurance:
 - a. Owner's Policy (Identify form used)
ALTA Owner's Policy of Title Insurance (6-17-06) (with Florida modifications) \$1,025,000.00
Proposed Insured: ~~Waterside Hollywood, LLC~~
 - b. Loan Policy (Identify form used)
ALTA Loan Policy of Title Insurance (6-17-06) (with Florida modifications) \$
Proposed Insured:
 - c. \$
(Identify form used)
Proposed Insured:

Premium: \$

- 3. The estate or interest in the land described or referred to in this Commitment is Fee Simple
(Identify estate covered, i.e. Fee, Leasehold, etc.)
- 4. Title to the Fee Simple estate or interest in the land is at the Effective Date vested in:
~~Java Properties, LLC, a Florida Limited Liability Company~~
- 5. The land referred to in this Commitment is described as follows:

See Exhibit "A" attached hereto and made a part hereof

Bergman and Jacobs, P.A.

By: _____
Authorized Countersignature for Bergman and Jacobs, P.A.

(This Schedule A valid only when Schedule B is attached.)



First American Title

ISSUED BY

First American Title Insurance Company

Exhibit A

Agent File Number: Waterside
FAST File Number: 1062-2719614

THE LAND REFERRED TO HEREIN BELOW IS SITUATED IN THE COUNTY OF Broward, STATE OF FL, AND IS DESCRIBED AS FOLLOWS:

Lots 21, 22, 23 and 24, less the East 12.83 feet thereof, Block "B", HOLLYWOOD BEACH SECOND ADDITION, according to the Plat thereof recorded in Plat Book 4, Page 6 of the Public Records of Broward County, Florida, together with that portion of Florida Coast Line Canal and Transportation Company's Canal, according to the Plat of HOLLYWOOD BEACH SECOND ADDITION, recorded in Plat Book 4, Page 6 of the Public Records of Broward County, Florida, described as follows:

From the Southwest corner of Lot 21, Block "B" of said Plat, thence North 05°56'21" East, 167.08 feet along the West lines of said Block "B", thence South 88°03'13" West, 50.47 feet along an extension of the North line of Lot 24; thence South 05°56'21" West, 167.08 feet; thence North 88°05'13" East, 50.47 feet along an extension of the South line of said Lot 21 to the Point of Beginning.

The following requirements must be met:

1. Pay and/or disburse the agreed amounts for the interest in the land and/or the mortgage to be insured.
2. Pay us the premiums, fees and charges for the policy.
3. Pay all taxes and/or assessments, levied and assessed against the land, which are due and payable.
4. The following documents, satisfactory to us, creating the interest in the land and/or the mortgage to be insured must be signed, delivered and recorded:

a.

Quit Claim Deed from E. D. Jason, Inc., a Florida Corporation to Java Properties, LLC, a Florida Limited Liability Company.

b.

Quit Claim Deed from ITA Development, Inc., to Java Properties, LLC, a Florida Limited Liability Company.

c.

Warranty Deed from Java Properties, LLC, a Florida Limited Liability Company, to ~~Waterside Hollywood, LLC~~ in connection with said deed, we will further require regarding the grantor:

- i) Production of a copy of the articles of organization and operating agreement if adopted, with an affidavit affixed thereto that it is a true copy of the articles of organization and operating agreement, and all amendments thereto (the "Enabling Documents"), and that the limited liability company has not been dissolved;
- ii) That said deed shall be executed by all of the members, unless the articles of organization provide that the company shall be governed by managers, then said deed shall be executed by all of the managers;
- iii) If the Enabling Documents authorize less than all of the members, or managers as the case may be, to execute a conveyance, then said deed may be executed by such members or managers as are authorized by the articles of organization and

Certificate from the Secretary of State (or other governmental agency designated for the filing of the Enabling Documents) of said limited liability company's domicile, showing the limited liability company to have been formed prior to the date of acquisition, together with proof as to the current status of said limited liability company;

vi) Documentary evidence in recordable form, showing compliance with all requirements regarding conveying company property contained in the Enabling Documents; and

vii) The Company reserves the right to amend the commitment, including but not limited to, the addition of further requirements and/or exceptions as it deems necessary based upon a review of any of the documentation required above.

EXAMINER'S NOTE

The Legal Description reflected on that Warranty Deed recorded in Book 33552, Page 751, and the Certificate of Title recorded in Book 32778, Page 1332 is incorrect. The call lessing out 112.33 feet is incorrect, it should read 12.83 feet; and the Portion of property adjacent which lies in the Florida Coast Line Canal Transportation Company's Canal the initial call from the Southeast corner is incorrect, and should read from the Southwest corner.

The legal description reflected on Schedule A is deemed to be correct.

The requirement for Quit Claim Deed from E. D. Jason, Inc., a Florida Corporation is due to the fact they are the last title holder of record of the correct legal description. The Requirement for the Quit Claim Deed from ITA Development, Inc., is in regards to the incorrect title received by that Certificate of Title in Book 32778, Page 1332.

In the alternative of the Requirement of these Quit Claims, a Quiet Title Action is acceptable, Quieting title into Java Properties, LLC, a Florida Limited Liability Company.

5. Satisfactory evidence must be furnished as to the proper incorporation of E. D. Jason, Inc., a Florida Corporation, a corporation, prior to acquisition of the property described in Schedule "A", together with proof as to the current status of said corporation in its state of origin. The Company reserves the right to make such additional requirements as it may deem necessary.

6. Satisfactory evidence must be furnished as to the proper incorporation of ITA Development, Inc., a corporation, prior to acquisition of the property described in Schedule "A", together with proof as to the current status of said corporation in its state of origin. The Company reserves the right to make such additional requirements as it may deem necessary.

~~7~~ A Surveyor's Certificate is to be issued in regards to the legal description appearing on the Certificate of Title recorded in Book 32778, Page 1332 and the Warranty Deed recorded in Book 33552, Page 751, stating that the initial call of proceeding from the Southeast corner is a obvious typographical error. In running out the remainder of the legal description, it reflects property boundaries on the West side of said Lots, not the East side of said Lots.

8. Written evidence, from appropriate governmental authorities, that Special Taxing District, City and County Special Assessment Liens, MSBU Assessment Liens, Impact Fees, and Water, Sewer and Trash Removal Charges, if any, have been paid.
9. Proof of payment of taxes and assessments for the year 2010 (Lot 24), plus any penalties and interest. Note: Any tax amount(s) shown herein are for information purposes only, and should be verified with the appropriate taxing authority(s).
- ~~10~~ Note: 2010 ad valorem taxes show **Due** in the gross amount of \$35.83 (by 4/30/12) for Tax Identification No. 514212-02-0140 (Lot 24).
- ~~11~~ Note: 2011 ad valorem taxes show **PAID** in the gross amount of \$17,456.03 for Tax Identification No. 514212-02-0130. Assessed value is \$773,640.00 (as to Lot 21 to 23)
- ~~12~~ Note: 2011 ad valorem taxes show **PAID** in the gross amount of \$4,406.66 for Tax Identification No. 514212-02-0140. Assessed value is \$195,300.00 (as to Lot 24)
13. If the amount of insurance to be issued exceeds the authority of the agent under the existing Agency Agreement with the Company, the Company requires that the agent obtain specific underwriting approval from First American.

NOTE: The following conveyance(s) have been recorded within the last 24 months:

None

PART II

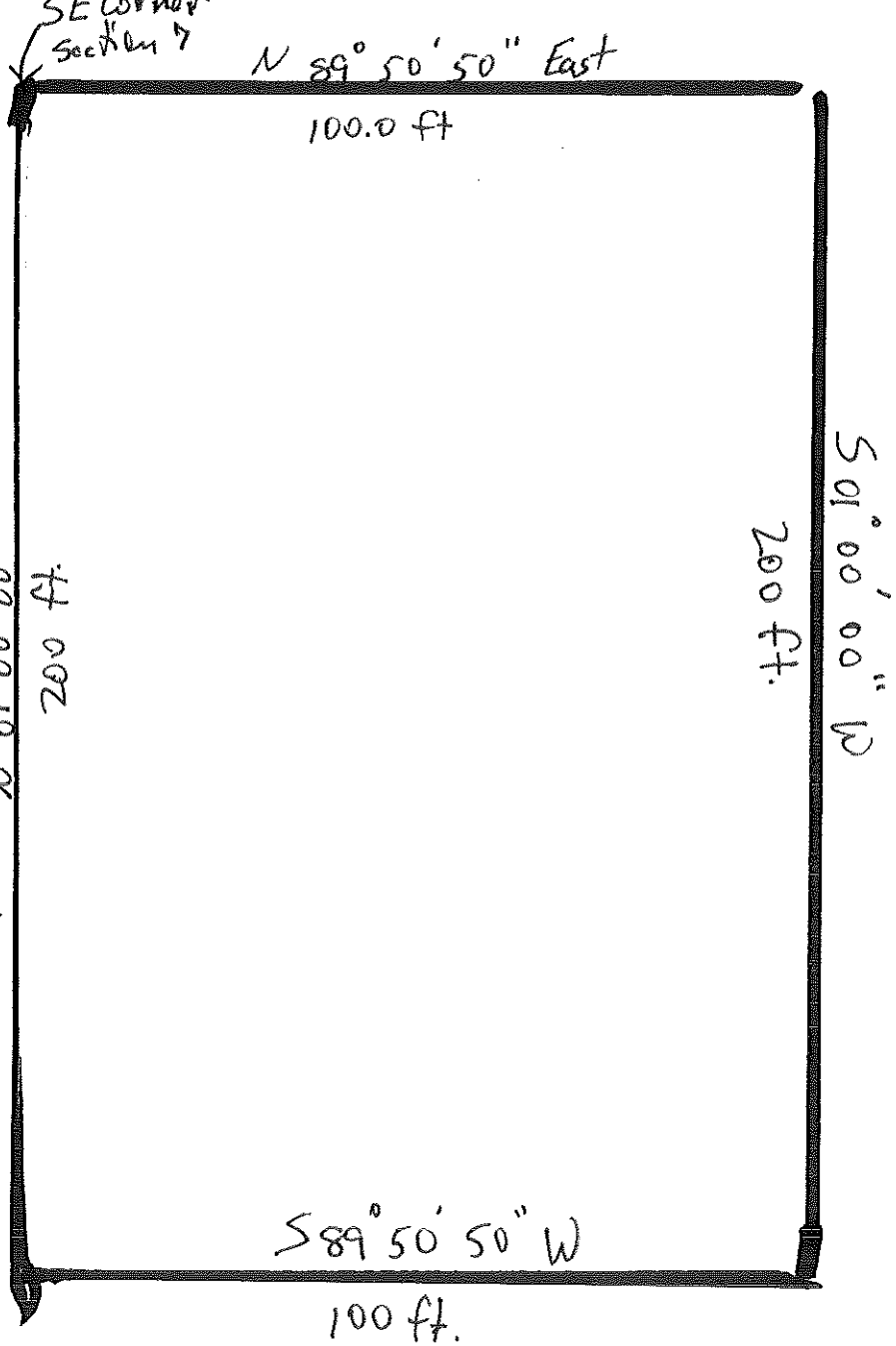
Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

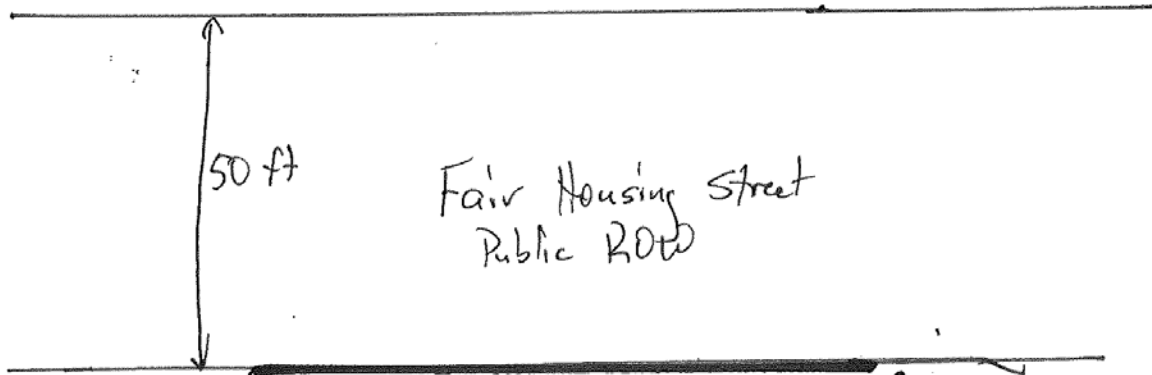
1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the Public Records or attaching subsequent to the Effective Date but prior to the date the proposed insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.
2. Any rights, interests, or claims of parties in possession of the land not shown by the public records.
3. 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.
4. Any lien, for services, labor, or materials in connection with improvements, repairs or renovations provided before, on, or after Date of Policy, not shown by the public records.
5. Any dispute as to the boundaries caused by a change in the location of any water body within or adjacent to the land prior to Date of Policy, and any adverse claim to all or part of the land that is, at Date of Policy, or was previously under water.
6. Taxes or special assessments not shown as liens in the public records or in the records of the local tax collecting authority, at Date of Policy.
7. Any minerals or mineral rights leased, granted or retained by current or prior owners.
8. Taxes and assessments for the year 2012 and subsequent years, which are not yet due and payable.
9. Restrictions, dedications, conditions, reservations, easements and other matters shown on the plat of HOLLYWOOD BEACH SECOND ADDITION, as recorded in Plat Book 4, Page(s) 6, but deleting any covenant, condition or restriction indicating a preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status or national origin to the extent such covenants, conditions or restrictions violate 42 USC 3604(c).
10. Perpetual Palm Tree Easement recorded in Book 28206, Page 481.
11. Riparian and/or littoral rights are not insured.

12. This Policy does not insure title to any part of the land lying below the ordinary high water mark of any abutting body of water.
13. Changes in the boundary of the land resulting from erosion or accretion caused by the flow of the Canal river (or creek).

Legal Description:

Commence at the SE corner of Section 7, thence North $89^{\circ}50'50''$ East 100 Ft.; thence South $01^{\circ}00'00''$ West 200 ft.; thence South $89^{\circ}50'50''$ W 100 ft.; thence N $01^{\circ}00'00''$ E 200ft to the Point of Beginning





Fair Housing Street
Public ROW

Access Easement
(add to title
commitment
insured
property)

