

COMMERCIAL REAL ESTATE LAW

By Dolores R. Kelley, Stark & Stark

Five Under-the-Radar Title Issues that Cause Problems for New Jersey CRE Buyers

As many buyers of commercial real estate may have learned the hard way, what they don't know about the title to a property they're purchasing can come back to haunt them. Dolores R. Kelley Normally, a title commitment or survey identifies issues with encumbrances on title that a buyer



and their attorney would want to resolve before they purchase a property.

Sometimes, a title commitment or survey will uncover under-the-radar title issues that could be marks on the title if not properly addressed by a buyer and their attorney. If the buyer does not address these issues before they sell the property down the road, these issues may delay the sales process and cause headaches for the buyer-turned-seller.

Here are five such issues New Jersey commercial real es-

tate buyers should be aware of.

Tax Sale Certificates

Buyers of commercial real estate in New Jersey subject to a tax lien who purchase the property after commencement of a foreclosure action in connection with the tax lien, or who do not record their interest prior to the filing of the foreclosure complaint, may have difficulty securing clear title to the property.

In New Jersey, property taxes create a continuous lien on a property. At least once each year, New Jersey mu-

nicipalities hold tax lien sales. These sales give investors an opportunity to purchase tax liens and collect payment with interest from property owners. If a property owner does not make payment, an investor may foreclose on the property two years after issuance of the tax sale certificate if the certificate is issued to a third party. If the lien is not sold to a third party, it is retained by the municipality and the municipality may foreclose six months after the date the auction occurred.

The foreclosure of a tax lien in New Jersey is a "strict foreclosure," which means that upon the order for judgment, the property vests directly to the holder of the tax lien. Once the judgment is issued, the property owner can no longer redeem and pay off the taxes.

Once a foreclosure action is filed, any would-be purchasers of the foreclosed upon property must intervene in the foreclosure proceeding and either get consent from the lien holder, or secure a court's approval of the sale and proposed price, to finalize the transaction and obtain title to the property. A 2021 amendment to N.J.S.A 54:5-89.1 raised the bar by permitting a purchaser who acquired an interest in a property after the filing of a foreclosure to intervene only if they had paid fair market value for the property. The amendment provides an exception for family members and other individuals close to the property owner, or if the interest was acquired through a judicial sale. The lien holder can challenge any redemption if the funds came from a source of the payoff came from someone other than a specific exception. Therefore, great care needs to be taken whenever a foreclosure has commenced on a tax lien to ensure that any repayment is made in accordance with statutory requirements.

Construction Liens

New Jersey allows contractors and others who work on property under a written contract to file a construction lien—also known as a mechanic's lien—for any unpaid labor or materials. Construction liens can complicate commercial real estate transactions.

When the property is a commercial property, the contractor or supplier has 90 days from the day they provide the last services or materials to file the lien. However, the opportunity to file a construction lien ends when the property is transferred to a bona fide purchaser who has recorded their interest prior to any lien filing.

Unlike some other states, New Jersey does not allow waiver of a construction lien unless it is secured through actual payment to the lien holder. Thus, when there's a construction lien on a commercial property, the lien holder can continue to pursue the lien even if the property is sold. **continued on page 18A**

STARK & STARK ATTORNEYS AT LAW

Shopping Center and Retail Development



Our Shopping Center and Retail Development Group focuses on helping landlords, owners, and developers navigate complex legal matters both regionally and nationally to achieve success for their portfolios, both regionally and nationally.

Garnering the strength, education, and real world knowledge of more than 25 interdisciplinary attorneys, our group is dedicated to all aspects of the market.

Zoning & Land Use
Purchase & Sale
Financing
Tenant Bankruptcy
& Creditors' Rights
Lease Drafting & Negotiation
Evictions
Property Tax Appeals
Eminent Domain
Construction Litigation
Insurance Coverage
Environmental
& Green Building
Collection Enforcement
Litigation
Liquor Licensing
Franchising
Compliance
Condemnations

Serving the legal needs of businesses and individuals since 1933.

www.Stark-Stark.com • 1-800-53-LEGAL • 100 American Metro Boulevard, Hamilton, NJ 08619

MID ATLANTIC REAL ESTATE JOURNAL

By Dolores R. Kelley, Stark & Stark

Five Under-the-Radar Title issues that cause . . .

continued from page 16A
cial property, it must be paid off by either the seller or the buyer prior to or at closing. Negotiations over the payment of the lien can slow down the sale of the property it is attached to.

Adverse Possession

Adverse possession could affect title to a commercial real estate property because it allows a non-owner of that property to gain title to it if they've occupied it without the owner's permission for a specified number of years in a way that would be obvious to others. In New Jersey, it takes 30 years of uninterrupted possession to gain title to land through adverse possession. That period increases to 60 years if the land is uncultivated or woodlands.

It's tempting for would-be buyers to assume that adverse possession is nothing to worry about because they could easily tell if someone, for several decades, had taken over a portion of a property they're contemplating purchasing.

Unfortunately for those would-be buyers, the encroachment necessary to secure adverse possession may not be obvious until they conduct a survey. If a neighboring landowner decades ago built a road across the back of a property, or a structure that extends 15 feet over their property line, and they (or a successor in interest) have used either for 30 or more years, they (or their successor) may have legal title to that property, which would obviously complicate a sale of it.

Riparian Rights

Waterfront property in New Jersey is popular and pricey. But for would-be buyers of waterfront property, if the body of water at the property's shoreline is natural, title can become complicated. Specifically, that shoreline may not be property the seller ever owned title to and could sell.

The State of New Jersey owns all "lands that are flowed by the tide," up to the high water mark, and lays claim to "formerly flowed tidelands."

The latter may include the shoreline beyond the current high tide line, but may also include areas where there is no longer any water. This means that commercial property a buyer is attempting to purchase may not extend as far as it appears. A buyer may secure a grant of tidelands where water formerly flowed, but New Jersey does not part with rights to land up to the current high water mark.

A buyer may also face limitations on improvements at the shoreline, such as the construction of a boat ramp or dock. Depending on the body of water in question, the buyer may be required to obtain a license, or may not be permitted to construct piers and launches at all. If the seller did not receive a license when they installed their boat ramp or dock, the buyer might not be able to use it.

Riparian rights regarding a property adjacent to a navigable body of water can be further complicated by the United States' authority to control bulkhead and pier-head lines. When acquiring property near a coastline or along any navigable waters, a buyer should obtain a tidelands search to verify whether the property is within the state owned tidelands. Any tidelands grant or license issued should appear in the land records, and in some instances, a new license or an assignment may be required.

Rollback Taxes on Land Previously Used for Agriculture

In New Jersey, owners of land actively used for farming that meets certain qualifications, or owners of undeveloped land that meets those same qualifications, can apply for a special tax assessment. But if the use is changed to a non-farming use leading up to a sale of that land, the parties to the transaction will have to negotiate who will pay any rollback taxes.

Farmland assessments consider the value of the property as farmland, rather than the

market value of the land for development. This can dramatically reduce the amount of property tax due.

However, when that land is no longer used for farming or no longer meets the eligibility criteria for the assessment, the property taxes don't just change moving forward. The property becomes subject to rollback taxes. Property taxes would be imposed at a regular assessment for the current tax year and the two prior years. The property owner would be responsible for the difference between the amount paid under the farm assessment and the amount that would have been due based on the general market value of the property over the preceding two years.

When a property for sale is subject to rollback taxes, those taxes are typically imposed after the closing and become a lien on the property. When a would-be buyer's tax search shows a property for sale was farmland assessed and is now subject to rollback taxes, they should work with their attorney to ensure that they and the seller agree about who will be responsible for paying the taxes.

These Title Issues May Be Temporary Obstacles, But They're Obstacles Nonetheless

It's not unusual for commercial real estate buyers to hit unexpected bumps in the road on the path to closing a transaction. These five under-the-radar title issues are often bumps in the road hiding in plain sight. A buyer and their counsel's failure to resolve these title issues early on, preferably before a transaction closes, could come back to haunt them in the future both when they attempt to use a property as they desire and when they decide to eventually sell the property.

Dolores R. Kelley is a Shareholder of Stark & Stark, Chair of its Real Estate, Zoning & Land Use Group, and a member of its Beer & Spirits Group. MAREJ

continued from page 15A