New England Regional Midweek Update
10/30/2024

Dear Stewart Partners,

In this week's Midweek Update we are including an article on Private Restrictions in Massachusetts and a pending case before Maine's highest court seeking to expand the public's use of waterfront land throughout the state.

We are also providing a link below to a recently published Stewart Bulletin which provides policy issuing guidelines relative to land that was the subject of a Non-Judicial Foreclosure, and which was also encumbered by a Junior Federal Lien. Given the increase in government sponsored mortgage modification programs, such as partial claim mortgages held by HUD, understanding the impact of a foreclosure of a senior encumbrance on such liens is critical.

Private Restrictions in Massachusetts By: Mark A. Jones, Esq. Assoc. Senior Underwriting Counsel, Massachusetts and Rhode Island

As underwriters we are often asked whether certain restrictions of record are expired. We see restrictions that attempt to regulate the size and color of a house, lot sizes, setbacks, the ability to have farm animals, commercial vehicles, boats etc. Typically, most restrictions expire after 30 years (or 50 years if recorded prior to January 1, 1962). See M.G.L. Chapter 184, Sections 27 and 28. There are, however, several exceptions to the statute.

Extensions of Restrictions

In a subdivision with a common scheme containing four or more contiguous parcels, private restrictions can be extended provided they meet the following requirements (see REBA Title Standard 27):

The recital in a deed or other instrument of a prior recorded restriction shall not act as an extension of such restriction unless such later recital:

1. is signed by a person then entitled of record to the benefit of the prior restriction, and
2. describes the benefited land, if any, of the party signing the later recital, and
3. describes the parcel subject to such prior restriction, and
4. names one or more of the persons appearing of record to own the parcel subject to the prior restriction at the time of the later recital, and

5. specifies the instrument imposing the prior restriction and its place of record in the public records, and
6. is indexed and marginally referenced as required by M.G.L. c. 184, §29, and
7. is contained in a document recorded within:

- 30 years from the recording of the prior restriction if imposed after December 31, 1961; or
- 50 years from the recording of the prior restriction if imposed before January 1, 1962; or
- 20 years from the recording of any extension thereof meeting the above requirements.

If the above requirements are met, the restriction can be extended in 20-year increments. From a title insurance perspective, we sometimes see an attempt to extend a restriction, however, there is a lack of clear compliance with the above requirements or there is ambiguity in the satisfaction of one or more requirements. In such circumstances, please contact your underwriting counsel at Stewart to determine whether the policy may issue without exception for the restriction.

Rights of First Refusal

Rights of first refusal that are contained in private restrictions can be trickier as they may not expire on the same timeline as the restrictions and it is necessary to read the document as a whole to determine when the right of first refusal is triggered and when it expires. Often a restriction will automatically expire with language such as “these restrictions expire 25 years after the date of this instrument.” That language may not be sufficient to extinguish a right of first refusal contained within that same document.

A distinct statute addresses rights of first refusal, M.G.L. c. 184A, Section 5(a), which states that such rights expire 30 years after their creation. However, there is a significant caveat that practitioners and title policy issuing agents should be aware of when dealing with rights of first refusal and the application of this statute. Specifically, the statute ONLY applies to rights created on or after July 30, 1990, the effective date of the statute. For rights created prior to this date, the right needs to be examined under the common law rule against perpetuities, and thus such rights can extend much longer than 30 years.

Generally, in order to issue a policy without taking exception for the right of first refusal we would require a release from the holder of the right. It is important to remember that rights of first refusal are personal rights, thus if the holder is a natural person who has since died, the right no longer exists. If, however, the right of first refusal is granted to an individual and their heirs or successors, the right is carried forward to those individuals and compliance with the right of first refusal would need to be documented in the record or a release would need to be obtained.

As always, reach out to an underwriter if you have any questions about private restrictions and rights of first refusal contained therein.

Maine’s High Court Hears Argument on Claims to Expand Public Rights to Waterfront Property By: Zachary I. Greenfield, Esq., Maine State Counsel

A straight line from Maine's southernmost point at the thread of the Piscataqua River, which separates Maine from New Hampshire, to Maine's easternmost point at the Quoddy Narrows, which separates Maine from the Canadian Maritimes, runs 228 waterfront miles along the Gulf of Maine. However, following the tidal coastline in and out of every inlet, bay, harbor, saltwater river, stream and tributary, the result is an astounding 3,478 miles of actual coastal waterfront. That is longer than the distance from Maine to California. Maine also has over 6,000 lakes and ponds. This extraordinary amount of waterfront makes Maine a recreational paradise. It also, however, creates a significant amount of litigation over the ownership and use of the "intertidal zone," which is the area between mean high tide and mean low tide.

To understand the developing body of law governing the ownership and use of the intertidal zone, one must start with English common law. Under English common law, the crown held legal title to the intertidal zone subject, however, to the public's beneficial rights to "navigation," "commerce," and "fishing." The crown was said to have held those rights in trust for the public's benefit. This arrangement, known as the "public trust doctrine," recognizes that certain natural resources are so critical to humanity that they must be protected and preserved at all costs. It is the philosophical foundation for all modern environmental advocacy, regulation, and legislation, and has a rich tradition on American soil dating back to the first European colonists.

In 1629, King Charles I granted the Massachusetts Bay Company, a group of English Puritans seeking religious freedom and prosperity, a charter to colonize New England. The Massachusetts Bay Colony eventually enacted the Colonial Ordinance of 1641-1647 to facilitate maritime economic development and commerce. Pursuant to the Ordinance, a conveyance of the intertidal zone to private individuals would, in keeping with the public trust doctrine, be subject to the rights of the public for "navigation," "fishing," and "fowling."

Upon American independence and the resulting abrogation of the colonial charter, the Colonial Ordinance also technically lost the force of law in the new country. However, the highest court of Massachusetts (including before and after Maine gained statehood) and the highest court in Maine have repeatedly held that the public trust doctrine as codified by the Colonial Ordinance, became by usage the common law of those states.

In Maine, there have been numerous challenges to the public trust doctrine, some of which have reached the Maine Supreme Judicial Court (the "Law Court"):

> In *Bell v. Wells*, 557 A.2d 168 (the "Wells Beach Case"), a divided Law Court held that the public trust doctrine does not allow the public to use the intertidal zone owned by private parties for recreational purposes, and that a statute attempting to codify that expansion constituted an unconstitutional taking of private property.
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> In *McGarvey v. Whittredge*, 2011 ME 97, 28 A.3d 620, the Law Court unanimously held that the public trust doctrine allows the public to walk across the intertidal zone owned by a private party for the purpose of scuba diving.
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> In *Ross v. Acadian Seaplants*, *Ltd*., 2019 ME 45, 206 A.3d 283, the Law Court unanimously (albeit with a concurring opinion by three justices calling for a different

analysis to reach the same result) held that the public trust doctrine does not allow the public to harvest rockweed from the intertidal zone owned by a private party.

In *Almeder v. Town of Kennebunkport*, 2019 ME 151, 217 A.3d 1111 (the "Goose Rocks Beach Case"), the Law Court held that the public trust doctrine has no application where the chain of title demonstrates that title to the intertidal zone is held by the town.

Plaintiffs in a new case pending before the Law Court, *Masucci v. Judy's Moody, LLC*, argue, among other things, that the State of Maine holds title to most of the intertidal land in Maine for the public, without limitation to fishing, fowling, and navigating, because when Maine became a state in 1820 with the Missouri Compromise, it did so on "equal footing" with the original thirteen states. As such, they argue, even though Massachusetts ratified the public trust doctrine and the Colonial Ordinance when the land that is now Maine was part of Massachusetts, Maine never adopted it as its law and should not be bound by it. The argument further asserts that, pursuant to the Maine Constitution, only the State itself may convey intertidal land, which it has only sparingly done. The trial court ruled against the plaintiffs on the equal footing argument because the Law Court already directly rejected it in the Wells Beach Case (the Colonial Ordinance, which was the common law in Massachusetts, became the common law of Maine because Maine's Constitution expressly recognized all laws in effect in Massachusetts at the time of Maine's statehood). The trial court originally allowed the case to proceed on the discrete question of whether the public trust doctrine allowed the public to use the intertidal zone for walking and research, presumably as some form of "navigation." However, after the parties filed summary judgment motions on that issue, the trial court ruled against the plaintiffs and declined to expand the public trust doctrine to include walking and research. The case is now on appeal to the Law Court. Onlookers await the result with bated breath.

Clearly, this is an evolving body of law in Maine that will have significant impact on conveyancing and title insurance. As such, whenever insuring property bounded by a body of water, it is important to include Stewart's standard exception for water rights applicable to that type of water body. Those exceptions are available in Virtual Underwriter under Standard Exceptions, and Wetlands, and can be found by following this link: https://www.virtualunderwriter.com/en/standard-exceptions.html

In Case You Missed It

On October 23, 2024 Stewart issued Bulletin SLS2024016 that provides information on underwriting Non-Judicial Foreclosures Involving Junior Federal Liens. To view this Bulletin, follow this link: https://www.virtualunderwriter.com/en/bulletins/2024-10/sls2024016.html

The bulletin provides important and mandatory guidelines when insuring property where the title is derived from a non-judicial foreclosure, and at the time of the foreclosure was also encumbered by a junior lien held by the federal government. Such liens include but are not limited to, mortgages held by HUD, such as partial claim and HAMP mortgages, and Small Business Administration (SBA). You will want to alert your title examiners to this bulletin so

that they know to include a note about these federal junior liens in any title exam involving a non-judicial foreclosure, whether current or in the back chain of title.

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