

Realtor® Attorney Joint Committee

All Things Waterfront

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Southwest Florida is blessed with beautiful rivers, bays, passes, and of course, the Gulf of Mexico. However, there are many waterfront issues of which buyers and Realtors® need to be aware, including FEMA elevation compliance, coastal setbacks, and riparian rights. While these issues are of the utmost concern to the buyer, real estate attorneys are often primarily concerned with title issues and rarely address these non-title matters. While a transaction can be terminated if clear title cannot be conveyed, a buyer has a very limited opportunity to terminate a contract if government regulations would prevent the construction of desired water-dependent uses.

Flood Insurance and FEMA:

Although everyone readily accepts the need for fire insurance, buyers often resist when they find out they need flood insurance, too. The Federal Emergency Management Agency (FEMA) administers the National Flood Insurance Program (NFIP) which aims to reduce the impact of flooding on private and public structures. The NFIP provides affordable insurance to property owners, renters, and businesses and by encouraging communities to adopt and enforce floodplain management regulations.

Despite the availability of flood insurance through the NFIP, obtaining flood insurance in Special Flood Hazard Areas (SFHA) can be difficult with older structures and/or unique waterfront properties. Additionally, even if flood insurance is obtainable, legal non-conforming properties may often be burdened with ever-increasing premiums.

In order to protect all buyers, a review of local flood hazard ordinances and FEMA maps is a necessary component of all real estate transactions in Southwest Florida. Additionally, if a buyer even remotely suspects the property may be in a SFHA, an elevation certificate should be ordered and reviewed prior to the end of any inspection periods. All too often a seller provides the buyer with a previously issued elevation certificate; however, it is very possible that the property has been remapped (including a new flood elevation) or worse yet, that the seller performed illegal improvements below the required base flood elevation. Lastly, non-conformities may present costly enforcement actions and may result in loss of what the buyer contemplated was habitable space.

Proper and thorough review of FEMA compliance is essential to every real estate transaction for waterfront and near-waterfront properties and may identify curable non-title matters that must be raised during the inspection/feasibility period.

Coastal Setbacks and Local Zoning

Many of the local towns, cities, and county authorities enact local coastal setback codes with the express purpose to limit development activity that would result in shoreline instability and flooding. It is the intent of these codes to reduce associated losses to coastal property and to limit hazards adversely affecting the public health, safety, and welfare. To that end, local authorities seek to protect the shoreline's natural features, including dune systems and coastal vegetation, and to preserve and protect them from imprudent construction which can jeopardize the



stability of the beach-dune system, accelerate erosion, provide inadequate protection of upland structures, and interfere with public beach access. These towns, cities, and local county authorities have determined and make it a priority public interest to preserve and protect these coastal barrier island features.

Real estate professionals should advise Buyers and Sellers to obtain verification of local coastal setback laws and ordinances. For buyers, their intended use of the property and structures thereon may be significantly impacted by the implementation of coastal setback codes. For example, the addition of a pool seaward of a residence may not be permitted due to coastal construction restrictions. Sellers too should be aware that past activities, albeit unintentional, may result in enforcement actions and jeopardize the transaction altogether (e.g. placement of non-native palm trees adjacent to a dune system may not be permitted).

Riparian Rights

When Florida was granted statehood and admitted to the Union in 1845, it was granted title to all lands beneath navigable waters which are commonly referred to as Sovereign Submerged Lands. These Sovereign Submerged Lands are held in trust by the State for the public use, and enjoyment and private right to use same are only appropriate when not contrary to the public interest.

The ebb and flow of the pull between public and private use is ever present in dock permitting in Southwest Florida. Not all waterfront property is equal when it comes to dock permitting; the shoreline frontage, waterbody classification, location of neighboring property owners, and local and state regulations all contribute to the availability of water-dependent structures and uses. It is equally important to note that existing water-dependent structures and uses may be limited in expansion, replacement, and repair.

FEMA, Coastal Setback, and Riparian rights are significant concerns not covered under the typical real estate attorney's review of title. Moreover, these matters are not traditionally reviewed by home inspectors. For these reasons, it is vitally important for real estate professionals to identify when an additional review is warranted in order to protect buyers and sellers.

This article is not intended to serve as legal advice and should not be used as a substitute for consultation with an attorney.