

Illegal Subdivisions and Title Insurance Coverage

Description

When first told that property is or may be the subject of an illegal subdivision, those who are unfamiliar with the concept of illegal subdivision — especially residential buyers and sellers — may become quite concerned. I have found that the best way to introduce the concept is to acknowledge the shock effect of the phrase “illegal subdivision,” and then proceed to explain the concept and its effect.

Property that is or may be subject to an illegal subdivision may still be conveyed between sellers and purchasers, but, because development or use of the property may be impacted by the local subdivision ordinance, the parties involved in a real estate transaction should be made aware of any potential illegal subdivision and the benefits and limitations of title insurance so that the parties can make an informed decision regarding how to proceed.

As used here, an “illegal subdivision” is any adjustment to a boundary line that does not comply with the relevant local subdivision ordinance.^[1] The current version of Va. Code Â§ 15.2-2240 requires “[t]he governing body of every locality” to “adopt an ordinance to assure the orderly subdivision of land and its development.”

Failure to comply with the subdivision ordinance cannot prevent the recordation of the instrument by which noncomplying land is transferred — or the passage of title as between the parties to the instrument.^[2] As a result, many parcels or lots of land have been subdivided without the approval required by law. In my experience, the likelihood of enforcement of subdivision ordinance violations varies between localities. Enforcement is more common in some areas of Virginia, such as the Hampton Roads area.

If the violation of a subdivision ordinance is overlooked when title to real property is acquired, then the violation may be discovered when a building permit is not approved. In many cases, the monetary cost to bring an improperly subdivided lot into compliance with the subdivision ordinance is relatively low. If a lot or parcel of land otherwise complies with current zoning requirements, then all that may be required to resolve an illegal subdivision is approval of a plat by the subdivision or zoning office.

Unfortunately, however, the monetary cost to bring an improperly subdivided lot into compliance with the local subdivision ordinance may not be the only cost that results from failure to comply with the subdivision ordinance.^[3] Obtaining an appropriate survey, submitting the plat, and waiting for approval from the subdivision or zoning office may cause unwanted and unexpected delay in a construction schedule. Worse, failure to comply with the subdivision ordinance may indicate that the lot does not comply with zoning requirements. If the lot does not comply with zoning requirements, then a zoning variance may be required, and such a variance may or may not be approved. Likewise, a current illegal subdivision may complicate future development, such as when a developer wishes to develop and resubdivide an existing parcel. Thus, it makes sense to determine if a specific lot or parcel of land complies with or violates the local subdivision ordinance before purchase.

Determining whether a specific lot or parcel of land complies with or violates the local subdivision ordinance begins with a review of the legal description used to describe the land. If the boundaries of a

parcel or lot of land are set out in a recorded plat, then the recorded plat may indicate that it was approved by a subdivision agent or other County or City officer responsible for enforcing local subdivision ordinances. Such approval ends the inquiry in most instances. If the legal description does not reference a recorded plat, or if the recorded plat does not display the necessary approval, the next step is to determine when the locality first adopted a subdivision ordinance. If the boundaries of a lot or parcel of land described by reference to a recorded plat or by metes and bounds or other physical description predate adoption of the local ordinance, no further inquiry may be necessary. If the date of the ordinance predates boundary changes then further inquiry is in order. Specifically, review the ordinance in effect at the time of the division to determine if there is a violation.

Note that, since some ordinances may have changed over time, the current subdivision ordinance may not be the ordinance that was in effect when the boundaries were modified.

While many current ordinances are available online, prior versions can be difficult to locate without visiting local government offices. The subdivision office, zoning office, or city or county attorney's office may be able to assist in determining if a specific lot or parcel of land complies with the subdivision ordinance. Many such offices are willing to issue a letter that states whether a specific lot complies with or is in violation of the subdivision ordinance. However, obtaining such a letter may delay a purchase or refinance. Parties to real estate transactions may prefer to accept the risk of illegal subdivision rather than wait for a formal determination that a violation exists or may prefer to proceed notwithstanding the violation.

Understanding the covered risks and the limitations of title insurance may help to inform the decision to wait or proceed.

Whether and how subdivision issues are covered by title insurance generally depends on what policy is purchased.^[4]

Under Covered Risk 5, the standard Owner's Policy and the standard Lender's Policy promulgated by the American Land Title Association (ALTA), which are available to both residential and commercial parties, insure against:

loss or damage . . . sustained or incurred by the Insured by reason of . . . A violation or enforcement of a law, ordinance, permit, or governmental regulation (including those relating to building and zoning), **but only to the extent of the violation or enforcement described by the enforcing governmental authority in an Enforcement Notice** that identifies a restriction, regulation, or prohibition relating to . . . the subdivision of land. [Emphasis added.]

The Enforcement Notice must be recorded in Public Records, meaning land records, as opposed to zoning office records or other records that do not impart constructive notice of matters relating to the Title to a purchaser for value without [k]nowledge.

In practical terms, then, illegal subdivisions are not covered by the standard Owner's Policy or the standard Lender's Policy.

The ALTA Homeowner's Policy of Title Insurance (frequently referred to as the enhanced policy) takes a different approach. Covered Risk 14 uses the same language as Covered Risk 5 of the Owner's policy, but Covered Risk 16 further covers loss, and subject to the deductible, if:

Because of a violation existing at the Date of Policy of a State or Municipal subdivision law or State or Municipal subdivision regulation affecting the Land:

- a. [The insured is] unable to obtain a building permit from a Municipal authority;
- b. [The insured is ordered by a State or Municipal authority to remove or remedy the violation; or
- c. Someone else refuses to perform a contract to purchase the Land, lease the Land, or make a mortgage loan on the Land, based on that violation.

On its face, then, the ALTA Homeowner's Policy provides additional coverage that the ALTA Owner's Policy does not. This expanded coverage is offered under the ALTA Homeowner's Policy of Title Insurance, but not the standard ALTA Owner's or ALTA Lender's Policy because the ALTA Homeowner's Policy of Title Insurance is uniquely designed for residential properties.^[5]

The effect of the deductible should not be overlooked in connection with the coverage offered under the Homeowner's Policy of Title Insurance. The cost of obtaining a plat and the fees associated with submitting the plat for approval may be less than the applicable deductible under the Homeowner's Policy. As a result, the coverage offered under the Homeowner's Policy may not, in every instance, reduce the insured's cost of correcting an illegal subdivision.

Regardless of which owner's policy is offered, if there appears to be a potential violation of a subdivision ordinance, the title commitment may include a requirement such as:

Confirm that there is no violation of any subdivision ordinance. If there is a violation, then the Homeowner's Policy of Title Insurance may not be issued, and additional requirements and/or exceptions may be made.

If it is determined that the subdivision ordinance has been violated, then, in residential contexts, the agent will likely refuse to issue the Homeowner's Policy of Title Insurance unless and until the illegal subdivision has been resolved. In both residential and commercial contexts, however, the agent may be able to issue the standard Owner's Policy with an exception as to the violation, if any, of the effective subdivision ordinance. Keep in mind that illegal subdivision is not generally covered by the standard Owner's Policy or lender's policy, whether such an exception is noted in the policy or not.

Once the risk of an illegal subdivision has been discovered, and the parties have been informed, then the next step should usually be to determine if there is an actual violation. If there is a violation, then, in many cases, the parties will agree that the best course of action is to resolve the illegal subdivision prior to completing a real estate transaction. The local subdivision ordinance will set forth what actions must be taken to bring the property into compliance. In many cases, a new survey will need to be approved by local officials and then recorded. Because the purchaser's title insurance will usually not cover a known violation of the relevant subdivision ordinance, the purchaser will usually request that the current owner resolve the violation prior to the purchase. Whether the current owner of property that is discovered to be the subject of an illegal subdivision may be able to benefit from making a claim under the owner's policy depends on what policy was issued and the terms of that policy. Likewise, the benefit of any such claim to the owner depends upon the terms of the policy especially the impact of the deductible under the Homeowner's Policy of Title Insurance.

While the existence of an illegal subdivision may not prevent a valid conveyance of land, the parties involved in a real estate transaction should be made aware of any potential illegal subdivision so that the parties can make an informed decision regarding how to proceed. In a purchase transaction, if the seller will not resolve the illegal subdivision prior to closing, then the purchaser should be advised of the risks and potential costs associated with an illegal subdivision before agreeing to proceed with the purchase. The purchaser should also be made aware of the limitations of any available title insurance policy. Explaining what an illegal subdivision is and, more importantly, explaining what steps may be taken to resolve any issues related to a potential illegal subdivision greatly reduces the shock effect of the phrase.

[1] See Douglass W. Dewing, *A Virginia Title Examiner's Manual*, Â§ 41-3 (Juris Publishing, Inc. 4th Ed. 2017) (1973) for a discussion of subdivision regulation at the state level.

[2] Va. Code Â§ 15.2-2254(3).

[3] See Sara Fleishman, *Many Lots in Fairfax Now Illegal*, The Washington Post, March 20, 2003 for examples of high costs associated with the negative effects of failure to comply with the local subdivision ordinance.

[4] The policy language cited in this article is taken from forms promulgated by ALTA in 2021. The language is similar to, but not identical to, the language used in older forms.

[5] According to its terms, the ALTA Homeowner's Policy covers only Land that is an improved residential lot on which there is located a one-to four family residence and only when each insured named in Schedule A is a Natural Person.â•



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Jon has a deep appreciation for the things that stay the same as well as the regional differences that exist in real estate matters. Following a clerkship with the Department of Housing and Urban Development's Office of Hearings and Appeals, Jon conducted business from Baltimore, MD to Fredericksburg, VA as an in-house attorney with a title company. Subsequently, Jon maintained his focus on real estate by joining a law practice located in the Hampton Roads area. Currently, Jon serves as counsel with Old Republic Title Insurance Company.

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Date Created

2022/06/22

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