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Make land survey part of any deal

Does title insurance eliminate the need for a land survey?

When Joe and Gloria signed an agreement to buy their house in Scarborough this summer, their real estate agent inserted this clause in the document:

"Seller agrees to provide at his own expense an existing survey of the above-mentioned property within three banking days from acceptance of this offer."

That was in mid-August, and closing was scheduled for the end of September. In my initial letter to the sellers' lawyer, I requested a copy of the survey which the sellers and their agent neglected to provide by the deadline.

After some prodding, the sellers' lawyer finally responded in late September that his clients did not have a survey and I should rely on the Reference plan (R-plan) registered on title. I'm not sure whether he was paying any attention to the file, but I responded politely that there was no R-plan on title and I was still expecting him to deliver a survey.

He then advised that his clients couldn't find a survey and were prepared to offer \$500 instead. I knew that there was a survey in existence since the house had been built in the late 1980s and all properties of that vintage were surveyed during construction.

Why was I insisting on a survey, especially when my clients were buying title insurance?

In everyday terms, a survey resembles a one-dimensional, overhead line drawing of a parcel of real estate. It shows the full measurements, corners and boundaries of the property.

Technically known as a surveyor's real property report, it is prepared by an Ontario land surveyor using calculations taken on the ground and compared with the registered title.

It reveals the location of the buildings on the land in relation to the lot lines, along with improvements such as fences, hedges, pools, overhead wires, easements and rights of way in favour of neighbouring owners or utility companies. It also tells whether the deed, in fact, describes the property accurately.

It shows where the property is located in the subdivision, what the buyers are getting, and more significantly, what they are not getting. In my opinion, a survey is the most important document in a real estate transaction even more important than the deed.

Unfortunately, with the increasing popularity of title insurance in recent years, industry stakeholders have tended to view title insurance as a replacement for the survey.

The truth is that title insurance does not eliminate the need for a survey, or its value in the transaction.

Last year, the law firm Miller Thomson prepared a report for the Alberta Land Surveyor's Association. It concluded, "Using title insurance as a replacement for a (survey) would be like purchasing theft insurance and then leaving the car door unlocked with the keys under the floor mat your car may not be stolen, but you increase the likelihood by acting in a careless manner. It does not seem to make sense for a purchaser of property to willingly not investigate the risks inherent to the property simply because there is title insurance.

"Any problems that may have been disclosed are simply passed on to the uninformed purchaser or lender to be resolved by them at a later date."

While a brand new survey is the best option for home purchasers, a legible copy of an existing survey is another alternative.

Tom Czerwinski is an Ontario land surveyor with Rabideau and Czerwinski in Toronto.

In an email to me last week, he wrote, "It's my recommendation (if a new survey is not ordered) that a purchaser / vendor / agent / solicitor make every effort to find a legible copy of an existing survey for every real estate transaction. Combined with a solicitor's opinion and a title insurance policy, a homeowner will not only know that they are protected from fraud, but they will also have a pretty good idea of what they actually bought!"

In Joe and Gloria's case, the inability of the sellers to provide the promised survey was a breach of contract and placed the transaction in jeopardy. Fortunately, at the very last minute, the sellers finally produced a legible copy of a 1988 survey by Anton Kikas Ltd., showing my clients' house and six adjacent houses which were all built at the same time.

The story of Joe and Gloria's purchase has some valuable lessons for every purchaser of a freehold property.

Every agreement of purchase and sale should have attached to it a legible copy of an existing survey. If it's not available, the listing agent hasn't done his or her job.

In 2003, the Real Estate Council of Ontario (RECO) heard a complaint against an agent who failed to make a purchase agreement conditional on review and approval of a survey. The council ruled that the agent had breached RECO's code of ethics. I suggest that a clause allowing review of a survey should be inserted in every offer to purchase.

If the seller says that no survey exists, and can produce her lawyer's reporting letter as proof, the purchaser should insist that a new survey be provided by the seller before closing.

If the seller can't produce a survey, it could be an indication that he or she is an imposter. Deeds and driver's licences can be forged, but I've never heard of a counterfeit survey, or a fraudster ordering a new one.

When the real estate agent says that title insurance is a substitute for a survey, an appropriate response is that the statement is simply incorrect. Title insurance is just that insurance. It's a backup position which can underwrite any resulting losses, but it is not a substitute for the information a survey reveals. Nor is it a substitute for the warnings a survey can provide that something is wrong with the title, such as an encroaching structure or fence, or the fact that a neighbour owns part of the land that was supposedly part of the transaction.

Joe and Gloria don't have to worry that their house encroaches on their neighbours' properties or that their neighbours' buildings are sitting on their land.

Even though they have a TitlePLUS insurance policy, they know they have a valid deed to all the land underneath their house and that there is no utility easement running through their living room.

Title insurance, as valuable as it is, is no substitute for that knowledge.