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BULLETIN NO. 2010-06

TO: MARYLAND AGENTS, APPROVED ATTORNEYS, OFFICERS & EXAMINERS
FROM: MARYLAND COUNSEL
DATE: SEPTEMBER 17, 2010
SUBJECT: UNDERWRITING REQUIREMENTS FOR GROUND RENTS WILL REMAIN UNCHANGED AFTER SEPTER 30, 2010

On May 8, 2007, Governor O'Malley signed House Bill 580 (Senate version was 622) into law. The bill entitled "Ground Rents – Registry of Properties Subject to Ground Leases" became Chapter 290 of the Laws of 2007.

The law provided for the creation of an on-line registry of properties that are subject to ground rents and required that all ground rent owners must register every ground rent owned by the owner with the State Department of Assessments and Taxation (SDAT) and pay a fee by a date certain or else risk having said ground rent interest extinguished. If the ground rent holder failed to register by the date specified, a leasehold owner was afforded the opportunity to obtain a certification from the SDAT that the leasehold interest holder was now vested with a fee simple interest in the property. Certain provisions were made in the law for ground rent holders under a disability as defined by the statute and for irredeemable ground rents. These specifics will be discussed later in this bulletin.

Now that the date specified in this legislation is fast approaching, it is extremely important that all agents understand the following: you are not authorized to insure over any ground rent interests in the chain of title that have purportedly been extinguished through the process summarized above. All underwriting requirements concerning ground rents remain in full force and effect. A refresher on these requirements will be provided for later in this bulletin as well.

The basis for this Company decision to retain the status quo as it pertains to ground rents is a lawsuit pending in the Circuit Court for Baltimore City (originally filed in Anne Arundel County Circuit Court). The Plaintiff in *Charles Muskin vs. State Department of Assessments and Taxation* (Case Number 24C10004437) has asked the Court for a Declaratory Judgment stating that the ground rent legislation is unconstitutional and also for an injunction barring the enforcement of the statute. The Company therefore will not recognize the legislation as a basis for the extinguishment of ground rent interests. In other words, you are only authorized to insure the interest as leasehold, not fee simple, regardless of whether the owner produces a certificate derived from the aforementioned statute from SDAT asserting the property is fee simple.

When there is a final determination made in this litigation the Company will revisit the issue.

Summary of Existing Ground Rent Underwriting Requirements

Keep in mind the following is a synopsis of the requirements and that you are still expected to adhere to all bulletins and underwriting guidelines pertaining to this issue including but not limited to Commonwealth/Lawyers Bulletin 03-04 and Chicago Bulletins Nos. 432 and 545 among others.

If the property is “leasehold” (subject to an annual ground rent):

A. Verify the status of the ground rent with seller, just as you would have done in the past. Collect and/or adjust, accordingly. Remember that ground rent is paid in arrears, meaning that the leasehold owner has the right to occupy the property, first, (usually for a 6-month period) before having to pay the ground rent for that period.

B. If the seller is unable (or unwilling) to provide information on status of ground rent (usually because the ground rent owner is unknown or cannot be located):

1.) **Collect 3-years’ worth of back rent and \$500.00, all of which will be held in escrow.**

2.) Usually, the back rent and \$500.00 would be held from the seller’s side of the settlement statement (because the obligation to pay the ground rent rests with the seller). But in a case where the seller refuses to provide the funds for the escrow (such as where HUD is the seller following a foreclosure) the buyer would have to fund the escrow. The requirement for the escrow is necessary because the insured lender will likely want title insurance coverage over possible unpaid back rent and associated expenses. (This assumes, of course, that the buyer is obtaining purchase money or other financing from a lender that is seeking title insurance. If the buyer is paying cash, in lieu of an escrow from buyer’s funds, an exception for possible unpaid back rent and associated expenses can be taken in Schedule B with buyer’s knowledge and consent.) **If neither party is willing to fund the escrow as required, you should not provide title insurance for the transaction.**

3.) An escrow agreement must be executed by buyer and seller. The escrow agreement should provide basic provisions to deal with the treatment of the escrowed funds in a manner consistent with our title underwriting. (Please contact our office for a copy of this form if you require one.) Please note, that the form is simply a general form which presumes that the seller funded the particular escrow. Changes to the form would be required if the buyer funded the escrow. Also, the parties need to decide, in the case where the property is sold during the 3-year period following closing, whether the \$500 “collection expense” portion of the escrow will be kept by buyer (for example, to fund the new purchaser’s back rent escrow) or returned to the seller. The parties can work-out other treatment for the funds, as long as title is protected. Contact underwriting counsel if you have questions.

C. For those files where you are holding a ground rent escrow, keep in mind that many owners or prior-owners believe that come September 30, 2010, you will be able to return their escrowed monies. This is not the case. The ground rent escrows will be administered just as they have been in the past and as summarized in this bulletin.

D. The law provides that, before the ground rent owner is entitled to collect expenses, the ground rent owner must first attempt to collect the back rent (without expenses) from the buyer. If 30 days passes without payment, the ground rent owner can claim all or part of the \$500.00 expense fee by contacting the leasehold owner, again, **and by also notifying the “title agent or attorney listed on the deed to the property or on the intake sheet recorded with the deed.” Do not ignore any such correspondence.** Obviously, in some cases, you will be holding an escrow and can pay the bill that you receive. In many cases, you will not. **You should respond promptly in cases where you are holding an escrow. The law ultimately provides a 45-day window for the leasehold owner to pay the back rent and capped expenses before the ground rent owner can file a lien against the property.** Ejectment is no longer an option for a ground rent owner for a residential property of 4 or fewer dwelling units. (The ejectment option was repealed effective July 1, 2007 by the codification of Chapter 286 (SB 396)) If you receive a ground rent bill or notice and are not holding a ground rent escrow, there is no requirement to take any particular action, (although a courtesy call to the ground rent owner or his or her counsel is recommended). **You should carefully maintain a log of all files where you are holding open escrows (of any kind). That way, you will be able to quickly respond to such requests.**

D. There may be instances when a lender conducting a refinance or other loan transaction may require title insurance coverage regarding unpaid back rent and associated expenses. Of course, such coverage can be provided with receipt of sufficient proof that the ground rent has been paid current, just as you would do in conducting a closing for a sale. (In many cases, the lender being paid-off would be holding ground rent in such lender’s mortgage escrow.) But, in the event status of payment cannot be confirmed, the escrow procedures outlined here could be adapted for a refinance or loan transaction.

E. Provided that you have either confirmed that ground rent payments are current or followed the escrow procedures outlined herein, you may use the following exception/affirmative coverage in the Schedule B Exceptions:

Lease dated _____ and recorded among the Land Records of _____ County, Maryland, in Liber _____, folio _____, including the right to collect the ground rent of \$ _____ payable in one-half yearly installments on the _____ days of _____ and _____. *This policy insures the insured that the ground rent covering installments for the three-year period immediately preceding the date of policy, along with related collection expenses authorized by law that may accrue prior to the filing of a lien by the ground rent holder, have been paid or collected as of date of policy.*

This exception/affirmative coverage may be used as standard language in all of your title commitments and policies for leasehold properties, both Owner’s and Lender’s, provided that you are either confirming the paid status of ground rent or following the escrow procedures outlined herein on all leasehold transactions, (sales, refinances, second mortgages, etc.).

F. In very rare instances, the seller of leasehold property may be able to produce sufficient evidence that there has been no demand or payment of the ground rent for twenty consecutive years. Section 8-107 of the Real Property Article provides that, in such case, the ground rent would be conclusively presumed to be extinguished. Always consult underwriting counsel before committing to insure title in fee simple based on this statute.

Ground Rent Registration - Real Property Sections 8-701 through 8-711

The deadline for ground rent registration is *September 30, 2010* (§8-707) for redeemable ground rents and December 31, 2010 (§8-110.1) for irredeemable ground rents. (See additional information on irredeemable ground rents below). If a ground lease holder is under a legal disability at the deadline period, the ground lease holder has 2 years after removal of the disability to register the ground lease. The registration form is available on the Maryland State Department of Assessments and Taxation (SDAT) website at:

http://www.dat.state.md.us/sdatweb/groundrent_registry.pdf

If a ground lease holder does not file the registration by September 30, 2010, the reversionary interest of the ground lease holder is extinguished and ground rent is no longer payable to the ground lease holder (§8-708(a)). If the ground lease is extinguished, a tenant may make application with SDAT, and the Department will issue to the tenant a ground rent redemption certificate. The redemption certificate is to conclusively vest fee simple title in the tenant. The certificate must be recorded in the Land Records of the county where the property is located.

There are provisions in the Article for legal disability of the ground lease holder. If the disability of the ground lease holder is removed within 2 years of the registration deadline, and the extinguishment certificate *has been* recorded, the ground lease holder is entitled to receive from the tenant the redemption value of the ground lease and no longer has a claim on the property that had been subject to the ground lease. If the extinguishment certificate *has not been* recorded, the ground lease holder may reinstate the ground lease by registering the ground rent with SDAT within 2 years of removal of the disability and is not entitled to ground rent for the period of the disability.

Conversion of Irredeemable Ground Rents - Real Property Section 8-110.1

An irredeemable ground rent (a ground rent created before April 9, 1884 that does not contain a provision allowing the tenant to redeem the ground rent) shall be converted to, and become, a redeemable ground rent, unless a notice of intention to preserve irredeemability is recorded in the Land Records of the county where the property is located. Requirements of the notice of intention are listed in §8-110.1(d) and (e). If a notice of intention to preserve *is filed on or before December 31, 2010* (§8-110.1(f)), the ground rent shall remain irredeemable for a period of 10 years from January 1, 2011. The filed notice shall lapse on January 1, 2021 and the ground rent shall become redeemable, unless a renewal notice is recorded within 6 months before January 1, 2021. If a notice of intention to preserve *is not filed on or before December 31, 2010*, the ground rent becomes a redeemable ground rent.

Additional Ground Rent Registration information can be found on the SDAT website:

http://www.dat.state.md.us/sdatweb/Register_groundrent.htm

Please make certain that this Bulletin and communications are disseminated to your staff.

Thank you for your attention to this matter and please do not hesitate to contact your local underwriting counsel if you should have any questions.

Thank you for letting us be your premier provider of title insurance products in Maryland.