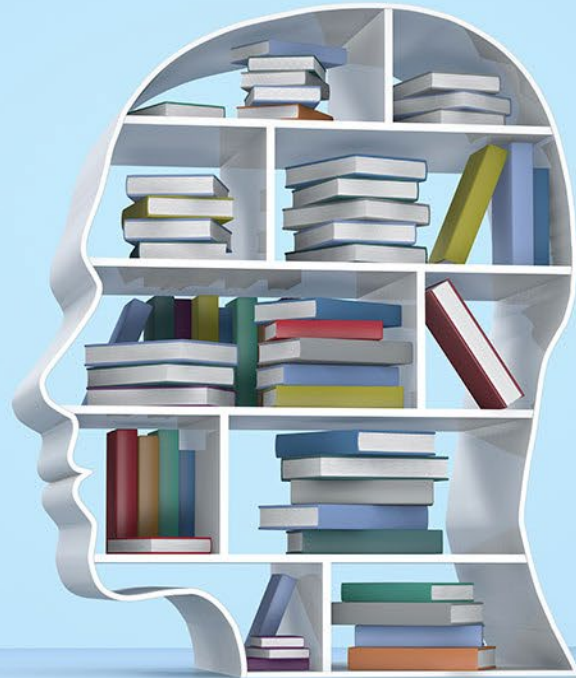


Mechanics Liens & the Repurposing of Mall Space & Retail

Title Tenets Webinar Series



Presented By: Shawn A. Elpel, Sr. Underwriting Counsel

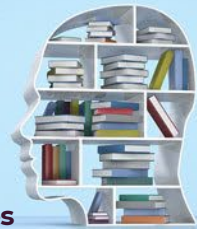
Wednesday, July 20, 2022

National Association of Realtors Survey

The 2020 NAR Survey and Case Study performed research to obtain information about retailers that have been repurposed successfully.

Quoting Coresight research:

- 9,350 stores were closed in 2019
- 2,021 closed by April 24, 2020

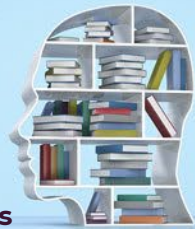


In a report by Coresight Research dated September 2, 2020, the research group estimated that:

- One-quarter of US malls could close over the next three to five years
- Class B, C and D malls at most risk of closures
- Department store closures will deprive many malls of anchor tenants



Source: Coresight research, dated Sept. 2020



Valuation Statistics

In addition, in a report by Laure Thomas of MSNBC dated Aug. 27, 2020, 15 to 17 percent of US malls will need to be redeveloped into other uses longer term. The report further stated that turning shuttered malls into e-commerce warehouses or multifamily structures could reduce value of property by 60 to 90 percent.

Source: MSNBC, dated Aug. 27, 2020, by Laure Thomas.



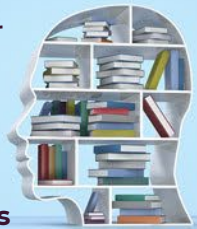


Mechanics Liens



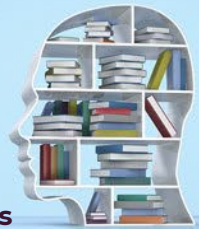
Mechanics Liens: Laws and Locations

From a title insurance perspective, the repurposing and/or redevelopment of malls creates underwriting issues when a title company is asked to provide mechanics lien coverage for a construction lender or incoming equity investor. The mechanics lien laws vary from state to state, but a significant number (and almost all in the Western US) have a “relation back” component where the contractual lien rights attached to the property on the day work for the project is commenced.



Mechanics Liens: Construction Lenders

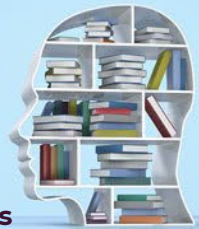
When a construction lender requests mechanics lien coverage, whether it be full coverage or some type of incremental ML coverage, and that a title company insures the priority of its mortgage/deed of trust over mechanics liens, title companies will treat this as a special risk and implement its underwriting protocols for such a project.



Mechanics Liens: Equity Investors & Mezzanine Lenders

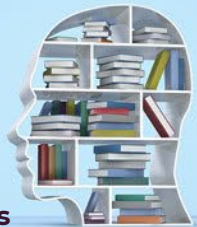


In addition, if there is to be an equity investor or mezzanine lender in the project, a request for some type of owner's coverage will also be made providing ML coverage that insures that all contractors, materialmen, laborers and equipment providers are paid current.





Mechanics Liens Coverage & Exceptions



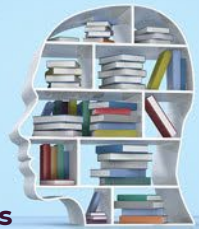
Covered risk 11 in the 2006 ALTA Loan policy provides coverage for the lack of priority of the lien of the Insured Mortgage upon the Title:

a) *as security for each and every advance of proceeds of the loan secured by the Insured*

Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either

- i. contracted for or commenced on or before Date of Policy; or*
- ii. contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance; and*

b) *over the lien of any assessments for street improvements under construction or completed at Date of Policy*



Mechanics Lien Exception – Relation Back

In the construction loan setting, this coverage creates an issue for title insurers who search the public records because although lien rights have already attached to the property, there may be no record of those rights in the public records.

As a result, a title commitment and subsequent policy will contain the following exception unless such lien rights are addressed, deposed of, or mitigated to a title company's satisfaction:

- *Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished imposed by law and not shown by the public records.*

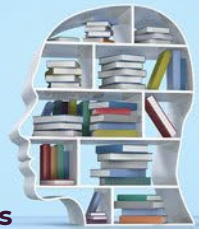
This exception negates any coverage an owner or construction lender may have under the policy for mechanics liens that have priority over the construction mortgage. Construction lenders, however, oftentimes seek removal of the mechanics lien exception and further seek specific coverage for mechanics liens.



Mechanics Lien Coverage Information

Typically, a title company will request the following information when considering what type of mechanics lien coverage (if any) it will provide:

- Loan Term Sheet**
- Loan Agreement**
- Loan Guarantee**
- Copy of financials for the borrower and guarantor**
- Equity contributions and timing of contributions by Borrower**
- Copy of General Contract**
- List of major subcontractors**
- Copies of current GC's pay application and lien waivers**
- Appraisal**
- Project budget**



ML Coverage Consideration

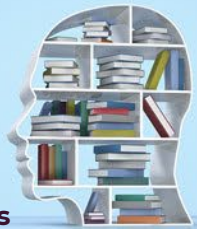
As part of this analysis, title companies will look to the following:

- Financial strength of borrower and any loan guarantor
- Strength and experience of General Contractor (“GC”)
- Past construction projects of Borrower and GC
- Terms and amount of the GC contract
- Whether GC and subcontractors will subordinate mechanics lien rights to mortgage
- Whether GC will provide “pay when paid” indemnity
- Amount of the construction loan and construction project
- Local market conditions for new construction of the project
- Amount of equity borrower has or will put into the project





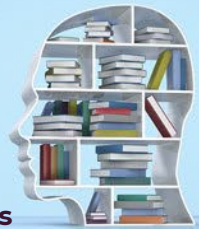
Incremental ML Coverage



The ALTA 32-06 Endorsement

The ALTA 32 deletes covered risk 11(a) as well as insures against loss or damages sustained by the insured by reason of the following:

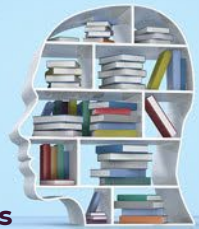
- a. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage;
- b. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance made on or before the Date of Coverage, over any lien or encumbrance on the Title recorded in the Public Records and not shown in Schedule B; and
- c. The lack of priority of the lien of the Insured Mortgage, as security for each Construction Loan Advance made on or before the Date of Coverage over any Mechanics Lien, if notice of the Mechanics Lien is not filed or recorded in the Public Records, but only to the extent that the charges for the services, labor, materials or equipment for which the Mechanics Lien is claimed were designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before date of coverage



The ALTA 33-06 Endorsement

The ALTA 33 is utilized with each construction draw to increase the amount of coverage provided to the lender as loan disbursements increase.

Whether incremental coverage is available by a title insurer depends on a review of the same factors as set forth above for issuance of a construction loan policy with the ML exception.





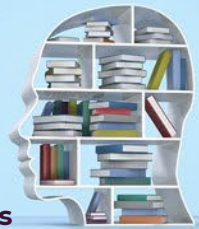
Mechanics Liens & Leasehold Improvements



Lien Rights/Notices



- Lien Rights of Tenant's contractors
- Notice of Non-Responsibilities



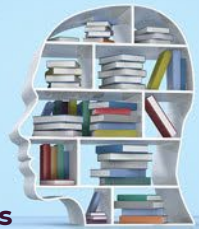


Other Title Issues



CC&Rs/Zoning

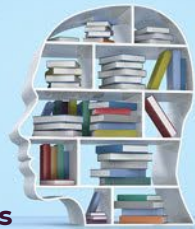
- CC&R Coverage – ALTA 9 Endorsement Series
- Zoning Endorsement – ALTA 3 Endorsement Series



New Uses for Retail Spaces

- Medical Facilities
- Gamer headquarters
- Churches
- Office Space
- Warehouses

Source: **5 creative ways malls are repurposing their space**, Retail Dive, Published Feb. 9, 2021 by Kaarin Vembar.





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Thank you



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