

Can I Still Sell My Property When the Registry Closes? – Gap Closings

By RIW on March 18, 2020



As sectors of the US economy effectively shut down one by one in response to COVID-19, a quick review of those sectors and essential functions that remain open for business may be the better approach to measure where things stand. In the world of real estate and mortgage financing, certain transactions may be able to proceed to close during this pandemic, despite the fact that many registries will not accept documents for recording until further notice.

As between a buyer and a seller, a borrower and a lender, a closing technically occurs when documents are signed and delivered. However, registries function to put the world on notice of ownership interests in real property. Massachusetts has been reluctant, as a matter of practice, to recognize the transfer of title to property until the “acceptance **and recording**” of instruments transferring title. The same cannot be said for other states where the key to closing a real estate transaction without actually recording a deed or mortgage lies in “Gap Title Insurance” coverage. Massachusetts has been slow to adopt so-called “Gap Closings” as the preferred transaction procedure in the state. “Gap Closings” are the norm, rather than the exception, in many other states. With a recent influx of out-of-state buyers, sellers, and their attorneys, the concept of closing on Gap Title Insurance has gained some traction, and perhaps current events will expand its application and acceptance.

In a Gap Closing, the deal is closed and money changes hands in reliance upon a title insurance company's commitment to issue insurance that protects against intervening liens or defects that may arise between “acceptance” and “recording”. Title documents can take weeks to record in certain states; therefore, gap insurance grew out of necessity to ensure a predictable timeline for closing. In Massachusetts, we have the luxury of registries that ordinarily allow for title rundown and recording within minutes. Sellers and borrowers in Massachusetts do not have to wait very long after signing documents to receive their proceeds despite the necessity of recording documents. An email or text from a title examiner declaring, “We’re on record...” is what usually triggers disbursement of funds, only after the examiner determines with certainty that the deed, mortgage, or other instrument of transfer made it on record without any intervening encumbrances.

Generally, in order to issue Gap Title Insurance, the title insurance company requires the owner of the land (i.e. the seller, or the borrower in the case of a refinance) to indemnify and defend the title insurance company, from and against any claims arising out of intervening liens and title defects during the “gap” between acceptance and recording of the instrument of transfer (i.e. a deed or mortgage). The insured buyer and/or lender is protected by Gap Title Insurance issued by the title insurance company based on the owner's indemnification. If an intervening lien or defect does arise between acceptance and recording, the title insurance company will undertake to correct the problem for the

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insured's benefit and will pursue the owner who provided the indemnification.

From a buyer's perspective, Massachusetts' traditional approach adds certainty where buyers know that they are the indefeasible owner of the property before parting with any money. Buyers (and their lenders) that accept Gap Closings effectively rely on an insurance company's indemnity to secure their future record ownership of the property. From a seller's perspective, Gap Closings are certainly more convenient and offer predictability, particularly where a seller is confident that there is no risk of any intervening liens. A seller can avoid the inconvenient wait for recording if the seller is willing to sign a Gap Indemnification Agreement with the title insurance company, which in turn allows the title insurance company to issue Gap Title Insurance coverage.

The outbreak of COVID-19 has undoubtedly increased anxiety for sellers that do not know when registries will re-open and accept deeds for recording. First American Title Insurance Company, as well as other national title insurance carriers, have published updated underwriting guidelines for the issuance of Gap Title Insurance coverage in response to COVID-19. The updated guidance requires thorough due diligence with respect to the owner and more robust owner and insurer gap indemnity language. The issuing title insurance agent is also required to record all relevant documents, "promptly after the Registry of Deeds is re-opened." While it remains to be seen whether this unanticipated COVID-19 stress test on Massachusetts conveyancing will force a trend towards more Gap Closings in the Commonwealth, Gap title insurance apparently remains a current viable option for closing real estate transactions in the midst of current turmoil if the buyer, seller and lenders all agree to accept Gap Title Insurance coverage at closing.

RIW is an Agent for First American Title Insurance Company and can work with you to facilitate Title Insurance including GAP Coverage.

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