

## ADDRESSING OPEN NOTICES OF COMMENCEMENT IN TITLE INSURANCE COMMITMENTS

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Bob Dylan once said, “*There is nothing more stable than change.*” We live in an age inspired by change. New construction is everywhere. Advertisements fill the airwaves convincing us to remodel our offices, homes, and yards. We add pools, remodel rooms, and add on to our homes and businesses. When this construction involves the use of licensed contractors who must pull building permits, a process is set in motion that can impact the title to the owner’s property. The purpose of this article is to spotlight how routine construction in Florida is impacted by provisions of Florida’s construction lien law and to provide guidance to Fund members regarding how to evaluate and address these issues when insuring a transaction.

### Generally

According to Sec. 713.135, F.S., when a government agency issues a building permit, a Notice of Commencement (NOC) must be duly filed in the public records and posted at the job site before the first inspection. With a few exceptions, the owner or its authorized agent must file a NOC in accordance with Sec. 713.13, F.S., prior to commencing work to improve any real property. The exceptions include subdivision improvements (Sec. 173.04, F.S.), projects costing less than \$2,500 (Sec. 713.02, F.S.), and recommencing completion of any improvement after default or abandonment. The provisions of Florida’s Construction Lien Law exist to protect the owner from being exposed to surprise liens filed by unknown

parties providing labor, services and materials to the property. These provisions ensure that a NOC will be recorded in the official records of the county where the property is located, whenever work is performed, or a permit is pulled to construct, repair or replace improvements to real property.

### Contents of a NOC

Sec. 713.13, F.S., mandates the form and contents of the NOC. The NOC contains a wealth of information about the nature of the construction and the identity of interested parties. A NOC is effective for a period of one year from the date of recording, or longer if so stated. If the work described in the NOC is not commenced within 90 days of its recording, the NOC is void. The NOC can be amended to extend the effective date, change erroneous information in the original NOC, or to add information that was previously missing. According to Sec. 713.07, F.S., the recording of the NOC establishes a point of reference to which

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valid claims of lien filed against the property relate back. Thus, the filing of the NOC alters the first in time, first in right rule of priority of Sec. 695.11, F.S., and its recording date becomes the established priority point in time for these unfiled construction liens, which tends to ensure that contractors providing labor, services or materials get paid.

### **Finding NOCs of Record**

What if the owner needs to borrow money or refinance the property to pay for their improvements after the NOC has been recorded? The title search will reveal the NOC and the process of determining its impact on the current transaction begins. The existence of a NOC in the public records will be shown as an exception on Schedule BII of a title commitment or as a recorded matter in a title search report. A requirement for eliminating the risk of liens under the NOC will appear in Schedule BI of a title commitment, noting that upon satisfaction of the requirement, the related exception can be deleted. It will take some evaluation of the facts surrounding a filed NOC to determine what that requirement will be. If there is a recorded claim of lien or a lis pendens of record, the need to release the lien or dismiss the litigation is obvious, but may be in addition to a requirement addressing the NOC per se. If there is nothing recorded subsequent to the NOC, the effect on title and the risk of future liens is less apparent. To avoid any disruption to a scheduled closing, the Fund Member should investigate the situation as early in the process as possible. This evaluation process may require input from third parties that are not directly related to the current closing so planning a course of action to address this type of title issue is critical to a successful closing. Whether the requirement for clearing the risk is simple or complex varies based on the facts, but a valid NOC in the chain of title can never be ignored.

### **Common Factors to Consider in Reviewing a NOC**

A title transaction with a recorded NOC involves a risk that a construction lien may be filed for unpaid labor, materials, or services. There are some common factors to evaluate when it comes to evaluating that risk.

The first is the status of the work. There is no lien risk if the work is complete and everyone is paid. If the work is complete, the date of completion becomes key, because a lienor's claim must be filed within 90 days of completing their portion of the work. Generally, Fund Members may expect to see one of three requirements associated with the NOC based on the

status of the work. If the work was completed more than 90 days prior to the title transaction, Fund Members may be able to rely on an owner's affidavit given in accordance with Sec. 627.7842(1)(c), F.S. If the work was completed fewer than 90 days prior to the title transaction, affidavits and proof of payment to all parties will be required. If the work is ongoing and cannot be completed before the scheduled closing, the restoration of priority process may have to be undertaken. Without off-record information, title examiners may not have enough information to determine the appropriate requirement, so Fund Members should undertake an inquiry into the facts to ensure that the appropriate requirement is reflected in the commitment.

The next factor in examining the NOC is to confirm that the legal description used in the NOC accurately describes only the job site. Owners and contractors sometimes use street addresses and property tax account numbers instead of an accurate legal description. If the work is being conducted on only a part of the overall parcel or the street address does not accurately describe the location of the work, an amended NOC clarifying the job site to the exclusion of the property being insured may be sufficient to eliminate the risk of liens associated with the NOC.

Next, the duration of the NOC as stated on the face of the document should be determined. If no expiration date is stated, the term is one year. For insuring purposes, a stated expiration date shorter than one year from the date of commencement may not be relied upon to shorten the one-year term. On the other hand, a NOC may expressly provide for an expiration date creating a duration of more than one year. If the NOC has recently expired, or will expire shortly before closing, confirmation that the work is complete and all lienors have been paid is a prudent insuring requirement. On the other hand, in the absence of any indication of a continuing risk, the operation of law may be sufficient to eliminate the risk associated with a NOC that has been expired for some period of time. Operation of law may also serve to eliminate the risk of a NOC that has been of record for at least 90 days if work has not yet begun; if the NOC is void for that reason, the Fund Member can verify this fact with the use of a reliable affidavit signed by the owner and

issue the policy without exception for the open NOC.

Another important piece of information to review in the NOC is the nature and scope of the work described. The NOC contains required information which may prove valuable when assessing its risk and when developing a plan to eliminate it. A minor scope of work may indicate that the work is likely completed, and all involved have been paid. For instance, a NOC for the installation of a fence, a sign or a new roof that has been of record for several months suggests the possibility that the work is likely complete, in which case Fund Members may be able to insure in reliance on affidavits. However, if the work described in the NOC is significant or extensive, it may be less reasonable to believe it is complete even if the NOC has been recorded for many months. In that case the Fund Member may need to undertake more due diligence to appropriately eliminate the risk.

Florida lien law does not provide an easy path or risk-free option to address a situation when the construction was completed fewer than 90 days prior to the insured transaction. The Fund Member must request and review proof of payment and lien waivers from all contractors and subcontractors constructing the improvements to assess the risk of liens being filed in the gap or after a closing. The general contractor must supply an affidavit attesting that the work described in the NOC is complete and all subcontractors have been paid in full. The contractor and subcontractors must provide a written waiver of lien evidencing payment in full. Florida law currently provides that all lienors must provide a payment affidavit and a lien waiver to the owner in order to confirm payment. Thus, requesting this information from the lienors in a current transaction poses no additional obligations on them regarding these same items. Lastly, the owner must also verify by affidavit that all work is complete, and all parties have been paid in full (see Aff-23 in The Fund's Affidavit Practice Manual (APM)). The greater the monetary risk associated with a NOC, the higher degree of inquiry that must be applied. For larger monetary risks, consultation with Fund Underwriting Counsel is required. A Fund Member may request assistance from Fund Underwriting Counsel to determine the sufficiency of this compiled information for insuring purposes. Guidance is also available in TN 21.03.01.

## Termination of a NOC

Following the process detailed in Sec. 713.132, F.S., and recording a notice of termination (NOT) is the best method available to address an open NOC. The owner may terminate the period of effectiveness of a NOC provided they record a NOT referencing the recording information of the NOC, and including statements regarding when the termination is effective (which cannot be less than 30 days from recording the NOT), that all lienors are paid in full and that the owner has served a copy of the NOT on those lienors in direct contract with the owner and on those who previously served a notice to the owner. The owner may not record a NOT except after construction ceases. The general contractor must provide an affidavit attesting to the fact the work is complete or ceased, and all lienors, including themselves, are paid in full (see APM Aff-25 and 25.1). This affidavit is then attached to the NOT when it is recorded. When scheduling a closing, Fund Members should consider that the statute provides that the NOT is only effective to terminate the NOC after the NOT has been of record for 30 days.

## Restoration of Priority

If the work described in the NOC will not or cannot be completed before closing, another option is to restore the priority of the loan against these potential unfilled liens. Restoration of priority is typically not necessary when insuring only a buyer during the sale of the property since the buyer will be accepting responsibility for the ongoing work and payment to the contractor in due course. In those instances, the owner's policy will contain an exception for the open NOC. When a loan will be insured without exception for the risk of liens associated with the NOC, the restoration of priority will be required. This process is outlined in TN 21.03.03 and involves scheduling a date for the work to cease at the job site, reviewing proof of payment and lien waivers from each contractor and subcontractor involved on the job and collecting affidavits from the general contractor and owner. Here again, the more complex the project, the closer the scrutiny should be, and consultation with Fund Underwriting Counsel is encouraged (see APM Aff-24 and 25.1). For complex commercial transactions, the restoration of priority process may include the recording of a NOT. Following restoration, a new NOC must be recorded after the insured mortgage. Fund Members are welcome to seek assistance from Fund Underwriting Counsel when their commitment requires restoration of loan priority.

## Summary

In closing, the presence of a NOC in the title search or commitment cannot be ignored and must be addressed at or before closing. Dealing with an open

NOC will require input and documentation from third parties whose cooperation and participation may affect the scheduled closing date. The Fund title commitment requirements will list instructions for dealing with open NOCs based on information available and may change upon a more detailed review of the facts surrounding the construction activity. It is important to immediately assess the nature and timing of the construction activities so an appropriate course of action can be undertaken to eliminate potential liens from affecting the rights of the lender and owner at closing. The more extensive the project, the more complex the insuring solutions may be, and Fund Underwriting Counsel are always available to support Fund Members. ☐