

AVOIDING MALPRACTICE – GIMME ACCESS

by Harold I. Levine

You are representing the purchaser of an idyllic suburban castle in Wayne, Palos Heights, Barrington, or other such place. The residential property that your client is purchasing is at the end of a winding, secluded road, far from the noise and bustle of the highway.

The first question in representing a purchaser of residential property in this fashion is how do I get to the street or the highway, or will the title insurer not only guarantee the property I am purchasing, but will the title insurer guarantee access to the road? A surprising number of malpractice cases in residential real estate involve claims by purchasers against their lawyers when they find out that they are landlocked or that their only means of access is by way of a private road and that the parties refuse to give access.

Remember, if there is no access, a lender is going to be reluctant to make a loan. Frequently, the only means of access is by means of a private road. Horror stories abound. One day, the unsuspecting purchaser finds a chain across the road and serious and bitter litigation develops; or the purchaser is horrified to find he or she must pay a substantial charge to keep the road open in the winter.

The value of the residence diminishes greatly because of these problems and the claim against the lawyer increases. We once had to negotiate with 14 private owners to obtain easements over a private road. The prior attorney had never given the matter any thought and assumed it was a public road. The 14 landowners made it very clear that they were not charitably inclined and it cost a lot of money.

So, always ask, how do I get to the street? Further, provide in the contract of sale that the contract is contingent on the seller providing full access to the road, which easement, shall be insured by a title insurer. If the title insurer comes back and says they can't do it because it's a private road, then you will become alert to the problem.

Remember, the ALTA owner and mortgage [title insurance] policies automatically insure access. However, the specific means and location of the access is not insured unless the specific access easement is described in paragraph 3 of Schedule A. Any time you are issuing a commitment or policy and there is a question about access, an exception for lack of access must be raised. The language of these exceptions and further information on access can be found in the ATG Underwriting Manual.