

## Title Insurance And The Real Estate Market



Under the provisions of the Real Estate (Regulation and Development) Act 2016 ("the RERA"), obtaining insurance in respect of the title of project land is a requirement for builders, and may soon be mandatory for builders and developers in Maharashtra (and indeed in the rest of the country). The relevant section of the RERA, among other things, requires a promoter to obtain all such insurances as may be notified

by the appropriate Government, including in respect of the title of the land and building forming the real estate project and in respect of the construction of the real estate project. The insurance stands transferred to the benefit of the allottee or the association of allottees, as the case may be, at the time of the promoter entering into an agreement for sale with the allottee. The state of Maharashtra is yet to notify any required insurance; however, it is only a matter of time. Therefore, it is essential to understand why there is a need for title insurance and what it means for the parties involved.

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**Title insurance will come as a welcome relief**

To understand title insurance it is important to understand what it means to be in 'title'. Title refers to legal ownership over and the right to use, deal with and dispose of property. Being in legal title means that you are the legal and recorded owner of the property. When purchasing property, a purchaser buys the legal title to the property. A property purchase may not give a person perfect title over property, either because there is a cloud with respect to the transfer of legal title (because of errors in past transfers etc.) or because other persons may have equitable title over all or parts of the property (the right to benefit from enjoyment of the property). Although this may change in the not too distant future with the introduction of land titling laws in the country, at present, recorded land title in India is not guaranteed by the government nor are land records conclusive proof of title to property.

Title insurance offers financial protection against such hazards of title. At present, it appears that only one insurance company has a title insurance product in the Indian market, while at least one other insurance company is in the process of developing a title insurance policy.

### What does title insurance mean for builders, property owners and other project promoters?

Under the RERA, title insurance will have to be taken by a developer at the time of project registration. The premium will have to be paid by the developer until the insurance is subsequently transferred to the association of allottees.

Title insurance should be a boon to builders and to other persons considered "promoters" under the RERA. The RERA places indefinite liability on promoters with respect to any loss caused due to defective title of the land on which a project has been developed. Title insurance will come as a welcome relief, protecting developers in the event of specified title disputes. The cost of the policy and premium will actually be rather minimal when compared to the amount of the investment at stake.

Further, the fact that the land and building title have been insured by a financial institution could point property purchasers to a probable assumption that the developer has conducted a sufficient amount of due diligence with respect to the title and managed to obtain the insurance only upon establishment of clear and marketable title. This would undoubtedly give a boost to the real estate sector and more confidence to property purchasers, knowing that due diligence has been conducted by the insurance provider and that in case of a dispute purchasers will be indemnified. This should also give greater confidence to housing finance companies and other project lenders who finance real estate projects.

Having said that, any title insurance cover would not be absolute. Every policy would be subject to the terms and conditions therein and only cover the specific insured risks under the policy. Further, a title insurance policy would only provide insurance for the number of years mentioned in the policy, while the promoters' liability would be indefinite. Hence, it is essential and imperative that builders conduct their own due diligence of any property they are considering developing at the inception of the project. A developer may wish to conduct title due diligence at the time of entering into a development agreement or joint venture agreement or any other definitive agreement with a landowner or society, as the circumstances may require.

The title insurance policy currently available on the Indian market in fact contemplates that promoters obtaining insurance under the policy will conduct their own due diligence and requires that promoters supply a legal report on title to form part of the insurance policy. Promoters will have to work to cure any title defects identified by such a report, as far as possible - the policy excludes defects in the title which the insured agreed to or allowed to happen and defects which the insured was aware of but omitted to take actions to safeguard against.

It should be remembered that under the RERA, landowners and housing societies may also be project promoters (depending on how the project is structured), so developers, landowners and housing societies must ensure that the transactional documents entered into between them specify which party will be responsible for obtaining the title insurance for the project.

### What does title insurance mean for insurance providers?

No doubt title insurance is a very exciting product, the existence of which by itself gives confidence to property purchasers and to lenders. The fact that it may soon be made compulsory under the RERA may be a big incentive to insurance providers to develop such a product.

However, insurance providers should not hurry to float a policy and sell this product without first thoroughly understanding its future probable repercussions. The exact wording of a title insurance policy can be very important for insurance providers who may wish to exclude specific kinds of liability from the scope of their insurance. Accordingly, an insurance provider needs to pay particular attention to drafting the terms and conditions of its policy and what it includes and excludes.

In addition, title insuring for each project begins with due diligence and title examination of the property in question, and eliminating title risks before insuring. As mentioned previously, title insurance providers may require the person applying for insurance to submit their own title report with respect to the property. However, at the very least, insurance providers will need to engage their own experts to examine the title report submitted to them. Of course, the best title examination or search cannot protect against matters not appearing in searches and public records, or from human errors. However, conducting title due diligence can definitely reduce title risk considerably.

### What does title insurance mean for allottees and associations of allottees? Are they really protected by title insurance?

Let's be clear! A title insurance policy provides insurance to the insured party against certain title issues up to the extent of the amount provided for in the policy. *It does not convey title or perfect title.* The insurance indemnifies to a certain extent the insured from losses associated with title disputes and defects, and thereby protects the insured. Without title insurance, a party could incur huge costs just defending their interest in a particular property and may even suffer total loss of the property. Having said that, what needs to be highlighted is that a defective title illegally conveyed would entitle an allottee or association of allottees to a monetary claim which could be recovered from the insurance provider subject to policy terms, conditions and exclusions. However, the allottee would not be able to perfect their title (obtain a right over the actual property insured) by virtue of being insured under a title insurance policy. Further, title insurance will only cover past defects and not future defects or future debts related to the property, amongst other exclusions. Accordingly, title insurance will protect allottees from losses they may otherwise face in case of a defective title or a title dispute but at the same time it does not perfect a defective title or guarantee one!

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Thus, with the ever-growing demand for property ownership, although the benefits of being insured under a title insurance policy are abundant and such policies give purchasers confidence with respect to property title, independent title due diligences should nonetheless be essentially undertaken by purchasers. Purchasers cannot rely blindly on title insurance to guarantee them a right to property that they have purchased.

To sum up, it is important to understand that title insurance will not overcome title defects or provide a legal, valid and perfect title to purchasers. Further, although title insurance is definitely good news for developers and property purchasers, it is still in its nascent stages in India, with only one policy available in the market at the moment and a few further in the pipeline. However, this may change rapidly in the future once state

authorities under the RERA issue notifications making title insurance mandatory, as envisaged under the RERA. To prepare, therefore, all players (developers, property owners, societies and insurance providers) should act now to prepare their documentation in advance so that they are able to react fast to such a change. The RERA provision regarding title insurance, once notified, will be applicable not only to new projects undertaken under the RERA but also to ongoing projects - promoters should therefore consider from now who will take on the onus of obtaining title insurance for these projects. Although it is not yet mandatory, promoters could also consider obtaining title insurance in advance; this may increase the overall price of projects but it will reduce the risk of liability for promoters and boost purchaser confidence in their projects.

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