Overcoming Encumbrances in Mitigation Bank Permitting
SPEAKERS

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Why Create/Use a Mitigation Bank?

State and Federal Regulations

- **Florida:**
  - “. . adverse impacts of activities regulated under this part may be offset by the creation, maintenance, and use of mitigation banks and offsite regional mitigation.” Fla. Stat. 373.4135 (1)

- **U.S. Army Corps of Engineers:**
  - “. . the district engineer should give preference to the use of mitigation bank credits when these considerations are applicable” § 332.3 (b) (2) General compensatory mitigation requirements
Mitigation Banks

- Over 80 permitted banks in Florida
- 20 pending banks
- Mitigation Service Areas cover major portion of state
Encumbrances in State and Federal Regulation

- Mitigation banks require conservation easements or fee simple transfer of property
- Must address existing encumbrances on real property

1. "sufficient legal or equitable interest. . to ensure perpetual protection and management of the land" Fla. Stat. 373.4136(1)(h)
2. "all conservation easements shall be granted in perpetuity without encumbrances, unless they do not adversely affect the ecological viability of the mitigation bank” 62-342.650 (3) F.A.C
3. “must. . prohibit incompatible uses that might otherwise jeopardize the objectives” 33 C.F.R. § 332.7 (a) (2)
4. “must provide long-term protection through real estate instruments” 33 C.F.R. § 332.7 (a) (1)
Why Resolve Encumbrances?

- Obligation is to transfer real property either in fee simple or as a Conservation Easement
  - Conservation Easement or Fee Simple Title free of exceptions
  - Must demonstrate that encumbrances don’t affect ecological viability
- Encumbrance cannot affect the long-term protection or management of the property
Locating the Bank

Mitigation Banker must have "legal or equitable title"

- Own the property in fee simple? (legal title)
- Easement to property? (equitable title)
- Contract for purchase? (equitable title)
- Ground lease? (equitable title)

Note: portions of the Property could be classified differently

- Transfer interest in fee simple or with a conservation easement
- Free of encumbrances that affect the ecological viability
- Boundary survey
- Appraisal
- Marketable title commitment
- Prohibit incompatible uses that might otherwise jeopardize the project (USACE)

F.A.C. 62B-342.400(4)(a)
Identifying Encumbrances

An encumbrance is a burden or charge on the property or an outstanding right in a third party, which interferes with the use or transfer of the property or subjects the property to an obligation. As a general matter, any encumbrance renders title unmarketable. Defined by First American Title Insurance Company of New York

- Title commitment
- Other unrecorded documents
- Walk the property!
Title Commitment

a) Easements
b) Covenants & Restrictions
c) Financial Liens
d) Plat Dedications
   (Fla. Stat. §177.081)
e) Mineral Interests
f) Reverter Interests on prior deeds
Other Unrecorded Documents

- Rights-Of-Way (may show up in title commitment)
- Sovereign Submerged Lands
- Access issues
- Recreational uses (trails, hunting)
- Riparian rights for other upland owners
- Land use and zoning restrictions
- Permit requirements
- Prescriptive easement
- Timber or Agriculture Leases
- Municipal Utility Atlas
When You Are on the Property — What Do You See?

- Roads
- Waterbodies (SSL/OHW)
- Recreational uses
- Boats
- Fences
- Monitoring wells
- Signage
- Timber
- Tree Stands/Feeding Stations
- Vehicular Tracks
Know What You Have

- What does the encumbrance mean to your project?
- What is the extent of each encumbrance?
  - Graphic representation of your encumbrance
  - Third Party Rights of enforcement (see *White v. Met.* Dade Co., 563 So.2d 117 (3d DCA 1990)
  - third Party Rights of Access (within easement document, general public’s rights)
- What are the actual constraints?
GET RID OF WHAT YOU CAN

- Recorded release
- Subordination of encumbrance
- Permit modification
- Declaratory Action/Action to Quiet Title
- Marketable Record Title Act (Fla. Stat. §712.02 et. seq.)

Possible Exceptions: Sovereign Submerged Lands, Board of Trustees Deeds, Government Interests
Design Around It

- Adjust the bank boundary to exclude encumbrance
- Incorporate encumbrance
  - Demonstrate it does not affect the ecological viability
  - Take responsibility if future issues affect the Mitigation Bank
If the Mitigation Bank Property remains encumbered (or in Real Property terms, an exception on the title is not deleted) and has the potential to impact the Mitigation Bank, what can you do?

- Condition the proposed Permit
- Include maintenance and repairs in Conservation Easement language
Draft Conservation Easement

- Conservation easement has practical priority over the other encumbrances
- Considerations for the CE:
  - Permitted uses/Retained Rights
    - Boardwalks
    - Passive Recreation
    - Others?
Timing – Resolve Remaining Encumbrances & Record CE

➢ Negotiate with agencies on timing of releasing existing encumbrances and granting new CE/conveyance of property.
   ➢ Before credits may be used 62-342.650(1) F.A.C.
     - SFWMD – BOR Section 4.4.9.10 “within 30 days of issuance. ..
       Conservation easement”
     - SWFWMD – BOR - no time frame
     - SRWMD – Applicant’s Handbook – no time frame
     - SJRWMD, NWFWM – Applicant’s Handbook – defers to 62-342 F.A.C
     - DEP – 62-342 F.A.C – no time frame

➢ Receipt of permits from all agencies
➢ Bank Implementation
Be aware of encumbrances that may arise AFTER construction and need to diligently review updated title commitment and status of Mitigation Bank Property:

- Construction Lien
- Eminent Domain/Condemnation Actions
- Right-Of-Way taking
- Prescriptive rights
- Association Liens
- Municipal Code Enforcement Liens
Questions?
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