



MITIGATING RISKS AND LIABILITIES IN LAND TRANSACTIONS IN GHANA: BUYERS' DUE DILIGENCE.

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... Had I known, is always at last! Oh, poor Habibi!

Introduction

During land or property transactions, the due diligence period typically starts as soon as contact is made for the execution of a sale and purchase agreement or a contract of sale to be exchanged and agreed upon. In some instances, the due diligence period starts as soon as refundable contractual deposits are made. The buyer gathers all the information on the property during this precautionary period to aid in determining whether or not they will move forward with the transaction.

This article aims to help raise awareness about the importance of legal and environmental due diligence in Ghanaian real estate transactions and provide guidance on how to effectively assess potential risks and liabilities to aid investors to make more informed decisions and mitigate potential risks associated with property acquisition in Ghana.

A critical issue that is often overlooked during the due diligence process in Ghanaian real estate transactions is environmental due diligence. Without due diligence, the investors are potentially opening themselves up to a bad investment choice.

Environmental due diligence in real estate transactions involves the assessment of known, potential, and contingent environmental liabilities and obligations associated with a parcel of property to be acquired.

It is notoriously known that legal due diligence relating to the title is often the primary focus of the due diligence process in Ghanaian real estate transactions. However, it's important to recognize that environmental due diligence is also a critical aspect of the due diligence process that should not be overlooked.

A. LEGAL DUE DILIGENCE

Legal due diligence is a crucial aspect of any real estate transaction, and it involves a thorough investigation and review of the legal and regulatory aspects of the property.

A potential purchaser must verify the identity of the vendor or seller in the property acquisition transaction. In verifying the identity of the vendor, any identity card issued by a state agency may be submitted to the issuing institution to authenticate or verify the identity of the seller.

Another crucial benchmark is paying a field visit to the site. A physical inspection is required to ensure that there are no competing interests or ownership claims. Aside from the physical view of the land, purchasers must speak with neighboring occupants or owners of adjoining lands to learn about actual ownership and problems associated with the land.

The next stage of the due diligence procedure is to request and examine the ownership documentation. The vendor's title deed, a site plan, and/or a Land title certificate (where the land falls within a registrable district and the same has been registered) are typically the documents that are used to prove title and ownership to the property. The site plan must be in accordance with how the land is described in the instrument granting the vendor title, which is the vendor's title deed.

To confirm whether the site plan attached to the title deed being given to the purchaser by the seller is indeed the same land as shown on the ground, it is advisable for the purchaser to hire the services of a licensed surveyor to visit the land and pick the coordinates of the boundaries of the land at issue in the transaction. Under no circumstances should a buyer rely solely on the site plan provided by the seller.

The site plan developed by the licensed surveyor must be signed by the Director of Survey to meet the acceptable standard prescribed by the Lands Commission. A copy of the site plan may then be presented to the Client Service and Access Unit (CSAU) of the Lands Commission for an official search to be conducted from three out of the four Divisions of the Lands Commission. These Divisions include the Survey and Mapping Division, the Land Registration Division, and the Public and Vested Lands Management Division. Again, depending on the location of the land, official searches may be conducted at State Housing Company Limited as well as TDC Development Company Limited (Formally Tema Development Corporation) depending on the location of the land.

A purchaser may also have to conduct a search at the Town and Country Planning Department of the Metropolitan, Municipal, or District Assemblies within which the subject property falls. This is done to confirm whether the land falls within the approved planning scheme of the Assembly. It also helps the purchaser to make an informed decision as to whether the land in issue can be used for the purpose for which it is being purchased. For example, the Assembly would not approve the siting of an industry within a locality planned for residential purposes only.

Depending on the location of the land in issue, the purchaser during his due diligence process may have to visit some other state agencies including the Environment Protection Agency and the Ghana Civil Aviation Authority.

Where the land is being sold by a company, the purchaser may have to conduct a search at the Office of the Registrar of Companies to confirm whether the said property is encumbered or not and also to verify the identities of the directors of the company.

Another important aspect of due diligence regarding the acquisition of large tracts of stool and skin lands is to ensure that the alienation has the necessary consent and concurrence of the relevant parties, including the chiefs and principal elders. Additionally, it is essential to confirm that the chief has been gazetted, meaning that the chief has been officially recognized by the government. Chiefs play a critical role in the administration of stool and skin lands and their gazetting is necessary to confer legitimacy and authority to their actions.

These search results will put a land purchaser in a better position to claim “bona fide purchaser for value without any adverse notice” in the event of future litigation.

In purchasing a landed property from a married person; the seller must always insist that the spouse to the seller consents to the conveyance or any deed that is executed between the buyer and the seller in accordance with the Land Act, 2020, (ACT 1036), Section 47.

Conducting due diligence about real estate matters in Ghana is a complex business transaction requiring adequate time, dedication, and expertise. Failure to undertake proper due diligence can result in costly legal disputes and complications that could affect the ownership and use of the property.

B. ENVIRONMENTAL DUE DILIGENCE

Environmental risks and liabilities can significantly impact a property's sell-on value, and failure to properly identify and address these risks during the due diligence process can lead to significant financial losses for investors. By conducting thorough environmental due diligence, investors can identify potential liabilities and take steps to mitigate them, which can help protect the value of the property in the long run.

Moreover, given the increasing focus on sustainability and environmental responsibility in the real estate industry, environmental due diligence is likely to become even more important in the years to come. Buyers who prioritize environmental due diligence and take steps to manage environmental risks and liabilities can differentiate themselves from competitors and position themselves for long-term success in the real estate market.

Environmental Impact Assessments (EIAs) are an important component of environmental due diligence, particularly for real estate projects that may have a significant impact on the environment. EIAs involve a systematic evaluation of the potential environmental impacts of a proposed project or development, including potential risks to air quality, water quality, soil quality, biodiversity, and other environmental factors.

In Ghana, the Environmental Protection Agency (EPA) is responsible for administering and enforcing the Environmental Assessment Regulations, which require developers to conduct EIAs for certain types of projects, including large-scale industrial projects, mining operations, and other projects that may have a significant impact on the environment¹.

POTENTIAL RISKS AND LIABILITIES IN GHANAIAN REAL ESTATE TRANSACTIONS.

The most significant risk in any real estate transaction is the possibility of title defects. In Ghana, it's not uncommon to find cases of multiple sales of the same property, lack of documentation, and boundary disputes. These issues can lead to costly legal battles and even loss of property. Therefore, buyers and sellers should exercise caution when dealing with property titles and ensure they obtain a thorough title search.

The real estate sector in Ghana is frequently plagued by fraudulent activity. Approach people with care if they guarantee speedy sales or provide properties at steep discounts. Forgery, impersonation, and the use of fake documents are all examples of fraudulent behavior. To

¹ <http://www.epa.gov.gh/epa/about/objectives-functions>

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prevent falling prey to fraud, buyers and sellers must engage with trustworthy real estate brokers, attorneys, and other experts.

Another crucial factor that needs to be taken into account throughout the environmental due diligence process is the risk of constructing or purchasing real estate on waterways or floodplains during dry seasons. This is because the recent catastrophic flooding in Ghana has seriously damaged both infrastructure and properties.

Construction defects can lead to expensive repairs, decreased property value, or even personal injury. Therefore, it's essential to obtain a property inspection report from a reputable inspector.

Ultimately, the goal of environmental due diligence is to identify and assess potential environmental risks and liabilities that could impact the value or use of a property. By including a review of flood and climate-related risks, buyers can make more informed decisions about the properties they are considering and develop strategies for managing these risks.

The rule of caveat emptor (buyer beware) applies in full so that a buyer/purchaser takes property at his own risk. The seller's liability to dispose of real estate is limited to that which he has warranted or covenanted for valuable consideration in the contract to transfer an interest in land, or in a collateral warranty for valuable consideration.

The seller must disclose all material latent defects in his title, including latent encumbrances and latent defects in the physical quality of the land, so far as they are known to him. There is also a duty to declare any onerous and unusual covenants in a head lease. However, where the land or the instrument affecting land has been registered, registration serves as actual notice to all persons and for all purposes.

Conclusion

Legal due diligence involves reviewing the legal and regulatory aspects of the property to identify any potential legal liabilities or issues that may arise during or after the transaction. By conducting environmental due diligence, buyers can identify potential environmental liabilities associated with the property, assess their impact on the property's value, and comply with environmental regulations.

It is important to engage experienced land and property law attorneys, review the property's title, zoning regulations, land-use restrictions, and environmental history, and review any past or ongoing legal disputes or issues associated with the property. Conducting effective due diligence can reduce the risks associated with purchasing real estate in Ghana and protect buyers from potential legal and financial liabilities.

The content of this article is intended to provide a general guide to the subject matter. Specialized legal advice should be sought about your specific circumstances.