

Blades, Crout & Proulx LLC

Risk Management Consultants - Established 1926

Look Beyond the Form Title - Subtly Broad Limitations in Casualty

Construction Risk Exclusion – Vacant Land

Introduction

The commercial insurance marketplace for real estate risks continues to see the hardest conditions (aka seller's market) seen in decades. The property marketplace continues to get the most attention as premiums continue to increase exponentially, while locations and coverages are being drastically limited or excluded. Amid the attention-grabbing property insurance marketplace difficulties, the commercial general liability (CGL) insurance marketplace has also been inducing its own hard marketplace by subtly eroding coverages, behind less painful premium increases. Most Insureds are not going to notice, or give the attention it deserves, a new exclusion or limitation on the CGL policy if the premium is flat. Especially if their property insurance premium has doubled, and the property Insurer has decided to exclude a critical coverage (flood, for example).

An example of this trend is the *CONSTRUCTION RISK EXCLUSION – VACANT LAND* endorsement (redacted copy included for reference) added to a client's commercial real estate portfolio insurance program. The client's program includes a mixture of office and retail properties, along with three parcels of land classified as *VACANT LAND*. The following is our interpretation of this specific form, and the potential impacts, if not properly vetted.

Background

The term vacant land, can be subjective in its meaning. The most conventional understanding is vacant land is a parcel of land that is not being used, is unoccupied, and does not contain any structures or buildings. It's this conventional understanding that leads Insureds to not give further consideration to a new form added to their program titled *CONSTRUCTION RISK EXCLUSION – VACANT LAND*. Based on the form title alone, it's reasonable to most Insureds that an Insurer would exclude construction activities on vacant land. From the Insurer's perspective, and perhaps their initial intent of the form, the exclusion is a way to limit their exposures for Insureds that build new structures on vacant land, and fail, intentional or not, to report the activity to the Insurer. Unfortunately, the specific exclusion we are discussing here casts such a wide net, and goes beyond most conventional understanding vacant land, and what construction on vacant land means.

Exclusion Form Analysis

The client policy, including the subject exclusion, does not define *VACANT LAND*, which in this context, is beneficial to the Insurer. Notwithstanding, this specific version of the exclusion applies only to the premises scheduled on the endorsement, with the scheduled premises being, *All Premises listed on the Premises Schedule with the Occupancy scheduled as VACANT LAND*. It is critical for Insureds to review the scheduled locations on the form and confirm those locations are in fact vacant land and rated as such on the policy rating schedule.

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A deep dive into the exclusionary language of the form provides critical considerations, that take this exclusion beyond the conventional understanding of vacant land and construction on such land. More specifically, per the form:

Notwithstanding any contrary provision in this policy or endorsement thereto, it is agreed that this insurance does not apply to “bodily injury” or “property damage” occurring, or resulting from any operations, at any Scheduled Premises, arising out of or in any way connected to any stage of construction or development of the Scheduled Premises, including, but not limited to, the design, site preparation, construction, remodeling, alteration, inspection, or demolition of any building or other man-made structure, or the failure to adequately maintain, inspect, or repair any improvement to the land or of any building or man-made structure on or under the land.

- *Notwithstanding any contrary provision in this policy or endorsement thereto, it is agreed that this insurance does not apply to “bodily injury” or “property damage”.*
 - This language clarifies it doesn't matter where else this policy may provide coverage for construction risk on vacant land, this exclusion applies above it all.
 - Most commonly, endorsement language reads, *it is agreed **and understood** that this insurance*. This conveys the coverage change has been offered, considered, and accepted by the Insured. By only stating *it is agreed*, it implies the carrier is unconcerned with the Insured's understanding or acceptance of the policy changes. A cavalier, albeit subtle, take-it-or-leave-it approach to underwriting.
- *“bodily injury” or “property damage” occurring, or resulting from any operations, at any Scheduled Premises arising out of or in any way connected to any stage of construction or development of the Scheduled Premises*
 - The language confirms the exclusion applies to both ongoing and completed operations, *occurring, or resulting from any operations*. Completed operations is the primary concern as this refers to losses that occur when the Insured is not actively onsite conducting operations. With vacant land, the Insured is likely not onsite conducting operations on a regular basis.
 - *Arising out of*, by itself, is widely accepted as the broadest term when contemplating possible exposures to loss. Add to it, *or in any way connected to*, and the Insurer is stacking the deck in their favor to capture any exposures that a court may determine to not be the result of *arising out of*.
 - *connected to any stage of construction or development of the Scheduled Premises*. This language creates an unlimited timeline for the exclusion to apply to construction or development on the vacant land, including any time before the Insured owned the parcel, including any unknown or unseen construction or development to the parcel. Additionally, *construction or development* are not defined terms, creating an opening for subjective interpretations, not favorable to the Insured, when claims occur.

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- *including, but not limited to, the design, site preparation, construction, remodeling, alteration, inspection, or demolition of any building or other man-made structure, or the failure to adequately maintain, inspect, or repair any improvement to the land or of any building or man-made structure on or under the land.*
 - This takes a conventional understanding of construction on vacant land, and building on to it to include, *or other man-made structure*. *Other man-made structure* is not a defined term in the policy and is open to be subjectively interpreted to include such *structures* as curbs, walkways, driveways, billboards, concrete pads, utility poles, street signs, culverts, drains, gutters, etc.
 - The exclusion is extended to apply to the Insured's, *failure to adequately maintain, inspect, or repair any improvement to the land or of any building or man-made structure*. Vacant land typically does not have regular inspections or visits, by the Insured. This is another way for the Insurer to cast a broad net in their determination to deny coverage, as described, above.
 - The exclusion also is extended to include *any building or man-made structure on or under the land*. Again, *man-made structure* is not a defined term in the policy, nor are specifics for ownership of the under-land structure. This exclusion can be interpreted to apply to underground structures such as utilities, drains, pipes, pumps, etc..

Conclusion

Our objective in this discussion is to make Insureds aware that the current hard insurance marketplace is not limited to property insurance. CGL Insurers are continuously finding ways, some quieter than others, to erode coverages, and “clarify” the intent of their policy forms. Insureds must continue to be diligent in their understanding of their insurance policy terms and conditions, and never stop asking questions. Only when we dig in on the form language, tie it back to the rest of the policy, and the Insureds operations and exposures, can we have an actionable understanding of the impact the form will have in the event of a claim.

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THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CONSTRUCTION RISK EXCLUSION – VACANT LAND

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SCHEDULED PREMISES:

All Premises listed on the Premises Schedule with the Occupancy scheduled as
VACANT LAND

Notwithstanding any contrary provision in this policy or endorsement thereto, it is agreed that this insurance does not apply to “bodily injury” or “property damage” occurring, or resulting from any operations, at any Scheduled Premises, arising out of or in any way connected to any stage of construction or development of the Scheduled Premises, including, but not limited to, the design, site preparation, construction, remodeling, alteration, inspection, or demolition of any building or other man-made structure, or the failure to adequately maintain, inspect, or repair any improvement to the land or of any building or man-made structure on or under the land.

All other terms and conditions of the policy remain the same.