

The Closing Word

A Sutton Alliance Publication



Adverse Possession:

Governor Patterson has signed into law Chap. 269 of the Session Laws of 2008 which amends the adverse possession standards set forth in RPAPL Sec. 501 et al. Chapter 269 and also adds new RPAPL section 543 which, for the first time, addresses de minimus non-structural boundary encroachments and minor maintenance (e.g., fences, hedges, shrubbery, sheds and non-structural walls, lawn mowing).

Revised Sect. 501 now contains specific definitions for the terms 'adverse possessor,' 'acquisition of title' and 'claim of right.' Adverse possession under a 'claim of right' requires the acts

of the adverse possessor to have been 'sufficiently open to put a reasonably diligent owner on notice' of the adverse possession.

The legislative history of the new law indicates that the new test is all about good faith. It recognizes that the doctrine of adverse possession should be used to settle good faith disputes over who owns land, but should not be used offensively to deprive a landowner of his or her real property.

Title Insurance/NYS Banking Department:

On July 9, 2008 Richard H. Neiman, Superintendent of Banks NYSBD, issued a letter captioned "Statutory Prohibitions Against 'Tying' Title Insurance to Mortgage Financing." It states, in part, that New York Banking Law Section 595-(a) precludes a mortgage banker or mortgage broker from requiring a borrower to purchase title insurance from a specific title company, agency or agent as a condition for securing a mortgage commitment. Likewise, Section 2503(a)(2) of the Insurance Law imposes the same restrictions on banks, trust companies, savings banks, saving and loan associations and national banks.

Contact Scott Spinner at **516.837.6109**.

Legal Updates

News from Sutton Land Title Agency

Are All Title Agents Created Equal?

Who cares about title insurance? Only the people who want to close transactions smoothly. From an outsider's perspective, it might be easy to think that all title insurers and agents are the same. After all, they all pull information from the same recorded data and measure risks using similar methods, right?

Well, actually, no. Title insurance agents, just like investment bankers, mergers and acquisitions specialists, commercial financiers and other highly skilled professionals are defined by their personal ability to get deals done. In fact, it's pretty safe to assume that Warren Buffett, Sam Zell, and Donald Trump have their "go to" people in some of the categories listed above. The individuals have the combination of work ethic, relationships, and deep expertise necessary to put a complex transaction together and drive it through to a happy ending.

That's why the movers and shakers of commercial and residential real estate choose their title agency partners carefully. A good title agent can save a client many thousands of dollars by using their expertise to take the information at hand and use it to benefit the transaction powerfully. In fact, many times, through applied expertise, we've saved clients over \$100,000 on their mortgage or transfer tax bill, aided in the complexities of a mortgage defeasance, or helped find financing for a troubled transaction. We think of ourselves as transaction and transfer experts, business partners...

not title agents. And in this way, we help the clients we are fortunate enough to serve bring real estate deals together.

The ownership and enjoyment of interests in real property depends upon the quality of the title acquired; and, the level of title protection provided depends specifically on the quality of the title representative you choose. Are all attorneys equally familiar with all areas of practice? I think not. The standard of care applied to your selection of a title service provider should be a high one. You should want to work with a title agent that holds itself to the same standard that would be applicable to an attorney abstracting the same title and giving a legal opinion of title.

All title agents are not created equal. Every title service provider is not granted the same level of underwriting authority. Only a seasoned title agent, who because of acquired legal and underwriting expertise, is given the broad underwriting authority and

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Howard J. Kopel, Esq.
Founding Member &
Chief Executive Officer
Sutton Alliance

Dear Clients and Friends,

Wow! We sure are having a roller coaster ride, and at my age, it's not fun anymore. In the last two issues of our newsletter, I struck optimistic notes. Now, notwithstanding all that has gone on, I am sticking with optimism. The government has finally jumped into the market with both feet and shows every indication that it will do whatever it takes to get things moving again. It may take a while longer, but I am not going to bet against them.

Those of us that experienced the last major real estate downturn in New York will recall that for an appalling length of time there were virtually no major transactions. Our industry, dependent on activity, suffered mightily. We are suffering again, but there are some fundamental differences that afford some hope. The New York market has not experienced the overbuilt situation that has happened around the rest of the country in residential property. There is simply not that much room here. But more importantly, there has been little overbuilding here or in most other places in commercial real estate. So, we will see depressed demand to be sure. Once the government succeeds in getting lending moving again, I am hopeful that we will see renewed activity.

Let me also take this opportunity to remind all of our friends in the Sutton community that we can help each other. Do you have a service to offer to other lawyers and real estate professionals? Let us know about it so that we can spread the word. Consider writing a piece for our newsletter. This issue contains a useful and interesting article on zoning issues. Who doesn't occasionally have the need for good information on this? And who better to consult than one of the premier firms in the field?

Remember that there are, even now, lenders that are in the market. Do you have a project that is stalled? A home buyer that is having trouble getting a loan? Call me at 516.837.6103. I may be able to help. We are blessed with many loyal friends, and we love introducing friends to each other.

Sincerely



Chief Executive Officer
Sutton Alliance

Meet the Team



Rafael Steiner
Senior Title Officer,
Sutton Land Title Agency


The more complex the title, the more intriguing to Rafael Steiner. A self-proclaimed "title detective" at heart, Rafael has a knack for uncovering potential issues.

It's no mystery why Rafael Steiner is a vital member of Sutton Alliance's commercial and residential title closing teams: the senior title officer simply loves his job.

"The fact is, I go to work happy every day," Rafael says. "I find the title clearance process intriguing and I'm fortunate enough to work with a team of professionals that shares my commitment to client service which is backed by the resources of a well-run organization like Sutton." Rafael, who began his career in the title industry 10 years ago as a Clearance Officer with Sutton, believes this background gives him a distinct advantage both when reading titles and when attorneys require assistance in clearing a title for closing.

"I think with a 'clearance' mind," he explains. "I find items within the chain of title that others may overlook and will raise those issues before they can potentially derail a closing." Even when those issues may be the responsibility of the seller's attorney to clear, Rafael leverages his knowledge base and industry contacts to help get the potential problem resolved and the transaction closed.

"There's a tremendous sense of satisfaction that comes with clearing a title and completing a transaction," Rafael notes, "particularly when the title chain is more complicated. Every property has its own history and every title tells its own story. It's my job to discover it."

An added plus: discovering – in person – a property he's helped clear the title on during one of his frequent visits to Manhattan, one of his favorite local destinations. Rafael Steiner can be reached at **516.837.6291**. 



Are All Title Agents Created Equal? *continued from the cover*

discretion needed to insure commercial transactions. Only experienced agents are trusted to make the business risk decisions required to get the unusual deals closed.

The type of title protection afforded under every kind of title policy and endorsement is not the same. Many times an owner or lender will require certain high risk coverage, coverage that is not commonly given and known to the average title agent. A good title service provider is familiar with the nonstandard types of title protection. High risk coverage can be provided by affirmative insurance or by endorsements. There is insurance for mezzanine financing, UCC protection, and tie in coverage for multiparcel transactions.

Not every title service provider is licensed to issue title policies all over the country. In fact, most New York based title agents are restricted by their agency agreements to issue title policies only in New York State. Without a national underwriting agreement, a title agent is forced to outsource the search, examination, and legal underwriting on your transactions to a title company located in the state where the property is located with whom you have no working relationship and by doing so your title representative gives up control of the process. How then are you assured that confidences required to close the transaction are managed?

Premiums are regulated, but not every title service provider charges

the correct premium. Title rates and premiums are fixed in many states, but how many times did you or a client pay 50 percent too much on a refinance transaction? Should someone – the title company – have told you that you were qualified for a deeply-discounted “reissue” or refinance title policy? Eight class action lawsuits filed in New York in the last couple of years argue that title companies are required to inform refinancers that they are entitled to lower premiums. It’s not enough to just rely on the fact that rates are fixed.

Does it matter who you use as your title service provider? Of course it does!

Contact Scott Spinner at 516.837.6109. ▽

Landmarked Properties: *Hidden Opportunities for Investors*

New York City landmark regulations can impose constraints on the development of designated properties beyond those imposed by zoning regulations. But with the right team of zoning attorneys and historical preservation savvy architects, a property’s landmark designation can become an asset rather than a liability.

Real estate developers might be hesitant to invest in buildings designated as landmarks, or properties located within historic districts, because of the regulations that the New York City Landmarks Preservation Commission (LPC) imposes on affected properties. However, the New York City Zoning Resolution (Zoning Resolution) contains regulatory safeguards which afford owners of designated buildings and properties some flexibility to modify certain zoning regulations. In some cases, these safeguards provide development options that would otherwise need to be secured through a variance, which requires meeting stringent standards and has an uncertain likelihood of success.

One such safeguard is the special permit authorized by Section 74-711 of the Zoning Resolution. This special permit is available to zoning lots either containing an LPC designated landmark, or with a building located within one of the LPC designated historic districts. Under 74-711, the City Planning Commission (CPC) may permit modification of the applicable use and bulk zoning regulations, except for floor area ratio regulations, subject to certain conditions and findings being satisfied.

Although the CPC (and sometimes the City Council) make the final determination whether to grant a 74-711 special permit, the LPC plays a pivotal role as a gatekeeper. As part of the special permit application, the LPC must

provide a report to the CPC stating that a continuing maintenance program for the preservation of the subject building has been established. Additionally, the LPC must affirm that the use or bulk modifications sought, or the restorative work proposed in the continuing maintenance program, “contributes to a preservation purpose....” For applications seeking to modify bulk regulations, the LPC must also report that the requested modifications “relate harmoniously to the subject landmark building or buildings in the Historic District....” Because the LPC enforces strict historic preservation standards, during this stage it is helpful to work with an architect who has experience with LPC practices, procedures, and preferences.



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Landmarked Properties

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It is important to note that the scope of the continuing maintenance program is not limited to the relief sought in the special permit. The 74-711 special permit effectively grants the LPC the power to request that restorative work be done on a building even if it is not related to the underlying application.

For example, in a recent 74-711 application filed by our office to allow a nonconforming commercial use on the ground floor of a building in a residential zoning district, the LPC asked (among many other items) that the owner replace the existing aluminum windows in the entire five-story building with wooden windows. This renovation has no direct relationship to the proposed commercial use, and would cost the

owner tens of thousands of dollars to complete. Alternatively, if the building was not in a historic district, the only way to obtain approval for the desired nonconforming use would be through a variance application. Obtaining this relief, in certain circumstances, might be unrealistic in the absence of documentable hardship and uniqueness, required findings under the variance standard.

There is, however, room for negotiation regarding the details of the continuing maintenance program. In the example above, LPC was receptive to a proposal by the owner's team of zoning attorneys and architects to paint the existing windows or install wood-like vinyl frames to achieve a less costly but equally historically accurate appearance.

This is a brief introduction to the give and take of 74-711; owners can obtain relief from certain zoning regulations, but they must agree to do work and maintain the property according to LPC specifications. Nonetheless, by utilizing the expertise and creativity of a qualified team of attorneys and architects, informed owners can take advantage of their property's landmark designation.

Elizabeth Safian, Esq. is an Associate at Sheldon Lobel, P.C., a land use and zoning law firm in New York City. Ms. Safian holds a B.A. from Tufts University and a J.D. from the Cardozo School of Law. For more information, contact Ms. Safian at esafian@sheldonlobelpc.com or 212.725.2727, or visit www.nyczoning.com