FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

TITLE TO ROADS AND HIGHWAYS

After American Independence in 1776, roads and highways were deemed held in trust by New York State for the general use of the public. That meant ordinary traffic and transportation was entitled to use the public roads. Beginning in the nineteenth century, toll roads and turnpikes were constructed by private companies for profit. (A turnpike is by definition a road consisting of at least four lanes or 66 feet.)

Today, when a deed states that a parcel of land is bounded by the adjoining street, it means that the grant of land runs to the centerline of the street. If the street is 80 feet wide, the parcel runs 40 feet into the street. Where however the legal description merely states that the boundary line of the land runs along the easterly side of a street, for example, the grant does not run to the centerline of the street but merely runs to the easterly edge of said street.

If a municipality conveys title to property, further, it is never assumed that Title is conveyed to the abutting public street. In such a case, the grantee takes Title only to the lot conveyed. *Paige v. Schenectady R.R.*, 178 N.Y. 102 (1904). Nevertheless, an owner of property generally does have an interest in any of the roadways as an "incident to ownership." Such an interest includes light, air and access to, from and over the roadway. *Scoglio v. County of Suffolk*, 85 N.Y.2d 230 (1995).

When there is a subdivision of a lot or a new development is created, it is generally assumed that the new lot if it is landlocked has an easement *by necessity* over other lots in order to reach the public street, so long as the deed describes the lots in the subdivision or new development as bounded by the public street. The owner of the new lot even has the right to open and improve the easement way in order to reach the public street. *Village of Baxter Estates v. G.N.M. Construction Co.*, 49 Misc.2d 333 (Sup. Ct., Nassau Co. 1966). This creates issues as to not only widening and grading, but also snow-plowing during the winter and maintenance by filling pot holes during warmer months.

If the municipality provides alternate access to the public road, however, the easement is terminated, and the municipality need not provide any compensation to anyone for "eminent domain," as in the usual condemnation cases under the New York State Eminent Domain Procedure Law.

While most of us live on lots abutting public roadways, there are a large number of communities in our suburbs that exist along private roadways. So, what if one or even a few deeds to the property in such a community had no easement language whatsoever, and no one caught it? What if no correction deeds were recorded? And what if there were no Homeowners Association -- at least none where the members could agree with each other as to where an easement was? It's not too difficult to see how expensive and unpleasant litigation could develop in such a situation, litigation your Title Company should help you avoid by checking the contract and deed, and by asking you the right questions before the closing.

COOPERATIVES

A number of statutes apply to Co-ops, which can be organized under the Business Corporation Law, the Cooperative Corporation Law or the Private Housing Finance Law. With a co-op, the buyer buys stock in the corporation and receives a proprietary lease and a stock certificate. From a Title perspective, however, is ownership of Real Estate in a co-op treated as personalty or realty? Answer: The stock certificate and proprietary lease are treated as personalty not realty. *State Tax Commission v. Shor*, 43 N.Y.2d 805 (1977). That means the mortgage need not be recorded in order to be a lien on the property, because, in fact, the mortgage is not a lien against the property at all but is a lien on the proprietary lease.

For this reason, lenders normally file a UCC-1 form in the county where the building is located. UCC-1 forms for condo's are usually filed in Albany with the State, but in the case of co-ops, the form is filed with the county. This county requirement began in 1988 when Article 9, section 401(1)(b) changed the place of filing for co-ops from Albany to the county where the property is located. Nevertheless some lenders still mistakenly file UCC-1 forms for co-ops in Albany, so to be safe, your Title Company should perform UCC searches in both Albany and the county where the property is located, just to be sure. And copies of all UCC-1's, especially those filed wrongly in Albany, should be provided to any bank being paid off in order that that bank may file a UCC-3.

PRESCRIPTIVE RIGHTS VS. ADVERSE POSSESSION

Prescriptive rights, such as an easement by prescription, are a product of the English common law. That means they have been handed down for generation after generation until finally they have become a tradition – almost "second nature" to our system of land governance. An easement by prescription is an easement not granted in writing by deed but inferred from the situation by a court, nor is easement by prescription the same thing as an easement by necessity, which means that there is no other way to the public street other than over the easement *by necessity*.

Adverse possession, on the other hand, was created by a New York State statute, like a mechanics liens or a lis pendens was created. The court requirements are always tougher for a statute than for a common law rule, and courts will never give you the benefit of the doubt as to the specific statutory requirements of a mechanics lien or of an adverse possession claim, whereas they will do so on behalf of a "common law right" regarding property -- like an easement by prescription.

Yet the courts have nevertheless decided that the same fundamental ideas and rules that apply to adverse possession also apply to a prescriptive easement according to the New York State Real Property Actions and Proceedings Law. *Di Leo v. Pecksto Holding Corp.*, 300 N.Y. 505 (1952). For this reason there is an even further distinction between a prescriptive easement and a mere "license" or "permissive use." For Example, where a neighbor *allows* another neighbor to travel across his property, no prescriptive easement is created because the use is *merely permissive*. For a prescriptive easement to be created, the use must be "hostile," as it must be in an adverse possession case. The second neighbor's use becomes hostile once the second neighbor gives the owner of the servient estate notice of his assertion of a hostile right. This should be done in writing in order to preserve a paper record or trail, or it can be done by taking photographs of something showing the hostile claim. In any case, the assertion of a prescriptive easement will depend upon the evidence presented at trial.

If you represent a client with a claim of a prescriptive easement, in no way should you enter into negotiations with the other side regarding permission to use the easement way, since such negotiations have been held to be an admission of the other side's title to the easement way. *Di Leo.* In any case, you should consult RPAPL's requirements as to adverse possession, applying them to the easement by prescription.