

Understanding New York State's Land Acquisition Process

Land Trust Alliance Lunch and Learn

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Title Issues that Impede Closing on Property Proposed for State Acquisition

1. **Seller must convey marketable title, not insurable title.** All title objections must be cleared of record, they cannot be insured over. Marketable title can be defined by reviewing the first three covenants in a full warranty deed:

- the covenant of "seizen" which means that the grantor, at the time of execution and delivery of the conveyance, is lawfully seized of a good, absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the premises thereby conveyed, with the tenants, hereditaments and appurtenances thereto belonging, and has good right, full power and lawful authority to grant and convey the same by the said conveyance; and

- the covenant of "Quiet Enjoyment" which means that the grantee, his/her/their heirs, successors and assigns, shall and may, at all times thereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the grantor, his heirs, successors or assigns, or any person or persons lawfully claiming or to claim the same; and

- the covenant of "freedom from encumbrances," means that such premises are free, clear, discharged and unencumbered of and from all former and other gifts, grants, titles, charges, estates, judgments, taxes, assessments, liens and encumbrances of what nature or kind soever.

For example, a land title may be subject to the lien of an open mortgage, which a title insurer might be willing to insure against foreclosure and mortgage lien. The Office of the Attorney General requires the mortgage to be discharged and title cleared of record.

2. **There must be a chain of fee title of sufficient length and quality to support Seller's claim to ownership.** The Office of Attorney General will examine title records to identify the "Root" title deed. The "Root" title deed has the following attributes:

- it is a warranty deed
- It conveys indefeasible title, that is fee simple absolute
- It conveys an undivided interest in fee, that is, 100%
- The grantee of the root title deed must be an apparent *good faith purchaser for value* within the meaning of Section 290 of the Real Property Law
- It has been of record and unchallenged for a period of time, of sufficient length, so as to provide a reasonable assurance that title is sound. For property in most counties, that length

of time is at least 40 years. For land within the state forest preserve, that length of time is 60 years.

The Office of the Attorney General is unlikely to assume title is good in any of the following as "Root" title: a last will and testament, a referee's deed, a tax deed, a quit claim deed, or a deed in which the grantor and grantee appear related by blood or marriage.

3. An unbroken chain of title from the root title deed to the Seller must support the Seller's claim to ownership. Any breaks in the record chain of title must be resolved to the satisfaction of the Office of the Attorney General before it will be approved and closing can proceed.

4. A title free of liens and encumbrances that render title unmarketable must be delivered to the State. The Office of Attorney General will not approve any title clouded by an unresolved lien or encumbrance that, in the opinion of the Office, renders title unmarketable.

Below are a few of the most common:

- Real property taxes. They must be paid in full before closing will be scheduled. The state will adjust for taxes after closing.
- Mortgages. Must be paid in full prior to closing and discharged of record.
- Judgments. Any unexpired judgment must be discharged of record.
- Notice of Pendency. Must be terminated before closing title.
- Leases. Must be terminated and tenants must vacate prior to closing.
- Covenants and restrictions. If a covenant and restriction in the Seller's deed will impair the State's programmatic use of the premises, or where there appears to be an unresolved violation of a covenant and restriction in the Seller's deed, the Office of Attorney General will not approve title.
- Physical encroachments. The Office of Attorney General will not approve title where the premises are subject to existing physical encroachments unless those encroachments are insignificant. Physical encroachments include things such as buildings or fences owned by an adjoining landowner constructed wholly or partially on the premises under examination. The Seller will be required to resolve significant encroachments before closing title with the State. Typically, encroachments must be resolved either by removing the encroaching structure, or by carving out the area subject to the encroachment from the legal description in the Seller's deed.

5. Titles subject to a recent tax foreclosure or mortgage foreclosure are likely to be unacceptable to the Office of Attorney General. Generally, the Office of Attorney General will not approve a state acquisition of title that arose out of an *in rem* tax foreclosure within the past 10 years. The closing may only proceed if the interests of the base fee owner at the time of the tax foreclosure are extinguished through an action to quiet title pursuant to Article 15 of the Real Property Actions and Proceedings Law. Title based upon a recent deed from a

mortgage foreclosure action also raises concerns and may require an Article 15 quiet title action before proceeding to closing.

6. Title to land parcels without legal access will not be approved by the Office of the Attorney General. The premises under title examination must have either frontage on a public road, or, if there is no frontage, be benefited by a legal right of way to a public road. The only exception to this policy is in regards to the State's acquisition of an easement for public fishing.