

Surveyors & Title

by

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Surveyors, as a general rule, stay clear of providing title opinions — rightfully so. Nevertheless, reasonably competent surveying services must rely on some fundamental knowledge of title opinions. A surveyor that is ignorant about the basis for a title opinion could fail to provide relevant information necessary for an attorney to provide a competent title opinion.

A deed is merely evidence of title – not proof of title

One of the fundamental concepts forming the need for an informed title opinion from a competent source is the fact that **the deed is merely evidence of title, not proof of title**. Every surveyor has heard a client or neighbor claiming: “I’ve got title to that property” or “I own that property.” The statement is usually made as they waive their deed about in a manner meant to forestall any further questioning of their right to claim to some boundary. However, unless the surveyor is in one of the few states permitting registered title and the surveyor is actually dealing with a registered title in that state, a deed is merely evidence of title – NOT proof of title. This is true despite the fact the deed is a warranty deed. If a deed were proof of ownership there would be no need for a title search or title insurance.

Since the deed is only evidence of title and not proof, the prudent buyer will obtain a title opinion. A title opinion is founded on two parts: 1) facts and information about the title and 2) an analysis of the facts and information culminating in an informed opinion. The facts are usually portrayed in the form of an abstract of prior records. The abstract is a compilation of information found in deeds, mortgages, releases, and other recorded documents. In the past, an abstract of title was prepared (or an existing abstract added to) for almost every property conveyed. The completed abstract was examined by a knowledgeable attorney who provided an opinion on the title.

A title opinion will opine that the title is one of the following (not always succinctly): clear,

marketable, defensible, clouded (unmarketable), or there is merely color of title.

Clear title is title that has no defects. It is title unencumbered by liens, encroachments, or other impediments that would cut short or curtail the complete and reasonable enjoyment of the entire property. In modern practice, title that is encumbered by zoning restrictions is still considered clear unless the current use of the property is in violation of the zoning.

Marketable title is title that a reasonably prudent and intelligent person, informed of the facts and their legal ramifications, would be willing to accept in the ordinary course of business. Marketable title is generally free from serious encumbrances, material defects, reasonable doubts, and well-founded concerns about its validity. It is title that can be sold or used as security at fair market value and allows the owner quiet and peaceful enjoyment of the property. It is title that does not expose an owner to probable litigation (regardless of the probability that the litigation outcome will be in the owner's favor). Circumstances that have been found to make title unmarketable include breaks or gaps in the chain of title, encroachments that violate zoning, title founded on adverse possession (but not litigated to quiet title), less than a complete property interest, impairment of legal access, and boundary disputes or potential boundary problems.

Defensible title is title that has potential problems that will not likely cause the loss of title but would cause the prudent buyer to pay less than the market value. Defensible title looks to the probability of the outcome of litigation involving a title defect. Marketable title looks to the probable and reasonable likelihood of litigation exposure.

Clouded or unmarketable title is title that is defective in some aspect sufficient to cause reasonable concern that the buyer will not receive all the benefits they have bargained for. While the buyer may be willing to purchase the property, the price will be less than the fair market value of the property had the title to the property existed without the deficiency.

Color of title is the appearance of title. It is title that is all form without substance. The person has a deed but the deed conveyed no title.

Interjected into the title determination and acceptability of the title opinion is title insurance. Title can be insured against loss, damage, etc., from a multitude of sources, based on the standards of the insurer and the risk of loss. From a practical viewpoint, all title is insurable if the premiums are made large enough or the list of exceptions extensive enough. Consequently, the term “insurable title” has some wide possibilities.

Title insurance can, in some cases, insure the marketability of the title. This has given some people room to argue that title insurance should be able to substitute for marketable title when the title insurance company is ready and willing to provide insurance that will affirmatively cover one or more conditions that may affect the marketability. However, marketable title and insurable title are not the same as they differ by discrimination criterion. Marketable title uses a reasonably intelligent or prudent person criterion based on future prospects for the property. Furthermore, marketable title requires a person accept or reject the title as it stands at the time of conveyance. The buyer or lender cannot qualify or condition their acceptance of the title.

On the other hand, insurable title uses a reasonably prudent investor or insurer criterion. The investor or insurer analyzes the risks, costs, profit margins, and the likelihood of successfully defending the title. The insurer can change the risk and amount of their indemnity by adding exceptions to the policy or using affirmative insurance. Consequently, they have the power to set conditions or stipulations for insuring the title that the buyer or lender does not have when determining if the title is marketable.

Consider the buyer who intends to build a house and a large garage where that person can indulge in his hobby of working on old cars. The buyer chooses a lot that is just sufficient in size to build the house and large garage. The seller is an elderly widow who is motivated to sell and plans to move in with her daughter. As a result, the buyer gets a great deal, purchasing the lot and residence for \$120,000. In the purchase and sales agreement, the buyer agreed to accept insurable title rather than marketable title. As a consequence an abbreviated title examination occurs and an owner’s title policy is issued. After purchasing the lot, the buyer discovers the width of the lot is five feet less than described in the deed. As a result of the deficiency in the width, the large garage cannot be built. The buyer files a

claim with the title insurer. The title insurer contacts the neighbor to determine the cost and availability of purchasing a five-foot strip. The neighbor demands \$3,000. Next the title insurer obtains an appraisal on the lot with five feet less in width. The appraisal values the lot at \$119,000. The title insurer sends the buyer a check for \$1,000. The buyer has been financially compensated for the loss sustained by the reduced width. The title insurer is obligated to financially compensate for the loss sustained, not satisfy the needs or aspirations of the buyer.

Title opinions have deficiencies. Both the abstract and opinion are only as good as the knowledge, training, and experience of the person preparing the abstract and tendering the opinion. Even a quality title opinion has dozens of caveats (usually unstated). Matters outside the record, defects arising from government regulations (e.g., zoning), encumbrances appearing in the record beyond the period encompassed in the title search, or conditions at the site, to name a few, are often not factored into a title opinion.

Without words to the contrary in a purchase and sales agreement for property, the buyer or lender has the right to expect marketable title from the seller or borrower where a warranty deed is sought and promised.

Every purchaser of land has a right to demand a title which shall put him in all reasonable security and which shall protect him from anxiety, lest annoying, if not successful suits be brought against him, and probably take from him or his representatives, land upon which money was invested. He should have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value. *Hebb v. Severson*, 32 Wash.2d 159, 167-168, 201 P.2d 156, 159 (1948) quoting *Dobbs v. Norcross*, 24 N.J.Eq. 327

Consequently, surveying services involved in the conveyance of property should focus on those aspects of surveying services that could affect the marketability of the title. Discovery of disputed boundaries and encroachments are important. Even remote chances of boundary litigation will make the title unmarketable. All problems that have a potential detraction on the marketability of the property should be reported. Here is where a surveyor who presumes adverse possession or prescription has occurred and fails to report this deficiency in title does the client a disservice. Without a judgment supporting

title gained by adverse possession or prescription, the title is not marketable.¹

Sometimes when a surveyor has discovered a problem and reported the problem, the surveyor has been pressured by a closing agent to obscure or remove the written disclosure from the survey work products in order that the buyer may be led to believe the buyer will be receiving marketable title.

The surveyor should make every effort to provide complete and accurate information for persons to arrive at a competent decision on the status of the title to be conveyed. This caution does always require every problem that exists be discovered or emphasized in a report.

Consider a 500-acre farm that has a one-foot strip of encroachment along an 80-foot section of the farm's boundary. This title is not a "clear title" because of the possibility of adverse possession of the one-foot strip. Nevertheless, the relatively small encroachment along such a small portion of the boundary to a large property will have no effect on the marketability of the title. A reasonable buyer, informed of the encroachment would still be willing to pay the fair market value for the 500-acre farm with or without the one-foot encroachment. Yet, the same one-foot encroachment on a one-quarter acre urban lot would make the title unmarketable. The reasonable buyer would either refuse to purchase the lot or demand a reduction in the purchase price upon discovery of the one-foot encroachment along a boundary of the one-quarter acre lot.

The concepts that have been outlined in this article point to the basis for many of the requirements set forth in the ALTA/ACSM Land Title Survey. As petty as many of the ALTA/ACSM Land Title requirements may appear to the surveyor, an insurer has judged the presence or, in some cases, the absence of certain features or conditions to have an affect on the marketability of the title or pose an unacceptable risk for the title insurer.

In the day-to-day practice of the surveyor, knowledge of the concepts presented in this

¹ See *Ivalis v. Harding*, 496 N.W.2d 690, 173 Wis.2d 751 (1993) where the court ultimately determined the boundaries located by the surveyor were in fact the actual boundaries of the property based on adverse possession but nevertheless held the

article can help the surveyor in deciding what needs to be reported or can be safely ignored. A title analysis when contemplating the detail involved in surveying services and reporting problems discovered comes down to the answer to two simple questions: 1) Would the reasonable buyer be concerned with the problem? 2) Will the condition or problem affect the value of the property? (Both questions are interrelated.)

With these two questions in mind, the surveyor would not likely be faulted for failing to report that the neighbor's driveway cuts across the corner of the client's property (by 0.8 feet). On the other hand, the failure of the surveyor to report the neighbor's well head is five feet within the client's property would likely have adverse consequences on the marketability of the client's title and could result in liability to the surveyor. (Although the surface area of both encroachments is approximately the same.)

Hopefully the concepts explained in this article will help surveyors understand title concerns and how surveying services relate to and may impact on the title.

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surveyor liable for the cost of the litigation in order to perfect the title to the property by adverse possession.