



## title insurance

# Take action to protect your property rights: A few simple procedures to follow

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### Take Action to Protect Your Property Rights

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When acquiring a retail shopping plaza, the prospective owner is typically represented by experienced counsel who advises him to obtain title insurance from a reputable insurer. Shopping center owners

who are often excellent at protecting ownership rights at the time of acquisition and leasing, sometimes fail to follow a few simple procedures to assure the continued protection of their ownership rights after closing.

Owners sometimes ask, "Why would I need to take action protect my property rights?" "Doesn't my title insurance policy to protect me against litigation and encroachments upon my property rights?" The answer is yes, it sure does. The insured property owner is covered for the full amount of any lien, value of property lost and all attorney fees incurred litigating the claim up to the policy amount. The catch is that the title policy covers only title defects which existed on the policy issue

date. When an encroachment occurs after the policy date, the plaza owner is not protected.

Most retail plazas are managed by a skilled superintendent who is excellent at general maintenance but is not trained to examine the property on a regular basis to identify potential issues. Should a plaza owner fail to take action to protect its property rights, neighboring owners may actually acquire title to part of the plaza property or acquire the right to travel across plaza property. Protesters of every stripe may acquire the right to hand out materials on plaza property.

Property Rights Risk #1 - Adverse Possession

In New York, we have a new (2008) law of adverse possession

which can be found in the NY RPAPL Sections 501, 512 and 522. In New York, the legal elements of adverse possession are now:

- a) Open, notorious and hostile possession
- b) Exclusive and continuous possession
- c) Under a reasonable claim of right
- d) Acts which constitute notice or protection by a substantial enclosure
- e) For a period of ten years or more

On the face of it, this new law provides property owners with added protection in that it no longer permits neighboring land owners to establish the elements of adverse possession through minor (de-minimus) fence

and non structural encroachments including lawn mowing and landscaping. Unfortunately, New York's new law is somewhat vague on the subject of exactly what constitutes a minor fence encroachment and what might constitute a substantial enclosure which would give rise to a claim of adverse possession. Title Insurance companies have not changed their underwriting requirements regarding encroachments. Until case law precedent is established, a plaza owner must not allow any mislocated fences or other encroachments of over 1 foot. Inattention to acts of adverse possession can bring severe consequences including costly litigation, loss of property, loss of certificate of occupancy based on changes in floor area/parking ratios and acceleration of mortgages based on transfer of property. The most common occurrences of adverse possession are in the wooded or grassy "buffer" areas of a shopping plaza. Encroaching walls and fences in parking areas are also common

To guard against claims of adverse possession, the premises should be visited by its owner or a trained representative not less than once per year. The person evaluating the site must be supplied with a current survey which references all improvements, fences and easements at the site. A list of all covenants and restrictions affecting the property should be annexed to the survey. The owner must "walk the property line" to make sure that there are no encroachments. The property must be thoroughly observed to make sure that there have been no changes since the date of the survey and that none of the recorded restrictions have been violated. Any new improvements should be added to the survey by a licensed surveyor to ensure that they do not encroach. If the owner is unable to locate his property line by simple observation, a licensed surveyor should stake the property corners and run lines between the stakes. If an owner observes an encroachment, he should immediately consult his attorney to obtain advice regarding the most appropriate actions to secure removal of said encroachment. Procedures will typically involve the sending of notices to the encroaching owner followed by an action for ejectment. In some cases, immediate "self-help" removal of the encroachment may also be appropriate.

*To be continued in the February 10, 2009 Shopping Centers edition of the New York Real Estate Journal.*

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