

NJ N2K Hour: Title Oddities

Air Rights, Mobile Homes,
and Adverse Possession

Presented By: Roberto Ditaranto, Esq. – NJ
Underwriting

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What are Air Rights?

- We are all familiar with acquiring a fee simple interest or leasehold interest when it comes to the surface of the ground or mineral rights beneath the surface.
- However, the space above the ground can also be acquired through a separate estate or interest such as an easement.
- The space above the ground is commonly referred to as “air rights.”
- N.J.S.A. 46:3-19 et seq. sets forth the creation of estates, rights and interests in areas above the surface of the ground and whether or not contiguous thereto, may be validly created in persons or corporations other than the owner or owners of the land below such areas, and shall be deemed to be estates, rights and interests in lands.
- This type of estate can be conveyed or mortgaged just like any other real property interest, and a leasehold interest can also be created for air rights.

Fee Simple or Leasehold Interest

- Air rights mean the estate, title, interest and rights in the open space or vertical area above ground level.
- Any ownership of land includes the ownership of air rights, which are subject to reasonable aircraft interference.
- The air or airspace itself is not real property, but it is real property in the context of being described in three dimensions with reference to a specific parcel of land.
- Such air rights are alienable, and they can be sold, purchased, mortgaged, leased, or otherwise encumbered, subject to easements of light and air.
- An example of a possible alienation of air rights are a condominium unit, which involves the ownership of a certain specified layer of air space.
- Another example would be an aviation easement, which is the right granted to aircraft, generally when approaching an airport, to fly at a stipulated altitude over certain specific land.

Methods of Conveyance

- The following are common methods of conveying air rights:
- **A lease of air rights above a fixed plane, together with the air and ground necessary for the foundations of and access to the airspace structure.**
- **An aerial easement which is generally used for the construction of elevated highways.**
- **Purchase of the fee of ground and air space with reservation of easement by the grantor.**
- **Purchase of the fee of air space plus easement for support and access.**
- **Purchase of the fee of air space and purchase of fee of support parcels.**
- **Purchase of the fee in condominiums.**

Easement Rights

- NJ courts have long recognized the common law doctrine of easements for light and air, which are often created by express grant or implication.
- The ancient rule of common law, giving a landowner exclusive rights in the column of air above his head, was based upon a maxim of Roman law, ***cujus est solum ejus usque ad coelum***.
- In England, at common law, an easement for light and air could be acquired by an adverse user.
- However, that doctrine has never been recognized in NJ. *Hayden v. Dutcher*, 31 N.J. Eq. 217, 222-23 (Ch. 1879).

Easement Rights (cont.)

- NJ case law has established that proof of the creation of an easement by implication or necessity first requires a separation of the title; second, that before the separation takes place, the use, which gives rise to the easement, shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained. *Kelly v. Dunning*, 39 N.J. Eq. 482 (Ch. 1885), rev'd 43 N.J. Eq. 62 (Ch. 1887), mod. and aff'd 46 N.J. Eq. 605 (E. A. 1890), aff'd 47 N.J. Eq. 324 (E. A. 1890); *Engel v. Siderides*, 112 N.J. Eq. 431 , 433 (E. A. 1933).
- In the case of *Blumberg v. Weiss*, 126 N.J. Eq. 616 (Ch. 1940), rev'd 129 N.J. Eq. 34 (E. A. 1941), the court ruled further on the *Engel* doctrine that such easements by implication are a development of the common law when land was sparsely settled, and community life comparatively simple; and it is now obsolete since it was not adapted to modern conditions in this country, and that comprehensive planning and zoning are now the means by which the common need in this behalf is served.

Solar Panels

- N.J.S.A. 46:3-24 et seq. is known as the Solar Easements Act and establishes the creation of solar easements.
- This statute provides for the creation of solar easements to ensure that proper sunlight is available to those who operate solar-energy systems.
- The term "solar energy device" is not specifically defined by the law and thus could conceivably include all manner of systems or equipment that utilize solar energy.
- Typically, most solar panels are installed on the roofs of residential or commercial buildings.
- Solar easements must be created in writing and shall be subject to the same conveyancing and instrument recording requirements as other easements.
- The existence of an easement, license, lease, or UCC financing statement securing the energy company's interest in the solar panels can typically be found in the land records.

Solar Panels (cont.)

- Without access to direct sunlight, over a sufficiently large "access pattern" and for a sufficient length of time (daytime hours), no solar energy system can function effectively.
- Solar easements are negative easements as to air space and are created by developers or by private agreements between adjoining owners for the benefit of property upon which there has been or is being constructed a solar collector of heat energy from the sun.
- For residential properties, the solar company typically owns the solar panels, which is secured by the recording of a UCC financing statement.
- The solar company will regard the solar panels as non-fixture personal property, and the homeowner will agree to purchase the electricity which is generated by the system.
- If the solar panels require maintenance, then the solar company will also record an access easement which benefits the solar company to conduct the maintenance.

Severance Transactions

- N.J.S.A. 46:3-19 et seq. establishes that estates, rights and interests in areas above the surface of the ground, whether or not contiguous thereto, may be validly created in persons or corporations other than the owner or owners of the land below such areas, and shall be deemed to be estates, rights and interests in lands.
- A severance of the building from the soil can create a fee simple interest in the cube of air that is bounded by the ceiling, walls, and floor of the building.
- However, even though it is possible to sever the building from the soil, there is still a question as to whether the building may be considered personalty in such a circumstance.
- Therefore, severance transactions should be reviewed on a case-by-case basis regarding insurability.
- Severance of the ownership of the "land" from the ownership of the "improvements" can be done through a "sale-leaseback" transaction.

Severance Transactions (cont.)

- A "sale-leaseback" is a general real estate transaction in which a sale of real property is executed simultaneously with a lease of the same property back to the original owner, so that the possession of the seller remains undisturbed although its status changes from that of a "fee owner" to that of a "lessee."
- Title to a "severed" building or improvement should not be insured unless the owner of the building or improvement also has an estate in the ground on which the buildings are situated.
- Also, title to buildings are only insurable if the owner has an estate in the ground sufficient to render the building a fixture.
- A variation of a sale-leaseback transaction may involve the sale of a parcel of property with the seller reserving title to the building on the land.
- The purchaser of the land then leases it back to the owner of the building.

Severance Transactions (cont.)

- Severance transactions are usually done for tax purposes, but they can create difficulties with insuring title, especially regarding any rights to the building.
- Since these transactions involve difficult questions concerning the effectiveness of the attempted severance, the character of the improvements, and the nature of the estates created, any examination involving such severance must be carefully reviewed and requires underwriter approval.
- A leasehold estate or any estate sufficient to render the building a fixture will generally be sufficient to insure.
- However, a separate estate of "buildings and improvements" cannot be insured unless the Company simultaneously insures an estate or interest in the land in the same party and in the same policy.

Underwriting Practices

- When insuring a severance transaction, any easements for access and for physical support must be included in the conveyance documents.
- The building must also be transferred by deed, not by a bill of sale, and must be taxed as real estate.
- Bill of sales are usually recorded for personalty, so if the building is being treated as personalty, it is not insurable.
- The description of the air space must be as specific as possible.
- Drafting a legal description requires the expertise of an engineer.
- An air space description is always extremely difficult and complicated to draft, and only local experts should attempt such a task.
- Any air space description must also encompass the tracts describing the easements of support and access.

Mobile Homes in NJ

- A mobile home is typically described as a prefabricated structure that is built in a factory and placed on a permanently attached chassis which can be transported to a particular site or location.
- These housing units are not considered to be insurable interests in realty until they are permanently affixed to the ground or soil.
- N.J.S.A. 46:8C-2 et seq. regulates the operation and sale of mobile home parks.
- N.J.S.A. 46:8C-14 sets forth the recording requirements for a mobile home conveyance, and states that no deed evidencing transfer of title to a private residential leasehold community land shall be recorded in the office of any county recording officer unless, accompanying the application to transfer the title is an affidavit annexed thereto in which the owner of the private residential leasehold community certifies compliance with the Mobile Home Protection Act.

Mobile Homes in NJ (cont.)

- In some instances, the determination as to whether a house or dwelling unit located on the land constitutes real property can be difficult.
- Houses or dwelling units can now be built completely on the land (on-site construction), or they can be built wholly in a different location (out-site construction.)
- Occasionally, the two methods of construction can be combined, which is described as component housing.
- While those houses or dwelling units that are totally built on the land present no problem in qualifying as real property, any housing unit which is completely built outside the land can present some serious difficulties to have them divested of their condition of personal property and have them qualified as part of the land.

Insuring a Mobile Home

- In addition to complying with specific provisions established by state law, you must verify the following matters prior to insuring that a mobile home or any other kind of manufactured housing unit is an integral part of the land:
- The same party owns both the land and the mobile home or similar housing unit (see the title registration, bill of sale, or certificate of sale).
- The party must manifest intent to dedicate the mobile home or similar housing unit for the exclusive purpose of a permanently located dwelling area.
- Mobile home or similar housing unit is taxed in conjunction with the land as a single parcel of real property.

Insuring a Mobile Home (cont.)

- The completion of permanent affixation of the mobile home or similar housing unit to land, which will entail: (1) removal of the axles and wheels; (2) setting on a permanent foundation; (3) connection to sewer system and public utilities; and (4) compliance with any other statutory requirements.
- Cancellation of any lien, security interest, or encumbrance that is shown in the title registration, or bill of sale, or certificate of sale.
- Check with the NJ DMV that the motor vehicle title certificate is cancelled.
- Any liens listed on the motor vehicle title certificate (if any) must be paid and discharged.
- Complete a U.C.C. filing search, that meets statutory requirements.
- Compliance of applicable U.C.C. state law that covers an out-of-state purchase of a mobile home or similar housing unit.

Insuring a Mobile Home (cont.)

- Check the tax records to confirm that the land is listed as improved by the municipal tax assessor.
- Title to both the soil and the housing unit must be vested in the same person or entity.
- When insuring a mortgage for a mobile home, the following clause must be included in the mortgage:
- **The real property described in this mortgage includes as an improvement to the land set forth herein a (mobile home) (description of any other similar housing unit) permanently affixed to such land.**

Mobile Home Parks

- Proof of compliance with N.J.S.A. 46:8C-10 et seq. is required when insuring a mobile home park.
- Also, pursuant to N.J.S.A. 46:8C-14, an affidavit must also be attached to the Deed for recording.
- The following requirement must also be added to Schedule B-I of the title commitment.

Proof is required to the Company's satisfaction of compliance with N.J.S.A. 46:8C-10 et seq. (the Mobile Home Protection Act), including proper disposition of the tenants' rights of first refusal, or exemption therefrom.

- When insuring a purchase of a mobile home park, if the existing use of the property is not being changed, the sale may be exempt from the notice requirements of N.J.S.A. 46:8C-10 and the tenants' right of first refusal, but from a title standpoint, the buyer and seller must confirm in writing that the use is not being changed.

Exceptions to Title

- The following exceptions must be included in Schedule B-II of the title commitment if the mobile home or similar housing unit is affected by these matters.
- **Any security interest, lien or, encumbrance that affects mobile home or similar unit and appears in the title registration, bill of sale, or certificate of sale.**
- **Any security interest revealed by the U.C.C. filing search.**
- **Any personal property or motor vehicle taxes assessed against the mobile unit or similar housing units.**
- If we are insuring real property, but a mobile home on the property does not qualify as part of the land, then the following exception must be raised.
- **The Land shall not be deemed to include any house trailer, mobile home or mobile dwelling.**

ALTA 7 Endorsement

- In NJ, the ALTA 7-06 (NJR 5-93) endorsement may be issued when insuring a mobile home or manufactured housing unit.
- The endorsement provides that the term "Land" includes the manufactured housing unit located on the land described in Schedule A at Date of Policy.
- The same underwriting requirements that were previously noted must be followed when issuing this endorsement for a mobile home transaction.
- This endorsement is also available for both the Owner's and Loan policy in NJ.
- Please note that the ALTA 7.1 and ALTA 7.2 endorsements are not available in NJ.



Adverse Possession

Adverse Possession

- Adverse Possession is typically defined as the exclusive, continuous, uninterrupted, visible and notorious entry onto, and possession of, lands of another for the required legal period of time.
- It can also be a method of acquiring title to property through the possession of the property for a statutory period of time (which varies from state to state) either under color of title or by a mere naked claim.
- This kind of possession of real estate must be inconsistent with the rights of the true (usually record) owner of the property.
- Possession under a permissive use such as an easement or lease, fails to prove a title claim by adverse possession.
- For the adverse possession to ripen into ownership, certain conditions pertaining to the type and quality of possession must be fulfilled.

Adverse Possession (cont.)

- Possession must be:
- **Actual**
- **Hostile**
- **Open and Notorious**
- **Exclusive**
- **Continuous for the statutory period of time**
- Title by adverse possession usually rests upon a state statute of limitation, which limits the time during which a true owner can bring an action to recover the land from the adverse possessor.
- However, title cannot be insured through the use of adverse possession, so extreme care must be exercised when determining if a person or entity is actually in title.

NJ Statutory Scheme

- NJ has a few statutes which pertain to adverse possession.
- The first is N.J.S.A. 2A:14-6 which states that every person having any right or title of entry into real estate shall make such entry within 20 years next after the accrual of such right or title of entry or be barred therefrom thereafter.
- N.J.S.A. 2A:14-7 further states that every action at law for real estate shall be commenced within 20 years next after the right or title thereto, or cause of such action shall have accrued.
- N.J.S.A. 2A:14-30 establishes that 30 years' possession of real estate, except woodlands or uncultivated tracts, and 60 years' possession of woodlands or uncultivated tracts however commenced or continued vest a full and complete right and title in every actual possessor or occupier of such real estate, woodlands or uncultivated tracts, and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person whatsoever for the recovery of any such real estate, woodlands or uncultivated tracts.

Case Law

- Due to some conflict between the relevant statutes for adverse possession, there has been some debate as to whether the 20 year or 30/60 year timeframe applies as to a claim for adverse possession.
- In the case of *J & M Land Co. v. First Union Nat'l Bank*, 166 N.J. 493 (2001), the Supreme Court of NJ rejected J & M's argument that it had the option of relying upon the shorter twenty-year limitations period provided by N.J.S.A. 2A:14-6 and -7 to acquire title, and held that J & M's claim is governed by the sixty-year limitations period for adverse claims to "uncultivated tracts."
- Another issue is that the decision in this case was applied prospectively, so any titles that were derived from previously entered judgments that were based upon a 20-year adverse possession period were not affected by the outcome of this decision.

Insuring Title

- No title insurance policy should be issued where the basis of ownership is adverse possession unless there is a final non-appealable court judgment or decree vesting title to the land in the proposed insured.
- Before insuring title, you must verify the statutory basis of the action and the validity of the judicial proceedings (jurisdiction, necessary party-defendants, service, any term or provision of the decree or judgment, no right to appeal, and no right to review).
- Prior to the issuance of any title insurance policy, a certified copy of the judgment or decree entered in the suit must be filed in the appropriate real estate recording office.

Insuring Title (cont.)

- Certain exception can be permitted in particular where the ownership to be insured is based upon a record chain of title for a period of time substantially longer than the required period for adverse possession and the adverse possession is intended for the purpose of overcoming an ancient "break" or defect in the chain of title.
- However, please consult your underwriter for further guidance and approval if such a circumstance exists with the chain of title.
- The relevant statute of limitations can be a useful tool to eliminate title defects on the property, but it should not be construed as a means to insure title without further review and analysis.

Boundary by Acquiescence

- Boundary by acquiescence is a legal concept or doctrine that may be utilized by a property owner to help determine the boundary line between two properties by considering the past conduct of neighboring property owners in order to determine if a boundary line may be legally implied from the neighboring owners past agreements, actions, or inaction.
- The boundary line is a legal line to a property that allows the property owner to determine what property belongs to them both physically and as stated on their deed documents.
- However, with boundary by acquiescence, one neighbor may be entitled to additional property, while another neighboring property owner will lose some of their property depending on where the boundary line is established.

Boundary Line Agreements

- One option to resolve a boundary line dispute is to draft and record a boundary line agreement between two adjoining property owners.
- A survey can be very useful in determining the appropriate boundary line of a specific property.
- In many instances, a property owner may erect a fence or improvement that encroaches onto the adjoining property.
- If such an encroachment is disclosed on a survey, the parties should consult with their counsel to have a boundary line agreement recorded permitting the encroachment.
- Otherwise, the boundary by acquiescence doctrine might become a factor if there is no written agreement in place.

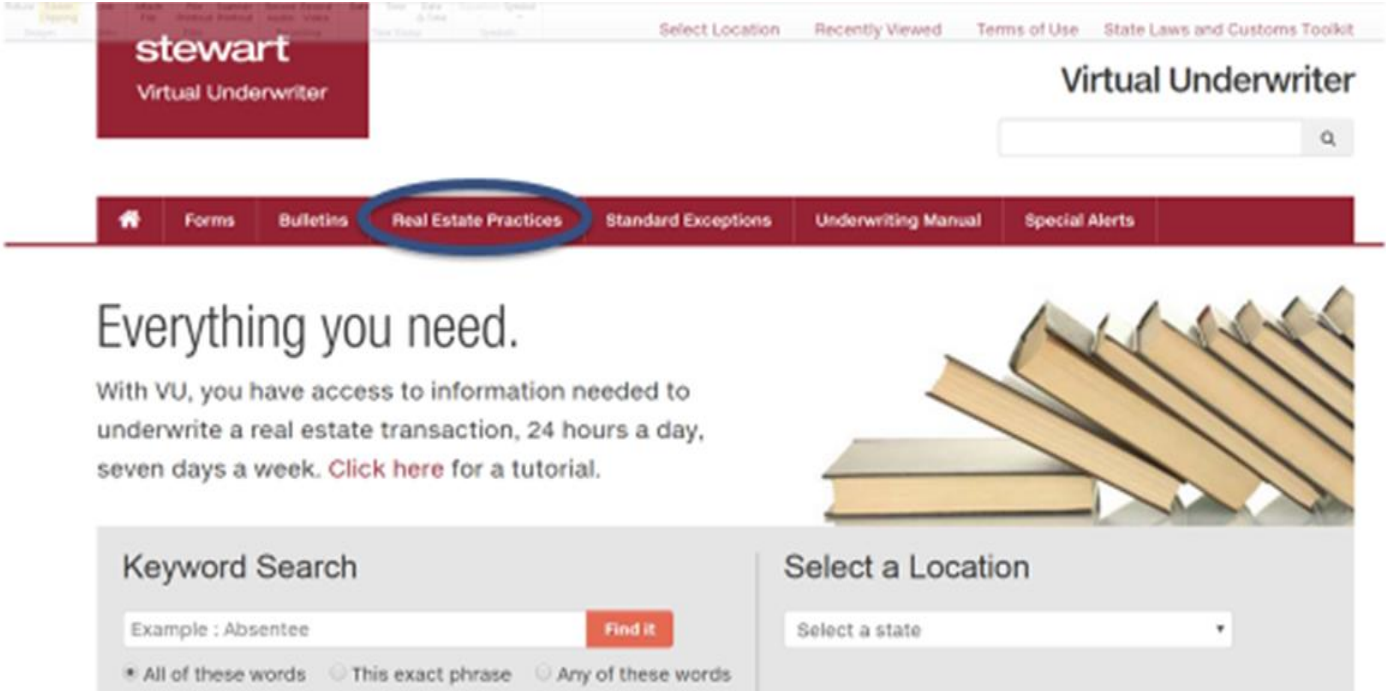
Prescriptive Easements

- Easements can be acquired by adverse possession under a claim of right for the statutory prescriptive period.
- The use must be hostile in its inception in order to satisfy a claim by adverse possession.
- Prescriptive easements have the same elements as adverse possession.
- However, a prescriptive easement only establishes a legal right to use another person's land for a specific purpose as opposed to acquiring title.
- An adverse user may acquire a right to a limited use of the property for a statutory period of time, but they may only acquire a nonexclusive right to use another's land for a specific purpose, such as ingress and egress.

Conclusion and Wrap-Up

- Air rights are alienable, and they can be sold, purchased, mortgaged, leased, or otherwise encumbered, subject to easements of light and air.
- N.J.S.A. 46:8C-14 or the Mobile Home Protection Act is the statutory scheme in NJ for the recording of conveyances involving mobile homes or mobile home parks.
- For mobile home purchases, the ALTA 7-06 endorsement may also be issued in NJ for both Owner's and Loan policies.
- No title insurance policy should be issued where the basis of ownership is adverse possession unless there is a final non-appealable court judgment or decree vesting title to the land in the proposed insured.

www.VUwriter.com



The screenshot shows the Stewart Virtual Underwriter website. At the top left is the Stewart logo with the text "Virtual Underwriter". To the right, there are navigation links: "Select Location", "Recently Viewed", "Terms of Use", and "State Laws and Customs Toolkit". Below this is a search bar with a magnifying glass icon. A dark red navigation bar contains several menu items: a home icon, "Forms", "Bulletins", "Real Estate Practices" (circled in blue), "Standard Exceptions", "Underwriting Manual", and "Special Alerts". The main content area features the heading "Everything you need." followed by the text: "With VU, you have access to information needed to underwrite a real estate transaction, 24 hours a day, seven days a week. [Click here](#) for a tutorial." To the right of this text is an image of several books stacked. Below the text are two search boxes: "Keyword Search" with a text input field containing "Example : Absentee" and a "Find it" button, and "Select a Location" with a dropdown menu labeled "Select a state". At the bottom of the keyword search box are three radio button options: "All of these words" (selected), "This exact phrase", and "Any of these words".

NJUWing@stewart.com



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March N2K HOUR

Remote Online Notarization

Tuesday

March 11th

11:00AM