Standards of Title Examination

Adopted
By The

Bar Association
Of
Erie County
New York

Revised Through December 31, 2006

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HISTORY

Standards of Title Examination were first adopted by the Directors of the Erie County Association in 1949. They were amended in 1955, 1960, 1968, 1978, 1983, 1991, 1993, 1996, 2001, 2003, 2004 and 2005.

PREAMBLE

The Revised Standards of Title Examination have been adopted to serve as a guide in examination of titles and to create a uniformity of practice among attorneys concerning certain title questions.

The purpose of the examination of title and of objections, if any, shall be to secure for the examiner's client a title which is in fact marketable and which is shown by the record to be marketable. Objections and requirements should be made only when the irregularities or defects reasonably can be expected to expose the purchaser or lender to the hazard of adverse claims or litigation.

The examiner, by way of a test, may ask after examining the title, what defects and irregularities the examiner had discovered by examination, and as to each irregularity or defect, who, if anyone, can take advantage of it as against the purported owner, and to what end.

AFFIDAVIT DEFINED

For purposes of these Standards, the word "Affidavit" is defined as an original sworn statement, in recordable form, made on personal knowledge of the facts set forth therein (not made "on information and belief," "to the best of affiant's knowledge," or "as far as affiant knows").

The Affidavit shall include a statement that affiant knows that his or her statements will be relied upon by the parties to a specified transaction and all those who subsequently acquire an interest in the property.

If a public record is incorporated by reference as the source of affiant's knowledge, the Affidavit shall contain a statement that it is a true and complete copy of all material parts of that record.

SURVEY DEFINED

For purposes of these Standards, the word "Survey" or "Survey Map" shall be defined as a drawing prepared under the supervision of a licensed land surveyor registered in the State of New York, which depicts the mathematical and physical features of a subject parcel of land described and certified in a currently

dated search or abstract of title, which relation to map lines, deeds of record, and/or other pertinent reference data and is based upon an actual field survey performed under the supervision of the licensed land surveyor, and which survey or survey map conforms to the current land survey standards adopted by the Bar Association of Erie County.

"Survey" or "Survey Map" shall exclude both a "tape map"or filed Map Cover which does not show improvements.

1 (A). EXAMINATION OF TITLE - EVIDENCE AND BEGINNING POINT:

Examination should be based upon an abstract or search guaranteed by a title insurance corporation licensed under Article 64 of the Insurance Law which begins with a source of title generally accepted as original or from a deed to an apparent owner recorded prior to 1920.

1 (B). EXAMINATION OF TITLE - EFFECT OF BREAKS:

Examination of the records should begin with a Warranty Deed, Executor's Deed, Trustee's Deed or Deed given in a court action or proceeding recorded at least sixty (60) years prior to the date of examination.

Title should not be rejected because of a break or hiatus in the chain which occurred prior to the recording of such Deed; however, the foretitle should be checked from the abstract or search for mortgages, easements, rights-of-way conditions, reservations, or reverter provisions which might continue in existence.

2. ABSTRACT CONTAINING FULL DESCRIPTION:

Objection shall not be made on the sole basis that a set-out in the abstract of title contains a full description in lieu of the abstracting company's certificate that same is premises or premises and more; the examiner shall make an independent examination of the description and determine its effect upon the description as contained in the set-out upon title of the premises which are the subject of the examination in accordance with the Preamble of the Standards.

3. SEARCH CERTIFICATES:

Objection shall not be made on the sole basis of an abstract which includes within its certificate, as a minimum:

A. A search of the indices to records, papers, files, and documents in the office of the Clerk of the County of Erie;

B. A search of the indices to wills and administration of decedent's estates in the office of the Surrogate of the County of Erie;

C. A search of the indices to bankrupts in the office of the Clerk of the United States Bankruptcy Court for the Western District of New York against the names of the parties appearing in the within abstract during the periods in which it appears there was a record interest in said premises under said names for twenty (20) years last past;

D. A search of the Judgment Dockets for ten (10) years last past;

E. A search of the Dockets of federal liens for ten (10) years and thirty (30) days last past against the names of the parties in such ownership in the office of the Clerk of the County of Erie;

F. A search of the index to Inactive Hazardous Waste Disposal Sites as provided for in Section 316-b of New York Real Property Law since July 1, 1993;

G. A guarantee that said Certificate is not limited by time; and

H. A guarantee that the setouts are correct statements as to the records and indices.

NOTE: This Standard is not intended to address the issue of solvency or sufficiency of liability insurance of the abstract company.

4. PAGE NOTATIONS:

Objection shall not be made on the sole basis that either the computer generated Endorsement or the first page of the actual document is referenced within a recorded document.

NOTE: When searching the computerized system at the Erie County Clerk's Office, it is recommended that the person working the inquiry, when using the "Refer to" search function, search back one page and forward one page when no assignments and/or discharges are found using the initial page number.

5. PROOF OF CORPORATE EXISTENCE:

Objection shall not be made on the sole basis of corporate existence where proof of corporate existence, prior to the transaction in question, is filed and/or recorded in the county in which the property is located.

The following will also be accepted as proof of incorporation:

A. A Certified copy of the Certificate of Incorporation;

B. A Certificate of Good Standing from the state of incorporation; or

C. An Affidavit made on knowledge, by one of the attorneys for the parties to a transaction, that an examination of the "Corporation and Business Entity Database" of the New York State Department of State reveals that (e.g.) xxx INC. made an initial filing with the Department of State on mm/dd/yy as a (e.g.) Domestic Business Corporation.

A copy of the Department of State search shall be incorporated by reference in the Affidavit.

6. CORPORATE NAME VARIATIONS:

Objection shall not be made on the sole basis that the name of a corporation appearing in the chain of title prior to the examination date is substantially the same as the name appearing in the source of proof of incorporation.

7 A. CORPORATE DEEDS DATED PRIOR TO INCORPORATION

Objection shall not be made on the sole basis of an original deed dated and recorded before the Certificate of Incorporation of the grantee is filed in the office of the Secretary of State where a confirmatory deed from the grantor to the corporation is subsequently recorded.

7 B. CORPORATE DEEDS TO RELATED GRANTEES:

Objection shall not be made on the sole basis of a deed from a corporation to a grantee who appears from the records to be an officer, director, stockholder of, or obviously related to, the grantor corporation or to a corporate grantee having interlocking directors and stockholders, if ten (10) years have elapsed since the recording of such deed, or if more than nominal consideration is stated in the deed.

8. PROOF OF HEIRSHIP:

Objection shall not be made on the sole basis of devolution of title by descent, in the absence of information suggesting otherwise, where proof is supplied in the form of:

A. Recitals in conveyances which comply with Section 341 of the Real Property Actions and Proceedings Law; or

B. A verified petition for probate or administration filed in Surrogate's Court made on personal knowledge by a person who under ordinary circumstances would be presumed to know the heirs of decedent, provided permanent letters testamentary or of administration have been issued; or

C. An affidavit or verified pleading made on personal knowledge provided that the same was filed or recorded more than ten (10) years prior to examination.

9. SURVIVORSHIP - JOINT TENANCY AND TENANCY BY THE ENTIRETY:

Objection shall not be made on the sole basis of the death of one joint tenant or tenant by the entirety and survivorship of a remaining joint tenant or tenant by the entirety where proof of death of the former is supplied in the form of:

A. Any of the material set forth in the preceding section in respect to devolution of title by descent; or

B. The recording or filing in the appropriate County Office of a Death Certificate which is properly certified, together with an Affidavit made by someone having knowledge of the facts, connecting the decedent for whom the Death Certificate was obtained and the person concerned in the chain of title.

NOTE: The Affidavit should reference a Liber and Page and/or Surrogate's File number, thereby connecting the decedent for whom the Death Certificate was obtained and the person concerned in the chain of title.

10. LEGACIES:

Objection shall not be made on the sole basis that payment of a legacy charged either expressly or impliedly upon real property is not shown to have been made, where more than ten (10) years have elapsed since the death of decedent.

11. NOMINAL CONSIDERATION WITHIN A DEED:

Objection shall not be made on the sole basis that the recital of consideration in a deed states a nominal consideration, provided:

A. Ten (10) years have elapsed since the recording of such deed; or

B. Subsequent to the recording of such deed, the grantor fiduciary's account has been judicially settled; or

C. The Deed confirms title already acquired by will or operation of law.

12. JUDGMENTS OR LIENS OF RECORD AGAINST ESTATE BENEFICIARY OR DISTRIBUTEE:

Objection shall not be made on the sole basis of a judgment or tax lien of record against a residuary beneficiary or distributee of the estate containing real property not specifically devised when such property is conveyed by the fiduciary for full consideration and no act to enforce the judgment or lien has been commenced or a lis pendens filed.

13. TRUST DEEDS:

Objection shall not be made on the sole basis of a deed made by a party in the chain of title who was identified as a trustee provided such deed by the trustee as grantor has been of record more than 10 years.

14. UNITED STATES AND NEW YORK ESTATE TAX, DISPOSITION BY AFFIDAVIT:

Objection shall not be made on the sole basis of the actual or potential existence of a lien arising out of the non-payment of any United States Estate Tax or New York Estate Tax on property forming a part of a decedent's gross estate, if an Affidavit is recorded, made on actual knowledge, stating:

A. The identity of the party making the Affidavit and the relationship of the party to the estate;

B. The decedent's name, date of death and ownership interest in property;

C. No Federal Estate Tax Return was filed or is expected to be filed. Decedent's estate (as defined by the Internal Revenue Code, including those provisions of the Code which require a lowering of the threshold for filing an estate return because of pre-death gifts) was not large enough to require that a Federal Estate Tax Return be filed; and

D. No New York Estate Tax Return was filed or is expected to be filed. Decedent's estate as defined by the New York Tax Law, including those provisions which require a lowering of the threshold for filing an estate return because of pre-death gifts, did not exceed $_____.

(Depending on the date of death, the appropriate limit to be inserted in the above allegation is:

$108,333 if prior to 6/10/1994
$115,000 if prior to 10/1/1998
$300,000 if prior to 02/1/2000
$675,000 if prior to 01/1/2002
$1,000,000 if after 12/31/2001)

E. A diligent search has been made for all estate assets.

15 A. UNITED STATES AND NEW YORK ESTATE TAX, ALTERNATE DISPOSITION:

(The Federal Estate Tax ceases to be a lien 10 years after the date of death. The New York State Estate Tax ceases to be a lien 15 years after the date of death.)

Objection shall not be made on the sole basis of the actual or possible existence of a lien arising out of the non-payment of any New York or United States Estate Tax on real property forming a part of a decedent's gross estate where the decedent's interest in the real property during his or her lifetime was that of a joint tenant, life tenant or tenant by the entirety and the transfer in question is one being made by the surviving joint tenant, remainderman or tenant by the entirety (or their successors) provided the instrument of conveyance contains a recital that the conveyance is made for a full and adequate consideration, or other satisfactory proof is available to show that the transfer is to a bona fide purchaser for value and for fair consideration as set forth in Section 6324 of the Internal Revenue Code and Section 975(e) of the New York Tax Law.

[The provisions above would usually be satisfied by the appearance of a purchase money third party mortgage in the chain of title or by adding the following recitation to the deed:

"This conveyance is made for a full and adequate consideration to a bona fide purchaser for value and for fair consideration as set forth in §6324 of the Internal Revenue Code and §975(e) of the New York Tax Law."]

15 B. TENANCIES BY THE ENTIRETY - NEW YORK ESTATE TAX ONLY

For Decedents Dying on or after May 26, 1990; objection shall not be made on the sole basis of the potential existence of a lien arising out of the non-payment of any New York Estate Tax on real property forming a part of a decedent's gross estate where the decedent's interest in the real property during his or her lifetime was that of a tenant by the entirety as forth in §975(e) of the New York Tax Law.

16. UNDISCHARGED MORTGAGES OF RECORD:

MERGER WITH THE FEE

A. Objection shall not be made on the sole basis of an undischarged mortgage which has apparently merged with the fee if followed by a deed executed by the owner in whom the title interest merged, or the owner's representatives, successors, or assigns.

60 YEARS AFTER RECORDING

B. Objection shall not be made on the sole basis that a mortgage recorded more than 60 years last past from the date of examination has not been discharged or the premises released therefrom of record.

12 YEARS OF NONPAYMENT AFTER MATURITY

C. Objection shall not be made on the sole basis that a mortgage having a maturity date more than 12 years prior to the date of examination remains undischarged or the premises unreleased of record provided an Affidavit is provided, in recordable form, containing a statement that no payment of any sums has been made pursuant to the terms of said mortgage, nor has any demand for such payment been made, for 12 years prior to the date of examination.

MATURITY UNKNOWN, 40 YEARS AFTER RECORDING, 12 YEARS NONPAYMENT

D. Objection shall not be made on the sole basis that a mortgage which does not contain a maturity date and which is recorded more than 40 years prior to the date of examination remains undischarged or the premises unreleased, of record, provided an Affidavit is provided, in recordable form containing a statement that no payment of any sums has been made pursuant to the terms of said mortgage, nor has any demand for such payment been made, for 12 years prior to the date of examination.

INSTITUTIONAL MORTGAGES PAID IN FULL

E. Objection shall not be made on the sole basis that a mortgage, which appears from the record to be held by a banking institution, remains undischarged or the premises unreleased of record provided an Affidavit is provided, in recordable form, containing a statement that no payment of any sums has been made pursuant to the terms of said mortgage, nor has any demand for such payment been made, for eight years prior to the date of examination.

This standard shall not apply to mortgages without fixed amortization; that is "credit line mortgages" and "reverse mortgages" granted pursuant to Real Property Law §281, §280, and §280-a.

The Affidavit shall also establish with documentary evidence that payment in full was transmitted to the lender eight years prior to the date of examination. The documentary evidence shall take the form of a copy of a statement from the lender establishing a final balance and a copy of the letter transmitting that balance to the lender.

17. DISCHARGE OF MORTGAGE - CLERICAL ERRORS:

Objection shall not be made on the sole basis of clerical errors or omissions of a clerical nature in a discharge or satisfaction of or release from the lien of a mortgage, where the instrument of discharge or release is recorded more than 2 years prior to the examination date, provided the mortgage is reasonably identified.

18. UNRECORDED MORTGAGE:

Objection shall not be made on the sole basis of a reference to an unrecorded mortgage in a deed of record for more than 20 years provided proof is supplied that for 12 years or more last past no principal or interest has been paid or demanded and no knowledge was had by the owner during that period of said unrecorded mortgage. However, where such recital is contained in the last deed of record, basis for an objection exists and the above is not applicable.

19. BUILDING LOAN AGREEMENT and/or NOTICE OF LENDING:

Objection shall not be made on the sole basis of a Building Loan Agreement or Notice of Lending of record, provided that a Satisfaction, Discharge, or Release of premises for the underlying mortgage has been recorded.

20. DISCHARGE OF ENCUMBRANCES:

Objection shall not be made on the sole basis of a recorded or filed encumbrance, the purpose of which is to correct a prior encumbrance, and a release or satisfaction is subsequently recorded which releases or satisfies either the original encumbrance or the correcting document but does not specifically release or satisfy the other; such a release or satisfaction is sufficient to release or satisfy both.

21. OPEN LIS PENDENS:

Objection shall not be made on the sole basis of a Lis Pendens in a foreclosure action where no Judgment of Foreclosure has been entered that affects the mortgage if the mortgage has been satisfied of record. (See Article 65 of the New York Civil Practice Law and Rules.)

22. TRUST MORTGAGES OF NIAGARA MOHAWK POWER CORPORATION:

Objection shall not be made on the sole basis of certain trust mortgages of Niagara Mohawk Power Corporation where it is shown that the premises in question is not subject to said mortgages by either of the following:

A. A specific covenant, in addition to a covenant against the grantor, in a deed by Niagara Mohawk Power Corporation, stating that the premises being conveyed is not subject to said trust mortgage and showing the reasons therefor; or

B. An affidavit by an officer of said Corporation who is familiar with the records of the Corporation showing that the premises is not subject to said mortgages and showing the reasons therefor.

23. BANKRUPTCIES:

Objection shall not be made to a deed made by a grantor whose name is the same or similar to the name of a bankrupt in a proceeding filed more than 20 years prior to examination of title.. (Note: This standard is intended to cover and include the present owner.)

24. FORECLOSURE IN REM:

Objection shall not be made on the sole basis that examination of title for fee purposes discloses devolution through a foreclosure of tax lien by action in

rem provided that more than ten (10) years have elapsed since the recording of the Referee's Deed in the in rem action.

Insurance of marketability of title may properly be required when less than ten (10) years have expired or examination discloses matters which would cast doubt on the validity of the proceedings, for example: improper assessment, actual payment of the taxes, open bankruptcy proceedings, prior filed or docketed liens or unavailability of records.

25. DOWER:

Objection shall not be made on the sole basis of dower or nonattachment thereof where a period of thirty-three (33) years or more have elapsed since the transfer of the interest in the property from the male concerned.

26. MENTALLY ILL PROCEEDINGS:

Objection shall not be made on the sole basis of mentally ill proceedings against a person in the chain of title.

NOTE: This refers to mentally ill proceedings only and not to incompetency, guardianship, or other such proceedings which do in fact reflect on the capacity of a person to convey or otherwise deal with the real property.

27. NAME VARIATIONS:

Objection shall not be made on the sole basis of minor variation in spelling or difference of initials between the names of successive grantees or grantors out of title more than five (5) years prior to the date of examination. All common abbreviations of names, even if part of the chain of title less than five (5) years, are acceptable as sufficiently establishing the identity of the parties. (NOTE: This Standard is intended to apply to individuals as well as other legal entities.)

28. ACKNOWLEDGMENTS:

Objection shall not be made on the sole basis of any defect or invalidity in acknowledgments if the acknowledged document has been recorded or filed for ten (10) years or if there is a validating act applicable thereto.

29. DELIVER - DELAY IN RECORDING A DEED:

Objection shall not be made on the sole basis that there is a time lapse between the date of the deed and the date of its recording where the deed is made by a natural person, provided nothing adversely affecting the title during such period prior to recording is found, and

A. The deed has been on recorded more than ten (10) years; or

B. The interval between the date of the deed and the recording date was less than ninety (90) days.

30. DEED TRANSFER TAX:

Objection shall not be made on the sole basis of apparent lack of proof of payment of deed transfer tax upon the recorded document itself.

31. ACTIONS - LOST PAPERS:

Objections shall not be made on the sole basis of title derived through an action or proceeding conducted more than ten (10) years prior to the examination date because of inability to find certain pleadings, orders, decrees, or judgments on file in the office of the Clerk of the County of Erie or the court in which the action or proceeding was conducted, provided:

A. That the clerk's register or other index shows that the missing pleading, order, decree or judgment was filed in said office; or

B. That the conveyance given pursuant to the judgment or final decree in such action or proceeding recites the making or granting of the missing pleading, order, decree, or judgment.

32. INSTRUMENTS MADE BY APPARENT STRANGERS TO THE CHAIN OF TITLE:

Objection shall not be made on the sole basis of an instrument executed by a person who has no apparent interest to the record chain of title at the time such instrument is recorded.

33. VIOLATION OF BUILDING RESTRICTIONS:

Objection shall not be made on the sole basis of an existing violation of building restrictions provided an affidavit to which is attached a recent survey

map made by a licensed surveyor showing the location of the violating structure is supplied, which affidavit establishes the pre-existence of the violation sufficiently to bring the issue of the existence of the violation within the provisions of Section 2001 of the Real Property Actions and Proceedings Law.

34. HEDGE, FENCE, DRIVEWAY AND STEP ENCROACHMENTS:

Objection shall not be made on the sole basis of minor discrepancies of the following as shown upon a survey map:

A. Variations between property lines and retaining walls, fences, and/or hedge rows:

B. Projection or encroachment of trees, shrubs, and/or bushes:

C. Projection or encroachment of eaves:

D. Encroachment by the driveway on the premises onto adjoining lands; or

E. Encroachment of steps of improvements on premises into a public street or right of way.

35. OIL AND GAS LEASES:

Objection shall not be made on the sole basis of an oil and gas lease of record where an Affidavit is supplied reasonably establishing there are no enforceable rights under such lease.

NOTE: See Section 15-304 of New York General Obligation Law.

For purposes of complying with said statute, the “no search vs. lessee” note at the oil and gas set-out must be removed by the abstract company after having made a search for the current ownership of said lease.

36. EASEMENTS OR RIGHTS OF WAY:

Objection shall not be made on the sole basis of an Easement or Right of Way, provided the location of the Easement or Right of Way does not interfere with the improvements erected on the premises, or, in the case of vacant land, any reasonable improvements to be erected on premises, which Easement or Right of Way is:

A. Locatable by the terms of the document of record; or

B. Not locatable by the terms of the document of record, but is described as a pole line over, through and/or upon all of the lands which the grantor owns; or

C. Not locatable by the terms of the document of record, but the extent of the rights exercised are shown on a survey map of the subject premises or defined in a document by the easement holder.

37. The material covered by title standard 37 is currently being revised by the Real Estate Committee of the Erie County Bar Association.

38. LLC TAX STATUS AND PROOF OF ENTITY EXISTENCE - LIMITED LIABILITY COMPANY, NOT-FOR-PROFIT CORPORATION, AND LIMITED PARTNERSHIP:

A. Objection shall not be made on the sole basis of Limited Liability Company, Not-For-Profit Corporation, Limited Partnership, and Limited Liability Partnership existence when its existence prior to the transaction in question is established by proof recorded in the county in which the property is located.

The following will be accepted as proof of a Limited Liability Company's, Not-For-Profit Corporation's, Limited Partnership's, or Limited Liability Partnership's existence:

(1) A recorded Certified copy of the entity's initial filing receipt issued by the New York Department of State, or

(2) An Affidavit made on knowledge, by one of the attorneys for the parties to a transaction, that an examination of the "Corporation and Business Entity Database" of the New York State Department of State reveals that (e.g., xxx LLC,) made an initial filing with the Department of State on mm/dd/yy as a (e.g., Domestic Limited Liability Company.).

A copy of the Department of State search shall be incorporated by reference in the Affidavit.

B. Absent indication to the contrary, an Affidavit, made on knowledge by the attorney for a Limited Liability Company that the Limited Liability Company has not elected to be taxed as a corporation may be accepted without further proof of the nonexistence of New York franchise tax liens.