



Take action to protect your prop. rights: A few procedures

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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

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.

Property Rights Risk #2

The more elusive cousin of adverse possession is the prescriptive easement. Prescriptive easements occur when all of the elements of adverse possession are met except that the property must merely be used on a continual basis and not actually possessed.

A retail plaza owner should carefully observe the flow of foot and vehicle traffic over his property. If automobiles and/or pedestrians cross the retail plaza property to access a neighboring property or street, a right to perpetually cross the plaza may vest in the neighboring land owner if all the other elements of adverse possession are satisfied. Plaza owners should erect fencing between their property and neighboring properties or if it is desirable to eliminate barriers between properties, enter into negotiated and recorded reciprocal easement agreements with neighboring property owners. Any gates which permit access to the plaza from a neighboring property should be eliminated or secured in compliance with applicable building and fire codes. Any walkways or roadways used by the general public should have the terms of their use recorded in a right of way declaration. To preserve legal control over future use of these roadways and walkways, it may be desirable to close them off to the general public for one day per year and document their closure.

Perhaps the most egregious examples of prescriptive easements involve easements obtained through the installation of underground piping. Prescriptive easement rights may vest even if the encroaching pipes are not visible on the surface. If a neighboring land owner runs a below ground drain pipe across your plaza property, that neighbor may acquire a perpetual prescriptive easement to cross the property even though you, the plaza owner, were unable to observe the pipe. For this reason, owners must be aware of any digging on the plaza site.

Property Rights Risk #3

If your plaza is viewed as a "meeting place" or sits near the center of town, activist groups may seek to turn your private shopping plaza into a public forum. In N.Y., retail plaza owners may prohibit campaigning, petitioning and distribution of leaflets on private property so long as the owner has a blanket policy against these activities. (SHAD Alliance v. Smith Haven Mall (66 NY2d 496)). The power to exclude protesters and leafleters is an important right held by N.Y. retail plaza owners.

Plaza owners can lose their protection under N.Y. law by opening their doors to any non-commercial speech activity. The lesson for plaza owners is that if you allow a local PTA to hand out fliers advocating passage of the local school budget, you may be required to permit an anti-war protest by a national organization of peace activists. In order to maintain control over use of your property by members of the general public, N.Y. retail plaza owners should post a blanket prohibition against campaigning, petitioning and distribution of leaflets on their property. Security personnel should be reminded to strictly enforce this policy.

I have found that after closing, even the largest retail plaza owner/operators do not pay sufficient attention to protecting their valuable property rights. Large plaza operators located out of state are often less likely to pay careful attention. The best property rights protection advice for retail plaza owners is to follow the simple procedures outlined above, remain alert and diligent regarding conditions at your site and promptly consult your attorney whenever any issues arise.

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