

# **Dealing With Land Under Water; Standard Title Insurance Objections About Insured Property Addressed**

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THIS ARTICLE will examine standard title insurance objections that are raised when the insured property adjoins tidal waters, considered from the perspective of both the purchaser and the lender.

The standard title objections raised in cases where land adjoins tidal waters consist of the following:

(1) No title will be insured to any land lying below the present or any former high water line of [insert name of body of water].

(2) Except riparian rights and easements of others over [insert name of body of water], but policy does not insure any riparian rights or easements in favor of the owner of the premises herein.

(3) Except the right of the United States Government to change and alter the harbor, bulkhead or pierhead lines adjacent to said premises, to establish harbor, bulkhead or pierhead lines different from the present lines, and to take land now or formerly under water without compensation.

(4) Except the rights of the United States Government, the State of New York and local municipalities or any of their departments or agencies to regulate and control the use of the piers, bulkheads, land under water and land adjacent thereto.

These objections will be considered in order.

## **First Objection**

This title objection deals with two issues: (1) land lying below the present high water line; and/or (2) land lying below any former high water line.

Even if the described and insured property consists of dry land, it could be subject to this

exception if located below the former high water line and subsequently filled in, in the absence of an appropriate grant of land under water. However, if there had been a proper unconditional grant of land under water from the State of New York<sup>1</sup> or, for that matter, from the English Crown before July 9, 1776<sup>2</sup> and the land were filled in, the objection would be applicable only to land below the present high water line.

In such cases, title companies would still except coverage for land below the present high water line even if the grant covered that area. The exception does not imply that there is bad title to land lying below the present high water line, but only that the company does not perceive it to be a prudent business risk to insure such titles.

Many grants of land under water had conditions attached to them such as the necessity of filling in the property within five years of the grant. This type of grant was referred to as a conditional grant and was generally commercial in nature. Thus if a grant were made in 1860, the property would have to have been filled in by 1865 in order for the condition to have been met or the title would revert to the state.

Section 78 of the Public Lands Law requires that the Commissioner of General Services by Jan. 10 of each year make a list of all grants which had conditions attached to them. The State Attorney General is then obligated by the same section to bring a proceeding to annul any grants which have not complied with the condition. However, when dealing with a conditional grant, it is possible to procure a certificate of compliance from the Office of General Services of the State of New York, if the grant has in fact been complied with.

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<sup>1</sup> All lands vested in the Crown of Great Britain before July 9, 1776 were vested in the people of the State of New York. Public Lands Law §4.

<sup>2</sup> Grants made by the Crown before July 9, 1776 generally could not be impaired. *Romart Properties Inc. v. City of New York*, 67 Misc.2d 162, aff'd, 40 AD2d 987 (1971).

Prudent lender's or buyer's counsel will seek to have this objection modified with one of the following modifications:

(a) Company insures, however, that no part of the premises shown on the survey [name of surveyor] is now or was formerly under water.

(b) Company insures, however, that the existing structure as shown on survey of [name of surveyor] dated [date of survey] does not lie on premises which were formerly under water.

(c) Company insures, however, that portion of the property described in Schedule A which is above the former high water line as shown on the survey of [insert name of surveyor] dated [insert date].

Whether or not a particular title company will permit any of the foregoing modifications will depend on how the company perceives the risk. If it is extremely unlikely that the change will ever take place, one is more likely to procure the coverage. It will also be much easier to procure the coverage on a lender's policy as opposed to an owner's policy.

The attorney may, however, be faced with a situation in which part of the land has evidently been filled in but it is difficult to determine where the former high water line was located. In this case it is essential to work with the surveyor and title company to attempt to determine the position of the former high water line. It will sometimes require great effort on the part of the surveyor to determine where the former high water line existed.

The surveyor may have to review numerous maps, atlases and old deeds to make such a determination. If local records are insufficient for this purpose, the surveyor may have to access the water grant index maps maintained by the Office of General Services in Albany. Most of these maps were prepared between 1821 and 1850 and are generally accepted by the Office of General Services for the purpose of establishing the former high water line. In addition, the Office of General Services

may use previous grants of land under water made in the area to establish the former high water line.

### **Second Objection**

Under the doctrine of jus publicum, the public has the right to traverse along the shoreline in the area between the mean low water line and mean high water line.<sup>3</sup> Thus it has been held that private clubs cannot prevent people from walking along the shoreline in front of their club. In addition, the public has the right to reasonable access to the shoreline. This title objection is usually not modified in the title report or policy.

### **Third Objection**

This is a very serious title objection, the effect of which is that the U.S. Government has the right to change and alter the harbor, bulkhead or pierhead lines adjacent to the premises and to establish new lines and to acquire land now or formerly under water without compensation. If such right is exercised, any mortgage on the property would be worthless. In essence, if a building is constructed on land which is filled-in land under water, the government can acquire that land without the payment of any compensation. The government's right to do so has been upheld by the U.S. Supreme Court.

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It is therefore incumbent upon attorneys to try to modify the above exception with one of the following modifications:

(a) Company insures, however, that no part of the premises shown on the survey of [name of

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<sup>3</sup> *Barnes v. Midland R.T. Co.*, 193 NY 378 (1908).

<sup>4</sup> *State of Wisconsin v. State of Illinois*, 278 U.S. 367, 49 S.Ct. 163 (1929); *Louisville Bridge Co. v. United States*, 242 U.S. 409, 37 S.Ct. 158 (1917).

surveyor], dated [insert date], is now, or was formerly, under water.

(b) Company insures, however, that the existing structure as shown on survey of [name of surveyor], dated [date of survey], does not lie on premises which were formerly under water.

(c) Company insures, however, that portion of the property described in Schedule A which is above the former high water line as shown on the survey of [insert name of surveyor], dated [insert date].

However, title companies may be willing to provide the foregoing modifications only in mortgage policies and not for purposes of fee insurance. It is therefore essential to negotiate with the title company.

#### **Fourth Objection**

Inasmuch as this objection deals with the regulatory powers of the federal, state and municipal governments and not with the issue of title, this objection is frequently accepted as set forth above due to the fact that title companies cannot insure over the police power.

#### **Procuring A Grant of Land Underwater**

A grant of land under water from the State of New York can be granted to an adjoining upland owner by applying to the Commissioner of General Services of the State of New York for a grant pursuant to §75 and 77 of the Public Lands Law of the State of New York. The Commissioner of General Services may establish a fee for the grant in accordance with the provisions of §75 of the Public Lands Law.

Procuring a grant of land from the state, however, will not provide protection from the rights of the federal government to change the harbor lines. Only the title company insuring over that right as

a business risk can protect against that if the land was once under water.

## Conclusion

When handling transactions adjoining tidal waters, it is essential that the underwater objections to title be carefully analyzed and modified in order to properly protect the client, whether lender or borrower.