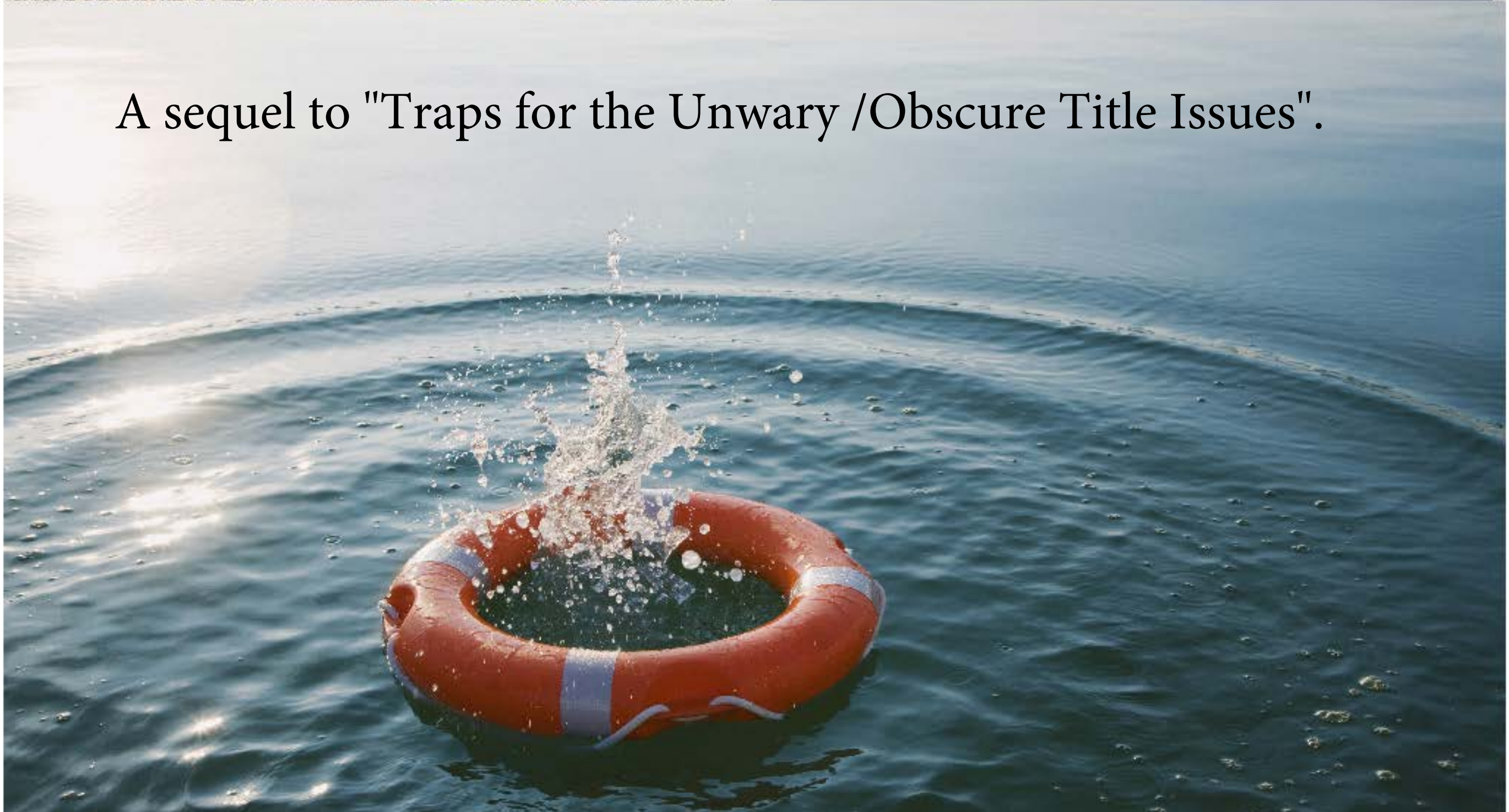




" GOOD CATCH: HOOKING
THE ELUSIVE TITLE FLAW
BEFORE IT BECOMES A
MAYDAY CALL"

A sequel to "Traps for the Unwary /Obscure Title Issues".



Introduction



Today's episode: "***Good Catch: Hooking the Elusive Title Flaw before it becomes a Mayday Call***" will include a quick review of a few prior Obscure Title issues, as well as a study of more subtle and sometimes puzzling red flag issues that may be overlooked during the researching and reporting of the official records at the Registry of Deeds and Probate Court.

Largest Categories of Title Claims *

1. Fraud / Vacant Land / Impersonation of Seller
2. Legal Descriptions / Legal Access Rights
3. Prior Liens
4. Legal Opinion / Closing Errors
5. Affirmative Coverage / Home Owners Policy

* ~Notes taken from Stewart Title National Claims Update webinar on May 25, 2023.

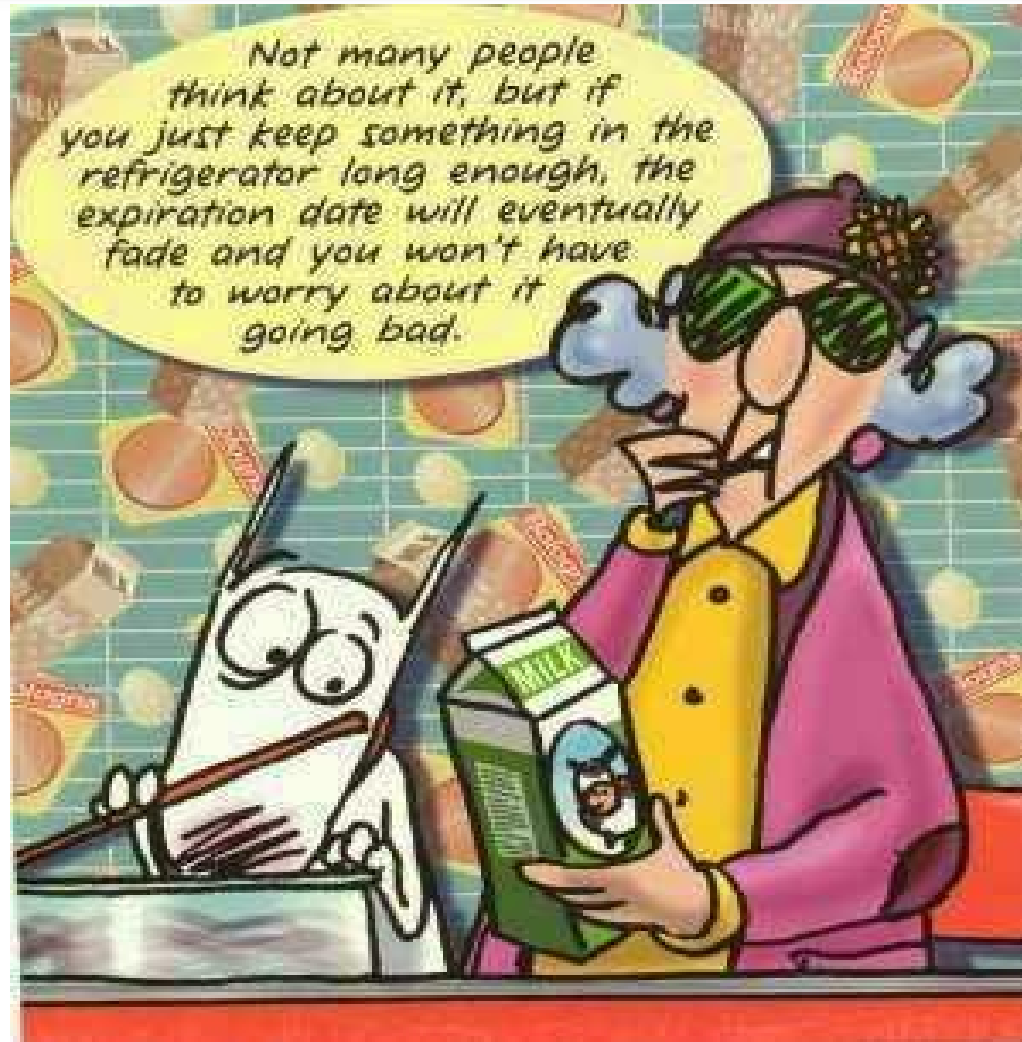
~ In consultation with:

Atty. Rachel Shyken from Fidelity National Financial Title Insurance Co.

Atty. Elizabeth Young from Westcor Land Title Insurance Co., Inc.

Atty. Katherine Prifti from First American Title

Executions, Liens, Bankruptcy OH MY!



Excerpts From:

"Title Traps for the Unwary and Claims Avoidance"

as originally presented by Atty. Katherine Prifti, Underwriting Counsel at First American Title
(and worth repeating)

1. Divorce and Title Issues: Equitable Mortgages set forth in Separation Agreement / Assumption payment has been made. Resumption of Maiden Name allowed? (Reg. Land?)
2. Probate Proceedings: Minors /Guardianship / Conservator / License to Sell?
3. Life Estates and Taxes: Failing to obtain a release or affidavit regarding estate taxes when the holder of a RESERVED life estate dies.
4. Bankruptcy Traps: During the pendency of a bankruptcy the "expiration" clock is tolled. The clock doesn't start again until the bankruptcy is **closed**. (re: **Attachments, Executions, DOR & IRS, Child Support Liens**)
5. Liens: IRS & DOR expire 10 years from date of assessment unless brought forward. Beware Registered Land. Child Support Liens *will attach to after acquired property and* Expire 6 or 10 years from the date of recording or perfection, whichever is later. Perfection begins when the obligor acquires property. Beware of Bankruptcy.
6. Acknowledgment: Massachusetts Statutory Form Required.

REBA Form No. 36
Notary Public – Acknowledgment

M.G.L. CHAPTER 222 §15(b)

COMMONWEALTH OF MASSACHUSETTS

_____, ss.

On this _____ day of _____, 20____, before me, the undersigned notary public, _____ (name of document signer) personally appeared, proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

(as partner for _____, a partnership)

(as _____ for _____, a corporation or other entity)

(as attorney in fact for _____, the principal)

(as _____ for _____, (a) (the) _____)

as the voluntary act of the (partnership)(corporation or other entity)(principal)(_____).

[affix or imprint official seal]

_____, Notary Public

My commission expires:

Alternative acceptable Forms of Acknowledgment found at M.G.L. Chapter 183 Appendix, Forms 13-15

(13) Acknowledgment of Individual acting in his Own Right.

(Caption specifying the state and place where the acknowledgment is taken)

On this _____ day of _____, 20____, before me personally appeared A B (or A B and C D), to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

(Signature and title of officer taking acknowledgment. Seal, if required.)

(14) Acknowledgment of Individual acting by Attorney.

(Caption specifying the state and place where the acknowledgment is taken)

On this _____ day of _____, 20____, before me personally appeared A B, to me known to be the person who executed the foregoing instrument in behalf of C D, and acknowledged that he executed the same as the free act and deed of said C D

(Signature and title of officer taking acknowledgment. Seal, if required.)

REBA Form No.36



REBA Form No. 37
Notary Public – Jurat

COMMONWEALTH OF MASSACHUSETTS

_____, ss.

On this _____ day of _____, 20____, before me, the undersigned notary public, _____ (name of document signer) personally appeared, proved to me through satisfactory evidence of identification, which were _____, to be the person who signed the preceding or attached document in my presence and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of (his)(her) knowledge and belief.

[affix or imprint official seal]

_____, Notary Public
My commission expires:

Notes and Comments

1. *This form appears in M.G.L. c.222, §15(c), preceded by the following: “A notary shall use a jurat certificate in substantially the following form in notarizing a signature or mark on an affidavit or other sworn or affirmed written declaration.”*

2. *An affidavit, certificate or other document signed “under the penalties of perjury” is effective without any notarization, but one may find it difficult to record in the absence of an attached acknowledgment or jurat certificate of a notary public. Use of a notary certificate is thus recommended if the document may need to be recorded. If the document itself is sworn to or affirmed, or signed under the penalties of perjury, either a jurat or acknowledgment may be used.*

Adopted May 1, 2017 (Replacing prior Form 37, originally adopted June 1, 2004)

REBA Form No.37



(15) Acknowledgment of a Corporation or Joint Stock Association.

(Caption specifying the state and place where the acknowledgment is taken)

On this _____ day of _____, 20__, before me appeared A B, to me personally known, who, being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent of the corporation or association) of (describing the corporation or association) and that the seal affixed to said instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors (or trustees), and said A B acknowledged said instrument to be the free act and deed of said corporation (or association).

(Signature and title of officer taking acknowledgment. Seal, if required.)

[If the corporation or association has no corporate seal, the words “the seal affixed to said instrument is the corporate seal of said corporation (or association), and that” shall be omitted, and at the end of the affidavit shall be added the words “and that said corporation (or association) has no corporate seal”.]

Notes and Comments

1. *The first form above appears in M.G.L. c.222, §15(b), preceded by the following: “A notary public shall take the acknowledgment of the signature or mark of persons acknowledging for themselves or in any representative capacity by using substantially the following form.” The last three forms are set forth in M.G.L. c. 183, Appendix, Forms 13-15, inclusive.*

2. *The Statutory “Forms of Acknowledgments, Etc,” referenced in M.G.L. c. 183, §§ 8 and 42 and found in the Appendix to c. 183, Forms 13-15, are reproduced here in the same historical form that they have been published since they were added to the General Laws in 1902. Section 8 specifically authorizes the practitioner to alter these forms “as circumstances require”. With respect to language regarding the use of a corporate seal in Form 15, this language is now widely disregarded since M.G.L. c. 183, §1A has made the use of a seal on instruments purporting to affect an interest in real estate unnecessary. With respect to the parenthetical “Seal, if required” after each form regarding the notarial seal, the “if required” language should be disregarded since M.G.L. c.222, §§1 (“Notarial certificate”) and 15(b) now require that the notary’s seal (described in c.222, §8) be affixed to every acknowledgment.*

3. *Section 2 of Chapter 289 of the Acts of 2016 amended Chapter 183 by striking out section 42 and replacing it with the following section:*

“Section 42. The forms set forth in the appendix to this chapter and in section 15 of chapter 222 for taking acknowledgments to deeds and other instruments and for certifying the authority of officers taking proofs or acknowledgments may be used but the existence of those forms shall not preclude the use of any other forms lawfully used as required or authorized by any general or special law or any regulation or executive order regulating notaries public, including forms that acknowledge the voluntary act of an individual executing a document in a representative capacity but fail to acknowledge the deed or instrument as the voluntary or free act of the principal or grantor.”

4. *Under the holding in Bank of America, N.A. v. Casey, 474 Mass. 556 (2016), an affidavit conforming to M.G.L. c. 183, §5B may be used to correct certain defects in recorded acknowledgments.*

Adopted May 1, 2017 (Replacing prior Form 36, originally adopted June 1, 2004)



Searching and Reporting Traps For the Unwary Title Examiner and Reviewing Attorney

1. Legal Descriptions and Legal Access **Warning Signs:**

- There is no reference to a Plan of Record for Locus.
- Are there excepted parcels listed as part of the legal description?
- Could excepted parcels create any overlap?
- Is the description an out dated "Ancient" description described only by abutter names? Does it close?
- Does the Mortgage description match the vesting deed description?
- Does the property have access to a Public Road or is the deed silent as to access?
- Are Beach Rights granted and if so, is access to reach the beach included?
- How can you confirm with any accuracy where locus sits on the ground?

WHAT'S THE EXAMINER TO DO?

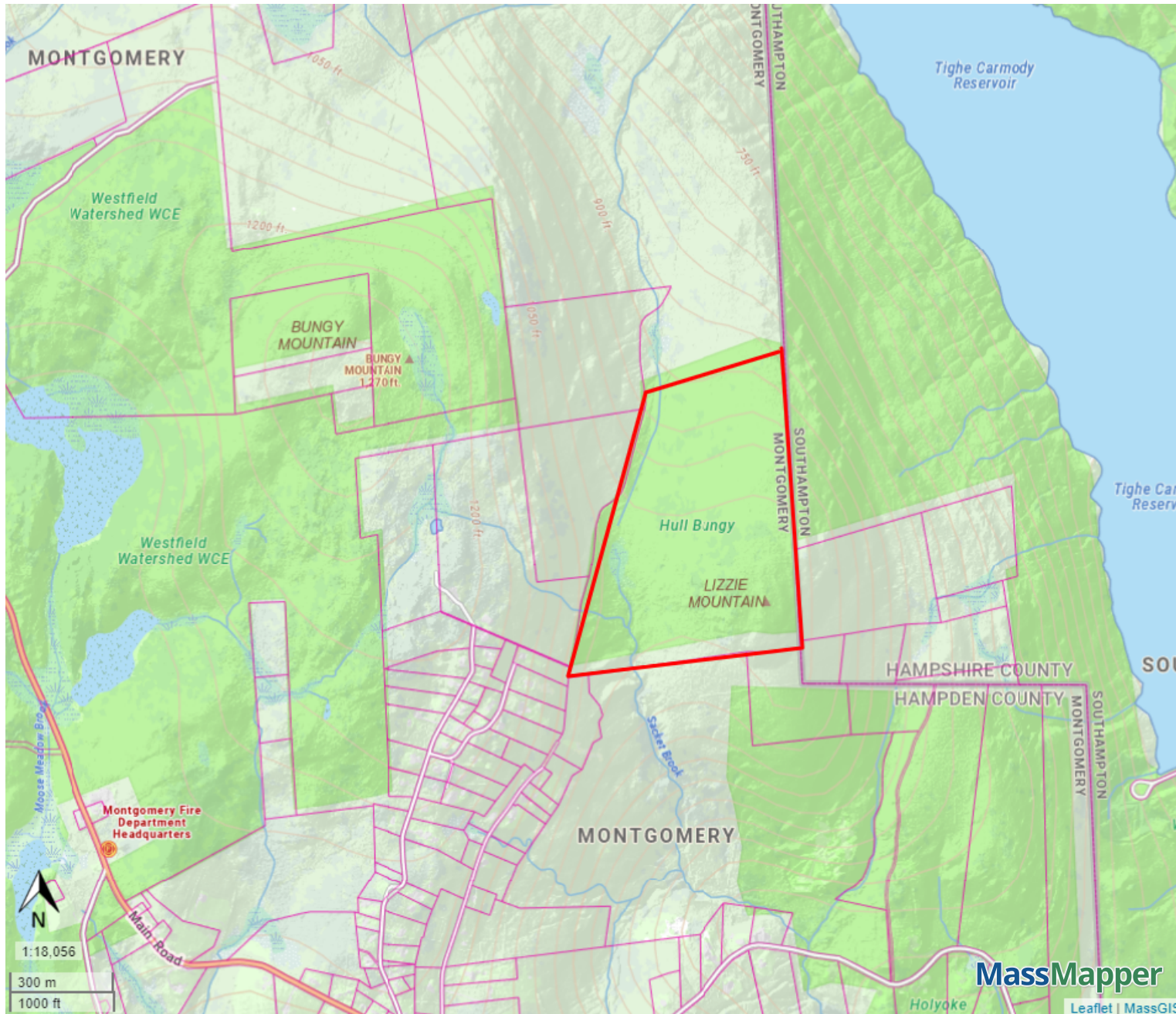
- Check the Plan Index for any prior plan or abutters plans for reference use. Provide a copy of the town's AOM.
- Copy any deeds listed as excepted parcels and provide copy of plans if referenced.
- Provide a sketch of the property and compare with excepted parcels, Query what is left over, might there be any encroachments?
- Flag issues: Report that Access has not been searched or confirmed, if applicable; Report that Locus has not been confirmed "on the ground". Report any and all inconsistencies.

WHAT'S THE REVIEWING ATTORNEY TO DO?

- Call your Title Insurance Underwriter

Locus Map Montgomery, MA

Property Tax Parcels



How do I get to my 102 acre Mountain top hideaway ?

Here's the deed description

EXHIBIT A

The land in the Town of Montgomery, County of Hampden, described as the "Bungy Lot" in deed of B&N Lands, LLC, to Hull Forestlands LP, dated June 29, 2001, recorded at Book 11732, Page 108, Hampden County Registry of Deeds, as follows:

Bungy Lot -

Those certain tracts or parcels of land located in the Town of Montgomery, County of Hampden, Massachusetts bounded and described as follows:

Parcel #1

Bounded on the North by land formerly of Chester Sheldon, now of Abner E. Peck, East on Southampton Town Line; South on land formerly of Chester Sheldon, now of said Peck; and West by old highway leading from "Washburn's Corner" to Southampton; <----? containing twelve (12) acres, more or less.

Parcel #2

Bounded on the North by land now or formerly of C.M. Washburn and land now or formerly of one Searle; East by land now or formerly of Lawrence Conner and now or formerly of Watson Root; South by land now or formerly of C.M. Washburn and Elisha & George Avery; and West by the old road leading from Montgomery to Southampton and Westhampton, and now discontinued; containing eighty (80) acres, more or less.

Parcel #3

That certain piece or parcel of land in said Montgomery, Hampden County, Massachusetts, containing twenty-three (23) acres, more or less, and as described in deed to Edgar J. Allyn, heirs and devisees, as recorded in Hampden County Registry of Deeds, Book 1709, Page 485, to which deed reference may be made for a more detailed description.

*Back Title
→ Tax Taking
* from E.J.A.
to
Town of Montg
- Ref. 532/163*

For title see said deed of B&N Lands, LLC, dated June 29, 2001 and recorded in the Hampden Country Registry of Deeds, Book 11732, Page 108.

No new boundaries are created by this conveyance.

DONALD E. ASHE, REGISTER
HAMPDEN COUNTY REGISTRY OF DEEDS

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Searching and Reporting Traps For the Unwary Title Examiner and Reviewing Attorney

2. Prior Liens: **Warning Signs:**

- Liens that have not been properly Discharged or Released.
- Liens that have not or do not automatically Expire by Statute.
- Sr. Liens or other financial encumbrances noted on the deed or mortgage which are not accounted for.
- Prior owner Liens that could possibly be brought forward.
- Liens that are recorded prior to the obligor acquiring property.

WHAT'S THE EXAMINER TO DO?

- **Best Practice:** Schedule all liens, whether expired by statute or considered obsolete on Schedule/ Run sheets. This allows the reviewing attorney to see what you, the Examiner, has seen, and have either reported or not.
- Run ALL Buyers and Borrowers for previous 10 year period.
- Run all owner's within last ten year's, for the previous ten year period.
- Flag issues: Do not make arbitrary decisions. When in doubt PHOTOCOPY.

WHAT'S THE REVIEWING ATTORNEY TO DO?

- Review the Schedule / Run sheets, included with and which are part of the title abstract. Confirm that the Examiner has run all parties for the appropriate time. Check for comments made by the Examiner on the Schedule sheets.
- Call your Title Insurance Company

Searching and Reporting Traps For the Unwary Title Examiner and Reviewing Attorney

3. Subtle and Puzzling Issues:

- The Four Unities Rule:

The “four unities” are unity of time, unity of title, unity of interest, and unity of possession. (ie: TTIP)

The unity of time principle requires that **each joint tenant** receive his/her interest at the same time, i.e., upon delivery of the deed to the property. Unity of title exists because each joint tenant receives his/her title from the same grantor, and unity of interest means that each joint tenant owns an undivided interest in the property. Unity of possession exists because each joint tenant has the right of possession of every part of the whole property.

These rules, still largely in effect in Massachusetts, cause drafting problems in deeds.

WHAT'S AN EXAMINER TO DO?

- Have knowledge to spot and flag a transfer of title which may end up contrary to the intended goal of a joint tenancy between the parties.

WHAT'S THE REVIEWING ATTORNEY TO DO?

- Review each deed in the chain of title.
- When in doubt, Call your Title Insurance Underwriter.

Searching and Reporting Traps For the Unwary Title Examiner and Reviewing Attorney

4. **Enforcement of Restrictions and Conditions: When do they REALLY Expire or Terminate?**

WHAT'S AN EXAMINER TO DO?

Best Practice: NOT to assume the Restriction expires after 30 years. Copy the Restriction. Allow reviewing Attorney the opportunity to scrutinize the document.

WHAT'S THE REVIEWING ATTORNEY TO DO?

- Review the Restriction: Ask yourself if it is unlimited as to time, then what? Does it allow for successive renewal periods of time ? Are there other Conditions or Special Provisions? Have the restrictions been reimposed? Lots of Questions !
- Review the Schedule sheets and deeds in the chain of title for any reference to Restrictions and question notation by Examiner: "Expired by Statute".
- When in doubt, Call your Title Insurance Underwriter.

Searching and Reporting Traps For the Unwary Title Examiner and Reviewing Attorney

5. Using a Prior Back Title and/or a Back Title Policy:

WHAT'S AN EXAMINER TO DO?

- Follow clients instructions.
- Don't hesitate to question prior reports to cover yourself.

WHAT'S THE REVIEWING ATTORNEY TO DO?

- Understand the Risk of relying upon an unknown Title Examiner's work product.
- Understand Risk of issuing a Title Commitment and Title Insurance Policy that is based on title work provided by an unknown entity.
 - Give clear instructions to your Title Examiner for updating the title, and updating the policy.
 - When in doubt, Call your Title Insurance Underwriter.

Beware : Have Title Vendors been properly vetted in compliance with CFPB regulations and local practice ?
Question how the work product has been produced; Is the search based solely upon records found On Line or a physical search of Registry of Deeds and Probate Court records? Is the search based upon an AI platform, using data from unofficial records?

Are they working in your best interest ?

Searching and Reporting Traps For the Unwary Title Examiner and Reviewing Attorney

6. **The Deadliest Catch: Traps in the Registry of Deeds**

Local knowledge about the inner workings of any particular Registry of Deeds is inherently vital to the proper gathering and reporting of recorded information. As technology changes advance, so too does the process of researching record title information.

It is therefore of the utmost importance to have the skill level necessary to interpret Registry of Deeds information, from old school record books to using the individual computer systems of today, in order to provide an accurate Title Report, Title Commitment and Title Insurance Policy.

A small sampling of Registry Traps include:

- misindexed entries
- search dates that do not cover the Full Title search requirement time
- Registered Land errors and inconsistencies
- Inconsistent use of Indexing Standards among the Registries
- Inconsistent Marginal Referencing among Registries
- **Insufficient Notifications when sites are experiencing difficulties and data may be at risk.**

WHAT'S AN EXAMINER TO DO?

- Always be aware of Registry issues. Know your Registry of Deeds.
- Use the cross referencing tools available. This helps to pick up misindexed entries.
- NEVER simply click on a name as it appears in the abstract box as the sole use of grantoring or granteeing.

Searching and Reporting Traps For the Unwary Title Examiner and Reviewing Attorney

6. **The Deadliest Catch: Traps in the Registry of Deeds (continued)**

WHAT'S AN EXAMINER TO DO? (continued)

- Be aware that Registry indexing abbreviations have differences. DO NOT dismiss an entry based upon knowledge from another Registry's style. (ie: Cert. has different meanings, Agreements can also indicate a Trust, etc..) **EXPERIENCE MATTERS!**

Best Practice: Look at everything. Verify everything if not scheduling everything. Copy Index pages as opposed to abstracting if preferred and you have bad handwriting!

- Know how to research the actual HOME page of a Registry to find older documents and Indices for a complete exam.

- Be aware that some Registries DO NOT have all documents imaged, despite what is stated.

- Understand that not all Registered Land Certificate of Titles are imaged. Not all Current Owner Certificates are up to date. (If you see an Encumbrance sheet with only the owner's deed referenced, that is a very good indicator that the Encumbrance sheet is not reliable and an actual inspection of the Registered Land Book is necessary) **ALWAYS Grantor and Grantee your Registered Land Owners in both the Registered Land Section and Recorded Land Section. (yes, twice the work)**

- Stay up to date with Registry and Title Industry changes, participate in Educational Seminars. Don't become stale.

Searching and Reporting Traps For the Unwary Title Examiner and Reviewing Attorney

6. **The Deadliest Catch: Traps in the Registry of Deeds (continued)**

WHAT'S THE REVIEWING ATTORNEY TO DO?

- Ask your Title Examiner for reference's, work experience, whether they have E & O Insurance (will this affect your own Professional Liability Insurance? Does your Title Insurance Underwriter care?)
- Don't assume your Title Examiner covers the Registry District that you have assigned them an order for.
- Don't assume your Title Examiner is aware of REBA Title Standards, especially revised Title Standards, including TS #1 and Practice Standard # 28.
- Know your Title Examiner and Know your Title has been examined; Does your Examiner pay attention to detail and use analytical skill to actually examin documents and check of required elements? or is your Examiner a Title Photocopier ?
- Let your Examiner know when you have a question and need followup.
- Let your Examiner know when they made a GOOD CATCH !

REBA Title Standard 1

Period of a Title Examination

1. It is sufficient if the title examination for land in the unregistered land system covers a period of fifty years and the starting point is a warranty, quitclaim, or duly authorized or empowered fiduciary deed which on its face does not suggest any defects.

2. In the case of registered land, it is sufficient to:

(a) start the examination on the date of the most recently issued certificate of title signed by the Land Court District's Assistant Recorder, including review of the memorandum of encumbrances appended thereto; and

(b) run the current owners, and the former owners if applicable, in the recorded land indices for Federal and Massachusetts tax liens and other liens that are not included in the registered land system by virtue of Chapter 185 for a period of twenty years and sixty days.

Notes and Comments

1. If there is a reference in the starting deed to a mortgage, an easement, an agreement, a restriction or another encumbrance which might still be in existence and applicable, a further examination should be made to ascertain the extent and the applicability of such burden and, in the case of a mortgage, whether or not such mortgage has been foreclosed.

2. A starting deed from a fiduciary under a recited power of sale, license, decree or other authority or from the heirs or devisees should not be considered defective on the ground that the title conveyed derives from the estate of a decedent. Authority of the fiduciary in such an instance may be presumed to have existed based upon the recital absent subsequently recorded information to the contrary.

3. See also M.G.L. c. 93, § 70 for certification of title to mortgaged premises with regard to certain residential property.

4. See Practice Standard No. 28 (Scope of a Title Examination).

Caveat

A registered title is subject to other Massachusetts liens and Federal matters, such as Federal land takings. See M.G.L. c. 185, § 46.

Adopted November 27, 1972

Amended May 22, 1980 (added "duly authorized or empowered fiduciary's deed")

Amended November 16, 1981 (second paragraph added)

Amended September 1, 1982 (added Caveat)

Amended May 4, 1994 (added Comment II)

Amended May 1, 2018 (revised name of Title Standard, revised second paragraph, revised second comment, and added cross reference to Practice Standard No. 28 in comment section)

REBA Practice Standard No. 28

Scope of a Title Examination

1. A title examination requires a search of the records of the Registry of Deeds in the district where the land is located, if the land is recorded, or the Registry District of the Land Court, if the land is registered. A search of both systems is also required if the land is both registered and recorded land, or if the search discloses an appurtenant or burdening instrument in the other system that affects the land that is being searched. (See REBA Title Standard No. 1)

2. An examination of registered land also requires a search on the recorded side for tax and other liens that are not included in the registered land system by virtue of M.G. L. Chapter 185, Section 46. This search must cover a time period that goes back far enough to discover any liens that may have been brought forward against a prior owner or owners. (See REBA Title Standard No. 1)

3. An examination also requires a search of the Registry District where the land was previously registered and has been withdrawn from the registered land system. Such searches may be conducted in person or through the official website of the Registry of Deeds, provided that website has available the necessary information for the requisite period of the search (or a combination of in person and internet search may be required).

4. A title examination in either recorded land or registered land also requires a search of the relevant records of the Probate and Family Court within the county where the land lies, including probate, divorce and equity proceedings. Such a search may also be undertaken in person or, provided that adequate information for a sufficient time period is available, at the official website of the Registry or of the Probate and Family Court.

5. A title examination also requires a search of the records of other registries of deeds (or districts other than where the land lies), other probate and family courts, federal courts, including bankruptcy court, Land Court, superior and district courts, or places where UCC filings are made, if other records or information within the scope of the required search indicate a search of such records is necessary. Such indicators may include lis pendens, notices of pending registration or confirmation in the Land Court, or references to proceedings elsewhere in the Commonwealth contained within a recorded document.

6. A title examination does not include Internet Based Title Information Sources, as defined in Title Standard 76, but conveyancers are encouraged to avail themselves of the information available in such sources, and to incorporate that information in the records of the Registry of Deeds, as set forth in Title Standard 76.

Notes and Comments

1. The purpose of this Practice Standard is only to outline the resources and indices that need to be reviewed when performing a title examination. It is the conveyancer's responsibility to allocate these tasks. See Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512 (2011).

2. See REBA Title Standard No. 1 for a discussion regarding the period of a title examination and M.G.L. c. 93 Section 70 for certification of title to mortgaged premises with regard to certain residential property.

3. M.G.L. c. 185, Section 46 provides a list of encumbrances that affect registered land regardless of whether those encumbrances appear on the Certificate of Title, as follows:

Every plaintiff receiving a certificate of title in pursuance of a judgment of registration, and every subsequent purchaser of registered land taking a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate, and any of the following encumbrances which may be existing:

First, Liens, claims or rights arising or existing under the laws or constitution of the United States or the statutes of this Commonwealth, which are not by law required to appear of record in the registry of deeds in order to be valid against subsequent purchasers or encumbrances of record.

Second, Taxes, within three years after they have been committed to the collector.

Third, Any highway, town way, or any private way laid out under section twenty-one of chapter eighty-two, if the certificate of title does not state that the boundary of such way has been determined.

Fourth, Any lease for a term not exceeding seven years.

Fifth, Any liability to assessment for betterments or other statutory liability, except for taxes payable to the Commonwealth, which attaches to land in the Commonwealth as a lien; but if there are easements or other rights appurtenant to a parcel of registered land which for any reason have failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to pass with the land until cut off or extinguished by the registration of the servient estate, or in any other manner.

Sixth, Liens in favor of the United States for unpaid taxes arising or existing under the Internal Revenue Code of 1954 as amended from time to time and any other federal lien which may be filed in the Commonwealth.

Seventh, Liens in favor of the Commonwealth for unpaid taxes arising or existing under the laws of the Commonwealth.

Adopted May 1, 2018

What's Next?

Symbolic of this picture, the links in the title product are only as strong as the weakest link.

The "New Frontier" in the world of AI; the use and abuse of On Line data bases (public and private); the Economic Impact of Cost vs. Quality, Accuracy vs. Title Insurance Claims is upon us all.

Current Trends toward Remote On Line Notarization; for profit Data Mining; Unofficial Land Record Sources, and Security issues are REAL challenges affecting the Real Estate Industry - NOW.

How do we care to respond?





Thank You