

## Real Estate Title Insurance & Construction Law

### A Perfectly Good Deed Can Result in a Perfectly Bad Title

By Dennis M. Gonski

There is a common misconception among lawyers that a deed conveys title to real property. It does not. One may obtain a perfectly good deed, a deed which conforms to every legal requirement, and still fail to obtain any title whatsoever.

Why so? It's because a deed is merely a conduit. When signed and delivered, deeds merely consign to the grantee the grantor's title to the land, whatever that title might be. If it turns out the grantor had no title then the grantee gets nothing.

A deed can not create title, because it is merely an instrument of transfer. What the grantor actually owns is all that the grantee can claim. And, if the grantor's title is bad...“He who has nothing can give nothing” (Dag Hammarskjöld, “Markings” 1964).

#### Why Do We Have Deeds?

Like so many of our laws and customs, the use of deeds has its roots in English law. In feudal times, all land

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within sovereign control was owned in fee by the king. Tracts of land were granted at will by the king for the use of his lords, often as reward for their services. The lords, in turn, would grant use of lesser tracts to lesser noblemen, and so on down the chain, but always the use of the land remained subject to the superior ownership rights of the king.

After the Magna Carta, the feudal system began to break down. Lords began consigning grants in haphazard fashion and without the King's consent. In an attempt to regain control, the King rejected those grants of his land that were not made in writing and verified by the “royal seal.” Ultimately this procedure became codified as the “Statute of Frauds” (a version which we still honor today).

But the requirement that there be written deeds brought with it new problems. Quantities of deeds had to be maintained and physically handed down from owner to owner, as proof of title. Until the creation of a central recording office, each new conveyance brought with it the presentation of an array of sometimes poorly preserved written instruments — which in the words of English Lord Westbury: “were difficult to read, disgusting to touch, and impossible to understand.”

After the Revolution, of course, we

set up our own system of establishing land ownership. We did, however, retain the custom of requiring written deeds. And, eventually we improved upon the conveyancing system by the creation of central recording offices, which favorably resolved at least some of Lord Westbury's complaints.

#### Requisites of a Deed

The formal requisites of deeds in New Jersey have not dramatically changed from those developed in early England. Then, like now, a deed requires: (1) capable parties able to contract and be contracted with, for the purposes intended by the deed; (2) a subject matter to be contracted for; (3) a good and sufficient consideration; (4) a writing arranged in orderly and legal form; (5) a signature and seal; (6) an attestation of witnesses; and (7) a valid delivery.

Once all these requisites coalesce, a “color of title” is created. The phrase “color of title” refers to the appearance of title being vested in a certain party. It does not mean that that party has perfected an actual conveyance of good title, because “color of title” is not synonymous with “vesting of title.” A common example of the difference is one that employs the Brooklyn Bridge. A deed to the bridge may meet all the legal requirements, and thereby create a “color of title” to the bridge. Obviously however, unless the grantor had title to the bridge, there is no vesting of actual title or of anything else in the grantee. (See “Black's Law Dictionary

8th Ed”).

### Types of Deeds

New Jersey recognizes three types of deeds: (1) quit claim; (2) bargain and sale; and (3) warranty.

A “quit claim” is the barest form of deed. It promises only “the estate which the grantor could lawfully convey” (N.J.S.A. 46:5-3). The grantor makes no promises as to the quality of the grantor’s title nor even that the grantor has title. The only promise the grantor makes is: “I give what I have, if indeed I have anything to give.”

A “bargain and sale” deed is not much better. It passes the same grantor’s interest as does a “quit claim” deed. However, a “bargain and sale” deed may also contain a promise by the grantor that: “he has done no act to encumber the said lands” (N.J.S.A. 46:4-6). This “covenant as to grantor’s acts,” in reality provides little solace. The grantee’s title search should disclose any recorded encumbrances allowed by the grantor. The grantee’s status as a “bona fide purchaser” will protect against any unrecorded encumbrances. And, as with a “quit claim” deed, there is no vesting of any title better than that the grantor had the power to convey.

The “best” form of deed is the “warranty deed.” There are two forms of warranty deeds: “general warranty” (N.J.S.A. 46:4-7) and “special warranty” (N.J.S.A. 46:4-8). Each promises to defend “forever” against adverse title claims. A general warranty promises to defend claims made by anyone. A “special warranty” limits the promise to defend only to claims made “by through or under” the grantor.

There may also be additional promises made in a warranty deed. In addition to the previously discussed “covenant against grantors acts” (N.J.S.A. 46:4-6), there may be a covenant of “seizen.” See N.J.S.A. 46:4-3 (a promise that the grantor owns the land). There may also be a covenant of a

“right to convey.” N.J.S.A. 46:4-4 (grantor has the right to convey the land); and covenants of “quiet possession” and “freedom from encumbrances.” See N.J.S.A. 46:4-5 (grantee shall have peaceable use of the land, free from all encumbrances); as well as a covenant of “further assurances.” See N.J.S.A. 46:4-10 (upon request grantor and his heirs will provide future assurances of the grantee’s title).

Again, however, all these covenants are just promises. Even a warranty deed will not pass any title where the grantor had no title to convey.

### Affidavits of Title

It is customary in New Jersey for a grantor to deliver an “Affidavit of Title” to the grantee. The affidavit promises the grantor’s ownership of the land and discloses additional information that might not appear in the title search. At least one court has held that the averments contained in the seller’s affidavit effectively convert a “bargain and sale” deed into a “warranty deed.” *Somerset County v. Durling*, 174 N.J. Super. 52 (Ch. Div. 1980).

Once again, however, the Affidavit of Title, like the deed it accompanies, provides only promises. The actual title the grantee receives remains measured only by the title the grantor owned.

### No Title Is Perfect

It has been said...“there is no title concerning which a possible doubt or possibility of a future flaw cannot be raised.” *Barger v. Grey*, 64 N.J. Eq. 236 (Ch. 1902).

Hence, a perfect title is generally not to be had. What may be expected by a grantee is a “good” or “marketable” title — as opposed to “bad” or unmarketable title.

In the vast majority of real property transactions, title insurance will protect against loss arising from a title’s unmarket-

ability. But, there is only so much a title insurance company can do in the event of a title defect. A title insurer may pursue “quiet title” litigation (N.J.S.A. 2A:62-1 et seq.) or seek judicial relief under the doctrines of “quia timet”; “adverse possession”; “estoppel by deed”; and/or “equitable title.” Success in such suits, however, will always depend on the facts of each case.

And, there are indeed some titles that are incapable of being saved. A most notable example of a totally toxic title is one involving a “wild deed.” A wild deed is one whose sole purpose is to create a chain-of-title where none otherwise exists. A chain-of-title based on a “wild deed” can not be saved. Subsequent grantees receive no title, because the grantor had absolutely no title to give. *Hyland v. Kirkman*, 204 N.J. Super. 345 (Ch. Div. 1985).

In many instances, title insurance can only soothe the pain of loss. Title insurance does not guarantee that such title defects will not occur. Title insurance is merely a hedge against the risk’s occurrence. A total failure of the grantor’s title leaves the grantee’s only recourse to the monetary amount specified in the title insurance policy purchased.

### Conclusion

In the conveyancing of real estate, a grantor’s title is all that counts. Such is true no matter what type of deed a grantee receives. Covenants made by the grantor are only promises. Bad title remains “bad” no matter how many promises the grantor may make. Title insurance, being a hedge, provides a source of monetary indemnification. However, a bad title will usually continue to be so. In the final analysis, the only determining factor as to the quality of the title a grantee receives is the grantor’s title, and his grantor’s title, and that of the grantor before him. What’s in your chain-of-title? ■