



# What Title Reveals that the Land Itself Cannot

BY MaryKay O'Donnell

This Grissom Elementary School site is part of Openlands' Space to Grow project, which brings green space to Chicago public schoolyards. "We work in an urban area and title work tells us the story of the land—things we couldn't know from walking the property today. Identifying and curing due diligence issues ensures Openlands can fulfill its promises to protect these lands for our communities." —Emily Brawley, Vice President of Conservation, Openlands (IL) (accredited)

Love to read detective novels? When you were little, did you pretend you were Nancy Drew or do you regularly impersonate Columbo by pestering friends with "Just one more thing. . .?" If so, title investigation is for you! Title is the story of the land, the story of our lives. Reading a title report is very much like immersing yourself in a detective novel: Who did it? When? How? Does it matter?

When you sit down across the kitchen table from a couple and promise to help them protect their land forever, you take that seriously. As a risk management step it is sensible to assure yourselves, the landowner, your supporters and the wider community that you actually have good title to the land. While the details of how to approach title review may vary, whether to review title should not. Ensuring good title enables your land trust to put its energy and resources fully into the land, knowing it is protected now and for future generations.

Anyone involved in acquiring land or conservation easements for a land trust has heard "Order title!" "Review title commitments early and often." But what exactly does it mean when *Land Trust Standards and Practices* advises us to investigate title?

## Part of Due Diligence

Reviewing title is part of the due diligence you perform prior to acquiring land or a conservation easement. Due diligence is defined as taking reasonable care in examining the property before acquisition and varies with the complexity of the transaction. Much due diligence work has to do with examining the land itself. But looking at the land cannot tell you if there are title issues lurking. You investigate title to determine the legal owner of the property, to uncover leases and to identify water and mineral rights ownership and other encumbrances that may affect the property. These factors must be examined to determine if there is anything that will affect your ability to protect the land. Title work will also identify if there are liens or mortgages that must be discharged or subordinated prior to or at closing.

The first step in investigating title is to order a title report and to have knowledgeable people review it and address any potential problems. Prior to acquisition, title issues should either be resolved, be evaluated to determine they will not adversely affect title or conservation or, in some cases, be deemed serious enough

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to not go forward with the project. Documentation of this review is critical.

Before we get into title report details, let's talk about how to go about reviewing title.

## Four Steps to Review Title

First, someone has to order the title. For advice on ordering title, see page 165 of *Acquiring Land and Conservation Easements* [available on The Learning Center]. Obtain copies of and review the legal documents listed in the report for each exception to title. The title report must be written by a professional title investigator: either a title company's title examiner or a real estate attorney who specializes in title work.

In step two, a qualified person(s) at the land trust should review the title report. Knowledgeable staff or volunteers can do the initial legwork and review. If your land trust lacks sufficient expertise on your staff, board or committees, you should immediately provide the title report and associated documents to an experienced real estate attorney to oversee the review process.

The initial reviewers can flag potential issues, obtain missing documents, ask clarifying questions, order additional materials (such as a survey) and request simple corrections. Read and understand the entire report, the vesting deed (the deed that gives ownership to the current landowner) and all of the exceptions. For example, if someone else holds tree-trimming rights on the land, you need to understand the implications and how those rights might affect the property. The reviewer should also ask questions of the landowner if something unexpected is revealed. For example, it is not uncommon to see unanticipated people named as owners. Surprise! Cousin Isabel is a partial owner who everyone forgot to mention. Or you might detect that Mary and John Smith do not actually own the property; they put it into trust in 1972 and the trust owns it.

This is why you want to order title early—you often learn things that need to be handled before closing. It can take many months to address title concerns. You don't want to find out there is a title issue two weeks before closing or, even worse, after closing.

Step three is to pass the report, documents and related information along to a real estate attorney or your title insurance company attorney

for his or her review and counsel. The attorney will examine the entire report and supporting documents. Having the materials in proper order with simple issues addressed will help streamline the process. Attorney review is not an optional step! The attorney will help identify and solve issues and will guide the organization in understanding the title report and any potential concerns. For example, if there is a lack of access exception, the attorney can work with the landowner and the title company to determine if the property really does lack legal access or if the notation is merely an error. They may refer to surveys, plat maps and previous conveyances to solve the mystery. If the title report is correct and there is no legal access to the property, then the attorney will craft a plan to cure this title defect prior to acquisition. In some cases, there are defects to title that are so severe that the land trust may choose not to pursue the transaction.

The land trust and the attorney work in tandem to ensure the organization is acquiring good title to the property. Develop your land trust's expertise on title by seeking out committee members with real estate backgrounds, paying for training and getting to know your local title companies as a resource.

The fourth step is to address any title concerns revealed in the title review. The land trust may need to make a business decision, with guidance from its attorney. Many decisions about title and what the organization is or is not willing to accept rides on one question: "Does any title issue affect our ability to protect the conservation values of the property?" For instance, an easement that allows a neighboring rancher to move cattle across the property every spring may not be of concern; however, the right of the water district to use a substantial portion of the property as a reservoir may be.

## A Plethora of Title Reports

Now let's talk about title reports. There are many forms of title work, which vary by region. These include: title abstracts, title reports, chains of title, attorney's opinions or certificates of title, title commitments and title insurance policies.

A **title abstract** is the condensed history of title to a parcel of real estate, consisting of a summary of the original grant and all subsequent conveyances and encumbrances affecting the property. The abstractor who produces the abstract certifies the history is complete and accurate.

"Reviewing the title work for a property is imperative to land protection; it can reveal old liens or encumbrances, problems with ownership, boundary overlaps, mineral claims and other issues that can threaten the validity of the project. In one instance, the title work revealed the landowner did not legally own 30 acres that he thought he did. In others we found old mineral claims and had to work with a third party to release those claims."

—Abbie Church, Conservation Director, Mississippi Valley Conservancy (WI) (accredited)

In some states it is common to order the title abstract through a real estate attorney who produces an attorney's title opinion during the due diligence phase and then may be asked to produce a certificate of title after acquisition to ensure everything is properly in place.

A **title report** is essentially the same as a title abstract but is produced by a title company and does not typically go back to the original patent or grant of title, although this varies state by state. The title company conducts a title search to examine public records, laws and court decisions to disclose facts regarding the land. Title companies keep records on every parcel of land called a title plant, which they rely on to create the title report.

A **chain of title** is a complete record of who owns the property and how they acquired it and can go back all the way to the original government patent. Typically, title companies will include a chain of title for a certain number of years, based on local custom or a state marketable title act, if the state has one. If you want more, for example, if you are partnering with a government agency that requires a longer chain, you simply ask the title company.

A **title insurance commitment** (also known as preliminary title commitment) is often the same as a title report with one big exception: It also includes a commitment to issue a title insurance policy if the proposed owner acquires the property, meets certain conditions (such as board authorization) and pays the insurance premium.

A **title insurance policy** is created from the commitment after you acquire the property. Unlike other types of insurance, this protects the organization from things that occurred in the past. If a title defect is found after closing, perhaps even years later, and the defect was not listed as an exception to title or an exclusion to coverage in the policy, the title insurance company becomes your partner in addressing the title defect.

While a thorough title investigation helps ensure good title to the land, only an owner's title insurance policy can protect the land trust from financial loss if a covered title problem is discovered. Since human errors occur in title reports, a title examiner may inadvertently miss something. Examples of hidden title problems include errors or



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omissions in deeds, mistakes in examining records, potential boundary issues, fraud and forgeries.

If covered, the title company has the obligation to either pay you the monetary value of the defect up to the policy limits or to help you cure it. Having a partner when title issues arise is a comforting thing. It is important to note that the title company has sole discretion to choose the option to pay you or to litigate on your behalf.

If you choose to purchase a policy for less than the value of your property interest, you may expose the land trust to potential loss. A land trust that holds a conservation easement worth \$100,000 but has only \$10,000 of title insurance may find the title company elects simply to pay the full policy amount (\$10,000) to the land trust, rather than incur the expense to defend the land trust for what may be a loss of \$100,000 or more.

## Helpful Sleuthing Tips

Projects often take years to complete. Title should be updated at least every six months (and more often if desired) on active projects to make sure nothing has happened to affect title and your project—you don't want a plot twist late in the story. In addition, the title should be brought current as of the date and time of closing. One of the advantages to working with title companies is that they can also provide escrow and closing services.

Ready to be the detective for your land trust? Additional resources can be found on The Learning Center in the digital library under Standard 9, Title Investigation and Subordination, as well as in *Acquiring Land and Conservation Easements*. Reference the one-page *Practical Pointers on Title Insurance*. See also the Land Trust Accreditation Commission's *Requirements Manual*, Practice 9H. The American Land Title Association and state bar associations often offer local training opportunities. Happy sleuthing!

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## WHAT IS TITLE?

Title is a collective term that encompasses your legal rights to own, possess, use, enjoy, control and dispose of real property—land. Title is often thought of as a bundle of rights and recognizes that some of the rights in the bundle may be removed and owned by someone else, such as timber rights, mineral rights or easements.