

# Neighbor Warning: Don't Sign Out of Possession Title Affidavits

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When your neighbors list their house for sale, proceed with caution and see an attorney immediately if you are presented with an out of possession title affidavit or a boundary line agreement.

This affidavit or agreement is a writing wherein you, as a neighbor, swears, under the penalties of perjury, that you do not assert an ownership claim to real estate which has been used by you as if it were your own. Meaning, part of the property owned by your neighbor in their deed, such as a driveway, fence, shrubs, bulkheading, wood chopping area, boat storage, or the like, may have been used by you for a period of time sufficient to transfer the ownership to you through legal concepts called either adverse possession or a prescriptive easement. However, the new purchaser wants this affidavit or agreement so you disclaim your ownership rights. The property at issue generally concerns some area at or around the boundary line between your property and that of your neighbor. Commonly, neighbors that need such an affidavit didn't have their properties' demarcated by surveys, stakes and monuments and as a result, the neighbors just used the property as they saw fit during their existence in harmony as neighbors. Everyone got along until one of the neighbors decided to sell their house and now the purchaser wants ownership over the entirety of what she is buying, except for the problem that you are still using some of her future property as if it is your own.

So, what happens? A well-intentioned real estate agent is typically sent to get the affidavit or agreement signed. The agent is told by one of the transactional attorneys that the deal is going to fall apart unless the agent can get this affidavit signed. So, the real estate agent goes to the neighbor and explains that the title insurance company is blocking their neighbor's real estate sale unless this stupid affidavit is signed. Then, the salesperson employs a measure of guilt by explaining that their nice neighbor needs this document in order to sell their house and that this is the only item that is stopping the deal and a nice neighbor would sign it. Isn't that the neighborly thing to do? To be clear, neighbors should not sign these affidavits or agreements until they speak to their own attorney.

An out of possession title affidavit expressly waives an ownership right existing by way of either of two similar legal concepts called adverse possession or a prescriptive easement. These legal concepts manufacture the ownership of real estate by use rather than through a deed. In such, an individual has a claim to own property by way of adverse possession where four elements have existed for 10 continuous years, including that the (1) use was hostile and under a claim of right (i.e., infringing on the owner's rights as if its one's own and without the owner's permission); (2) use included actual occupation of the parcel (i.e., improving or cultivating the land or, instead, protecting the land by an enclosure); (3) use was open and notorious (i.e., use creates actual notice to the true owner of a hostile claim); and (4) use was exclusive (i.e., holding the land for one's own use and benefit, not for another). In contrast, a prescriptive easement requires all of the same elements except that the use of the property doesn't need to be exclusive and the occupation isn't required to be actual so such a prescriptive easement presents a lesser burden to obtain ownership as compared to adverse possession. However, unlike adverse possession a prescriptive easement only gives a right of use, not ownership, over the real estate. Additionally, it's noted that the adverse possession law changed in 2008 and anyone whose claim of use for 10 continuous years commenced after 1998 will consequently have a different legal standard to obtain ownership through adverse possession. For the 10-year periods that started after 1998 the element of hostility now requires a reasonable belief that the claimant has title to the property and adverse possession cannot be established through an intentional trespass onto another's land. Further, the actual occupation can no longer include non-structural encroachments such as fences or hedges or plantings.

Regardless, a title affidavit or boundary line agreement waives both of these ownership rights (regardless of the year that the use was started) by expressly stating on its face (in some variety of the following language) that: "I do not own the Strip of Land and that Strip of Land is not included in the deed to my property." Further, it states that such use was

"with permission of my neighbor." Lastly, it includes a release of "any right, title, and interest" which may have been acquired in the property through the above referenced legal concepts of adverse possession and a prescriptive easement. So, why in the world would anyone ever sign such a document?

Neighborly is one thing, but giving up your rights without "just compensation" is another.

There are two options that a neighbor can do while maintaining his claim. The first is to simply refuse to sign the affidavit or agreement. In this situation the purchaser is not prevented from buying the property except where the appraised value of the property without the claimed land does not satisfy a lender's terms to issue a loan. Yet, beyond this valuation issue, the only effect for a purchaser of an inability to obtain the title affidavit or agreement will be that the purchaser's title insurance company will refuse to insure that portion of the premises subject to the neighbor's ownership claim by way of excluding it from the policy. The second option is to force the issue. In this situation, a neighbor can assert their ownership claim and negotiate for some right of continual use or simply pursue the ownership claim to judgment in court. Perhaps the neighbor can settle for an easement that expires when the remaining neighbor vacates the premises. This can be a win-win scenario for all involved. Notwithstanding these possibilities, New Yorkers are advised never to sign these affidavits or agreements without first consulting with their attorney.

*Adapted from this [Dan's Papers](#) article.*