

The Art of Retracement

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New Jersey Society of Professional Land Surveyors

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Presented by

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Biography of Gary R. Kent

Gary Kent is a part-time Professional Surveyor with Schneider Geomatics, a land surveying and consulting engineering firm based in Indianapolis. He is in his 40th year with the firm and upon his transition to part-time status in 2020, he formed Meridian Land Consulting, LLC through which he provides training, consulting and expert witness services.

Gary is a graduate of Purdue University with a BS in Land Surveying; he is registered to practice as a professional surveyor in Indiana and Michigan. He served as chair of the joint ALTA/NSPS Workgroup on the ALTA/NSPS Standards from 1995 to 2021. Gary is a past-president of both the American Congress on Surveying and Mapping and the Indiana Society of Professional Land Surveyors.

A member of the adjunct faculty for Purdue University from 1999-2006, Gary taught Boundary Law, Legal Descriptions, Property Surveying and Land Survey Systems and was awarded “Outstanding Associate Faculty” and “Excellence in Teaching” awards for his efforts. Gary is on the faculty of GeoLearn (www.geo-learn.com), an online provider of continuing education and training for surveyors and other geospatial professionals. He is also a certified instructor for the International Right of Way Association.

Gary has served on the Indiana State Board of Registration for Professional Surveyors since 2004. He is frequently sought as an expert or consulting witness in cases involving boundaries, easements, riparian rights, survey standards and land surveying practice. He has presented programs on boundary law, easements and rights of way, surveying standards and practice, and leadership multiple times in each the 50 states and three times in Europe. He is also a columnist for The American Surveyor magazine.

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Preface

While reference is often heard to the “art” and “science” of boundary surveying, this author has often discounted if not criticized those terms because boundaries are much more a function of the application of the law to evidence than they are of art and science. “Art” sounds like “style,” and science is simply the science of measurement, which – although a major tool of retracement – is generally a minor factor in retracement. Yet, this program is entitled the *Art of Retracement* to recognize that there is, in fact, an art even to the application of the law.

It is my intent that this program be part dialogue and exchange of thoughts and ideas as we work through some typical retracement problems.

Introduction

Every professional surveyor across the United States knows the phrase “*Follow in the Footsteps*” as it relates to conducting a boundary retracement survey. But what does it really mean and what is the basis for following the footsteps? And exactly whose footsteps are we talking about? Surveyors also know the effect of the statute of frauds is that what is written in the conveyancing document is considered by the courts to be the highest and best expression of the parties’ intentions. But what happens when the evidence of the footsteps on the ground conflicts with the written title? What if there are seemingly no footsteps to follow? What then?

In this program we will explore the concept of retracement, how it relates to and is dependent on the document of conveyance, and what controls when conflicts are inevitably encountered. When armed with a full understanding of the concept of retracement, surveyors will be much better equipped to help steer their clients (and their affected neighbors) *away* from the pain and cost of litigation, and towards an amicable solution based on well-placed confidence and understanding of their respective roles and responsibilities.

There are three goals for this program;

1. Provide support for and encourage surveyors to be more open to what they consider as acceptable evidence of an original survey with the goal of finding defensible ways to not upset the neighbors - or even entire neighborhoods - by disregarding long-standing lines of occupation/possession..
2. Encourage surveyors - under some well-framed circumstances - to consider giving professional opinions as to ownership, and even monumenting to the lines that they believe represent ownership.
3. Encourage surveyors to recognize that - regardless of what they think about #1 and 2 above - they must communicate to clients and third parties what the lines and corners of their surveys represent and what they do not represent - in particular, with respect to ownership.

Aside from the technical aspects of a proper retracement, there are ethical considerations that must also be taken into account. It should also be noted that many of the principles explained in this program and paper apply equally to the process of section corner perpetuation in Public Land Survey states.

Definitions - Retracement and original boundary surveys

Indiana Administrative Code 865 IAC 1-12-2 defines a retracement survey as “a survey of real property that has been previously described in documents conveying an interest in the real property.” This is in contrast to an original boundary survey which is defined in the same rule as “a survey that is executed for the purpose of locating and describing real property that has not been previously described in documents conveying an interest in the real property.” This program addresses retracement surveys and the role that the original survey plays in a retracement; we will leave the performance of original surveys for another day.

An original survey has also been defined in a variety of other ways:

- [T]he survey originally done when a subject tract was separated from its source parcel¹
- A cadastral survey which creates land boundaries and marks them for the first time.²
- A survey called for or presumed to have been made at the time a parcel or parcels were created.³

Introduce flowchart

The flowchart developed as part of this program and included on page is a work in progress.

Intent

The author of this paper has, many times, cited the Indiana case of *Pointer v. Lucas* 131 Ind.App. 10, 169 N.E.2nd 196 (1960), viz.,

The grantor's intention controls, and the question for the court is not what the parties meant to say, but what they meant by what they did say.

This decision – and there are many just like this - makes it very clear that the unambiguous intentions of the parties as expressed in the deed will override any unexpressed intentions. Such an approach can result in seemingly illogical outcomes, yet, the statute of frauds clearly dictates this approach unless the result is “manifestly absurd.”⁴

¹ Wilson, Donald A., Boundary Retracement, Processes and Procedures, CRC Press, 2017, p. 89

² Cadastral Survey Training Staff, *Glossary of BLM Surveying and Mapping Terms*, U.S. Department of the Interior, Bureau of Land Management, 1980

³ Robillard, Walter G., Wilson, Donald A., and Brown, Curtis M., *Evidence and Procedures for Boundary Locations*, 4th Edition, Wiley, 2002, Chapter 2.

⁴ See e.g., *Long Run Timber Company v. Dept. of Conservation & Natural Resources*, 145 A.3d 1217 (Pennsylvania) (2016) (p. 18 of this handout)

As stated in *Marchak v. Claridge Commons, Inc.*, "[w]hen reading a contract, our goal is to discover the intention of the parties. Generally, we consider the contractual terms, the surrounding circumstances, and the purpose of the contract." 134 N.J. 275, 282, 633 A.2d 531 (1993). *Highland Lakes Country Club v. Franzino*, 892 A. 2d 646 - NJ: Supreme Court 2006.

Where there is nothing ambiguous or uncertain in the terms of a deed it speaks for itself and the inquiry should be limited to what the words of the deed express without regard to any intention independent of those words. * * * The intention of the parties to a grant is to be gathered if possible from the language itself and is determined by a proper construction of the language used rather than by resorting to extrinsic evidence. *Pinsky v. Sloat*, 130 Cal. App. 2d 579 - Cal: Court of Appeal 1955.

The general principle is well established that the intention of the parties as evidenced by a clear, unambiguous written instrument cannot be varied by parol proof of a different intention, in the absence of some equitable grounds for intervention, such as duress, fraud or mistake. *Alcorn v. Linke*, 133 NW 2d 89 - Iowa: Supreme Court 1965.

Where a deed is plain and unambiguous, its meaning is to be determined without reference to extrinsic facts. *Badura v. Lyons*, 147 Neb. 442, 23 N.W.2d 678. In determining the intent of the parties to a deed, the language of the instrument, together with the surrounding circumstances, are to be considered. *Schaffert v. Hartman*, 278 NW 2d 343 - Neb: Supreme Court 1979.

When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. In such cases, the meaning and intent of the parties to the written contract must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence. *Derbes v. GBS PROPERTIES, LLC*, 902 So. 2d 1109 - La: Court of Appeals, 5th Circuit 2005.

¶ 13 There are several considerations when interpreting a contract: (1) a court's primary goal is to determine and give effect to the parties' intent; (2) if possible, that intent is to be determined from the language of the contract itself; (3) if the language of the contract is unambiguous, it will be deemed to express the intent of the parties; and (4) the contract's plain meaning will be enforced as written. *Hess v. Hobart*, 2020 COA 139 - Colo: Court of Appeals, 1st Div. 2020.

Unfortunately, legal descriptions contained in deeds often lack the information that could be most helpful to the surveyor in determining intent. The fact that there are very frequently ambiguities in legal descriptions emphasizes the dangers associated with blindly laying out the geometry of that description onto the ground while ignoring other evidence. That specific will be discussed at length later in this paper.

"The tendency of modern decisions is to disregard technicalities and to treat all uncertainties in a conveyance as ambiguities subject to be cleared up by resort to the intention of the parties as gathered from the instrument itself, the circumstances attending and leading up to its execution, and the subject matter and the situation of the parties as of that time. Hence, in the construction of deeds surrounding circumstances are accorded due weight. In the consideration of these various factors, the court will place itself as nearly as possible in the position of the parties when the instrument was executed." *Monroe v. Rucker*, 310 Ky. 229, 220 S.W.2d 391, 393

But even where the description is seemingly unambiguous, the primary question is this: What most clearly represents the intentions of the parties in an unambiguous legal description?

The answer to that question, as with so many questions in boundary surveying, depends on a variety of factors.

Where there was, in fact, *no* original survey, the *unambiguous* description as written stands as the best evidence of the boundaries. But the inclusion of the phrase above "*considering the surrounding circumstances*" invokes the need for the surveyor to search for and identify the origin of the description – which would be an original survey – and, if found, retrace the boundary based on that survey.

Alternatively where (a) there *was* an original survey, (b) the legal description *is* ambiguous, or (c) the evidence on the ground indicates other unanticipated ambiguities, relying on even exacting dimensions in the written description as the best expression of intent is almost certainly a road taken in the wrong direction.

Providing thoughtful and, perhaps to an extent, provocative, guidance to the professional surveyor for use in retracing boundaries under these conditions constitutes the primary purpose of this paper.

Determining if there was an original survey

Miscellaneous thoughts on identifying the original survey

How does the surveyor know if there was, or was not, an original survey and, if so, who the original surveyor was and where we can find any information related to that survey?

In the case of acreage in rural areas, many such properties were first surveyed out of the larger tract (typically, or at least often, a quarter section) in the mid-1800s. In Indiana, most such surveys were conducted by the County Surveyor pursuant to the legal survey statute (which dates back to at least 1851) and the County Surveyor should, by law, have a legal survey record book detailing those, and more recent, surveys.

Smaller metes and bounds or acreage tracts were typically not the subject of legal surveys and finding direct evidence of those surveys can be – at the very least – problematic. Not knowing

who may have conducted the survey is only the first challenge because even if the surveyor is known or can be discovered (which is far from certain), finding the corresponding survey or fieldnotes may be next to impossible given the passage of time, retiring surveyors, closed businesses and lost or destroyed records.

Thus, finding direct evidence of an original survey of a normal metes and bounds or smaller acreage tract may be very difficult unless one is aware of the history of the area, the surveyors who formerly practiced there and of their practice habits. As a result, surveyors are often forced to rely on indirect evidence.⁵

Alternately, a subdivision is a specialized type of original survey and there is generally a presumption (albeit rebuttable) that the lots therein were, in fact, actually surveyed and located on the ground. Thus, the subdivision plat itself is the original survey, although many old subdivision plats indicate no monuments at the lot corners. However, where the platting surveyor states that lots were, for example, “surveyed,” “laid out,” etc., there is a presumption that the lines were actually run on the ground.⁶

Regardless, surveyors must, in the performance of a retracement survey, find all available, relevant evidence, understand its relative importance, analyze and weigh it in order to identify which is the best to rely on, then apply it to retrace the boundary, even though that evidence may not be admissible in a court of law.

A survey may be proven by any evidence of facts that are relevant and material, but this evidence may not be admissible.⁷

Mandatory recordation of boundary surveys and Records of Survey (of which recordation is typically required in states that require them) is a seemingly obvious answer to identifying the original survey and surveyor even though many states do not require this.

Yet, it is an ironic and discouraging fact that many professional surveyors oppose the idea of mandatory recordation surveys even though every one of them understands at least the concept of following in the footsteps of the original surveyor. Many of the same surveyors complain about the integrity of their jurisdiction’s GIS even though mandatory recordation of boundary surveys would be one obvious step in the direction of providing information that would improve the accuracy and precision of a GIS.

⁵ Further discussion on direct and indirect evidence is found below and an excellent primer on evidence as relating to surveyors can be found in *Evidence and Procedures for Boundary Locations*, 4th Edition, Robillard, Walter G., Wilson, Donald A., and Brown, Curtis M., Wiley, 2002, Chapter 2.

⁶ “The statement on a map “Surveyed by Wheeler in 1880” is conclusive proof that the land was surveyed, and it must be presumed that monuments were set.” Robillard, Walter G., Wilson, Donald A., and Brown, Curtis M., *Evidence and Procedures for Boundary Locations*, 4th Edition, 2002, p. 358 (citing *Curtis v. Upton*, 175 Cal. 322 (1917))

⁷ Robillard, Wilson, and Brown, p. 30

Indiana has required recordation of nearly all boundary surveys since 1988, and although that administrative rule is generally followed in some parts of the state, in other parts it is seldom followed. Regardless, in order to provide a better means by which to identify the original surveyor, a statute was passed in 2018 requiring that the caption of a description prepared based on an original survey include the name, license number, date of certification and other identifying information of the survey that was the basis for the description.

Yes, there was an original survey

The Surveyor's Responsibility – Follow in the Footsteps

If there was an original survey, the surveyor's task is to retrace the lines and corners of that survey – follow in the footsteps of the original surveyor. This means the original survey of the tract or parcel in question – the survey that resulted in the land description that was subsequently conveyed in a deed - not some subsequent retracement survey, although in some circumstances, as we will find, that subsequent survey may be the best available evidence of the original survey. The original survey carries with it a particularly special status that subsequent surveyors must attend to.

Although boundaries arising from the conveyance of land are determined with reference to the intention of the grantor, as expressed in the instrument of conveyance, "[t]he highest and best proof of this intention, ordinarily, lies not in the words of expression of the deed, but rather, in the work upon the ground itself, where the survey was made prior to the conveyance." *Sullivan v. Kanable*, 41 NE 3d 264 - Ill: Appellate Court, 2nd Dist. 2015.

First, the surveyor can, in the first instance, lay out or establish boundary lines within an original division of a tract of land which has theretofore existed as one unit or parcel. In performing this function, he is known as the 'original surveyor' and *when his survey results in a property description used by the owner to transfer title to property* that survey has a certain special authority in that the monuments set by the original surveyor on the ground control over discrepancies within the total parcel description and, more importantly, control over all subsequent surveys attempting to locate the same line.

Second, a surveyor can be retained to locate on the ground a boundary line which has theretofore been established. When he does this, he 'traces the footsteps' of the 'original surveyor' in locating existing boundaries. Correctly stated, this is a 'retracement' survey, not a resurvey, and in performing this function, the second and each succeeding surveyor is a 'following' or 'tracing' surveyor and his sole duty, function and power is to locate on the ground the boundaries [*sic*] corners and boundary line or lines established by the original survey; he cannot establish a new corner or new line terminal point, nor may he correct errors of the original surveyor. He must only track the footsteps of the original

surveyor. The following surveyor, rather than being the creator of the boundary line, is only its discoverer and is only that when he correctly locates it." (Emphasis in original.) *Rivers v. Lozeau*, 539 So.2d 1147, 1150-51 (Fla.Dist.Ct.App.1989) cited in *Sullivan v. Kanable*, 41 NE 3d 264 - Ill: Appellate Court, 2nd Dist. 2015.

Under California law, the location of a disputed boundary line is proven by retracing, as nearly as possible based upon existing evidence, the footsteps of the original surveyor whose survey fixed the boundaries. (See *Pauley v. Brodnax* (1910) 157 Cal. 386, 396-397 . . . ["The survey as made in the field and the lines actually run on the surface of the earth . . . must control." [Citation.]] *BERTOLLI PROPERTIES, LLC v. HEADWATERS RANCH, INC.*, Cal: Court of Appeal, 1st Appellate Dist., 3rd Div. 2018 (Not for Publication).

'[T]he question presented to the court in a boundary dispute is not that of making a resurvey but one of determining as a question of fact from the preponderance of expert and nonexpert evidence (as in all other civil cases) the actual location of the monuments, corners or lines as actually laid out on the ground by the official surveyor.' [A later surveyor] should endeavor to retrace the steps of the man who made the original survey. If by so doing the line can be located, it must be done, and, when so located, it must control.[Citation.]]*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 736-737.

[T]he location of a disputed boundary line is first proven by retracement, and where monuments are obliterated and undiscoverable, corners should be reestablished wherever possible in accordance with natural objects described in the original survey's field notes of the original survey. However, in circumstances where a corner is "lost"[4] such that it cannot be located on the ground, a court may "as a last resort" use the proportional method, which "redistributes an excess or shortage proportionately between all owners along the particular line."The proportional method "is not to be used 'if the line can be retraced as it was established in the field' and it "'must not be resorted to unless all other prescribed methods fail.'"*BERTOLLI PROPERTIES, LLC v. HEADWATERS RANCH, INC.*, Cal: Court of Appeal, 1st Appellate Dist., 3rd Div. 2018

"A resurvey not shown to have been based upon the original survey is inconclusive in determining boundaries, and will ordinarily yield to a resurvey based upon known monuments and boundaries of the original survey. So a resurvey which locates lines in accordance with a recorded plat will prevail over a resurvey not in accordance with such plat." 11 C.J.S. Boundaries § 61, p. 634. *Pallas v. Dailey*, 100 NW 2d 197 - Neb: Supreme Court 1960.

In retracing lines or making the survey the surveyor shall take care to observe and follow the boundaries and monuments as run and marked by the original survey, but shall not give undue weight to partial and doubtful evidence or appearances of monuments, the recognition of which shall require the presumption of marked errors in the original

survey, and he shall note an exact description of such apparent monuments. SDCL 43-18-7.

[T]he last accepted government survey, prior to the issuance of a patent, will prevail over subsequent surveys. *Larson v. Larson*, 89 Cal. App.2d 846, 202 P.2d 121 (1949). This rule holds true even if a subsequent determination is made that the accepted original survey is incorrect. *United States v. Reimann*, 504 F.2d 135 (10th Cir.1974). *Schoenecke v. Yost*, 776 P. 2d 1262 - Okla: Supreme Court 1989.

[A]n original surveyor can establish an original boundary line only for an owner who owns the land on both sides of the line that is being established and that line becomes an authentic original line *only when the owner makes a conveyance based on a description of the surveyed line* and has good legal title to the land described in his conveyance. *Rivers v. Lozeau*, 539 So. 2d 1147 - Fla: Dist. Court of Appeals, 5th Dist. 1989 [footnote intentionally omitted].

[W]hen asked whether they had ... followed the footsteps on the ground of the original ... surveyor, which methodology is required in a "retracement" survey, the ... surveyors admitted that they had not. *RAPIDES PARISH POLICE v. GRANT PARISH POL.*, 924 So. 2d 357 - La: Court of Appeals, 3rd Circuit 2006.

In a boundary dispute, the actual boundary as fixed by the original survey must control unless another boundary has been established by practical location. *Benz v. City of St. Paul*, 89 Minn. 31, 36, 93 N.W. 1038, 1039 (1903)..

This does not generally mean simply mathematically tracing the *legal description* written based on that survey onto the ground or even recreating the lines and corners based on the *plat* produced as an instrument of that survey, but rather retracing the lines and corners *as run on the ground*. Following the *fieldnotes* from the original surveyor would be a good start if they can be obtained since those were presumably collected during the actual survey, but even those yield to evidence on the ground of the original survey. The distances and directions reported on the plat or in the record description are overridden by the lines run, and corners set, on the ground.

"A resurvey not shown to have been based upon the original survey is inconclusive in determining boundaries, and will ordinarily yield to a resurvey based upon known monuments and boundaries of the original survey. So a resurvey which locates lines in accordance with a recorded plat will prevail over a resurvey not in accordance with such plat." 11 C.J.S. Boundaries § 61, p. 634. *Pallas v. Dailey*, 100 NW 2d 197 - Neb: Supreme Court 1960.

We are in accord with the view that fixed monuments and surveys staked out on the ground control over field notes, showing the courses, distances, and quantities; or a description of a survey in words, or a picturization of a survey in a plat. The general rule

is: "Since plats are merely a picturization of courses and distances, the statements as to conflicts between monuments and plats apply also to conflicts between the monuments marking a surveyed line and the description thereof in a course and distance description. *Hoke v. Welsh*, 77 NW 2d 659 - Neb: Supreme Court 1956.

In *Sellman, supra*, the Court said the subdivision is first done by the survey of the premises, establishing monuments, etc., so that a physical or semi-physical dividing of the land with the attendant markings takes place. Then a plat is made and the symbolic representation of what was done on the premises becomes the recorded documentation of the action taken and provision is made for the dedication and acceptance of public streets and ways. The Court posed the question: "What is the situation where the actual location of a corner by a surveyor in setting up a subdivision differs from the description or plat?" The Court then discussed numerous authorities before arriving at the following conclusions set forth in syllabi 1 and 2:

"1. Where a survey of a parcel of land has been made by a surveyor, monuments placed or ascertained, and boundary lines established by such monuments and a plat is made thereafter and recorded which subdivides the land so surveyed into lots, the boundary lines of such lots as so established on the ground itself are primary. The plat is derivative and secondary.

"2. Where the original monuments as located by such surveyor are still ascertainable, the boundary lines determined by such monuments will determine the boundaries of the respective lots irrespective of deviation from the course or distance as set forth in the plat." (Emphasis ours)

In Clark, *Surveying and Boundaries* (3rd Ed. 1959), it is said at page 534, Section 540:

"§ 540. Survey rather than plat fixes location of boundary. — Where a plat delineates an actual survey, the survey rather than the plat fixes the location and the boundaries of the land. The plat is a picture, the survey the substance. In a conveyance referring to such plat, the lot bounded by the lines actually run upon the ground is the lot intended to be conveyed. The plat may be all wrong, but that does not matter if the actual survey can be shown. Thus, where there is a dispute as to the boundary line between a street and the abutting lots, the original survey will control the recorded plat. Where a surveyor of the land marks the division lines on the ground by monuments, such lines control calls and distances indicated on his map. * * *"

Scarberry v. Carr, 571 P. 2d 458 - Okla: Supreme Court 1977

It affirmatively appears that the private surveys upon which both plaintiff and cross-complainant rely were not made in accordance with the official plat, field notes, monuments of survey, lines, descriptions and landmarks made and established by the official government survey of the two quarter sections. For such reasons these surveys cannot and they do not furnish evidence of the location of the true boundary line[.] *Schoenecke v. Yost*, 776 P. 2d 1262 - Okla: Supreme Court 1989.

[I]t is a general rule that the monuments placed by the original surveyor are conclusive on all persons owning or claiming to hold with reference to such survey. *Morales v. CAMB*, 160 P. 3d 373 - Colo: Court of Appeals, 2nd Div. 2007.

The object of a resurvey is to furnish proof of the location of the original survey's lost lines or monuments, not to dispute the correctness of it. 12 AM.JUR.2D Boundaries § 57. If the original corners can be found, the places where they were originally established are conclusive without regard to whether they were in fact correctly located. *Gilbert v. Geiger*, 747 NW 2d 188 - Wis: Court of Appeals 2008.

[The surveyor] is considered preeminently a measurer of land. This is very true, and in certain localities and under certain conditions this may compose almost the entire work of the surveyor. But in the vast majority of cases the actual measuring of land forms the smaller portion of his duties. His hardest work is often, to use a colloquial phrase, to "find the land" to be surveyed.⁸

It is needless to say that the successful surveyor must be accurate in his instrument work and his computation; yet, if he would really be successful, he must go beyond this. He must add to this the patience to collect all the evidence which can be found bearing upon the case in hand, together with the ability to weigh this evidence to a nicety and to determine clearly the course pointed out by the balance of probability.⁹

In establishing the original boundary on the ground the original surveyor is conclusively presumed to have been correct and if later surveyors find there is error in the locations, measurements or otherwise, such error is the error of the last surveyor. Likewise, boundaries originally located and set (right, wrong, good or bad) are primary and controlling when inconsistent with plats purporting to portray the survey and later notions as to what the original subdivider or surveyor *intended* to be doing or as to where later surveyors, working, perhaps, under better conditions and more accurately with better equipment, would locate the boundary solely by using the plat as a guide or plan. Written plats are not construction plans to be followed to correctly reestablish monuments and boundaries. They are "as built" drawings of what has already occurred on the ground and are properly used only to the extent they are helpful in finding and retracing the original survey which they are intended to describe; and to the extent that the original surveyor's lines and monuments on the ground are established by other evidence and are inconsistent with the lines on the plat of survey, the plat is to be disregarded. When evidence establishes a discrepancy between the location on the ground of the original boundary survey and the written plat of that survey the discrepancy is always resolved against the plat. *Tyson v. Edwards*, 433 So. 2d 549, 552 (Fla. 5th DCA 1983)

⁸ Mulford, A.C., *Boundaries and Landmarks*, A Practical Manual, Van Strand , 1912, p. 1

⁹ Mulford, p. 87

As stated in 8 Am. Jur., Boundaries, Section 102, page 819: "The object of a resurvey is to furnish proof of the location of the lost lines or monuments, not to dispute the correctness of or to control the original survey. The original survey in all cases must, whenever possible, be retraced, since it cannot be disregarded or needlessly altered after property rights have been acquired in reliance upon it." It is generally held, therefore, that a resurvey that changes lines and distances and purports to correct inaccuracies or mistakes in an old plat is not competent evidence of the true line fixed by the original plat. See *Dittrich v. Ubl*, 216 Minn. 396, 13 N.W.2d 384; *Cragin v. Powell*, 128 U.S. 691, 9 S.Ct. 203, 32 L.Ed. 566; *City of Racine v. Emerson*, 85 Wis. 80, 55 N.W. 177, 178. *Akin v. Godwin*, 49 So. 2d 604 - Fla: Supreme Court 1950.

A surveyor cannot set up new points and establish boundary lines unless he is surveying unplatted land or subdividing a new tract. Subsequent surveyors may only locate the points and retrace the lines of the original survey; they cannot establish new lines or corners. See *Tyson*, 433 So. 2d at 552. *BECKHAM/TILLMAN v. Bennett*, Fla: Dist. Court of Appeals, 1st Dist. 2013 [internal citations intentionally omitted]

[W]hat the original surveyor actually did by way of monumenting his survey on the ground takes precedence over what he intended to do as shown by his written plat of survey. *Tyson v. Edwards*, 433 So.2d 549, 552-53 (Fla. 5th Dist.App.1983).

It is the general rule that ... recourse must be had first to the monuments placed in the original surveys. Secondly, if such corners cannot be established the field notes should be taken and "from the courses and distances, natural monuments or objects, and bearing trees described therein the surveyor should endeavor to fix the line precisely as it is called for by the field notes. He should endeavor to retrace the steps of the man who made the original survey", and if by doing so the line can be located it must be done, and when so located "it must control." *De Escobar v. Isom*, 112 Cal. App. 2d 172 - Cal: Court of Appeal 1952.

Each party received a deed which refers to a recorded plat or survey and there is no question but that the measurements, courses, and monuments shown on the recorded plat are incorporated in each deed by reference. The descriptions therefore embody, just as would a metes and bounds description, the monuments, courses and distances set forth in the plat to describe the actual land owned by each party. However, this description and this plat is a symbolic representation of something which has been physically marked out on the surface of the earth. The actual physical markings and location by monument or otherwise is the primary thing. It locates the land. The map or plat is secondary to this purporting to symbolically represent that which has been physically located. *Sellman v. Schaaf*, 26 Ohio App. 2d 35 - Ohio: Court of Appeals 1971.

The Surveyor's Challenges

The Best Evidence of Intent

As noted above, the courts have deemed the lines and corners surveyed on the ground by the original surveyor to be far and away the most significant evidence of the parties intentions. The original survey sits alone at the top of the hierarchy where there are conflicts in determining the intentions of the parties with respect to boundary locations.¹⁰

In determining the location of a boundary line, it is not where the surveyor intended to run a boundary or should have run it, but where the boundary was actually run that controls.¹¹

It is a fundamental principle of law that boundaries are to be located on a resurvey where the original surveyor ran the lines and called for them to be located in his fieldnotes.¹²

In *Clark on Surveying and Boundaries*, 3rd § 9, the surveyor's function is stated in this language:

"As has been pointed out heretofore it is not the surveyor's responsibility to set up new lines except where he is surveying heretofore unplatted land or subdividing a new tract. Where title to land has been established under a previous survey, the surveyor's duty is to solely locate the lines of the original survey. He cannot establish a new corner, nor can he even correct erroneous surveys of earlier surveyors. He must track the footsteps of the first."

McKinley v. Hilliard, 454 SW 2d 67 - Ark: Supreme Court 1970

When there is no original survey – or no remaining, reliable evidence of an original survey – one is faced with an entirely different challenge that will be addressed later in this paper.

The Best Evidence of the Original Survey

If there is conclusive evidence that there was, in fact, an original survey, the issue becomes simply, What is the best evidence of that survey?

Direct Evidence

In the context of this paper, the term '*direct evidence*' is not *necessarily* intended to be a reference to the legal definition of direct evidence. However, definitions from Black's Law Dictionary ("*that which immediately points to the question at issue*") and from Wilson ("*that*

¹⁰ Innumerable court decisions and learned texts have documented this fact, e.g., Mulford p. 11

¹¹ Wilson, p. 64

¹² Wilson, p. 64

means of proof which tends to show the existence of a fact in question without the intervention of the proof of any other fact”¹³ support the idea of direct evidence being that evidence convincing enough to the *surveyor* for him or her to opine that there was, in a sense, indisputably, an original survey. Of course, surveyors always keep in mind what their arguments will be and how they will hold up under cross examination in a court of law.

The same can be said for the term ‘*indirect evidence*,’ (discussed further below) which has been defined as “*Evidence that establishes immediately collateral facts from which the main fact may be inferred.*”¹⁴

If we have direct evidence of the original survey – for example, monuments found on the ground that correspond with the original plat or fieldnotes, or improvements that can be shown as to have been built soon after the original survey (see footnote 3) - the surveyor’s job is theoretically straightforward: Retrace the lines and corners based on that evidence and make the case for why they represent the lines and corners as run.¹⁵ Of course, ambiguities will almost always be found, but those are not fatal to the retracement effort, they merely call for the evidence to be analyzed and the rules of construction to be applied as appropriate.

- Is there still direct evidence of that original survey? And what constitutes such direct evidence?
 - Lines run and marked on the original survey
 - Monuments found in the field corresponding to the original plat of survey
 - Monuments found in the field corresponding to the original field notes
 - Improvements built based on the original monuments¹⁶

¹³ Wilson, Donald A., *Forensic Procedures for Boundary and Title Investigation*, Wiley, 2008).

¹⁴ <https://www.merriam-webster.com/dictionary/indirect%20evidence>

¹⁵ The desirability (arguably, the *necessity*) of explaining the evidence and justification that support the surveyor’s boundary opinion is an argument for the use of a Surveyor’s Report on every boundary survey. Among other things, the advantages of a Surveyor’s Report include – to the point of this paper – “[R]ecords the weight given by the surveyor to the evidence studied” and “[A]llows a resurvey to be made at less cost” (i.e., with fewer problems). F. Henry Sipe, L.L.S., *The Report of Survey*, undated.

¹⁶ Relying on old fences without careful consideration can be a snare and a delusion. If relying on the doctrine of acquiescence as evidence of some prior parol agreement, the surveyor may be taking on a legal role in determining whether or not acquiescence has operated. If, however, the original parties to the parol agreement that the acquiescence claim is rooted in are still the current owners, there would seem to be ample opportunity to illuminate the agreement and to strongly urge the parties to put the agreement to writing. Alternately, if the legal description is patently ambiguous or if there are other latent ambiguities relating to a boundary, old fences that have been long-acquiesced in may aid in solving those ambiguities by providing satisfactory proof of where the original lines were run.

Indirect Evidence

Very frequently, unidentified monuments are recovered at or near the apparent corners of the tract being surveyed. But are they from the original survey? Some questions to consider...

1. Is there a plat indicating that there was an original survey?
2. The monuments found do not match what the plat says, or the plat does not indicate any monuments, but are the monuments of a type and condition that could plausibly represent those set on an original survey given the date the parcel was first conveyed out of its parent?
3. Are the locations of those monuments with respect to themselves and other boundaries and improvements within a precision that would have been acceptable as of the date the parcel was first conveyed out of its parent?

If the answer to all three of those questions is yes, then an opinion that the monuments recovered were set on the original survey may be defensible. However, if the answer is yes to only the second and third questions, while the answer to the first is no, such an opinion is not as strong and will be more difficult (but certainly not impossible) to defend in court (which is the measure of credibility that the surveyor must ultimately consider).

A physical monument not recited in the description, but identified as set prior thereto, and on which the description is based, and which is substantially conformable with the dimensions in the description and known to be in the original position, will hold as physical evidence of title conveyed by the description, as preferable to the recited record monument in the description.¹⁷

Indirect evidence above and beyond monuments must also be sought and considered as evidence of an original survey. This might include:

- Unidentified monuments found
 - that could date to the original survey
 - that have been relied upon by the owners (and, perhaps, surveyors) for a long period of time
 - that are consistent with improvements that relate to the boundary
- Improvements found relating in some manner to the boundary (See footnotes 16, 18 and 19)
 - that could plausibly date to the original survey

¹⁷ Wattles, William, *Land Survey Descriptions*, Gurdon H. Wattles, 1974, p. 10

- that have been relied upon by the owners (and, perhaps, surveyors) for a long period of time

Disregarding direct – or even indirect – evidence of an original survey simply because it does not match the geometry of the legal description can have serious consequences. The challenge, however, for the surveyor is to sift through the disparate evidence that was not called for in the conveyance and determine which, if any, is acceptable.

A primary consideration in weighing the applicability of indirect evidence or assessing the plausibility of ostensibly direct evidence, the surveyor must consider whether it accurately emulates the locations based on the courses and corners of the original legal description *given the date of the original survey*. (i.e., would the precision that the evidence currently represents have been acceptable as of the date of the original survey? If so, it would seem to be part of a good argument for respecting that evidence; if not, perhaps it should be discarded or at least at a minimum, looked at with a critical eye.

Professional surveyors must cast their nets far and wide to find all possible physical evidence of the original survey. It is this writer's opinion that surveyors should be guarded, but more liberal, in accepting such evidence.

The position of old fences may be considered in ascertaining disputed boundaries. As between the old boundary fences and any survey made for the monuments after dispute, the fences are far better evidence of what the lines of the lot actually were.¹⁸

If a record map shows no bearings, and insufficient distances to determine direction or position of lot lines, the occupation of long standing will have control preference in spite of possible apparent differences from record.¹⁹

Certain landmarks may be specifically mentioned in a description. These may perhaps be called special landmarks and must be identified as far as possible from the characteristics named in that description. But beside these there are a large number of general marks not mentioned perhaps in the deed, but which are nevertheless of the greatest possible value. Yet there can be no hard and fast classification of these, because they vary greatly with locality.²⁰

The evidence relating to the iron pins not shown on the plans was properly considered as evidence of the original survey (*Barron v. Cobleigh*, 11 N.H. 557 (1841)) and together with the other factors in evidence enabled the court to establish the boundary line to most

¹⁸ Mulford, p. 12.

¹⁹ Wattles, p. 79.

²⁰ Mulford, p. 13.

nearly conform to the calls in the deeds. *Sheldon v. Sevigny*, 110 NH 419 - NH: Supreme Court 1970.

There are cases holding that where the description of land in a deed or mortgage is in some respect vague, uncertain or indefinite, parol evidence is admissible, to explain and remove, by proof of pertinent facts existing at the time, the uncertainty, and to identify the property intended to be conveyed, thus giving effect to the intention of the parties to the instrument... *Carson v. Palmer*, 1931, 139 Fla. 570, 190 So. 720²¹

¶ 15 As noted, the original survey of a given parcel "control[s] over all subsequent surveys attempting to locate the same line." *Rivers*, 539 So.2d at 1151. We acknowledge that an occupation line might be of value in setting the boundary between the properties on either side of *that* line. Occupation lines might also correspond to improvements on property. "The evidentiary value of improvements depends upon the probability that their builders had, at the time of construction[,] a better means of knowing where the original lines were located than is now available." Griffin, *supra*, at 500. *Sullivan v. Kanable*, 41 NE 3d 264 - Ill: Appellate Court, 2nd Dist. 2015.

A more accurate statement of law would be: (1) where original stakes which mark boundaries of old plats have disappeared, surveys should try and determine where the original stakes were placed. *Carpenter v Monks*, 81 Mich 103; 45 NW 477 (1890); (2) In determining where the original stakes were located, various types of evidence are admissible including new stakes or monuments which replace old stakes, reference points correlated to other established points, and occupational lines established by long usage. All of these may be considered by the fact finder, but no one factor, such as occupational lines, dominates the others as a matter of law. FN 6 , *Kahn-Reiss, Inc. v. Detroit & Northern Savings & Loan Ass'n*, 228 NW 2d 816 - Mich: Court of Appeals 1975.

In his concurrence, Judge Friedlander discussed the case of *Wingler v. Simpson*, 93 Ind. 201 (1884), in which the Indiana Supreme Court invoked the doctrine of title by acquiescence, ruling "that the parties' actions proved that the original establishment of the boundary accurately reflected the intent of the parties in completing the transfer of property." *Id.* at 1272. In so holding, the *Wingler* Court underscored the policy of the doctrine, stating:

Parol evidence is admissible to prove the former existence, identity and location of ancient monuments since removed, such as marked trees and stones, indicative of the location of lines and corners; and we see no reason why the acts of the interested parties,

²¹ The court went on to say, "There are, however, exceptions to this rule. One of the recognized exceptions is that of a patent ambiguity. A patent ambiguity in the description of land is such an uncertainty appearing on the face of the instrument that the Court, reading the language of the instrument in the light of all facts and circumstances referred to therein, is unable to derive therefrom the intention of the parties as to what land was to be conveyed... This type of ambiguity may not be removed by parol evidence, since that would necessitate the insertion of new language into the instrument, which under the parol evidence rule is not permissible..."

contemporaneous with the alleged existence of the monuments, as tending to prove their existence, should not be also admissible in evidence. *Garrett v. Spear*, 998 NE 2d 297 - Ind: Court of Appeals 2013.

The Ohio Court of Appeals has likewise given direction on the “best evidence,” viz.,

{¶39} Appellants maintain the old boundary fence and a stone located near the entrance of their driveway, which appellees removed, is the best evidence and the trial court should have used it in determining the boundaries. The trial court specifically found that appellants did not submit a boundary-line survey of their property lines and therefore, the trial court was unable to make any findings regarding the property lines of appellants from their deeds. Findings of Fact, May 5, 2003, at ¶ 17. Without a survey to support their argument regarding the location of the old boundary fence, the only evidence the trial court had to rely upon was the survey submitted by appellees. Therefore, the trial court properly relied upon appellees' survey. *Robinson v. Armstrong*, 2004 Ohio 1463 - Ohio: Court of Appeals, 5th Appellate Dist. 2004.

In Michigan, no less than Justice Cooley - not surprisingly - continues to weigh-in nearly 150 years later...

Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity.

But no law can sanction this course. ... The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that monuments control course and distance,—a rule that we have frequent occasion to apply in the case of public surveys, where its propriety, justice and necessity are never questioned. But its application in other cases is quite as proper, and quite as necessary to the protection of substantial rights. The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks . . . and if those were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known. . . . As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are, and it would have been surprising if the jury in this case, if left to their own judgment, had not so regarded them. [*Diehl v Zanger*, 39 Mich 601, 605-606 (1878)]

(COOLEY, J., concurring) (internal citation omitted), quoted with approval in *Jonkers*, 278 Mich App at 267-268.]. *DEAVEN v. Paulson*, Mich: Court of Appeals 2011.

Intent, Direct and Indirect Evidence - Summarized

This discussion of direct and indirect evidence and their roles in ascertaining intent can be summarized with the following from the Pennsylvania Supreme Court's decision in the case of *Long Run Timber Company v. Dept. of Conservation & Natural Resources*, 145 A.3d 1217 (Pennsylvania) (2016), viz.,

In boundary dispute matters, the purpose of the adjudicator "is to ascertain the intent of the grantor at the time of the original subdivision."

The general rule provides that "[w]here the calls for the location of boundaries to land are inconsistent, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries (which are considered a sort of monument), and thereafter to courses and distances."

"[W]here there is a conflict between courses and distances or quantity of land and natural or artificial monuments, the monuments prevail."

However, the rules of construction with regard to boundaries "[are] not ... imperative or exclusive" but are aids in construction "to ascertain, or to aid in determining, the intention of the parties" that must yield to a contrary showing. Thus, these rules do not apply "where the monument claimed is so manifestly wrong as to lead to an absurd result."

Monuments not mentioned in a deed may be utilized if "said monuments are afterward erected by the parties with intent to conform to the deed."

Nevertheless, if "the monuments are doubtful, a resort will be had to the courses, distances, and quantity."

"Before a physical monument is accepted as a boundary line, there must be evidence other than its mere existence that the monument was intended for that purpose" which may be shown if it is mentioned in deeds related to the chain of title or there is "evidence that any past parties erected it as a monument to mark the boundary."

Viewing the evidence in the light most favorable to DCNR as the prevailing party, the Board's determination is supported by substantial evidence.

Thus, given the consistency of the credited evidence relied upon the Board, "the monument[s] claimed [by DCNR and the Board are not] so manifestly wrong as to lead to an absurd result."

The court's cautionary comment regarding blind adherence to the rules has been echoed many times in many cases and by no less authority than Curtis Brown, Walter Robillard and Donald Wilson in their discussion on the *Order of Importance of Conflicting Title Elements*.²²

The order of importance of conflicting deed elements..., while generally true, can vary from state to state, and with the same jurisdiction it can vary under different circumstances.

Indeed a number of prominent surveyors expressed concern that the publishing of his seminal text Boundary Control and Legal Principles would result in retracement surveyors electing to follow the rules of construction without thinking critically about the effect on bona fide rights and neighbors who were – to that point – happy with their boundaries.²³

No – There was no original survey, or at least no conclusive direct or indirect evidence of one.

If there is no plat found of the original survey, that is one indication – albeit not conclusive - that there may not, in fact, have been an original survey. It certainly means that the surveyor has no direct evidence that there was an original survey²⁴ in which case the boundary resolution hinges on indirect evidence of the original survey. And if there is not even any indirect evidence, the practical effect would seem to be the same as if, in fact, there definitively never was an original survey (see flowchart).

Where lines in a subdivision are determined to have been protracted, the Kentucky Court of Appeals provided guidance in an 1801 decision, viz.,

This is not a question of tracing an actual boundary, or of discovering a lost one, or one which may be presumed to have been completed; but of constructing a survey by adding two lines which were never run. And the cardinal object is to ascertain what the surveyor would have done if he had gone on to complete the work. *Beckley v. Bryan and Ransdale* 1 Bibb 393 (1801).

Additionally, where the description is unambiguous and precise, the words written must control.

"[a] deed which describes the land to be conveyed precisely and without ambiguity can only be construed as conveying the land described and nothing more or less." *Sorenson v. Wilson*, 124 N.H. 751, 476 A.2d 244 (1984).

²² Brown, Curtis, Robillard, Walter and Wilson, Donald, *Brown's Boundary Control and Legal Principles*, 6th Edition, Wiley 2009, p. 325.

²³ Pallamary, Michael J., Ed., *The Curt Brown Chronicles*, AuthorHouse, 2011, p. 8-9 .

²⁴ The most common direct evidence of an original survey is probably the existence of a plat of survey, the date of which corresponds to the original conveyance out of the parent tract.

Where there was no original survey or no direct or indirect evidence of one, the surveyor first needs to study the legal description: is it patently ambiguous? If so, an attempt must be made to uncover all possible sources of information that could explain the ambiguity. That extrinsic evidence must be carefully weighed and analyzed to determine the most defensible explanation of the meaning of the description's ambiguous words.

Ambiguities

Ambiguity exists when, after application of principles of contract interpretation, a genuine uncertainty remains as to which one of two or more meanings is the proper one. A mere disagreement between the parties as to the meaning of policy language does not establish an ambiguity. Only when the policy language is susceptible to two reasonable interpretations do we find an ambiguity. *Kibbee v. State Farm Fire and Cas. Co.*, 525 NW 2d 866 - Iowa: Supreme Court 1994.

According to Black's Law Dictionary, a patent ambiguity is one that appears on the face of a document and arises from the language itself. A latent ambiguity does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed (*see id.*). *L&L Painting Co., Inc. v. CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK* 68 AD 3d 594, 892 NYS 2d 55 - NY: Appellate Div., 1st Dept., 2009.

However, there has been a recent trend in the courts in some states to erase the differences between the two when interpreting contracts.

Last year in interpreting a trust, our Supreme Court held that the distinction between patent and latent ambiguities no longer served any useful purpose and concluded that "where an instrument is ambiguous, relevant extrinsic evidence may be properly considered in resolving the ambiguity." *Univ. of Southern Ind. Foundation v. Baker*, 843 N.E.2d 528, 535 (Ind.2006). Although *Baker* involved the construction of a trust, it would logically follow that the abrogation of the patent/latent distinction would also apply in the construction of easements. However, the present parties argue either that there is latent ambiguity or the complete absence of ambiguity. Therefore, no distinction in the type of ambiguity is requested, and we address the issue in the terms employed by trial court, the parties, and the relevant cited caselaw. Footnote 1, *Drees Co., Inc. v. Thompson*, 868 NE 2d 32 - Ind: Court of Appeals 2007.

Patent Ambiguities

A patent ambiguity is one that is obvious in a reading of the legal description.

A patent ambiguity is an uncertainty which appears on the face of the will. *Estate of Russell*, 69 Cal. 2d 200 - Cal: Supreme Court 1968

A contract will be considered ambiguous if it is capable of being understood in more sense than one. *City of Grosse Pointe Park v. MUNICIPAL LIABILITY AN PROPERTY POOL*, 702 NW 2d 106 - Mich: Supreme Court 2005.

[A] patent ambiguity is an] ambiguity in a legal document (as a contract or will) that is apparent on the face of the document and arises from inconsistent or uncertain language.²⁵

Patent ambiguity refers to uncertainty on the face of a legal document. This gives the agreement or contract an indefinite meaning. When a document includes a patent ambiguity, no external evidence can show the testator's intention, which remains unclear. A patent ambiguity may invalidate an agreement or contract.²⁶

A document is found to be ambiguous only when reasonable persons find the contract subject to more than one interpretation. *Drees Co., Inc. v. Thompson*, 868 NE 2d 32 - Ind: Court of Appeals 2007.

A patent ambiguity is one "that clearly appears on the face of a document, arising from the language itself." Black's Law Dictionary (7th ed). *City of Grosse Pointe Park v. MUNICIPAL LIABILITY AN PROPERTY POOL*, 702 NW 2d 106 - Mich: Supreme Court 2005.

The surveyor should attempt to solve the problem of a patent ambiguity by applying the "rules of construction" which refer to the collection of (generally non-codified) rules that govern the interpretation of ambiguous or uncertain legal documents and contracts. Their aim is to guide the investigator to the intentions of the parties to the document.

Curtis Brown, Walter Robillard and Donald Wilson in their discussion on the *Order of Importance of Conflicting Title Elements*²⁷ state:

It should always be kept in mind that while the order of conflicting elements may serve to resolve differences between calls, for a variety of reasons, strictly speaking the order of conflicting elements applies to the resolution of ambiguities within a written description. This set of rules is not intended to resolve all conflicts, or conflicts between written evidence and physical evidence.²⁸

It is important, however, to emphasis yet again that the *unambiguous* description may only be interpreted based on the words within the four corners of the document; parol evidence is not

²⁵ <https://www.merriam-webster.com/legal/patent%20ambiguity>

²⁶ <https://www.upcounsel.com/patent-ambiguity>

²⁷ Brown, Curtis, Robillard, Walter and Wilson, Donald, *Brown's Boundary Control and Legal Principles*, 6th Edition, Wiley 2009, p. 324.

²⁸ *Ibid*, p. 325

allowed to clarify or otherwise change the clear terms of a legal description. In the same breath, the concept of the words within the four corners must be somewhat liberally construed because, as noted above, the courts have also given guidance on what the best evidence of the intent of those words is — and they, inevitably point to the original survey.

Although boundaries arising from the conveyance of land are determined with reference to the intention of the grantor, as expressed in the instrument of conveyance, "[t]he highest and best proof of this intention, ordinarily, lies not in the words of expression of the deed, but rather, in the work upon the ground itself, where the survey was made prior to the conveyance." *Sullivan v. Kanable*, 41 NE 3d 264 - Ill: Appellate Court, 2nd Dist. 2015.

The description in a deed must be such that the property intended to be conveyed can be located and identified, and the general rule is that the description must fully appear within the four corners of the instrument itself, or that the deed should refer to some map, plat, or other deed as part of the description, so that the description may be clear. The courts have not established precise criteria to determine whether a property description is sufficient; rather, they take every case on its own facts and apply a liberal construction so as to sustain, rather than defeat, the conveyance. *COVEY PARK GAS, LLC v. BULL RUN ACQUISITIONS II, LLC*, La: Court of Appeals, 2nd Circuit, 2021.

Beyond the looking to the original survey, every professional surveyor is – or should be - familiar with the hierarchy of elements in a description and which terms control over which other terms when the words are ambiguous.

Generally, in determining boundaries, natural and permanent monuments are the most satisfactory evidence and control all other means of description, in the absence of which the following calls are resorted to, and generally in the order stated: First, natural boundaries; second, artificial marks; third, adjacent boundaries; fourth, course and distance, course controlling distance, or distance course, according to circumstances. * *

*" 6 Thompson, Real Property (1962 Replacement) § 3044, pp. 571-576 cited in *sRH Corp. v. Rogers Trailer Park, Inc.*, 252 A. 2d 713 - NJ: Supreme Court 1969.

The established rule is that "when identifying boundary lines, fixed and known monuments or objects called for in a legal description found in a deed prevail over given courses and distances; the order of application being first, to natural objects; second, to artificial marks; and, third, to courses and distances." *Magnuson v. Cossette*, 707 N.W.2d 738, 744 (Minn. App. 2006). Thus, artificial objects prevail over courses and distances only when included in a legal description in a deed. *IN THE MATTER OF APPLICATION OF FISCHER SAND AND AGGREGATE, LLP*, Minn: Court of Appeals 2015.

There are ... rules of construction which have been developed to aid in resolving ambiguities in deeds. One such rule of construction provides that when a deed describes the property in terms of monuments, the monument will prevail over courses and distances. *Chao v. The Richey Co., Inc.*, 122 NH 1115 - NH: Supreme Court 1982.

North Carolina law provides adequate support for the court's finding that natural and artificial monuments control course and distances. In deciding the location of a disputed boundary line, "the general rule is that natural objects and artificial monuments control courses and distances." *BOUNDARY DISPUTE v. RL WALLACE CONST.*, 681 SE 2d 553 - NC: Court of Appeals 2009.

[W]e note that with respect to land descriptions, this court has held that the order of preference for the location of boundaries is in descending order as follows: natural objects or land marks, artificial monuments, adjacent boundaries, courses and distances, and lastly quantity. *Bowling v. Poole*, 756 N.E.2d 983, 989 (Ind.Ct.App.2001) cited in *Harlan Bakeries, Inc. v. Muncy*, 835 NE 2d 1018 - Ind: Court of Appeals 2005.

[T]he rule is well settled that in ascertaining boundaries, visible monuments, such as stones, trees, stakes, and the like, are held to control other designations not obvious to the senses. The south line of the section may be mistaken; a visible stake can not be...."); *Earhart v. Rosenwinkel*, 108 Ind. App. 281, 292, 25 N.E.2d 268, 272-73 (1940) ("Under the principle that where some particulars of the description in a deed do not agree, those which are uncertain and more liable to error and mistake must be governed by those which are more certain. Various rules for the interpretations of descriptions of the location and boundary of lands have been evolved and are now frequently referred to in interpreting grants and deeds. Accordingly an order of precedence has been established among different calls for the location of boundaries of land, and, other things being equal, resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries, and thereafter to courses and distances. Natural objects, of course, include mountains, lakes, rivers, etc., whereas artificial monuments and objects consist of marked lines, stakes, and similar matters marked or placed on the ground by the hand of man."), *trans. denied. LTC INVESTMENTS INC. v. EGR INDIANA PROPERTIES, LLC*, Ind: Court of Appeals 2013 (not for publication).

{¶ 36} As noted in *Broadsword* at 533-35:

It is well settled that monuments are of prime importance in settling boundary disputes. The general rule is well stated in 6 Thompson on Real Property (Perm.Ed.), 519, Section 3327, as follows:

"A 'monument' is a tangible landmark, and monuments, as a general rule, prevail over courses and distances for the purpose of determining the location of a boundary, even though this means either the shortening or lengthening of distance, unless the result would be absurd and one clearly not intended, or all of

the facts and circumstances show that the call for course and distance is more reliable than the call for monuments. This rule does not apply when it is evident that the call for a natural object or established boundary line was made under a mistaken belief with reference to the survey. Generally, in determining boundaries, natural and permanent monuments are the most satisfactory evidence and control all other means of description, in the absence of which the following calls are resorted to, and generally in the order stated: First, natural boundaries; second, artificial marks; third, adjacent boundaries; fourth, course and distance, course controlling distance, or distance course, according to circumstances (sic). Area is the weakest of all means of description. The ground of the rule is that mistakes are deemed more likely to occur with respect to courses and distances than in regard to objects which are visible and permanent. The reason assigned for this rule is that monuments are considered more reliable evidence than courses and distances. A description by course and distance is regarded as the most uncertain kind of description, because mistakes are liable to occur in the making of the survey, in entering the minutes of it, and in copying the same from the fieldbook. 'Consequently, if marked trees and marked corners be found conformably to the calls of the patent, or if watercourses be called for in the patent, or mountains or other natural objects, distances must be lengthened or shortened and courses varied so as to conform to those objects.' When it comes to courses and distances, the latter yield to the former."

Perry v. Davis, 2013 Ohio 4078 - Ohio: Court of Appeals, 2nd Appellate Dist. 2013.

It is a well-established rule of law that quantity is the least reliable of all descriptions, and course and distance must yield to calls for monuments, natural and artificial. *Phelps v. Pacific Gas & Electric Co.*, 84 Cal. App. 2d 243 - Cal: Court of Appeal 1948.

In resolving an inconsistency in a deed, the court should look first to natural monuments, next to artificial monuments, then to courses and distances. Monuments control courses and distances, which are considered the least reliable of all calls. *Jackson v. Woods*, 876 P. 2d 116 - Colo: Court of Appeals, 2nd Div. 1994.

Latent Ambiguities

An uncertainty arising from the words of the will or other instrument is patent; but latent where the doubt arises not upon the words themselves, but from some extrinsic or collateral matter. A latent ambiguity "is where the words of a written instrument are plain and intelligible, but by reason of extraneous facts, the certain and definite application of those words is found impracticable." *In re Estate of Armour*, 94 A. 2d 286 - NJ: Supreme Court 1953.

Ambiguity is latent where the written language is apparently clear and certain but becomes doubtful in the light of something extrinsic or collateral. *Stoffel v. Stoffel*, 41 NW 2d 16 - Iowa: Supreme Court 1950.

"[A]n uncertainty which does not appear on the face of the instrument, but which is shown to exist for the first time by matter outside the writing when an attempt is made to apply the language to the ground" is known as a "latent ambiguity." *Gilbert v. Geiger*, 747 NW 2d 188 - Wis: Court of Appeals 2008.

A latent ambiguity ... is one "that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." Black's Law Dictionary (7th ed.). Because "the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist." In other words, "where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract." Thus, the question becomes whether an ambiguity exists [in the contract]. *City of Grosse Pointe Park v. MUNICIPAL LIABILITY AN PROPERTY POOL*, 702 NW 2d 106 - Mich: Supreme Court 2005.

A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the "*necessity for interpretation or a choice among two or more possible meanings.*" *Hayes v. GINOSKO DEVELOPMENT COMPANY*, Mich: Court of Appeals 2019 (unpublished).

[A] [l]atent ambiguity is an ambiguity that does not readily appear on the face of a document. The ambiguity becomes apparent only in the light of knowledge gained from a collateral matter. Extrinsic evidence can be used to clarify latent ambiguities, but not patent ambiguities.²⁹

The legal principles concerning latent ambiguities, although at times difficult to apply to the facts of a given case, seem to be generally recognized. A latent ambiguity occurs where a writing appears on its face clear and unambiguous, but which, in fact, is shown by extrinsic evidence to be uncertain in meaning; or where a description apparently plain and unambiguous is shown to fit different pieces of property, and in such cases, the ambiguity being raised by extrinsic evidence, the same kind of evidence may be admitted to explain it or identify the property referred to in the writing. A latent ambiguity in a contract can be explained by parol evidence. In construing a written instrument the court may place itself in the parties' position to ascertain their intent from the language used. Deeds should be construed most favorably to the grantee and the intention of the parties is the test by which to determine the effect of a deed, including the description therein. Furthermore, there is a presumption that a grantor in executing a deed intended to convey only property which he owned. *Allendorf v. Daily*, 129 NE 2d 673 - Ill: Supreme Court 1955 (internal citations intentionally omitted).

²⁹ <https://definitions.uslegal.com/l/latent-ambiguity/>

A latent ambiguity is a defect which does not appear on the face of language used or an instrument being considered. It arises when language is clear and intelligible and suggests but a single meaning, but some intrinsic fact or some extraneous evidence creates a necessity for interpretation or a choice between two or more possible meanings, as where the words apply equally well to two or more different subjects or things. ... Latent ambiguities are frequently considered as they relate to wills, in which the language may be clear but can apply to different people based on extrinsic evidence. In *Conkle*, a gift was given to the testator's "grandchildren" but the matter was complicated by circumstances surrounding adopted children. *Id.* at 52. In such cases, the language contained in the document is unambiguous but circumstances outside of the document create an ambiguity. *VIOLANTE v. VILLAGE OF BRADY LAKE*, 2012 Ohio 6220 - Ohio: Court of Appeals, 11th Appellate Dist. 2012 (internal citations intentionally omitted).

Parol/extrinsic evidence and solving ambiguities

The admissibility of parol evidence in explaining patent ambiguities has been explained in depth by the courts.

[W]here a contract is complete in itself and, as viewed in its entirety, is unambiguous, its language is the only legitimate evidence of what the parties intended. The intention of the parties cannot be determined from the surrounding circumstances, but must be gathered from a four-corners' examination of the contractual instrument in question. Mercury Inv. Co. v. FW Woolworth Co., 706 P. 2d 523 - Okla: Supreme Court 1985.

[I]f the instrument's description of the property is patently ambiguous, and the instrument furnishes no other information from which the parties' intention can be gleaned, the attempted conveyance is void, and parol evidence may not be employed to cure the deficiency. For example, in Carson v. Palmer, 139 Fla. 570, 190 So. 720 (1939), the deed at issue gave two inconsistent legal descriptions, describing two separate parcels. Our supreme court held that, in the absence of other language in the instrument showing the grantor's intent as to which parcel was to be conveyed, the deed was void. In Mitchell v. Thomas, 467 So.2d 326 (Fla. 2d DCA 1985), the deed described the property by metes and bounds, but omitted two boundary calls, such that the description did not close. This court held that the attempted conveyance was void because the deed contained insufficient information to permit a surveyor to locate the land to be conveyed. Mendelson v. Great Western Bank, FSB, 712 So. 2d 1194 - Fla: Dist. Court of Appeals, 2nd Dist. 1998.

In general, where the parties to an agreement have reduced the agreement to a written document and have included an integration clause that the written document embodies the complete agreement between the parties, ... the parol evidence rule prohibits courts from considering parol or extrinsic evidence for the purpose of varying or adding to the terms of the written contract. *However, the prohibition against the use of parol evidence is by no means complete. Indeed, parol evidence may be considered if it is not being*

*offered to vary the terms of the written contract, and to show that fraud, intentional misrepresentation, or mistake entered into the formation of a contract.... In addition, parol evidence may be considered to apply the terms of a contract to its subject matter and to shed light upon the circumstances under which the parties entered into the written contract. Harlan Bakeries, Inc. v. Muncy, 835 NE 2d 1018 - Ind: Court of Appeals 2005 (italics in original).*³⁰ (footnotes intentionally omitted).

"Parol evidence is therefore often necessary to make descriptions intelligible." *Id.*; see also *Randolph v. Wolff*, 176 Ind.App. 94, 98, 374 N.E.2d 533, 536 (1978) ("It is well established that where the description given is consistent, but incomplete, and its completion does not require the contradiction or alteration of that given, nor that a new description should be introduced, parol evidence may be received to complete the description and identify the property.") *Harlan Bakeries, Inc. v. Muncy*, 835 NE 2d 1018 - Ind: Court of Appeals 2005.

Where a court determines that a contract is ambiguous, its construction is then a question of fact, and parol evidence is admissible to explain and ascertain what the parties intended. *Farm Credit Bank of St. Louis v. Whitlock*, 581 NE 2d 664 - Ill: Supreme Court 1991 (internal citations intentionally omitted).

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." In light of this cardinal rule, and to effectuate the principle of freedom of contract, this Court has generally observed that "[i]f the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity." "However, we will not create ambiguity where the terms of the contract are clear." *City of Grosse Pointe Park v. MUNICIPAL LIABILITY AN PROPERTY POOL*, 702 NW 2d 106 - Mich: Supreme Court 2005.

The testimony of the relator is parol evidence which is offered to explain or vary the terms of the written deed of easement for the subject channel improvement. It is well established law that parol evidence of prior conversations, offered to vary or contradict the terms of a written agreement which are plain and unambiguous on the face of the instrument, is incompetent. *State ex rel. Goldsberry v. Weir*, 60 Ohio App. 2d 149 - Ohio: Court of Appeals 1978.

Here we should say that the trial court properly, in view of the deed wording in dispute, admitted extrinsic evidence which gives the rather full picture set forth herein of this entire transaction. This is long established law in Colorado. See *State Savings & Trust Co. v. Matz*, 1914, 26 Colo.App. 511, 520, 521, 143 P. 1039; *Sullivan v. Collins*, 1895, 20 Colo. 528, 39 P. 334; and *Laughlin v. Hawley*, 1886, 9 Colo. 170, 11 P. 45, 47. In the

³⁰ Footnote 9 in that decision states "The final settlement agreement did contain an integration clause. See Appellant's App. at 155."

latter case it was said: "Where the description of the property is in such general terms as to call for evidence dehors the writing, parol evidence is admissible to apply it to the subject-matter, and thereby render certain what would otherwise be doubtful and indefinite." And in *Stanley v. Green*, 1859, 12 Cal. 148, it was said:

"It is undoubtedly essential to the validity of a conveyance, that the thing conveyed must be described so as to be capable of identification, but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence."

Dissent in *Crews v. Yenter*, 352 P. 2d 295 - Colo: Supreme Court 1960.

When a latent ambiguity is revealed by the survey, extrinsic evidence may be sought to explain the parties' intentions. Extrinsic evidence could include, but is not limited to, prior surveys, statements from knowledgeable parties or landowners, evidence found on the ground (e.g., fences, monuments of unknown origin), and even calculations made by the surveyor.

At common law, declarations of the testator may be invoked to clarify a latent ambiguity, but not to resolve a patent ambiguity. This is an ancient rule in aid of construction; it does not open the door to the introduction of evidence of an intention independent of that expressed in the writing. *In re Estate of Armour*, 94 A. 2d 286 - NJ: Supreme Court 1953.

While parol testimony cannot vary, modify or contradict the terms of the instrument, it is admissible to explain the meaning of words when there is a latent ambiguity in the written text of the agreement. *Mercury Inv. Co. v. FW Woolworth Co.*, 706 P. 2d 523 - Okla: Supreme Court 1985.

Determining whether a conveyance is ambiguous is a matter of law. *Messner v. Moorehead*, 787 P.2d 1270, 1273 (Okla. 1990). When the court determines that a deed is ambiguous, the court has a duty to resolve the ambiguity by considering parol and extrinsic evidence, including the parties' admissions and construction, and other circumstances. *Crockett v. McKenzie*, 867 P. 2d 463 - Okla: Supreme Court 1994.

Extrinsic evidence always may be introduced initially in order to show that under the circumstances of a particular case the seemingly clear language ... actually embodies a latent ambiguity for it is only by the introduction of extrinsic evidence that the existence of such an ambiguity can be shown. Once shown, such ambiguity may be resolved by extrinsic evidence. *Estate of Russell*, 69 Cal. 2d 200 - Cal: Supreme Court 1968.

[E]xtrinsic evidence must be considered to resolve a latent ambiguity. *Matter of Estate of Gross*, 646 P. 2d 396 - Colo: Court of Appeals, 2nd Div. 1981.

Parol evidence can be used in some circumstances to resolve patent ambiguities. With regard to interpreting legal descriptions, the application of extrinsic evidence is generally limited to helping explain the circumstances surrounding the conveyance, to explain the meaning of the

words used, or to help complete an otherwise incomplete description. The primary consideration is that parol evidence may *not* be used to change the unambiguous terms of the description.

[I]n the case of *patent* ambiguity[,] resort may not be had to parol evidence. *Stoffel v. Stoffel*, 41 NW 2d 16 - Iowa: Supreme Court 1950.

This rule provides that in construing [a] written instrument, the language of the instrument, if unambiguous, determines the intent of the instrument such that parol or extrinsic evidence is inadmissible to expand, vary, or explain the instrument unless there has been a showing of fraud, mistake, ambiguity, illegality, duress or undue influence. Even if ambiguity exists, extrinsic evidence is only admissible to explain the instrument and not contradict it. *Id.* at 757-58 (quoting *Lippeatt*, 419 N.E.2d at 1335). *Poznic v. Porter County Development Corp.*, 779 NE 2d 1185 - Ind: Court of Appeals 2002.

A patent ambiguity appears on the face of the instrument and extrinsic evidence is usually permitted to dispel such. *Matter of Estate of Gross*, 646 P. 2d 396 - Colo: Court of Appeals, 2nd Div. 1981.

When the instrument is free from any patent or latent ambiguity, parol evidence cannot be received to vary or contradict it. *Carter Oil Company v. King*, 134 So. 2d 89 - La: Court of Appeals, 2nd Circuit 1961.

This rule provides that in construing [a] written instrument, the language of the instrument, if unambiguous, determines the intent of the instrument such that parol or extrinsic evidence is inadmissible to expand, vary, or explain the instrument unless there has been a showing of fraud, mistake, ambiguity, illegality, duress or undue influence. Even if ambiguity exists, extrinsic evidence is only admissible to explain the instrument and not contradict it. *Id.* at 757-58 (quoting *Lippeatt*, 419 N.E.2d at 1335). *Poznic v. Porter County Development Corp.*, 779 NE 2d 1185 - Ind: Court of Appeals 2002.

The issue before us is whether the legal description contained a patent ambiguity and, even if so, whether parol or extrinsic evidence is admissible to explain the parties' intent. * * * In *Carson v. Palmer*, 139 Fla. 570, 190 So. 720 (Fla. 1939) the court did hold that a patent ambiguity in a description could not be cured by parol evidence because to do so would be the "insertion of new language into the instrument." But *Lente* and *Simons* hold that proving the actual description of a parcel which the instrument shows was intended by the parties to be conveyed does not "add anything to the terms of the agreement" and thus would not violate the statute of frauds. The modern view, consistent with *Lente* and *Simons*, is that the description is sufficient if the reference to the property in the deed is such that the court, by pursuing an inquiry based upon the words of reference, is able to identify the particular property to the exclusion of all other property. *Bajrangi v. Magnethel Enterprises, Inc.*, 589 So. 2d 416 - Fla: Dist. Court of Appeals, 5th Dist. 1991 {footnotes removed}.

The rules governing the interpretation of deeds are well-settled and are designed to enable the courts to ascertain the intention of the parties to the deed. The courts should first seek the parties' intention by examining the words in the deed, and by considering these words in the context of the deed as a whole. * * * The courts customarily decline to consider parol evidence that adds to, varies, or otherwise contradicts the language of the deed. *Mitchell v. Chance*, 149 SW 3d 40 - Tenn: Court of Appeals 2004 (internal citations intentionally omitted).

Where the language of a deed is plain, certain, and unambiguous, the surrounding facts and circumstances will not be considered. * * * Parol evidence is not admissible to add to, detract from, or vary the terms of a deed. * * * The estate granted by a deed cannot be limited or qualified by oral testimony. * * * The operation of a deed cannot be defeated by parol evidence of an intention on the part of the grantor that it should have an effect different from that apparent on its face. * * * As a matter of law, the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule is operative when there is a single and final memorial of the understanding of the parties. * * * Parol evidence, though admitted without objection, must be ignored as of no legal import, and its incompetency to vary a written contract is a matter of law. *Pinsky v. Sloat*, 130 Cal. App. 2d 579 - Cal: Court of Appeal 1955.

The parol evidence rule posits that "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous."

This rule is subject to several exceptions, which this Court articulated in *Hamade*, supra at 145:

First, it is a prerequisite to application of the parol evidence rule that there be a finding that the parties intended the written instrument to be a complete expression of their agreement with regard to the matters covered. For this reason, "[e]xtrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an 'integrated' agreement." Second, extrinsic evidence may be presented to attack the validity of the contract as a whole. Thus, extrinsic evidence may be presented to show (1) that the writing was a sham, not intended to create legal relations, (2) that the contract has no efficacy or effect because of fraud, illegality, or mistake, (3) that the parties did not integrate their agreement or assent to it as the final embodiment of their understanding, or (4) that the agreement was only partially integrated because essential elements were not reduced to writing. *Markham v. SUNOCO OIL COMPANY*, Mich: Court of Appeals 2008 (internal citations intentionally omitted).

The courts in some states have - or have seemingly — erased the differences between patent and latent ambiguities when it comes to utilizing extrinsic evidence to explain them.

When the language of a will is ambiguous or uncertain resort may be had to extrinsic evidence in order to ascertain the intention of the testator. [fn. 8] We have said that extrinsic evidence is admissible "to explain any ambiguity arising on the face of a will, or to resolve a latent ambiguity which does not so appear." *Estate of Russell*, 69 Cal. 2d 200 - Cal: Supreme Court 1968

We find in 20 Am.Jur., Evidence, § 1155 the statement: "Originally, ambiguities were classified as 'latent' and 'patent,' and this classification still exists in many jurisdictions. However, the distinction is gradually disappearing, and parol evidence is held admissible to explain an ambiguity whether latent or patent." *Stoffel v. Stoffel*, 41 NW 2d 16 - Iowa: Supreme Court 1950.

We are satisfied that the trial court correctly denigrated the usefulness of a distinction between patent and latent ambiguities for determining what type of extrinsic evidence should be considered when construing ambiguous or contradictory provisions. Because it is reasonable for the Minnesota judiciary to weigh evidence of the testator's declarations of intent, the basis for the patent/latent distinction appears outmoded. *In re Estate of Cole*, 621 NW 2d 816 - Minn: Court of Appeals 2001.

Last year in interpreting a trust, our Supreme Court held that the distinction between patent and latent ambiguities no longer served any useful purpose and concluded that "where an instrument is ambiguous, relevant extrinsic evidence may be properly considered in resolving the ambiguity." *Univ. of Southern Ind. Foundation v. Baker*, 843 N.E.2d 528, 535 (Ind.2006). Although *Baker* involved the construction of a trust, it would logically follow that the abrogation of the patent/latent distinction would also apply in the construction of easements. However, the present parties argue either that there is latent ambiguity or the complete absence of ambiguity. Therefore, no distinction in the type of ambiguity is requested, and we address the issue in the terms employed by trial court, the parties, and the relevant cited caselaw. Footnote 1, *Drees Co., Inc. v. Thompson*, 868 NE 2d 32 - Ind: Court of Appeals 2007.

When the ambiguities cannot otherwise be resolved, the problem may be resolved against the drafter of the document, in a deed, this typically being the grantor.

[U]ncertainty or ambiguity in deeds must be resolved in favor of the grantee and against the grantor. *Flanagan v. Prudhomme*, 138 NH 561 - NH: Supreme Court 1994

Ambiguous terms are conditions or provisions that are "fairly and reasonably susceptible to either of the constructions asserted by the parties." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). In reviewing and construing contracts, ambiguous terms are to be "construed against the drafting party." *Lagies*, 142 N.C. App. at 248, 542 S.E.2d at 342. [Cited in *Cogdill v. SYLVA SUPPLY COMPANY, INC.*, 828 SE 2d 512 - NC: Court of Appeals 2019 - Dissenting opinion]

Analyzing the evidence and applying the appropriate boundary law principles

To the layperson/property owner, boundary retracement is merely a simple exercise of finding the existing corners, laying the geometry of the deed onto the ground, or even simply providing them with the “GPS coordinates” of their property so they can locate their corners themselves.

Surveyors, of course, know otherwise. Aside from the challenges of uncovering all the available evidence, analyzing it and applying the appropriate boundary law principles to determine the boundary location, even the courts acknowledge that all surveyors do not view the evidence in the same way.

[T]he court noted that land surveying is not always an exact science and that qualified and experienced surveyors can and sometimes do arrive at different conclusions in interpreting legal descriptions in deeds and reconciling those descriptions with monuments observed on the property. *Turner v. Albert*, 2015 Ohio 809 - Ohio: Court of Appeals, 11th Appellate Dist. 2015.

Boundaries are frequently found to exist at locations other than those shown by an accurate survey of the premises in question[.] *Summers v. Dietsch*, 849 SW 2d 3 - Ark: Court of Appeals, 2nd Div. 1993.

That is why boundary law classes and seminars are so critical to the integrity of the surveying profession. Professional surveyors must understand boundary law intimately – or know how and where to readily find clues to the answers to their boundary questions – and, just as importantly, be able to express persuasive and defensible arguments in support of their opinions in a way that even a lay person can understand.

There are plenty of texts that delve into boundary law – some in more depth than others - including but not limited to, a number that are otherwise cited in this paper, such as:

- *Boundary Retracement*, Wilson, CRC Press, 2017
- *Brown's Boundary Control and Legal Principles*, Brown, Robillard and Wilson (multiple editions), Wiley
- *Brown's Evidence and Procedures for Boundary Location*, Brown, Robillard and Wilson (multiple editions), Wiley
- *Clark on Surveying and Boundaries*, Robillard, Bouman and Shelton (multiple editions), LexisNexus
- *Skelton on the Legal Elements of Boundaries & Adjacent Properties*, Skelton, Bobbs Merrill, 1930
- *Boundaries and Landmarks*, Mulford, 1912, Van Strand, 1912

It is not the intent of this program and paper to reexamine boundary law other than as support for the premise which is as a practical guide to retracement.

Boundary or title conflicts independent of the resolved boundary

If, in the process of conducting the records research, a potential title conflict is discovered, or, once the surveyor has formed an opinion as to the location of the boundary lines and corners, he or she finds possession or occupation evidence substantively³¹ to the contrary, it is strongly advised that the surveyor proceed carefully lest he or she create a dispute where none existed before. As a practical matter, a number of presenters and authors promote the idea that work on such a project be at least temporarily suspended.

This seemingly drastic step is not as severe as it may seem because title and boundary conflicts can only be resolved by the affected parties; surveyors have no authority to solve them on their own. In fact, by completing surveys and setting monuments or reporting conditions that are contrary to the preconceived beliefs of one or both of the affected owners, surveyors may very well launch those parties into expensive, time-consuming, illogical, ill-advised and emotion-driven litigation - and be pulled into the fray themselves.

The concept of suspending work must be supported by a written contract that allows the surveyor to take such an action. Following is an example of such wording.³²

Scope of Services:

Prepare a boundary survey pursuant to the Indiana Administrative Code requirements enumerated in 865 IAC 1-12. This includes monuments set or found at (or a witness to) each boundary corner, a signed, certified plat of survey and accompanying Surveyors Report.

It should be noted, however, that boundary determinations not infrequently disclose unseen or unknown conflicts between record documents and/or between record documents and the location of physical improvements. Thus, if in the process of conducting the research, fieldwork or analysis, the surveyor identifies a possible boundary or title conflict, a sketch showing the revealed conditions will be prepared and a meeting with the client – and the affected neighbor(s), if desired – will be scheduled. During that meeting, the problem will be explained, alternatives for possible resolution will be presented and any additional survey work that would be required to achieve resolution will be outlined.

Following that meeting, if the client wishes to engage the surveyor to assist in pursuing resolution of the problem as a consultant, expert and/or formal or informal mediator, the contract will be modified accordingly. Otherwise the client will be invoiced only for the time expended to that point, and work on the survey will be suspended until or unless the client is able to resolve the issue by agreement or litigation, at which time a subsequent contract may be executed to complete the survey pursuant to that agreement or litigation.

³¹ Substantiality is a subjective judgment. In the case of few uncertainties, unambiguous legal descriptions and the retracement of contemporary surveys, a substantial difference might be quite less than a foot. Alternately, where there are significant uncertainties, ambiguous legal descriptions and/or when retracing ancient surveys, a substantial difference might be a dozen feet or even more.

³² Credit is given to John Stahl, PS (Utah) for some of this content. Note that any contract should be vetted by the surveyor's attorney in order to account for state-specific statutes and regulations.

Ownership Considerations

A number of nationally-recognized authors and speakers have acknowledged the surveyor's limitations and/or encouraged what have heretofore often been considered unconventional strategies - in particular, as related to opinions on ownership - that have been generally avoided, especially when conflicts are revealed.

“I recommend against a policy of always staking a line based on one class of evidence and then ... simply telling the client to seek the advice of an attorney to evaluate the other evidence. * * * Tell your client in advance what services you can provide and how you can help resolve conflicting evidence, and that in some cases an attorney should be consulted before the survey is finalized.” *Washington State Common Law of Surveys and Property Boundaries*, Jerry R. Broadus, 2009.

Surveyors normally stake the line based on the best evidence of the written title. When questions arise as to unwritten rights surveyors have routinely referred their clients to attorneys. Yet, Mr. Broadus and, as documented below, John McEntyre, Darrell Dean and Curtis Brown - in addition to Jeff Lucas, Esq., PLS - suggest that surveyors could, carefully and in some cases, take a more assertive stance regarding unwritten rights and ownership.

[T]here is support for the land surveyor to take an affirmative and responsible position with respect to identifying and making recommendations concerning boundary lines established by unwritten means. *Establishment of Boundaries by Unwritten Methods and the Land Surveyor*, John G. McEntyre and Darrell R. Dean, Jr., Indiana Society of Professional Land Surveyors and School of Civil Engineering, Purdue University, circa 1976.

In my early writings, I generally advocated that surveyors should locate land boundaries in accordance with a written deed; all conveyances based upon unwritten rights should be referred to attorneys for resolution. Within recent years there have been cases, and one in particular, wherein surveyors have been liable for failure to react to a change in ownership created by prolonged possession. * * *

From my experience with clients, very few know that there is a difference between [ownership and the written deed]; most clients want to know what they own. * * *

As a summary of the discussion presented, the following is offered:

1. The surveyor in finding an encroachment on his client's land, must fully inform the client of its significance; further the information must be presented in such a manner that third parties also understand the significance of any encroachment;
2. Nothing in the law prevents the surveyor from deciding who has ownership to encroachments, and he may monument ownership lines rather than written title lines;

3. In some circumstances the surveyor may be justified in monumenting the line that he believes to represent [the] true ownership line. In my experience, this occurs when (1) the client has color of title, (2) the client has paid taxes on the land described with color of title, and (3) the client has possession by an enclosure for a time more than the statute of limitations. In cases involving adverse relationships (adverse possession), estoppel, or recognition and acquiescence, the surveyor is probably foolish to try to establish ownership.
4. Since, to avoid liability, the surveyor must fully disclose the significance of encroachments; surveyors must have knowledge of how and when unwritten conveyances occur. It is my recommendation that all surveyors should be required to understand the subject.

A practice that would save the land surveyor harmless is the practice of drafting "Property Line Agreements." * * * This is accomplished by causing the client and all adjoining owners to sign a map stating that they agree that the lines shown thereon are their common property lines. This is a good way to resolve the problem under discussion and all land surveyors should attempt to settle their boundary disputes in this way.³³ *Land Surveyors' Liability to Unwritten Rights*, Curtis M. Brown, NMACSM Legal Seminar, January 1979.

"Uncertainty of record description and/or uncertainty or indeterminability of physical monuments may make location impossible; in such an event, the only solution is establishment of a substitute line or lines, by agreement deed, with mutual quitclaim, or by court action. In many cases, the agreement is a more satisfactory method for fixing a line than all the labor of analysis and extended survey, even though the relocation is reasonably possible." *Land Survey Descriptions*, William C. Wattles, Gurdon H. Wattles, 1974, p. 81.

The rule is thus stated in *Young v. Blakeman*, 153 Cal. 481, [95 P. 888]:

"When such owners, being uncertain of the true position of the boundary so described, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements. The line so agreed on becomes in legal effect the true line, the agreement as to the line may be in parol and it does not operate to convey title to the land which may lie between the agreed line and the true line, but it fixes the line itself and the description carries title up to the

³³ Individual surveyors should be knowledgeable of the processes, laws and regulations in their areas that would result in the outcome sought by a boundary line agreement. Simply having the client and affected adjoining owners sign the survey likely is not enough to accomplish the agreement. Manifesting the agreement line as shown on the survey by a subsequent exchange of deeds describing the agreed upon line(s) would be most desirable.

agreed line regardless of its accuracy; the agreement as to the line is not in violation of the statute of frauds, because it does not transfer title; the parties hold up to the agreed line by virtue of their original deeds and not by virtue of the parol agreement; 'the division line when thus established attaches itself to the deeds of the respective parties and simply defines not adds to, the lands described in the deeds,' and if more is thus given to one than the calls of his deed actually require he 'holds the excess by the same tenure that he holds the main body of his land.'"

Price v. De Reyes, 119 P. 893 (Cal. 1911)

When court decisions are studied, it is readily apparent that the "true boundary" sought by the parties and the courts are the extents of ownership, not the lines of the written title. And the courts not infrequently point this out, either directly or indirectly, viz.,

"It has been held very generally, that when there has been an honest difficulty in determining the lines between two neighboring proprietors, and they have actually agreed by parol upon a certain boundary as the true one, and have occupied accordingly with visible monuments or divisions, the agreement long acquiesced in shall not be disturbed, although the time has not been sufficient to establish an adverse possession." *Lake v. Crosser*, 216 P. 2d 583 - Okla: Supreme Court 1950 (citing *Smith v. Hamilton*, 20 Mich. 433 - 1870).

Under the doctrine of mutual recognition and acquiescence, while a boundary may be fixed in accordance with a survey, when a different boundary is shown to have existed between the parties for the 10-year statutory period, it is that boundary line which is determinative and not that of the original survey. *BUSH ISLAND, INC. v. Kortum*, 30 Neb. App. 79 - Neb: Court of Appeals 2021.

Boundaries are frequently found to exist at locations other than those shown by an accurate survey of the premises in question... *Summers v. Dietsch*, 849 SW 2d 3 - Ark: Court of Appeals, 2nd Div. 1993.

It is well established that whenever adjoining landowners tacitly accept a fence line or other monument as the visible evidence of their dividing line for a long period of time and thus apparently consent to that line, the line becomes the boundary by acquiescence. The property owners and their grantees are then precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one, although it may not be on the survey line. *Summers v. Dietsch*, 849 SW 2d 3 - Ark: Court of Appeals, 2nd Div. 1993.

An acquiesced boundary often will not lie on the surveyor's true location. When this occurs, the legal effect of the doctrine of acquiescence is to rewrite the deed or document of title by operation of law to reflect the acquiesced change so that the agreed upon boundary becomes the true dividing line. *Duncan v. Peterson*, 3 Cal.App.3d 607, 83 Cal.Rptr. 744, 746 (1970); *Edgeller v. Johnston*, 74 Idaho 359, 262 P.2d 1006, 1010

(1953). An acquiesced line "becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location." *Young v. Blakeman*, 153 Cal. 477, 95 P. 888, 890 (1908). "Thus, if the distance call in the deed is '500 feet,' it may henceforth be treated as if it read '517 feet' or '483 feet,' and every future deed of the land which copies or incorporates the original description will also be so read." Roger A. Cunningham et al., *The Law of Property* § 11.8, at 765 (1984). See also Olin L. Browder, *The Practical Location of Boundaries*, 56 Mich.L.Rev. 487, 530 (1958). *Salazar v. Terry*, 911 P. 2d 1086 - Colo: Supreme Court 1996.

Of course, state statutes can and do control what the courts can do in that regard.

With respect to actions seeking to establish the boundary between two properties, the civil code provides as follows: "The court shall fix the boundary according to the ownership of the parties; if neither party proves ownership, the boundary shall be fixed according to limits established by possession." La.Civ.Code art. 792. "When both parties rely on titles only, the boundary shall be fixed according to titles. When the parties trace their titles to a common author preference shall be given to the more ancient title." La.Civ.Code art. 793. "When a party proves acquisitive prescription, the boundary shall be fixed according to limits established by prescription rather than titles." La.Civ.Code art. 794.

In Iowa, careful consideration must be given to the case of *Heer v. Thola*, 613 NW 2d 658, 2000 in which it was determined that acquiescence and adverse possession do not ripen until the courts have so determined. Thus, surveyors in Iowa must consider that decision when thinking about accepting a fence as the boundary over other evidence.

Each state has Rules of Evidence which set out what is allowed as evidence in a court proceeding. The Federal government also has Rules of Evidence. These rules could support an expert giving an opinion on ownership — which is ultimately what the owners want to court to rule on — assuming the expert is qualified to do so.

Rule 704 - Federal Rules of Evidence

Opinion on an Ultimate Issue

(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

New Jersey Rules of Evidence 704

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Completing the survey

It is the opinion of the author of this paper that the completion of a retracement survey should be accompanied by a plat/map of that survey and a surveyor's report regardless of the client's wishes.³⁴ A principal focus of this paper and one of the most inviolable rules of retracement surveying is to follow in the footsteps of the original surveyor. This directive is extremely difficult, if not bordering on impossible, to comply with if original surveyors do not produce any footsteps to follow by monumenting their boundaries, calling for those monuments in their descriptions and writing a surveyor's report to document and support the decisions made.

The footsteps of retracement surveyors, while not as critical, are part of the evidence. Explaining the search for the evidence - what records and locations were searched, and with what results (i.e., what was found and not found) – and the evidence rules, doctrines and evidence relied upon to retrace the boundary is part of the record that could very well help the subsequent surveyor reach back to the original survey.

The final step to complete the circle is the placement of the plat of survey and surveyor's report into the public record. Not only does this provide a permanent record, it also permits the information to be used to improve the parcel layer of the jurisdiction's GIS (which many surveyors are notoriously fond of criticizing (i.e., GIS means "Get it Surveyed"), but do little to help improve it when they have the information in their own records).

Part of closing the loop on easing the search for evidence of the original survey is found in the descriptions written as a part of those surveys. Indiana recently passed a statute requiring that the caption of any new description produced as a part of an original (or retracement) survey contain specific information identifying the surveyor and the survey that resulted in that description.³⁵

Summary

This paper and program are planned as the first step towards a more comprehensive look at the process of conducting a proper retracement. It is hoped that in the meantime, readers and attendees will find it helpful and instructive in their work.

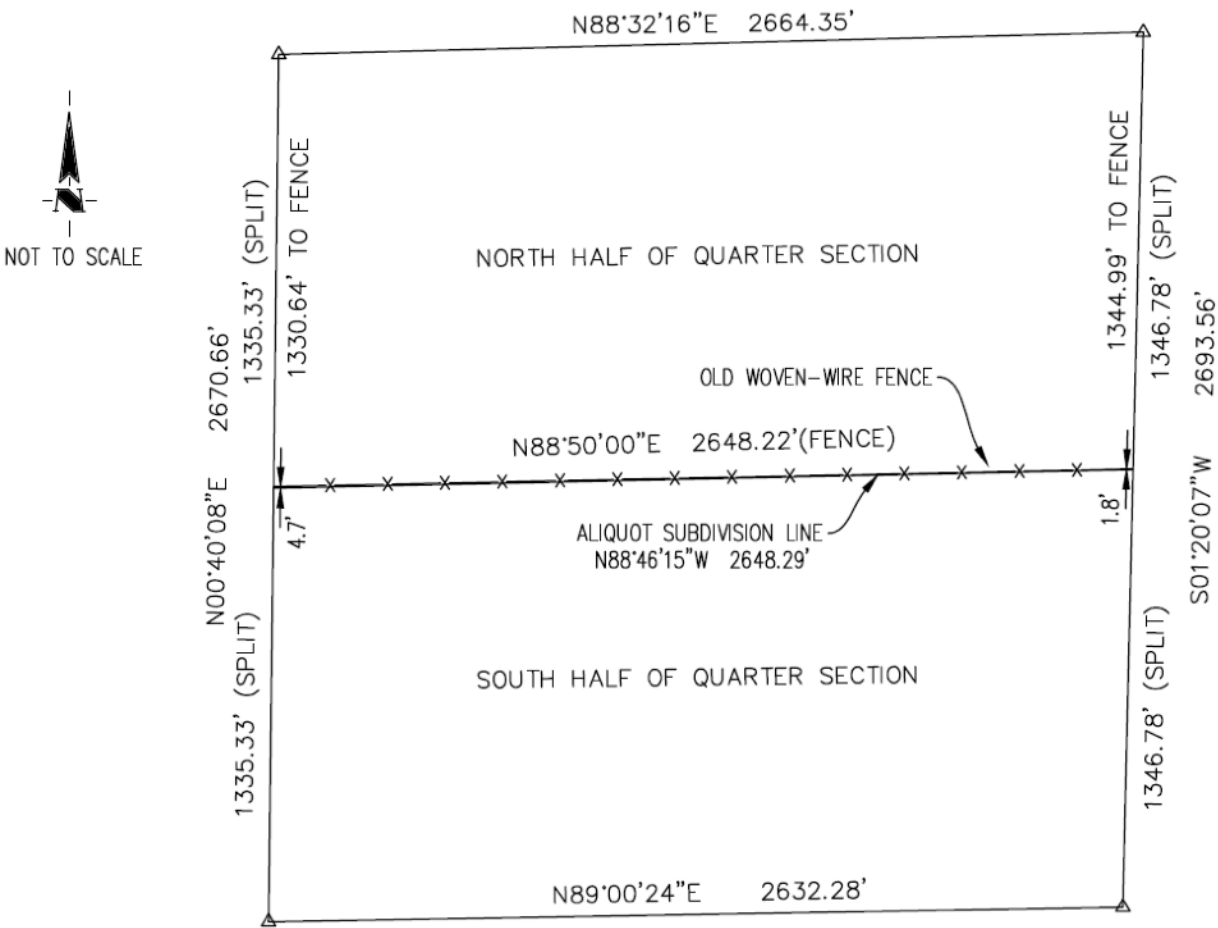
Gary R. Kent, PS, Indiana and Michigan

³⁴ A plat of survey and accompanying surveyors report are required under Indiana law (865 IAC 1-12-12)

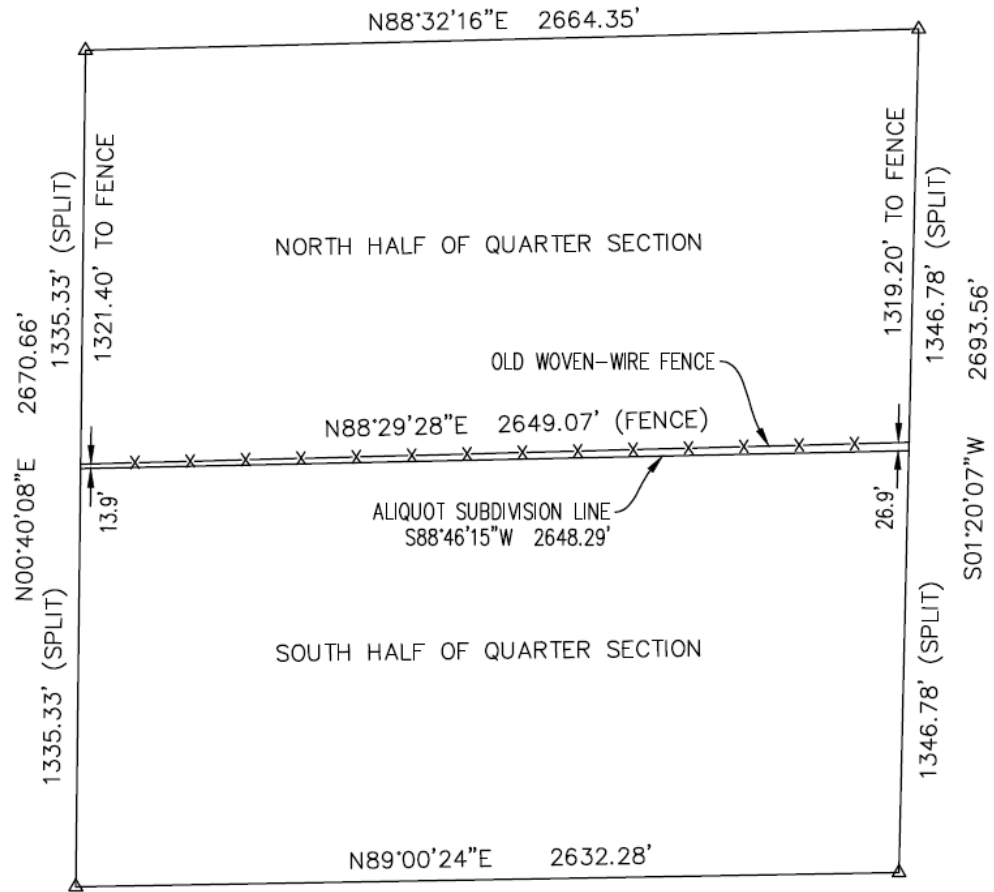
³⁵ Any new or modified real property description prepared by a professional surveyor as a product of an original survey or a retracement survey must include a caption that identifies: (1) the name and professional surveyor registration number of the professional surveyor who prepared the description; and (2) the plat of survey produced as a part of the original survey or retracement survey, including the following information: (A) The date of the surveyor's certification, (B) The date of the last revision, if any, to the survey, (C) Any associated project or job number, (D) The name of the survey company, if any. See IC 25-21.5-9-9(b).

Example Scenarios for Discussion

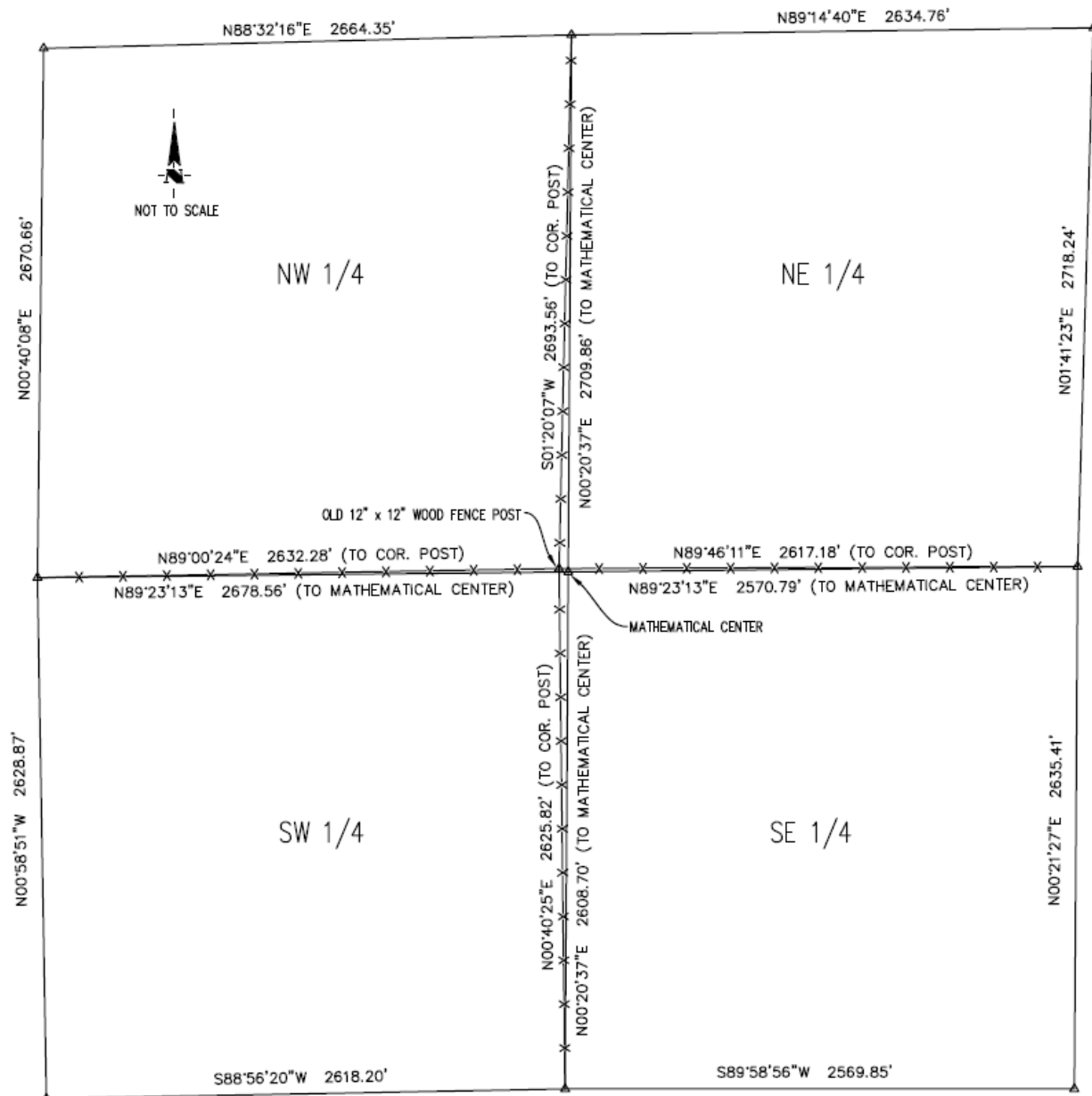
SCENARIO #1



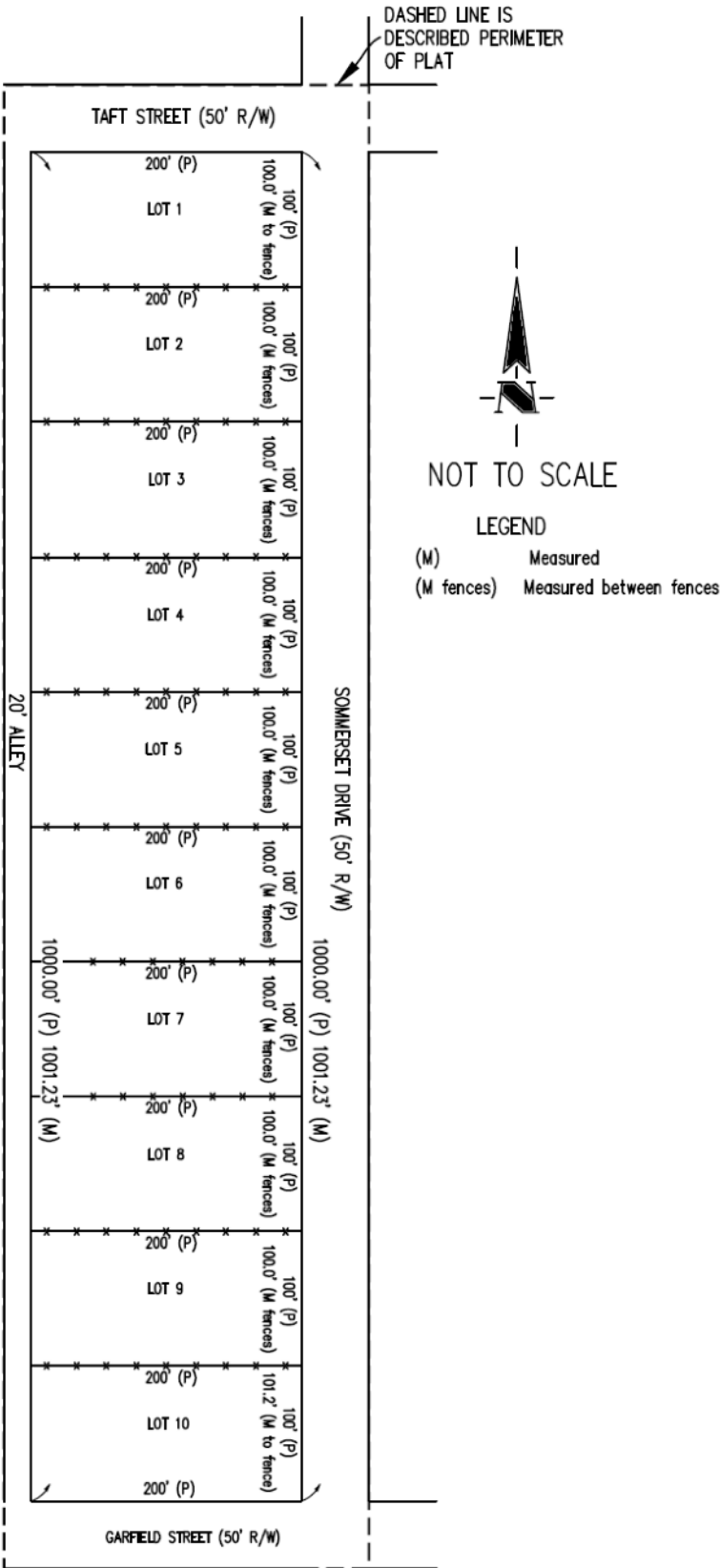
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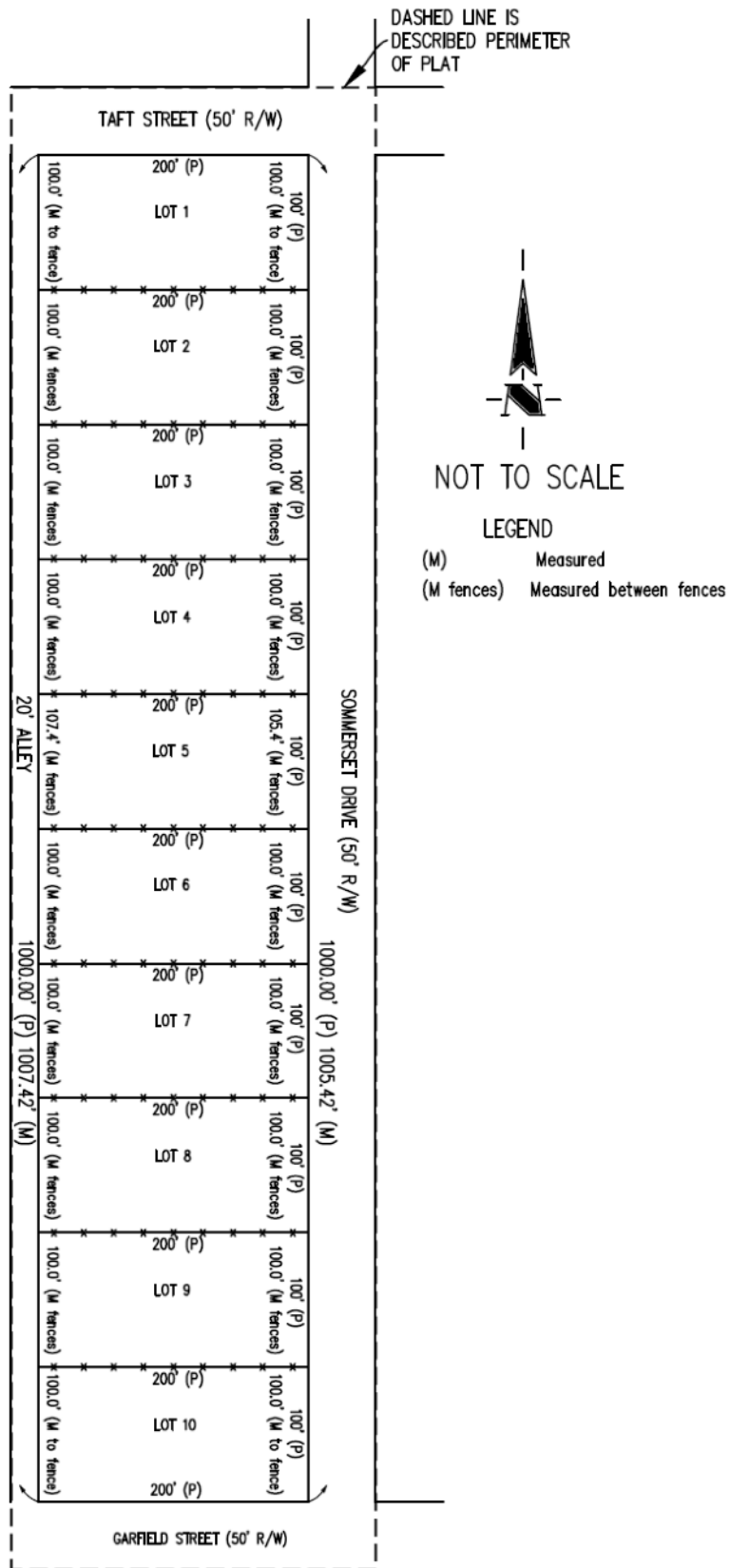
SCENARIO #3



SCENARIO #4



SCENARIO #5



NOT TO SCALE

N00°40'08"E 2670.66'

1335.33' (SPLIT)

1321.40' TO FENCE

N88°32'16"E 838.5'

SURVEYED PROPERTY

N88°32'16"E 2664.35'

NORTH HALF OF QUARTER SECTION

OLD WOVEN-WIRE FENCE

S88°29'28"W 883.14'

N88°29'28"E 2649.07' (FENCE)

ALIQUOT SUBDIVISION LINE
S88°46'15"W 2648.29'

139.20' TO FENCE

1346.78' (SPLIT)

2693.56'

1335.33' (SPLIT)

139.20' TO FENCE

2693.56'

S01°20'07"W

SOUTH HALF OF QUARTER SECTION

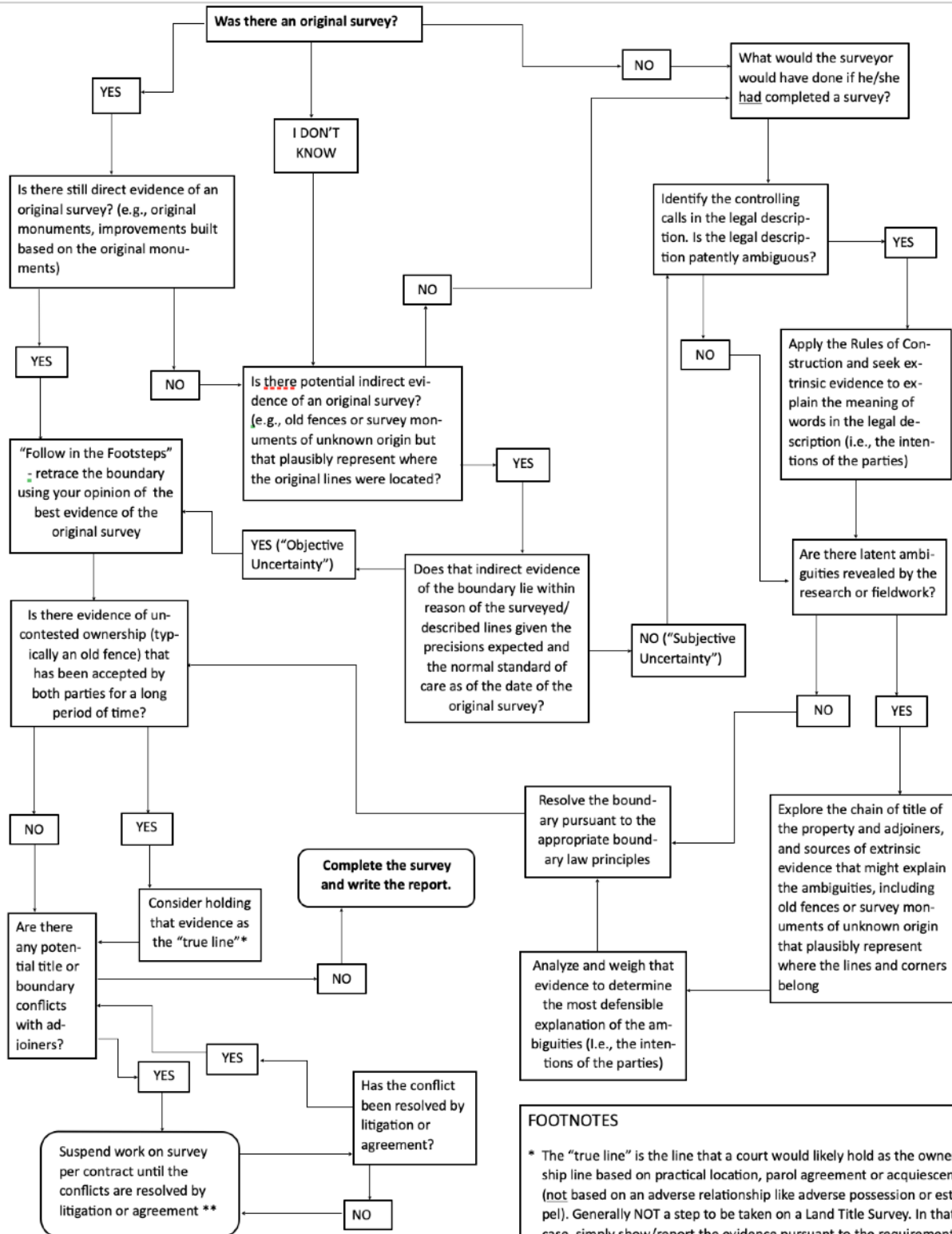
N89°00'24"E 2632.28'

Part of the North Half of the Northeast Quarter of Section 17, Township 19 North, Range 8 East of the Second Principal Meridian in Henry County, Indiana being described as follows:

Beginning at the northwest corner of said half-quarter section; thence East along the north line thereof a distance of 840 feet; thence South a distance of 1320 feet to the south line of said half-quarter section; thence west 840 feet to the southwest corner of said half-quarter section; thence north to the point of beginning. Containing 25½ acres, more or less.

RETRACEMENT GUIDANCE FLOWCHART

(vers. 12/08/21)



FOOTNOTES

* The "true line" is the line that a court would likely hold as the ownership line based on practical location, parol agreement or acquiescence (not based on an adverse relationship like adverse possession or estoppel). Generally NOT a step to be taken on a Land Title Survey. In that case, simply show/report the evidence pursuant to the requirements in the ALTA/NSPS Standards.

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