Title vs. Survey

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Statutes, Standards and Boundary Law Principles

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New Jersey Society

~of~

Professional Land Surveyors

Atlantic City, New Jersey

February 5, 2015

Presented by

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Title vs. Survey – Statutes, Standards and Boundary Law Principles

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Biography of Gary R. Kent

Gary Kent is Integrated Services Director for The Schneider Corporation, a land surveying, GIS and consulting engineering firm based in Indianapolis and with offices in Indiana, North Carolina and Iowa. He is in his 32nd year with the firm and his responsibilities include serving as project and account manager, safety, corporate culture, training, coaching and mentoring members of the surveying staff, and advising the GIS Department on surveying matters.

Gary is a graduate of Purdue University with a Bachelor of Science Degree in Land Surveying. He is registered to practice land surveying in Indiana and Michigan. Gary is chair of the committee on ALTA/ACSM Standards for ACSM/NSPS and is the liaison to NSPS/ACSM for the American Land Title Association. He is also past-president of the American Congress on Surveying and Mapping and a twice past president 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 an instructor for the International Right of Way Association.

Gary is in eleventh year on the Indiana State Board of Registration for Professional Surveyors. He is frequently called as an expert witness in cases involving boundaries, easements and land surveying practice. He regularly presents programs across the country on surveying and GIS topics, and he also writes a column for *The American Surveyor* magazine.

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The Role of the Land Surveyor in Boundary Determinations

The Regulation of Land Surveying

The definition of surveying in all states allows the registered surveyor to rely upon the work of unlicensed subordinates working under his or her direct supervision. There are relatively few registered surveyors in the United States (probably on the order of 40,000).

The practice of Land Surveying is, in all states, regulated by a state board. Some states, like West Virginia, Maine, New Hampshire and Indiana, have boards that regulate only Land Surveyors. Many other states, however, have "joint" boards that regulate more than one profession – typically engineering and surveying.

Surveying is part Science, part Law and part Art

The **science** aspect is generally the science of measurement – using angle measuring devices (theodolites, total stations), distance measuring devices (electronic distance measuring instruments, steel tapes) and GPS (global positioning system which uses satellites).

The **law** aspects relate to the interpretation and resolution of legal descriptions and boundaries. There are no statutes or legislated laws that tell surveyors how to determine boundaries; the rules for that are from a body of common law derived from hundreds of years of court cases related to boundary disputes and legal descriptions. Surveyors cannot make proper boundary determinations without studying and understanding what the "weight of authority" has been in case law.

The **art** aspect could be said to apply to the judgments and decisions in the field related to where, and to what extent, to look for evidence, and how that information is all presented. For example, having a gut feeling on where to dig to try and find a stone marker set in 1840, or how to most effectively run a survey line from one location across a ravine and river and through the trees to another location.

Surveying can also be seen as part "*doing*" and part "*thinking*." It's one thing to make a measurement; with today's technologies, virtually anyone can make very precise survey-grade measurements. But it's an entirely different thing to understand <u>where</u> to make the measurements from, and to what, and how to apply those measurements to the facts and evidence at hand so a defensible boundary opinion can be made.

The retracement of a boundary is the professional opinion of the surveyor. That opinion is based on the evidence available to the surveyor; and if that evidence changes, the opinion may well change. Evidence comes in many forms – from the writings, from what is found in the field, from verbal and written statements, from measurements and from historical information.

Two competent surveyors faced with the same evidence will generally come to the same opinion, although there are occasions when the surveyors will simply have differing opinions as to how to interpret or weigh certain pieces of evidence. This can result in the two surveyors arriving at different conclusions as to a boundary location. If the surveyors cannot resolve the differences satisfactorily, and if the affected owners are inclined to litigate, a final determination will be made by a court.

New Jersey Definition of Land Surveying[1]

(e) The term "practice of land surveying" within the meaning and intent of this chapter shall mean any service or work the adequate performance of which involves the application of special knowledge of the principles of mathematics, the related physical and applied sciences and the relevant requirements of law to the act of measuring and locating distances, directions, elevations, natural and man-made topographical features in the air, on the surface of the earth, within underground workings, and on beds of bodies of water for the purpose of determining areas and volumes, and for the establishing of horizontal and vertical control as it relates to construction stake-out, for the monumentation of property boundaries and for the platting and layout of lands and subdivisions thereof and for the preparation and perpetuation of maps, record plats, field notes, records and property descriptions in manual and computer coded form that represent these surveys. The practice of land surveying shall include the establishment and maintenance of the base mapping and related control for land information systems that are developed from the above referenced definition of the practice of land surveying.

The Issues for the Surveyor – Matters of Survey vs. Matters of Title

With respect to boundaries, the *surveyor* deals with matters of survey, primarily location – the "where" of a boundary. Sometimes the boundary location is not in question – the deed description is unambiguous and there are no issues with the adjoiners. Many times, however, the description(s) require interpretation to eliminate or resolve the ambiguities. Either way, we are in the realm of "where" which falls in the authority of the surveyor.

Alternatively, the *law* deals with "what" that boundary line is – in essence, what the boundary represents with respect to title (ownership). These concepts of "where" and "what" are often, however, not mutually exclusive. The best example of that is with unwritten rights.

> The vocation of a surveyor is limited to the ascertainment of definite lines. He may ascertain where the lines and corners specified in the description of the given tract of real estate actually are. He does not have the power to determine what the terms of such description ought to be. Where the line lies, and where its corners are, is a question, and on which the surveyor, on account of his superior facilities for doing so, may be called upon to officially determine. What the lines and corners are is a matter of law, which courts can alone declare. *Wilson v. Powell*, (1905) 37 Ind.App. 44, 70 N.E. 611.
>
> What constitutes the line, is a matter of law; where it is, is a matter of fact. *McCanless v. Ballard*, 222 N.C. 701, 703, 24 S.E.2d 525; *Jenkins v. Trantham*, 244 N.C. 422, 426, 94 S.E.2d 311. *Smothers v. Schlosser*, 163 SE 2d 127 - NC: Court of Appeals 1968.

There are a number of means by which boundaries can be established by unwritten means. Yet each of these doctrines would seem to be contrary to the otherwise inviolate Statute of Frauds, which requires that conveyances of real property must be in writing. The courts have found a way around this conundrum; however, by determining that these doctrines do not transfer title, but rather merely fix what were otherwise uncertain lines.

Everyone can agree that the doctrine of adverse possession falls in the realm of title, not survey. The necessary elements typically include all, most, or some version of, the following: adverse or

[1] New Jersey Permanent Statutes 45:8-28 Definitions

hostile, open and notorious, visible, actual, exclusive and with a claim of right or color of title. Some states also require payment of the property taxes due on the area being claimed. The statutory period varies from 3 to 21 years depending on the state, with some states providing for shorter periods if the claimant can show color of title, that the taxes had been paid, and/or if the nature of the possession was especially open.

Courts do not look kindly on the doctrine of adverse possession which is why every single element most be proven - typically by "clear and convincing" evidence. Failure to prove only one of the elements is enough to defeat the entire claim. However, when a claim of unwritten rights is perfected in a court of law, it (1) confirms that the line of <u>ownership</u> changed from the original written title line, and (2) creates marketable title to the ownership line.

With a few exceptions, the states view the unwritten boundary doctrines of acquiescence, practical location, and – obviously – parol agreement, as being manifestations of prior boundary line agreements, contrary to adverse possession which arises out of contentious situations. Even the doctrines of estoppel and repose could be seen as representing boundary line agreements – in essence, <u>inverse</u> agreements, whereby the <u>inaction</u> of one party can be taken as an implied acceptance of a claim by an adjoiner.

Each of the various unwritten boundary doctrines has its own set of specific requirements that must be met in order for a court to perfect the claim. Some requirements are problematic in that they require a look inside the mind of the claimant; and some requirements are counterintuitive. As an example of the former, in some states a claim of adverse possession is defeated if it can be shown that the claimant did not intend to possess someone else's land (i.e., it was 'by mistake"). With regard to the latter, in some states, a parol agreement between two parties to set a common line is not valid if there is no conflict in the written title or if a survey would have otherwise resolved the uncertainty.

All of the doctrines that alter boundary lines by unwritten means are matters of title, not survey. And title by unwritten means can only be perfected by a court. If a surveyor decides to act on his or her opinion that unwritten rights have operated and move a written boundary line to conform with that opinion, he or she has stepped over the line - out of survey and into title. However, Thomas Cooley, Chief Justice of the Michigan Supreme Court in 1881, wrote "Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of parties concerned…"

Thus, if the surveyor can bring the affected parties together and get them to agree to a line that represents the status quo in the neighborhood (which was most often a long-established, and ostensibly a long-agreed upon line anyway), then the surveyor may have 'cover' to survey to the agreed-upon line. In such cases, however, it is virtually a given that the surveyor, after preparing such a survey, should also prepare descriptions and an exhibit showing and describing to the agreed upon line, and then <u>go no further</u> until the owners engage an attorney or attorneys to see that the proper written documents are prepared and recorded memorializing and providing notice of the agreed-upon line. Otherwise, what may have been an agreement in the moment could easily devolve into a dispute later on which the surveyor will most assuredly be dragged into.

Additionally, there are very important, but not always obvious, issues such as the treatment of mortgages that might be affected by the new line which must be properly vetted by an attorney. Also, if the elements of whatever doctrine the surveyor relied on as the basis for his or her opinion were not met (including those elements that impossibly require one to climb inside the head of one or both of the parties), the surveyor is at great risk if the written title line was disregarded and there was no acquiescence by the parties to the surveyed line.

But the surveyor may be uncomfortable or concerned about violating standards, practicing law or determining a matter of title. Or perhaps, despite an attempt, the neighbor and client simply could not be convinced to agree to the line that represents the surveyor's opinion. Either way, the surveyor will be left with surveying to the written title line and showing any conflicts with adjoiners' deeds or with occupation/possession. Except in a few states, this is actually what is expected of surveyors, and/or required by state statutes or administrative code/rule (standards).

Either way, no matter what line the surveyor decides to go with, there must be clear communication of the necessary information so the client does not act ill-advisedly and cause a problem with an adjoiner. For example, perhaps there is a five foot overlap with an adjoiner and your client's written title line falls five feet over the neighbor's fence. If you deem it necessary to monument that location (or if the parties could not otherwise be brought to agreement), you had better clearly understand what is going on and advise the client accordingly. Why? Because the client will most assuredly assume that she owns to the rebar and take steps to exercise domain over to that line (5 feet over the fence) to the detriment of the adjoiner's rights.

Junior/Senior Rights

In most public land survey states and in many of the colonial states, surveyors do not routinely attempt to resolve junior/senior conflicts. Rather they simply report the potential conflict, which is what the ALTA/ACSM Standards require.

In some states like in New England and Texas; however, surveyors *must* attempt to 'resolve' junior/senior relationships in order to comply with their respective states' laws.

Some surveyors around the country, outside New England or Texas, would suggest that there is only one boundary; and in order to properly determine its location, the surveyor must resolve the junior senior relationship. This argument creates an interesting dichotomy in attitudes towards title. No knowledgeable surveyor would suggest that title should or could be resolved by a surveyor when it is potentially affected by unwritten rights (e.g., adverse possession, acquiescence) because they know it is the purview of the courts to ascertain whether or not such rights have been successfully achieved, and to perfect written title if they have.

Yet, most real estate attorneys would assert that resolving junior/senior rights is *also* a title issue, not a survey issue. The ALTA/ACSM Survey Standards ever since 1962 and in the 2011 version, in particular, also take this stance. When preparing an ALTA/ACSM Land Title Survey, the surveyor is to disclose the gap or overlap to the title company and client prior to delivering the final survey *"for determination of a course of action concerning junior/senior rights."* [2]

Aside from boundaries per se, surveyors *do* get indirectly involved in title when performing an ALTA/ACSM Land Title Survey. The primary purpose of the ALTA/ACSM Survey Standards is for the surveyor to locate and show those conditions observed that could adversely affect title to the property being surveyed. Such conditions would include potential prescriptive easements and adverse claims by others. By virtue of a proper and complete Land Title Survey, the title company is appropriately informed of such conditions and can, by virtue of listing them in the

[2] 2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys, Section 6.B.vii.

title commitment, likewise inform the interested parties, and help facilitate responses or solutions that will eventually aid in a successful real estate transaction.

Junior/Senior Rights – New Jersey

The New Jersey Administrative Code requirements outlining the standards of practice (Title 13, Chapter 40) make no mention of adjoners. It is typically the practice of surveyors in nearly all states – and in fact is required in most states' standards and in the ALTA/ACSM Land Title Survey standards – to make a determination as to the relation of the surveyed lines with its adjoiners. In at least one case, it would appear that surveyors told they <u>must</u> resolve junior/senior conflicts.[3] But can they really do this?

The reality is that where there is a title or boundary conflict there are only two parties who can resolve the issue. Those parties are not the title company, attorneys, surveyors or even judges and juries - except in only one case.

No, only the two affected owners can resolve the problems. And they can do it by agreement … or by litigation (which is the only time that judges and juries can get involved). But surveyors can assist owners by not misleading them and by guiding them based on their extensive understanding of boundary law.

Surveyors mislead owners every day without realizing it. This is because the typical owner thinks surveyors "tell them what they own." Yet, *every* surveyor knows that professional surveyors do not have the legal authority to determine ownership. Whether or not surveyors should be having that conversation up-front is open for debate, but one thing is not debatable. If we surveyors do not recognize the disconnect between what owners *think* we are doing and what we are *really doing*, we are leading them down a path to – at best - completely unnecessary and often indefensible conflicts with their neighbors, and – at worst – litigation that will cost tens of thousands of dollars.

[3] General Rules of Procedures and Practices, Texas Board of Professional Land Surveying §663.16. Boundary Construction – "(a) When delineating a property or boundary line as an integral portion of a survey, the land surveyor shall respect junior/senior property rights …"

NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS
4601 Six Forks Rd Suite 310
Raleigh, North Carolina 27609

September 21, 2012

Mr. Josh White, PE, PLS, President
North Carolina Society of Surveyors
331 South White Street
PO Box 2101
Wake Forest, NC 27588

Re: Clear and Factual Plats

Dear Mr. White:

The Surveying Committee of the Board, after consideration at the September Board Meeting, is responding to your letter dated June 8, 2012 and as a follow-up to the discussion with Mr. John Logsdon, J.D., PLS, and Board Counsel David Tuttle at the NCSS Convention. The presentation by John Logsdon at the Surveying Committee Meeting, with Joel Johnson, PLS., Randy Rambeau, PLS and Christy Davis of NCSS in support, was helpful to the Board Members in further clarifying the position of the Board.

The questions that were raised boil down to property title issues. Title issues cannot be determined by the PLS based upon the surveyor's research when there is a conflict as to matters affecting title to the property. Only if the Surveyor is able, through research and by applying the tenets of survey construction, that a line is in fact the correct boundary line and any other line is not correct, then the determined line may be represented as the boundary line. Any other line may be represented for information with a note of explanation as to why that line cannot be the boundary line, but is shown for information.

Any determination that impacts the title to any portion of the property must be agreed upon by the parties in appropriate legal documents or settled by arbitration or the Courts by application of law. This is true for the application of senior/junior deed rights, since the property rights (title) have been placed in multiple parties. It cannot be a weighing of the evidence, but must be a determination of the Surveyor to full certainty as to the one line. The Board's previous interpretation is not meant to take away the Surveyor's right to interpret and apply the results of research to exercise professional judge as to surveying matters, but to avoid the Surveyor representing on the survey a professional opinion on title as to the relative weight to be given one line over another. By the same token

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(919) 791-2000	(919) 791-2012	ncbels@ncbels.org	www.ncbels.org

it is not meant to unnecessarily cloud a title with information that is not credible. Notes on the map can go a long way towards presenting the results of a survey in a clear and factual manner, but they are not a substitute for, and do not overcome, the depiction of one line as greater or more correct than another for the reasons given in the Board's September 8, 2011, letter to Mr. Logsdon.

The Surveyor's judgment is left intact as to determining and reporting facts of a boundary line location, but not as to interpreting title issues that arise from conflicting lines or deeds. The Surveyor is to report the facts and does not have the role of advocating for the client. That is reserved to the client and the client's attorney.

The Board also confirms the position in the September 8, 2011 letter as represented in the following two paragraphs from that letter:

> "The use of equal line weights on the plat for the conflicting boundary lines is based upon Board Rule 21-56.1602(f) requiring that the results of the survey be reported in a clear and factual manner. The surveyor should not represent or imply that one boundary line is more significant than another when an overlap occurs and can only do so once the boundary issue is resolved by agreement or the court. The boundary line described in the reference deed of the tract being surveyed is certainly significant, but no more significant than that of the adjoiner, and that fact can be noted, but not by giving greater significance by line weight or otherwise.
>
> Not only can it create confusion, but it gives the false impression that the client owns the conflicting area (or at least has a greater claim) and the client may treat it in a way that is detrimental to the adjoining property owner."

We trust that this discussion of determining title versus determining facts has brought clarity to the issue. If you have any questions please contact David S. Tuttle, Board Counsel, at dstuttle@ncbels.org or (919) 791-2000 ext. 111.

For the Board,

Andrew L. Ritter
Executive Director

DST/

Recordation Statutes

Where there is a gap or overlap between properties – representing some sort of conflicting junior/senior rights - some surveyors will (and in some states, like New England and Texas, must) research the chain of title to attempt to determine which deed is senior. Surveyors need to recognize that this is an exercise in title, and not a matter of survey. In doing so, the surveyor is essentially deciding who "owns" written title to the area in question. However, the answer is not always clear by simply examining the written record. This is because the effect and order of recordation and the date of execution of conflicting deeds can differ from state to state and may be dependent on whether there was notice to subsequent purchasers of prior conveyances.[4] Another very simply way of saying this is that the first deed recorded is not necessarily the senior deed.

Race statute

Also known as the "Race to the courthouse." The rule that the document recorded first wins and will have priority over any later recordings.

- States that follow the Race statute: Delaware, Louisiana, and North Carolina. [One source found also included Maryland]

Notice statute

A later buyer who pays fair value for the property and does not have notice that there were any other earlier conflicting interests, wins and will have priority over any later recordings. If a prior interest records first, but not until after a subsequent purchaser paid fair value, that recordation has no effect.

- States that follow the Notice statute: Alabama, Arizona, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, and West Virginia.

Race-Notice statute

A later buyer who pays fair value, does not have notice of any other earlier conflicting interests, and records first, wins and will have priority over any later recordings.

- States that follow the Race-Notice statute: Alaska, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio (regarding mortgages, Ohio follows the Race statute), Oregon, Pennsylvania (regarding mortgages, PN follows Race), South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. [Note one source found stated that Maryland is a race state]

[4] See http://www.legalmatch.com/law-library/article/recording-acts.html

Recordation Act – New Jersey (Race-Notice statute)

New Jersey Permanent Statutes 46:26A-12. Effect of recording.

a. Any recorded document affecting the title to real property is, from the time of recording, notice to all subsequent purchasers, mortgagees and judgment creditors of the execution of the document recorded and its contents.

b. A claim under a recorded document affecting the title to real property shall not be subject to the effect of a document that was later recorded or was not recorded unless the claimant was on notice of the later recorded or unrecorded document.

c. A deed or other conveyance of an interest in real property shall be of no effect against subsequent judgment creditors without notice, and against subsequent bona fide purchasers and mortgagees for valuable consideration without notice and whose conveyance or mortgage is recorded, unless that conveyance is evidenced by a document that is first recorded.

Marketable Title

Marketable Title Acts exist in about 20 states under a variety of names. The purpose of these acts is to allow for the removal of potential title defects of 'ancient' origin by essentially enacting statutes of limitation that act to clear away obscure property rights that might otherwise cloud title.

Under a Marketable Title Act, it is possible to extinguish ancient interests, whether they are revealed in the present day or in the future, unless the holders of such interests act to protect their interests by recent recordation.

Marketable Title Acts vary substantively in the states that have them. Differences include the property interests that are subject to the act, the statutory period of limitation, the period of time allowed for recording of notices preserving rights, and exceptions contained therein.

According to one source, states that have some form of Marketable Title Act include Colorado, Connecticut, Florida, Kansas, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, and Wyoming.

North Carolina General Statutes – Marketable Record Title[5]

§ 47B-1. Declaration of policy and statement of purpose.

It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina that:

(1) Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable.

(2) Nonpossessory interests in real property, obsolete restrictions and technical defects in titles which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property.

[5] North Carolina General Statutes, Chapter 47B – Real Property Marketable Title Act

(3) Such interests and defects are prolific producers of litigation to clear and quiet titles which cause delays in real property transactions and fetter the marketability of real property.

(4) Real property transfers should be possible with economy and expediency. The status and security of recorded real property titles should be determinable from an examination of recent records only.

It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished. (1973, c. 255, s. 1.)

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

(a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.

(b) A person has an estate in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate either in:

(1) The person claiming such estate; or

(2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate;

with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

(c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

(d) In every action for the recovery of real property, to quiet title, or to recover damages for trespass, the establishment of a marketable record title in any person pursuant to this statute shall be prima facie evidence that such person owns title to the real property described in his record chain of title. (1973, c. 255, s. 1; c. 881; 1981, c. 682, s. 11.)

§ 47B-3. Exceptions.

Such marketable record title shall not affect or extinguish the following rights:

(1) Rights, estates, interests, claims or charges disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed, provided, however, that a general reference in any of such muniments to rights, estates, interests, claims or charges created prior to such 30-year period shall not be sufficient to preserve them unless specific identification by reference to book and page or record be made therein to a

recorded title transaction which imposed, transferred or continued such rights, estates, interests, claims or charges.

(2) Rights, estates, interests, claims or charges preserved by the filing of a proper notice in accordance with the provisions of G.S. 47B-4.

(3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.

(4) Rights of any person who likewise has a marketable record title as defined in G.S. 47B-2 and who is listed as the owner of such real property on the tax books of the county in which the real property is located at the time that marketability is to be established.

(5) Rights of any owners of mineral rights.

(6) Rights-of-way of any railroad company (irrespective of nature of its title or interest therein whether fee, easement, or other quality) and all real estate other than right-of-way property of a railroad company in actual use for railroad purposes or being held or retained for prospective future use for railroad operational purposes. The use by any railroad company or the holding for future use of any part of a particular tract or parcel of right-of-way or non-right-of-way property shall preserve the interest of the railway company in the whole of such particular tract or parcel. Operational use is defined as railroad use requiring proximity and access to railroad tracts. Nothing in this section shall be construed as repealing G.S. 1-44.1.

(7) Rights, interests, or servitudes in the nature of easements, rights-of-way or terminal facilities of any railroad (company or corporation) obtained by the terms of its charter or through any other congressional or legislative grant not otherwise extinguished.

(8) Rights of any person who has an easement or interest in the nature of an easement, whether recorded or unrecorded and whether possessory or nonpossessory, when such easement or interest in the nature of an easement is for any one of the following purposes:

a. Flowage, flooding or impounding of water, provided that the watercourse or body of water, which such easement or interest in the nature of an easement serves, continues to exist.

b. Placing and maintaining lines, pipes, cables, conduits or other appurtenances which are either aboveground, underground or on the surface and which are useful in the operation of any water, gas, natural gas, petroleum products, or electric generation, transmission or distribution system, or any sewage collection or disposal system, or any telephone, telegraph or other communications system, or any surface water drainage or disposal system whether or not the existence of the same is clearly observable by physical evidence of its use.

c. Conserving land or water areas pursuant to a conservation agreement or preserving a structure or site pursuant to a preservation agreement under Article 4 of Chapter 121 of the General Statutes.

(9) Rights, titles or interests of the United States to the extent that the extinguishment of such rights, titles or interest is prohibited by the laws of the United States.

(10) Rights, estates, interests, claims or charges created subsequent to the beginning of such 30-year period.

(11) Deeds of trust, mortgages and security instruments or security agreements duly recorded and not otherwise unenforceable.

(12) Rights, estates, interests, claims or charges with respect to any real property registered under the Torrens Law as provided by Chapter 43 of the General Statutes of North Carolina.

(13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B. (1973, c. 255, s. 1; 1995, c. 443, s. 3.)

§ 47B-4. Preservation by notice; contents; recording; indexing.

(a) Any person claiming a right, estate, interest or charge which would be extinguished by this Chapter may preserve the same by registering within such 30-year period a notice in writing, duly acknowledged, in the office of the register of deeds for the county in which the real property is situated, setting forth the nature of such claim, which notice shall have the effect of preserving such claim for a period of not longer than 30 years after registering the same unless again registered as required herein. No disability or lack of knowledge of any kind on the part of any person shall delay the commencement of or suspend the running of said 30-year period. Such notice may be registered by the claimant or by any other person acting on behalf of any claimant who is

(1) Under a disability;

(2) Unable to assert a claim on his behalf; or

(3) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(b) To be effective and to be entitled to registration, such notice shall contain an accurate and full description of all real property affected by such notice, which description shall be set forth in particular terms and not be by general reference; but if such claim is founded upon a recorded instrument, then the description in such notice may be the same as that contained in the recorded instrument. Such notice shall also contain the name of any record owner of the real property at the time the notice is registered and a statement of the claim showing the nature, description and extent of such claim. The register of deeds of each county shall accept all such notices presented to him which are duly acknowledged and certified for recordation and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded, and each register of deeds shall be entitled to charge the same fees for the recording thereof as are charged for the recording of deeds. In indexing such notices in his office each register of deeds shall enter such notices under the grantee indexes of deeds under the names of persons on whose behalf such notices are executed and registered and under the grantor indexes of deeds under the names of the record owners of the possessory estates in the real property to be affected against whom the claim is to be preserved at the time of the registration. (1973, c. 255, s. 1.)

§ 47B-5. Extension of time for registering notice of claims which Chapter would otherwise bar.

If the 30-year period specified in this Chapter shall have expired prior to October 1, 1973, no right, estate, interest, claim or charge shall be barred by G.S. 47B-2 until October 1, 1976, and any right, estate, interest, claim or charge that would otherwise be barred by G.S. 47B-2 may be preserved and kept effective by the registration of a notice of claim as set forth in G.S. 47B-4 of this Chapter prior to October 1, 1976. (1973, c. 255, s. 1.)

§ 47B-6. Registering false claim.

No person shall use the privilege of registering notices hereunder for the purpose of asserting false or fictitious claims to real property; and in any action relating thereto if the court shall find that any person has intentionally registered a false or fictitious claim, the court may award to the prevailing party all costs incurred by him in such action, including a reasonable attorney's fee, and in addition thereto may award to the prevailing party treble the damages that he may have sustained as a result of the registration of such notice of claim. (1973, c. 255, s. 1.)

§ 47B-7. Limitations of actions and recording acts.

Nothing contained in this Chapter shall be construed to extend the period for the bringing of an action or for the doing of any other required act under the statutes of limitations, nor, except as herein specifically provided, to affect the operation of any statutes governing the effect of the registering or the failure to register any instrument affecting real property. (1973, c. 255, s. 1.)

§ 47B-8. Definitions.

As used in this Chapter:

(1) The term "person" denotes singular or plural, natural or corporate, private or governmental, including the State and any political subdivision or agency thereof, and a partnership, unincorporated association, or other entity capable of owning an interest in real property.

(2) The term "title transaction" means any transaction affecting title to any interest in real property, including but not limited to title by will or descent, title by tax deed, or by trustee's, referee's, commissioner's, guardian's, executor's, administrator's, or sheriff's deed, contract, lease or reservation, or judgment or order of any court, as well as warranty deed, quitclaim deed, or mortgage. (1973, c. 255, s. 1.)

§ 47B-9. Chapter to be liberally construed.

This Chapter shall be liberally construed to effect the legislative purpose of simplifying and facilitating real property title transactions by allowing persons to rely on a record chain of title of 30 years as described in G.S. 47B-2, subject only to such limitations as appear in G.S. 47B-3. (1973, c. 255, s. 1.) [italicized highlights added]

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Title Insurance

In the United States, the system of land tenure does not, in and of itself, provide for a definitive guarantee or even assurance of ownership, except in the half dozen states where title registration is available (and even in those states it is not required and is seldom used).

Thus we rely on title insurance companies to provide for the continuity, confidence and permanence in title that is necessary for a functioning society. Because the system does not inherently provide the necessary assurances, title companies conduct searches and risk analyses and then provide insurance, so conveyances, mortgages, and other actions and transactions involving real estate can take place generally without the concern or liability associated with finding that someone else owns the property that you paid for and thought was yours.

Because of its importance and ubiquity in real estate conveyancing title insurance is relatively heavily regulated in most states.

Title Insurance – New Jersey (selected sections of the New Jersey Permanent Statutes)

17:46B-1. Certain words defined

Certain words defined. As used in this act:

a. "Title insurance" means insuring, guaranteeing or indemnifying owners of real property or others interested therein against loss or damage suffered by reason of liens, encumbrances upon, defects in or the unmarketability of the title to said property, guaranteeing, warranting, or otherwise insuring by a title insurance company the correctness of searches relating to the title to real property, or doing any business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of this act.

b. The "business of title insurance" shall be deemed to be (1) the making as insurer, guarantor or surety, or proposing to make as insurer, guarantor or surety, of any contract or policy of title insurance; (2) the transacting or proposing to transact, any phase of the title insurance, including abstracting, examination of title, solicitation, negotiation preliminary to execution of a contract of title insurance, and execution of a contract of title insurance, insuring and transacting matters subsequent to the execution of the contract and arising out of it, including reinsurance; or (3) the doing, or proposing to do, any business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of this act.

17:46B-7. Financial requirement

Financial requirement.

a. Every title insurance company shall have a minimum capital, which shall be paid in and maintained, of not less than $500,000.00 and, in addition, paid-in surplus of at least $250,000.00.

b. Every title insurance company shall, prior to the issuance of any policy of title insurance in this State, have on deposit with the Commissioner of Insurance of the state of its domicile or in segregated funds if permitted by the company's state of domicile the sum of $100,000.00 as a fund for the security and protection of its policyholders wherever situated, or beneficiaries under such policies. The amount of such deposit shall be increased by the sum of $50,000.00 for each state or territorial subdivision of the United States, other than the state of its domicile, in which it shall be or become qualified to engage in the business of title insurance, less the amount required by and deposited in such other states or territorial subdivisions. When the aggregate of amounts so deposited in this or such other states or territorial subdivisions has reached the sum of

$250,000.00 no further deposit shall be required of such title insurance company as a condition of its qualification to engage in the business of title insurance in this State.

17:46B-9. Determination of insurability required

No policy or contract of title insurance shall be written unless and until the title insurance company has caused to be conducted a reasonable examination of the title and has caused to be made a determination of insurability of title in accordance with sound underwriting practices for title insurance companies. Evidence thereof shall be preserved and retained in the files of the title insurance company or its agent for a period of not less than 15 years after the policy or contract of title insurance has been issued.

It is important for surveyors to note that *a title commitment is not a statement as to the condition of title of a property.* It merely states the terms and conditions under which the insurer is will to issue the policy. The Revised Code of the State of Washington does a good job of pointing this out, viz.,

> (c) "Preliminary report," "commitment," or "binder" means reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and other matters as may be incorporated by reference. The reports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. *The report is not a representation as to the condition of the title to real property, but is a statement of terms and conditions upon which the issuer is willing to issue its title policy, if the offer is accepted*.[6] [italicized highlight added]

Title Registration ("Torrens")

Torrens Title Registration is a system of registering land titles whereby the state essentially guarantees an indefeasible title to those included in the register. Once title to real estate is registered, it is transferred not by the traditional deed, but rather through the written registration.

In short, in an "abstract system" of title, the abstract is <u>evidence</u> of title. In the Torrens system, the Certificate of Title <u>is</u> the title.

The primary advantage of title registration is that it simplifies conveyances of real property and provides for a state guarantee as to the ownership of absolute title. It is very common in many parts of the world; however, in the United States the only states that provide for some form of title registration are Colorado, Georgia, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Virginia and Washington. It is not widely used in any state and Illinois repealed its registration of title law a few years ago. At one time, twenty states had statutes authorizing title registration.[7]

Disadvantages of title registration include the time and costs involved in the preparation and review of a complete abstract of title and survey, and the remedying of any deficiencies.

[6] RCW 48.29.010

[7] Reference is made to http://www.inversecondemnation.com/inversecondemnation/2010/04/land-court-schmand-court-state-disregards-torrens-title-claiming-unstated-preexisting-rights.html

The Relationship between Surveying and the Title industry

Because title companies rely on ALTA/ACSM Land Title Surveys to be of consistent quality and completeness, it is important that the surveying profession and the title industry work together to achieve their common goals. In order to do this, surveyors and title professionals need to understand each other's roles, obligations and challenges. The 2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys (discussed below) address these needs by outlining responsibilities of the surveyor and client with regard to research and of the surveyor in performing the survey and preparing the plat or map.

Surveyors are the eyes of the title company, and – for that matter – of the lender and attorneys and often the buyer, with respect to issues on the ground that could adversely affect title to the property being surveyed. The requirements contained within the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys are aimed at providing guidance to the surveyor so that the data is collected and presented in a manner that serves the needs of the title company, lender and buyer with respect to those potential title problems.

It is this writer's opinion that Surveyors and title professionals should take every opportunity to have dialogue about their common interests, expectations and needs. Surveyors would be well-served to hand-deliver Land Title Surveys to title companies so they can sit down and go over the results, particularly when the survey has any complexity to it.

The 2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys

The American Land Title Association and the National Society of Professional Surveyors promulgated the latest version of the *Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys* in the fall of 2010. This version became effective February 23, 2011 and represents the first major rewrite of the standards since their initial adoption by the two organizations in 1962.

The new standards have been completely restructured into 8 sections, together with 22 items in Optional Table A, and are organized as follows:

Section 1 – Purpose

Section 2 – Request for Survey

Section 3 – Surveying Standards and Standards of Care

Section 4 – Records Research

Section 5 – Field work

Section 6 – Plat or Map

Section 7 – Certification

Section 8 – Deliverables

Table A - *Optional/Negotiable Items*

The following portion of this handout includes selected section of the standards with associated comments as they relate to title issues.

<u>Section 1 – Purpose</u>

Members of the American Land Title Association (ALTA) have specific needs, unique to title insurance matters, when asked to insure title to land without exception as to the many matters which might be discoverable from survey and inspection, and which are not evidenced by the public records.

For a survey of real property, and the plat, map or record of such survey, to be acceptable to a title insurance company for the purpose of insuring title to said real property free and clear of survey matters (except those matters disclosed by the survey and indicated on the plat or map), certain specific and pertinent information must be presented for the distinct and clear understanding between the insured, the client (if different from the insured), the title insurance company (insurer), the lender, and the surveyor professionally responsible for the survey.

In order to meet such needs, clients, insurers, insureds, and lenders are entitled to rely on surveyors to conduct surveys and prepare associated plats or maps that are of a professional quality and appropriately uniform, complete and accurate. To that end, and in the interests of the general public, the surveying profession, title insurers and abstracters, the ALTA and the National Society of Professional Surveyors, Inc. (NSPS) jointly promulgate the within details and criteria setting forth a minimum standard of performance for ALTA/ACSM Land Title Surveys. A complete 2011 ALTA/ACSM Land Title Survey includes the on-site fieldwork required under Section 5 herein, the preparation of a plat or map showing the results of the fieldwork and its relationship to record documents as required under Section 6 herein, any information in Table A herein that may have been negotiated with the client, and the certification outlined in Section 7 herein.

The Standard Survey Exception

Title policies usually contain coverage exceptions in addition to the standard coverage exclusions. The exceptions are generally set forth on Schedule B to the policy and can consist of standard printed exceptions (which differ regionally) and specific additional exceptions based on relevant facts.

One standard exception, which normally may be removed, insured over or modified if a current survey (or in certain cases, relevant affidavits) is provided is the "survey exception." The standard survey exception negates insurance for encroachments, overlaps, boundary line disputes or other matters which would be disclosed by an accurate survey or inspection of the premises. The precise wording of the standard survey exception differs from region to region and from insurer to insurer.

Typical language in a case where no survey was provided would be: "*Rights or claims of parties in possession, boundary line disputes, overlaps, encroachments, and any matters not shown by the public records which would be disclosed by an accurate survey and inspection of the land described in Schedule A.*"

A short form exception frequently set forth is: *"Such state of facts as would be disclosed by an accurate survey and inspection of the premises."*

If an older survey is provided, the insurer may rewrite the exception as: *"Such state of facts occurring subsequent to [date of prior survey] as would be disclosed by a current accurate survey and inspection of the premises,"* although it is becoming more frequent that lenders put pressure on title companies to remove any exception to matters that occurred after the date of a survey!

If a current acceptable survey is provided, the insurer may simply replace the standard survey exception with language keyed to the survey provided, such as: *"Matters shown on survey of the premises prepared by [Surveyor] dated [Date]."* A better and more frequently used approach is for the insurer to review the survey and write specific exceptions for each potential title problem revealed on the survey; for example: *"Encroachment upon the insured premises of garage along the west line as shown on survey prepared by [Surveyor] dated [Date]."*

The best approach for the insured is to have the survey exception deleted in its entirety if there are no apparent problems disclosed by a survey

What constitutes a complete ALTA/ACSM Land Title Survey?

Quoting from the 2011 Standards: *"A complete 2011 ALTA/ACSM Land Title Survey includes the on-site fieldwork required under Section 5 herein, the preparation of a plat or map showing the results of the fieldwork and its relationship to record documents as required under Section 6 herein, any information in Table A herein that may have been negotiated with the client, and the certification outlined in Section 7 herein.* This sentence was added in order to lay to rest any misconceptions about the surveyor's responsibilities and to, in a sense, put a ribbon around the entire set of ALTA/ACSM Minimum Standard Detail Requirements.

<u>Section 2 - Request for Survey</u>

> *The client shall request the survey or arrange for the survey to be requested, and shall provide a written authorization to proceed from the person or entity responsible for paying for the survey. Unless specifically authorized in writing by the insurer, the insurer shall not be responsible for any costs associated with the preparation of the survey. The request shall specify that an **"ALTA/ACSM LAND TITLE SURVEY"** is required and which of the optional items listed in Table A herein, if any, are to be incorporated. Certain properties, including but not limited to marinas, campgrounds, trailer parks and leased areas, may present issues outside those normally encountered on an ALTA/ACSM Land Title Survey. The scope of work related to such properties should be discussed with the client, lender and insurer, and agreed upon in writing prior to requesting the survey. The client may need to secure permission for the surveyor to enter upon the property to be surveyed, adjoining properties, or offsite easements.*

The order for an ALTA/ACSM Land Title Surveys may come from a title company, attorney, owner, buyer, real estate broker or other interested party. In any event, it is incumbent on the surveyor to identify who is actually responsible for payment and to obtain a contract with that party. This section of the 2011 Standards specifies that there shall be a written authorization - and the best form of that is a written contract.

While many surveyors perform surveyors without benefit of a written contract, surveyors would be advised to recognize that *every* project they undertake involves a contract. They should understand, however, that if a problem is encountered, (1) without a *written* contract, some judge will be the one who interprets what the surveyor's responsibility was under the oral contract, and (2) often times, the statute of limitations is actually *longer* under an oral contract than under a written one.

The contract or correspondence regarding the request shall specify that an ALTA/ACSM Land Title Survey is being requested and which of the optional items listed in Table A, if any, are to be incorporated. It is suggested that the client actually be involved in the selection of the Table A items. In this way, the client will have a better sense of the standards, and this also affords the surveyor an opportunity to make a connection between the fee for the survey and which, and how many, Table A items are requested.

Certain properties such as marinas, campgrounds, trailer parks and leased areas, present issues that fall outside the realm of those normally encountered on an ALTA/ACSM Land Title Survey. The 2011 Standards suggest that the scope of work related to such properties should be discussed with the client, lender and title insurance company, and agreed upon in writing prior to requesting the survey. For example, trailers themselves are generally (but not always) personal property, not real property. Do any of the parties have an expectation that the surveyor will be locating and showing all of the trailers?

Section 3.D. – Boundary Resolution

> *The boundary lines and corners of any property being surveyed as part of an ALTA/ACSM Land Title Survey shall be established and/or retraced in accordance with appropriate boundary law principles governed by the set of facts and evidence found in the course of performing the research and survey.*

No previous version of the ALTA/ACSM Standards specifically addressed the resolution or establishment of boundaries – apparently leaving this to the professional's judgment. Many persons felt this has always been a shortcoming of the ALTA/ACSM Standards. Thus, in Section 3.D. of the 2011 Standards, the surveyor is specifically charged with understanding the applicable standard of care and proper boundary law principles and applying those accordingly to the set of facts and evidence when establishing or retracing a boundary.

Section 3.E. – Measurement Standards

Sections 3.E.ii. and 3.E.iii. – Uncertainties in Boundary Locations

> *3.E.ii. - Any boundary lines and corners established or retraced may have uncertainties in location resulting from (1) the availability, condition, history and integrity of reference or controlling monuments, (2) ambiguities in the record descriptions or plats of the surveyed property or its adjoiners, (3) occupation or possession lines as they may differ from the written title lines, and (4) Relative Positional Precision. Of these four sources of uncertainty, only Relative Positional Precision is controllable, although due to the inherent errors in any measurement, it cannot be eliminated. The magnitude of the first three uncertainties can be projected based on evidence; Relative Positional Precision is estimated using statistical means (see Section 3.E.i. above and Section 3.E.v. below).*
>
> *3.E.iii. - The first three of these sources of uncertainty must be weighed as part of the evidence in the determination of where, in the surveyor's opinion, the boundary lines and corners of the surveyed property should be located (see Section 3.D. above). Relative Positional Precision is a measure of how precisely the surveyor is able to monument and report those positions; it is not a substitute for the application of proper boundary law principles. A boundary corner or line may have a small Relative Positional Precision because the survey measurements were precise, yet still be in the wrong position (i.e. inaccurate) if it was established or retraced using faulty or improper application of boundary law principles.*

In the process of conducting a boundary survey, a variety of conflicts between deed descriptions, plats, surveys, and even facts on the ground, will inevitably be found. A brief explanation of the causes of these discords is warranted. And since many disagreements between legal descriptions have their genesis in the surveys that were performed in the creation of those descriptions, a look at the sources in uncertainties in boundary determinations is necessary.

There are four potential sources of uncertainty in boundary locations. These result from (1) uncertain, indeterminate or conflicting reference monuments; (2) inconsistent or erroneous or conflicting legal descriptions and survey plats or maps; (3) lines of occupation or possession that differ from the lines of title described in the deed; and (4) the inherent inaccuracy in any measurement.

Reference/Controlling Monumentation

Any boundary survey must begin at or be based on at least two known "control" or "reference" points. Boundaries are not established out of thin air, they must relate in some way to other known locations, such as street rights of way, section lines, or grant corners.

Reference monuments can take many forms other than those mentioned above since there are many points and lines referenced in any given description on which the boundary is dependent. The location of each of these dependent points or lines must be recovered, established or otherwise determined in order to retrace the boundary properly and with integrity.

The problem is that frequently the referenced point or line is not well-documented. For example, a description may call for a line to run parallel with a railroad right of way line. If that particular railroad was abandoned 30 years ago, determining exactly where the right of way line was may be problematic.

Likewise, a description may commence at the intersection of the centerlines of two old county or township roads. The surveyor may find few if any records related to that location. Upon field investigation, he or she may not find any marker at that location, in which case the location must re-established – often based on conflicting, old and incomplete records and evidence. The resulting location will not have as a high of a level of integrity or "confidence" as if the original marker had been found.

Different surveyors may interpret the records and evidence differently thereby coming up with their own differing location of the same point. Obviously, surveys utilizing different beginning points will result in boundary corners and lines that are in conflict.

Record Documents

Another source of boundary conflicts lies in the records themselves. Many boundary lines, in which one would expect neighboring properties to share "common" lines, in fact, have gaps and overlaps with their adjoiners. The exact source of these variances can sometimes be found and sometimes not. They may be result of unqualified persons writing descriptions or of descriptions that were written without benefit of a land survey.

Sometimes these problems are simply the result of mistakes that occurred in the transcription of a deed and were perpetuated through the years in a series of deed descriptions. Sometimes they are the result descriptions based on conflicting surveys (e.g. as discussed above under "Reference Monumentation"). Conflicts in the records may be the result of simple poor survey work in the first place.

In any case, in a boundary survey, it is important to recognize that conflicts will occur in the records and this is not unusual or unexpected.

Lines of Possession or Occupation

It is not unusual in the process of performing a boundary survey to find lines of occupation such as fence lines or tree rows near, but not exactly on the actual boundary line. Sometimes, these lines will be significantly different from the line as described in the deed. This is important to recognize since great weight is often placed on lines of occupation – sometimes justifiably, sometimes not.

Often fence and tree lines, for example, are reliable evidence of where a boundary may lie. But sometimes, they differ significantly from the line described in the deed. While these differences may be evidence of the movement of lines by unwritten means such as adverse possession, finding resolution to such issues is well beyond the ability of anyone to resolve without a boundary survey and a deep understanding of boundary law and perhaps the assistance of an attorney and a legal action such as a quiet title suit.

Generally for possession to be considered evidence of original survey lines:[8]

- There must have been a controlling survey that, if located, would control the lines between the adjoiners
- Lines of possession are along the lines surveyed or presumed to have been surveyed by the original surveyor
- A series of possessions in agreement with one another tend to substantiate one another
- The possession is of a former generation (ancient) or testimony can be taken as to its origin

[8] Brown, Robillard & Wilson, Evidence & Procedures for Boundary Location, 5th Edition (p. 111)

- Possession has the reputation of being on the correct survey lines

Measurement Uncertainty

There is no such thing as a perfect measurement. No matter what type of measuring device is used, the "true" length of anything is unknown – at least within the measurement tolerance of the device being used. Surveying is no different.

Surveyors have many highly accurate measuring devices such as electronic total stations, EDM, lasers and GPS. But none of these are perfect and all result in some level of uncertainty in the measurement. And when current technologies are applied in land surveys to retrace boundaries that were originally surveyed with a compass and chain in the mid 1800's, these measurement issues can become significant.

These issues can be the source of conflicts that occur in modern surveys and descriptions as they fit with or relate to older parcels.

Interestingly, of these four sources of uncertainty in boundary location, only the last one – measurement uncertainty – is controllable by surveyor; and it cannot be eliminated, only minimized. The other sources – reference monuments, records and occupation/possession – are part of the evidence that the surveyor uses in forming an opinion about where a boundary line or corner should be placed.

Section 4 – Records Research

> *It is recognized that for the performance of an ALTA/ACSM Land Title Survey, the surveyor will be provided with appropriate data which can be relied upon in the preparation of the survey. The request for an ALTA/ACSM Land Title Survey shall set forth the current record description of the property to be surveyed or, in the case of an original survey, the current record description of the parent parcel that contains the property to be surveyed. Complete copies of the most recent title commitment, the current record description of the property to be surveyed (or, in the case of an original survey, the parent parcel), the current record descriptions of adjoiners, any record easements benefiting the property, the record easements or servitudes and covenants burdening the property (all hereinafter referred to collectively as "Record Documents"), documents of record referred to in the Record Documents, documents necessary to ascertain, if possible, the junior/senior relationship pursuant to Section 6.B.vii. below, and any other documents containing desired appropriate information affecting the property being surveyed, and to which the ALTA/ACSM Land Title Survey shall make reference, shall be provided to the surveyor for use in conducting the survey. Reference is made to Section 3.B. above.*

In order for the surveyor to meet the needs and expectations of the title industry regarding the location and existence of easements, the relationship with adjoiners, the width and locations of eights of way, etc., the American Land Title Association has, since 1962 by adoption of the ALTA/ACSM Standards, agreed that the insurer (title company) must provide the appropriate record documents to the surveyor for use in preparing the survey. Since the surveyor's client is typically not the insurer, the standards specify that the client shall provide these documents. Reference is made to Section

The request for an ALTA/ACSM Land Title Survey is to include the current record description of the property to be surveyed or, in the case of an original survey, the current record description of the parent parcel that contains the property to be surveyed. The provider of this information is not specified. Although it would logically be the title company, often times the initial deed information will come from a real estate broker, lender or the client.

In the 2011 Standards, the definition of *"Record Documents"* and the types of documents to be provided to the surveyor have been widened. In particular, there is now a reference to junior/senior relationships, which must be taken in the context of Section 6.B.vii. and which requires that the surveyor determine if any gaps and/or overlaps exist with adjoiners (to the extent that that can be accomplished by virtue of a review of the record documents and from field evidence gathered during the process of conducting the survey of the subject property). If overlaps are identified, the surveyor shall, prior to preparation of the final plat or map, disclose this to the insurer and client for determination of a course of action concerning junior/senior rights (See Section 6.B.vii. below).

If the documents required under Section 4 are not forthcoming, the surveyor has no responsibility for the resolution of junior/senior relationships under the 2011 Standards, *other than as may be required by state or local standards or the normal standard of care.*

Surveyors should note that that there is nothing in the 2011 Standards that suggest these documents need to provided at no cost; some abstractors/title companies may provide the title research documents at no cost and some may want to charge a fee.

The American Land Title Association's position has <u>always</u> been that if title research is needed by the surveyor, it should be provided to him or her. Notwithstanding that, here are a few things that will help clarify this requirement.

a. The ALTA/ACSM Standards are actually a contract between the Surveyor and Client. Although the Standards anticipate that title research would and should be provided by the Title Company, these Standards cannot actually force that, unless the Title Company is the Client.

b. Again, there is nothing whatsoever in the 2011 ALTA/ACSM Standards that says this information has to be provided by the title company at no cost.

c. The title company does not need to provide any deeds unless they are asked. Often, if not typically, they will, in fact, *not* be asked because in many states there are administrative laws dictating that surveyors must do their own deed research. Even in those states, however, the surveyor might wish to enlist the title company's help, but again there is nothing that says "for free."

d. Some in the title industry think this requirement to provide adjoiner deeds will require a title search. There is nothing in the standards about a title search for adjoiners. It simply says "current record descriptions of adjoiners." However, title plants are typically not set up to easily go find and pull a deed; they are set up to support title searches. Thus, simply finding a current deed may actually require some level of title search and we need to be cognizant of that issue.

e. As an aside, under Section 6.C.vi. it is very clear that when the adjoiner is a lot in a platted, recorded subdivision, the individual deeds are not required at all unless elected by the client pursuant to Table A item 13.

f. As another aside, while the new 2011 standards now specifically mention adjoiner deeds, the last 4 or 5 prior versions of these standards very clearly implied that adjoiner descriptions would need to be part of the documents provided. So frankly, this is not really a new requirement.

ALTA/ACSM Land Title Survey when there is no title work provided

Section 6.B.x. requires that the plat or map of survey have a note identifying the title commitment/policy number, effective date and name of the insurer for any title work provided to the surveyor. *It is the express position of the joint ALTA/NSPS Committee on the ALTA/ACSM Standards that if title work is not provided as part of the survey, the survey is not, and cannot be identified as, an ALTA/ACSM Land Title Survey.*

Sometimes a client wants an ALTA/ACSM Land Title Survey, yet there is no pending conveyance or financing, therefore there is no title work being prepared. Perhaps someone simply told them it's a "good" survey and they want one.

Notwithstanding the fact that in some states (e.g. New England) surveyors must do their own title and easement searches regardless of whether title work is provided or not, as long as the client clearly understands that easements are not being shown (potentially to his/her own detriment), there is no problem with the surveyor going forward with a survey, *but it cannot be labeled, identified or presented to the client as an ALTA/ACSM Land Title Survey.*

<u>Section 5 – Field Work</u>

> *The Survey shall be performed on the ground (except as otherwise negotiated pursuant to Table A, Item 15 below, if selected by the client), and the field work shall include the following:…*

ALTA/ACSM Land Title Surveys are to be based on field work conducted on the ground, unless Table A item 15 has been selected by the client and negotiated and cleared by the client, the lender and the title company (see discussion on Table A, item 15 later in this document).

Section 5.A. – Monuments

Section 5.A.i. – Controlling Monuments

> *The location and description of any monuments or lines that control the boundaries of the surveyed property.*

Monuments or lines that control the boundaries of the surveyed property potentially fall into two categories. The first are those monuments called for directly, or indirectly (e.g. by virtue or reference to a subdivision plat), in the record description and which therefore control the perimeter boundary of the surveyed property itself.

The other category includes those monuments or lines that control the boundary by reference. Examples include:

- If the description commences at a remote corner and then runs one or more courses to the point of beginning, that remote corner may control the location of the point of beginning even though it is not actually on the perimeter of the surveyed property.
- If a part of the boundary of the property runs parallel with, for example, a railroad right of way line, that right of way line is a controlling line even though it is not itself part of the boundary of the surveyed property.
- In the U.S. Public Land Survey states where the surveyed property is described, for example, as a quarter-quarter or half-quarter section, the monuments forming the entire quarter section would typically be part of what controls the aliquot part of that quarter section.

There are innumerable other examples, but in all cases, the 2011 Standards require that the location and a description of such lines and monuments be included as part of the survey and shown on the plat or map.

Section 5.A.ii. – Monuments on the Boundary

> *"The location, size and type of any monuments found (or set, if Table A, Item 1 is requested by the client, or if otherwise required – see Section 3.B. above) on the boundary of the surveyed property.*

In addition to controlling monuments contemplated under Section 5.A.i., the location, size and type of any monuments found or set on the boundary of the surveyed property must be included as part of the survey and shown on the plat or map.

In many, if not most, states monuments (or witnesses) are required by statute or administrative rule to be set at the corners of the surveyed property if there was no monument or witness found. For those states in which there is no such requirement, only if Table A item 1 is elected by the client is a monument required to be set where one (or a witness) was not found.

Section 5.B. – Rights of Way and Access

Issues of access are of paramount concern to title companies; and surveyors performing ALTA/ACSM Land Title Surveys would be well-advised to know that, based on input from the title industry, this is an area where surveyors often do not do a good job accurately reporting the access situation on the ground.

Section 5.B.i. – Distance to nearest right of way line

> *The distance from the appropriate corner or corners of the surveyed property to the nearest right of way line, if the surveyed property does not abut a right of way.*

In urban or suburban areas where the surveyed property does not abut a right of way, the field work is to include a measurement to the nearest right of way line from the appropriate corner or corners of the property.

"Appropriate corner or corners" means that, for example, if the nearest right of way line is to the east of the property, the surveyor does not need to make or show a measurement to that right of way line from corners on the *west* side of the surveyed property.

Section 5.B.ii. – Name, width and location of abutting right of way

> *The name of any street, highway or other public or private way abutting the surveyed property, and the width and location of the travelled way relative to the nearest boundary line of the surveyed property.*

Where the surveyed property abuts an existing public or private way, the name of that way must be shown, and the width and location of the travelled way must be shown from the nearest boundary line of the surveyed property. This information is important to the title company in assessing the condition of access to the property it is being asked to insure. See discussion under Section 5.B.vi. below.

Section 5.B.iii. – Visible evidence of access

> *Visible evidence of physical access (such as, but not limited to, curb cuts and driveways) to any abutting streets, highways or other public ways.*

The surveyor is obligated to identify the visible evidence of physical access (such as curb cuts and driveways) to any street, highway or other public way that abuts the surveyed property. This gives the title company yet more information as to the exact access situation affecting the property.

Section 5.B.iv. – Access by other than the occupants

> *The location and character of vehicular, pedestrian or other forms of access by other than the apparent occupants of the surveyed property to or across the surveyed property, including, but not limited to driveways, alleys, private roads, sidewalks and footpaths observed in the process of conducting the survey.*

When the surveyor observes vehicular, pedestrian or other forms of access to or across the surveyed property by other than the apparent occupants of the surveyed property, the location and character of that use must be shown. Examples of such uses include driveways, alleys, private roads, sidewalks and footpaths. The concern, from a title standpoint is the possibility of prescriptive rights being gained by persons other than the owners/occupants of the property.

In the case of, for example, sidewalks and driveways, the title-based concern is not with regard to regular visitors who might access the property or building via a driveway to the parking lot or a sidewalk from the parking lot to the building, but rather adjoiners or members of the general public who use or cross the property for general access purposes.

Section 5.B.v. – Potential encroachments of ways of access

> *Without expressing a legal opinion as to ownership or nature, the location and extent of any potentially encroaching driveways, alleys, and other ways of access from adjoining properties onto the surveyed property observed in the process of conducting the survey.*

Notwithstanding the fact that surveyors often give opinions and make general statements on encroachments, whether or not a physical condition represents a true encroachment is a *legal* determination, not a matter of survey. Thus, this section begins with the phrase, *"Without expressing a legal opinion as to ownership or nature…"*

In any event, the surveyor must carefully look for potentially encroaching ways of access from adjoining properties, and locate and measure the extent of any such condition. Again, this ties to potential title claims of prescription, so the title company needs to be made aware of their existence so appropriate exceptions can be written.

Section 5.B.vi. – Widths of abutting rights of way

> *Where documentation of the width or location of any abutting street, road or highway right of way was not disclosed in Record Documents provided to the surveyor or was not otherwise available from the controlling jurisdiction (see Section 6.C.iv. below), the evidence and location of parcel corners recovered which might indicate the width or location of such right of way lines.*

When surveyors are provided documentation (see discussion under Section 4 above) regarding the location and width of an abutting right of way, that information must be reflected on the survey. However, when no such information was provided, the surveyor needs to check with the controlling jurisdiction for any available information (see also the discussion below under Section 6.C.iv.).

When no information was provided by the client or obtained through the jurisdiction, the legal width of the right of way is obviously in question. This section requires that the surveyor look for and report evidence of nearby parcel corners (for example, fences or survey monuments) that might represent someone's opinion of the right of way's width and location. As with the other items under Section 5.B., such information helps the title company understand and evaluate the access situation.

Section 5.B.vii. – Water access

> *Evidence of access to and from waters adjoining the surveyed property, such as paths, boat slips, launches, piers and docks observed in the process of conducting the survey.*

In many cases, property adjoins a water way; and in many states, this is of particular and significant value. Water access also typically carries with it certain riparian and other rights, which are, in some cases, shared with others.

In some states like Maine, water access carries a particular importance because property owners there cannot obtain an easement by necessity if their property has access to navigable waters. As a result of these types of issues, evidence of access to the water feature is of particular interest to the title company, and the surveyor must locate and show the related improvements such as boat launches, piers and docks.

Locations of the water features themselves are discussed below under Sections 5.G. and 6.B.vi.

Section 5.C. – Lines of Possession, and Improvements along Boundaries

Potential encroachments, claims of adverse possession, acquiescence and prescriptive rights are examples of situations that could affect title and result in title claims. As a result, title companies must be aware of their existence.

Section 5.C.i. – Evidence of possession or occupation

> *The character and location of evidence of possession or occupation along the perimeter of the surveyed property, both by the occupants of the surveyed property and by adjoiners, observed in the process of conducting the survey.*

Lines of occupation and/or possession are an indication of the respective owners' opinions as to where they believe their property lines are. When those lines differ from the actual boundary line, there is a potential claim of unwritten rights. The surveyor must locate and identify the character of the possession or occupation and show it on the plat or map. The title company will likely write an exception for any conflicting claims associated with those lines.

Typically, such lines are represented by improvements like fences, walls, buildings and landscaping, but the surveyor should also watch for less overt features such as brush or tree lines. In some states, a mow line may be considered enough of an occupation on which to base a claim of unwritten rights. In any event, the surveyor should assess the magnitude and significance of such conditions, and locate and show them if there is any question.

Section 5.C.ii. – Improvements within 5 feet of the boundary line

> *The character and location of all walls, buildings, fences, and other improvements within five feet of each side of the boundary lines, observed in the process of conducting the survey.*

Title companies have an interest in the character and location of any improvements within five feet of each side of the boundary lines. Features such as neighboring buildings or manholes near the line may end up being significant in, for example, the development or a property, so the surveyor must locate and show such improvements on the plat or map. This is independent of the issue of a line of occupation or possession covered in Section 5.C.i.

Section 5.C.iii. – Potential encroachments over boundary lines

> *Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the evidence, location and extent of potentially encroaching structural appurtenances and projections observed in the process of conducting the survey, such as fire escapes, bay windows, windows and doors that open out, flue pipes, stoops, eaves, cornices, areaways, steps, trim, etc., by or onto adjoining property, or onto rights of way, easements or setback lines disclosed in Record Documents provided to the surveyor.*

As with Section 5.B.v., notwithstanding the fact that surveyors often give opinions and make general statements on encroachments, whether or not a physical condition represents a true encroachment is a legal determination, not a matter of survey. So, similar to Section 5.B.v. this section begins with the phrase, *"Without expressing a legal opinion as to the ownership or nature of the potential encroachment…."*

The surveyor must carefully assess the property for potential encroachments, which can take many forms, particularly in downtown and urban areas. The location, extent and nature of any potential encroachment observed must be noted and shown on the plat or map in relation to the impacted boundary or any affected right of way, easement or setback line for which documentation was provided.

Section 5.D. – Buildings

> *Based on the normal standard of care, the location of all buildings on the surveyed property shown perpendicular to the nearest perimeter boundary line(s) and expressed to the appropriate degree of precision.*

All buildings must be located and shown on the plat or map with respect to the nearest perimeter boundary line or lines. The distance to the boundary line is related to the title company's need to know whether or not the building's location meets any applicable setback requirements. Thus, if possible, the surveyor should assess which corner(s) or side(s) of the building may be impacted by the setback requirements and show the distance(s) from the building to the related boundary line(s).

Notwithstanding many lenders' certifications which ask the surveyor to certify that there are no violations of any zoning setback requirements, the surveyor is reminded that such "violations" are legal or jurisdictional determinations, not matters of survey.

Except for the 2005 version of the ALTA/ACSM Standards, previous versions never addressed the precision with which the physical building setback distances should be located and shown. With the 2011 Standards, this is left to the surveyor to determine based on the normal standard of care. Factors in making such a determination will include the current or planned use of the property and the distance to the boundary line(s). For example, a precise measurement (for example, to the nearest 0.1 feet) is probably not necessary where the building is an out-building 800 feet from the boundary on a farm property. On the other hand, the measurement should be to the nearest 0.1 feet, or perhaps even to the nearest 0.01 feet when possible, where the building is a steel and concrete tower in close proximity to the boundary line in a downtown area.

Section 5.E. – Easements and Servitudes

Section 5.E.i. – Evidence of easements or servitudes disclosed in the Record Documents

> *Evidence of any easements or servitudes disclosed in the Record Documents provided to the surveyor and observed in the process of conducting the survey.*

When the surveyor is provided copies of easements and servitudes, any evidence of those encumbrances observed in the course of performing the survey must be located and shown. If such documents are not provided, the surveyor has no obligation under the ALTA/ACSM Standards to search them out; however, as noted in the discussion under Section 4 above, *the survey may not qualify to be identified as an ALTA/ACSM Land Title Survey.* Also, as previously noted, notwithstanding the ALTA/ACSM Standards, in some states there may be other standards or standards of care that put the burden of finding those encumbrances on the surveyor.

Section 5.E.ii. – Evidence of easements or servitudes not disclosed in the Record Documents

> *Evidence of easements or servitudes not disclosed in the Record Documents provided to the surveyor, but observed in the process of conducting the survey, such as those created by roads; rights of way; water courses; ditches; drains; telephone, fiber optic lines, or electric lines; water, sewer, oil or gas pipelines on or across the surveyed property and on adjoining properties if they appear to affect the surveyed property.*

As with Section 5.B.iv., the gist of this section has to do with the possibility of prescriptive easements. The title company is relying on the surveyor to be its eyes in observing evidence of possible prescriptive easements or servitudes that may exist without benefit of a supporting record document.

This writer once gave a deposition in a federal lawsuit against a surveyor's insurance company claiming over $1 million in damages due to a manhole not having been shown on an ALTA/ACSM Land Title Survey. The manhole turned out to be observable evidence of a large, old, brick combination sewer which cut right through the surveyed property, and for which there was no record easement.

Likewise, this writer is familiar with a $60,000 claim for damages resulting from a gate in a fence that had provided long-time access by an adjoiner across the surveyed property. The fence was shown on the ALTA/ACSM Land Title Survey, but the gate was not. Both of these cases involved claims of prescriptive easements that resulted in valid title claims. And in both cases, the surveyor clearly had a responsibility to have observed and shown the feature.

Observable evidence of easements and servitudes can take many forms as noted in this section of the Standards. It would be advisable for surveyors to train their field technicians on the nature of prescriptive easements and what features might constitute evidence of one.

It should be noted that some utility installations may be evidence of an easement or prescriptive easement, while other features may not. Surveyors might want to consider the relationship of Table A, item 11a to Section 5.E.ii. and think about how to deal with this relationship in the field and on the plat or map.

Section 5.E.iii. – Underground easements and servitudes

> *Surface indications of underground easements or servitudes on or across the surveyed property observed in the process of conducting the survey.*

As with Section 5.E.ii., surveyors and their field technicians should be familiar with what constitutes evidence of underground easements and servitudes. When in doubt, it is likely better to ere on the side of caution and show any questionable features.

Section 5.E.iv. – Evidence of use by others

> *Evidence of use of the surveyed property by other than the apparent occupants observed in the process of conducting the survey.*

Again, the surveyor is the eyes of the title company and lender and, often, of the buyer. Previous sections such as 5.E.ii., 5.C.i., and 5.B.iv. address specific uses by others; this section covers use by others in general. Such uses could take on a wide variety of characteristics.

This writer was once involved in an ALTA/ACSM Land Title Survey of an abandoned parking lot. There was a tiny six foot by eight foot building that had been the "office," and the field crew observed that there was a homeless person actually living in this building. How or if the title company needed to deal with this issue is not known, but the buyer – a large corporation that was considered a "good corporate citizen" was extremely grateful that this fact had been noted.

Section 5.F. – Cemeteries

> *As accurately as the evidence permits, the location of cemeteries, gravesites, and burial grounds (i) disclosed in the Record Documents provided to the surveyor, or (ii) observed in the process of conducting the survey.*

The title industry knows it is unreasonable to ask surveyors to identify all cemeteries, gravesites or burial grounds on the surveyed property. Thus, the burden on the surveyor is to be observant during the course of the field work and to locate any evidence of cemeteries, gravesites or burial grounds observed in the process of conducting the survey. This evidence should be shown with a degree of precision commensurate to the evidence observed.

Additionally if the surveyor has been provided documents indicating the existence of a cemetery, gravesite or burial ground, he or she should diligently search for evidence of same. If such evidence is found, that fact should be indicated on the plat or map.

Section 5.G. – Water Features

Section 5.G.i. – Springs, ponds, lakes, streams and rivers

> *The location of springs, together with the location of ponds, lakes, streams, and rivers bordering on or running through the surveyed property, observed during the process of conducting the survey. See Table A, Item 19 for wetlands locations.*

The various water features and courses that border on or run through the surveyed property need to be located and shown on the plat or map. The extent of this effort, and the precision with which these features need to be located and shown, is dependent on a variety of factors. Section 6 begins with the statement *"Where dimensioning is appropriate, dimensions shall be in accordance with the appropriate standard of care"* and this logically applies to water features. In addition, the surveyor would be well-advised to understand the impact on the water feature on the surveyed property and its potential development. Being armed with this information will help determine the effort necessary to meet the client's expectations and needs.

A new Table A item (19) has been added to give the client the option of having the surveyor locate wetlands as delineated by appropriate persons.

Section 5.G.ii. – Natural Water Boundaries

> *The location of any water boundary on the surveyed property. The attribute(s) of the water feature located (e.g. top of bank, edge of water, high water mark, etc.) should be congruent with the boundary as described in the record description or, in the case of an original survey, in the new description. (See Section 6.B.vi. below).*

The surveyor must locate any natural water boundary on the property. Studying the record documents will help identify what feature of the water boundary actually forms the legal boundary (e.g. the ordinary low water line, the bank, the edge of water, etc.). While it is acknowledged that the lines and points located by the surveyor will not be the actual limit of title due to the meandering, irregular nature of most natural water boundaries, the locations obtained and shown on the plat or map should bear some relationship to the legal boundary or, if a new boundary is being created, to that described boundary. If this cannot be done (e.g. when the boundary is the center of a river or out in a lake), there should be a note on the survey explaining this fact.

This section must be taken together with Section 6.B.vi. for a more complete understanding of the ALTA/ACSM Standards' requirements regarding natural water boundaries.

<u>Section 6. – Plat or Map</u>

> *A plat or map of an ALTA/ACSM Land Title Survey shall show the following information. Where dimensioning is appropriate, dimensions shall be in accordance with the appropriate standard of care.*

Section 6.A. – Evidence and locations outlined in Section 5

> "The evidence and locations gathered during the field work as outlined in Section 5 above."

The plat or map must reflect the data gathered in the fieldwork outlined in Section 5. As the introductory sentence to Section 6 notes, where dimensioning is appropriate, the surveyor should use his or her judgment and apply the normal standard of care to the specific situation and conditions of the feature being dimensioned.

Section 6.B. - Boundary, descriptions, dimensions and closures

Section 6.B.i. – Descriptions

> The current record description of the surveyed property, and any new description of the surveyed property that was prepared in conjunction with the survey, including a statement explaining why the new description was prepared. Preparation of a new description should be avoided unless deemed necessary or appropriate by the surveyor and insurer. Preparation of a new description should also generally be avoided when the record description is a lot or block in a platted, recorded subdivision.

As was required in the 2005 ALTA/ACSM standards, the record description of the surveyed property is to appear on the face of the plat or map. The committees understand that this is not the typical practice in some areas, but feel it is appropriate so the parties relying on the survey know exactly what real estate parcel was the subject of the survey.

When the surveyor and the title company deem it appropriate, and a new description was therefore prepared, that description is to also appear on the plat or map with an explanation as to why the new description was prepared.

Generally speaking, preparing a new description for a property that was otherwise adequately described in the record is not necessary or appropriate. Additionally, it is inappropriate, unnecessary and even confusing to the chain of title to prepare a new description when the record description is a lot or block in a platted, recorded subdivision, thus surveyors are advised to resist requests otherwise.

Section 6.B.ii. – Monuments

> The location and description of any monuments, lines or other evidence that control the boundaries of the surveyed property or that were otherwise relied upon in establishing or retracing the boundaries of the surveyed property, and the relationship of that evidence to the surveyed boundary. In some cases, this will require notes on the plat or map.

As discussed above under Section 5.A.i. and ii., monuments that control the boundaries of the surveyed property are of paramount importance in properly resolving a boundary. Under Section 6.B.ii., identifying these monuments (location and description) and how they were relied upon in conducting the survey is a necessary part of the documentation of the survey.

In many cases, the application of controlling monuments to the boundary resolution can be clearly explained simply by virtue of graphic representation on the plat or map. In many cases, however, the manner in which monuments were relied upon, or the manner in which they were considered as part of the evidence in the boundary determination, cannot be explained graphically. In such cases, the surveyor must provide notes on the plat or map explaining how the monuments were used.

Section 6.B.v. – Depicting the Remainder of a Parcel

> The remainder of any recorded lot or existing parcel, when the surveyed property is composed of only a portion of such lot or parcel, shall be graphically depicted. Such remainder does not need to be included as part of the actual survey, except to the extent necessary to locate the lines and corners of the surveyed property, and it need not be fully dimensioned or drawn at the same scale as the surveyed property.

When the survey is of only a *part* of a larger lot or parcel, the plat or map must show the remainder of the larger/parent parcel. This is *not* to say that the remainder must be included as part of the survey; only that there be a graphic depiction that shows where the surveyed property lies within the larger parcel. There are a variety of ways that this can be accomplished.

Section 6.B.vi. – Water Boundaries

> When the surveyed property includes a water boundary, a note on the face of the plat or map noting the date the boundary was measured, which attribute(s) of the water feature was/were located, and the caveat that the boundary is subject to change due to natural causes and that it may or may not represent the actual location of the limit of title. When the surveyor is aware of natural or artificial realignments or changes in such boundaries, the extent of those changes and facts shall be shown or explained.

Where the surveyed property contains a water boundary, the survey must include a note explaining when the boundary was measured and what attribute(s) of the water feature were located. A caveat in the form indicated above must also appear explaining the nature of water boundaries.

When the surveyor is aware that realignment or changes in a water boundary occurred in the past, those facts are to be shown or explained.

Section 6.B.vii. – Relationship with Adjoiner Boundaries

> The relationship of the boundaries of the surveyed property (i.e. contiguity, gaps, or overlaps) with its adjoiners, where ascertainable from Record Documents and/or from field evidence gathered during the process of conducting the survey of the property being surveyed. If the surveyed property is composed of multiple parcels, the extent of any gaps or overlaps between those parcels shall be identified. Where gaps or overlaps are identified, the surveyor shall, prior to preparation of the final plat or map, disclose this to the insurer and client for determination of a course of action concerning junior/senior rights.

Where the relationships of the boundaries of the surveyed property with its various adjoiners can be determined from the record documents and from the field work performed as part of the survey of the property that is the subject of the ALTA/ACSM Land Title Survey, these relationships must be identified.

Additionally, if the surveyed property is composed of multiple parcels, any gaps or overlaps between those parcels shall be identified.

Where gaps or overlaps are identified, the surveyor shall disclose this information to the title company and client prior to issuing the final plat, so a determination can be made on a related course of action.

Section 6.B.viii. – Explanatory Notes (Boundary Resolution)

> When, in the opinion of the surveyor, the results of the survey differ significantly from the record, or if a fundamental decision related to the boundary resolution is not clearly reflected on the plat or map, the surveyor shall explain this information with notes on the face of the plat or map.

In order that the resolution of the boundary on an ALTA/ACSM Land Title Survey be documented for reference by future surveyors and surveyors of adjoining properties, when a fundamental decision related to the boundary resolution (e.g. how a controlling monument applied, or how a conflict in the record description was resolved) cannot be clearly explained by virtue of the drawing on the plat or map, the surveyor shall provide a note or notes to explain these facts.

Additionally, where the results of the survey differ significantly from the record, an explanation of such conditions must be provided, giving the surveyor's opinion as to the source of such differences.

Section 6.B.x. – Explanatory Notes (Title Documents)

> A note on the face of the plat or map identifying the title commitment/policy number, effective date and name of the insurer for any title work provided to the surveyor.

The plat or map must identify the title commitment/policy number, effective date and name of the insurer for any title work provided to the surveyor. As explained above under the discussion on Section 4, if no title work is provided, the survey *cannot be labeled, identified or presented to the client as an ALTA/ACSM Land Title Survey*.

Section 6.C. – Easements, Servitudes, Rights of Way, Access and Record Documents

Section 6.C.i. – Documentation of Plottable Rights of Way, Easements and Servitudes

> The width and recording information of all plottable rights of way, easements and servitudes burdening and benefitting the property surveyed, as evidenced by Record Documents which have been provided to the surveyor.

The plat or map must reflect the width and recording information for any plottable rights of way, easements and servitudes that either benefit or burden the property being surveyed, presuming that the related Record Documents for same were provided to the surveyor.

As noted previously (see Sections 3B, 3C and 5.E.i.), standards in some states and regions will require such information be shown regardless of whether or not the documents were provided.

Section 6.C.ii. – Notes (Easements and Servitudes)

> A note regarding any right of way, easement or servitude evidenced by a Record Document which has been provided to the surveyor (a) the location of which cannot be determined from the record document, or (b) of which there was no observed evidence at the time of the survey, or (c) that is a blanket easement, or (d) that is not on, or does not touch, the surveyed property, or (e) that limits access to an otherwise abutting right of way, or (f) in cases where the surveyed property is composed of multiple parcels, which of such parcels the various rights of way, easements, and servitudes cross.

In order to standardize the way information related to certain rights of way, easements and servitudes is presented, notes are required on the plat or map when certain conditions exist. These conditions, and the nature of the related notes, are detailed in Section 6.C.ii.

Surveyors need to familiarize themselves with these requirements which include several items not previously addressed by the ALTA/ACSM standards (e.g. documents that limit access to a parcel).

Section 6.C.iii. – Note (Physical Access)

> A note if no physical access to a public way was observed in the process of conducting the survey.

As previously mentioned, access is a very important issue to title insurers, thus, if no physical access was observed while conducting the survey, the surveyor must provide a note to that effect.

Section 6.C.iv. – Width of Rights of Way

> The width of abutting rights of way and the source of such information (a) where available from the controlling jurisdiction or (b) where disclosed in Record Documents provided to the surveyor.

The plat or map of the survey shall document the width of the right(s) of way abutting the surveyed property where it was disclosed in Record Documents provided to the surveyor. If no Record Documents were provided, the surveyor needs to contact the controlling jurisdiction to see if such information is available.

In some areas, a "Thoroughfare Plan" documenting existing rights of way may be published. In many areas, though, the jurisdiction may be unable to document rights of way, or may even decline to provide such information. The surveyor could readily document his or her investigation by disclosing any conversations had or searches made.

Section 6.C.v. – Identifying Titles and Recording/Filing Data of Referenced Documents

> The identifying titles of all recorded plats, filed maps, right of way maps, or similar documents which the survey represents, wholly or in part, with their recording or filing data.

The titles of any documents represented by or on the survey, such as recorded plats, filed maps, right of way maps and other such documents, together with their recording or filing data, must be identified on the plat or map.

Section 6.C.vi. – Adjoiners

> For non-platted adjoining land, names and recording data identifying adjoining owners according to current public records. For platted adjoining land, the recording data of the subdivision plat.

Where adjoiners are non-platted properties, the name and recording data (from current public records) for those adjoiners is to be given on the plat or map. If the adjoiner is a subdivision plat, the plat or map need only provide the recording data for the subdivision plat, not for individual owners (adjoiners) within that plat.

<u>Table A – Optional Survey Responsibilities and Specifications</u>

> NOTE: The items of Table A must be negotiated between the surveyor and client. It may be necessary for the surveyor to qualify or expand upon the description of these items (e.g., in reference to Item 6(b), there may be a need for an interpretation of a restriction). The surveyor cannot make a certification on the basis of an interpretation or opinion of another party. Notwithstanding Table A Items 5 and 11(b), if an engineering design survey is desired as part of an ALTA/ACSM Land Title Survey, such services should be negotiated under Table A, item 22.

Table A items are, by definition, optional. They are to be requested by the client when the survey is ordered so the surveyor has the opportunity to associate additional fees with the items requested.

The last sentence clarifies that an ALTA/ACSM Land Title Survey, even with certain Table A items, is not an engineering design survey. Such services may be negotiated under Table A item 22.

Item 20(a) – Offsite Easements (Improvement Locations)

> *Locate improvements within any offsite easements or servitudes benefitting the surveyed property that are disclosed in the Record Documents provided to the surveyor and that are observed in the process of conducting the survey (client to obtain necessary permissions).*

Indications are that in most cases around the country, lenders, title companies and clients expect, and surveyors provide, merely a graphic representation of off-site (appurtenant) easement lines without locating the improvements therein. Table A, item 20 requires the surveyor to locate the improvements observed in the process of conducting the survey within easements that are identified in the title commitment (or Record Documents) provided to the surveyor. The client needs to arrange for access if necessary.

Item 22 – Client Option

Table A, item 22 is provided as an open-ended option for the client to request their own specific requirement(s). As with all Table A items, it is important that such items be requested with the order so the surveyor has the opportunity to consider the request and to negotiate the scope and fee ahead of time.

Boundary Law

Land surveyors have a responsibility to conduct a survey in accordance with their state rules and regulations and the normal standard of care. To this writer's knowledge, no state's statutes or regulations address the actual process of resolving a boundary, thus the resolution of a boundary can only be based, as they always have been, on principles derived from common law precedent.

Over hundreds of years – dating back to Roman law – the courts have laid out principles related to the retracement and establishment of boundaries and the interpretation of legal descriptions. These principles are constantly reiterated in various court decisions; in some cases, they evolve over time as courts revisit prior decisions.

The 2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys say this regarding boundary resolution, *"The boundary lines and corners of any property being surveyed as part of an ALTA/ACSM Land Title Survey shall be established and/or retraced in accordance with (a) the applicable standard of care and (b) the appropriate boundary law principles governed by the set of facts and evidence found in the course of performing the research and survey."*

The surveyor's role is, in virtually every case, to determine the *intentions of the parties* to a conveyance and to establish the boundaries in accordance with that intent. The problem that continually plagues surveyors is how to determine that intent, and the courts, again, have provided guidance. For example:

> There being no ambiguity in this deed, it follows that what the grantor, or grantees understood by its terms, or in what manner they subsequently treated it, has no bearing upon the construction thereof. *Wilkins, et al v. Young*, 144 Ind. 1 (1895).

> The vocation of a surveyor is limited to the ascertainment of definite lines. He may ascertain where the lines and corners specified in the description of the given tract of real estate actually are. He does not have the power to determine what the terms of such description ought to be. Where the line lies, and where its corners are, is a question, and

> on which the surveyor, on account of his superior facilities for doing so, may be called upon to officially determine. What the lines and corners are is a matter of law, which courts can alone declare. *Wilson v. Powell*, (1905) 37 Ind.App. 44, 70 N.E. 611
>
> 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. *Pointer v. Lucas* (1960) 131 Ind.App. 10, 169 N.E.2nd 196.

Unless they are establishing the boundaries for newly-created parcels, surveyors are typically 'retracing' boundaries of parcels that already exist by virtue of a legal instrument. It is through this retracement process that they apply the appropriate boundary law principles to determine what they believe to the intentions of the parties and then to recreate those intentions in corners and lines on the ground.

Properties are divided into two types – those created by virtue of sequential conveyances (conveyances which involved junior/senior relationships between adjoiners), and those created simultaneously (parcels which were created in the same legal instant by the same person, persons or agency, and by the same instrument). The common law principles addressing boundaries differ based on the type of property involved.

Sequential Conveyances

While the principles with regard to intent are clear, the problem often faced by the surveyor is how to properly interpret the written intentions when the writings contain patent or latent conflicts.

While the courts have, by virtue of hundreds of years of rulings, developed a weight of authority to be given to the various elements of a description - what Curtis Brown called the "Order of Conflicting Title Elements" in Boundary Control and Legal Principles - the exact application of those rules is highly dependent on the individual set of facts and evidence for the given boundary.

The courts have held that, notwithstanding the weight of authority, the elements of the deed will be applied in a manner that best express the intentions of the parties. Thus, a call for what would normally be a higher ranking element may be overridden by an ostensibly lower ranking element if it can be shown, for example, that the higher ranking element was used in error. In keeping with this, all of the terms of a description must be considered in light of each other when attempting to resolve what the intent actually was.

The application of intent to resolve boundaries has a major qualification – intent is applicable only to the parties of the conveyances, it cannot affect third parties. Therefore, even when the intent is expressly understood, that intent may be otherwise altered by facts and circumstances outside the realm of the parties to the conveyance itself – in particular, unwritten rights and senior rights.

The Order of Importance of Conflicting Title Elements[9]

A. Right of Possession (unwritten conveyance)

B. Senior rights (in the event of an overlap)

[9] Brown's Boundary Control and Legal Principles, Sixth Edition, Curtis Brown, Walter Robillard and Donald Wilson

C. Written Intentions of parties
    1. Call for a survey or an actual survey on which the conveyance is based
    2. Call for monuments
        a. Natural
        b. Artificial
    3. Call for adjoiners
    4. Call for direction and distance
    5. Call for direction or distance
    6. Call for area (quantity)

Unwritten Rights

Whether unwritten rights have operated to move the line of ownership from the original written title line to a possession line based on one of the doctrines of unwritten rights is a title issue, not a matter of survey. However, surveyors should be familiar with the various types of unwritten rights and the common law rules that govern their operation in the state(s) in which they survey.

Surveyors can better advise clients and adjoiners as to the possibilities when they are fully aware of what the courts in their states have said about unwritten rights.

Adverse Possession

> To establish title by adverse possession, a possessor must prove by a preponderance of the evidence that her use of the true owner's property was exclusive, continuous, uninterrupted, open and notorious for the statutory period. *DiGiovanni v. Rodriguez*, NJ: Appellate Div. 2010.

> [T]o acquire title by adverse possession, the possession must be actual and exclusive, adverse, visible or notorious, and continued and uninterrupted." *Randolph Town v. County of Morris*, 864 A. 2d 1191 - NJ: Appellate Div. 2005. [internal citations omitted]

> "`A use is adverse or hostile if a person uses the property of another under a claim of right, pursued with an intent to claim against the true owner in such circumstances of notoriety that the owner will be aware of the fact and thus alerted to resist the acquisition of the right by claimant before the period of adverse possession has elapsed.'"
> *HAWES REALTY, INC. v. Cupo*, NJ: Appellate Div. 2012. [internal citations omitted]

Acquiescence

There are several theories that the doctrine of acquiescence is based on. One is the situation in which acquiescence is considered evidence of some prior oral agreement between two adjoining owners who were either uncertain or in dispute over the location of the true boundary. Long acquiescence to a line (usually a fence) by both parties is considered evidence of that parol agreement. In some states, definitive evidence of the dispute or uncertainty must be provided to prove boundary by acquiescence.

Another theory is simply that long acquiescence in a line, without objection by either party (for the statutory period, which can vary state-to-state), establishes the boundary.

Both of these theories could be seen to essentially rely on estoppel, whereby the adjoiners are prevented from disputing the line because of their - or their predecessors' - previous agreement, or because of their long acceptance to the line.

In New Jersey, acquiescence seems to be tied to estoppel; no recent cases otherwise outlining boundary by acquiescence were found.

Finally, if a conveyance is made that mistakenly does not describe to an intended boundary, long acquiescence to the intended line can cause the line to move to the intended line.

Parol Agreement

In general, parol agreements to set boundaries between adjoining landowners have effect only when there is an uncertainty or dispute as to the true location of the line; however, the exact requirements vary state-to-state and the doctrine is more stringently viewed in some states.

> In order to establish the validity of a parol agreement establishing a boundary it is necessary that a well grounded doubt appear as to the true location of the premises arising out of an uncertain, insufficient or inaccurate description in the deed. The rule permitting evidence aliunde to show the allegedly true location of boundaries sets down as a condition precedent to its operation the requirement that there be a latent ambiguity in the deed description or uncertainty in its application to the premises granted. *Schroeder v. Engroff*, 144 A. 2d 808 - NJ: Superior Court, Law Div. 1958.

Estoppel

The doctrine of estoppel is based in equity. The law does not favor persons who either directly or indirectly misrepresent a situation expecting another party to rely on that misrepresentation to that other party's detriment.

> "This brings us to … estoppel by acquiescence and silence.
>
> Here complainant relies upon the familiar maxim, that where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent. * * *
>
> * * * `There is no principle better established in this court, nor one founded on more solid foundations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase or expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.' *Kish v. Beruth Holding Corp.,* 168 A. 2d 649 - NJ: Appellate Div. 1961.

Practical Location

Boundary by practical location is not mentioned in any recent New Jersey decisions, but it is addressed in some other states. Practical location seems to be a doctrine that relates to other unwritten boundaries such as those by acquiescence, parol agreement and estoppel.

"A party can establish a boundary by practical location in three ways: (1) by acquiescing in the boundary for a sufficient period of time to bar a right of entry under the statute of limitations; (2) by expressly agreeing with the other party on the boundary and then by acquiescing to that agreement; or (3) by estoppel." *Slindee,* 760 N.W.2d at 907 (citing *Theros v. Phillips,* 256 N.W.2d 852, 858 (Minn. 1977)).

To establish a boundary by practical location through acquiescence, "a person must show by evidence that is clear, positive, and unequivocal that the alleged property line was acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations," which is 15 years in Minnesota. *Britney v. Swan Lake Cabin Corp.,* 795 N.W.2d 867, 872 (Minn. App. 2011) (citing Minn. Stat. § 541.02) (quotations omitted). "The acquiescence required is not merely passive consent but conduct from which assent may be reasonably inferred." *Id.* Besides arguing that respondents acquiesced in the gravel road as the boundary line because they knew about the garage, concrete slab, and shrubs on the land in dispute and did not object, appellants did not present any evidence of conduct on the part of respondents from which to infer that they acquiesced in the new boundary line. Accordingly, the district court did not err in determining that appellants failed to provide evidence of direct conduct, as opposed to mere passive consent, from which assent could be reasonably inferred.

To establish a boundary by practical location through express agreement, a person must prove that "an express agreement between the landowners set an `exact, precise line' between [their properties] and that the agreement had been acquiesced to `for a considerable time.'" *Slindee,* 760 N.W.2d at 907 (quoting *Beardsley v. Crane,* 52 Minn. 537, 546, 54 N.W. 740, 742 (1893)). "Without a specific discussion identifying the boundary line or a specific boundary-related action clearly proving that the parties or their predecessors in interest had agreed to a specific boundary, a boundary is not established by practical location based on express agreement." *Id.* at 910. "[A]n express agreement requires more than unilaterally assumed, unspoken and unwritten mutual agreements corroborated by neither word nor act." *Id.* at 909 (quotations omitted). Appellants argue that the district court "failed to recognize the specific boundary-related actions of the parties, including [their] maintenance of the yard up to the road, the construction of a garage, and the placement of a cement slab up to the road, all with no objection by [r]espondents." But again, appellants failed to present evidence that respondents agreed to the new boundary line beyond their passive failure to object to appellants' use of the disputed land.

Finally, to establish a boundary by practical location through estoppel, a person must show that "the parties whose rights are to be barred . . . silently looked on, with knowledge of the true line, while the other party encroached upon it or subjected himself to expense in regard to the land which he would not have had the line been in dispute." *Pratt Inv. Co. v. Kennedy,* 636 N.W.2d 844, 849 (Minn. App. 2001) (quoting *Gifford v. Vore*, 245 Minn. 432, 436, 72 N.W.2d 625, 628 (1955)). "[E]stoppel requires knowing silence on the part of the party to be charged and unknowing detriment by the other." *Theros*, 256 N.W.2d at 859. Because neither party claims to have had knowledge of the true boundary line between their properties prior to the 2001 survey, the district court correctly determined that appellants' estoppel claim fails as a matter of law.

Watkins v. Patch, Minn: Court of Appeals 2013 (Memorandum Decision, not for publication)

Senior Rights

See discussion earlier in this handout regarding Junior/Senior Rights.

Many surveyors will research the junior/senior relationship to resolve a gap or overlap even though senior rights are clearly issues of title, not survey. It may be that the availability of a written record (chain of title) gives surveyors confidence in attempting to resolve such issues, although documents outside the normal chain, the order of conveyance or whether a subsequent buyer had notice could also impact title.

In some New England states, it is essentially required of surveyors to conduct such research by law. In Texas, the Board of Professional Surveyors has adopted the following:

§663.16. Boundary Construction[10]

(a) When delineating a property or boundary line as an integral portion of a survey, the land surveyor shall respect junior/senior property rights, footsteps of the original land surveyor, the record, the intent as evidenced by the record, the proper application of the rules of dignity or the priority of calls, and applicable statutory and case law of Texas.

Written Intentions of the Parties

The concept of the written intentions must be taken liberally because a survey that is not specifically called for in the record can still control as long as it can be determined that the lines run on that survey were considered as the lines of the transaction (see below). Thus, since the lines described in the record were initially located based on the survey, then the survey - in essence and indirectly - becomes a part of the written record; and retracing the footsteps of that original surveyor represents the most clear representation of the written intentions of the parties.

Call for a Survey

The lines marked and surveyed have force only where:

- the lines as run were considered as the lines of the transaction
- the lines can be identified
- the lines do not encroach on a senior right
- the lines run are not for the purpose of meandering a body of water, and
- the lines run are called for in the deed (in most states)

Monuments

In deeds written without benefit of a survey, calls for monuments are presumed to reflect the intentions of the parties or they would not have been inserted. An uncalled for monument cannot; however, in most cases, be considered controlling when in conflict with other elements.

[10] General Rules of Procedures and Practices, Texas Board of Professional Land Surveying

Monuments are ranked by their certainty – the likelihood of being confused or destroyed. Thus, natural are highest in ranking followed by artificial monuments and then record monuments (calls to adjoiners).

Distance and Direction

Whether distance or direction holds over the other generally requires that the surveyor analyze the specific situation and rely on that which is most appropriate based on the intent of the parties. Other common law principles such as, if an element of a description must be ignored, ignore the element that has the least impact on the rest of the description should be considered. It is better to work carefully through the possibilities based on the intent of the parties than it is to blindly apply the rule, although it is critical to understand the common law in the specific state. At least one state (Texas) has even legislated the issue.

Area

Area controls only in two cases. First, when it clearly represents the intentions of the parties as with an area description (e.g., ten acres off the entire south end of the half-quarter section). And second, when the description is so ambiguous that area must be relied upon to clarify other elements higher in the order.

Coordinates

Coordinates have historically been a function of direction and distance, thus they could not be above them in the hierarchy. However, with the pervasive use of GPS, where directions and distances may have been derived from coordinates, this may change. Time will tell.

Simultaneously-created Boundaries

Lots created by virtue of an executed subdivision plat are the most commonly thought of examples of simultaneously-created parcels. However, there are other ways that parcels can be created simultaneously – by partition, for example.

Often, particularly in older subdivisions, there is a dearth of documented monumentation and the surveyor is forced to rely on monuments – or less – of less than desirable integrity. In order to assure that the resulting lot lines and corners will withstand the scrutiny of other surveyors' work or the courts, the surveyor must be familiar with the weight of authority in resolving subdivision lines. As always, these rules are aimed at the best evidence vis-à-vis the intent of the parties.

The order of importance of monuments found within a subdivision is as follows, although, as is always the case in boundary retracement, the contrary can be shown, particularly when strictly applying the order appears to conflict with the intention of the parties. [11]

1. Original natural monuments [boundaries]
2. Original artificial monuments set within a subdivision
3. Original monuments set to mark the boundary lines of a subdivision…
4. Uncalled for monuments may become controlling by common report…

[11] <u>Brown's Boundary Control and Legal Principles, 6th Edition,</u> Brown, Robillard and Wilson

5. A series of boundary improvements built soon after the original stakes were set, in agreement one another and long-acquiesced to by adjoining owners…
6. When two monuments, otherwise equal, are in conflict, the one in harmony with distance, angle or area becomes controlling
7. Judicial decisions affecting that particular subdivision

A monument by common report is the common acceptance by numerous surveyors of a monument which is reputed to correct, whose history is lost in antiquity, and the integrity of whose position cannot be proved nor disproved.

It is important in this definition to note that the mere reputation of being correct or even used by numerous surveyors is not enough to allow a monument to hold by common report if it can, in fact, be proven to be incorrect. This is consistent with several of Justice Thomas Cooley's statements in his famous treatise The Judicial Function of Surveyors (see appendix) in which he stated "*He [the surveyor] has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence has fixed the rights of the parties as if it were at another.*" This statement is equally valid when the surveyor is reduced to relying on improvements such as fences.

There are also guidelines when the evidence is so sparse or questionable as cause the surveyor to consider improvements as the best evidence of the boundaries.

For possession to be considered evidence of original survey lines[12]:

1. There must have been an early survey that, if located, is controlling the line between the adjoiners
2. Lines of possession are along the lines surveyed or presumed to have been surveyed by the surveyor
3. Usually, but not always, a series of possessions in agreement with one another, substantiate one another
4. The possession is an ancient matter of a former generation
5. Possession has the reputation of being on the correct survey lines

Excess and Deficiency

When simultaneously-created boundaries are found to not measure in accordance with the record, a proration may be applied so that each parcel is awarded its fair share of the excess or deficiency. Proration, however, is by no means always the correct solution to shortages or overages; such a decision is often premature. Proration should actually be a last resort. If the difference from the record is large, it is likely there is an error in the description, survey or plat.

Alternatively, if the difference is small, while a proration may be appropriate, the results could also be similar to mathematically adjusting a traverse. The final result may give the appearance that the survey was better than it actually was.

[12] Evidence and Procedures for Boundary Location, 4th Edition, Robillard, Wilson and Brown, P. 96

Appendix

THE JUDICIAL FUNCTIONS OF SURVEYORS
by Justice Thomas M. Cooley, Michigan Supreme Court January, 1881

When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible of accurate solution, he is likely to be not a little impatient when he is told that, under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors.

In the State of Michigan all our lands are supposed to have been surveyed once or more, and permanent monuments fixed to determine the boundaries of those who should become proprietors. The United States, as original owner, caused them all to be surveyed once by sworn officers, and as the plan was simple, and was uniform over a large extent of territory, there should have been, with due care, few or no mistakes; and long rows of monuments should have been perfect guides to the place of any one that chanced to be missing. The truth unfortunately is that the lines were very carelessly run, the monuments inaccurately placed; and, as the recorded witnesses to these were many times wanting in permanency, it is often the case that when the monument was not correctly placed, it is impossible to determine by the record with the aid of anything on the ground, where it was located. The incorrect record of course becomes worse than useless when the witnesses it refers to have disappeared.

It is, perhaps, generally supposed that our town plats were more accurately surveyed, as indeed they should have been, for in general there can have been no difficulty in making them sufficiently perfect for all practical purposes. Many of them, however, were laid out in the woods; some of them by proprietors themselves, without either chain or compass, and some by imperfectly trained surveyors, who, when land was cheap, did not appreciate the importance of having correct lines to determine boundaries when land should have become dear. The fact probably is that town surveys are quite as inaccurate as those made under the authority of the general government.

Recovering Lost Corners

It is now upwards of fifty years since a major part of the public surveys in what is now the State of Michigan were made under authority of the United States. Of the lands south of Lansing, it is now forty years since the major part were sold, and the work of improvement begun. A generation has passed away since they were converted into cultivated farms, and few if any of the original corners and quarter stakes now remain.

The corner and quarter stakes were often nothing but green sticks driven into the ground. Stones might be put around or over these if they were handy, but often they were not, and the witness trees must be relied upon after the stake was gone. Too often the first settlers were careless in fixing their lines with accuracy while monuments remained, and an irregular brush fence, or something equally untrustworthy, may have been relied upon to keep in mind where the blazed line once was. A fire running through this might sweep it away, and if nothing was substituted in its place, the adjoining proprietors might in a few years be found disputing over their lines, and perhaps rushing into litigation, as soon as they had occasion to cultivate the land along the boundary.

If now the disputing parties call in a surveyor, it is not likely that any one summoned would doubt or question that his duty was to find, if possible, the place of the original stakes which determined the boundary line between the proprietors. However erroneous may have been the original survey, the monuments that were set must nevertheless govern, even though the effect be to make one half-quarter section ninety acres and the adjoining seventy; for parties buy or are supposed to buy in reference to these monuments, and are entitled to what is within their lines and no more, be it more or less. While the witness trees remain, there can generally be no difficulty in determining the locality of the stakes. When the witness trees are gone, so that there is no longer record evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor.

It is by no means uncommon that we find men, whose theoretical education is thought to make them experts, who think that when the monuments are gone, the only thing to be done is to place new monuments where the old ones should have been, and would have been if placed correctly. This is a serious mistake. The problem is now the same that it was before: To ascertain by the best lights of which the case admits, where the original lines were. The mistake above alluded to, is supposed to have found expression in our legislation; though it is possible that the real intent of the act to which we will refer is not what is commonly supposed.

An act passed in 1869, Compiled Laws 593, amending the laws respecting the duties and powers of county surveyors, after providing for the case of corners which can be identified by the original field notes or other unquestionable testimony, directs as follows: Second. Extinct interior section corners must be reestablished at the intersection of two right lines joining the nearest known points on the original section lines east and west and north and south of it.

Third. Any extinct quarter-section corner, except on fractional lines, must be established equidistant and in a right line between the section corners; in all other cases at its proportionate distance between the nearest original corners on the same line. The corners thus determined the surveyors are required to perpetuate by noting bearing trees when timber is near."

To estimate properly this legislation, we must start with the admitted and unquestionable fact that each purchaser from the government bought such land as was within the original boundaries, and unquestionably owned it up to the time when the monuments became extinct. If the monument was set for an interior section corner, but did not happen to be at the intersection of two right lines joining the nearest known points east and west and north and south of it it nevertheless determined the extent of his possessions, and he gained or lost according as the mistake did or did not favor him.

Extinct Corners

It will probably be admitted that no man loses title to his land or any part thereof merely because the evidences become lost or uncertain. It may become more difficult for him to establish it as against an adverse claimant, but theoretically the right remains; and it remains a potential fact so long as he can present better evidence than any other person. And it may often happen that notwithstanding the loss of all trace of a section corner or quarter stake, there will still be evidence from which any surveyor will be able to determine with almost absolute certainty where the original boundary was between the government subdivisions.

There are two senses in which the word extinct may be used in this connection: one is the sense of physical disappearance: The other the sense of loss of all reliable evidence. If the statute speaks of extinct corners in the former sense, it is plain that a serious mistake was made in supposing that surveyors could be clothed with authority to establish new corners by an arbitrary rule in such cases. As well might the statute declare that if a man loses his deed, he shall lose his land altogether.

But if by extinct corner is meant one in respect to the actual location of which all reliable evidence is lost, then the following remarks are pertinent.

1. There would undoubtedly be a presumption in such a case that the corner was correctly fixed by the government surveyor where the field notes indicated it to be.

2. But this is only a presumption, and may be overcome by any satisfactory evidence showing that in fact it was placed elsewhere.

3. No statute can confer upon a county surveyor the power to establish corners, and thereby bind the parties concerned. Nor is this a question merely of conflict between State and federal law; it is a question of property right. The original surveys must govern, and the laws under which they were made must govern, because the land was bought in reference to them; and any legislation, whether state or federal, that should have the effect to change these, would be inoperative, because it would disturb vested rights.

4. In any case of disputed lines, unless the parties concerned settle the controversy by agreement, the determination of it is necessarily a judicial act, and it must proceed upon evidence, and give full opportunity for a hearing. No arbitrary rules of survey or evidence can be laid down whereby it can be adjudged.

The Facts of Possession

The general duty of a surveyor in such a case is plain enough. He is not to assume that a monument is lost until after he has thoroughly sifted the evidence and found himself unable to trace it. Even then he should hesitate long before doing anything to the disturbance of settled possessions. Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is attainable; and the surveyor should inquire when it originated, how, and why the lines were then located as they were, and whether a claim of title has always accompanied the possession, and give all the facts due force as evidence. Unfortunately, it is known that surveyors sometimes, in supposed obedience to the state statute, disregard all evidences of occupation and claim of title, and plunge whole neighborhoods into quarrels and litigation by assuming to establish corners at points with which the previous occupation cannot harmonize.

It is often the case when one or more corners are found to be extinct, all parties concerned have acquiesced in lines which were traced by the guidance of some other corner or landmark, which may or may not have been trustworthy; but to bring these lines into discredit when the people concerned do not question them not only breeds trouble in the neighborhood, but it must often subject the surveyor himself to annoyance and perhaps discredit, since in a legal controversy the law as well as common sense must declare that a supposed boundary long acquiesced in is better evidence of where the real line should be than any survey made after the original monuments have disappeared. Stewart vs Carleton, 31 Mich. Reports, 270; Diehl vs. Zanger, 39 Mich. Reports, 601. And county surveyors, no more than any others, can conclude parties by their surveys.

The mischiefs of overlooking the facts of possession most often appear in cities and villages. In towns the block and lot stakes soon disappear; there are no witness trees, and no monuments to govern except such as have been put in their places, or where their places were supposed to be. The streets are likely to be soon marked off by fences, and the lots in a block will be measured off from these, without looking farther. Now it may perhaps be known in a particular case that a certain monument still remaining was the starting point in the original survey of the town plat; or a surveyor settling in the town may take some central point of departure in his surveys, and assuming the original plat to be accurate, he will then undertake to find all streets and all lots by course and distance according to the plat, measuring and estimating from his point of departure. This procedure might unsettle every line and every monument existing by acquiescence in the town; it would be very likely to change the lines of streets, and raise controversies everywhere. Yet this is what is sometimes done; the surveyor himself being the first person to raise the disturbing questions.

Suppose, for example, a particular village street has been located by acquiescence and used for many years, and the proprietors in a certain block have laid off their lots in reference to this practical location. Two lot owners quarrel, and one of them calls in a surveyor that he may make sure his neighbor shall not get an inch of land from him. This surveyor undertakes to make his survey accurate, whether the original was so or not, and the first result is, he notifies the lot owners that there is an error in the street line, and that all fences should be moved, say one foot to the east. Perhaps he goes on to drive stakes through the block according to this conclusion. Of course, if he is right in doing this, all the lines in the village will be unsettled; but we will limit our attention to the single block. It is not likely that the owners generally will allow the new survey to unsettle their possessions, but there is always a probability of finding someone to do so. We shall have a lawsuit; and with what result?

Fixing Lines by Acquiescence

It is a common error that lines do not become fixed by acquiescence in less time than twenty years. In fact, by statute, road lines may become conclusively fixed in ten years; and there is no particular time that shall be required to conclude private owners, where it appears that they have accepted a particular line as their boundary, and all concerned have cultivated and claimed up to it. Public policy requires that such lines be not lightly disturbed, or disturbed at all after the lapse of considerable time. The litigant, therefore, who in such a case pins his faith on the surveyor is likely to suffer for his reliance, and the surveyor himself to be mortified by a result that seems to impeach his judgment.

Of course nothing in what has been said can require a surveyor to conceal his own judgment, or to report the facts one way when he believes them to be another. He has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence has fixed the rights of the parties as if it were at another. But he would do mischief if he were to attempt to establish monuments which he knew would tend to disturb settled rights; the farthest he has a right to go, as an officer of the law, is to express his opinion where the monument should be, at the same time that he imparts the information to those who employ him, and who might otherwise be misled, that the same authority that makes him an officer and entrusts him to make surveys, also allows parties to settle their own boundary lines, and considers acquiescence in a particular line or monument, for any considerable period, as strong if not conclusive evidence of such settlement. The peace of the community absolutely requires this rule. It is not long since, that in one of the leading cities of the State an attempt was made to move houses two or three rods into a street, on the ground that a survey under which the street had been located for many years, had been found in a more recent survey to be erroneous.

The Duty of the Surveyor

From the foregoing it will appear that the duty of a surveyor where boundaries are in dispute must be varied by the circumstances.

1. He is to search for original monuments, or for the places where they were originally located, and allow these to control if he finds them, unless he has reason to believe that agreements of the parties, express or implied, have rendered them unimportant. By monuments in the case of government surveys we mean of course the corner and quarter stakes: blazed lines or marked trees on the lines are not monuments: they are merely guides or finger posts, if we may use the expression, to inform us with more or less accuracy where the monuments may be found.

2. If the original monuments are no longer discoverable, the question of location becomes one of evidence merely. It is merely idle for any State statute to direct a surveyor to locate or establish a corner, as the place of the original monument, according to some inflexible rule. The surveyor, on the other hand, must inquire into all the facts; giving due prominence to the acts of parties concerned, and always keeping in mind, first, that neither is opinion nor his survey can be conclusive upon the parties concerned; and, second, that courts and juries may be required to follow after the surveyor over the same ground, and that it is exceedingly desirable that he govern his action by the same lights and the same rules that will govern theirs.

It is always possible when corners are extinct that the surveyor may usefully act as a mediator between parties, and assist in preventing legal controversies by settling doubtful lines. Unless he is made for this purpose an arbitrator by legal submission, the parties, of course, even if they consent to follow his judgment, cannot on the basis of mere consent, be compelled to do so; but if he brings about an agreement, and they carry it into effect by actually conforming their occupation to his lines, the action will conclude them. Of course, it is desirable that all such agreements be reduced to writing; but this is not absolutely indispensable if they are carried into effect without.

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I have thus indicated a few of the questions with which surveyors may now and then have occasion to deal, and to which they should bring good sense and sound judgment. Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of parties concerned; and it is important for them to know by what rules they are to be guided in the discharge of their judicial functions. What I have said cannot contribute much to their enlightenment, but I trust will not be wholly without value.

[NOTE - The remainder of Cooley’s paper dealt with meander lines; this portion is not included here]