

So, You've Discovered a Conflict, Now What?

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Abstract

So, You've Discovered a Conflict, Now What?

This course will be offered in two parts. The morning session will cover entry level to intermediate topics of common discrepancies that surveyors are challenged by on a daily basis. We will look at problems with deeds, common transcription mistakes, conflicts in writings, and conflicts in evidence. We will also review some real life examples of projects and court cases involving deed interpretation and resolution of conflicting terms.

The afternoon session will cover more advanced topics of boundary dispute resolution and resolution of title and boundary problems. We will discuss ways to lower your liability exposure and make more money while doing it. You will finally get an answer to the often avoided question, "So, the deed doesn't match the occupation line. Where do you set your monument?"

Instructor Biography



John B. Stahl, PLS, CFedS, is a registered professional land surveyor in the states of Utah and Montana, currently owning and operating Cornerstone Professional Land Surveys, Inc., and Cornerstone Land Consulting, Inc., in Salt Lake City. Mr. Stahl specializes in surveying land boundaries, resolving boundary conflicts, performing title and historical research, land boundary consultation services, mediation and dispute resolution. He has been qualified as an expert witness in numerous boundary, access, and negligence cases and has actively participated in the preparation of amicus curiae briefs to the Utah Supreme Court. He has furthered his mediation education by participating in a state-qualified 40-hour training program. He has also completed a 200-hour training and examination program to earn the recognition as a Certified Federal Surveyor. Mr. Stahl has served his profession as state chairman of the Utah Council of Land Surveyors and a Utah delegate to the Western Federation of Professional Surveyors. He is an adjunct professor for the Salt Lake Community College, where he has taught mathematics, ethics and liability courses for land surveying students. He continues to teach an extensive course in land boundary law comprising 54 hours of lecture per year since 1991. Mr. Stahl received his A.A.S. degree in land surveying from Flathead Valley Community College in Kalispell, Montana and has authored numerous articles and publications covering topics on boundary laws, research, and resolving conflicts of evidence.

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Conflict Resolution for the Land Surveyor

Introduction

The overwhelmingly vast majority of surveys in most regions are executed by surveyors without the slightest hint of any ambiguity, conflict, or dispute arising. The percentage of surveys where conflicts are discovered ranges in direct proportion to the original evidence perpetuated in the title record, the availability of original survey records, and the legislated methods for perpetuating the evidence disclosed by subsequent survey records. Stable monuments produce stable land boundaries; land boundaries that are known, recognized and perpetuated by the landowners. When the evidence fades with time or is destroyed by development, uncertainty and disputes follow.

This presentation is not intended to address the procedures used for establishing, recovering, or retracing existing boundary locations where clear evidence can be found. Land surveyors are keen at deciphering the title records and recognizing the footsteps of prior surveyors. However, there seems to be a disconnect between the commonly recognized duty of the surveyor when retracing recoverable boundaries and their duty when the evidence has been lost, destroyed or faded beyond recognition. Surveyors, as with those of most any profession, routinely fall short of their potential when confronted by difficult situations. This presentation is designed to address those occasional surveys, those minority of surveys, where the surveyor faces difficult choices; choices which often result in increased liability and the likelihood of disturbing settled possessions.

This presentation will, hopefully, offer the surveyor alternative solutions to those commonly promoted and practiced. Alternative solutions which will provide the surveyor with the tools necessary to resolve conflicts when they are discovered rather than to merely document their existence. The surveyor possesses many of the skills, knowledge and expertise necessary to assist in the resolution process. Skills which too often go unused for lack of experience. The surveyor is often the first discoverer of a potential ambiguity, conflict or potential dispute. Their response in light of the discovery will set the tone for the success or failure of the potential resolution. So, you've discovered a conflict ... Now what?

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Surveying ... A Unique Profession

The title transfer process is controlled by laws and regulations necessary to promote a free society by empowering the landowner with control over the rights, title and interests in their land holdings. Many professions are called together in the transfer process to assist the landowner and ultimately protect their interests. Real estate agents and attorneys are retained by both the buyer and the seller to represent the best and often competing interests of their clients. Those retained by the buyer have the goal to achieve the greatest interest at the least expense. Those retained by the seller have the opposite goal: to transfer the least interest for the greatest income.

The land surveyor's role, however, is unique among the real estate professionals. The boundary, though single in location, derives its position at the furthest extent of the two contiguous estates. The boundary's position can only be derived by giving full consideration to the rights, title and interests of the landowner estates located on both sides of the line. The land surveyor must execute his duties in all cases as a mediator with the interests of both parties in mind. The surveyor must remain *disinterested* even though his services are retained by only one of the interested parties. The surveyor's final decision must be made with equal consideration given to the rights of the adjoining owners and must never be dissuaded by the interests of the client. The land surveyor is and must remain a disinterested third party.

In January, 1881, a group of surveyors met for the second annual gathering of the Michigan Society of Surveyors and Engineers to discuss the matters which concerned their profession. An invited speaker to the event was Thomas M. Cooley, Chief Justice of the Supreme Court of Michigan. Justice Cooley shared with the group his insights which have proven timeless in their wisdom. The transcript of his presentation, entitled *The Judicial Function of Surveyors* has been published and republished in surveying textbooks since that time. The article can currently be found in the Appendix of the most recent edition of *Evidence and Procedures for Boundary Location*, fifth edition, published in 2006. Justice Cooley summarized the role of the surveyor by saying:

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“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 judgement, 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.”

The surveyor is often best suited to understand the nature of the problem and is in a position to inform the parties of both the most economical and beneficial methods available to resolve the problem. The surveyor presumably has performed the necessary research, gathered the necessary evidence, properly weighed the evidence and derived the relevant facts; the surveyor has analyzed the facts in accordance with the current laws and regulations to determine the origin, the extent, and the nature of the doubtful lines. He is often in the position, as the discoverer of the conflict, to suggest the proper remedy for its resolution or to suggest *alternative* solutions. The parties, as Justice Cooley suggests, are not bound to the surveyor’s recommendations, but are free to consent to them or to disagree. If the surveyor is successful at mediating the conflict, the resulting agreement of the parties is best documented when memorialized in the title record through the proper means at the surveyor’s disposal.

“It is true that no person can be deprived of their property without due process of law, *U.S. CONST. amends. V and XIV*; *MO. CONST. art. I, § 10*. While it is undisputed that the courts of Justice shall be open to every person and certain remedy afforded for every injury to person, property or character, *MO. CONST. art. I, § 14*, parties to disputes have a right to waive their day in court and to equitably compromise and settle their differences, as it is the policy of the law to encourage freedom of contract and peaceful settlement of disputes. *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 480-481 (Mo. banc 1972).” *Dewitt v. Lutes*, 581 S.W.2d 941, (MO. 1979)

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Once the parties are presented with the reality of a boundary problem, they have no idea where to turn. Their first reactive instinct is to defend every inch of their property. This natural tendency for action by force, if necessary, is contrary to a civilized society yet, when confronted with a lack of knowledge, is the only remaining natural course. When the parties are confronted, not with a complex problem but with *solutions* to resolving it, they will often react in a more favorable light. They will often work together as long term neighbors to discover a solution to the common problem which they both share and likely neither caused.

The Surveyor's Role

The land surveyor performs four distinctly separate yet little recognized roles in society: 1) *laying out* and *retracing* land boundaries, 2) *documenting* and *perpetuating* boundary evidence, 3) acting as a mediator or arbitrator *assisting* the landowners in resolving discrepancies, and 4) performing the role of the *consultant* or *expert witness* in court. The responsibilities and duties that the land surveyor employs differ with each role. The requirements upon the surveyor imposed by each role must be clearly distinguished to prevent the improper mixing of functions and responsibilities.

The retracement and layout of land boundaries is one role which the land surveyor is most familiar. Many surveyors perform only this limited

function and never venture into the additional roles available. The surveyor utilizes his knowledge, skills and expertise in the recovery and establishment of evidence necessary to prove the location of the boundaries based upon the application of legal processes. The expression of the surveyor's *opinion* is made by the monuments placed or recovered on the ground and the recorded descriptions which create land boundaries.



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The surveyor's skill also is apparent in the variety of methods used to present the evidence relied upon to support his findings. The surveyor will generally prepare a map indicating the evidence recovered and relied upon to support his findings. He will indicate the relative positions between the monuments recovered based upon his skills in measurement techniques. His report of findings will generally include a synopsis of his methods of analysis and the application of the legal principals utilized in reaching his conclusion.

In all cases, the surveyor is bound by the laws, rules and regulations which govern both his profession and the fundamental rights of the property owners sharing the common boundary. The surveyor must be aware of these laws and he must faithfully execute them during the course of the survey. When the surveyor fails, the failure has a direct impact upon the rights of the landowners, their subsequent purchasers, and many others whose reliance upon the survey will have foreseeable result.

Chief Justice Cooley stated it best when he said of the retracing surveyor:

“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 ... 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.”

The vast majority of surveys are concluded without incident. The surveyor's findings are accepted by the landowners who rely upon the positions as established. Occasionally, the survey results are questioned. Differences with prior survey results, *ambiguities* raised by non-conforming prior occupation, or possibly the differing opinion of the landowner will cause doubt to be cast upon the survey. Occasionally the surveyor himself will discover conflicts in the record or ambiguities in the meanings of terms recited. The surveyor's ability to research and recover the evidence necessary to *resolve* the ambiguities and conflicts is indispensable to their proper resolution.

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When confronted by discrepancies, the surveyor must step back and reflect upon the evidence and possibly gather additional evidence. Each additional piece of evidence will cause the determination of facts to be altered. Alteration of the facts will require the possible application of differing legal principles. The application of differing legal principles will yield different *conclusions* as to the ultimate location of the boundary. Resolution of the discrepancies is absolutely vital to assure the proper conclusion. Without proper determination of the facts, there can be no proper conclusion.

The surveyor's opinion is not binding upon the landowners. If either of the landowners affected suspect or doubt the surveyor's findings, he may act as a mediator by assisting the landowners in settling the discrepancies and achieving an acceptable result. The landowners may seek additional opinions from other surveyors. If the landowners hire a second surveyor to confirm the findings, the first surveyor must be willing to provide the subsequent surveyor with the evidence relied upon in reaching his decision. The surveyor should assist the landowners in the form of a fact finder reporting the evidence recovered to those who are asked to evaluate his findings.

The surveyor should maintain an open *dialogue* with the reviewer to ensure that any evidence recovered before or during the review is shared between the surveyors. The goal of the surveyors should be to resolve the discrepancies using any method or procedure available so that the conclusion reached is a unanimous one. Differing opinions between surveyors *must* be resolved between the surveyors. If the problem causing the differing opinions is not resolvable and the ambiguity results in equally acceptable but differing results, the surveyors should design alternate solutions that the landowners can utilize to repair the ambiguity. The landowners are the only ones with the *authority* to resolve the discrepancies. Given the proper solutions, most landowners will readily resolve the conflict.

Occasionally, the landowners challenge the surveyor's findings in a court of law. The land surveyor serves a somewhat differing role when presenting his findings to the court. Few professions are afforded the latitude that the surveyor enjoys. The surveyor often performs two separate functions in court. One function is as a *lay witness* whose responsibility is to present the evidence that the surveyor utilized in reaching his decision. As a lay witness, only evidence directly perceived by the

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surveyor is presented. No opinions are expressed. The surveyor performs his role as the “fact finder” and simply presents the evidence leading to the facts concluded. The second function the surveyor may be asked to perform is the role of the *expert witness*. As an expert, the surveyor is relied upon by the court to assist the trier of fact in interpreting the evidence presented and understanding the legal principles and their proper application to the fact situation. The expert witness is afforded the ability to express his opinion as to the ultimate issue before the court. That is, the surveyor’s opinion where the boundary is located.

The land surveyor is charged with the *responsibility* to know and to follow the laws regarding property boundary location and to execute that responsibility faithfully. It is the execution of their responsibility that takes the surveyor from the realm of merely “following the law,” as if driving 55 mph, to “executing the law,” as if passing judgement on the boundary location.

Chief Justice Cooley made an interesting observation regarding the land surveyor:

“Of course, nothing in what has been said can require a surveyor to conceal his own judgement, 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 had fixed the rights of parties as if it were at another.”

This dichotomous position that the surveyor is confronted with has caused much consternation and dialogue among the profession. In the surveyor’s *haste* to complete the survey, he often will choose the solution which yields the most certainty while requiring the recovery of the least amount of evidence. The solution is likely to result in the monumentation of the record boundary position in spite of any direct evidence contrary with the occupational improvements.

Chief Justice Cooley also observed that:

“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,

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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.”

The surveyor’s *impatience* is precisely the root of the difficulty. The surveyor, when faced with conflicting evidence, must step back, re-evaluate the evidence, perhaps begin a lengthy quest for additional evidence, and be willing to allow the necessary passage of time for all things to be adequately considered. The conflict, once adequately assessed, must be communicated with the landowners adjoining the boundary under consideration. They must be given the information concerning the source of the problem, the impact of the problem, and the possible remedies available to resolve the problem.

Most landowners, once thoroughly informed, will negotiate a settlement to remedy the situation. The input of the surveyor during the negotiation phase can be crucial to the outcome of their decision. The surveyor can suggest the appropriate remedies that are available to meet the needs and desires of the landowners. The surveyor must be familiar with the state and local *regulations* which may bear weight on the possible solutions to ensure the chosen remedy will not cause additional problems.

The Survey Process

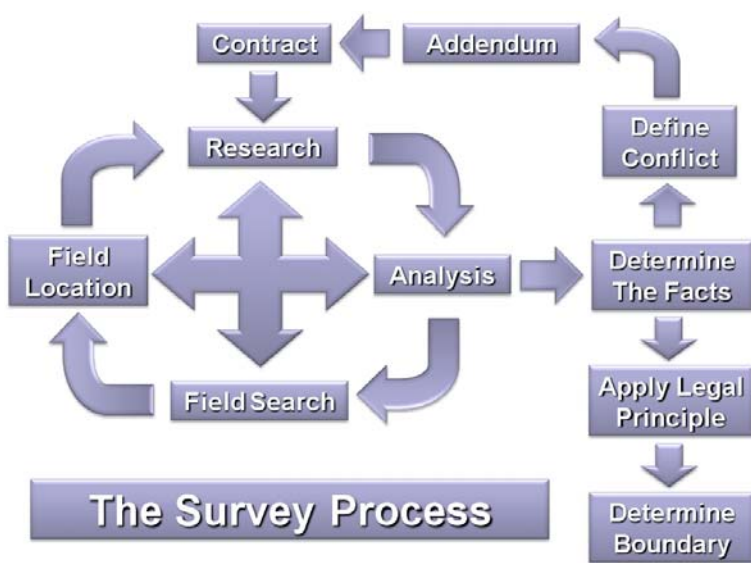
The surveyor cannot merely assume the client knows or understands the potential problems or liabilities associated with his actions. The client has contracted the surveyor to provide a service, the scope of which is often unknown. Most clients don’t have a clue as to what the surveyor needs to perform his duty or what his duty even involves. It is up to the professional to ascertain the needs of the client and to provide what is essential to meet those needs.

Proper steps are necessary to ensure that the client’s needs will be met when undertaking any project. The surveyor must fully evaluate the request for services before committing to perform the work. The first and most often overlooked step in this process is defining the scope of work. Without first establishing a clear objective or purpose for the survey, neither the client nor the

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surveyor will have similar understandings of the work necessary to achieve the goal. The surveyor must thoroughly interview the client to establish the purpose and intended use for the survey being requested.

Once the client's needs have been established, the surveyor has the responsibility to determine if he or she is properly qualified in accordance with the state licensing statute. The Professional Land Surveyor's licensing act limits the conduct of the land surveyor to disciplines which the licensee is competent or qualified by examination, education, or experience. The licensing act sets forth the minimum qualifications for licensure as a land surveyor. These minimum qualifications are not sufficient to automatically qualify a surveyor to competently provide services in all survey disciplines. The surveyor must judge his or her own competency before accepting any project.



After appraising the scope of work and the ability to provide the service, the surveyor should be able to provide an estimate of the cost and the expected time of completion of the project. The client should be informed of the estimated date of commencement and the estimated length of time to complete the work. The surveyor should prepare a written agreement establishing the

scope of work, estimated time of completion, estimated cost, and the delivery product.

A *caveat* is normally included in the agreement addressing the discovery of unknown factors during the course of the survey. Items such as missing monumentation, defects in title or weather conditions can seriously effect the final cost or completion schedule. The caveat should enable the surveyor, upon discovery of any ambiguity, uncertainty, or dispute regarding the boundary location, to notify the client, discuss the nature of the discovery, and, if necessary, to issue a *suspension* of

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work on the contract. If a suspension is issued, the order should be accompanied with an explanation of the discovery, its need for resolution, and an invoice for the portion of the contract completed to date. Once issued, the surveyor and the client can negotiate the additional unforeseen work that may be necessary to resolve the ambiguity, uncertainty, or dispute.



Resolution of the discovery may lead to an infinite number of potential solutions, time delays, and costs. There may be a need for additional research beyond the normal measure conducted during a typical survey. There may be a need for additional field work, monument recovery, and investigation. There may be a need to contact adjoining or prior landowners to explain the historical circumstances about which the boundary was formed. When a dispute arises, there may be need for mediation or possibly litigation to resolve the dispute before the surveyor can complete the survey. All of these conditions are typically *unforeseen* by the surveyor or the client and can rarely be accounted for in the initial contract. If difficult conditions are expected, they should be included in the initial scope of work. The unforeseen circumstances and conditions will typically result in an amendment to the scope of work and outlining the estimated time and costs associated.

Once the ambiguity, uncertainty, or dispute has been resolved and documented, the surveyor can issue to the client a notice resuming the initial contract. If the resolution is not possible, the surveyor or the client may *terminate* the initial agreement. During the resolution process the surveyor can provide expertise assisting the client during negotiation, mediation and, when necessary, litigation processes. The role of the surveyor during the resolution can be quite varied dependant upon the measure of repair necessary. The surveyor may be called upon to assist in preparing exhibits,

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descriptions, or affidavits to document the factual evidence and the results of negotiations. The surveyor may also be called upon to assist in the mediation or litigation process as a consultant or an expert witness. As such, the role of the surveyor can dynamically change throughout their engagement.

Authority of the Land Surveyor

Boundaries between contiguous estates must be determined by mutual agreement between the coterminous landowners who share an equal interest in determining their common boundary. Of course, there are circumstances where the exclusive right of the owner is restricted, principally where the right has been abdicated to the governing political authority through legislative process. Subject to the regulatory restrictions, the landowner is free to decide what to do on his property and where to do it. If more property is required to meet the landowners needs, he can negotiate with neighbors for the exchange or purchase of property which will meet the needs. The landowner has all the authority to maintain or relocate his boundaries as long as he recognizes his neighbors right to do the same. All actions regarding the boundaries are strictly controlled by the two adjoining landowners.

The simple statement regarding the surveyor's authority is that they have *NONE*. The attorneys, likewise, have *NONE*. The judges, likewise, have *NONE*. The authority lies with the landowner. The landowners alone have the authority to determine, establish or settle their boundary location. No one else, unless appointed as arbiter, can settle any issues for them; we can only assist them in achieving an agreement. They can call their mother-in-law or their high school counselor if it helps them achieve the agreement. The owners can call a priest if that will help. They can call an attorney and certainly they can call a land surveyor.

The Minnesota Land Surveyor's Registration Act Rules assigns the land surveyor's authority as:

1800.4100 CERTIFICATE OF LICENSURE OR CERTIFICATION.

Subp. 2.

Licensure as land surveyor.

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The board shall issue to each applicant who has successfully completed the fundamentals of land surveying examination and the professional practice examination ***a certificate of licensure giving the licensee authority to practice land surveying as defined by Minnesota Statutes***, section 326.02, subdivision 4. This certificate shall be in effect for a period ending June 30 of the even-numbered year of the biennium in which the certificate is issued, after which date the certificate will expire unless renewed. Applicants who are licensed by comity from other states, having met the Minnesota licensure requirements, shall be issued certificates of licensure in the same manner as provided in this part.

The authority granted to the surveyor by statute recognizes the surveyor's professional responsibility for the documents produced under seal. No binding authority is given for the determination of land boundaries. The surveyor's responsibility is to determine land boundaries in accordance with the rule of law. Only when the rules are properly applied will the surveyor's determination of the boundary withstand challenge.

When confronted with an unresolvable dispute, there are avenues the owners may take whereby they may abdicate their authority to another such as a judge or an arbitrator. However, when that decision is handed down, there is nothing to prevent the landowners from appealing that judge's decision or from going back home, getting together and agreeing to do something entirely different. They started with the authority and are left with the authority. Resolving boundary disputes has nothing to do with the surveyor's authority. It is the ability of the land surveyor to assist the landowners in settling their differences that matters.

“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...” *The Judicial Function of Surveyors*

Every boundary *established* is done so by the fulfillment of some operation of law. To locate the line, once established, requires the application of a legal principle that sanctions the course of the surveyor. The process for the surveyor is the same as the process used by the court.

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The fulfillment of the legal requirements confirms or establishes the *location* of the boundary. Every boundary determined by the surveyor follows these same processes and every monument set by the surveyor is the conclusion of his interpretation of the facts, based upon the evidence viewed in the light of legal principles applied. The surveyor makes his judgment and expresses his opinion as to the location of the boundary. The surveyor's opinion is not binding upon the landowners.

A simple example is the establishment of a lost corner lying between two recovered original monuments. The surveyor has gathered sufficient evidence to establish the fact that he has found two original monuments and that the corner sought is "lost." That is a conclusion of law based upon the facts. The surveyor then proceeds to apportion the lost corner in accordance with common-law (court made) principles. Or, should the surveyor apply a different principle where the boundary location is governed by the senior rights? The position of the replacement monument is not subject to the random discretion of the surveyor, it is controlled by the "*law*" and the "*legal conclusion*" made by the surveyor is where the monument is placed. The application of the appropriate legal principle is crucial to the proper determination.

Certainly the surveyor's opinion has no more weight than a judge's opinion and is subject to the review and acceptance of the landowner. If the landowners are not in agreement with the position determined by the surveyor, they may "appeal" that decision to the court and get a second opinion from the judge. If they disagree with the judge's opinion, they can "appeal" that decision to a higher court and get the opinion of three to seven judges. If they disagree with their majority opinion, nothing prevents them from going home and settling the line in a position they both agree upon.

Judicial Surveys

Illinois, as well as several other states, provides by statute an opportunity for disputing parties to arrange through the civil court the commission of a *panel of surveyors* to jointly conduct a survey with the intent to resolve the location of a boundary line. The purpose of such a statute is not to grant overriding authority to the surveyors to adjudicate the location of the boundary, but is to

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provide a consortium of surveyors who, working together to gather and review the evidence, are more likely to derive a proper conclusion regarding the boundary location.

Upon completion of the survey, a *report of findings* is made to the court for final adjudication. The process is similar to those jurisdictions which provide for the selection of a *special master* when topics of technical issues are being tried by the court. Because the judge and jury don't have the benefit of the expert's knowledge, training, or skills in a certain subject, they must rely upon the expertise of trained professionals such as the surveyor. The duty of the expert is to *assist* the trier of fact (i.e. the judge and/or jury) to understand the evidence, its proper analysis, and the facts determined from the evidence. In the case of boundary locations, the surveyors are then required to apply the appropriate rule of law which aligns with the fact situation as the case presents and to determine the location of the boundary line.

The parties affected by the boundary line determined by the expert, special master, or commission are given opportunity to review, challenge, or accept the findings as reported to the court prior to its final adjudication. For this reason, the findings report is not considered as having any *binding* or authoritative standing. The report expresses the opinions of the surveyors regarding the evidence, factual determinations and resulting boundary location. Those opinions are subject to review and challenge by the parties and the court. The court will take the report under advisement along with any issues brought up under challenge and will make its determination regarding the ultimate issue before the court.

"Whenever one or more proprietors of lands in this state, the corners and boundaries of whose lands are lost, destroyed, or are in dispute, or who are desirous of having said corners and boundaries permanently re-established, and who will not enter into an agreement as provided by section one of this act, it shall be lawful for said proprietor or proprietors that they shall cause a notice, . . . that, . . . he, she or they will make application to the circuit court of the county in which said lands are situated, for the appointment of a commission of surveyors to make survey of and to permanently establish said corners and boundaries, . . ."

(Ill. Rev. Stat. 1987, ch. 133, par. 12.)" *Kelch v. Izard*; 590 N.E.2d 1050, 227 Ill. App. 3d 180, 169 Ill. Dec. 131, 1992.IL.0000590, (04/20/1992)

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The statute is designed such that, when disputing parties cannot agree to have their boundary jointly surveyed, they may *petition* the court to assign a commission of surveyors to locate the line in question. Once the survey is completed and the final adjudication by the court is made, the parties will be bound by the adjudicated line. The charge given the surveyors is no different than their normally assigned task which is to locate the line in accordance with the rules of law using the best evidence which can be recovered. The surveyors cannot be used under the statute to establish new corners or boundaries (*Burns v. Kimber* (1912), 176 Ill. App. 515). They are charged only with locating existing boundaries as have been created and established by prior action. As such, the surveyors are responsible for retracing existing boundaries as formerly established.

“**765 ILCS 215/3** – Upon the filing of proper petition and proof of due notice as aforesaid, the said court shall appoint a commission of three surveyors, entirely disinterested, to make said survey, who shall proceed to make said survey and report their proceedings to the said court, as soon as may be accompanied by a plat and notes of said survey; said commission of surveyors shall be authorized to administer an oath, and take the evidence of, and incorporate the same with their survey, of any person who may be able to identify any original government or other legally established corner or witness thereto, or government line, tree or other noted object, and all stone corners or other monuments that have been in existence over twenty years, and recognized as original government corners by the adjoining proprietors. (Source: Laws 1933, p. 1105.)”

The statutes require that notification be provided to all owners affected by the permanent survey as their boundaries will ultimately be established by judicial action thereby binding the parties to the boundaries as determined by the survey. The parties are typically given an appeal period during which they may file any objections to the locations of their boundaries.

The judicial process surveys have a unique quality among surveys as the adjudication directly following the survey process lends permanency to the adjudicated boundaries. The boundary locations become fixed in position while the costs of the adjudication are borne by the parties who initiated the action. Judicial surveys provide an opportunity for repair of multiple boundaries which may comprise entire neighborhoods or subdivisions whose boundaries are in turmoil from the lack

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of monumentation or the over-prevalence of conflicting evidence. The effect of the judicial process is to establish the positions of the existing boundaries, not to adjudicate matters of title.

Administrative Surveys

In some states, such as Wisconsin, a process similar to the Judicial Surveys is available by statute for the purpose of repairing large-scale boundary problems. The process under Wisconsin statutes (s. 70.27, Stats.), referred to as an “Assessor’s Plat,” is provided to the governing body as a remedy where one or more parcels “cannot be made sufficiently certain and accurate for the purposes of assessment, taxation or tax title procedures.” The process gives jurisdiction to the governing body, through its administration process, the ability to “correct metes and bounds” descriptions “when gross errors exist in lot measurements” or where “difficulty is encountered in locating new structures, public utilities or streets.”

A similar process is found in Minnesota statutes, Section 465.79, where the city council, town board or county board can create a *boundary commission* to review property descriptions and cause a survey to be made which documents and establishes the locations of boundary lines throughout complete neighborhoods. The commission will attempt to establish agreements with each of the landowners as to the location of their common boundary lines and have the boundaries delineated by the surveyor on the final map. The landowners are given opportunity to observe the monuments placed by the surveyor and to attend a public hearing prior to final acceptance.

The goal of the administrative surveys is to more plainly define the boundaries of the parcels incorporated into the survey and plat by clearly monumenting them on the ground by survey where they are made known to the landowners, and by creating a plat which more correctly reflects the location and configuration of the parcel boundaries. The plats are ordered by the governing body (the city council, or by the town, village, or county board in Wisconsin), and are paid for from the local treasury with the costs apportioned back to the parcels through their annual tax assessment.

The surveyor making the plat must “survey and lay out the boundaries of each parcel, street, alley, lane, roadway, or dedication to public or private use.” The survey requires a thorough review of the

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chronology of the events which established the boundaries, keeping in mind that reconstruction of the intent of the landowners is paramount to their proper discovery. Temporary monuments are set by the surveyor and the landowners are notified and given opportunity to review the placement of the temporary markers. If any discrepancies are revealed by the owners, it is the surveyor's responsibility to attempt to resolve them. Written agreements between landowners may be required to establish the locations of uncertain or disputed boundaries before the plat is complete. A judicial review may be requested by the council or board. The court will determine the location of any disputed, contested or unagreed boundary by determining adverse claims to each parcel.

Specific requirements are made with regard to the *amendment* of the Assessor's Plats including the alteration or further division of parcels in the plat. The statutory processes and procedures for creating and amending the Assessor's Plat must be understood by the surveyor to ensure that the proper procedures are followed. Upon completion, the plat is given final certification by the surveyor, the governing body, and the clerk, whose office it resides in for 30 days awaiting any appeal by landowners affected by the plat. Landowner *appeals* are made by suit in district court where other boundary disputes are adjudicated. Once finally adjudicated, the plat receives its final approval by the governing body and is filed for record in the deed repository. Once recorded, the plat serves the same effect as a land division plat.

Legal Surveys

A third type of survey which may be made legally binding upon the owners is similar to that established by the Indiana legislature under the county surveyor's act:

IC 36-2-12-10

Maintenance of legal survey record book; procedure for establishing location of line; effect of location and establishment of lines; appeal

Sec. 10. (a) The surveyor shall maintain a legal survey record book, which must contain a record of all the legal surveys made in the county showing outline maps of each section, grant, tract, subdivision, or group of sections, grants, tracts, and subdivisions in sufficient detail so that the approximate location of each legal survey can be shown. Legal surveys shall be indexed by location.

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(b) A landowner desiring to establish the location of the line between the landowner's land and that of an adjoining landowner by means of a legal survey may do so as follows:

(1) The landowner shall procure a land surveyor registered under IC 25-21.5 to locate the line in question and shall compensate that surveyor.

(2) The land surveyor shall notify the owners of adjoining lands that the land surveyor is going to make the survey. The notice must be given by registered or certified mail at least twenty (20) days before the survey is started.

(3) If all the owners of the adjoining lands consent in writing, the notice is not necessary.

(4) The lines and corners shall be properly marked, monumented by durable material with letters and figures establishing such lines and corners, referenced, and tied to corners shown in the corner record book in the office of the county surveyor or to corners shown on a plat recorded in the plat books in the office of the county recorder.

(5) The land surveyor shall present to the county surveyor for entry in the legal survey record book a plat of the legal survey and proof of notice to or waiver of notice by the adjoining landowners. The land surveyor shall give notice to adjoining landowners by registered or certified mail within ten (10) days after filing of the survey.

(c) The lines located and established under subsection (b) are binding on all landowners affected and their heirs and assigns, unless an appeal is taken under section 14 of this chapter. The right to appeal commences when the plat of the legal survey is recorded by the county surveyor in the legal survey record book.

As added by Acts 1980, P.L.212, SEC.1. Amended by P.L.23-1991, SEC.34.

While the legal survey process appears to empower the surveyor with absolute authority for the location of the land boundary, the adjudicative process ensures that the landowners retain complete control over the survey outcome. The notification requirement provides opportunity for the adjoining landowners to be involved in the survey process and imposes upon them a responsibility to engage themselves. The post-filing notification provides a second opportunity for the neighbor to observe the location of the boundary determined on the ground by physical monuments placed by the surveyor and to respond with any objections to the location. The neighbor is given opportunity for appeal of the surveyor's decision through the process outlined in the successive section 14.

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IC 36-2-12-14 Appeal of survey; procedure

Sec. 14. (a) The owner of property surveyed under this chapter may appeal that survey to the circuit court for the county:

(1) within ninety (90) days if he is a resident of the county and was served with notice of the survey; or

(2) within one (1) year if he is not a resident of the county and notice was by publication.

(b) When an appeal is taken under this section, the surveyor shall immediately transmit copies of the relevant field notes and other papers to the court, without requiring an appeal bond.

(c) The court may receive evidence of any other surveys of the same premises. If the court decides against the original survey, it may order a new survey to be made by a competent person other than the person who did the original survey, and it shall:

(1) determine the true boundary lines and corners of the lands included in the survey; and

(2) order the county surveyor to:

(A) locate and perpetuate the boundary lines and corners according to the court's findings by depositing durable markers in the proper places, below the freezing point;

(B) mark the boundary lines and corners; and

(C) enter the boundary lines and corners in his field notes.

(d) A new survey made under this section may be appealed under this section.

As added by Acts 1980, P.L.212, SEC.1.

Strict conformance with the statutory process for a legal survey provides the landowners with an opportunity to resolve ambiguities or discrepancies in their boundary locations. The landowners, through active cooperation and engagement, can assist the surveyor by providing evidence necessary for the proper determination of the boundary line. Their cooperative efforts can effectively establish their boundaries in a binding fashion in accordance with their expectations achieved through agreement, settlement or mediation.

The correctness of the legal survey, once established beyond the period of appeal, is foreclosed from attack and becomes binding upon the noticed parties. Failure of the notification process is frequently found as a reason for a failure of the legal survey. The boundary location, properly

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established by a legal survey, may also be overcome when title to land based upon possession has not been properly considered. The Indiana courts have recognized this limitation.

“... As boundaries may be fixed by possession and by estoppel, it is proper to introduce evidence tending to prove possession for the statutory period, or to prove possession for a shorter period, conjoined with facts constituting an estoppel. "A land-owner who submits to a survey does not by so doing lose any of his land. In submitting to a survey he does not surrender any valid title that he may have, no matter how it may have been acquired. In not objecting to a survey he does not put himself in the position of surrendering his land, or any part of it. The object of the statute, in permitting the parties to try the correctness of the survey, was not to confine either to a mere paper title, but to permit them to establish the true title and boundary lines, howsoever acquired or fixed. It would produce great confusion and work much injustice if parties could only try the correctness of a survey by the descriptions found in the conveyances. It is a familiar rule that it is not the office of a description to identify lands, but simply to furnish the means of identification. *Rucker v. Steelman*, 73 Ind. 396; *Lanman v. Crooker*, 97 Ind. 163 (49 Am. R. 437). Parol evidence is, therefore, often necessary to make descriptions intelligible." 107 Ind. at 592, 593, 8 N.E. at 624." *Criss v. Johnson*, 348 N.E.2d 63; 169 Ind. App. 306 (1976)

The recognition of boundary lines as established on the ground through whatever means the law provides must be considered by the surveyor when conducting the survey. Determination of the legal boundary must include consideration of the effect of the actions of the parties in possession as well as the circumstances surrounding the creation and establishment of the boundary.

Registered Surveys

Another type of survey, available in Minnesota and a few other states, is made in conjunction with the landowner's ability to register land title under the *Torrens Title* process. Torrens Title registration provides a method whereby a landowner may have their ownership of a particular parcel of land adjudicated under statutory process. A decree of the district court adjudges the quality of title to the land, including the nature, character, extent, and amount of all liens and encumbrances and removes all clouds from the title. The Torrens Title registration process may or may not, however, include an adjudication of the boundary locations.

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508.23 CONTENTS OF DECREE; COPY FILED.

Subd. 1a. Judicial determination of boundaries. If one or more boundary lines are judicially determined, the land description in the decree of registration shall make reference to that fact and to the location of the judicial landmarks that mark the boundary lines. When any of the boundary lines are registered, the court administrator also shall file with the registrar a certified copy of the plat of the survey which contains a certification by a licensed land surveyor that the boundaries registered have been marked by judicial landmarks set pursuant to the order of the court. The registrar of titles shall enter the certified copy of the plat of the survey as a memorial upon the certificate of title issued for the land registered by the decree. If any of the adjoining lands are registered, the decree of registration shall direct the registrar of titles to show by memorial upon the certificates of title for the adjoining lands which of the boundary lines of these lands have been determined in the district court case.

It is evident by the statutes that the adjudication of title is a separate process from the adjudication of the location of the boundaries of the parcel of registered land. A registered title certifies the ownership and related rights and interest in the land and provides prima facie evidence in the courts without further proof. A registered land survey may or may not be provided as part of the title adjudication. The registered land survey may be required by the registrar of titles when an unplatted registered parcel is subdivided, or must be provided when an adjudication of the boundaries is requested by petition of the owners.

508.671 DETERMINATION OF BOUNDARIES.

Subdivision 1. Petition. An owner of registered land having one or more common boundaries with registered or unregistered land or an owner of unregistered land having one or more common boundaries with registered land may apply by a duly verified petition to the court to have all or some of the common boundary lines judicially determined. ... The owner shall have the premises surveyed by a licensed land surveyor and shall file in the proceedings a plat of the survey showing the correct location of the boundary line or lines to be determined.

Subd. 2. Order. Before the issuance of any final order determining the location of the owner's boundary lines, the court shall fix and establish the boundaries and direct the establishment of judicial landmarks in the manner provided by section 559.25. The final

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order shall make reference to the boundary lines that have been determined and to the location of the judicial landmarks that mark the boundary lines. ...

Subd. 3. Plat of survey to be filed. The court administrator also shall file with the registrar of titles a certified copy of the plat of the survey which contains a certification by a licensed land surveyor that the boundaries as registered have been marked by judicial landmarks set pursuant to the order of the court. The registrar of titles shall enter the certified copy of the plat of the survey as a memorial upon the certificate of title.

The boundary registration process requires the same performance from the surveyor as any boundary survey would require. The surveyor's determination of the boundary line location is not authoritative or binding upon the owners. The owner or the adjoining landowners may contest the survey in court during the adjudication process and have the right of appeal if they disagree with the district court ruling. The title registration process protects the owner from title contests based upon claims of *adverse possession*, but the location of the parcel boundaries are subject to a proper determination based upon the common law principles accounted for by the surveyor.

508.02 REGISTERED LAND; SAME INCIDENTS AS UNREGISTERED; NO ADVERSE POSSESSION.

Registered land shall be subject to the same burdens and incidents which attach by law to unregistered land. ... No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered. Section 508.671 shall apply in a proceedings subsequent to establish a boundary by practical location for registered land.

Expressing Your Opinion

The surveyor is expected to perform the necessary research, properly analyze and weigh the evidence, determine the facts, make his judgment, and express his professional opinion relative to the position of the boundary in question. The surveyor's opinion should be founded upon the most highly educated, highly skilled, and highly experienced methods and procedures that the surveyor has to offer. The surveyor's opinion is based not solely upon his technical ability to measure, but

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upon his ability to research and recover the pertinent evidence, his ability to reason, and his knowledge of the proper *application* of legal principles.

Chief Justice Cooley again reasoned:

“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.”

Opinions, for What They’re Worth

Everyone seems to have an opinion: the landowner who hires the surveyor, the neighbor who has lived on the property for years, and the prior owners who were responsible for originally creating the boundary. These opinions form the rationale behind the subsequent actions of the landowners. Their understanding of the boundary location will guide the placement of improvements along the boundaries and within the property. The more rooted their opinions are, the less likely they will appreciate the surveyor’s opinion that they are mistaken.

The landowner’s opinion is usually well formed and likely correct if they were party to the original transaction that created the line. They likely were there when the surveyor set the original monuments. They are the ones who entered the initial agreement of what was to be purchased. They are the ones who had the “meeting of the minds” with the original seller. They are likely to know with a high degree of certainty where the boundaries were created.

The surveyor who now tells them that they are wrong, and that their boundary “should be” in another location, is not likely to be received with much credit. The surveyor should not be *telling* the landowner where the line is but should be instead *listening* to the landowner in an attempt to ascertain the evidence. The surveyor should then be including the evidence in his analysis and rethinking his initial, albeit too often, hasty conclusion.

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The current landowners are often quite far removed from the original conveyance that created the boundary. They may have some suspicion with regard to the boundary location, but they may have little certainty. That is usually the reason the surveyor was called in the first place. The landowners simply don't know and are seeking confirmation before commencing their intended improvements. These landowners are more likely to accept the findings of the surveyor as correct and without challenge.

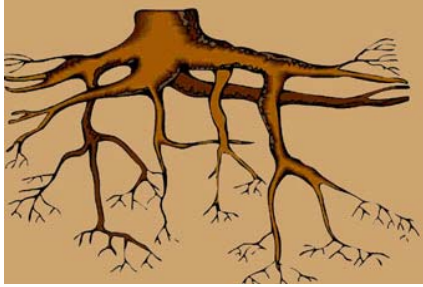
Occasionally, the landowners suspect the position of the existing improvements, and, for one reason or another, believe they have a problem with their boundaries. It may well be that a surveyor has already visited the property and declared the occupation line to be "off." A second surveyor may be called to confirm the results of the first. It is important for the surveyor to identify the situation and perform his services accordingly. Is the surveyor being called upon to formulate an opinion *de novo*, or is he being asked to provide a cursory review of another's opinion.

The land surveyor many times is called to assist the landowners to ascertain the position of their boundary. They already know they have a problem and that the occupation lines disagree with the record. What they are in need of is not to have another surveyor confirm what they already know or suspect, but someone who will properly appraise the problem and offer a *remedy* to their situation that will be both affordable and functional.

Certainly, the surveyor can recommend an attorney who may specialize in title matters, however, the problem at hand is not necessarily a *title problem*. It may be a *location problem*. The attorney alone can not repair the landowner's boundary. They have need of the surveyor and his survey results to prepare a description of the boundary, to prepare the documents necessary to repair the record, and to identify the adjoining landowner with whom to enter an agreement for the repair.

Unfortunately, many attorneys' initial answer to the boundary problem is a quiet title action. The attorney needs to know one thing: the name of the adjoining neighbor so he knows who to file suit against. Certainly the attorney's solution to the problem will work, but it does little good to neighbor relations and the landowner's pocket book. A quiet title action should be a last resort in any title conflict resolution. Yes, it works, but it's akin to killing a fly with a cannon.

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As a matter of last resort, a *quiet title action* or a *declaratory judgment* may be necessary when the landowners cannot agree to the proper or adequate resolution to their conflict. The conflict may be taken before the court and the landowners will be given another opinion: the judge's. The trial preparation and process is likely to take at least a year to complete and will ultimately cost the landowners tens of thousands of dollars. The surveyor

will work for the better part of the year with the attorney, educating him as to the important pieces of evidence and their proper *interpretation* and analysis. He will then be given four to eight hours to educate the judge. The entire outcome of the judge's opinion will be based upon the eight or ten, maybe twenty or thirty boundary cases he has ruled upon rather than the experience of hundreds or thousands of boundaries the surveyor has been asked to determine.

It is the extraordinary skill, education, and experience achieved by the surveyor that prepares him for the determination of the boundaries. It is his trained, analytical thinking that allows him to reason through the possible remedies. It is his knowledge of local *agency review* requirements that allows him to recommend one remedy over another and to evaluate the positive and negative sides of each recommendation. It is these same abilities that make many surveyors ill-suited for working closely with people. The surveyor must recognize the gap between himself and the average layman and adjust his methods of communication that he may be more clearly understood. He must be sensitive to the desires of the landowners and facilitate them in mediating a resolution to their boundary conflict.

Determining the Root of the Problem

As the development of the nation progresses, land use restrictions rise, and complex regulations are enacted, the surveyor's knowledge, education, and expertise in these areas must increase. The surveyor is less often viewed as the frontiersman of an undeveloped region, but as taking on a role more closely involved in the legal profession as a team player in the resolution of boundaries and development project approvals. The surveyor's knowledge in these arenas is crucial, not only in *documenting* the resolution of boundary conflicts, but also assisting in their resolution.

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Proper resolution of any problem begins with discovering the root of the problem. Rushing head long into a solution without first defining the nature of the discrepancy can yield disastrous and expensive results. Employing the surveyor early on can yield quick and permanent solutions through the joint resolution of commonly held boundary problems. The neighbor, the unfortunate recipient of a hasty lawsuit, likely shares the same problem as the client who initiated the contact.

The surveyor's knowledge must encompass the rules and procedures that the court utilizes in determining the position of a boundary. The surveyor already uses the same processes as the judge and jury to reach the ultimate conclusion of where the boundary is. The courts have established the rules; the surveyor must apply the rules to the unique facts as the case admits and expresses his opinion as to the location of the boundary.

An undefined problem has an infinite number of solutions. - Robert A. Humphrey

For every complex problem, there is a solution that is simple, neat, and wrong. - H. L. Mencken

Chief Justice Cooley pointed out the importance for the land surveyor to follow the rules of the court when determining land boundary locations. He stated that:

“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 ... 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.”

The Nature of Real Property Conflicts

Real property conflicts can be categorized into three basic groups: 1) *Title conflicts*, 2) *Deed conflicts*, and 3) *Location conflicts*. Each of these areas of conflict have individual bodies of law which are designed to address and resolve conflicts when they arise. Title conflicts involve issues of property ownership. Deed conflicts result when the writings themselves contain ambiguities and uncertainties. Location conflicts arise from a myriad of property owner actions or failures to act

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during the physical occupation of the land. Each basic group should be viewed independently in order to understand the various legal principles designed for achieving resolution when conflicts are discovered.

The facts of each case bring to light the nature of each conflict. A single case may occasionally incorporate more than one category, however each specific issue should be distinctly identified. The perspective for each will require the unique application of certain legal principles. Each principle is designed from a different perspective which will provide direction to resolve the particular conflict. A principle designed for resolving ambiguous deed construction is misplaced when resolving a boundary established by agreement of the landowners.

Title Conflicts

Understanding land title and the variety of conflicts which arise requires a fundamental review of the components which comprise the totality of ownership. When all components which represent real property ownership are considered, an estate is formed. The estate is made up of all rights, title and interests associated with or appurtenant to the property. Following are the definitions of the terms commonly associated with real property which must be clearly understood. The definitions are excerpted from *Black's Law Dictionary, 6th Ed.*.



Title - The formal right of ownership of property. Title is the means whereby the owner of lands has the just possession of his property. The union of all the elements which constitute ownership. Full independent and fee ownership. The right to or ownership in land; also, the evidence of such ownership. Such ownership may be held individually, jointly, in common, or in cooperate or partnership form.

One who holds vested rights in property is said to have title whether he holds them for his own benefit or the benefit of another.

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Right - A power, privilege, or immunity guaranteed under a constitution, statutes or decisional laws, or claimed as a result of long usage; an interest or title in an object of property; a just and legal claim to hold, use, or enjoy it, or to convey or donate it, as he may please.

Interest - The most general term that can be employed to denote a right, claim, title, or legal share in something. In its application to real estate or things real, it is frequently used in connection with the terms “estate,” “right,” and “title.” More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title.

The term *title* is frequently used to denote not only the ownership of the property but the associated rights and interests which are, in fact, different and particular components of the title. The term title should be used to specifically relate to ownership. A title to land was defined by Lord Coke to be “*the means whereby the owner of lands hath the just possession of his property*” (Co. Lit. 345). Bouvier explained that “*complete title*” is comprised of three parts: 1) *mere possession* or actual occupation of the estate, without any apparent right, 2) the *right of possession*, which may reside in one man, while the actual possession is not in himself; he may have an *apparent* right of possession which may be defeated, or an *actual* right of possession which will stand any test, and 3) the *right of property* without either possession or the right of possession. Bouvier described the unity of the three parts as “*perfect title*” (2 Bouv. 567, 1843).

The *rights* of the title holder include such rights as access, occupation, surface, subsurface, subjacent, timber, mineral, development, etc. The interests reflect those particular outside interests which impose restrictions upon the title holder’s rights. *Interests* may be imposed by governing bodies such as zoning and development requirements, statutory interventions such as wetland or shoreline restrictions, or homeowner and neighborhood associations which include particular *covenants, conditions and restrictions*. Interests are commonly interposed through contractual obligations such as those made with lending institutions or lien holders.

Title conflicts typically involve issues which expose uncertainties affecting the ownership of a particular parcel of land. The parcel may be well defined with regard to its location and the deed can be completely void of ambiguity, yet the title itself may be brought into question. The *quiet title action* was designed for the purpose of clearing questions of land ownership. Ownership

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uncertainties originate from numerous sources such as the process of inheritance or *descent*. Ambiguities in wills, trusts, or probate claims can result in clouds lingering over the title. Lack of heirs may revert the property ownership to the state or other sovereign through the doctrine of *escheat*. Complications in partnerships can spawn *partition* actions to settle or divide ownership interests. The outright abandonment of the property, a common occurrence during the westward settlement, resulted in *adverse possession* claims affecting ownership of entire parcels.

Title conflict resolution is typically not within the scope of the land surveyor's duty. While the surveyor may become proficient in title matters and the determination of ownership of a particular property, such determinations are ancillary being not necessary for the determination of boundary locations. The surveyor must, however, have an intimate understanding of title matters in order to properly depict the type of holding, particularly the extent of title holdings relative to easement rights. The surveyor may develop a particular expertise regarding the research of title records.

“The last survey merely resulted in leaving on the public records two separate, independent and inconsistent surveys. Such a public record is fatally indefinite. Instead of establishing permanent boundary lines it results only in confusion. Manifestly a new survey cannot be permitted to be employed as a means of disturbing vested rights acquired, as here, in reliance on an earlier survey (8 Am. Jur., Boundaries, § 102) and much less may those rights be thus disturbed in violation of a valid agreement between immediately adjacent property owners. Were the rule otherwise there could be repeated surveys with the result that each would disturb rights acquired in reliance on a former survey. The very purpose of establishing official permanent boundary lines would be completely defeated.

Before further discussing the trial court's rulings with respect to the surveys we pause to state an established rule. It is that surveys merely establish boundary lines. They do not determine title to land involved. The subject of title is no concern of the surveyor. (Swarz v. Ramala, 63 Kan. 633, 66 P. 649; Wagner v. Thompson, 163 Kan. 662, 186 P.2d 278.)” *In re Moore*, 173 Kan. 820, 252 P.2d 875 (Kan. 01/24/1953)

Determinations of title matters will affect the final depiction of a boundary based upon the surveyor's understanding of the nature of the conveyance. The depiction of an *ownership* boundary (title) is distinctively different from that of a *right of use* for a utility installation or access road

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(right). The surveyor must be aware of the distinctive differences between title, rights, and interests in land to assure proper depiction on the final survey.

Deed Conflicts

It is generally supposed that a proper description of a parcel or tract of land is sufficient only when the terms of the deed precisely enumerate the boundaries. Such supposition is not a requirement imposed by the courts. The purpose of the description is to merely provide a unique *identification* of the subject matter parcel. The description must be capable of isolating the subject property apart from any other parcel. The goal of the description is to iterate *what* is being conveyed; if you want to know *where* the boundaries are, get it surveyed. When the description is successful in accomplishing that goal, it is deemed sufficient.

"The courts are extremely liberal in construing descriptions of premises conveyed by deed with the view of determining whether those descriptions are sufficiently definite and certain to identify land and make the instrument operative as a conveyance. The purpose of a description of the land, which is the subject matter of a deed of conveyance, is to identify such subject matter; and it may be laid down as a broad general principle that a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. It is sufficient if the description in the deed or conveyance furnishes a means of identification of the land or by which the property conveyed can be located. In construing a doubtful description, the court will keep in mind the position of the contracting parties and the conditions under which they acted and interpret the language of the instrument in the light of these circumstances... The maxim is 'that is certain which can be made certain;' and the courts lean against striking down a deed for uncertainty of description of the land conveyed, and a liberal rule of construction will be applied to uphold the conveyance. So, if a surveyor with the deed before him can, with the aid of extrinsic evidence if necessary, locate the land and establish its boundaries, the description therein is sufficient. *16 Am Jur Deeds*, § 262, pp 585-586"

Many terms used in a description become antiquated and their meanings change over time. Other terms may seem to be in direct conflict with each other. It is important to view each description in light of the *circumstances* which surround its creation. Understanding the historical terminologies,

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techniques, and procedures used to create the description are essential to understanding its meaning. Through proper analysis and application of established rules, the meaning and intent of the document can be properly construed. The rules provide a reasoned process which gives precedence to that which is most certain in the description (a *locative call*) over that which is least certain (an *informative call*).

“The court also found applicable well-established rules of priority of references; rules for harmonizing calls in deeds or surveys; and the requirement that the court consider all the evidence. Applying these rules to the evidence, the court determined that the White survey controlled, that it more accurately set forth the boundary, and that it set forth the true boundary. The court found significant Mr. White's conclusion that the white oak referenced in both deeds was the corner boundary of the tracts and Mr. White located the tree. "This monument is a natural or fixed object which is a locative call, served to fix the boundaries." *Ezell v. Duncan*, No. M2003-00081-COA-R3-CV (Tenn.App. 12/15/2004)

There are three basic styles of written descriptions in use in various parts of the country. Some styles are more common than others and some are more often preferred, but each style is appropriate for the individual circumstance and custom as long as it is sufficient. The three most common types of descriptions are: 1) *reference descriptions*, 2) *bounding descriptions*, and 3) *metes and bounds descriptions*. *Reference descriptions* commonly refer to a map or survey which is filed in the record and which identifies a certain tract either by number or letter. A *bounding description* identifies the boundaries of the subject property by referencing locative calls for lines of record such as adjoining properties, streets, or natural features. Bounding descriptions may or may not contain a combination of informative course measurements incorporated with the locative bounding call. *Metes and bounds* descriptions provide a series of consecutive courses delineated by informative measurements and directions with locative calls for physical features which represent the boundaries or corner monuments. Determination of when a locative call controls over an informative call is critical to the proper construction of the intent expressed in the description.

Intent

The intent of the landowners when creating any boundary, if properly ascertained by the surveyor, will provide certainty in the location of the boundary. The landowners' *intent* is found not only

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expressed in the words of the conveyance, but in their mutual understanding of the contractual agreement and their subsequent actions taken as a result of that understanding. The intent of the landowners is paramount to the resolution of conflicts between adjoining parcels. When the descriptions of two parcels are perceived as causing an overlap or gap, study of the landowners' actions and subsequent treatment of the land will often yield important clues as to their intent.

"... Technical rules of construction are not favored, and are not to be so applied as to defeat the intention of the parties; for, as was said in *Witt v. St. Paul & N.P. Ry. Co.*, 38 Minn. 122, (35 N.W. Rep. 862,) such rules of construction, in modern times, have given way to the more sensible rule, which is, in all cases, to give effect to the intention of the parties, if practicable, when no principle of law is thereby violated. Too much stress is not to be laid on the grammatical construction or forms of expression used. The cardinal rule of construction is to ascertain and give effect to the intention of the parties to the instrument; and, to this end, the court must consider all parts of it, and the construction must be upon the entire deed, and not upon disjointed parts. And, if the language is ambiguous, resort may be had to evidence of the surrounding circumstances, and the situation of the parties, if necessary, in order to throw light upon their intention." *In re Application of Waldo T. Mareck to Register Title. Waldo T. Mareck v. Frederick A. Hoffman and Others.* 100 N.W.2d 758, 257 Minn. 222 (01/22/1960)

One must keep in mind that the purpose for the *rules of construction* is to construe the intent of the scrivener. It is not possible for the words of the description to identify all evidence necessary for the determination of its boundaries. The description is but one piece of the evidence which the surveyor must discover before a proper determination can be made. The actions of the landowners before, during and after the conveyance as well as their testimony concerning the boundaries provide the surveyor with extrinsic evidence which must be considered. The surveyor's skill in gathering and interpreting the extrinsic evidence used to construe the intent of the scrivener is critical.

"It is not necessary, and it is not humanly possible, for the symbols of description, which we call words, to describe in every detail the objects designated by the symbols. The notion that a description is a complete enumeration is an instinctive fallacy which must be got rid of before interpretation can be properly attempted. ... *Wigmore's compendium on "Evidence"*, 2nd. Edition, Vol. 5 § 247"

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The surveyor must keep an open mind when running the lines of the description on the ground. Extrinsic evidence discovered during the course of the survey must be considered and evaluated. The ambiguities that arise during the course of the survey may be considered as latent ambiguities which exist within the framework of the deed. Such ambiguities may signal a re-visitation of the deed terms to determine if the evidence recovered is locative or informative in nature.

Ambiguities

The courts have set forth numerous presumptive rules which form a basis for resolving ambiguities found within deeds. These rules are commonly referred to as “*rules of construction*.” The ambiguities found in deeds may be classified in two separate categories; latent ambiguities and patent ambiguities.

Latent ambiguity. A latent ambiguity is a defect which does not appear on the face of the language used. The language is usually clear and intelligible, suggesting a single meaning; however, the introduction of extrinsic evidence reveals a possibility of multiple interpretations or meanings.

Patent ambiguity. A patent ambiguity is apparent or obvious on the face of the instrument or inherent in the uncertainty of the language used such that its effect is to convey no definite meaning.

One of the requirements of a deed is that the description be sufficient to convey a single, identifiable parcel of land. The ultimate test of the description is whether it can be located on the ground by a land surveyor. An ambiguity in a deed description may be resolved by the surveyor by following the appropriate rules established by the courts. Applying *rules of construction*, however, does not constitute reformation of a deed. The description in the deed is followed.

"The intention of the parties is to govern the question of boundary line. Parol and extrinsic evidence may be given to determine that intention, when there is an ambiguity or doubt in the deed itself. An ambiguity or doubt may arise either upon the language of the deed itself, or when that language comes to be applied to the locus. If, when a surveyor attempts to locate upon the ground the description in the deed, elements of uncertainty and doubt are found in the situation, which render the meaning and application of the description in the

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deed uncertain, then there exists an ambiguity or doubt, which may be solved by the admission of evidence of extrinsic circumstances. This case was such as to present such an ambiguity or doubt, and justified the court in admitting evidence of extrinsic circumstances to determine the real intention of the parties. *Waterman v. Johnson* 13 Pick. 261." *Beardsley v. Crane*, 52 Minn. 537, 54 N.W. 740 (1893)

Application of the rules of construction does not mean that a rigid or dogmatic approach should be taken to attribute all evidence to the four corners of the deed. The deed language must be viewed in light of the circumstances surrounding the preparation and the knowledge of the parties at the time of the writing. When latent or patent ambiguities arise, *extrinsic evidence* must be relied upon to assist in the construction. When convincing evidence is recovered showing a mutual mistake by the parties in drafting the document, such extrinsic evidence might be sufficient to justify reformation of the conveyance document language.

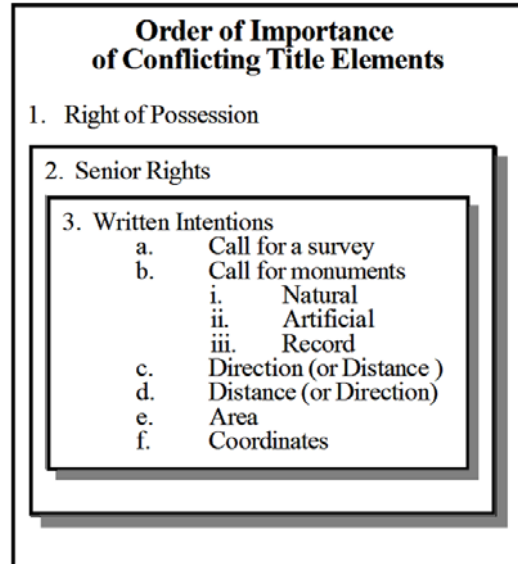
“In general, reformation is an equitable remedy that applies to written instruments of various kinds, including deeds. *Fritz v. Fritz*, 94 Minn. 264, 266-67, 102 N.W. 705, 706-07 (1905). The general legal standard for reformation can be called a "mutuality standard." It requires a showing that (1) there is a mutual understanding or valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) the failure was due to a mutual mistake of the parties or a unilateral mistake accompanied by fraud or inequitable conduct by the other party. See *Yliniemi v. Mausolf*, 371 N.W.2d 218, 222 (Minn. App. 1985) (stating that a mutuality standard is required to support the reformation of a deed); see also *Theros v. Phillips*, 256 N.W.2d 852, 857 (Minn. 1977) (holding that the mutuality standard, required to support reformation of other written instruments, also applies to a deed).” [U] *Jolly v. Deason*, No. C5-01-2177 (Minn.App. 07/23/2002)

It is important for the surveyor to keep in mind that their survey not be undertaken in such a way as to introduce language into a conveyance which isn't included or to neglect language that is included. Such actions might constitute the unwarranted reformation of the language contained in the instrument. The surveyor must remember that extrinsic evidence can only be used to provide clarification when an ambiguity arises; the same extrinsic evidence cannot be used to modify the clearly expressed terms of the conveyance.

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Order of Importance of Conflicting Title Elements

The land surveyor is guided by legal principles in his evaluation of the evidence for a boundary location. As conflicts are discovered between the various forms of evidence, application of the legal principles provides for their proper resolution. One such principle, often referred to as a “*rule of construction*,” is the order of importance of conflicting elements. The order of importance is a presumptive principle which can be used to preliminarily categorize certain calls contained in the written record while recognizing the priority of rights created by a sequence of conveyances. The principle also recognizes the presumptive right of the landowners to stabilize the location of their boundaries through legal recognition of their right of possession. The resolution of conflicts between recovered evidence is one of the most misunderstood problems for both surveyors and lawyers. Conflicting terms contained within the deed or other written conveyance occur frequently. Clearly written and unambiguous expressed language of the written conveyance occasionally is found to conflict with other writings or with the occupation of the land. Understanding of the legal principles at play is crucial to the proper analysis and resolution of any boundary location.



“We discern the meaning of a writing, such as a deed, by looking at its language. See *In re Application of Mareck*, 257 Minn. 222, 226-27, 100 N.W.2d 758, 761-62 (Minn. 1960). It is a long-settled rule that when identifying boundary lines, fixed and known monuments or objects called for in a legal description found in a deed prevail over given courses and distances; the order of application being first, to natural objects; second, to artificial marks; and, third, to courses and distances. *Yanish v. Tarbox*, 49 Minn. 268, 276-77, 51 N.W. 1051, 1051-52 (1892).” *Magnuson v. Cossette*, 707 N.W.2d 738 (Minn.App. 01/17/2006)

The courts have long recognized an order or hierarchy of evidence used in the interpretation of land boundaries. The hierarchy is based primarily upon the variation in the level of certainty that exists with each form of evidence. When terms contained within a deed are found to conflict, the surveyor

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must analyze the terms in their order of certainty and their classification as either locative or informational. A *locative call* is one which is found higher in the list and the informational term is typically found lower in the list. The locative term will have more certainty of recognition and position, the *informational call* will have the least significance. However, if the results obtained by adhering to the ranking of elements is clearly contrary to the overall intent of the deed, the clearly stated contrary intent of the deed will control.

The priorities are based on presumptions about the relative certainty of each type of evidence. There is an underlying fundamental principle which forms the foundation of the rules. When the reasons for adhering to the presumed priority ranking no longer exist, the presumed ranking should fail and the best available evidence should prevail.

Maxims of Jurisprudence

When the reason of a rule ceases, so should the rule itself.

Where the reason is the same, the rule should be the same.

That is certain which can be made certain.

An interpretation which gives effect is preferred to one which makes void.

Interpretation must be reasonable.

Seniority Conflicts

A boundary, by definition, “marks the confines or line of division of two contiguous properties.” How, then, can any two adjoining properties overlap or gap? The appearance of a gap or overlap represents the *discovery* of a boundary location conflict. The resolution of the gap or overlap through the appropriate application of a legal principle represents the *resolution* of the boundary conflict. The surveyor is expected to arrive at a conclusion to the boundary location and to monument their decision on the ground. The boundary location is determined by application of the surveyor’s skill, knowledge and expertise at resolving conflicting title elements contained within the described boundaries according to legal principles.

The boundary defining the farthest extent of the contiguous estates found by the surveyor may not reflect the dimensions found in the written title. The location of the boundary reflected by the title

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dimensions and the location as established by means of agreement or possession should be clearly indicated on the survey by making reference to the record and measured dimensions. The conflicts identified by the survey should be disclosed in a manner which explains the conflicting evidence and the *theory of location* applied by the surveyor to achieve a remedy. This process will often involve the contiguous owners' input and agreement which, when reduced to writing and recorded, will resolve the discrepancies discovered. The survey may then be completed reflecting the agreement.

Differences between the dimensions reflected in the record title and the location of the boundary as measured upon the ground can originate from a variety of causes. The cause may be found in a dimension from an earlier survey or from an estimation of distance between fixed monuments. The cause may be found in a platted block subsequently divided into individual lots. Errors in the early surveys are often discovered by later surveys which employ modern equipment and techniques. The nature of the differences in measurement and the process by which the property was divided often will determine the method used for reporting and distributing the measurement differences.

Simultaneous Conveyances

Parcels of land which are subsequently divided into several parcels can occur under two distinct bodies of law. They may be divided by *sequential* conveyance through a series of conveyances made at different times, or they may be divided *simultaneously* at a single moment. A simultaneous division occurs typically by recording a plat which depicts a division of a single parcel into several tracts which might include streets, alleys, blocks, and individual lots. Each of these tracts are considered to be simultaneously created by the act of filing the plat. Because all of the tracts are created under one act, they are considered to be equal in circumstance and, therefore, equal in right. Other examples of protracted and simultaneously created boundaries are found in wills, court decrees, and much of the fabric of the Public Land Survey System.

Often in such circumstances, monuments may be placed by the surveyor at each intervening block corner, leaving the individual lots defined by a protraction diagram of the lot boundaries. *Protracted lines* are depicted on the plat without the benefit of having been located on the ground by survey or monuments. Any differences discovered between the dimensions of a given block as depicted on

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the plat and those found between the monuments on the ground are generally distributed equally amongst the lots, each being given its proportionate share of any excess or deficiency.

The principle of law designed to resolve discrepancies of excess or deficiency is referred to as the *rule of apportionment*. The apportionment rule is widespread and typically well established in most jurisdictions with a few exceptions, parts of New York being one example. The apportionment rule, while being widely accepted, is nonetheless limited in its application.

“There is not enough land the platted tract to supply all the lots of dimensions given on the plat, and this situation is not controverted. Giving to lot 22 frontage of 75.38 feet results in moving of the other lots 25 feet west, and in the end to completely extinguish or eliminate lot 1. In other words, there is a deficiency of land, and all the lots cannot be accounted for. In such a case the most the court is authorized to do, in the form of correcting the apparent mistake, is to apportion the deficiency among the several lots, and not eliminate one of them entirely, as the trial court in effect did in the case at bar. The owner of lot 1 has as much, and it would seem a greater, right to have his property remain a part of the plat, as the owner of lot 22; the greater right, because lot 1 was first laid out by the owner of the plat and beyond controversy, with the intention that it should be and remain a lot of the subdivision of the dimension indicated. The rule requiring an apportionment of either an excess or deficiency of land in such cases is well settled.” *Barrett et al. v. Perkins et al.*, 130 N.W. 67, (S.C. Minn. 1911)

The apportionment rule is only applied to parcels having equal rights and which have never been established on the ground by survey or subsequent occupation. Once the boundaries have been established through fulfilment of the legal process, the rule of apportionment will no longer apply.

“There is no doubt that relying on original monuments, that is, monuments that can be traced to the original plat, is preferred when conducting a resurvey. *Dittrich v. Ubl*, 216 Minn. 396, 401, 13 N.W.2d 384, 388 (Minn. 1944). Here, the parties agree that original monuments were scarce. Therefore, it was reasonable for Williams to resort to other artificial monuments and occupational evidence when composing his resurvey of the plat. There is a hierarchy of evidence that surveyors rely on when reconstructing the boundaries intended by the original surveyor. Williams looked first to the few original monuments and then to other secondary evidence. Other surveyors testified that this is an acceptable method of conducting a

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resurvey. Given that it is for the trier of fact to judge the credibility of the witnesses, this court must defer to the district court's decision that the Williams' survey most accurately fit the intention of the original surveyor." [U] *Wurdeman v. City of Maplewood*, No. C5-00-435 (Minn.App. 12/05/2000)

Sequential Conveyances

Boundaries created by a series of *sequential conveyances* fall under a different well recognized rule. Because the resulting parcels are subject to the ownership interest of the grantor at the time of each conveyance, a succession of priority is created, each parcel having seniority of right over the subsequent parcel created. When the surveyor is confronted by a conflict in the written title which gives the appearance of either an overlap or a gap with the adjoining parcel, the surveyor is obligated to research the record title to ascertain which of the parcels was created first. It is the conveyance of that senior parcel which created the original boundary. Any subsequent conveyance of the adjoining property will result in a junior parcel. The description of the boundary in the junior deed merely reflects the scrivener's interpretation of the location of the existing senior boundary. If the senior boundary is improperly located, the resulting junior parcel description will have the appearance of creating an overlap or a gap with the senior parcel.

Shortages (Deficiencies or Overlaps)

Overlaps in title are a technical impossibility that are often misunderstood. What is "*described in*" a deed may overlap with an adjoining property, however, what is "*conveyed by*" the deed is limited to only that portion the grantor has title to. The conveyance of title is limited by the senior or junior rights. Any shortage discovered in the amount of land available in a parent tract may result in the appearance of an overlap. The parcel with senior rights will prevail over the junior parcel provided the boundary has not been established by the actions of the landowners. Title to the overlapping portion is vested in the senior parcel. The junior parcel has the appearance of title that cannot affect the prior ownership rights of the senior abutter.

The simple remedy for an apparent overlap between two contiguous parcels is the execution of a Quit Claim Deed which describes the senior parcel or the parcel to which the ownership is to be granted. The description contained in the Quit Claim Deed would encompass the existing record

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description of the adjoining (typically senior) parcel. Release of the overlapping portion by the title holder of the junior parcel by Quit Claim Deed will remove the cloud upon the senior parcel. This method has many advantages over the optional methods as the existing record parcel description is merely substantiated and no appearance of creating new parcels is seen in the title record.

Overages (Excesses or Gaps)

Gaps in title with an adjoiner are similarly a technical impossibility. To “*adjoin*” means to be connected, which by logic makes a gap impossible. The more proper term “*adjacent*” means lying near to but not necessarily touching. Every boundary marks the division of two contiguous estates. Therefore, having a gap between two contiguous estates is not possible. When two parcels do not join or are not contiguous, a third parcel owned by a third party separates them. The parcel may not be shown on a map or recognized by the assessor for taxation purposes, but if the property exists, it exists. No agreement between the adjacent properties will affect the third party interest. Likewise, if the property does not exist, the two properties are adjoining and there is no gap between them. An overage or excess found in the dimensions of a parent parcel, from which the current properties share a common root of title, may result in the appearance of a “gap” between the parcels.

The descriptions of properties frequently contain inaccuracies that, if taken literally, result in the appearance of slight gaps or strips of property along the exterior lines of the original tract. The Supreme Court of West Virginia has addressed this common problem on numerous occasions. Their logic has been relied upon by the Michigan court when considering a narrow strip of land approximately 10 feet wide and 1205 feet long:

“Generally, it will not be presumed that a party granting lands intends to retain a long narrow strip next to one of his lines; but if the courses and distances approximate closely to a line or corner of the tract owned by the grantor -- especially if the description in the deed corresponds, exactly or substantially, with the description in the title papers under which the land is held -- it will be presumed that the lines mentioned are intended to reach the corners and run with the lines of the tract.” *Western Mining & Manfg. Co. v. Peytona Cannel Coal Co.* (syllabus), 8 W. Va. 406.” *Gutha v. Roscommon County Road Commission*, 296 N.W. 694, 296 Mich. 600 (MI 03/11/1941)

This principle is also found expressed by the Kansas courts:

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“In general, the intention of the parties as duly ascertained will determine the question as to the quantity of land conveyed by a deed. So, where an intent to convey the entire interest of the grantor is clear from the whole deed, the instrument should be so construed as to effectuate such intent. Again in such cases the rules apply that, where the description is of doubtful character, the instrument shall be construed against the grantor and in favor of the grantee. There is a presumption that a grantor intends to convey his entire interest, and a deed will be taken to convey the entire property and interest of the grantor in the premises unless something appears to limit it to a lesser interest.” *Brewer v. Schammerhorn*, 183 Kan. 739, 332 P.2d 526 (Kan. 12/06/1958)

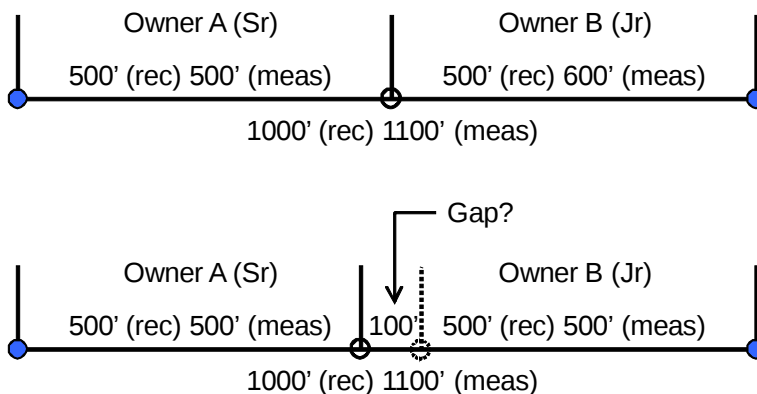
Consider an example of a landowner who holds title to a parcel of land (the parent tract) described as containing 100.0 feet of frontage. The landowner is approached by an individual desiring to purchase the west 50.0 feet of the parcel. They decide to forgo the expense of a survey. The landowner subsequently is approached by a second individual desiring to purchase the remainder of the original parcel. The landowner is clearly aware that he originally purchased 100.0 feet, sold the west 50.0 feet and, therefore must have 50.0 feet remaining. The deed is drawn up describing the remaining east 50.0 foot parcel and the sale is consummated. A surveyor is requested to perform a division of the east parcel and proceeds to retrace the boundaries. Of course he will find that the dimension of the original parent tract to be either long or short of the original 100.0 feet presumed by the original landowner. The result is one of two possible scenarios.

It is readily apparent that the landowners intended to create a boundary with the first senior conveyance. The *senior* deed will describe for the first time the location of the boundary agreed upon by the original conveyance. The subsequent conveyance of the adjacent (*junior*) parcel can have but only two possible intents. The first intent would be to follow the existing line of record created by the senior deed; the second would be to create a new boundary and retain ownership of a third parcel of land separating the first and second parcels.

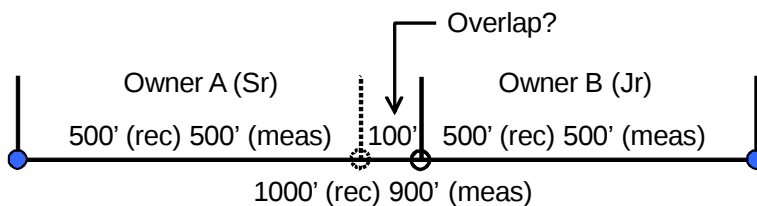
The intentional creation of a third parcel should be reflected in the deed records by the subsequent sale of the third parcel, or by delineation of the strip in the assessor’s records as a separate parcel. Lacking the recovery of evidence that either condition is found in the record, it must be presumed that the intent of the second conveyance was to follow the existing line of record. Such an interpretation is consistent with the presumptions stated in the above cited ruling.

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Surveys often mistakenly disclose errors in deed dimensions which stem from historic parcel dimensions as “gaps” in title. Such a premise fails to consider the *intent* of the landowner and the sequence of conveyances which lead up to the creation and establishment of the boundary. If there is, in fact, an intentionally created “gap” between two parcels, then there must be an intent of the owner to retain ownership of the supposed “gap.” Such an intent by the owner should be proved by the evidence gathered by the surveyor and reflected on the survey. Too often, however, no attempt is made by the surveyor whose duty is thought to simply “disclose the facts” and the resulting surveyor-created “gap” is thrust to the owners to resolve. The attorneys and courts, relying upon the surveyor’s depiction of the phantom “gap” are immediately posed with a question of *title* to the strip of land and seek remedy of the problem in the title doctrines. The remedy is found, not in the title doctrines, but in the common law principles of boundary establishment recognizing the intent of the owners.



A case which typifies the problem is found in the Indiana court unpublished records, *Cook v. Collins*, 857 N.E.2d 30 (Ind.App. 11/17/2006). A 2003 survey of a 40-acre parcel of land identified that the parcel, in fact,



contained closer to 40 ½ acres. The survey depicted a 13-foot wide “gap” between the south 21 acres and the north 19 acres. The record before the court disclosed that in the two parcels were originally part of a single forty-acre parcel and that in 1913, the original owners deeded the south 21 acres to Collins’ predecessor. In 1922, the north part was deeded as containing “19 acres, more or less,” was conveyed to the predecessor of Cook. The trial court, relying upon the depiction of the “gap” parcel on the 2003 survey, recognized that “real estate surveyed in the early 1800’s” was not “precisely forty-acres, but slightly more than that,” and that there “was no evidence that anyone

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knew the gap existed until [name omitted] conducted the 2003 survey.” This realization did not cause any hesitation by the court to believe the survey on its face as determining that a third parcel of land, the supposed “gap,” existed between the parcels. The trial court further recognized in its findings of fact that:

“[T]his quarter-quarter section [which includes the Cook and Collins parcels together] is not perfect, and in fact, it has probably a half acre more than a perfect forty acres. So as a result, one party has always owned that nineteen, and the other has always owned that twenty-one. And there's a gap in there that no one has ever owned. If I rule that way, someone is going to have to file an action to quiet title on this gap of land going back . . . giving notice to all the heirs since 1920. . . .”

The court turned its attention on who the owner of this parcel was. In order to prove ownership to the property by deed, the parties needed to present evidence that their deed included the disputed strip of land. According to the survey, neither parties deed included the “gap,” so the parties failed in their burden to prove their ownership by deed. The court then turned to the only argument left to prove title which was adverse possession which, in Indiana, requires payment of taxes accompanied by occupation and control with intent to claim ownership.

“No one has paid taxes on that gap. [Larry Cook]'s paid taxes on his eighteen point whatever acres, but that doesn't include that gap. I'm not arguing with you, Mr. Cook. I'm just telling you, no one has paid taxes on that gap. Period.”

Neither party was able to successfully prove to the court that they had paid taxes on the disputed strip, so they were sent home with the issue of ownership unproven. No judgment of ownership was granted to either party. Upon review by the Indiana Court of Appeals, the trial court’s “non”-ruling regarding unproven ownership of the “gap” parcel, was affirmed with slight hesitation found in a footnote which stated:

“We agree with the trial court that neither party has paid taxes on the gap. We note, however, that where the parties who own adjacent parcels have paid real estate taxes according to the tax duplicates, the payment of taxes on disputed real estate which lies along the common property line usually cannot be shown. The gap does not appear in the public records of Dubois County. Both parties paid taxes on their respective parcels, but the gap was not

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included on either party's tax duplicate. Thus, the parties are on equal footing vis-à-vis the payment of taxes on the gap. As our supreme court has observed, legal descriptions of real estate are "usually sketchy and inaccurate." *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573, 575 (Ind. 1955). This is especially true with respect to rural real estate."

The Wisconsin courts, however, have had occasion to take a different view by applying their more equitable powers to resolving a mix of metes and bounds descriptions of potential lots and occupational evidence. The case of *Pavela v. Fliesz*, 26 Wis.2d 710, 133 N.W.2d 244 (03/02/1965), began with the division of a parcel of land owned by a common grantor in March of 1948 described as being 112.66 feet (east-west) by 40 feet (north-south) "being known as Lot Eighteen (18), Block Twelve (12) of the First Addition to Kenosha Center, when same is placed on record." In May, 1948, the owners conveyed the north adjoining parcel described as being 113 feet (east-west) and 41 feet (north-south), "being known as Lot Seventeen (17), Block Twelve (12) of the First Addition to Kenosha Center, when same is placed on record." The northern parcel is described as located 256.75 feet southerly from the south line of 50th Street, while the southern parcel is described from a quarter corner nearly 1300 feet distant, leaving an unconveyed strip of the original parcel 2.55 feet in width which the court found was not intended to be retained by the original owner.

No map of the First Addition to Kenosha Center was ever recorded. An unrecorded map of the area entitled "Kenosha Center," in the possession of the city assessor since at least 1936, was presented at trial designating the area as "First Addition." The map depicted lot 17 as 41 feet wide, the same width recited in the metes and bounds description, however, lot 18 was depicted as being 42 feet wide, two more feet than described in its metes and bounds description. If the map were deemed incorporated into the descriptions, the widths of 40 feet and 42 feet would be so incorporated as the general, though not universal rule is that the plat (the survey) would take precedence over the description. There was no evidence, however, that the grantors or grantees had actual knowledge of the map.

Relying upon its "equitable powers," the trial court determined to divide the 2.55-foot strip equally between the parties. The court reasoned that "such a division of land unintentionally omitted from conveyances of adjoining properties is somewhat analogous to the apportionment of discrepancies between the actual measurements of a subdivision and the measurements of the lots therein as shown

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by the recorded plat.” Apparently, the a fence maintained as a convenient enclosure for a small child, allowed the court to apply the “Solomon Principle” to “split the baby in half.”

Location Conflicts

The conveyance of a portion of a parcel of land by a landowner is presumed to follow a set pattern of events. The conveyance requires the entering of a contractual agreement between the buyer and the seller. This agreement is somewhat unique in comparison with the typical formation of an agreement. The contractual agreement contains certain necessary elements. It is essential to the existence of a contract that there be an offer, an acceptance, an assent or “meeting of the minds, a sufficient cause or consideration, and execution or fulfillment.

- (1) an offer;
- (2) an acceptance;
- (3) an assent or “meeting of the minds”;
- (4) a sufficient cause or consideration; and
- (5) execution or fulfillment.

The typical agreement is a two-party document which requires the signature of both parties forming a mutual covenant. The instrument of conveyance for a land transaction, however, contains the signature of only one party, the grantor. The reason that the grantor’s signature is the only one required is that the grantor is in complete control of the transaction. It is the grantor who determines the price of the sale and it is the grantor who determines the placement of the boundaries of the parcel being sold. The grantee does have the ability to negotiate the sale price or to negotiate the size of the parcel being purchased; it is the grantor, however, who has the ultimate control over the final conditions of the property transfer. It is for this reason that the terms of the conveyance document are interpreted against the grantor.

The grantor and the grantee are presumed to have entered into the final agreement with full knowledge of the location of the boundaries of the parcel. They have, in the normal contractual sense, entered into a “meeting of the minds” and the agreement is formed. The conveyance document is prepared which identifies the parcel of land being conveyed, the consideration is exchanged, and the document is executed and delivered.

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Practical Construction

The courts presume that, in the process of negotiation and assent, the parties have had opportunity to enter into a complete understanding of specifically what is being exchanged. They have taken the opportunity to identify the proposed boundaries on the ground by the placing of monuments, a description of the proposed boundaries is prepared and placed in the conveyance document, and following the exchange of consideration, the document is executed and the transaction completed. Both parties are presumed to be fully aware of the location of the boundaries of the parcel on the ground. It is also presumed that any subsequent occupation is made in accordance with the mutual agreement. This presumption may be overcome by evidence to the contrary, however, absent such evidence the presumption will prevail.

Upon completion of the title transfer, the grantee may proceed to enter into possession of the parcel and to erect improvements. These improvements are located with reference to the boundaries established and made known to both parties prior to the transaction. Fence lines are erected along the monumented boundaries and buildings are constructed with reference to the boundaries and local set back ordinances. The actions of the parties involved from the time of the initial assent to the period of occupation are expected to be made in accordance with the agreement and form the trail of evidence which the retracing surveyor may recover and consider. Such actions are found to result in a *practical construction* of the intent of the parties upon the ground.

“To discover the intention of a grantor of land, the district court may consider, among other things, "the facts and circumstances attending the execution of the deed, the practical construction of the deed by the parties and their grantees, and the preliminary negotiations of the parties." *Sandretto v. Wahlsten*, 124 Minn. 331, 334, 144 N.W. 1089, 1090 (1914); see also *Cannon*, 44 Minn. at 298, 46 N.W. at 358 (stating that the district court may "place itself in [the grantor's] place, and then consider how the terms of the instrument affect the subject-matter").” [U] *Winskowski v. Bruss*, No. A07-1846 (Minn.App. 07/29/2008)

The monuments are often destroyed during the construction of the occupational improvements. Many landowners will remove the monuments and perpetuate their position by erecting fence corner posts where they once stood. In such a case, the fence line or post coupled with the testimony of the installer will be conclusive evidence of the position of the intended boundary location.

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Unfortunately, the retracing surveyor is typically not privy to such direct evidence after the property has undergone one or two conveyances and the original landowners or the fence constructor are no longer available.

The loss of direct evidence does not change the fact that the improvements were constructed in accordance with the original monuments. The simple fact remains but is more difficult to prove. Such is commonplace when retracing old boundaries. Time fades all evidence but the fading or loss of evidence does not result in the fading or loss of title or its boundaries. The boundary still remains as legally defined on the day of its creation; its location just becomes more difficult to prove.

The retracing surveyor must look for additional evidence which may corroborate the position of the improvements. Such *corroborative evidence* may be found in the harmony of the improvements with those placed on other boundaries compared to the configuration of the boundaries identified on the original conveyance document. The proximity of the age of the improvements compared with the date of the original conveyance may also provide sufficient evidence to substantiate the original boundary location. The retracing surveyor often will look to historical records such as aerial photos, testimony of prior landowners, building permits, or site plans which may reveal the location of improvements relative to the boundaries.

When the *preponderance* of the evidence recovered suggests that the improvements were erected with reliance upon the original survey monuments which best express the original intent of the parties, the original boundaries may be reestablished in accordance with the evidence. The boundary location is not one based upon any form of occupational boundary or subsequent agreement, but is based upon the recovery of best available evidence remaining of the original intent. The boundary recovery is a process of retracement of the survey techniques and subsequent reliance upon them which establishes the original boundary as intended by the initial parties.

Mistakes

The original grantor and grantee often enter into a mutual agreement based upon mistaken or erroneous information or a misrepresentation or fraud. Such misinformation may result in the establishment of a boundary which conflicts with the mutual intent of the parties. From the

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contractual perspective, there was sufficient meeting of the minds, however, both minds were equally dissuaded by the misinformation and the subsequent agreement results in a mutual mistake.

Upon discovery of the mistake or fraud, the original parties are not bound by the mistake and may modify the original conveyance to correct the deficiency. The modification of the original agreement requires recognition of the mutual mistake by both of the original parties and a mutual understanding as to the effect of the mistake. The parties can “open” the original conveyance document and “reform” the agreement to reflect their true intent. The *reformation* is not a process which is intended to alter the original agreement, but is one which alters the words of the document to reflect the original agreement.

“A written instrument may be reformed if the following elements are proved: (1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and; (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party. *Owatonna*, 353 N.W.2d at 230, (citing *Nichols v. Shelard National Bank*, 294 N.W.2d 730, 731, 734 (Minn. 1980).” *Yliniemi v. Mausolf*, 371 N.W.2d 218 (Minn.App. 07/02/1985)

When one of the parties refuses to recognize the mutual mistake, the other party may seek remedy in court under a claim of reformation based upon the mutual mistake. The burden of proof of the mistake will be upon the challenging party but, if proven, the court can order the reformation of the original conveyance.

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Resolving Boundary and Title Problems

Past and Present Views of the Surveyor's Role

The surveyor's role in society has changed dramatically during the settlement and development phases of our country. The surveyor's role during the settlement and homesteading process included the explorer, the mapper, and the one chosen to go before the settlement and to bring order to its lines and occupation of its claimants. The early surveyor played a distinct role in establishing land title records by locating, surveying and describing the boundaries established by the landowners. He worked intimately with the landowners, encouraging settlement of their disputed land claims, and documenting the results.

During the development phase of our nation, the surveyor's role became one of a more technical process of laying out roads, infrastructure improvements, and supplying the engineer with accurate data from which designs could be contemplated. The advancements of technology coupled with necessity encouraged refinement of the surveyor's practice. While technological advancements have allowed more precision to rule the surveyor's duty, the result has more recently exposed errors of the past creating confusion and uncertainty regarding long established boundaries.

The future role of the surveyor is made even more apparent as the values of land and costs of litigation increase. The landowner can no longer afford the expenses required to litigate a dispute over a boundary discrepancy. Alternative means of dispute resolution are required to fulfill the needs of our present and future society. The land surveyor's role in that future society will undoubtedly require the surveyor to be more intimately involved in the legal aspects of boundaries and the application of the legal principles designed by the courts to resolve uncertainties, disputes and doubts.

The authors of the third edition of *Evidence and Procedures for Boundary Location*, 3rd Ed., made the following statement:

Surveying should be considered to be a combination of three separate and distinct areas: technical, legal, and administrative, professional, or business. Although each of these is

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separate, they have a common area of overlap in which all three are interrelated (see Figure 1.1).

In the 4th Edition of *Evidence and Procedures*, the authors added the following observation:

What the authors do see is that the surveyor of tomorrow will be more closely oriented toward the legal aspects.

As the surveyor becomes more involved in the legal aspects of boundary conflict resolution, areas once observed as a conflict between the three disciplines of surveying are being found as areas of opportunity. The opportunities available to the surveyor are not new opportunities, nor are they new discoveries of application for the surveyor's knowledge. They are opportunities which early surveyors were deeply involved in and were active participants.

As the development of the nation progresses, land use restrictions rise, and complex regulations are enacted, the surveyor's knowledge, education, and expertise in these areas must increase. The surveyor is less often viewed as the frontiersman of an undeveloped region, but as taking on a role more closely involved in the legal profession as a team player in the resolution of boundaries and development project approvals. The surveyor's knowledge in these arenas is crucial, not only in documenting the resolution of boundary conflicts, but also assisting in their resolution.

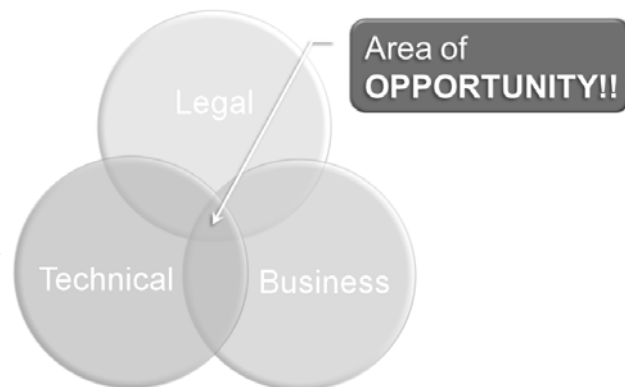


Figure 1.1

The surveyor's knowledge must encompass the rules and procedures that the court utilizes in determining the position of a boundary. The surveyor already uses the same processes as the judge and jury to reach the ultimate conclusion of the boundary location. The courts have established the rules; the surveyor must apply the rules to the unique facts as each case admits and expresses his opinion as to the location of the boundary.

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Chief Justice Cooley pointed out the importance for the land surveyor to follow the rules of the court when determining land boundary locations. He stated that:

“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 ... 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.”

Types of Evidence

Just as in the courtroom, the surveyor must begin by gathering evidence. The surveyor must look for written or record evidence, verbal evidence in the form of oral testimony and physical evidence. The surveyor then analyses the evidence, establishes the facts, applies certain laws and rules and arrives at a conclusion as to the location of the boundary. The surveyor in many ways acts as the judge and the jury where matters of boundaries are concerned. What boundaries are is a matter of law for determination by a judge; where they are is a matter of fact for the determination by the jury (*11 C.J.S.*, §118). The surveyor, when he expresses his professional opinion concerning the location of a boundary, is relied upon by the landowners to have properly performed the level of research necessary to reach a proper conclusion. There are three basic types of evidence available to the surveyor and the court for identifying the location of boundaries. All evidence can be classified as either *demonstrative*, *documentary* or *testimonial*.

Demonstrative Evidence

Demonstrative evidence consists of tangible items as distinguished from testimony of witnesses about the items. It is evidence from which one can derive a relevant firsthand impression by seeing, touching, smelling, or hearing the evidence. This evidence is gathered from the physical realm of the surveyor. The realm where he is most comfortable. The physical evidence deals closest with certainty in the mind of the surveyor. No one can argue whether the fence line is there or that the 1 inch iron pipe is there. They can be seen, touched, and measured.

Among the most frequently utilized types of demonstrative evidence are maps, sketches, illustrations, and diagrams prepared as exhibits. They are generally admissible on the basis of

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testimony that they are substantially accurate representations of what the witness is endeavoring to describe. Field notes and sketches prepared by the surveyor are demonstrative of the surveyor's direct observations of the physical features and conditions.

Photographs are viewed as a graphic portrayal of oral testimony and become admissible when a witness has testified that they are correct and accurate representations of relevant facts personally observed by the witness. The witness often needs not to be the photographer but should know about the facts represented or the scene or objects photographed. Once this knowledge is shown, the witness can state whether a photograph correctly and accurately portrays those facts.

Documentary Evidence

Documentary evidence is any evidence in written form. It may include business records such as phone conversations, meeting notes, file memoranda, the surveyor's notes, or witness statements reduced to writing. Any information in a written form related to the boundary is considered documentary evidence. Documentary evidence is generally admissible if the documents are maintained in the normal course of business.

The most common types of documentary evidence gathered by the surveyor are in the form of deeds and maps of prior surveys. The surveyor must be certain that the deeds and maps will be admissible and that their originator can be contacted, if available. This one simple step, often overlooked by surveyors, will tend to yield a wealth of direct evidence which may prove to be indispensable in interpreting the record or locating the original position of the boundary. This step is required by the court for the admission of the evidence as long as the declarant is available.

Testimonial Evidence

Testimonial evidence is that given by a competent live witness speaking under oath or affirmation. Land surveyors are frequently called on to give testimonial evidence regarding the nature, scope, conduct, and results of their survey. It is incumbent on all witnesses to respond completely and honestly to all questions.

Testimonial evidence gathered by the surveyor is often the most overlooked form of evidence. It is viewed by the court as the most substantial evidence presented during a trial. Nothing will make

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the surveyor look more incompetent than to express his opinion as to the location of a certain boundary only to have the location contradicted by the original landowner providing testimony as to the location of the original monument that he witnessed being placed in the ground. Credibility of the witness must be considered when gathering the testimony of the interested parties.

The Honorable Justice Walter R. E. Goodfellow, in the Supreme Court of Nova Scotia at Truro, Nova Scotia said regarding the credibility of one witness:

“I found [the witness] to be lacking in credibility. He described himself as a sneaky, sly fox. He acknowledged he set a "trap" by describing his western boundary as the red line. Such was a deliberate false misrepresentation made by [him] to Blackburn the surveyor he originally intended to engage and the deception was advanced to others.... Where there is a conflict with the evidence of [his], I accept the contrary evidence and in particular I have a strong preference for the evidence of people such as Mr. Lavin, Austin Langille and Mr. Patriquin.” *Lavin v. Lessard*, 2002 NSSC 016

Land surveyors often overlook a very important step in gathering testimonial evidence. The surveyor’s conversations with the client and prior landowners are an indispensable part of the totality of evidence. All witness statements should be properly noted in the surveyor’s diary. Witness statements may be written and signed by the witness, dated, and witnessed by a third party when possible. It is important to obtain the full name, address, and telephone number of the witness. The land surveyor in many jurisdictions is authorized to execute oaths or affirmations. If not, the land surveyor should take the necessary steps to become a notary for the purpose of witnessing title transactions and for notarizing witness statements. If the witness is unwilling to sign a written statement, the surveyor should record his own recollection of the statement and make a record of the witness’s reluctance to sign the statement.

The reconnaissance phase of the survey is the most critical. The information gathered by the surveyor through conversations with the client and the neighbors can have direct effect upon the successful completion of the task. Aside from the marketing advantages gained by speaking with the neighbors, and aside from the necessity to speak with them regarding access issues and informing them that the survey crew will be working in the area, there is critical knowledge that the neighbor may have regarding the boundary locations which may save the surveyor hours of research

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and investigation, and may save him from eventual embarrassment when the final determination is made. The surveyor who knows the expectations of the client and the neighbors as to the results of the survey is at a great advantage. Once the surveyor completes his investigation and determines his professional opinion regarding the boundary location, he will instantly be aware if the opinion is in conflict with their expectations. If the determination aligns with the expectations, the surveyor is safe to monument and complete the survey. If not, the surveyor must step back, reassess the various opinions, and seek a resolution before completing the survey.

Theory of Location

Once the surveyor has gathered the evidence necessary to make a determination of the boundary location, the evidence must be documented, analyzed, and compared. The analytical process the surveyor undertakes is in accordance with the same rules which govern the jury in a trial. It is the jury's general duty to determine, from the evidence presented, what factual determinations can be reached. The facts of the case are critical to the outcome. The factual setting sets the stage for the application of the legal principles involved which determine the outcome or the result of the process. The result – the determination of the boundary location – is controlled by the legal *theory of location* applied by the surveyor to reach the ultimate conclusion depicted on the survey. The surveyor's knowledge, skill and ability to understand and apply the appropriate theory of location is crucial.

Rule 12 of the Indiana Administrative Rules defining competent practice for land surveying defines the Theory of Location as:

865 IAC 1-12-2 (m) "Theory of location" means applying: (1) federal laws, including 43 U.S.C. 751 through 43 U.S.C. 775; (2) state and local laws; and (3) court precedent; to establish the position of real property corners.

The surveyor, at a minimum standard of competence, is expected to know, understand and apply the federal, state, and local statutory laws as well as the common law principles established through court precedent which establish the positions of land boundaries. A failure to understand and apply these principles (laws) will result in a failure to determine the true boundary location. Such a failure can result in a direct impact upon the public and the stability of land boundaries established in accordance with the rules of law which govern their establishment.

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Establishment Doctrines

There are several fundamental doctrines which are utilized for the purpose of resolving conflicting evidence when determining boundary locations. These doctrines have been developed by the courts to provide instructions for the landowners to encourage resolution of uncertainties, doubt or disputes regarding their common boundaries. Application of the doctrines provides the surveyor with the rules of law which can be applied to determine the likelihood of a possessory interest establishing a boundary. A boundary established by possessory rights will supercede any boundary established by a written document, by a senior right, or by an original survey monument.

The rules of law which form the foundation of the boundary establishment doctrines vary from one jurisdiction to another. Their similarities, however, form a common thread of elements making several doctrines universally recognized. The doctrines can be reduced to four basic types.

Minnesota courts define a slight variant from the typical doctrines by placing the oral agreement, implied agreement, and equitable estoppel doctrines under an umbrella doctrine of practical location, rather than holding practical location as a doctrine separate and distinct from the others.

1. Oral Agreement
2. Implied Agreement
3. Equitable Estoppel
4. Practical Location

“In Minnesota there are only three ways in which the practical location of a boundary may be established:

(1) The location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations; (2) the line must have been expressly agreed upon between the parties claiming the land on both sides thereof and afterward acquiesced in; or (3) the parties whose rights are to be barred must have 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.” *Zahradka v. Reiling*, 472 N.W.2d 153 (Minn. App. 06/0/1991)

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It is important for the surveyor to understand that the boundary establishment doctrines are applied, not for the purpose of proving ownership to the adjoining property, but for the purpose of determining the location of the established boundary. *The establishment doctrines do not affect title to property, only the location of the boundary between two adjoining properties.* Every boundary determined by the surveyor has been established by the landowners through compliance with one (or more) of these legal principles. An understanding of the fundamental concepts upon which these doctrines were constructed will assist the surveyor, lawyer and the courts in understanding their application and will result in correct determinations of the boundary location sought. Any boundary, whether established by deed, by survey, or by occupation, can be proved as established under the appropriate rule of law.

Statute of Frauds

The statute of frauds, enacted by the English Parliament in 1677 (29 Chas. II, c. 3) has required that all conveyances affecting rights or interests in real property are to be documented in writing. Here in America, as early as 1627, the New England colonists required all transfers of property to not only be made in writing, but to also be duly recorded in the public records. The written record minimizes confusion in the conveyance of title by providing a resource for refreshing faded memories and overcoming misrepresentations and acts of fraud common in the ancient days of fiefdom. The recording process works as a secondary assurance through statutory encouragement of recording the conveyance document in the public records. Proper recording of the document assures constructive notice to any subsequent purchaser and provides protection to the *bona fide purchaser*.

513.04 CONVEYANCE OF INTEREST IN LAND EXCEPT UP TO ONE-YEAR LEASE.

No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the parties creating, granting, assigning, surrendering, or declaring the same, or by their lawful agent thereunto authorized by writing.

The Statute of Frauds exists in the legislative statutes of all 50 states and Canada in one form or another. The purpose of the Statute of Frauds is to encourage the formation of written contracts affecting real property to memorialize agreements between parties. The statutes include a wide

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variety of contracts including the transfer of landownership. The requirement for a written conveyance of property ensures the ability to prove ownership and is further enhanced by the ability to record the transfer in the public records.

“A conveyance of land must be in writing to be valid. Minn. Stat. § 513.04 (2008). To satisfy the statute of frauds, a contract must, among other things, identify the land to be conveyed with reasonable certainty. *Doyle v. Wohlrabe*, 243 Minn. 107, 110, 66 N.W.2d 757, 761 (1954). A contract for the conveyance of land "need only provide that degree of certainty which is reasonably necessary to identify... the land to be conveyed." *Id.* at 107, 66 N.W.2d at 759.” [U] *Ed Cave & Sons, Inc. v. City of Two Harbors*, No. A08-1888 (Minn.App. 09/17/2009)

Most Statutes of Fraud contain an exception for conveyances made by “operation of law.” While the statutes do prohibit the sale of lands unless by written instrument, they do not prohibit two landowners from entering into a mutual agreement to settle a dispute or uncertainty that arises with regard to their common boundary. The boundary agreement doctrines are not prohibited by the Statute of Frauds.

“It has been held very generally, that when there has been an honest difficulty in determining the lines between two neighboring proprietors, and they have actually agreed by parol upon a certain boundary as the true one, and have occupied accordingly with visible monuments or divisions, the agreement long acquiesced in shall not be disturbed, although the time has not been sufficient to establish an adverse possession. Where the transaction has not been such as to amount merely to an honest attempt to determine a doubtful line, the authorities have not permitted an agreement to stand which would operate as a violation of the statute of frauds. But where the parties have only tried to find the true boundary, it has been held that the statute was not infringed, and the line was fixed by acquiescence.” [*Smith v Hamilton*, 20 Mich 433, 438 (1870).] [U] *VanBynen v. Burton*, No. 282726 (Mich.App. 04/14/2009)

Whether by a “legal fiction,” or way of a concerted effort of the parties to establish their boundary, the result is the same; the existing boundary common to the parties is fixed in position and their agreement establishing the boundary will be upheld. No transfer of title is made and no new

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boundary is created. The agreement of the adjoining landowners will successfully remove any uncertainty or will resolve any dispute by fixing the position of the boundary between them.

Boundary Agreement Doctrines

Boundary agreement doctrines recognize a remedy which allows the landowners to settle an uncertainty or dispute over their existing boundary. The owners are encouraged to avoid litigation as a means of resolving disputes. If they can work together as neighbors, resolve any ambiguity discovered in their common boundary, the court will not intervene. There are numerous reasons that uncertainty exists. Faulty surveys, inability to measure with precision, destruction of monuments, and the loss of survey records, all can attribute to the presence of ambiguities. Are the monuments recovered the identical monument called for in the conveyance? Are they a proper perpetuation of the former position of the called for monument? Can the boundaries be reestablished with certainty?

The evolution of survey equipment and techniques has undergone rapidly increasing improvements. These improvements have significantly increased the surveyor's ability to measure locations with higher degrees of precision than at any time in history. The same passage of time that resulted in an increase of precision has also resulted in the degradation of the evidence left by the earlier surveyors. It is the protection, recovery and perpetuation of the original monumentation that increases certainty in boundary locations, not precision in measurements. Once the evidence of the original monuments is destroyed, the surveyor and landowners must rely on secondary forms of evidence to reestablish the monument's former position.

The replacement of the original position becomes more susceptible to error as the evidence of its former position fades. This uncertainty may, at times, escalate to an unacceptable degree that requires the landowners to enter into agreement as to the former position of the boundary. The agreement of the landowners is not an agreement to create a new boundary to replace the former; nor is it an agreement to exchange portions of their land or to transfer ownership between the parties. It is an agreement meant to settle the uncertainty that exists in the location of the existing boundary. As such, the agreement will not fall under the purview of the Statute of Frauds and is an acceptable remedy.

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The Wisconsin court had opportunity to canvass the boundary establishment principles as they applied to the 1954 case of *Thiel v. Damrau*, 268 Wis. 76, 66 NW 2d 747, involving missing monuments relied upon by the parties to establish their boundary prior to discovery by a subsequent survey of an error in the boundary placement. Boundary establishment doctrines, being universal in their application, are often applied across jurisdictional lines. The Wisconsin court looked to the courts of New York, Michigan, Idaho, and Oklahoma to understand the applications of the various doctrines used to establish boundary locations. The court balanced a variety of issues involving practical location and parol agreement in light of continued possession and acquiescence.

The agreement doctrines are founded on common law principles which have been codified by state statute in some jurisdictions. The doctrines are applicable in the vast majority of jurisdictions in the states, the common exception being those regions under the *Torrens* title system. The Torrens title system often requires that every boundary be established by a registered survey and provides for a method of establishment by adjudication process. The surveys are registered in the public record and are perpetually updated with each consecutive survey. The availability of survey records and the public maintenance of the record system decreases the likelihood of uncertainty or doubt in the location of any particular boundary.

Parol Agreement

When an uncertainty or dispute arises, the landowners may enter into a parol (oral) agreement to settle the uncertainty. The *oral agreement* will be upheld in a court of law, however, litigation of oral agreements is rare. Disputes over oral agreements are difficult to litigate as they typically are reduced to a he-said she-said argument. One party may complain that the agreement settled a right of use rather than a fee interest. Another party may deny the very existence of the agreement altogether. Proof of the agreement is reduced to circumstantial evidence and becomes speculative.

- An Oral Agreement
- Between Adjoining Landowners
- Settling a Boundary of Uncertainty or Dispute
- Executed by Actual Location of the Boundary

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There are occasions, however, when the landowners have rightly entered an oral agreement and continue to report their mutual understanding of the terms of the agreement. Such an agreement is proper and acceptable. The difficulty with oral agreements is that the original parties will eventually transfer the land to another and forget to inform them of the agreement or will take the memory of the agreement with them to the grave. The subsequent purchasers are left with the remnant of the agreement with nothing but faded memories to reestablish the original agreement terms.

"An agreement between adjoining owners as to the location of a boundary line, though merely oral, is not, it is generally conceded, invalid as being within the Statute of Frauds, provided the agreement is followed by actual or constructive possession by each of the owners up to the line so agreed upon, and provided further, that the proper location of the line is uncertain or in dispute; the theory being that the agreement does not, in such case, involve any transfer of title to land, but merely an application of the language of the instruments under which the owners claim. On the other hand, it has been held that, if the boundary line is not doubtful or in dispute, an oral agreement for its change is invalid, this involving an actual transfer of land, within the statute." Tiffany, Real Property (2d Ed.) § 294

The rule of law recognizing the landowners' right to settle any uncertainty or dispute over their common boundary has been long recognized by the courts. The landowners' ability to resolve any uncertainty or dispute over their common boundary is fully recognized if not even encouraged by the court. There is much preference given to the owners when they choose to amicably settle their differences and establish their boundary by common accord, rather than resort to litigation as a solution to their uncertainty or dispute.

The unique and often overlooked distinction with the doctrine of oral agreement is the fact that the passage of time is irrelevant. The parties enter into a contractual agreement orally which has the intended purpose of fixing the location of their boundary and resolving any dispute or uncertainty they share. The fulfillment of that agreement is found in the erection of the fence or marking of the line in accordance with their agreement. The parties have entered into a contract by agreeing to establish the line and the terms of the contract are considered fulfilled when they do what they agreed to do; they make an assertive effort to mark the line in accordance with their agreement. Once the terms of their agreement are fulfilled, the line is established. There is no time element

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required to fulfill their contract. The parties don't have to wait for the line to be accepted. Their agreement, and fulfillment of its terms, are proof of their acceptance and satisfaction.

"Under this theory, a landowner may establish a boundary by practical location by evidence that neighboring landowners expressly agreed on a boundary location and thereafter acquiesced in the boundary line created. *Nadeau v. Johnson*, 125 Minn. 365, 366, 147 N.W. 241, 241 (1914). If the neighboring landowners expressly agree on a boundary, they need not acquiesce for the full 15 years. *Id.* at 367, 147 N.W. at 242. For example, when two adjacent landowners participated in measuring and locating a boundary line, expressly agreed on the dividing line between lots, staked the entire line, and then treated the line as the true boundary line for 10 years, the Nadeau court found that the parties established a boundary by practical location through express agreement. *Id.* But a boundary by practical location through agreement is not established when neighboring landowners, although they expressly agree on the corner dividing their lots, never agree on an entire boundary line. *Phillips*, 281 Minn. at 270-71, 161 N.W.2d at 527-28." [U] *Blanchard v. Rasmussen*, No. A05-474 (Minn.App. 10/11/2005)

The goal of the land surveyor when confronted by evidence of a valid parol agreement is to encourage the landowners to remedy the record by documenting the agreement. As Chief Justice Cooley suggested, "*it is desirable that all such agreements be reduced to writing, but this is not absolutely indispensable if they are carried into effect without.*" The land surveyor may act as a mediator to encourage and assist the landowners to properly document the agreement thereby correcting the record by converting the unwritten agreement to a written boundary agreement. The surveyor has no authority to remedy the record without the mutual consent of the landowners.

Should the landowners refuse to remedy the record, the surveyor can then resort to documenting the agreement by notation on the survey. The surveyor may include a narrative statement regarding the testimony received from the landowners stating the particulars of the parol agreement. The agreed boundary location should be indicated on the survey along with an indication of the record boundary which has been superceded by the agreement if ascertainable.

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Implied Agreement (Acquiescence)

The implied agreement doctrine exists as a remedy to the longstanding occupation line which has been consistently treated as a boundary between contiguous landowners. The landowners may have little or no remembrance of a specific occasion resulting in an oral agreement. Neither of the current landowners may have installed the boundary improvement and can give little or no evidence regarding the origin of the improvement. It may be that the improvement was installed by a former landowner who is no longer available or can not recall the conditions existent at the time the improvement was erected. For whatever reason, the evidence of the origin of the fence line has faded with the memories of the landowners and no clear evidence exists to explain why the fence line is located where it is.

- Occupation to a Visible Line Marked by Monuments, Fences or Buildings
- Mutual Recognition and Acquiescence in the Line as a Boundary
- For a Long Period of Time
- By Adjoining Landowners

Implied agreements have been seen as a legal fiction that is required to bring stability to boundaries established by the landowners most familiar with the original monument locations. The courts have long recognized the inaccuracies of the original surveys and the fundamental right of the landowners to settle the uncertainties in their boundaries. It is presumed that the parties responsible for the erection of the improvement either knew where their boundaries were or, if not, settled the uncertainty through negotiation and agreement. The fence line was constructed where the parties understood the boundary to be. The actions of the landowners are readily apparent as the boundary improvement is there for all to witness. It stands as a memorial to a legitimate agreement that was at one time entered in to by the parties, was consummated, and has been continually honored even though the memory of the agreement has long since perished.

“We have further held in this state that in the absence of evidence that the owners of adjoining property or their predecessors in interest ever expressly agreed as to the location of the boundary between them, if they have occupied their respective premises up to an open boundary line visibly marked by monuments, fences or buildings for a long period of time and mutually recognized it as the dividing line between them, the law will imply an

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agreement fixing the boundary as located, if it can do so consistently with the facts appearing, and will not permit the parties nor their grantees to depart from such line. *Holmes v. Judge*, 31 Utah 269, 87 P. 1009. This rule is sometimes referred to as the doctrine of boundary by acquiescence. In the recent case of *Glenn v. Whitney*, Utah, 209 P.2d 257, Mr. Justice Latimer explained that the rule is bottomed on the fiction that at some time in the past the adjoining owners were in dispute or uncertain as to the location of the true boundary and that they compromised their differences by agreeing upon the recognized boundary as the dividing line between their properties. In *Holmes v. Judge, supra*, we declared that the doctrine of boundary by acquiescence 'rests upon sound public policy, with a view of preventing strife and litigation concerning boundaries' and that 'While the interests of society require that the title to real estate shall not be transferred from the owner for slight cause, or otherwise than by law, these same interests demand that there shall be stability in boundaries'." *Brown v. Milliner*, 120 Utah 16, 232 P.2d 202 (Utah 1951)

The implied agreement doctrine is founded on the principles of acquiescence and repose. The principle of repose recognizes that the landowners tend to accept the locations of improvements. Whether the improvements are located correctly or not, the boundary location is accepted by the landowners and peace settles over the neighborhood. The landowners occupy their land in accordance with the accepted boundaries and erect improvements upon what is perceived to be their property. Once the period of repose has run, no subsequent survey is allowed to upset the peace by supposedly fixing the boundaries where the record position cannot harmonize.

The Minnesota courts have long recognized the theory of acquiring ownership over disputed land by a popular doctrine unfortunately attributed as "Practical Location by Acquiescence."

When adjoining landowners occupy their respective premises up to a certain line that they both recognize and acquiesce in for 15 years, generally they are precluded from contesting that boundary line. *Amato v. Haraden*, 280 Minn. 399, 403, 159 N.W.2d 907, 910 (1968); see Minn. Stat. § 541.02 (2004). Acquiescence requires actual or implied consent to some action by the disseizor, such as construction of a boundary or other use of the disputed property and acknowledgement of that boundary for an extended period of time. *Engquist*, 243 Minn. at 507-08, 68 N.W.2d at 417; *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. App. 1987); see also *Fishman v. Nielsen*, 237 Minn. 1, 7-8, 53 N.W.2d 553, 556-57 (1952) (finding practical boundary by acquiescence when two predecessors in title agreed on a line,

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built a fence on the line, and acquiesced in the line for at least 18 years); *In re Zahradka*, 472 N.W.2d 153, 156 (Minn. App. 1991) (finding that boundary by practical location by acquiescence when disseizor built parking lot on disseized land and disseized made no claim to ownership of land for more than 15 years), review denied (Minn. Aug. 29, 1991).

Although possession of the land is not a prerequisite to establishing acquiescence in a boundary, the disseizor must take some action to demarcate an actual boundary by erecting a barrier or making some use of the land; otherwise there is no identifiable boundary in which the disseized can acquiesce. *Pratt*, 636 N.W.2d at 849-50.

Implicit here is the notion that to demonstrate acquiescence in a boundary location, the line must be "certain, visible, and well-known." *Beardsley v. Crane*, 52 Minn. 537, 546, 54 N.W. 740, 742 (1893); see also *Fishman*, 237 Minn. at 8, 53 N.W.2d at 557 (holding that fence constructed on agreement of two neighbors established practical boundary because it was "known, definite, certain, and capable of ascertainment"). The fence or division need not traverse the entire length of the boundary, however. See *Allred v. Reed*, 362 N.W.2d 374, 375, 377 (Minn. App. 1985) (holding that parties acquiesced in boundary even though fence demarcating boundary did not stretch length of lot), review denied (Minn. Apr. 18, 1985). But when the boundary line is unclear, ambiguous, or contradictory, acquiescence in a particular boundary has not been demonstrated. *Theros*, 256 N.W.2d at 859; see *Phillips*, 281 Minn. at 271, 161 N.W.2d at 528. "There can hardly be an acquiescence in a boundary line that is claimed to be located in several different places." *Theros*, 256 N.W.2d at 859." [U] *Blanchard v. Rasmussen*, No. A05-474 (Minn.App. 10/11/2005)

The evidence available typically proves that the current landowners have mutually recognized that the improvement properly marked their common boundary and that they have each occupied up to the improvement. No contrary evidence can exist that either landowner at any time prior to the running of the required time period was informed of the true location of the record boundary. Knowledge of the true boundary will interrupt the period of acquiescence. Once the landowner is aware of the true position of the record boundary, the Statute of Frauds prevents the continued acquiescence in any other line. The continued acquiescence can be equated to a knowledgeable attempt to transfer title to land without a writing as required by the Statute of Frauds.

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Evidence of knowledge of the record boundary location could be presented in the form of prior surveys or the existence of original survey monuments known by the landowners to represent the record boundary. Once the acquiescence period has run its course while the other elements are fulfilled, the occupation rights have ripened. The subsequent execution of a retracement survey of the record boundary can not contradict the establishment of the line by established right. In a dissenting opinion written by Colorado Justice Kourlis in *Salazar v. Terry*, 911 P.2d 1086 (Colo. 02/12/1996) it was stated that:

“An acquiesced boundary often will not lie on the surveyor's true location. When this occurs, the legal effect of the doctrine of acquiescence is to rewrite the deed or document of title by operation of law to reflect the acquiesced change so that the agreed upon boundary becomes the true dividing line. *Duncan v. Peterson*, 3 Cal. App. 3d 607, 83 Cal. Rptr. 744, 746 (Cal. App. 1970); *Edgeller v. Johnston*, 74 Idaho 359, 262 P.2d 1006, 1010 (Idaho 1953). An acquiesced line "becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location." *Young v. Blakeman*, 153 Cal. 477, 95 P. 888, 890 (Cal. 1908). "Thus, if the distance call in the deed is '500 feet,' it may henceforth be treated as if it read '517 feet' or '483 feet,' and every future deed of the land which copies or incorporates the original description will also be so read." Roger A. Cunningham *et al.*, *The Law of Property* § 11.8, at 765 (1984). See also Olin L. Browder, *The Practical Location of Boundaries*, 56 Mich. L. Rev. 487, 530 (1958).”

Equitable Estoppel

Equitable estoppel is a boundary establishment principle involving a representation made which becomes binding if the reliance on the representation results in a detriment or injustice. The representation is typically founded on either a mistake or fraud. The reliance must result in substantial costs for the boundary to become fixed. The term “substantial” is rather subjective and varies in a case-by-case situation. What may amount to substantial costs in one case may not be considered substantial in another. Situations involving the establishment of boundaries by the doctrine of equitable estoppel are somewhat rare.

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- Misrepresentation by Record Title Holder
- Reliance in Good Faith by Adjoiner
- Substantial Costs Incurred

"The equitable doctrine of estoppel by conduct, which is altogether different from technical legal estoppels in pais, so far from being odious, is a favored doctrine of the courts. Equitable estoppel, in the modern sense, arises from the 'conduct' of a party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. ... While originally the creature of equity, it is now thoroughly incorporated into the law, and is as available in a legal action as in an equitable one; and while at one time the courts hesitated to apply the doctrine so as to give or divest an estate or interest in land, as being opposed to the letter of the statute of frauds, yet it is now well settled that a person may by his conduct estop himself from asserting his title to real property, as well as to personalty, although, as applied to the former, the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity." *Poksyla v Sundholm*, 106 N.W.2d 202, 259 Minn. 125 (11/25/1960)

The Oregon court has identified two prongs attributed to the doctrine of estoppel; estoppel by reason of long-continued tacit acquiescence and estoppel by an affirmative action coupled with substantial reliance. The case of *City of Molalla v. Coover*, 192 Or. 233, 235 P.2d 142 (Or. 08/14/1951), contains a thought provoking discussion of the nuances of the two prongs with regard to private improvements encroaching upon public rights of way. The court expressed its hesitancy to apply the prong of tacit acquiescence, overruling its 1903 decision in *Schooling v. Harrisburg*, 42 Or. 494, 71 P. 605. The court stopped short of determining "whether estoppel may in exceptional cases be predicated upon affirmative action by a city or its officers need not be and is not here decided."

Practical Location

The doctrine of practical location is somewhat akin to the doctrine repose. It can be considered the "rule of last resort" regarding boundary dispute doctrines. The doctrine is founded somewhat on

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the principles of equity and good faith reliance, often resorted to as a matter of acceptance merely because it has been accepted. *Practical location* arises when the location of the boundary improvements have always been believed to be on the true line. No one has questioned the positions of the improvements and no dispute has arisen. The parties have lived and continue to live in peace

- Conveyance Between Parties
- Improvements Established at or Near the Time of Conveyance
- Improvements Reflect the True Intentions of Parties
- Believed to be on the True Line

and harmony, yet for some inexplicable reason, the improvements are located incorrectly. Often the evidence is simply lost with time.

Both Jonkers and Adams relied on "the law as set forth by Justice Cooley more than 100 years ago" in *Diehl v Zanger*, 39 Mich 601 (1878) (Cooley, J., concurring):

Nothing is better understood than that few of our early plats will stand the test of a careful accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were not subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. [Id. at 605.]

When it comes to land surveys, monuments control course and distance. Id. Surveyors should attempt to ascertain "the actual location of the original landmarks" and "if those were discovered they must govern." Id. However, where "they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines" Id. Importantly, "[a]s between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are." Id. at 605-606.

Under this standard, the trial court was correct in using the fence line as the property line, which in turn implied that the corner fence post was in fact the correct position of the quarter corner in question. There was no monument indicating where the quarter corner was located. Occupational evidence, in this case the fence line, was the best evidence that could be used

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to determine its location. If the trial court had found that the quarter corner should be set 50 feet south of the Remon Committee's corner, where defendants contend it should be, other property owners not directly involved in this litigation would be affected, creating the very "consternation" that Justice Cooley said that "no law can sanction." Id. at 605." [U] *Greenview Associates, LLC v. Pettis*, No. 279109 (Mich.App. 03/10/2009)

The courts in Minnesota have taken a similar view of resurveys and their affect on boundaries:

"Resurveys for the lawful purpose of determining the lines of an old survey and plat are generally very unreliable as evidence of the true lines. The fact, generally known and quite apparent in the records of courts, is that two consecutive surveys by different surveyors seldom, if ever, agree; and the greater number of surveys, the greater number of differences and disagreements will occur. When two surveys disagree, the correct one cannot be determined by still another survey. It follows that resurveys are of very little use in such a case as this, except to confuse it. *City of Racine v Emerson*, 55 N.W. 177 (Wis. 1893)" *Dittrich v. Ubl*, 13 N.W.2d 384, 216 Minn. 396 (02/04/1944)

One of the common presumptions undertaken by the doctrine is that the parties of the original transaction were fully aware of the boundaries of the parcel being conveyed. The parties likely had a survey performed and marked the lines upon the ground. Through some mistake or inadvertence, the record failed to coincide with the markings and the improvements were erected in a position other than described in the conveyance document.

Some key elements to look for when recognizing evidence of *practical location* are:

- (1) Age of the improvements in proximity with the date of the original conveyance;
- (2) geometry of the original parcel relative to the improvements along successive boundaries;
- (3) harmony of improvements along successive boundaries of adjoining parcels;
- (4) lateral displacement of improvements along successive boundaries of the subject or adjoining parcels; and
- (5) rotational displacement of improvements along successive boundaries of subject or adjoining parcels.

The common evidence recovered indicates a harmony with the overall geometry of the improvements when compared to the record. The boundaries occupied by the improvements

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generally conform to the boundaries described in the record. The improvements indicate either a lateral or rotational displacement of the parcel and perhaps neighboring parcels. The conditions will reflect those discussed previously under the topic of *Practical Construction*.

The doctrines of *Practical Location* and *Practical Construction* are quite similar in their presentation, both favoring the same result but under slightly variant conditions. The doctrine of Practical Construction is a means for explaining terms contained in the title document through the actions of the original parties to the conveyance. The doctrine of Practical Location relies solely upon the implications drawn from subsequent actions by subsequent or unknown parties acting outside of the original document. Where the original conveyance document resulted in some latent ambiguity, subsequent parties resolve that ambiguity through a good faith effort to locate the boundaries according to their perceived understanding of the intent of the original parties.

“If [the original monuments] are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known. *Stewart v. Carleton*, 31 Mich. 270. As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are....” *Hansen v. Stewart*, 761 P.2d 14, (Utah 1988)

“The courts have recognized such boundaries because the early surveys in the state were most uncertain, and in later years the monuments and landmarks they described could not be found. (See Loeb, *The Establishment of Boundary Lines by Practical Location*, 4 Cal. L. Rev. 179.) In the present case the boundary lines could not be ascertained from the early surveys, for the monument determining the northern end of the boundary and most of the other landmarks cannot be found. Given the difficulties of fixing the boundaries anew according to the old surveys, the trial court properly recognized a line that has served for many years as the practical boundary.” *Hannah v. Pogue*, 147 P.2d 572 (Cal. 1944)

As evidence continues to fade with the marching of time, the courts are less reluctant to rely upon the implications made by long-standing physical evidence of boundaries. The doctrines of repose, estoppel and implied agreement serve the purpose of stabilizing land boundaries as they have physically existed by presuming that the parties have established their boundaries in accordance with

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surveys, monuments and knowledge of the intent of the parties. The establishment was made in good faith and the lands were occupied in conformance with the requirements of law. Direct knowledge of the reasons for the locations, the existence of original monuments, or evidence of who may have established the improvements or why they were established have all been lost. What remains is the evidence of the physical improvements. They stand alone as a testament to the boundary, all other evidence faded away with the passage of time.

Title Conflict Resolution

A variety of resolution processes are available to remedy title problems. These remedies include actions for *probate*, *partitioning* or *quiet title actions* based upon possessory rights acquired through *adverse possession*. Other forms of title resolution may involve the rights or interest claims made against the property by virtue of *lien-hold interests*, rights of use *easements*, real estate *contracts*, and rental *agreements*. Boundaries, the subject of this paper, may be affected through adverse possession and the variant forms of related prescriptive easements.

Adverse Possession

Adverse Possession differs from the typical boundary establishment doctrines which are founded on common-law principles for the purpose of settling boundary location disputes. Adverse Possession is a title doctrine based upon statutory law and is designed to remedy discrepancies in title, not boundary location. The doctrine is frequently misapplied to boundary issues as it does effectively quiet title to the extent of the boundaries defined. Its best use, however, is for the quieting of title to the entire parcel against the claim of all others. It is a doctrine which takes root in the Roman law principles of conquering land through the occupation and unfurling of the flag on the hilltop for all to see.

Unlike adverse possession, which establishes title, acquiescence establishes a boundary.
Shoemaker v. Houchen, 994 S.W.2d 40
(Mo.App. S.D. 05/11/1999)

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All 50 states have an Adverse Possession statute, however, there are certain variations that exist between the states. The Adverse Possession statute has arisen as part of the law referred to as “statutes of limitation.” There are numerous statutes of limitation dealing with all areas of law from criminal and civil proceedings to those involving both real and personal property. The statutes of limitation serve to limit one’s rights by placing a time period within which the injured party must file an action to recover from damages. Surveyors and engineers are most familiar with the professional negligence and breach of contract provisions contained within the statutes of limitation.

Adverse Possession

Open
Continuous
Exclusive
Adverse
Notorious

The Adverse Possession statute serves to limit the record titleholder’s right to recover the ownership of his property against an occupant who has effectively occupied the land against the right of the record owner under some claim of right for the statutorily designated period of time. There are many variations to the method of occupation, the claim of right, and the time period required for the

respective variations. The statutes can be broken into two basic types: possession *with color of title* (short-term) and possession *without color of title* (long-term). Some states have both statutes, some have only one, but not the other.

The basic principles in the short-term statutes are founded on the strength of the claim of right or “color of title” held by the occupant. The color of title is typically in the form of a recorded or unrecorded deed.

Short-Term Possession

- Based upon written instrument (Color of Title)
- Notice of possession
- Payment of taxes
- Shorter period of possession required

Many of the short-term statutes require the payment of taxes on the property as well. The payment of taxes requirement typically is the downfall for most attempts at adverse possession. There must be some recorded transaction that triggers the tax assessor to send the tax notices to the occupant rather than the record titleholder. These recorded transactions rarely make their way into the public record but are, however, common in the case of overlapping record descriptions.

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Title to overlapping portions of property normally is resolved through application of the principles of junior and senior rights. Occasionally, when the occupant of the land is junior in title, the adverse possession statute may provide a remedy to quiet the title in the overlapping portion of the tract described in the junior deed. This remedy is not particularly within the purview of the adverse possession statute and should be resolved by the appropriate boundary agreement doctrine. An advantage is gained by seeking remedy through the adverse possession statute as the time period may be shortened considerably from the period required by common law principles which normally run 20 years.

The long-term adverse possession statutes typically involve the occupation of a parcel of land with no written right or color of title. Because there is no color of title, payment of taxes is also not a typical requirement of the long-term statute.

The occupant's ability to quiet the title to the parcel is based upon the actual possession of the land as marked by some improvements sufficient to establish a perimeter of the property being occupied.

Long-Term Possession

- Not on written instrument (No Color of Title)
- Actual possession
- Protected by substantial enclosure or limit
- Longer period of possession required

The occupant's claim of title is limited to the portion of the property actually occupied, not the whole parcel described in the record titleholder's deed unless occupation of the whole parcel can be shown. The boundaries or extent of title obtained by long-term possession, because there is no document which describes the parcel occupied, is dependent upon the location of the enclosure under which title is claimed. The enclosure limits effectively establish the location of the boundaries created by the fulfillment of the statutory provisions. The Wisconsin adverse possession statutes remain typical of the early forms.

Wisconsin Statutes 893.25 Adverse possession, not founded on written instrument.

(1) An action for the recovery or the possession of real estate and a defense or counterclaim based on title to real estate are barred by uninterrupted adverse possession of 20 years, except as provided by s. 893.14 and 893.29. A person who, in connection with his or her predecessors in interest, is in uninterrupted adverse possession of real estate for 20 years, except as provided by s. 893.29, may commence an action to establish title under ch. 841.

(2) Real estate is possessed adversely under this section:

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(a) Only if the person possessing it, in connection with his or her predecessors in interest, is in actual continued occupation under claim of title, exclusive of any other right; and

(b) Only to the extent that it is actually occupied and:

1. Protected by a substantial enclosure; or
2. Usually cultivated or improved.

893.26 Adverse possession, founded on recorded written instrument.

(1) An action for the recovery or the possession of real estate and a defense or counterclaim based upon title to real estate are barred by uninterrupted adverse possession of 10 years, except as provided by s. 893.14 and 893.29. A person who in connection with his or her predecessors in interest is in uninterrupted adverse possession of real estate for 10 years, except as provided by s. 893.29, may commence an action to establish title under ch. 841.

Most cases of adverse possession will hinge upon a particular requirement of the statutes. The claim of possession will fail because the requisite number of years had not elapsed, or the tax payments were not made, or the continuity was broken. Although appearing complex at first glance, the success of adverse possession can typically be predicted by reviewing each basic element as the case warrants. The Missouri Court of Appeals prepared an excellent summary regarding the application of elements associated with adverse possession:

“The person claiming by adverse possession has the burden of proving by the preponderance of evidence the existence for the entire statutory period of each and every element of adverse possession. *Teson v. Vasquez*, 561 S.W.2d 119, 125 (Mo.App. 1977). The person must show that possession was actual, hostile and under a claim of right, open and notorious, exclusive, and continuous possession of the property for ten years. Failure to prove any one element prevents the ripening of title by adverse possession. *Id.*

Color of title is not an element of adverse possession, but it serves to extend actual possession of some portion of the land claimed to constructive possession of the whole tract described in the instrument providing the basis for color of title. *Compton v. Cain*, 829 S.W.2d 75, 78 (Mo. App. S.D. 1992). Section 516.040 RSMo 2000 provides: " The possession, under color of title, of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract."

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In order to establish color of title, some writing should be shown purporting to convey land and to describe the same. *Henderson v. Town and Country Grocers of Fredericktown, Missouri, Inc.*, 978 S.W.2d 850, 855 (Mo. App. S.D. 1998). It is only when the adverse claimant, in actual possession of part of the land, seeks to draw to it the whole, that he must show color of title to the whole. *Id.*” *Thomas v. B.K.S. Development Corp.*, 77 S.W.3d 53 (Mo.App. E.D. 06/04/2002)

Land surveyors must recognize the difference between surveying a tract of land under color of title opposed to surveying a tract of land under enclosure. The former being considered a typical tract of land subject to typical laws governing its boundaries. The latter being a new tract of land created by the fulfilment of the statutory requirements and having new boundaries created in accordance with the occupation in a location established by the enclosure. The surveyor’s duty, under such a claim, would be to locate the portion of the tract or tracts defined by the limits of the enclosure relative to existing boundaries of the tract from which the adversely possessed tract was derived.

History of Adverse Possession and its Confusion with Boundary Doctrines

The foundation of the boundary establishment doctrines was laid centuries ago, developed over time under contract law. The principles of written, parol, and implied agreements, provide the basis for the laws applied to determine the location of land boundaries as established on the ground. Evidence of the agreements is most often easily recoverable and discernable to the land surveyor when time is taken to gather it before concluding the boundary location. When the concept of contractual laws is kept in mind, understanding the various rules of establishment becomes much more simplified.

Unfortunately, many of the courts have forgotten the basic reasoning behind the rules of establishment and have confused them with title doctrines meant to resolve ownership issues. Title doctrines are a specifically distinct and separate set of laws based upon similar concepts, often using similar words to express them. The lines between the establishment doctrines and the title doctrines occasionally becomes blurred, muddling the two sets of laws.

The confusion of the doctrines is most common when the courts (or more likely the attorneys or surveyors) begin interpreting conflicting evidence from adjoining deeds as yielding overlapping claims of title to a “strip” or “gap” of land. The ownership, or title, to the strip is called into

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question as if it were a separate and distinct parcel of land. The more common likelihood is that the “parcel” is non-existent. From a title perspective, in order for a strip of land to exist, there must have first been an intention to either retain ownership of the strip or to convey the strip to two different owners. There must be direct evidence from the title record or from part performance of an agreement to have created a second boundary. Even then, the grantor would have no right to create a boundary across lands of another, therefore, no separate “overlap” parcel can exist.

By treating these “overlaps” or “gaps” as separate parcels, the court will attempt to apply title doctrines to resolve the ownership of the disputed “strip” and to quiet title in one of the claimants. The typical argument relied upon to prove this ownership is adverse possession. When, in fact, these “overlaps” or “gaps” were never intended to exist and are prevented under the law from existing, the real solution is found, not in the application of title doctrines, but in the application of boundary establishment doctrines. The establishment doctrines are designed to resolve the conflicting evidence and to resolve the location of the single boundary located between the two adjoining property owners. There isn’t a question of who the owners are; the only question to be resolved is the location of the boundary which divides their separate estates.

Confusion of the establishment doctrines with the title doctrines and the misapplication of the laws, sometimes results in the right answer for the wrong reason, but often results in no equitable resolution to the problem. The Indiana court provided an excellent treatise on the history of adverse possession in its recent ruling of *Fraley v. Minger*, 829 N.E.2d 476 (Ind. 06/20/2005). Beyond establishing the “clear and convincing” quantum of proof for adverse possession, the court visited the common law doctrine and its statutory adoption history within the State of Indiana. The court recognized the beginnings of the adverse possession in the 2250 B.C. Code of Hammurabi (which undoubtedly stemmed from man’s natural tendency to control his territory), and traced its history through the Norman Conquest of 1066 (sidestepping the perfection of the doctrine by the Roman Empire). Recognition of the doctrine by the early Virginia colonists in 1646 and the first statutory adoption in 1715 by the North Carolina legislature sealed adverse possession in the annals of American law.

Prior to the 1852 passage of the Homestead Act, land claims were perfected by a process of possession often without color of title. The land was open and available to any settler who could

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muster the strength and fortitude to possess it and to protect it against an adverse claim of all others. In the case of *Doe v. West*, 1 Blakf. 133, 135 (Ind. 1821), the court observed that “[i]n England, and in some of our sister States, it has been decided that 20 years’ peaceable possession gives a right which is sufficient to maintain ejectment.” The common law doctrine of adverse possession received legislative approval in Indiana in 1820 with enactment of a 20-year statute of limitations. In 1951, the General Assembly shortened the statutory time limit from 20 years to 10 years.

The early cases, such as *Worthy v. Burbanks*, 146 Ind. 534, 45 N.E. 779 (1897), determined “five indispensable elements” of adverse possession as “1, it must be hostile and under a claim of right; 2, it must be actual; 3, it must be open and notorious; 4, it must be exclusive; and 5, it must be continuous.” The early courts accepted the general proposition that, “an entry upon land with the intention of asserting ownership to it, and continuing in the visible, exclusive possession under such claim, exercising those acts of ownership usually practiced by owners of such land, and using it for the purposes to which it is adapted, without asking permission and in disregard of all other conflicting claims, is sufficient to make the possession adverse.” The adverse possession claims were made without any initial claim or color of title and were based upon sole possession of the land.

The tax payment provision in Indiana statutes was added in 1927 following a “great agitation in the northern part of the state caused principally by ‘squatters’ who were obtaining original titles to land by adverse possession.” The General Assembly, in response, provided:

“Hereafter in any suit to establish title to lands or real estate no possession thereof shall be deemed adverse to the owner in such manner as to establish title or rights in and to such land or real estate unless such adverse possessor or claimant shall have paid and discharged all taxes and special assessments of every nature falling due on such land or real estate during the period he claims to have possessed the same adversely: Provided, however, That nothing in this act shall relieve any adverse possessor or claimant from proving all the elements of title by adverse possession now required by law.” Acts 1927, ch. 42, § 1, p. 119 (currently codified, with minor changes, at Ind. Code § 32-21-7-1).

The first Indiana appellate case to “examine the language of the act and look to the intention of the legislature,” *Echterling v. Kalvaitis*, 235 Ind. 141, 126 N.E.2d 573 (Ind. 1955), explained that “the

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1927 act was enacted to halt the pernicious effect of squatters upon lands where title holders had paid taxes on lands owned by them, but where possession of parts of the land was usurped by squatters for long years without claim of title or payment of taxes.” The court construed the adverse possession tax statute as “supplemental” to the statute of limitations rather than superseding it.

The Indiana court, in *Fraley* (2005), recognized a “simplified articulation” of the common law doctrine of adverse possession which “entitles a person without title to obtain ownership to a parcel of land upon clear and convincing proof of control, intent, notice, and duration, as follows:

- (1) Control -- The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of "actual," and in some ways "exclusive," possession);
- (2) Intent -- The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of "claim of right," "exclusive," "hostile," and "adverse");
- (3) Notice -- The claimant's actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant's intent and exclusive control (reflecting the former "visible," "open," "notorious," and in some ways the "hostile," elements); and,
- (4) Duration -- the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former "continuous" element).

In *Fraley* (2005), the facts of the case clearly fulfilled the newly recited elements of the common law adverse possession requirements, however, the court closely reviewed its application (or lack thereof) of the statutory proviso requiring the *payment of taxes*. The Indiana court’s imaginative application of a variety of constructions attributed to the tax payment provision allowed it to effectively eviscerate the statutory requirement. The court reasoned in some instances that, while the tax descriptions were “usually sketchy and inaccurate,” allowed a “contiguous or adjoining strip” to be considered as included with the tax payment for an adjoining tract. The court further reasoned that its construction of the statutory tax proviso had survived legislative inaction for an excess of 50 years, having therefore been “acquiesced” and “agreed to” the judicial interpretation.

The *Fraley* court focused on the reasoning of the tax payment proviso in *Kline v. Kramer*, 179 Ind.App. 592, 600, 386 N.E.2d 982, 989 (1979), where the proviso was equated with the “notice”

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provision of adverse possession. The *Kline* court reasoned that the construction of a fence along a presumed boundary could serve as notice to the adjoining owner thus fulfilling the notice requirement in place of the notice by tax payment. The *Kline* court affirmed a determination of adverse possession for a strip of land 309 feet long and varying in width from one to four feet, where the adverse claimant believed his property extended to a boundary fence and assumed that he was paying taxes on the enclosed parcel. The *Fraley* court recognized:

“In circumstances where boundary disputes arise due to the erection of fences or other structures, the supplementary element of tax payments is inapplicable, since it does not serve as notice to the recorded titleholder that the identical described land on the tax statement is being adversely claimed by another. The erection of the fence or other structure becomes the notice to the adjoining title holder.”

While recognizing the need for a boundary remedy, the court failed to recognize the distinct difference between laws designed to remedy boundary *location* issues and the laws designed to remedy *title* issues. Decades of misapplication of the adverse possession doctrine as a remedy for boundary locations between owners had limited the court’s choices for remedy. Recognizing their obligation to “follow and enforce the adverse possession tax statute as enacted by our legislature,” the *Fraley* court took a “restrained view of legislative acquiescence” by holding:

“... that *Echterling* permits substantial compliance to satisfy the requirement of the adverse possession tax statute in boundary disputes where the adverse claimant has a reasonable and good faith belief that the claimant is paying the taxes during the period of adverse possession. But we decline to extend *Echterling* to permit total disregard of the statutory tax payment requirement merely on grounds that the legal title holder has other clear notice of adverse possession.”

The new course set by the Indiana Supreme Court in *Fraley* (2005) has stirred much controversy on a number of points of law. Since its publication in June of 2005, the case has been cited in over 63 cases in nearly as many months. It is this author’s opinion that the opportunity is ripe for a return to the fundamental principles of adverse possession and boundary establishment doctrines in Indiana. Proper application of boundary establishment principles will negate the confusion with statutory provisions required for adverse possession. Adverse possession provisions should be

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applied to resolve matters of title to entire parcels of land which are intentionally created by the landowners. Instead, the courts (with the assistance of the surveyors) have chosen to invent phantom strips of land with disputed ownerships in order to find resolution through a title doctrine. Boundary establishment principles should be relied upon to resolve the location of boundaries established between owners.

Alternative Dispute Resolution Methods

The Oregon court long ago expressed its regret that landowners are subjected to needless litigation and encouraged them to settle their differences through compromise agreements.

“This case presents a most regrettable situation. The parties have been litigating at considerable expense ever since July, 1946, and have twice required the attention of this court, in a case involving a mere sliver of land, when a compromise agreement would have adequately protected both parties. It adds one more unfortunate chapter to the long history of line-fence disputes between neighbors.” Val v. Miller, 208 Or. 176, 300 P.2d 416 (Or. 07/31/1956)

Mediation is a conflict resolution process in which a neutral person facilitates communication, the development of understanding, and the generation of options for creative dispute resolution. Unlike a judge or jury, the mediator does not decide the outcome of a dispute. A mediator’s role is to help participants surface issues, to create a safe space to discuss issues that may be emotionally difficult, and to foster agreement as participants seek options that could move them forward toward workable solutions. Mediation is a useful process when the goal of preserving the neighbor-to-neighbor relationship is as important as resolving the substantive problems. Unlike litigation or arbitration, mediation allows the participants in the dispute to remain in control of the process and to contribute to the outcome.

The Minnesota legislature, in step with many state legislatures throughout the nation, enacted statutes to encourage and promote methods of alternative dispute resolution including mediation and arbitration. Section 484.74, of the Minnesota Statutes, passed in 1987, provides for resolution of civil disputes through methods of *arbitration* or *alternative dispute resolution*. Section 484.76 empowered the Supreme Court of Minnesota to establish a *Community Dispute Resolution* program

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and the accompanying rules to bring uniformity to alternative dispute resolution with the view that the interests of the parties can be preserved in settings other than the traditional judicial dispute resolution method.

484.74 ALTERNATIVE DISPUTE RESOLUTION.

Subdivision 1. Authorization. In litigation involving an amount in excess of \$7,500 in controversy, the presiding judge may, by order, direct the parties to enter non-binding alternative dispute resolution. Alternatives may include private trials, neutral expert fact-finding, mediation, mini trials, and other forms of alternative dispute resolution. The guidelines for the various alternatives must be established by the presiding judge and must emphasize early and inexpensive exchange of information and case evaluation in order to facilitate settlement.

The rules adopted by the judiciary define methods for *(1) mediation, (2) arbitration, (3) Mini-trials, (4) summary jury trials, and (5) private judges*, as a number of variations available to assist parties in alternative dispute resolution. The legislature passed an important part of the law empowering judges to order parties to select a resolution alternative to encourage settlement of disputes without going to trial.

Through facilitated dialogue, the participants are able to identify what is important to them and what they need to reach a solution. Mediation is a voluntary process which relies on the good faith participation of the people involved. One of the fundamental tenets of mediation is confidentiality. To encourage honest and open communication among participants, all conversations associated with the mediation process remain confidential. As a process, mediation of boundary conflict resolution requires the use of a skilled, knowledgeable mediator for which the land surveyor is well suited. With sufficient training and practice, anyone can serve as a mediator provided they have no stake in the outcome of the dispute.

There are many barriers that have an affect on the resolution of disputes. These barriers include: time constraints, inadequate access to information, poor communication structures, conflicting desires of the landowners, high value of property at stake, emotionally charged situations, and fatigue. For many land surveyors, there is little training or skill development in negotiation, listening, communication, or conflict resolution. Limited training and little priority placed on the

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importance of developing mediation skills, provides few mentors or role models for modeling effective skills and techniques. Surveyors have a natural tendency to avoid addressing conflict directly. It is little wonder that boundary conflict resolution has been avoided by many in the land surveying profession. The goal for successful mediation requires that the land surveyor overcome these barriers and remain engaged in the resolution process.

Identifying the Landowners' Concerns

The first step to boundary dispute resolution is to identify the needs, wishes and concerns of each landowner. They each bring a unique perspective to the resolution process and have their own preconceived idea of what constitutes a satisfactory outcome. The surveyor must remember that in mediation the location of the record boundary is unimportant; the location of the occupation boundary is unimportant; and, most importantly, the location of the “correct” boundary as the surveyor believes is absolutely unimportant. It is important to let each of the parties understand your opinion, if and when asked. It is also important to express your opinion with clarity and with certainty. It is also important for the surveyor to express to the landowners that they are in control and that they have the authority to remedy the boundary conflict however they see fit within the confines of local zoning and approval requirements when applicable.

One area of concern to the land surveyor is that the landowners look not only to their current needs but to their future needs as well. The landowners must be cognizant of future uses and conditional developments that may affect their overall needs. A solution which works well for the moment may be insufficient for the long term.

Finding Areas of Common Interest

The mediation of most boundary conflicts is quite simple. The common interest shared by both landowners is the boundary itself. Most often the surveyor performs his survey and identifies a problem either with the occupation of the land or a discrepancy in the title documents. Once the error is sufficiently researched and confirmed, the most adequate solution presents itself, along with a few alternative methods that are not as well suited but none-the-less are sufficient. The landowners either are surprised by the finding or were already expecting it before they ordered the survey. Most landowners would rather solve the problem than escalate it.

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When the surveyor presents the possible remedies to the client, the next stage of the process is to meet with the neighbor. The vast majority of occurrences result in a settlement of the issues on the very first meeting with a simple hand shake and clear direction to the surveyor regarding the wishes of the landowners. They may wish to “make the record fit the fence,” or they may choose to simply “move the fence.” They may even decide to “split the difference” and move both the record line and the fence. The surveyor then proceeds to prepare the necessary documentation and produces it for the ratification by the landowners.

Occasionally, the landowners’ interests differ appreciably and consideration must be given to their unique needs. They both may desire to construct a residence that will have certain characteristics and require certain placements on the available land. One may have a desire to enlarge his parcel and the other may be able and willing to accommodate their desires. One may desire to enlarge his front yard while the other may desire to enlarge the back. The possible remedies are as infinite as the imagination of the landowners. What begins as a potential conflict is often reduced to a neighborly agreement followed by a hand shake and a lasting cooperative relationship.

Equal Dissatisfaction

Many times the mediation settlement will require each of the parties to sacrifice portions of their desires in the spirit of compromise. When there simply isn’t enough land to go around or to fulfill their needs, something has to give. It may be that one party will give land, the other may give money. It may be that each will be required to give portions of their land in an exchange. The possibilities are usually plentiful, and, as long as the parties are willing to remain at the mediation table, a solution is likely. The alternatives to mediation breakdown are to: 1) do nothing and let the conflict continue; or 2) litigate the conflict at great expense to both parties at the risk of the judge’s decision. Either solution may be acceptable to the parties.

One matter to keep in mind when the only solution is based upon compromise is that the parties are in perfect harmony when each is equally dissatisfied. There will be no true “winner” in any compromise. Both should leave the mediation feeling like they lost something. Whether that loss is a little or a lot, the real issue is whether the feeling of loss is equal.

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Reaching an Agreement

Effective techniques for improving collaboration and resolving conflicts include listening for understanding, reframing, elevating the definition of the problem, and creating clear agreements. Use of these techniques helps to manage conflict by fostering understanding and acceptance, surfacing and acknowledging underlying interests or needs, identifying common ground, and communicating clearly regarding future actions that enable each person to feel that his or her needs have been addressed. The following table summarizes these four techniques.

A Note About Third Parties

The land surveyor must pay particular attention to the existence of third parties that may be affected by the execution of a boundary adjustment. The majority of property owners today have a mortgage on their home and property that impacts their fee ownership. A properly executed boundary

Mediation Techniques		
Technique	Description	Purpose
Listening for Understanding	Listening openly without interrupting, giving advice, judging, or asking immediate questions	Allows speaker to feel heard and control content of information; allows listener to hear underlying issues, show empathy, and make open assessments of the situation without jumping to conclusions or confirming assumptions
Reframing	A statement or response that acknowledges the emotion, removes the inflammatory language, restates the problem or issue, and seeks clarification or validation from the speaker	Through reframing, one can neutralize the language, assess underlying issues, inform the speaker that you understand what they are saying, and redirect the conversation from a confrontational mode into a problem solving mode
Elevate the Definition of the Problem	A statement or response that combines multiple opposing or disparate positions by reflecting back to an issue that is common to everyone involved	To acknowledge issues that are important to each person while establishing common ground; to demonstrate commonality and encourage each person to work together toward a common goal; to regain trust
Clear Agreements	A mutually acceptable agreement that is specific, clear, and represents an attempt to meet the needs and interests of the parties	Guide for preparation of agreement documents; provide a foundation for trust and a plan for addressing costs for final survey, document preparation, review and filing fees; third party notice

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modification may also involve the third party mortgagor or trust holder. A partial reconveyance or substitution may be necessary to amend any existing mortgage on the property. The amended mortgage will be subordinate to the boundary adjustment and will be properly amended to include the corrected property. There may be no problem if the mortgage amendment is overlooked as long as the mortgage never goes into default. If so, the mortgagor may foreclose against the encumbered property with the result of undoing the boundary resolution.

- Mortgage Holder
- Lien Holder
- Easement Interests
- Public Interests
 - Planning
 - Zoning
- Home Owners' Assoc.

Thought should also be given to the method by which the property ownership is held. If by a partnership, corporation or trust, there is a need for confirmation that the negotiating party has the ability to act as a proper agent for the entity and is empowered to sign on the entity's behalf. Third party easement interests should also be considered when relocating or amending a boundary. Many parcels are subject to utility easements along the perimeter boundaries. Relocation of the boundary may cause a conflict with the existing easements.

Resolution by Litigation

When all efforts of the landowners to arrive at a mutual agreement regarding the location of their common boundary have been exhausted, the landowners reach an impasse. Only two choices remain. Either walk away and leave the problem unresolved, or litigate the resolution. Prior to the choice to litigate, the parties have the mutual authority to resolve their boundary. They share a common problem. Their failure to resolve the problem amicably is not doomed to eternity. One or the other parties may choose to litigate.

Abraham Lincoln was a skilled trial lawyer who viewed litigation as a "last resort." He is quoted as writing:

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time." *Abraham Lincoln's Notes for a Law Lecture*, July 1, 1850.

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The step to litigate is one which essentially passes the mantle of authority from the landowner to an arbitrator. The arbitrator may be chosen by the landowners either from an informal or formal setting. When we commonly think of litigation, we equate it with the court system involving attorneys appointed to represent the owners, a judge appointed as the arbitrator, lack of control over the outcome, and lots of time and money expended in the process. This is not necessarily the landowners' only recourse. They may choose to informally arbitrate the boundary.

The landowners may choose a solution as simple as appointing the surveyor as the arbitrator. They agree to share the cost of a survey and, "what ever the surveyor decides, that will be our line." In this type of action, the surveyor is appointed as the sole arbitrator. He will perform the survey as typical, he will gather all physical evidence, the written evidence, and the oral testimony of the landowners (they need their day in court), and make a professional determination regarding the boundary location in accordance with the rules of law just as he is expected to do in any other survey. The difference being that (and this really isn't any difference) the landowners may choose to appeal his decision even though they've initially agreed to be bound by the arbitrator's decision.

The landowners may also choose to go the formal route by hiring the attorneys and yielding their authority to the judge. They will proceed through a formal process governed strictly by the law (the same law which governs the actions of the surveyor). Once a judgment is obtained, the owners again have the right to appeal the decision of the court. If they choose to appeal the judges decision, they can afford the opportunity to receive the opinion of three to five judges whether their case is heard by an appellate court or the supreme court of their state.

At some point in the arbitration process, the landowners will reach a point of mutual exhaustion, either in desire or dollars, and will turn away from the process, return to their homes, and either live with the results of the decision handed to them or choose to amicably adjust their boundary to a location which is mutually agreed upon by both owners. The authority to mutually decide the location of their common boundary remains intact. They have the power to decide the fate of their boundary before they choose to litigate and they have that same power after the litigation is complete. Their power lies in their ability to arrive at a mutual agreement.

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If one or the other parties refuses or is unable to reach a mutual agreement, having exhausted their remedy through the judicial process, their only choice is to live with the judgment. If one of them refuses to acknowledge the judgment of the court, that's where the strong arm of the law can enter. The police powers are associated with the judgment. The sheriff, policeman, or constable can be called upon to enforce the judgment. The police power of enforcement is not available to enforce a civil agreement or arbitrated settlement. The *dunamis* represented by the officer's side-arm is typically sufficient to enforce the resolution.

Documenting the Final Resolution

The variety of solutions derived from the mediation, settlement, agreement or judicial processes yield an equally varied possibility of documentary solutions. The final form of the settlement is controlled not only by the settlement itself but by state and local statutory processes. These processes vary greatly by state, region, or locality and must be intimately understood by the land surveyor. The land surveyor will serve a major role by providing the necessary documentation for the review, acceptance, and approval of the landowner settlement agreement by the local reviewing agency. Certain documents may be necessary for the local agency and others may be required for the public records repository.

Most agreements will result in some form of correction or amending document being filed in the public records. There will be some, however, that will require no alteration as the parties have agreed to relocate the occupational improvements to harmonize with the existing record boundary. All of the agreements should, at a minimum, include a land survey map graphically depicting the location of the boundaries relative to existing lines of occupation. Monuments should be set along the agreed-upon boundaries with the full expectation of the parties to the agreement. The survey map should also document all monuments found which were relied upon during the course of the survey and a narrative or survey report should be provided to document the deed records, owner testimony and survey history relied upon to achieve the surveyor's ultimate opinion regarding the boundary location as resolved by the parties.

Additional documentation beyond the survey map may also be required. If the title to the land is affected, the title record may require reparation. Existing title documents may need to be reformed,

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exchanges of title may be required, or the filing of the final judgement, owners' affidavits, or similar documentation may be required to perpetuate the evidence of the resolution. Too often, the resolution is filed by the attorney with the clerk of court and no evidence of the dispute or its ultimate resolution is found in the title record. This can be a serious problem when subsequent purchasers come on the scene using the existing title records to pass title, unaware of the court record. The problem which was resolved at great effort and expense may be reopened and another dispute started over the same problem previously resolved, only after additional expenses are again incurred with the earlier resolution likely to come to light.

The choice of various methods of documentation will be governed by local ordinances, state statutes and other factors such as the ability of the surveyor to file their survey in a public repository. State filing laws for surveys provide a crucial step forward toward perpetuating evidence as to the location of boundaries and the auxiliary evidence which may disclose the result of an owner agreement or a final judgement resolving the boundary location. Survey records are a vital addition to the title record by providing graphic depictions and written descriptions of the evidence which is used to define the location of the boundary on the ground.

A surveyor's narrative included on the map can provide an excellent medium for documenting the oral, physical, and written evidence utilized by the surveyor in reaching his determination of the boundaries. The narrative also provides an opportunity to reference any settlement agreements or judgments affecting the boundary locations shown on the face of the survey.

Although the survey can provide a means of documenting the evidence, the survey records commonly do not provide the constructive notice that recording a document in the title records affords. It is the constructive notice of the title record that binds subsequent purchasers to the resolution. Once made a matter of public record, all bona fide purchasers of the land are expected to make the purchase with full knowledge of the contents of the title record. For this reason, resolutions are best documented when placed in the title record. While there is no law requiring that the boundary established by an agreement between adjoining owners be recorded (parol agreements are acceptable), the owners should be encouraged to enter their agreement in writing and record it as a matter of the title record. Their agreement may be in the form of a written agreement or may be in the form of an owners' affidavit, whichever is allowed by rules governing document recording.

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If the owners so choose, the second best alternative may be to document the evidence of their agreement on the face of the survey either by landowner signature or, even less binding, by the surveyor's notation within the narrative. Of course, the landowners may, even when given the opportunity, choose to make no effort to document their agreement. Their failure to document it will not invalidate their agreement and it may be up to the surveyor to document the evidence of their agreement in the narrative. The bottom line is that any effort toward documentation is better than no effort at all. If the jurisdiction requires, this survey may be recorded in the title record giving it greater effect.

Correction Deeds

Correction deeds are an excellent tool specifically designed to repair mistakes made by the parties to the original conveyance document. When the parties reach a mutual agreement that the conveyance document contains language that is inconsistent with their original agreement, they are allowed to modify the language to comport with their agreement. This modification is viewed by the courts as an allowable reformation of the instrument. The reformation is not allowed to change or alter the original agreement.

Modification of a conveyance document by correction deed affords some particular advantages over a release or reconveyance. By correcting the original document to conform with the parties' original agreement, the time and circumstances of the original agreement are left intact. Clarification of ambiguities or mutual mistakes in the agreement are passed through to other instruments made subsequent to but near the proximate time of the initial conveyance. The original date and all other terms of the conveyance are left intact.

Correction Deeds

Advantages

- Maintains intent of original conveyance
- Maintains time and date
- Maintains circumstances
- Correction passes through

Disadvantages

- Must be corrected by parties in privity
- Cannot be used to change parties
- Requires mutual agreement

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Execution of a correction deed requires caution to ensure that documents prepared subsequent to the original conveyance will not have an adverse affect on the parties' right to correct their conveyance document. Others' rights established under subsequent conveyance should also be closely reviewed and proper notice made to any potentially affected party.

Attachment #1

Boundary Adjustments

Boundary adjustments are appropriate when the parties intend to create a new boundary location, not intending to honor the existing boundary between them. The adjustment will result in an exchange of title between the owners and will affect the record size and description of the existing parcels. Boundary adjustments are typically controlled by a statutory or administrative process common in many states. Some refer to the process as a "Lot Line Adjustment" or a "Property Line Relocation." The typical approach involves the preparation of a boundary survey that identifies the existing record title boundaries together with the location of all occupational improvements and on-site dwellings that may be affected by side yard or rear yard set back requirements. The survey will also show all third party easements and encumbrances located on the subject parcels.

In states where the recording of the survey is made in the official public record, the local reviewing agency will examine the proposed boundary adjustment to confirm that no new violations of existing zoning ordinances will result from the boundary adjustment. The existing building locations are checked for set back compliance and the overall parcel configuration is checked against minimum area and frontage requirements. The survey map is then signed by the surveyor and the consent to record is signed by the affected landowners. The survey map should contain the original record descriptions of each parcel, new descriptions of each of the new parcel configurations, and cross-conveyance language to facilitate the title exchange. The final map is then recorded along with any required transaction documents. The map, in some jurisdictions, may be accompanied by separate document for the purpose of exchanging title in accordance with the newly formed descriptions.

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In states where the surveys are recorded in a non-public repository, such as the County or State Surveyor's records separate from the deed transaction records, the review process is typically similar to that stated above. The final survey map will show the same pertinent information and will contain the surveyor's certification statement and new parcel descriptions. The recorded title exchange document should contain the original record descriptions of each parcel, new descriptions of each of the new parcel configurations, and cross-conveyance language to facilitate the title exchange. The title exchange document will be recorded in the public deed records with reference made in the caption of the description to the recorded survey.

Boundary Adjustments

Advantages

- Establishes clear link in the chain of title
- Local review and approval
- Meets zoning and planning ordinances
- Results in two fully identified parcels

Disadvantages

- Must deal with all adjoining parcels
- Time delays for review process

In states where there is no provision for the recording of private surveys, the only record of the boundary adjustment is made in the title exchange documents that are filed in the deed record. It is imperative that the description makes reference to the specific monuments set by the surveyor with clear references to all controlling monuments found and set. A copy of the survey that was reviewed by the governing agency may be filed as part of their review records, but the final copy will likely be retained in the private surveyor's records with copies retained by each of the landowners.

Attachment #2

Boundary Agreements

Boundary agreements are a simplified preparation, lower cost, high-yield performance type of document. While having few down sides, the theory is well founded in the constitution, accepted in most jurisdictions, judicially recognized, and provides a simple approach to resolving boundary conflicts. Remember, there must be some degree of uncertainty or dispute regarding the boundary

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for the agreement to take proper form. The boundary agreement is made for the purpose of resolving the ambiguities that may exist in the record boundary between the parties, not for the purpose of relocating an existing boundary that is known to the parties. The statute of frauds requires that a boundary adjustment be made in writing; a boundary agreement may be written or oral and is exempt from the statute of frauds as no property is conveyed or exchanged by the agreement. The purpose of conflict resolution is to reduce the oral agreement to a written agreement which will best perpetuate the evidence of the location of the agreed boundary.

Some landowners, however, may refuse to enter the agreement in the record. The land surveyor must be prepared, in such a case, to make the appropriate notations on his survey regarding the existence of the oral agreement and record the survey as allowed by statute or ordinance. The survey alone may be the only document which memorializes the agreement even though its validity may be more easily challenged by third parties and subsequent purchasers unless actual notice of the agreement is given. The surveyor can also protect himself from any claim of negligence as the survey should reflect the agreed-upon boundary and the boundary of record, if ascertainable.

Subsequent transactions by deed are protected by the boundary agreement, if recorded. The boundary agreement serves to clarify the location of the existing boundary of record. Therefore, the existing boundary described in the original deed, although it be ambiguous, is altered forever by the boundary agreement. A proper survey of the original deed boundary must retrace the agreed-upon boundary. The boundary, as retraced, will have no impact on the remaining parcel boundaries as described in the original deed or independently established. Only the agreed boundary will be affected by the agreement. The agreed boundary location will have no relationship nor will it control the positions of the remaining parcel boundaries.

Boundary Agreements

Advantages

- Settles uncertainties and ambiguities
- All focus is on the common boundary
- Reduced survey costs
- Simple documentation and execution
- Flexible – Can be modified to include many parcels

Disadvantages

- No modification of record title description
- No change in tax assessment
- Easily overlooked in subsequent sales

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One advantage of the boundary agreement is the omission of the requirement for the survey of each parcel in its entirety. The survey costs can be reduced and an adequate remedy still afforded by the landowners. The only boundary that requires description is the boundary affected by the agreement. The end lines of the existing parcels are simply extended or foreshortened to intersect with the agreed-upon boundary. The uncertainty in the corner locations may be an acceptable sacrifice to some landowners when weighed against the cost of performing a survey of the entire tract. If cost is the primary concern of the landowners, the boundary agreement may provide an adequate solution.

Another advantage of the boundary agreement is its flexibility. The boundary agreement may be modified to include multiple boundaries between many parcels and may be formatted to include the complete descriptions of the parcels. Including the complete description of each parcel begins to incorporate some of the advantages found in the as-surveyed description transactions. The survey can be extended to include the entirety of several parcels with new descriptions being prepared for each parcel. The owners of the parcels as well as the adjoining landowners can be included in a single agreement with the purpose of amending all of the common boundaries.

Attachment #3

Affidavits

Occasionally, the surveyor will encounter owners who cannot be convinced of the importance to enter a written agreement into the title record. They are hesitant to commit to the written agreement because of either emotional or financial reasons. Emotional reasons can typically be mediated, sometimes they must be left for time to heal. Financial reasons are typically insurmountable in the immediate sense; alternatives are available, however.

The surveyor can simply agree to stop work on the survey, collect his fee to date, and await the parties' change of heart or financial status. He can collect his findings and prepare them for archival until the day the phone rings when the parties are ready to properly complete the process. Or, the surveyor may feel comfortable proceeding with his survey under alternate conditions. If one of the landowners is agreeable and the other not, the agreeable landowner may be encouraged to enter an

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affidavit into the title record for the purpose of documenting a long-standing occupation, knowledge of the boundary history, or the existence of a past oral or implied agreement.

Affidavits are a non-binding document which simply perpetuate a persons statement of interest or facts regarding a boundary or title matter. Affidavits are used for a vast number of differing issues and are widely accepted methods for entering evidence, through the form of sworn truthful testimony, into the title record. Any person with personal knowledge of a matter of evidence or fact pertinent to the land title or boundaries can record an affidavit. The affidavits are accepted by the courts as providing public

notice of the evidence or fact and as a proper vehicle for perpetuating evidence which could otherwise become lost with the passage of time.

Affidavits can be filed by the landowners themselves, their predecessors in title, or by the surveyor to perpetuate evidence or testimony recovered during the survey process. The surveyor's affidavit can be used to report the surveyor's findings in states which do not have a method or procedure for publically recording private surveys. The surveyor's affidavit can also be used to correct scrivener's errors which make their way, undetected, into the record as a result of an erroneous description or survey plat.

The use of affidavits should be considered as an alternative to the Boundary Agreement only when all negotiations have failed to convince one of the parties to sign a written agreement. While the affidavit can be relied upon to perpetuate one-half of the story, it must be understood that the affidavit is a non-binding form of temporary resolve. Because the statement is the sworn truth of only one party with no response or acknowledgment by the other party, the statements made are non-binding and no final resolution is achieved. The sworn statement is, however, admissible in court

Affidavits

Advantages

- Perpetuates evidence in public title record
- Requires no agreement by second party
- Reduced survey costs
- Simple documentation and execution
- Flexible – Can be modified to include any statement of interest or knowledge of fact

Disadvantages

- Non-binding
- No final resolution
- Not entirely trustworthy – Hearsay

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and will be considered for the matters stated. If the declarant is available, they should be summoned to the trial where they can be cross-examined. If they are unavailable, the affidavit was by far the best way to perpetuate their statements of interest. Had no statement been documented, the evidence they express concerning the boundary would have been lost.

Attachment #4

Survey Narratives and Reports

In a number of states it is customary for the surveyor to place a narrative either on the face of the survey or filed separately with the survey. The narrative is an excellent way for the surveyor to declare the processes and procedures used to perform the survey. The surveyor can discuss the evidence recovered, the facts determined from the evidence, the legal principles relied upon, and the conclusions that he reached forming his professional opinion. The narrative serves two purposes. First, the surveyor's findings are documented in a way that the surveyor can better remember the procedures he used to make his determinations, and second, those following after him can more clearly understand his analysis. The more clearly the evidence is documented and the more clearly the surveyor's decisions are expressed, the more assurance that the retracing surveyor has in following his footsteps. The more the surveyor's findings are relied upon, the more well settled and established the boundaries become.

The retracement survey documents the surveyor's professional opinion of the boundary locations based upon the evidence recovered during the survey. The surveyor's opinion is not binding upon the surveyor's client or the neighbors. Any ambiguities discovered and resolved by the surveyor through the application of rules of law can also be addressed in the narrative. Although the surveyor's resolution of the ambiguities provides no

Survey Narrative or Report

Advantages

- Perpetuates evidence in public title record if a provision exists for filing the survey
- Documents the surveyor's professional opinion
- Opportunity to state the evidence relied upon to determine boundary location
- Simple documentation and no execution

Disadvantages

- Non-binding
- No final resolution
- Third-party statement – Hearsay

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binding resolution, the more clearly the narrative is expressed and the more clearly the principles applied, the more likely that the retracing surveyor will simply accept the surveyor's prior resolution.

Narratives by the surveyor are considered to differ from affidavits as the surveyor is a disinterested third-party to the property. He has no interest in the property to protect other than a correct identification of the boundary location. The more clearly he can communicate his findings the less likelihood there is for his findings to be challenged. It must be remembered, however, that the surveyor's statements aside from the actual physical evidence and record evidence gathered, are hearsay. If the surveyor is available, he should be summoned to court to testify to his discoveries and his professional opinion expressed on the survey. The narrative will provide him an excellent reminder of the thought process used to derive his expressed opinion.

Attachment #5

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Conclusion

Over a century has now passed since Chief Justice Cooley penned his treatise on the Judicial Function of the Land Surveyor. Technology has since overtaken the surveying industry and the pace of development has quickened the destruction of evidence of past boundaries. Yet, his words still ring true to today's land surveyor:

“A generation has passed away since [the lands] were converted into cultivated farms, and few if any of the original corner and quarter stakes now remain ... 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.”

As the evidence continues to fade, it rests on the surveyor to recover its remains, to bolster it with new evidence, and to perpetuate the boundaries for future generations to recover. While the technology increases the speed and precision by which the surveyor can secure the position of the boundary, the recovery of the evidence necessary to prove the boundary's position becomes more time consuming and difficult.

The difficulty of evidence recovery and analysis has led many surveyors to give up, resort to staking the “deed line,” and passing the resulting problems on to the client. The client is handed a map, an invoice, and the advice, “better call an attorney.” The map is overridden with disclaimer statements in an attempt to shield the surveyor from the fallout of damages caused by the inadequate survey. Surveyors have attempted to re-define the profession by reducing it to a technical process of mathematics and measurement. They have replaced accuracy with precision and enter a warfare where the closest pin to the true measurement wins. The result is a property corner resembling a pin-cushion of possible monuments with no decisive action made to console the landowner.

Somewhere along the passing century, the land surveyor has been allured by the shimmer of technology and has forgotten the true quest. The certainty of the mathematics and the speed at which a measurement can be obtained tends to reduce boundary surveying to a technical process. The art of the surveyor has been mournfully sacrificed.

NOTES:

It is time for surveyors to re-discover the root of their profession. To seek after the evidence that seems so illusive, to study the laws which govern their actions, and to perform their duty regarding the recovery of the true boundary. The surveyor must take time to gather all of the evidence available and recognize the importance of the actions of the landowners and their attempts at establishing their boundaries. Surveyor must take an active role to assist the landowners in mediating land disputes which arise. There is only one profession in these great United States which is empowered with the skills, knowledge, and expertise to identify and locate land boundaries. There is no other profession upon which the duty falls.

Finally, as Chief Justice Cooley also said:

“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 judgement. 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.”

I can only trust that the discussions prompted by this presentation may also be of equal value and will foster the advancement of our profession.

NOTES:

Attachment #1

Correction Deeds

12/2 WHEN RECORDED, MAIL TO:

M
MICHAEL D. BLACKBURN
Blackburn & Stoll, LC
257 East 200 South, Suite 800
Salt Lake City, UT 84111

ENT 130187:2009 PG 1 of 2
RODNEY D. CAMPBELL
UTAH COUNTY RECORDER
2009 Dec 21 2:04 pm FEE 12.00 BY CS
RECORDED FOR BLACKBURN & STOLL

CORRECTING DEED WARRANTY DEED (LIMITED)

This deed is prepared to correct an error in a deed from grantor MICK P. MCGRATH, 3820 South Terrace Heights Road, Salt Lake City, UT 84109, to grantee MICK PHIL MCGRATH and BARBARA ELAINE PELTON MCGRATH, or their successors, as Trustees of the MICK AND BARBARA MCGRATH FAMILY TRUST, u/t/d May 8th, 2009, 3820 South Terrace Heights Road, Salt Lake City, UT 84109, dated August 7th, 2008, and recorded in Book 9634, Page 805-806, Entry Number 10497144 at the Salt Lake County Records Office, in the state of Utah, on August 12th, 2008. This deed is also prepared to clarify various deeds that have been recorded concerning the real property described below. It is our understanding that this deed is transferring the entire interest in said real property.

MICK P. MCGRATH
3820 South Terrace Heights Road
Salt Lake City, UT 84109

the grantor, hereby CONVEYS and WARRANTS to

MICK PHIL MCGRATH and BARBARA ELAINE PELTON MCGRATH, or
their successors, as Trustees of the MICK AND BARBARA MCGRATH
FAMILY TRUST, u/t/d May 8th, 2008
3820 South Terrace Heights Road
Salt Lake City, UT 84109

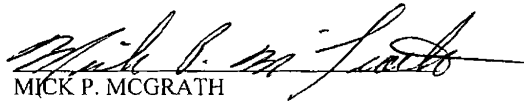
grantee, for the sum of TEN DOLLARS (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, his entire interest as a surviving joint tenant, and not as a tenant in common, in the following described real property located in Utah County, State of Utah:

Parcel No.: 21-36-477-003-0000

Commencing at a point 1286.5 feet North from the Southeast corner of Section 36, Township 2 South, Range 1 West, Salt Lake Meridian; and running thence East 55 feet, more or less to the West line of State Street; thence North on the West line of State Street, 72 feet; thence West 185 feet more or less to the East bank of the Salt Lake City Canal; thence South 23°32' West along the East bank of said canal to a point North 87°8' West of the place of beginning; thence South 87°8' East 161.68 feet more or less to the place of beginning.

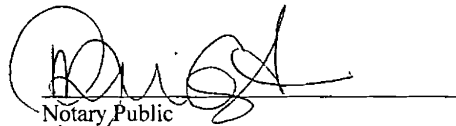
The covenant of warranties hereunder are limited to those covered under the policy of title insurance issued in favor of THOMAS PHILLIP MCGRATH and MICK P. MCGRATH at the time of the acquisition of the above-described real property.

WITNESS, the hand of said grantor, this 3 day of Dec, 2009.


MICK P. MCGRATH

STATE OF UTAH)
COUNTY OF SALT LAKE)
:SS

On the 3RD day of December, 2009, personally appeared before me MICK P. MCGRATH, the signer of the within instrument, who duly acknowledged to me that he executed the same.


Notary Public
Residing at: _____

My Commission Expires:



Attachment #2

Boundary Adjustments

Gretta C. Spendlove
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt lake City, UT 84111

When recorded send to

Recorder's use

PROPERTY LINE ADJUSTMENT AND QUITCLAIM

This Property Line Adjustment and Quit Claim is made and entered into by and between **Charles and Shauna Wheatley**, hereinafter referred to as **"Wheatley"**, and , **Gary N. Spangler**, Trustee of the Gary N. Spangler Family Living Trust dated June 7, 1984 as to an undivided one-half (1/2) interest, and **Ruth Ann Spangler**, Trustee and her successors in trust as trustees of the Ruth Ann Spangler Family Living Trust dated June 7, 1984, as to an undivided one-half (1/2) interest, hereinafter referred to as **"Spangler"**.

WHEREAS:

- A. **"Wheatley"** is the owner in fee simple of the following described parcels of real property recorded in Book 9852 at Page 2314 as Entry No. 11017748 of the Salt Lake County records:

Parcel 1 (Tax ID No. 28-11-477-044): Lot 201, Stone Ridge No. 2 Subdivision located in the Southeast Quarter of Section 11, Township 3 South, Range 1 East of the Salt Lake Base and Meridian, Salt Lake County, Utah, according to the official plat thereof on file and of record in the Salt Lake County Recorder's Office. Less and excepting therefrom, the West 55 feet of said Lot 201. Also Less and excepting therefrom, the North 17.0 feet of said Lot 201.

Parcel 2 (Tax ID No. 28-11-477-052): The North 17.0 feet of Lot 201, Stone Ridge No. 2 Subdivision located in the Southeast Quarter of Section 11, Township 3 South, Range 1 East of the Salt Lake Base and Meridian, Salt Lake County, Utah, according to the official plat thereof on file and of record in the Salt Lake County Recorder's Office.

- B. **"Spangler"** is the owner in fee simple of the following described parcel of real property as recorded in Book 9629 at Page 7756 as Entry No. 10485842 of the Salt Lake County records:

Parcel 3 (Tax ID No. 28-11-477-054): Lot 202, Stone Ridge No. 2 Subdivision located in the Southeast Quarter of Section 11, Township 3 South, Range 1 East of the Salt Lake Base and Meridian, Salt Lake County, Utah, according to the official plat thereof on file and of record in the Salt Lake County Recorder's Office.

- C. The undersigned parties mutually desire to adjust the common boundary line between said parcels in accordance with Section 10-9-808 of the Utah Code and 15A-30-07 Revised Ordinances of Sandy City.

- D. The undersigned parties hereby acknowledge that a Notice of Approval of Property Line Adjustment, approved and executed by Sandy City, is being recorded concurrently herewith.
- E. The undersigned parties mutually recognize that a survey has been made for the purposes of defining the location of the adjusted common boundary lines between their respective parcels. Said survey was performed by Cornerstone Professional Land Surveys, Inc. Salt Lake City, Utah and certified by John B. Stahl, license Number 170560, as project number KTM0401, said survey being recorded in the office of the County Surveyor.

NOW THEREFORE, in consideration of the above premises, and for other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, and for the purpose of adjusting the common legal and physical boundary lines between the parcels described herein, it is mutually agreed as follows:

- I. It is hereby agreed that the Wheatley adjusted parcel be described as follows:

Parcel A Adjusted: BEGINNING at the southeast corner of Lot 201, Stone Ridge No. 2 Subdivision located in the southeast quarter of Section 11, Township 3 South, Range 1 East, of the Salt Lake Base and Meridian, Salt Lake County, Utah, according to the official plat thereof as recorded in the office of the Salt Lake County Recorder, said point being on a 225.00 feet radius curve to the right, and running thence westerly 5.44 feet along the arc of said curve through a central angle of $01^{\circ}23'10''$, said arc having a chord bearing of South $88^{\circ}47'36''$ West 5.44 feet; thence South $89^{\circ}29'11''$ West 118.13 feet to a point North $89^{\circ}29'11''$ East 55.00 feet from the southwest corner of said Lot 201; thence North $00^{\circ}30'49''$ West 142.83 feet; thence South $89^{\circ}29'11''$ West 55.00 feet to the west line of said Lot 201; thence North $00^{\circ}30'49''$ West 17.00 feet to the northwest corner of said Lot 201; thence North $89^{\circ}29'11''$ East 177.50 feet along said north line to a point South $89^{\circ}29'11''$ West 2.50 feet from the northeast corner of said Lot 201; thence South 32.00 feet; thence East 2.50 feet to the east line of said Lot 201; thence South 127.75 feet to the point of BEGINNING, containing 20,719 square feet.

2. It is hereby agreed that the Spangler adjusted parcel be described as follows:

Parcel B Adjusted: BEGINNING at the southwest corner of Lot 202, Stone Ridge No. 2 Subdivision located in the southeast quarter of Section 11, Township 3 South, Range 1 East, of the Salt Lake Base and Meridian, Salt Lake County, Utah, according to the official plat thereof as recorded in the office of the Salt Lake County Recorder, and running thence North 127.75 feet along the boundary between Lots 201 and 202 of said subdivision; thence West 2.50 feet; thence North 32.00 feet to the north boundary of said subdivision; thence North $89^{\circ}29'11''$ East 251.50 feet along said north boundary to the northeast corner of said Lot 202; thence South $00^{\circ}30'49''$ East 96.49 feet to a point on the north line of Stone Mountain Drive, said point being on a non-tangent 16.00 feet radius curve to the right; thence westerly 21.50 feet along the arc of said curve through a central angle of $76^{\circ}58'35''$, said arc having a chord bearing North $67^{\circ}45'43''$ West 19.92 feet to a point on a reverse 55.00 feet radius curve to the left; thence westerly 147.78 feet along the arc of said curve through a central angle of $153^{\circ}57'10''$, said arc having a chord bearing

South 73°45'00" West 107.17 feet to a point on a reverse 16.00 feet radius curve to the right; thence southwesterly 21.50 feet along the arc of said curve through a central angle of 76°58'35", said arc having a chord bearing South 35°15'43" West 19.92 feet; thence South 73°45'00" West 64.09 feet to a point on a 225.00 feet radius curve to the right; thence westerly 56.35 feet along the arc of said curve through a central angle of 14°21'01", said arc having a chord bearing South 80°55'31" West 56.21 feet to the point of BEGINNING, containing 28,002 square feet.

3. In order to effectuate this property line adjustment, "Wheatley" hereby quitclaims to "Spangler" any fee simple interest in the "Wheatley" property described herein lying within the Spangler adjusted parcel.
4. In order to effectuate this property line adjustment, "Spangler" hereby quitclaims to "Wheatley" any fee simple interest in the "Spangler" property described herein lying within the Wheatley adjusted parcel.
5. Nothing contained herein shall be construed as giving, granting, conveying, or relinquishing any existing easement rights, interests or claims.
6. The terms and conditions of this property line adjustment shall be and hereby are made binding on the heirs, administrators, executors, personal representatives, successors, and/or assigns of the parties hereto.

(The remainder of this page is intentionally left blank)

Witness the hands of said owners, this ____ day of _____, 20__.

Charles Wheatley

Shauna Wheatley

STATE OF UTAH)
 SS
COUNTY OF SALT LAKE)

On the ____ day of _____, 20__, personally appeared before me Charles Wheatley and Shauna Wheatley, the signers of the above instrument, who being by me duly sworn, did acknowledge that they executed the same.

Notary Public

Notary Seal:

Witness the hands of said owners, this ____ day of _____, 20__.

Gary N. Spangler, Trustee of the Gary N.
Spangler Family Living Trust dated June 7, 1984
as to an undivided one-half (1/2) interest

Ruth Ann Spangler, Trustee and her successors
in trust as trustees of the Ruth Ann Spangler
Family Living Trust dated June 7, 1984, as to an
undivided one-half (1/2) interest

STATE OF UTAH)
SS
COUNTY OF SALT LAKE)

On the ____ day of _____, 20__, personally appeared before me Gary N. Spangler and Ruth Ann Spangler, the signers of the above instrument, who being by me duly sworn, did acknowledge that they executed the same as trustees of the above named trusts.

Notary Public

Notary Seal:

Attachment #3

Boundary Agreements

SURVEYOR'S CERTIFICATE:

Parcel 4

[illegible][illegible][illegible]

Diagram illustrating a traverse with bearings and distances:

- Old Road
- Old Road Point
- N 10° 00' 00" E 27.00
- N 89° 02' 00" E 99.02
- N 17° 00' 00" W 177.00
- N 13° 00' 00" W 13.00

RECEIVED LAND SURVEYOR
LUCILLE STROUD
JOHN E. STROUD
RYAN, ILL.

PARCEL 7

51. sq.ft.

1 ft.

CEL 8

STATE STREET

N 00°05'05" W 26.97'
(N 00°02'40" E 33.60')(ARP)

55 WEST STREET

[illegible]

CERTIFICATE OF SURVEY
FOR
BOUNDARY LINE AGREEMENT

CORNERSTONE, INC.
PROFESSIONAL LAND SURVEYORS

2028 East 7000 South, Suite 204
Salt Lake City, Utah 84121
(801)943-4090 FAX (801)943-7690

ALL T.A. SURVEYS, COMPUTER MAPPING
BOUNDARY CONSULTATION & RESEARCH

[illegible]

Property Line	—
Measurement Line	—
Survey Line	—
Utility Dead Line	—
Batted Side Fence	—
Chain Link Fence	—
Wood Fence	—

Figure 1 of 3

6134115

BK7139PG1663

WHEREAS:

A parcel of land located in the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described in Book 1229 at Page 304 as Entry Number 1442005 of the Salt Lake County records described as follows:

2. "Woodbury" is the owner in fee simple of the following described parcel of real property, hereinafter referred to as "Parcel 2":

BEGINNING at the Southwest Corner of the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian in the County of Salt Lake, State of Utah; thence North 382.8 feet, more or less to the center of a deep gully or wash; thence Easterly along the said wash and on the south line of the lands conveyed to Olfert Nielson by Deed recorded June 26, 1889, in Book 2-V of Deeds, Page 286, the following courses and distances: North 75° East 237.6 feet; thence North 60° East 145.2 feet; thence South 33° East 75.3 feet; thence leaving said south line as conveyed to Olfert Nielson and Katharine Olfert, his wife, by Deed recorded December 18, 1885, in Book 2-V of Deeds, Page 286, and Katharine Olfert, his wife, by Deed recorded December 18, 1945, in Book 450, Page 430 of the official records now in file in the office of the County Recorder of Salt Lake County, Utah; thence West 99 feet; thence South 440 feet to the south line of the Southeast Quarter of the Southeast Quarter of said Section 1; thence West 297 feet to the point of BEGINNING.

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BEGINNING at the Southwest Corner of the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Meridian, in the County of Salt Lake, State of Utah, and running thence North 392.8 feet, more or less, to the center of a deep gully or wash; thence North 75° East along the center of said wash and on the south line of the lands conveyed to Oluf Nielson, by Deed rec'd Jan 26, 1889 in Book 27 of Deeds, Page 286, a distance of 155 feet; thence South 424.8 feet, more or less, to the south line of the said Southeast Quarter of the Southeast Quarter of Section 1; thence West along said line 1~8 feet, more or less, to the point of BEGINNING.

A parcel of land located in the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described in Book 6557 at Page 1180 as Entry Number 5375715 of the Salt Lake County records described as follows:

4. "Henderson" is the owner in fee simple of the following described parcel of real property, hereinafter referred to as "Parcel 4":

BEGINNING at a point 24 rods East of the Southwest Corner of the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, and running thence North 26 2/3 rods; thence North 10 feet; thence South 33° East 58.02 feet; thence South 7° East 1.63 chains; thence South 40° East 1.6 chains; thence South 60° East 27.04 feet; thence South 208 feet, more or less, to a point due East of the point of beginning; thence West 133 feet, more or less to the place of BEGINNING.

BEGINNING at a point South 89°54'33" East 369.2 feet, and North 102.47 feet from the Southwest corner of the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, and thence North 438 feet along „, old fence to another old fence; thence East 27 feet along said fence to an old fence; thence South 17° East 224 feet, along said fence; thence South 64° East 89 feet along the same fence to the intersection with another old fence; thence South 10° West 189 feet, along said fence; thence Norli: 88°11'44" West 21 feet; thence South 89°55'33" West 118 feet, to the point of BEGINNING.

A parcel of land located in the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described in Book 2572 at Page 398 as Entry Number 2207266 of the Salt Lake County records described as follows:

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A parcel of land located in the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described in Book 6486 at Page 0495 as Entry Number 5292988 of the Salt Lake County records described as follows:

LESS AND EXCEPTING therefrom that portion deeded to David H. Tanner and Janet Tanner by warranty deed recorded April 19, 1990, as Entry No. 4906479 in Book 6213, at Page 2727 and re-recorded October 5, 1990, as Entry No. 4974541 in Book 6258 at Page 2142, more particularly described as follows:

7. "L.T. Miller" is the owner in fee simple of the following described parcel of real property, hereinafter referred to as "Parcel 7":

BEGINNING at a point 9.20 chains South from the Northwest Corner of the Southeast Quarter of the Southwest Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Meridian, and running thence East 20.00 chains to section line; thence South along meridian line 80 links, more or less to the center of Draper Canal; call East Jordan Irrigation Company Canal; thence Southwestly along center of said canal following the crooks and curves in the same, 12.00 Chains, more or less, to the north line of County Road 6 and west; thence North 71° West along center of a gully or wash 5.86 chains; thence North 60° West 1.44 chains; thence along center of wash North 40° West 1.60 chains; thence North 7° West 1.63 chains; thence North 33° West 2.5 chains; thence South 60° West 2.20 chains; thence South 75° West 3.60 chains to government line; thence North on said line 5.20 chains to point of **BEGINNING**.

A parcel of land located in the Southwest Quarter of the Southeast Quarter of Section 1, Township 3 South Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described in Book 2441 at Page 445 as Entry Number 2147742 of the Salt Lake County records described as follows:

Cornestone Professional Land Surveys, Inc. • 2028 East 7000 South, Suite 204 • Salt Lake City, Utah 84121 • (801)943-4000 • File No: CU9501-1-AGF

9. The exact location of the boundaries between Parcels 1 through 8 are currently in dispute. In order to eliminate any confusion and to forever determine the issue of the common boundary lines between said parcels, the undersigned parties desire to establish said boundary lines.

NOW, THEREFORE, in consideration of the above premises, and for other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, and for the purpose of permanently establishing the common legal and physical boundary lines between the parcels described herein, it is hereby agreed as follows:

A parcel of land located in the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described as follows:

BEGINNING at a point on the north line of 9400 South Street, said point being South 89°59'33" West 359.91 feet along the monument line and North 0°40'03" West 33.00 feet from the Salt Lake County Surveyor's monument located South 89°50'35" East 90.77 feet (South 89°59'54" East 90.64 feet by Area Reference Plat), North 0°05'05" West 25.93 feet, North 0°20'40" East 33.00 feet by A.R.P.; and North 88°11'44" West 93.00 feet from the Southeast Corner of Section 1, Township 3 North, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, said monument also being North 89°55'33" West 359.91 feet from the existing Salt Lake County Surveyor's monument located South 89°50'35" East 90.77 feet (South 89°59'54" East 90.64 feet by Area Reference Plat) to the north line of 9400 South Street; thence along said north line North 0°40'03" West 45.00 feet along an existing fence; thence South 89°59'33" West 149.00 feet along an existing fence; thence South 0°40'03" East 45.00 feet along an existing fence to the north line of 9400 South Street; thence along said north line North 0°40'03" East 149.00 feet to the point of BEGINNING.

A parcel of land located in the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described as follows:

BEGINNING at a point on the north line of 9400 South Street, said point being North 89°55'33" West 216.40 feet along the monument line and North 33°00'00" East from the Salt Lake County Survey...¹ "Y's monument located North 89°50'35" East 90.77 feet (South 89°50'54" East 90.64 feet by Area Reference... Plat), North 90°05'05" West 26.97 feet (North 90°02'49" East 33.00 feet by A.R.P.) and North 89°11'44" West 93.50 feet from the Southeast Corner of Section 1, Township 33 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, said monument also being North 89°55'33" East 107.58 feet (1407.15 feet A.R.P.) from an existing Salt Lake County monument at the intersection of 9400 South Street and 255 West Street, and running thence North 447.00 feet along an existing fence, thence North 89°56'11" West 149.68 feet along an existing fence, thence South 90°43'03" East 456.00 feet along an existing fence to the north line of 9400

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South Street; thence along said north line 33' E: 143.92 feet to the point of BEGINNING.

3. It is hereby agreed that Parcel 3 will be hereafter described as follows:

A parcel of land located in the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described as follows:

BEGINNING at a point on the north line of 9400 South Street, said point being South 89°55'33" West 117.40 feet along the monument line and North 40.00 feet from the Salt Lake County Surveyor's monument located North 89°50'35" East 90.77 feet (South 89°59'54" East 90.64 feet by Area Reference Plat), North 00°05'05" West 26.97 feet (North 00°02'40" East 33.00 feet by A.R.P.) and North 88°11'44" West 930.50 feet from the Southeast Corner of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, said monument also being North 89°55'33" East 1407.56 feet (1407.15 feet A.R.P.) from an existing Salt Lake County monument at the intersection of 9400 South Street and 255 West Street, and running thence North 438.00 feet along an existing fence; thence North 88°55'01" West 99.02 feet along an existing fence; thence South 440.00 feet along an existing fence to the north line of 9400 South Street; thence along said north line North 89°55'33" East 99.00 feet to the point of BEGINNING.

4. It is hereby agreed that Parcel 4 will be hereafter described as follows:

A parcel of land located in the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described as follows:

BEGINNING at a point on the north line of 9400 South Street, said point being South 89°55'33" West 117.40 feet along the monument line and North 40.00 feet from the Salt Lake County Surveyor's monument located North 89°50'35" East 90.77 feet (South 89°59'54" East 90.64 feet by Area Reference Plat), North 00°05'05" West 26.97 feet (North 00°02'40" East 33.00 feet by A.R.P.) and North 88°11'44" West 930.50 feet from the Southeast Corner of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, said monument also being North 89°55'33" East 1407.56 feet (1407.15 feet A.R.P.) from an existing Salt Lake County monument at the intersection of 9400 South Street and 255 West Street, and running thence along said north line the following two courses: North 89°55'33" East 118.00 feet and South 89°11'44" East 23.43 feet; thence North 89°34'36" East 107.23 feet along an existing fence; thence North 15°04'17" East 78.79 feet; thence North 64°00'00" West 67.08 feet; thence North 17°02'00" West 224.00 feet; thence West 27.00 feet along an existing fence; thence South 438.00 feet along an existing fence to the point of BEGINNING.

5. It is hereby agreed that Parcel 5 will be hereafter described as follows:

A parcel of land located in the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described as follows:

BEGINNING at a point on the north line of 9400 South Street, said point being South 88°11'44" East 170.65 feet along the monument line and North 01°48'16" East 33.00 feet from the Salt Lake County Surveyor's monument located North 89°50'35" East 90.77 feet (South 89°59'54" East 90.64 feet by Area Reference Plat), North 00°05'05" West 26.97 feet (North 00°02'40" East 33.00 feet by A.R.P.) and North 88°11'44" West 930.50 feet from the Southeast Corner of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, said monument also being North 89°55'33" East 1407.56 feet (1407.15 feet A.R.P.) from an existing Salt Lake County monument at the intersection of 9400 South Street and 255 West Street, and running thence North 05°05'54" East 150.94 feet along an existing fence; thence North 70°37'51" West 130.03 feet; thence South 15°04'17" West 78.79 feet along an existing fence; thence South 08°34'36" West 107.23 feet along an existing fence; thence North 88°11'44" East 2.43 feet to the northeast corner of a 7 foot wide strip conveyed to Sandy City Corp. by Warranty Deed recorded in Book 6030 at Page 1799 of the Salt Lake County records; thence South 10°00'00" West 7.07 feet to the north line of 9400 South Street; thence along said north line South 88°11'44" East 151.32 feet to the point of BEGINNING.

6. It is hereby agreed that Parcel 6 will be hereafter described as follows:

Corneison Professional Land Survey, Inc. - 2028 East 7000 South, Suite 204 - Salt Lake City, Utah 84121 - (801)943-4000 - File No: CU0501-1-AGR

A parcel of land located in the Southeast Quarter of the Southeast Quarter of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, described as follows:

BEGINNING at a point on the north line of 9400 South Street, said point being South 88°11'44" East 170.65 feet along the monument line and North 01°48'16" East 33.00 feet from the Salt Lake County Surveyor's monument located North 89°50'35" East 90.77 feet (South 89°59'54" East 90.64 feet by Area Reference Plat), North 00°05'05" West 26.97 feet (North 00°02'40" East 33.00 feet by A.R.P.) and North 88°11'44" West 930.50 feet from the Southeast Corner of Section 1, Township 3 South, Range 1 West, Salt Lake Base and Meridian, Salt Lake County, Utah, said monument also being North 89°55'33" East 1407.56 feet (1407.15 feet A.R.P.) from an existing Salt Lake County monument at the intersection of 9400 South Street and 255 West Street, and running thence along said north line South 88°11'44" East 127.02 feet to an existing 6.0 foot chain link fence, said point being the southwest corner of that certain parcel described in Partial Summary Judgement 2167017 dated July 15, 1991 as Civil Number 900904052 in the Third Judicial District Court, County of Salt Lake, State of Utah; thence along said chain link fence and west line of said judgement North 03°05'34" East 107.06 feet (North 03°15'30" East 105.06 feet by record); thence North 68°19'25" West 128.43 feet; thence South 05°05'54" West 150.94 feet along an existing fence to the point of BEGINNING.

7. In order to effectuate this agreement, the undersigned owners of Parcels 1 through 6 hereby accept ownership of their respective parcels in the position and with the areas as surveyed, monumented, and described herein and hereby quit claim to adjoining owners any interest in property which was described as being within the boundaries of said owners' parcel which is now surveyed, monumented and described herein as being a part of another owners' parcel.

8. Also, in order to effectuate this agreement, the undersigned owners of Parcel 7 hereby quit claim to adjoining owners of Parcels 2 through 6 any interest in property which was described as being within the boundaries of said Parcel 7 which is now surveyed, monumented and described herein as being part of said Parcels 2 through 6.

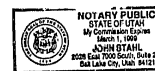
9. Also, in order to effectuate this agreement, the undersigned owners of Parcel 8 hereby quit claim to adjoining owners of Parcel 1 any interest in property which was described as being within the boundaries of said Parcel 8 which is now surveyed, monumented and described herein as being part of said Parcel 1.

Dated this 1st day of August, 1995 by DARWIN M. BAGLEY and DEON S. BAGLEY, owners of "Parcel 1".

Darwin M. Bagley
Darwin M. Bagley
Deon S. Bagley
Deon S. Bagley

STATE OF UTAH)
) ss.
County of Salt Lake)

On this 1st day of August, 1995, personally appeared before me DARWIN M. BAGLEY and DEON S. BAGLEY, who being duly sworn and affirmed, did say that they are the owners of "Parcel 1" and that the foregoing instrument was signed and executed by them.



John E. Stahle
Notary Public,
Murray, Utah
Residing at

My Commission Expires March 1, 1999

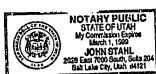
Corneison Professional Land Survey, Inc. - 2028 East 7000 South, Suite 204 - Salt Lake City, Utah 84121 - (801)943-4000 - File No: CU0501-1-AGR

Dated this 1st day of August, 1995 by LUEN ATKIN WOODBURY as Trustee, or the Successor Trustee of THE LUEN ATKIN WOODBURY INTER VIVOS TRUST, owner of "Parcel 2".

Luen Atkin Woodbury
Luen Atkin Woodbury
aka: *Luen Atkin Woodbury Flannery*

STATE OF UTAH)
) ss.
County of Salt Lake)

On this 1st day of August, 1995, personally appeared before me LUEN ATKIN WOODBURY, who being duly sworn and affirmed, did say that she is the Trustee of THE LUEN ATKIN WOODBURY INTER VIVOS TRUST, that said trust is the owner of "Parcel 2" and that the foregoing instrument was signed and executed in the name of said trust.



John E. Stahle
Notary Public,
Murray, Utah
Residing at

My Commission Expires March 1, 1999

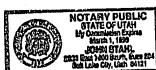
Dated this 2nd day of July, 1995 by KARL E. TUFTS and MABEL M. TUFTS, Trustees of THE TUFTS FAMILY TRUST, owner of "Parcel 3".

Karl E. Tufts
Karl E. Tufts, Trustee

Mabel M. Tufts
Mabel M. Tufts, Trustee

STATE OF UTAH)
) ss.
County of Salt Lake)

On this 2nd day of July, 1995, personally appeared before me KARL E. TUFTS and MABEL M. TUFTS, who being duly sworn and affirmed, did say that they are the Trustees of THE TUFTS FAMILY TRUST, that said trust is the owner of "Parcel 3" and that the foregoing instrument was signed and executed in the name of said trust.



John E. Stahle
Notary Public,
Murray, Utah
Residing at

My Commission Expires March 1, 1999

Corneison Professional Land Survey, Inc. - 2028 East 7000 South, Suite 204 - Salt Lake City, Utah 84121 - (801)943-4000 - File No: CU0501-1-AGR

Dated this 2nd day of August, 1995 by ANDREW HENDERSON, owner of "Parcel 4".

Andrew Henderson
Andrew Henderson

STATE OF UTAH)
) ss.
County of Salt Lake)

On this 2nd day of August, 1995, personally appeared before me ANDREW HENDERSON, who being duly sworn and affirmed, did say that he is the owner of "Parcel 4" and that the foregoing instrument was signed and executed by him.



John E. Stahle
Notary Public,
Murray, Utah
Residing at

My Commission Expires March 1, 1999

Dated this 1st day of August, 1995 by C. JACK SEARLE, President of CENTRAL HEATING, Inc., a Utah Corporation, owner of "Parcel 5".

C. Jack Searle
C. Jack Searle, President

STATE OF UTAH)
) ss.
County of Salt Lake)

On this 1st day of August, 1995, personally appeared before me C. JACK SEARLE, who being duly sworn and affirmed, did say that he President of CENTRAL HEATING, Inc., a Utah Corporation, that said Corporation is the owner of "Parcel 5" and that the foregoing instrument was signed and executed by him on behalf of said Corporation.



John E. Stahle
Notary Public,
Murray, Utah
Residing at

My Commission Expires March 1, 1999

Corneison Professional Land Survey, Inc. - 2028 East 7000 South, Suite 204 - Salt Lake City, Utah 84121 - (801)943-4000 - File No: CU0501-1-AGR

Attachment #4

Affidavits

SURVEYOR'S AFFIDAVIT

I, Arthur F. Jueschke, do hereby state and affirm that I am a licensed Land Surveyor, holding Certificate No. 145812 (old License No. 3373) as prescribed by the laws of the State of Utah.

Because a question has arisen as to the accuracy of the official records for Kelley's Grove Subdivision, Plats "B", I was asked to review and study the official plats of said subdivision, and to perform a field survey to accurately determine the true location of certain lots within Plat "B", and, by extension, the true coordinates of the Points of Beginning of the Plats for Plat "B" of said Kelley's Grove Subdivision. For informational purposes, I here state that the records show that Plat "A" was surveyed by W. Elmo Coffman and approved and recorded in 1948. Its location appears to be correct, however a re-drafted plat of said subdivision gives incorrect beginning point coordinates. Plat "B", Blocks 1 and 2 and Block 3, Lots 1, 2, 3 and 4, was surveyed by LeVern D. Green and approved and recorded in 1952. Plat "B", Block 3, Lots 5, 6 and 7, and Block 4 was surveyed by John M. Neff, and approved and recorded likewise in 1952.

The location of the points of beginning of the two maps of Plat "B" are incorrect.

Accordingly, I did therefore personally perform a field survey to determine the true starting point coordinates for Plat "B". I began my survey at the Witness Corner to the East Quarter Corner of Section 32, Township 7 South, Range 4 East, Salt Lake Base and Meridian, and ran to the Northeast Corner of said Section 32 to determine the bearing and distance between the two aforementioned survey monuments. Using the survey data (angles and distances measured), I was able to calculate that the course and distance from the said Witness Corner to the said Northeast Corner to be North 0° 02' 05" West 2645.45 ft. (The Utah County Surveyor's official plat of portions of Township 7 South, Range 4 East lists only the grid coordinates of those monuments, but the grid distance between those two monuments calculates to be North 0° 02' 05" West 2644.63, which equates to a ground distance of 2645.50 ft., more or less.)

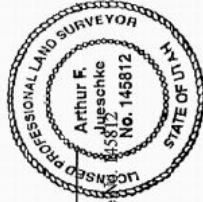
I then continued my survey to certain found, accepted lot corner monuments on Block 4, Plat "B", Kelley's Grove Subdivision. From data shown on the official plat of said subdivision, I was able to then calculate the true point of beginning for the said plat.

The listed coordinates for the point of beginning are given on the official plat as South 1593.86 ft. and West 1310.07 ft. from the East Quarter Corner of Section 32, Township 7 South, Range 4 East, Salt Lake Base and Meridian. According to data within that plat, the coordinates of the Northeast Corner of Lot 8, Block 4, calculate to be South 1925.73 ft. and West 1823.86 ft. from the said East Quarter Corner of Section 32. The actual coordinates for the Northeast Corner of said Lot 8, Block 4 are South 2771.36 ft. and West 1629.69 ft. from the East Quarter Corner of Section 3. The bearing shown on the official plat for the northerly line of Lots 5 through 12 is given as South 83° 43' West. By actual measurement to lot corners found, and

SURVEYOR'S AFFIDAVIT, PAGE 2

accepted as being correctly placed, the bearing of said line is South 84° 23' 15" West. By applying this bearing rotation of 0° 40' 15" clockwise, the coordinates for the point of beginning for said plat calculate to be South 2445.53 ft., more or less, and West 1112.06 ft., more or less, from the said East Quarter Corner of Section 32.

Accordingly, appropriate, similar rotational and coordinate changes should also apply to Blocks 1 and 2 and Lots 1 through 4, Block 3, Plat "B".



Arthur F. Jueschke
Arthur F. Jueschke
Land Surveyor, Utah Certificate
No. 145812

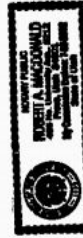
STATE OF UTAH)
(ss
COUNTY OF UTAH

On the 11th day of June, A.D. 1999, personally appeared before me, a Notary Public in and for the State of Utah, Arthur F. Jueschke, who duly acknowledged to me that he did execute the above SURVEYOR'S AFFIDAVIT.

Arthur F. Jueschke
Notary Public

Residing at: *Provo, Utah*

My Commission Expires: *7-25-2002*



10.00
①

2001-028615

STATE OF INDIANA
PORTER COUNTY
FILED FOR RECORD

09-25-2001 9:40 AM

JACQUELYN M. STERLING
RECORDER

SURVEYOR'S AFFADAVIT FOR
CONCORD GREEN SUBDIVISION

The undersigned, C. Thomas Harris, L.S., being duly sworn upon his oath, states as follows:

1. I am a Registered Land Surveyor in the State of Indiana under registration number 12298, and my practice is conducted from an office at 2559 Hamstrom Road, Portage, Indiana.
2. That the plat of Concord Green was recorded April 23, 2001 in the Recorder's Office of Porter County, Indiana, in Plat File 40-B-2, as Document No. 2001-010196.
3. That an absolutely horrible error, unforgivable in its very nature, and likely to destroy the harmony of the free world as we know it, has been discovered by those wonderfully understanding administrators (policemen) of the Portage Planning Department, to wit: Lot 1 in said subdivision bears the street address of "5358 Lexington Avenue". This lot is within a zoning area which allows for the construction of duplexes. Therefore, the plat must be amended to read "5358-5360 Lexington Avenue". Great shame has befallen me that I failed to recognize this breach, and may my house be cursed forever for suggesting that they simply write the new number on their copy of the plat.
4. Awful as it may seem, the same disaster befell Lot 2 in said subdivision. It now reads "5366 Lexington Avenue", but it must read "5366-5368 Lexington Avenue".
5. I submit this document with great trepidation, and the supplication of the unrighteous.

C. Thomas Harris, L.S.
Indiana Reg. No. 12298

September 20, 2001



FILED

SEP 25 2001

line". That deed is dated November 7, 1994, and the same fence line was in place at that time.

6. The "fence line" referred to in Exhibits "C" and "D" is a fence that was in place at the time I purchased the 8 acre parcel in 1994 (Exhibit "A"). That was the only fence line in the vicinity of the Newton Farms property which existed at the time I purchased the 8 acre parcel. After I purchased the 8 acre parcel, I had the north line of that parcel surveyed and I installed a fence along the north line of said parcel. The old fence was still in place at that time and was approximately 15 ft. north of my property line. After that, I acquired the additional parcel (Exhibit B) located to the north of the 8 acre parcel. For these, and other reasons mentioned in this Affidavit, I can state with confidence that the old fence line is one and the same as the old fence line that was in place when I purchased the 8 acre parcel. Therefore, the old fence line is the south boundary of the Newton Farms property.

7. When I acquired the additional parcel, (Exhibit "B") from Lehi Farms, this parcel was apparently separately assessed from the 8 acre parcel (Exhibit "A") and the Newton parcel (Exhibit "D"), because I paid several year's back taxes on this parcel. The old fence line has been removed, but post holes and posts have been located in the old line of fence and the alignment of these holes and posts is the same as the north line of the parcel which I purchased in 2002. It is evident that the fence line (south boundary of the Newton parcel) and the north line of the parcel I purchased in 2002 are one and the same, and that the common boundary line between the properties which comprise the Newton Farms and Ward Meadows is the north line of the parcel which I acquired in 2002 (Exhibit "B").

8. The current subdivision plat for Ward Meadows correctly shows the north boundary line of the property. The proposed plat for Newton Farms encroaches on the Ward Meadows plat on the north line of the Ward Meadows plat. The south line of the Newton Farms plat should be revised to be along the south line of the old fence line which is the north line of the Ward Meadows plat.

9. The owners of the Newton Farms property approached me sometime ago in the presence of a witness to purchase the parcel which I acquired in 2002 (Exhibit B). This is further evidence to me that these people are aware that they do not own the said parcel. In addition, I was approached and I have given an easement to a public utility for a facility located within the parcel I acquired in 2002.


Duane Ward

**AFFIDAVIT OF DUANE WARD
RELATING TO COMMON BOUNDARY LINE DISPUTE
BETWEEN PROPOSED SUBDIVISIONS KNOWN AS
"NEWTON FARMS" AND "WARD MEADOWS"
IN SECTION 18, TSS, R1E, SLB&M**

BNF 117565:2007 pg 1 of 7
KANE COUNTY RECORDER
2007 Aug 13 4:07 PM FEE \$21.00 BY CM
RECORDED FOR WARD MEADOWS

STATE OF UTAH)
COUNTY OF UTAH)
: ss.
)

DUANE WARD, being first duly sworn on his oath, deposes and says:

1. This Affidavit is made for the purpose of assisting in the establishment of the common boundary line between a proposed subdivision to be known as "Newton Farms" and a proposed subdivision to be known as "Ward Meadows" located in Section 18, Township 5 South, Range 1 EAST, SLB&M. The common boundary line in issue is the South boundary of Newton Farms property and the North boundary of the Ward Meadows property.

2. I am a resident of Salt Lake County, Utah, over the age of 21 years, and in all respects competent to make this Affidavit. Except as otherwise indicated in this Affidavit, the matters herein set forth are based upon my personal knowledge.

3. In July of 1994 I purchased approximately 8 acres of property in Lehi from Lehi Farms. The said parcel is described on Exhibit "A" to this Affidavit. In July of 2002 I purchased an additional parcel of land from Lehi Farms located contiguous to the north of the 8 acre parcel, being a strip of land 754.56 ft. east and west and of varying depth from 12.72 ft. on one end to 14.89 ft. on the other. A copy of the deed to said parcel is attached to this Affidavit as Exhibit "B".

4. The subdivision plat known as Ward Meadows includes the 8 acre parcel described in Exhibit "A" and the adjoining parcel described in Exhibit "B". The north line of the platted property is one and same as the north line of the parcel described on Exhibit "B".

5. At one time the properties included within the Newton Farms and Ward Meadows plat were owned in common by Lehi Farms. I have been provided with copies of the deeds in the chain of title from Newton Farms to the present owner of the Newton Farms Subdivision. Copies of these deeds are attached hereto as Exhibits "C" and "D" respectively. Exhibit "C" is a deed from Lehi Farms to Eileen R. Harding and Exhibit "D" is a deed from Eileen R. Harding to Lori A. Brown. Per Exhibit "D" the south line of the Newton Farms property is described as being "along a fence" which was in place at the date of that conveyance (February 1988). The deed to Newton Farms immediate predecessor in interest (Lori Brown) (Exhibit "D") describes the south line of the Newton Farms property as commencing at a point "in a fence line and thence along said fence

**AFFIDAVIT OF LYNN HARDING
RELATING TO COMMON BOUNDARY LINE DISPUTE
BETWEEN PROPOSED SUBDIVISIONS KNOWN AS
"NEWTON FARMS" AND "WARD MEADOWS"
IN SECTION 18, T5S, R1E, SLB&M**

BM 117566:2007 Pg 1 of 7
UTAH COUNTY RECORDER
2007 Aug 13 4:09 PM FEE 23.00 BY CM
RECORDED FOR WARD MEADOWS

STATE OF UTAH)
COUNTY OF WASHINGTON) : ss.

LYNN HARDING, being first duly sworn on his oath, deposes and says:

1. This Affidavit is made for the purpose of assisting in the establishment of the common boundary line between a proposed subdivision to be known as "Newton Farms" and a proposed subdivision to be known as "Ward Meadows" located in Section 18, Township 5 South, Range 1 EAST, SLB&M. The common boundary line in issue is the South boundary of Newton Farms property and the North boundary of Ward Meadows property.

2. I am a resident of Washington County, Utah, over the age of 21 years, and in all respects competent to make this Affidavit. Except as otherwise indicated in this Affidavit, the matters herein set forth are based upon my personal knowledge.

3. Lehi Farms was a limited partnership. Title to the lands which now comprise the proposed subdivisions known as Newton Farms and Ward Meadows was at one time held by Lehi Farms. For many years I was a partner in Lehi Farms and I was very familiar with the lands owned by the limited partnership in said Section 18. I grazed livestock (horses and cattle) for several years on said properties.

4. In February of 1988 the limited partnership conveyed lands which are now located in Newton Farms to my wife, EILEEN R. HARDING, by Warranty Deed, copy of which is attached hereto as Exhibit "C". In November of 1994 my wife conveyed this same property to LORI A. BROWN, who is a predecessor in interest to the current owners of Newton Farms. A copy of that deed is attached hereto as Exhibit "D". I am very familiar with these transactions and was consulted in connection with the same. At the time of the conveyances in 1988 and in 1994, there was a fence in place at the south line of the properties conveyed. This was the only fence in the vicinity of the south line of said property. Each of the 1988 and 1994 conveyances tied the south line of the property to the old fence line and the fence line was intended by the Grantor and the Grantee to be the south boundary of the property. Indeed, the south line of the property was described as being along the said fence line. After title was conveyed to my wife, I constructed an outdoor arena on the property and the old fence was approximately 2 feet south of the footings for that building. The footings are still in place on the land.

5. I have been provided with a copy of the Warranty Deed by which Lehi Farms conveyed a parcel of land (approximately 8 acres) to DUANE WARD. A copy of that deed is attached hereto as Exhibit "A". Mr. Ward constructed a fence line along the north boundary of the said 8 acre parcel and the old fence line was still in place at the time Mr. Ward constructed the fence line on the north boundary of his 8 acre parcel. The old fence line was parallel to and approximately 15 ft. from the north fence line of the Duane Ward 8 acre parcel.

6. Further, I have been informed that Lehi Farms conveyed a strip of land to Duane Ward located between the old fence line and the north line of the 8 acre parcel. Exhibit "B" attached hereto was provided to me as a copy of that conveyance.

7. Apparently the north line of the parcel described in Exhibit "D" is one and the same as the old fence line which was intended to be the south boundary of the land conveyed by Exhibits "C" and "D"

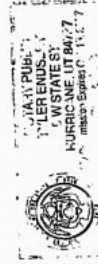
8. The old fence line has been removed, but there are more than one remnants of posts and post holes located on the alignment of the old fence to establish where it was on the land.

Subscribed and sworn to before me this 11 day of August, 2007.

Lynn Harding
Lynn Harding

Notary Public
NOTARY PUBLIC
Residing at: *Harding, UT*

My Commission Expires:
10/1/07



Attachment #5

Survey Narratives

I further certify that this plat correctly shows the true dimensions of the boundaries surveyed and of the visible improvements affecting the boundaries and their position in relationship to said boundaries; that none of the visible improvements on the above described property encroach upon adjoining properties; and that no visible improvements, fences or eaves of adjoining properties encroach upon the above described property, except as shown.

John B. Stahl, LS
License No. 7600

Date

Narrative:

Purpose: The purpose of this survey is to retrace the boundaries of the properties and to prepare descriptions of the boundaries to remedy latent ambiguities in the title documents.

Basis of Bearings: The basis of bearings for this survey was established between the Salt Lake County Surveyor's monuments marking the centerline of 9400 South Street as shown on the survey. The bearing is referenced by the Salt Lake County Area Reference Plat, the Wallace Heights Subdivision, and various surveys and deeds of record.

Survey Findings: The composite deed for the properties in question share a common root in title by Indenture dated June 5, 1888 as recorded in Book 2-0 at Page 342 which locates the north boundary along the center of a deep ditch and the south line along the centerline of a County road and Section Line. The remainder description of the north adjoining property dated March 29, 1889 as recorded in Book 2-V at Page 286 uses as its south boundary the same deep ditch located 5.2 chains south of its northwest corner. Partial remains of the ditch (referred to also as a gully or wash by more recent records) were recovered along the rear portion of the Henderson, Central Heating, and Miller parcels. The north adjoining deed and the locative calls were used to determine the former location of the west portion of the ditch. The ditch has been completely filled throughout the majority of its length and partially filled where recovered. Aerial photographs taken in 1952 show the ditch filled in along the west portion. The fence lines along the north boundary of the Bagley, Woodbury and Tufts parcels are apparent in the photos.

The ditch, the north-south fence line presumed by the owners to mark the 1/16th line and the East Jordan Canal (also referred to in the record as the Draper Canal) are the only remaining monuments recovered which were called for in the original conveyance. The east-west section line and the location of the center line of 9400 South Street as currently located do not conform with the location indicated by the original conveyances. The more certain natural monuments called for were used to locate the original boundaries as described.

The composite parcel was divided into seven parcel beginning with the Tufts parcel in 1945. All of the parcels were described using the original language and dimensions as the 1888 deed. The centerline of the street and the section line locations were substantially different from the 1888 locations, however the dimensions of the parcels were computed based upon the original parcel dimensions.

As the properties were occupied and improvements were established, variations were made from the boundaries as described in their respective conveyances. Beginning in 1987, the discrepancies have been discovered and attempts have been made to remedy the discrepancies on four of the seven parcels. The Bagley parcel was redescribed by Quit Claim Deed recorded January 21, 1987 in Book 5867 at Page 2824 using a "Fence line survey description". The Henderson parcel was redescribed in a Boundary Agreement recorded October 8, 1987 changing the boundaries to match existing fence lines as occupied. The Tanner parcel description was reformed by a Judgement filed July 15, 1991 utilizing the existing fences as boundaries. The Miller parcel was redescribed by a survey by Duane Peterson dated June 11, 1992. The description does not appear on any recorded documents at this time.

Parcels 1 through 6 as shown on this survey were surveyed, monumented and described in accordance with the instructions received by the owner of each respective parcel. A boundary line agreement was prepared to forever determine the locations of the common boundaries as surveyed, monumented and described. The said agreement was entered into by the owners of Parcels 7 and 8 in order to establish the common boundaries of Parcels 1 through 6.