New York's Property Boundary Law: The Doctrine of Practical Location and Related Doctrines

Laura E. Ayers, Esq.
The Law Offices of Laura E. Ayers, Esq.
434 Main Street – P.O. Box 237
Schoharie, New York 12157
(518) 456-6705
www.lauraayerslaw.com

Introduction

Overview of the Course

Order of Precedence

Practical Location

Boundary by Agreement

Boundary by Estoppel

Adverse Possession

Encroachments

Judicial Determination of Boundaries

Surveyor's Responsibility

Order of Precedence of Locative Calls in Deed Descriptions

Rule of Construction:

Generally

- Grants are made with a view of the premises
- Intentions of the parties controls
- That which is more definite will yield to that which is less definite

Order of Precedence

- Real Property Law 240(3)
- Every instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law.

The Order of Precedence

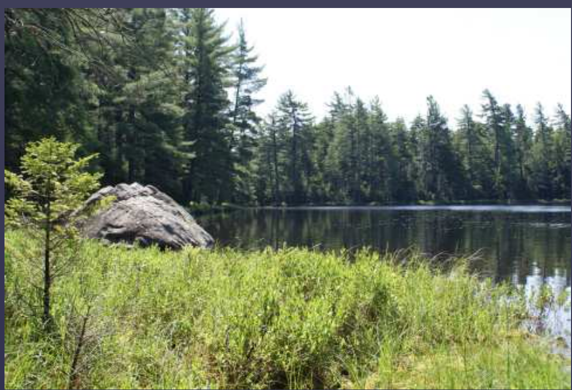
1. Natural Objects or Landmarks
2. Artificial Monuments
3. Adjacent Boundaries
4. Courses and Distances
5. Quantity

The Order of Precedence

- The rule is well settled that a conveyance is to
- be construed in reference to its visible locative calls, as
- marked or appearing upon the land, in preference
- to quantity, course, or distance; and <u>any particular may be</u>
- <u>rejected, if inconsistent with the other parts of the</u>
- <u>description</u>, and sufficient remains to locate the land
- intended to be conveyed. '
- Robinson v. Kime, 70 N.Y. 147, 154 (1877) citing to Hathaway v. Power, 6 Hill [453], 454 ; Drew v. Swift, 46 N.Y. 204 .

The Order of Precedence

Natural Object



Henry v. Malen, 263 A.D.2d 698 (3rd Dept 1999)

- "Although there was conflicting testimony as to whether the brook or the stone wall marked the boundary line, since the brook is a natural object, under the rules of construction for discrepancies in deed calls, the brook would designate the boundary line.... As such, it appears that the phrase "following the fence along the Brook as it now runs" acts as a directional aid rather than a boundary line."

The Order of Precedence

Lewis v. Clark, 133 N.Y.S.2d 880 (Sup. Ct. Ontario Co. 1954)

- "It is true there is a strong element of danger over a course of years in anchoring a conveyance to a perishable object. But here we are concerned with the brief span from 1941 to 1951 and the uncontradicted evidence is that this willow has stood there during all that time and to the present."

Artificial Monument

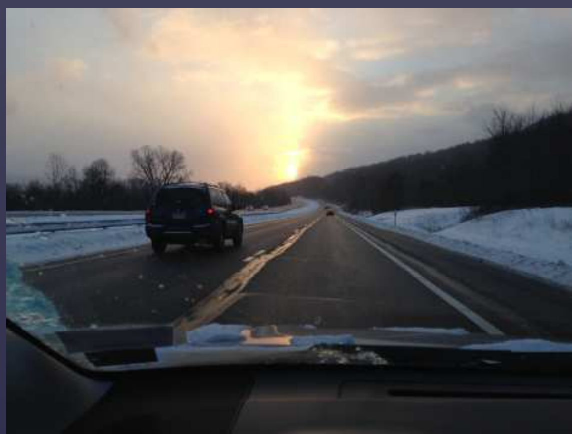
The Order of Precedence

- ADJACENT BOUNDARIES:
- Requires surveyor to obtain deeds to adjoining lands and determine the client's property lines by another's title.
- The boundaries of adjacent lands may be treated as monuments when they can be competently determined. See *Robinson v. Kime*, 25 Sickels 147 (1877).
- A surveyor's map is his or her interpretation of the deed description applying the rules for construction
- They are an expression of an opinion, and opinions may vary→boundary line dispute

The Order of Precedence

Highways

- Centerline presumption
- Bashaw v. Clark, 267 A.D.2d 681 (3d Dept 1999)



The Order of Precedence

Water and Watercourses

- Centerline presumption
- *Knapp v. Hughes*, 19 NY3d 672 (2012)

Order of Precedence

Courses and Distances

- Course and a Distance
- N 12°09’00” E – 88 feet

Order of Precedence

- Courses and Distances: Arcane Units of Measurement:
- Perch-
- As a unit of length-- equal to 5.03m or 5.5 yards
- As a unit of area—equal to 25.3m^2 or 30.25 sq. yards
- Rood-
- A unit of area
- 1 rood =1/4 acre = 1,011.7 sq m
- Often mis-read in old deeds for a "rod" which is a linear measurement of 16.5 feet
- Rod-
- A unit of length equal to 16.5 feet
- One rod is equal to 1/320 of a mile

Order of Precedence

- Courses and Distances: Arcane Units of Measurement
- Chain → unit of length equal to 22 yards or 66 feet
- Fathom → unit of length equal to six feet used to measure depth of water
- Furlong → unit of distance equal to 220 yards
- Hide → old unit of land area equal to 120 acres
- Link → unit of length used by surveyors, equal to 7.92 inches; 100 links equals one chain
- Pole → unit of area equal to a square rod

The Order of Precedence

Metes

- Starts at a Point of Beginning
- Travels around the property's perimeter to points at corners
- Ends at the Point of Beginning creating a closed figure

Bounds

- Describes the property by the adjoining land owner's properties in the four directions of the compass
- Surveyor must acquire and interpret the deeds of the adjoining landowners

The Order of Precedence

- QUANTITY: least definite descriptive element
- Often see deeds state the uncertainty of the quantity
- Example: containing 50 Acres, more or less

The Order of Precedence

- Reference to a Map or Plat
- Maps referred to in a deed may control the description where the conveyance is by lots and reference to the map.
- In such cases the map controls the dimensions in the deed
- The map controls even over a positively stated area.

The Order of Precedence

- Exceptions:
- Monuments control courses and distances, except when they don't.
- "The rule that monuments control courses and distances is merely a rule of construction to ascertain the intention of the parties. If that intention is otherwise plainly manifested, it need not be ignored in blind adherence to such a rule."
- *Green v. Horn,* 207 N.Y. 489 (1913).

Boundary Lines by Acquiescence or Practical Location

Good fences make good neighbors

Mending Wall

Robert Frost

- …But at spring mending-time we find them there. I let my neighbor know beyond the hill; And on a day we meet to walk the line And set the wall between us once again. We keep the wall between us as we go…
- He only says, 'Good fences make good neighbors'. Spring is the mischief in me, and I wonder If I could put a notion in his head: 'Why do they make good neighbors? Isn't it Where there are cows? But here there are no cows. Before I built a wall I'd ask to know What I was walling in or walling out, And to whom I was like to give offence. Something there is that doesn't love a wall,…

Boundary Line by Acquiescence

- The doctrine of practical location was originally derived from a long acquiescence by the parties in a line known and understood between them, for such a period of time as to be identical with "time immemorial" or "time out of memory." *Adams v. Warner,* 209 A.D. 394 (3d Dept, 1924).

Boundary Line by Acquiesence

- "The doctrine as to the practical location of a boundary line is well settled in the courts. It was adopted as a rule of repose with a view of quieting titles, and rests upon the same ground as the statute in reference to adverse possession which has continued for a period of twenty years. (Baldwin v. Brown, 16 N.Y. 359 ; Adams v. Rockwell, 16 Wend. 285 .)
- It applies not only to cases of disputed boundary, but to those about which there can be no real question."
- *Sherman v. Kane,* 86 NY 57 (1881)

Boundary Line by Acquiescence

- Elements:

1. An act of the Parties
2. Mutual so that both parties are affected by it
3. A line definitely known, understood and settled
4. For a long period of time

Boundary Line by Acquiescence

Act of the Parties

- Express Act
  - Fence for many years, afterward a post remained and both parties maintained their properties (planting flowers) up to the post on either side of an imaginary line running to the back of the property. VanDusen v. Lomomanco, 24 Misc. 2d 878 (Sup. Ct. Madison Co. 1960).
- Implied Act
  - Old stone wall and pipes which once supported a wire fence located between two known end point monuments. Markowski v. Ferrari, 174 AD2d 793 (3rd Dept 1991)

Boundary Line by Acquiescence

- Mutual so both parties are affected by it
- In Adams v. Warner 209 A.D. 394 (3rd Dept 1924) there was no certain visible known line that both parties had acquiesced to since the plaintiff's lands were timber lands, unfenced, unoccupied and unused.

Boundary Line by Acquiescence

- Mutual so both parties are affected by it
- A line of trees marked in the woods with paint and random posted signs were insufficient to demonstrate mutual acceptance of a division line between the properties. *Riggs v. Benning* 290 A.D.2d 716 (3d Dept 2002).

Boundary Line by Acquiescence

- Mutual so both parties are affected by it
-
- Use of the disputed area for decades as a part of a goat farm is insufficient evidence of mutual agreement in the absence of a clear demarcation of a boundary line. *Kennedy v. Nimons,* 2014 NY Slip Op 07036 (3d Dept 2014).

Boundary Line by Acquiescence

- A line definitely known, understood and settled
  - Fences
  - Hedge rows
  - Plants
  - Posts
  - Pipes

Boundary Line by Acquiescence

"Here, defendants submitted proof that former owners of their property and neighbors always assumed the trees were on defendants' property, and plaintiff has failed to allege facts that would support that the trees in question were mutually understood to reflect the boundary line and that such an understanding persisted for more than 10 years ." *McMahon v. Thornton,* 69 A.D.3d 1157 (3d Dept 2010).

Boundary Line by Acquiescence

- Practical Location fixes the location of the boundary line EVEN if the boundary line described in the deed can be definitively located in the field

- Bell v. Hayes, 60 A.D. 382 (2d Dept 1901)
- Baldwin v. Brown, 16 N.Y. 359 (1857)
- Kaneb v. Lamay, 58 A.D.3d 1097 (3d Dept 2009)

Boundary Line by Acquiescence

- For the Statutory Period
- Precludes all evidence to the contrary as to the location of the boundary line other than the line acquiesced to by the parties.
- Reed v. Farr, 35 N.Y. 113 (1866)

- For less than the Statutory Period
- Is conclusive evidence of the boundary line between the properties.
- Markowski v. Ferrari, 174 AD2d 793 (3rd Dept 1991)

Boundary Line by Acquiescence

- PARTIES BOUND:
- "a boundary, once located and openly adhered to by contiguous owners, cannot be disturbed and re laid by a subsequent owner"
- *Fisher v. MacVean,* 25 AD2d 575 (3d Dept., 1966)

Boundary Line by Acquiescence

- Baldwin v. Brown, 16 N.Y. 359 (1857)

Boundary Line by Acquiescence: Case Studies

- Adams v. Warner 209 A.D. 394 (3rd Dept 1924)

Boundary Line by Acquiescence: Case Studies

- Markowski v. Ferrari, 174 AD2d 793 (3rd Dept 1991)

Boundary Line by Acquiescence: Case Study

- VanDusen v. Lomomanco, 24 Misc. 2d 878 (Sup. Ct. Madison Co. 1960).

Boundary Line by Acquiescence: Case Studies

- Jakubowicz, v Solomon, 107 A.D.3d 852 (2d Dept 2013).

Boundary Line by Acquiescence: Case Studies

- Gibbs v. Porath, 2014 NY Slip Op 07030 (3d Dept 2014).

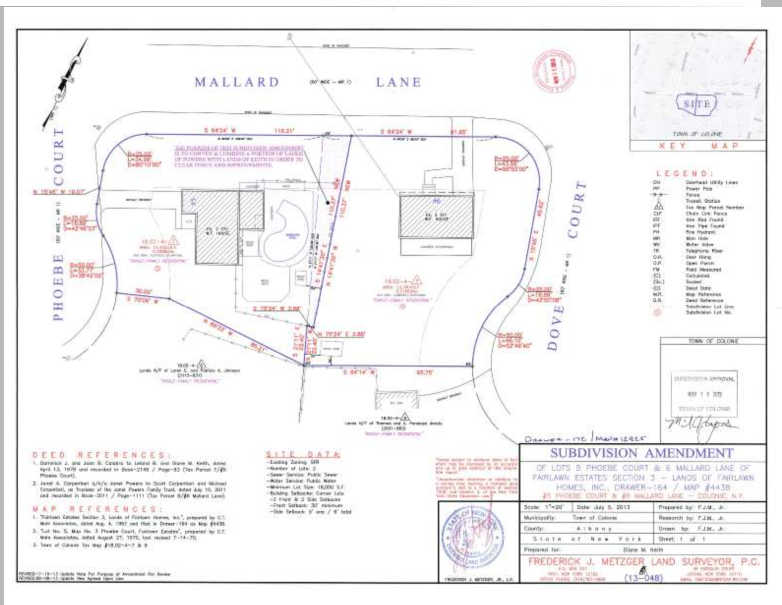
Boundary Line by Acquiescence: Case Studies

- Kennedy v. Nimons, 2014 NY Slip Op 07036 (3d Dept 2014).

Boundary Lines by Acquiescence

Boundary Lines by Acquiescence

Boundary Lines by Agreement



Boundary Lines by Agreement

- Parol Agreement
1. Adjoining Landowners
2. Uncertain or disputed common boundary
3. Parol Agreement as to the boundary

Boundary Line by Agreement

General Obligations Law § 5-703. Conveyances and contracts concerning real property required to be in writing

- 1. **An estate or interest in real property**, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, **cannot be created**, granted, assigned, surrendered or declared, **unless by act or <u>operation of law</u>, or by a deed or conveyance in writing, <u>subscribed by the person creating</u>**, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing….

Boundary Lines by Agreement

- The parties themselves ought to be the best judges of the boundaries of their own lands; and after they have deliberately settled a boundary line between them, it would give too much encouragement to the spirit of litigation to look beyond such settlement, and break up the lines so established between them.
- *Jackson v.Van Corlaer,* 11 Johns. 123 (1814).

Boundary Lines by Parol Agreement

- Where there is a disputed, indefinite, or uncertain boundary line between adjoining proprietors, they may, by parol agreement, or by arbitration, fix upon a line between themselves.
- Wood v. Layfayette, 46 N.Y. 484 (1871)
- "Upon actual survey the true location can be ascertained apparently with absolute certainty. There is not the slightest room for the application of the doctrine…."
- *Adams* Supra.

Boundary Lines by Parol Agreement

- *Terry v. Chandler*, 16 N.Y. 354 (1857)

Boundary Lines by Parol Agreement

- Wood v. Lafayette, 46 N.Y. 484 (1871)

Comparison with Practical Location

- Practical Location:
- It doesn’t matter if the line described in the deed is ascertainable upon actual survey or not, either way the line acquiesced to by the parties is the true boundary line

- Parol Agreement:
- The line described in the deed has to be uncertain, questionable, unresolved or disputed for the oral agreement to be binding

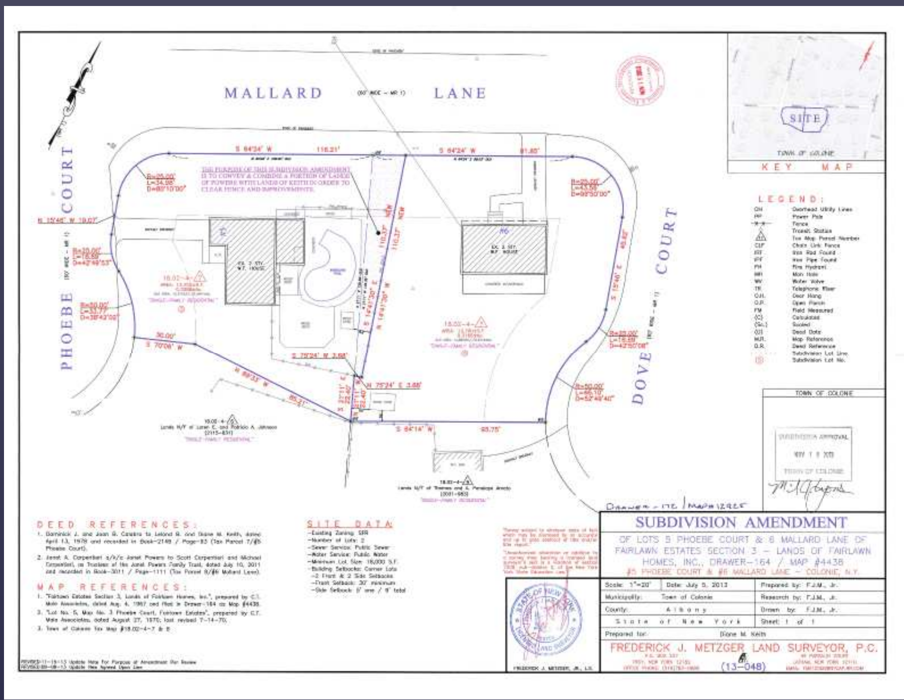
Boundary Line by Agreement

- "…that the subject deeds contain no specific bearings or directional calls and set forth only the vaguest description of the intended boundary line between the land originally conveyed to plaintiff and Laight. Indeed, Langdon opined that the deeds in question were "so bad" that a boundary line could not be established absent either a boundary line agreement, which the parties apparently were unable to forge, or judicial intervention."
- *Gibbs v. Porath*, 2014 NY Slip Op 07030 (3d Dept 2014).

Boundary Lines by Agreement

- Written Agreements:
- A conveyance to adjust the location of the boundary line
- To conform with the parties longstanding recognition of the boundary line between their properties
- To demonstrate a perfected adverse possession
- To adjust for an encroachment
- Fix an ambiguous description

Boundary Lines by Agreement



Boundary Lines By Agreement

Town of Colonie Zoning & Subdivision Code

- 18,000 Square feet minimum lot size for Single Family Residential Zoned Lots
- Both lots were approximately 13,000 sq. feet

- §190-59 Classification
- (C) Subdivision amendment:
- (2) Transfer of real property from one parcel of land to an adjoining parcel such that no new lots are created, where any of the affected parcels is shown on a previously filed subdivision map.

Boundary Lines By Agreement

TOWN OF COLONIE
Zoning Board of Appeals
Public Operations Center
347 Old Niskayuna Road
Latham, New York 12110
Phone (518) 783-2706 Fax (518) 783-2772
www.colonie.org

Paula A. Mahan
Town Supervisor

OCT 2013
RECEIVED
Colonie
Building Dept.

Granted
ZBA 13-042

James Campbell
Chairman

Michael J. Garry
Counsel

DECISION OF ZONING BOARD OF APPEALS:

IN THE MATTER OF: **5 Phoebe Court**

Fred Metzger, Jr. (agent for Diane Keith & Janet Powers gave notice of appeal from the decision of the Building Department Manager for the Town of Colonie, which refused to issue a Building and Zoning Permit for **5 Phoebe Court** on the grounds that such would be in violation of the Town of Colonie Land Use Law for the following reason(s):

The proposed subdivision amendment, moving an 110.37' portion of the side property line, creating a 13,452 sq. ft. lot (5 Phoebe Court) and a 13,790 sq. ft. lot (6 Dove Court), does not comply with the minimum 18,000 sq. ft. lot required in a Single Family Residential zoning district, as stated in the Town of Colonie Land Use Law, Article V, Section 190-25, Dimensional Table #2.

Fred Metzger, Jr. (agent for Diane Keith & Janet Powers has petitioned the Zoning Board of Appeals for a variance from the strict application of said provisions, specifically an **area** variance as set forth above.

Whereas, said Board, on the **3rd day of October, 2013,** and after due notice, held a public hearing on said appeal, at which hearing any and all persons interested in said appeal, were given an opportunity to appear and be heard thereon; and

Whereas, said Board has examined the application for the aforesaid permit and the aforesaid petition for variance in relation to the circumstances and conditions affecting said property and those applying in the neighborhood of the same;

Now, Therefore, Be it Resolved, BASED ON THE ENTIRE RECORD BEFORE THE BOARD, THE REQUESTED VARIANCE IS:

__X__ **APPROVED** ______ APPROVED IN PART ____CONDITIONALLY APPROVED _____ DENIED

CONDITIONS: N/A

NOTE: Unless otherwise specified, any decision of the Zoning Board of Appeals shall expire and become null and void one year after the filing of such decision if the applicant has not exercised such authorized activity within such period. Issuance of a building permit in accordance with, and within one year of, such decision, shall be deemed prima facie evidence that such activity has been exercised. ZBA Rules and Procedures Article 8.6.

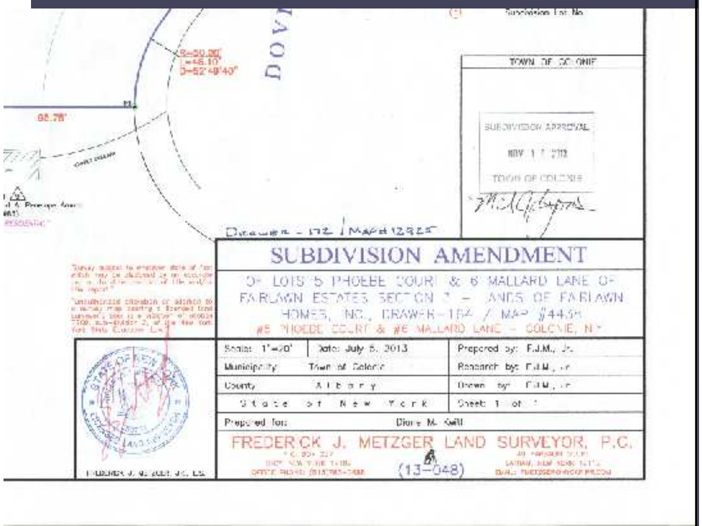
Certificate

I, James Campbell, Chairman of the Zoning Board of Appeals of the Town of Colonie, do hereby certify that the foregoing is a true copy of a decision of the Zoning Board of Appeals made at a meeting thereof duly called and held on the **3rd** day of **October, 2013.**

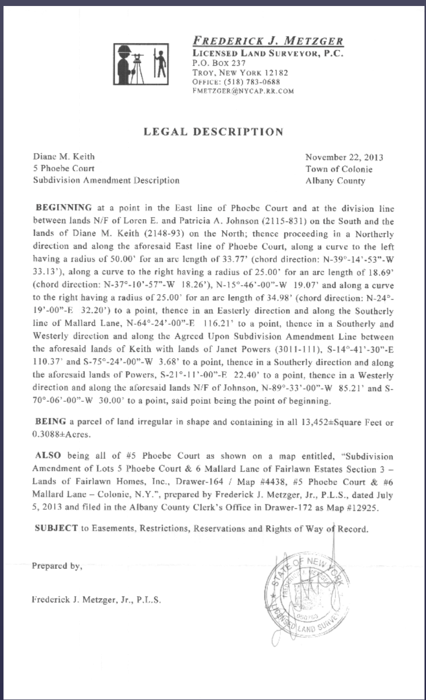
Date: 10/8 2013

James Campbell, Chairman
Zoning Board of Appeals

FILED



Boundary Lines by Agreement



FREDERICK J. METZGER
LICENSED LAND SURVEYOR, P.C.
P.O. BOX 237
TROY, NEW YORK 12182
OFFICE: (518) 783-0688
FMETZGER@NYCAP.RR.COM

LEGAL DESCRIPTION

Diane M. Keith
5 Phoebe Court
Subdivision Amendment Description

November 22, 2013
Town of Colonie
Albany County

BEGINNING at a point in the East line of Phoebe Court and at the division line between lands N/F of Loren E. and Patricia A. Johnson (2115-831) on the South and the lands of Diane M. Keith (2148-93) on the North; thence proceeding in a Northerly direction and along the aforesaid East line of Phoebe Court, along a curve to the left having a radius of 50.00' for an arc length of 33.77' (chord direction: N-39°-14'-53"-W 33.13'), along a curve to the right having a radius of 25.00' for an arc length of 18.69' (chord direction: N-37°-10'-57"-W 18.26'), N-15°-46'-00"-W 19.07' and along a curve to the right having a radius of 25.00' for an arc length of 34.98' (chord direction: N-24°-19'-00"-E 32.20') to a point, thence in an Easterly direction and along the Southerly line of Mallard Lane, N-64°-24'-00"-E 116.21' to a point, thence in a Southerly and Westerly direction and along the Agreed Upon Subdivision Amendment Line between the aforesaid lands of Keith with lands of Janet Powers (3011-111), S-14°-41'-30"-E 110.37' and S-75°-24'-00"-W 3.68' to a point, thence in a Southerly direction and along the aforesaid lands of Powers, S-21°-11'-00"-E 22.40' to a point, thence in a Westerly direction and along the aforesaid lands N/F of Johnson, N-89°-33'-00"-W 85.21' and S-70°-06'-00"-W 30.00' to a point, said point being the point of beginning.

BEING a parcel of land irregular in shape and containing in all 13,452±Square Feet or 0.3088±Acres.

ALSO being all of #5 Phoebe Court as shown on a map entitled, "Subdivision Amendment of Lots 5 Phoebe Court & 6 Mallard Lane of Fairlawn Estates Section 3 – Lands of Fairlawn Homes, Inc., Drawer-164 / Map #4438, #5 Phoebe Court & #6 Mallard Lane – Colonie, N.Y.", prepared by Frederick J. Metzger, Jr., P.L.S., dated July 5, 2013 and filed in the Albany County Clerk's Office in Drawer-172 as Map #12925.

SUBJECT to Easements, Restrictions, Reservations and Rights of Way of Record.

Prepared by,

Frederick J. Metzger, Jr., P.L.S.

- Legal Descriptions prepared by Land Surveyors
- Only Licensed NY Land Surveyors can ascertain boundary lines (not engineers)

Boundary Lines by Agreement

- Release of Part of Mortgaged Premises

Albany County Clerk
16 Eagle St. Rm 128
Albany, NY 12207

Return to:
LAURA E AYERS ESQ
POB 237
SCHOHARIE NY 12157

Instrument Mortgage Release

Document Number: 11553887 Book: 6784 Page: 764

Mortgagor
POWERS, JANET A AKA
CARPENTIERI, JANET A AKA

Mortgagee
TRUSTCO BANK

Number of Pages: 3

Recorded Date/Time 01/28/2014 at 12:33 PM

Receipt Number 808875

Note: ** DO NOT REMOVE - THIS PAGE IS PART OF THE DOCUMENT **
THIS PAGE CONSTITUTES THE CLERK'S ENDORSEMENT, REQUIRED BY SECTION 316-a(5) & 319 OF THE REAL PROPERTY LAW OF THE STATE OF NEW YORK.

Bruce A Hidley, County Clerk

Boundary Lines by Estoppel

Boundary Lines by Estoppel

- Elements:
- Entering the lands in accordance with an agreement, indications or representations made as to location of boundary lines and
- Making improvements thereon in accordance with such agreement, indications or representations, which in equity would be unfair to have the party who made the improvements, remove.

Boundary Lines by Estoppel

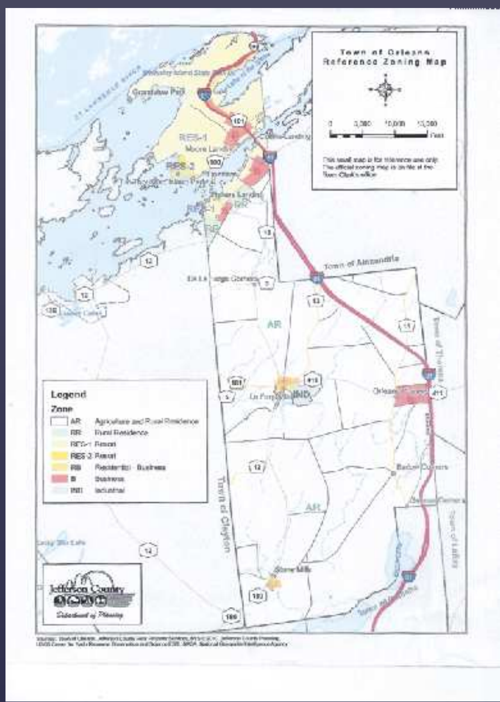
- 'The presumption is, that every person is acquainted with his own rights, provided he has had reasonable opportunity to know them; and nothing can be more liable to abuse, than to permit a person to reclaim his property, in opposition to all the equitable circumstances which have been stated, upon the mere pretence that he was at the time ignorant of his title. Such an assertion is easily made, and difficult to contradict.'
- *Lavalle v. Jaccard* 27 N.Y.S.2d 671(Sup Ct. Richmond Co., 1941).

Boundary Lines by Estoppel

- If the map line differed from the line of occupation, the latter must control.
- *Burke v. Henderson,* 54 A.D. 157 (4th Dept 1900)
- house and fence over the boundary line

Boundary lines by estoppel

- Burke v. Henderson
- P and D's lots shared a common boundary line
- P Bounded by Union Street and Coleman Street,
- D bounded by Coleman Street and being 90 feet distance from Union Street
- Deeds referenced a filed map (not a subdivision map)



Boundary Lines by Estoppel

- Burke v. Henderson
- Orleans Street was surveyed and the ROW found to be 11 feet distant from the opened and used Street
- D claimed 11 feet of P's lot on the opposite side of the fence between their lots

- "To conclude, I treat the west bounds of Union street as used and existing as a monument on the ground, and I hold that the parties contracted with reference to that monument as a matter of fact, and that if the map line differed from the line of occupation, the latter must control in view of the authorities just cited."

Boundary Lines by Estoppel

- NY Central & Hudson River RR Co. v. The City of Buffalo, 85 Misc. 78 (Sup. Ct. Erie Co. 1914)

Adverse Possession

A doctrine of repose to quiet title.

Adverse Possession

- Common Law Elements:

1) Hostile and Under a claim of right
2) Actual
3) Open and Notorious
4) Exclusive and
5) Continuous for the Statutory Period

Adverse Possession

- Requirement that adverse possession be hostile and under claim of right, actual, open and notorious, exclusive and continuous means nothing more than that there must be possession in fact of a type which would give the owner a cause of action in **ejectment** against the occupier throughout the prescriptive period.
- Brand v. Prince, 1974, 35 N.Y.2d 634, 364 N.Y.S.2d 826, 324 N.E.2d 314

67

Adverse Possession

- The essential elements of an effective adverse possession are that the possession be hostile and under claim of right, actual, open and notorious, exclusive and continuous, and if any of these constituents is wanting the possession will not effect a bar of the legal title.
- Belotti v. Bickhardt, 1920, 228 N.Y. 296, 127 N.E. 239.
- See, also, South Atlantic Realty Co. v. Caruselle, 1953, 119 N.Y.S.2d 218;
- Times Square Properties v. Alhabb Realty Corp., 1952, 117 N.Y.S.2d 901;
- Evans v. Francis, 1950, 101 N.Y.S.2d 716;
- Laudati v. State, 1941, 30 N.Y.S.2d 267.

Adverse Possession

- Mere possession of land without any claim of right, no matter how long it may be continued, gives no title under doctrine of adverse possession.
- MAG Associates, Inc. v. SDR Realty, Inc. (2 Dept. 1998) 247 A.D.2d 516, 669 N.Y.S.2d 314.

Adverse Possession

- Statutory Elements:
- Before July 7, 2008

OLD NY RPAPL § 501

- Action after entry
  - An entry upon real property is not sufficient or valid as a claim unless an action is commenced thereupon within one year after the making thereof and within ten years after the time when the right to make it descended or accrued.

Adverse Possession

- **RPAPL § 511. Adverse possession under written instrument or judgment**

  Where the occupant or those under whom he claims entered into the possession of the premises under claim of title, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the premises included in the instrument, decree or judgment, or of some part thereof, for ten years, under the same claim, the premises so included are deemed to have been held adversely; except that when they consist of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot.

Adverse Possession

- **RPAPL § 512. Essentials of adverse possession under written instrument or judgment**

  For the purpose of constituting an adverse possession by a person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases:

  1. Where it has been usually cultivated or improved.
  2. Where it has been protected by a substantial inclosure.
  3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant.

  Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated.

73

Adverse Possession

- RPAPL §521 Adverse possession under claim of title not written
  - Where there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

Adverse Possession

- **RPAPL § 522. Essentials of adverse possession under claim of title not written**

  For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

  1. Where it has been usually cultivated or improved.
  2. Where it has been protected by a substantial enclosure.

75

Walling v. Pryzblo

Adverse Possession

- 2008 Amendments to the Statute
- Apply to all claims for Adverse Possession filed on or after July 7, 2008
- Chapter 269 Section 9 of the Laws of 2008

NEW NY RPAPL § 501

Adverse possession; defined

- For the purposes of this article:

1. Adverse possessor. A person or entity is an "adverse possessor" of real property when the person or entity occupies real property of another person or entity with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment.

NEW NY RPAPL § 501 (Cont.)

Adverse possession; defined

- For the purposes of this article:

2. Acquisition of title. An adverse possessor gains title to the occupied real property upon the expiration of the statute of limitations for an action to recover real property pursuant to subdivision (a) of section two hundred twelve of the civil practice law and rules, provided that the occupancy, as described in sections five hundred twelve and five hundred twenty-two of this article, has been adverse, under claim of right, open and notorious, continuous, exclusive, and actual.

New NY RPAPL § 501 (Cont.)

Adverse possession; defined

- For the purposes of this article:

3. Claim of right. A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be. Notwithstanding any other provision of this article, claim of right shall not be required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the county clerk, or the register of the county, of the county where such real property is situated, and located by reasonable means.

NY RPAPL § 511

The old law

- Adverse possession under written instrument or judgment
  - Where the occupant or those under whom <u>he</u> claims entered into the possession of the premises under claim of <u>title</u>, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the premises included in the instrument, decree or judgment, or of some part thereof, for ten years, under the same claim, the premises so included are deemed to have been held adversely; except that when they consist of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot.

The new law

- Adverse possession under written instrument or judgment
  - Where the occupant or those under whom **the *occupant*** claims entered into the possession of the premises under claim of ***right***, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the premises included in the instrument, decree or judgment, or of some part thereof, for ten years, under the same claim, the premises so included are deemed to have been held adversely; except that when they consist of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot.

NY RPAPL § 512

The old law

- Essentials of adverse possession under written instrument or judgment
  - For the purpose of constituting an adverse possession by a person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant.

- Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated.

The new law

- Essentials of adverse possession under written instrument or judgment
  - For the purpose of constituting an adverse possession, founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in **any** of the following cases:

1. *Where **there has been acts sufficiently open to put a reasonably diligent owner on notice.***
2. Where it has been protected by a substantial ***enclosure, except as provided in subdivision one of section five hundred forty-three of this article.***
3. Where, although not **enclosed**, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant.

- Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared or not **enclosed**, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated.

82

NY CLS RPAPL § 521

The old law

- Adverse possession <u>under claim of title not written</u>
  - Where there has been an actual continued occupation of premises under a claim of <u>title</u>, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

The new law

- Adverse possession ***not under written instrument or judgment***
  - Where there has been an actual continued occupation of premises under a claim of ***right***, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

NY CLS RPAPL § 522

The old law

- Essentials of adverse possession under claim of title not written
  - For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.

The new law

- Essentials of adverse possession ***not under written instrument or judgment***
  - For the purpose of constituting an adverse possession not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. *Where **there have been acts sufficiently open to put a reasonably diligent owner on notice** .*
2. Where it has been protected by a substantial ***enclosure, except as provided in subdivision one of section five hundred forty-three of this article***.

84

ALL NEW: NY RPAPL § 543

- **Adverse possession; how affected by acts across a boundary line**

1. **Notwithstanding any other provision of this article, the existence of de minimus [de minimis] non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse.**
2. **Notwithstanding any other provision of this article, the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse.**

85

Cases After the Amendment

- *Franza v. Olin,* 73 A.D.3d 44 (4th Dep't 2010)
- The plaintiff commenced her action 6 weeks after 7-7-08 amendments went into effect
- The ten year period of plaintiff's adverse possession was between 1975 and 1985
- "It therefore follows that, where title has vested by adverse possession, it may not be disturbed retroactively by newly-enacted or amended legislation."
- "Thus inasmuch as title to the disputed property would have vested prior to the enactment of the 2008 Amendments, we conclude that application of those amendments to plaintiff is unconstitutional."

Cases After the Amendment

- *Franza v. Olin,* 73 A.D.3d 44 (4th Dep't 2010)
- "The amendments abrogate the common law of adverse possession and define as "permissive and non-adverse" actions that, under the prior statutory law and longstanding principles of common law, were sufficient to obtain title by adverse possession."

Cases After the Amendment

- First Department
- Bronx
- New York County

- Second Department
- Dutchess
- Kings
- Nassau
- Orange
- Putnam
- Queens
- Richmond
- Rockland
- Suffolk
- Westchester

Cases after the Amendment

- Third Department
- Albany
- Broome
- Chemung
- Chenango
- Clinton
- Columbia
- Cortland
- Delaware
- Essex
- Franklin
- Fulton
- Greene
- Hamilton
- Madison
- Montgomery
- Otsego
- Rensselaer
- St. Lawrence
- Saratoga
- Schenectady
- Schoharie
- Schuyler
- Sullivan
- Tioga
- Tompkins
- Ulster
- Warren
- Washington

Cases After the Amendment

- Fourth Department
- Allegany
- Cattaraugus
- Cayuga
- Chautauqua
- Erie
- Genesee
- Herkimer
- Jefferson
- Lewis
- Livingston
- Monroe
- Niagara
- Oneida
- Onondaga
- Ontario
- Orleans
- Oswego
- Seneca
- Steuben
- Wayne
- Wyoming
- Yates

Cases After the Amendment

- First Department
  - Has not had any adverse possession cases since the amendment
- Fourth Department
  - Has never applied the new law

Cases After the Amendment

- Second Dept.
- Applied the New Law 3x Old Law 8x

- On March 29, 2011 the Second Department decided *Maya's Black Creek, LLC v. Angelo Balbo Realty Corp.*, 82 AD3d 1175.

- In Maya the Court stated under either the new or old standard for Adverse Possession, the Plaintiff had stated a cause of action for Adverse Possession.

Cases After the Amendment

- Second Dept.
- Applied the New Law 3x Old Law 8x

- May 3, 2011 the Second Department decided *Hartman v. Goldman*, 84 AD3d 734
-
- In Hartman the Court applied the new law despite the fact that the plaintiff began maintaining the disputed property in 1987, claiming that the lawyers did not dispute that the new law applied. Plaintiff's plantings of foliage and shrubbery, landscaping and lawn maintenance were considered de minimus and deemed permissive and non-adverse. (2 driveway lights, a six inch driveway edge and a bed of shrubs.

Cases after the Amendments

- July 19, 2011 the Second Department decided Hogan v. Kelly, 86 AD3d 590
-
- In Hogan, the Court applied the old law because title by adverse possession had vested in 2006 despite the action being commenced after 7-7-08. The Second Department explicitly stated it agreed with the Third and Fourth Departments that the amendments cannot be retroactively applied to deprive the claimant of a property right that vested before the enactment. The Court explained away its decisions in Maya and Hartman as the issue of a vested property right was not before them in either case.

Cases after the Amendments

- ▫Calder v. 731 Bergan, LLC, 83 A.D.3d 758 (N.Y. App. Div. 2d Dep't 2011)
- The new law was applied, even though rights would have allegedly vested prior to enactment of the amendments. The facts would have satisfied the "claim of right" requirement under prior law as well, yet the Court specifically applied the new legal requirement of a reasonable basis for a claim of right.

Cases after the Amendments

- The Split Second Department decisions have resulted in Supreme Court Decisions in the Second Department (10 counties) that are all over the board
- Some lower courts refuse to apply the 2008 Amendments Retroactively and cite to *Hogan*
- Some Lower courts apply the the 2008 Amendments retroactively and cite to *Hartman*

Cases After the Amendment

- Third Department
  - Applied the new law 2x
  - Since the Fourth Department decided Franza v. Olin, the 3rd Dept has applied the old law

Adverse Possession: Unresolved Ambiguities

- Claim of Right v. Claim of Title
- Legislature removed claim of title and inserted claim of right
- A claim of right is defined as "a reasonable basis for the belief that the property belongs to the adverse possessor"
- A claim of title included title acquired by adverse possession (intentional hostile take over), as well as by deed, map or mistake therein.

Adverse Possession: Unresolved Ambiguities

- Actual Possession
- "Usually cultivated and improved" and "protected by a substantial enclosure" were removed
- "Acts sufficiently open to put a reasonably diligent owner on notice" and "protected by a substantial enclosure except as defined by §543" were inserted.
  - What acts of ownership are going to suffice?
  - Visible acts?
  - Paying taxes won't count anymore?

Adverse Possession: Unresolved Ambiguities

- Retroactive or Prospective Requirements
- Courts have repeatedly stated that the adverse possessor becomes the owner immediately upon the expiration of the statute of limitations
- A quiet title action only serves to confirm that outcome.
- Second Department is all over the board→Court of Appeals will have to settle the discrepancies between the Appellate Divisions.

Encroachments

Encroachments

- Less than 6 inches
- 1 year Statute of Limitations
- Implied prescriptive easement after the limitations period runs
- See Sova v. Glasier, 192 A.D.2d 1069 (4th Dept 1993) and
- NY RPAPL 611(2)

- More than 6 inches
- 10 year Statute of Limitation
- NY RPAPL 871: Removal of Encroaching Structures

Encroachments

- Remedies under RPAPL 871:
- Removal of the Structure
- Damages

Encroachments: Christopher v. Rosse

- "the court determined that the easterly wall of the Rosse house encroached a maximum of one and three-quarter inches over the westerly boundary of the Christopher property, and the eaves of the roof encroached from 16 inches to 25.2 inches over the westerly line of the Christophers.

Encroachments: Christopher v. Rosse

- We disagree with the trial court in its reliance upon the provisions of RPAPL 611(subd 2) in granting the easement to defendants for the reason that minor encroachments of a structure on adjoining property, where no other structure is involved, are not subject to the provisions of that section." (internal citations omitted)
- Christopher v. Rosse, 91 A.D.2d 768 (3rd Dept 1982)

Encroachments: Damages

- Christopher v. Rosse
- an appropriate award of damages to plaintiffs would be more equitable than a direction to remove the encroaching eaves together with a conveyance by plaintiffs to defendants of title to a six-inch strip of land along the westerly boundary of plaintiffs' property for maintenance and repair of the previously existing encroaching building
- Monetary damages in an encroachment action are measured by the difference between the value of the plaintiff's property subject to the alleged encroachment and the value of the property absent the encroachment."
- *Paluccio v. Thatcher* 42 Misc. 3d 134(A) (Appellate Term, Second Dept. 2014)

Judicial Determinations of Boundaries

Questions of Law and Fact

- Questions of Law
- Determined by the Judge
- Interpretation of a deed is a question of law when there are no ambiguities in the description
- Four Corners of the document
- Intentions of the Parties

- Questions of fact
- Determined by the trier of fact, either the Judge in a bench trial or the Jury
  - Indefinite boundary lines
  - Disputed boundary lines
  - Conflicting evidence whether the line has been acquiesced in by the adjoining owners
  - Conflicting evidence of a parol agreement

Role of the Court

- What boundaries are is a question of law
- Where boundaries are is a question of fact

Evidence

- Ancient Maps & Deeds
- Agreements
- Surveyor Testimony: expert and factual
- Current and Past owner testimony
- Other neighbors

Surveys and field notes

- Field notes of the original surveyor are generally regarded as the primary evidence of the true location of the boundaries
- Proof of identity, competency and authority of the surveyor in the particular case and
- The purpose of the survey

Survey Maps

- Critical pieces of evidence in a property dispute "Indeed survey's give reasonable support to a claim and, if based on monuments, are entitled to great weight in a boundary dispute."
- 1 NY Jur2d Adjoining Landowners §143

Authentication of Surveys

- Proof of identity, competency and authority of the surveyor in the particular case and
- The purpose of the survey
- Resurvey not shown to be based upon the original survey is inconclusive in determining boundaries

Maps

- Maps may be admitted into evidence if they are supported by proof of authenticity
- Examples:
- Map attached to the deed
- Map referred to by the deeds

- Maps made for other purposes are not admissible to prove boundaries
- Examples:
  - Published county maps
  - Tax maps

Ancient Maps

- Civil Practice Laws and Rules 4522:
- All maps, surveys and official records affecting real property, which have been on file in the state in the office of the register of any county, any county clerk, any court of record or any department of the city of New York for more than ten years, are prima facie evidence of their contents.
- A "practical location long recognized by parties in interest will prevail over even old surveys, the accuracy of which is assumed." *Van Dusen v. Lomonaco,* 24 Misc. 2d 878 (Sup. Ct. Madison Co. 1960)

Testimony of Surveyors

Expert Testimony

- Original Surveyor who established the line
- May use his or her map to refresh his or her memory

Factual Testimony

- Testimony by a surveyor of marks left by a prior surveyor is merely testifying as to facts from his personal knowledge

Testimony of Surveyors

- That the courses and distances are incongruous
- That all the lines indicated by the monuments differ in length from the deed
- As to the Location of great lot lines and subdivision lines
- As to Original line of a highway

Testimony of Surveyors

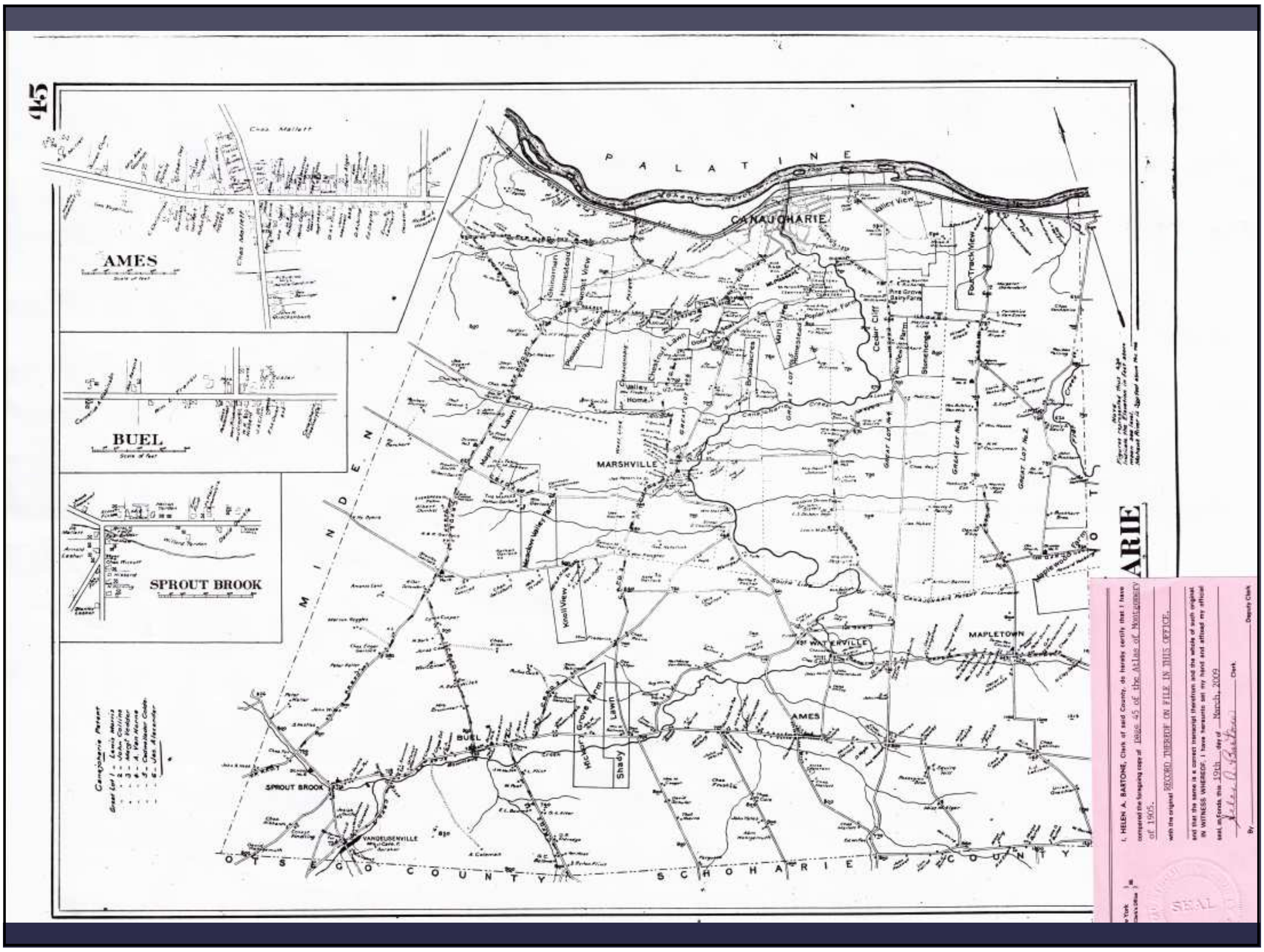
- Kattimbang v. 719 Ocean View Avenue, LLC 13 Misc. 3d 1215(A) (Sup. Ct Kings Co. 2006)

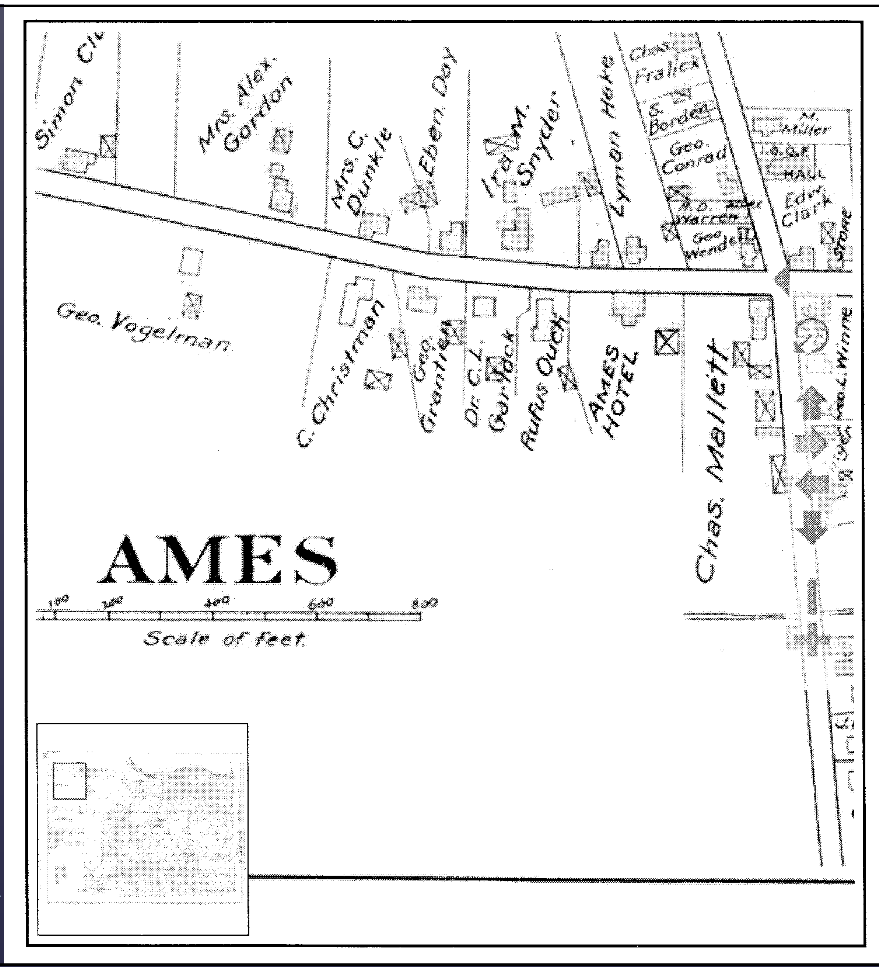
Testimony of Surveyors

- Towner v. Jamison 98 A.D.2d 970 (4th Dept 1983)

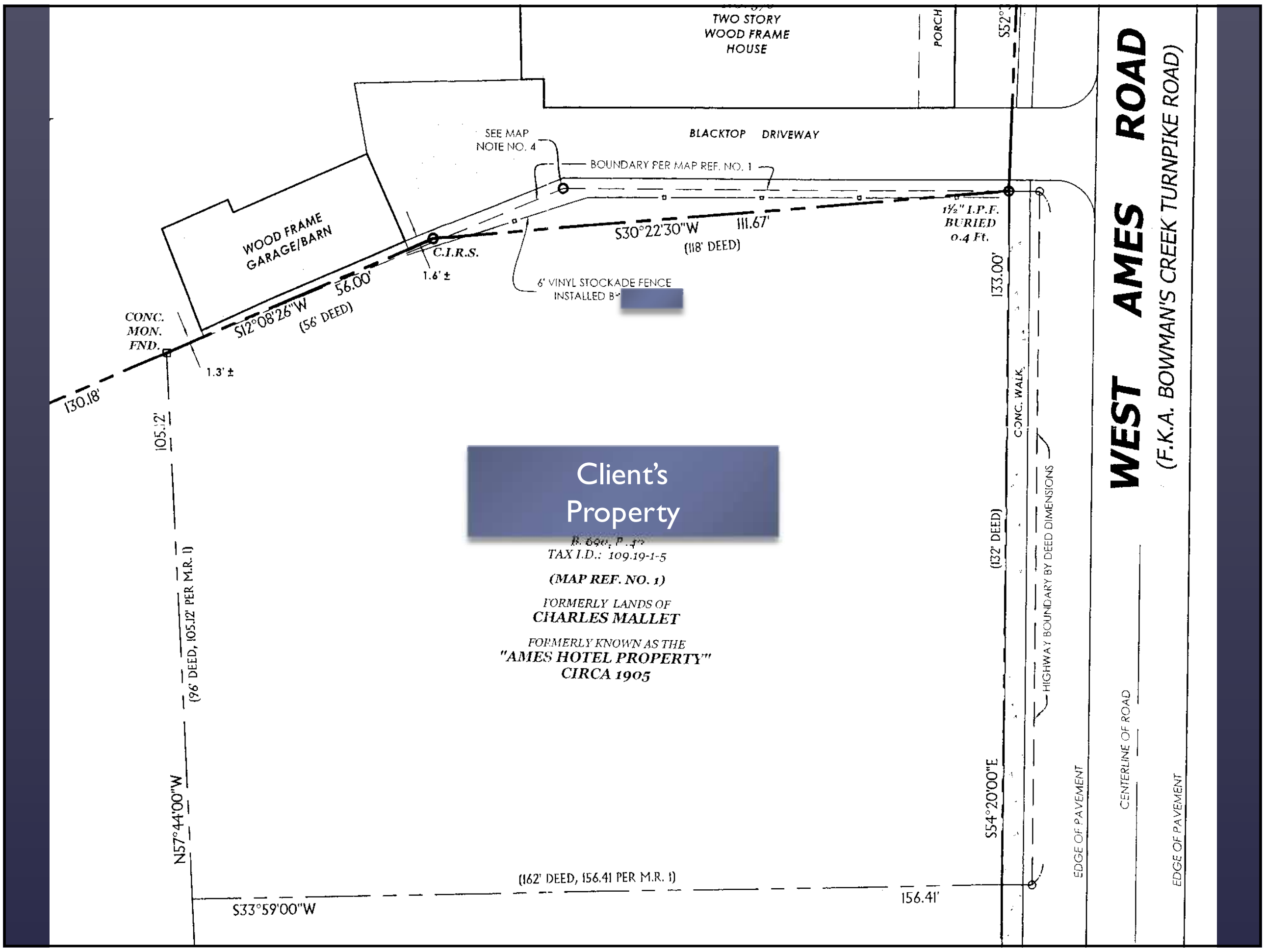
Best Evidence Rule

- Whenever a party seeks to prove the contents of a writing, they must produce the original or satisfactorily account for its absence.
- Certified Copies from the County Clerk's office suffice as duly authenticated copies.

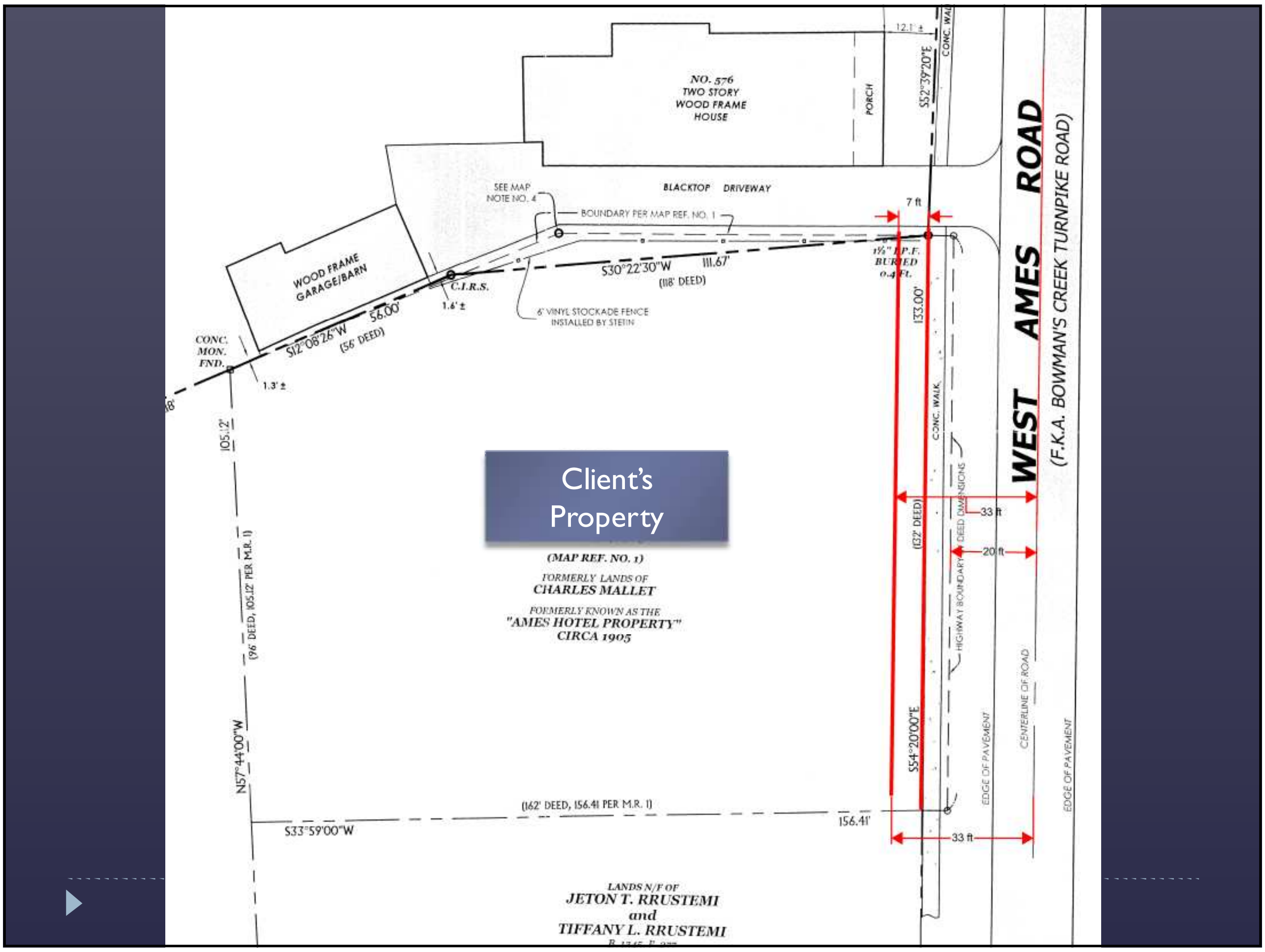

45
AMES
BUEL
SPROUT BROOK
PALATINE
CANAJOHARIE
MARSHVILLE
WATERVILLE
MAPLETOWN
MINDEN
OTSEGO COUNTY
SCHOHARIE COUNTY
SEAL



AMES
Scale of feet
Geo. Vogelman
Mrs. Alex. Gordon
Mrs. C. Dunkle
Eben Day
Ira M. Snyder
Lyman Hake
Chas. Fralick
S. Borden
Geo. Conrad
M. Miller
I.O.O.F. HALL
Edw. Clark
STORE
Geo. Wendell
C. Christman
Geo. Grantier
Dr. C.L. Gurdock
Rufus Quick
AMES HOTEL
Chas. Mallett



TWO STORY
WOOD FRAME
HOUSE
PORCH
BLACKTOP DRIVEWAY
SEE MAP
NOTE NO. 4
BOUNDARY PER MAP REF. NO. 1
WOOD FRAME
GARAGE/BARN
C.I.R.S.
1.6' ±
S30°22'30"W
111.67'
(118' DEED)
1½" I.P.F.
BURIED
0.4 Ft.
6' VINYL STOCKADE FENCE
INSTALLED B
CONC.
MON.
FND.
S12°08'26"W
56.00'
(56' DEED)
1.3' ±
130.18'
105.12'
133.00'
CONC. WALK
Client's
Property
TAX I.D.: 109.19-1-5
(MAP REF. NO. 1)
FORMERLY LANDS OF
CHARLES MALLET
FORMERLY KNOWN AS THE
"AMES HOTEL PROPERTY"
CIRCA 1905
(96' DEED, 105.12' PER M.R. 1)
N57°44'00"W
(132' DEED)
HIGHWAY BOUNDARY BY DEED DIMENSIONS
S54°20'00"E
(162' DEED, 156.41 PER M.R. 1)
156.41'
S33°59'00"W
EDGE OF PAVEMENT
CENTERLINE OF ROAD
EDGE OF PAVEMENT
WEST AMES ROAD
(F.K.A. BOWMAN'S CREEK TURNPIKE ROAD)


NO. 576
TWO STORY
WOOD FRAME
HOUSE
PORCH
BLACKTOP DRIVEWAY
SEE MAP NOTE NO. 4
BOUNDARY PER MAP REF. NO. 1
7 ft
WOOD FRAME GARAGE/BARN
C.I.R.S.
S30°22'30"W 111.67'
(118' DEED)
6' VINYL STOCKADE FENCE INSTALLED BY STEIN
S12°08'26"W 56.00'
(56' DEED)
CONC. MON. FND.
1.3' ±
1.6' ±
S52°39'20"E
133.00'
CONC. WALK
WEST AMES ROAD
(F.K.A. BOWMAN'S CREEK TURNPIKE ROAD)
Client's Property
(MAP REF. NO. 1)
FORMERLY LANDS OF
CHARLES MALLET
FORMERLY KNOWN AS THE
"AMES HOTEL PROPERTY"
CIRCA 1905
105.12'
(96' DEED, 105.12' PER M.R. 1)
N57°44'00"W
(132' DEED)
S54°20'00"E
33 ft
20 ft
DEED DIMENSIONS
HIGHWAY BOUNDARY
EDGE OF PAVEMENT
CENTERLINE OF ROAD
EDGE OF PAVEMENT
(162' DEED, 156.41 PER M.R. 1)
156.41'
S33°59'00"W
33 ft
LANDS N/F OF
JETON T. RRUSTEMI
and
TIFFANY L. RRUSTEMI

I.P.F. = Iron Pin Found

MAP REFERENCES:

1: "SURVEY MAP OF LANDA OF [redacted] Clients property [redacted] PREPARED BY WILLIAM J. SYMOLON, JR. PLS NO. 49,964 AND DATED NOVEMBER 11, 2006.

2: "SURVEY MAP OF A PORTION OF LANDS OF RONALD G. HODGE." PREPARED BY WILLIAM J. SYMOLON, JR. PLS NO. 49,964 AND DATED NOVEMBER 10, 1994.

3: BOUNDARY LINE AGREEMENT BETWEEN LANDS OF ROBERT AND DORIS MARRING AND DANIEL F. SR. AND MAUREEN REARDON PREPARED BY RICHERD A . PAPA, PLS NO. 49,009 AND DATED MARCH 17, 1988.

4: MONTGOMERY COUNTY ATLAS DATED 1905.

MAP NOTES:

1: NORTH ORIENTATION AND BEARINGS ARE REFERENCED TO MAGNETIC NORTH AS OBSERVED DURING SEPTEMBER OF THE YEAR 2007.

2: THE HIGHWAY BOUNDARY OF WEST AMES ROAD HAS BEEN ESTABLISHED FROM PHYSICAL EVIDENCE AND PREVIOUS SURVEYS. IT IS APPROXIMATELY 25 FEET SOUTHWESTERLY OF THE CENTERLINE OF THE TRAVELED WAY. DUE TO THE FACT THAT WEST AMES ROAD WAS FORMERLY KNOWN AS BOWMAN'S CREEK TURNPIKE ROAD WHICH MAY HAVE HAD A RIGHT-OF-WAY GREATER THAN THAT AS STATED ABOVE, THIS SURVEY IS MADE SUBJECT TO ANY RIGHT, TITLE OR INTEREST THE VILLAGE OF AMES, THE TOWN OF CANAJOHARIE, THE STATE OF NEW YORK OR THE TRAVELLING PUBLIC MAY HAVE TO LANDS COMPRISING THE FORMER RIGHT-OF-WAY OF SAID TURNPIKE ROAD.

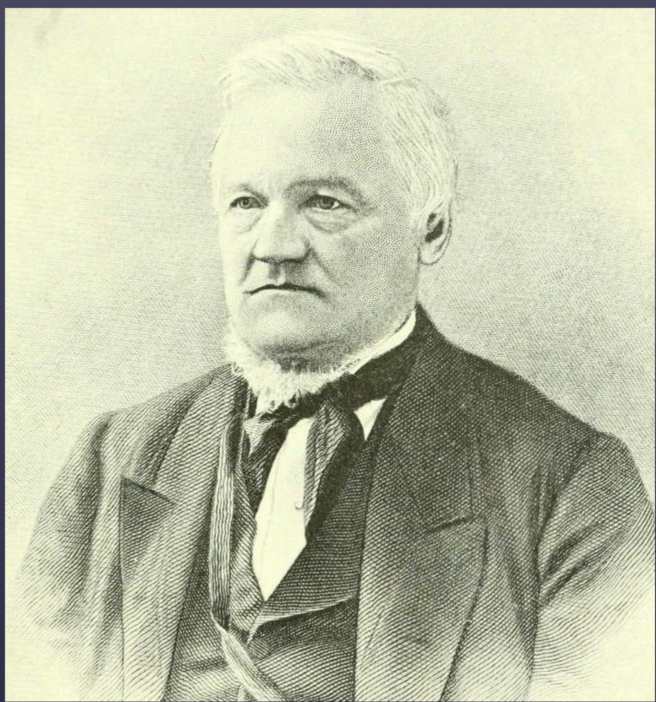
3. THE DESCRIPTION CONTAINED IN THE CURRENT DEED OF RECORD FOR THE LANDS OF [redacted] WHICH IS THE SUBJECT OF THIS SURVEY DESCRIBES THE PROPERTY BY BOUNDING OWNER NAMES. NO DIMENSIONS OR BEARINGS ARE STATED. THE WESTERLY AND NORTHWESTERLY BOUNDARY HAS BEEN ESTABLISHED BY A RECORDED BOUNDARY LINE AGREEMENT. THE SOUTHWESTERLY BOUNDARY HAS BEEN ESTABLISHED BY DATA DEPICTED ON MAP REFERENCE NO. 2. THE EASTERLY AND SOUTHEASTERLY BOUNDARY HAS BEEN ESTABLISHED BY EXISTING PROPERTY MARKERS, DEED DIMENSIONS AND INFORMATION DEPICTED ON MAP REFERENCE NO. 4.

4. THE "FOUND IRON BAR" AT THE ANGLE POINT IN THE BOUNDARY AS DEPICTED ON MAP REFERENCE NO.1 WAS NOT FOUND AT THE TIME OF THIS SURVEY. BY PAROLE TESTIMONY FROM MR. AND MRS. [redacted] HIS IRON BAR WAS SET BY THE [redacted] TO SUPPORT A FENCE. IT WOULD APPEAR THAT IT WAS THOUGHT TO BE A PROPERTY CORNER BY MR. [redacted] SURVEYOR, AND THAT IT WAS USED TO ESTABLISH THE LOCATION FOR THE PRESENTLY INSTALLED FENCE BY MR. [redacted]

Role of the Court

- Apply the various laws to the facts of the case

"The value of the land in dispute is less than twenty dollars. It is much to be regretted that so serious a litigation should originate from such a small affair; but the question must be decided the same as if affecting important rights." Judge Martin Grover, *Wood v. Lafayette*, 46 N.Y. 484 (1871).



Surveyor's Responsiblity

New York Education Law §7203

- Definition of Practice of Land Surveying
- The practice of the profession of land surveying is defined as practicing that branch of the engineering profession and applied mathematics which includes the measuring and plotting of the dimensions and areas of any portion of the earth, including all naturally placed and man- or machine-made structures and objects thereon, the lengths and directions of boundary lines, the contour of the surface and the application of rules and regulations in accordance with local requirements incidental to subdivisions for the correct determination, description, conveying and recording thereof or for the establishment or reestablishment thereof.

Rules of the NYS Board of Regents Part 29: Unprofessional Conduct

- §29.3(a)(9)
- In the profession of land surveying, the revision, alteration or update of any existing boundary survey without adequate confirmation of boundary lines and monuments. To be adequate, such confirmation shall include a reasonable field verification and shall be sufficiently reasonably ensure the accuracy of the revision, alteration or update as appropriate to the circumstances of the revision, alteration or update.

Standard of Care

- A surveyor "must exercise that degree of care which a civil engineer or a surveyor of ordinary skill and prudence would exercise under similar circumstances, and he may be held responsible for such damages as are sustained due to his negligence and lack of skill."
- R.H. Bowman & Associates, Inc. v. Danskin, 72 Misc. 2d 244 (Sup. Ct. Schenectady Co. 1972)

Standard of Care

- "What are the professional standards required of a surveyor? It appears that a surveyor is not necessarily an insurer of the accuracy of his work unless he so undertakes."
- R.H. Bowman, Supra

Surveyor's Responsibility

- To collect evidence of past boundaries described in documents
- To collect evidence of possession and use and
- To create new evidence to be left for future surveyors to recover.

Surveyor's Responsibility

- Original Survey: Create the boundary, by describing the parcel of land
- Re-tracement: the boundary created must be relocated and identified at some time
  - The surveyor must take the description and using the words, locate it on the ground
  - The surveyor may disagree with peers as to what the words mean or what the evidence indicates

Lines of Occupation

- Have to be shown
- May be evidence of Acquiescence or Adverse Possession
- May be evidence of encroachments
- Surveyor alone cannot determine that the lines of occupation are the boundary line

Lines of Record

- Locating a natural or artificial monument → research and then searching in the field
- Record monument →obtain a copy of the record describing the monument and then locate the boundaries in accordance with the monument
- Apply the priority of calls, or order of precedence
  - Depends on the quality of the original measurements and the
  - Quality of the original description

Unauthorized Practice of Law

- §478 of the Judiciary Law
- It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state, or
- to furnish attorneys or counsel or an attorney and counsel to render legal services,
- or to hold himself out to the public as being entitled to practice law as aforesaid,

Avoiding the Unauthorized Practice of Law

- or in any other manner,
- or to assume to be an attorney or counselor-at-law,

Avoiding the Unauthorized Practice of Law

- or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law or counselor-at-law, or attorney, or counselor, or attorney and counselor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law
- or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law,
- without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath.

Avoiding the Unauthorized Practice of Law

- Judiciary Law §484 None but attorneys to practice in the state
- No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate,

Avoiding the Unauthorized Practice of Law

- or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state,
- or make it a business to practice for another as an attorney in any court or before any magistrate
- unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record in the state…

Avoiding the Unauthorized Practice of Law

- In the Matter of the New York County Lawyers Association vs. Bernard Bercu, 273 AD 524 (1st Dept 1948)
- Issue: whether the professional practice in which respondent is admittedly engaged (accounting) constitutes the practice of law.
- Respondent was an accountant. He gave certain advice to the Croft Company on a tax question.

Avoiding the Unauthorized Practice of Law

- Matter of Bercu cont.
- Respondent researched case law for an exception to a rule and then wrote a memorandum to the client based upon his research of cases and gave advice that the clients' situation was similar to a case and would have a similar result.
- The Court said that the accuracy of the advice was not relevant and that "The decision must rest on the nature of the services rendered and on whether they were inherently legal or accounting services."

Avoiding the Unauthorized Practice of Law

- Matter of Bercu cont.
- The Lawyers Association asserted "that tax law enters into accounting and accounting into tax law and that it is a proper function of an accountant to prepare tax returns, which work requires a knowledge and application of the law, but contends that giving advice with respect to the tax law, unconnected with work on the books or tax returns, is giving legal advice and practicing law."

Avoiding the Unauthorized Practice of Law

- Matter of Bercu cont.
- "It is not expected or permitted of the accountant, despite his knowledge or use of the law, to give legal advice which is unconnected with accounting work. That is exactly what this respondent did…In short, legal advice was sought and given on a question of law."
- "When, however, a taxpayer is confronted with a tax question so involved and difficult that it must go beyond its regular accountant and seek outside tax law advice, the considerations of convenience and economy in favor of letting its accountant handle the matter no longer apply, and considerations of public protection require that such advice be sought from a qualified lawyer. At that point, at least, the line must be drawn."

Avoiding the Unauthorized Practice of Law

Use Disclaimers.

Don't give advice about questions of law.

Refer clients to a qualified Real Property Attorney

Avoiding the Unauthorized Practice of Law

- Disclaimer Example:
- This (note, survey, article) is provided for general informational purposes only. It should not be construed as legal advice and is not intended to be substituted for legal counsel. Persons requiring legal advice should retain a properly licensed lawyer.

Questions


NOTICE IS HEREBY SERVED
ON HERMAN ROSSA
AND HIS WHOLE DAMN FAMILY
TO KEEP OFF
MY PROPERTY.
W. W. VAN KEUREN.
KINGSTON, N.Y.

The END

- laura@lauraayerslaw.com
- (518) 456-6705