

Boundary Line Agreements Beware the Known Boundary

by
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In the January 2009 issue of *The American Surveyor* (Vol. 6, No. 1), Farris Cadle had an excellent letter to the editor on boundary line agreements. Boundary line agreements are ideal documents to employ in order to fix the uncertain boundaries for the situation he described. It is my opinion that surveyors can and should prepare boundary line agreements for the situation he described. To quote a proverb from Rosalind Ferguson in *The Facts of File, Dictionary of Proverbs*, 1983:

“A lean agreement is better than a fat judgment.”

However, not all situations may be cured by a simple boundary line agreement. The surveyor must be wary of employing the boundary line agreement where there is a known record boundary (or one that can be located). This article will explain the constraints surveyors should consider before preparing a boundary line agreement for the client and neighbor (i.e., parties in interest).

Can the Record Boundary be Located With Reasonable Certainty?

No simple boundary line agreement² should be employed without attempting to fix the location of the record boundary using the operative records. The attempt to locate the record boundary must adhere to reasonable boundary retracement standards using the information found in the operative records coupled with evidence available in the field. This step is absolutely necessary to determine the legal requirements for the agreement and if the preparation of the agreement is within the surveyor's scope of practice.

After the surveyor has attempted to fix the location of the record boundary using the operative records, the surveyor will face one of two situations where boundary line agreements are sought.

The Record Boundary Location is Vague or Unknown

In the first situation, the location of the record boundary is vague and cannot be reliably located with reasonable certainty by a competent surveyor based on the information in the operative records coupled with the information found in the field. (The criteria that there be reasonable certainty does not mean the surveyor does not possess some doubt about their opinion on the boundary location.) As a surveyor said to a client: “I know where the boundary isn't but darn if I can tell you where it is exactly.”

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² Unless, of course, the assumption is made that a transfer of title will occur in which case a more complex agreement with words of conveyance or deeds must be employed.

In this situation, the surveyor should encourage the parties in interest to agree on a boundary location. There is no reason that the surveyor cannot take a leading role in preparing and documenting the boundary line agreement in this situation.

The Record Boundary Can Be Reasonably Located

In the second situation, the location of the record boundary can be determined by a competent surveyor with reasonable certainty using the information in the operative records; yet, the parties in interest would like to place the boundary in a different location such as along an existing fence line. Also falling within the second situation is the case where the record boundary can not be reasonably located by the surveyor but the parties in interest want to locate the common boundary in a location that the operative records clearly can not support. As a surveyor would say to a client: “I can’t tell you where your boundary is located but I know it’s not over there where you want to put it.”

The surveyor must beware of the known boundary location where a boundary line agreement will change the location of the common boundary established by the operative documents. In this situation, a transfer of title is being contemplated. The law does not ordinarily condone the transfer of title by the simple language often employed in boundary line agreements (absent a legal doctrine such as adverse possession). Only a carefully worded boundary line agreement containing thoughtfully considered legal wording should be employed. Proper documentation of the title transfer must be prepared using the correct legal wording. Execution of the document adhering to the law of the state is required. Lien-holders should be brought in to the agreement and title transfer.³ Transfer taxes must be paid. Subdivision approval may be required. These are legal matters and an attorney should be involved. As Jeremy Bentham in the *Principles of the Civil Code*, c. 1843 stated:

“Property [title] and law are born and must die together.”

A surveyor would be wise not to take it upon their shoulder to oversee the boundary line agreement in the second situation. In the second situation, the surveyor’s involvement should be limited to providing documentation on the boundary location that will be used in the title transfer documents.

Legal Foundation

The surveyor’s involvement is markedly different between the two situations. The question that arises is why should the surveyor’s involvement be different?

In the first situation where the record boundary location is vague or unknown, the boundary line agreement is effective because the parties in interest are simply clarifying a location that their current deeds have already legally established (“legal” as opposed to a “practical” establishment of the boundary). In other words, the parties in interest are agreeing to a boundary location

³ Many mortgages expressly state that should the security (i.e., title to the property) be jeopardized the balance of the mortgage is immediately due.

supported by their deeds. The parties in interest make the vague descriptions in the operative deeds certain. The agreement clarifies the deed but does not change the deed.

On the other hand, where the parties wish to place the boundary by agreement in a location that conflicts with their deed, the title to the property between the former and the agreed boundary location must be transferred in accord with the law. The law would not ordinarily recognize the transfer of the title using a boundary line agreement that lacks legal words of transfer in the agreement, concurrent deed deliveries, or the subsequent consummation of title through possession based upon such legal doctrines as adverse possession.

Contents of the Agreement

For the surveyor who is in the situation where a boundary line agreement is practical and the parties in interest agree to execute one, the law tends to be lax and recognize any agreement that speaks of a clear intent to fix the location of the common boundary – making an uncertain location, clear. Where the law does not stand as a tyrant barring the way, the agreement will make the law. Most, if not all simple agreements will be upheld.

The undersigned agree the location of their common boundary is located as shown on this plat.

Prudence does suggest a more lengthy content become the agreement. Litigation surely passes by those agreements that speak words that the law has long favored.

Accordingly, words favored in an agreement should speak on the following matters:

- A reasonable and diligent record and field search was conducted by a reasonably competent surveyor adhering to the normal standard of care.
- There was uncertainty in the location of the boundary using the record and field information available.
- The parties have agreed on a location for the common boundary that is both reasonable and certain.
- Contractual requirements such as the proper and clear identification of parties in interest, subject matter identification, meeting of the minds, and consideration are stated.
- The boundary agreed upon is intended to be permanent and binding upon the heirs and assigns of the parties in interest.

BOUNDARY AGREEMENT
State of _ County of _
This agreement is between _ [party 1] of _, County of _, State of _, and _ [party 2] of _, County of _, State of _.
1. The parties own or have equitable interests in adjoining tracts of land in _, County of _, State of _, as described in deed book _, page _ and deed book _, page _.

2. The exact location of their common boundary line as described in the records is indefinite and unascertainable by a competent surveyor and cannot be made reasonably certain by acceptable surveying efforts.

3. The parties have agreed upon the boundary line between their respective tracts of land to be fixed by a/an _ [existing fence, marked line, surveyor, etc.]

4. The parties have each in turn viewed this agreed boundary as marked on the ground and accept and desire the same to be the true and correct boundary between them and admit this to be the location as described in their respective deeds.

5. For and in consideration of establishing the boundary line between their respective tracts of land, the parties hereto do agree that the said boundary line hereinafter specifically described is the true and correct boundary line between their respective tracts of land and the one described in their respective deeds.

[Description of Agreed Line]

6. The parties shall cause or permit this agreement along with any survey plat showing the agreed boundary to be recorded in the registry of deeds, county of _.

7. The boundary agreed upon will be permanent and binding upon the heirs and assigns of the undersigned parties.

In witness, the parties have executed this agreement at _ [place of execution], on the _ day of the month of _ in the year _.

[party 1]

[party 2]

[witness]

[witness]

Acknowledgement⁴

State of _

_ County, ss

Personally appeared the above named _ [landowner]⁵ and made oath to the truth of the foregoing statements and also acknowledged this instrument to be their free act and deed.

⁴ In most states, a survey plat is not required to be acknowledged in order to be recorded. Accordingly, if this form is placed on the plat, the acknowledgement by a party in interest can be omitted.

⁵ In many states only one party in interest has to acknowledge the instrument in order to record it. The surveyor is cautioned to check their state laws to ascertain the number of parties in interest required in the acknowledgement and the wording of the acknowledgement necessary to admit the document to be recorded.

Notary Public

Other Considerations

Agreements can and sometimes must deviate from the example shown. Where the parties in interest cannot agree on a common boundary location, the parties in interest can sometimes be convinced to agree on a method to locate a common boundary rather than a common boundary location. The agreement could include terms to fix the common division line by an agreed area or percentage, a third party such as a surveyor to locate the common boundary, or documents that would not be admissible in evidence or ordinarily used by a surveyor to locate a boundary.

Since the location of the boundary is now in doubt, the parties agree to retain and contract with, _ [name of surveyor], a licensed surveyor in the state where the property is situated and charge such surveyor to determine and mark the location of the common boundary. The parties further agree to:

- a. contribute equally to discharge the expenses incurred by reason of the making of such survey;
- b. abide thereafter by the boundary established by the surveyor; and
- d. relocate the fences or improvements accordingly.

Some states have adopted a short form deeds act. The short form deeds act removes the necessity of common law archaic language requirements for a deed (e.g., “to have and to hold,” “lease and release,” “bargain and sale,” etc.) and simple words (e.g., release, grant, give, etc.) can be used in the agreement to effectuate a transfer of title within the framework of a boundary line agreement. The short form deeds act would remove the need to exchange deeds that is ordinarily required to settle the title issues. The exchange of deeds is often onerous and a deal breaker. Where parties in interest often show little reluctance to sign an agreement believing the agreement merely fixes a status quo, these same parties in interest would balk at signing a deed that appears to convey some of their property.

Where the boundary line agreement is viewed as a contract,⁶ other terms may be added to the agreement that would not only settle the location of the boundary but include covenants binding the future conduct of the parties in regard to their common boundary. Additional terms in the agreement could include building setback distances, payment of attorney fees to the successful party in the event of litigation over the boundary location in the future, or boundary maintenance requirements, for some examples.

The undersigned parties further agree and covenant on their own behalf, their heirs, and their assigns that in the event of litigation over the location of the common boundary, the party substantially prevailing in the litigation shall be compensated by the loser for attorney fees, survey fees, and court costs.

The boundary line agreement can be placed on the plat that depicts the common boundary location. In the alternative, the diagram of the common boundary may be incorporated into the

⁶ Rather than holding the agreement to be binding on the basis of contract law, some states would recognize the binding effect of the agreement based on the doctrine of estoppel or practical location.

written agreement and the agreement can be recorded. Where it is not practical to have one party in interest notarize the agreement, the surveyor can still make the agreement part of the record by attaching it to an affidavit executed and acknowledged by the surveyor that is then recorded.

The boundary line agreement can be a useful tool to fix a boundary the parties in interest believe to have been already established by adverse possession, practical location, or acquiescence (thereby possibly removing the need for subdivision approval or other legal obstacles preventing a new transfer of title). The terms of the boundary line agreement based upon one of these doctrines should clearly admit to the existence of the elements of adverse possession or the elements of other doctrines that are used as a foundation for the agreement and recognition of the status quo of the title. In these situations, the agreement should be structured and written in such a manner that a title attorney would be convinced that should the title issue be litigated, there is substantial likelihood the foundation doctrine of the agreement would be upheld and the legal obstacles to a title transfer would be overcome. The contents of the agreement and the form of the agreement should be prepared by a competent title attorney licensed in the state.

Conclusion

Boundary line agreements can be useful tools to fix vague or uncertain boundaries. The boundary line agreement should not be used to simply save surveying costs unless the surveyor is sure the record boundary cannot be located with reasonable certainty. Surveyors should tell the parties in interest to seek legal counsel when using an agreement that attempts to fix a boundary location that differs from the location that was or could be reasonably established by the operative deeds.