

A Surveyor's Responsibility and Possession Boundaries

by

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A professional land surveyor's responsibilities in regard to performing a boundary retracement survey are composed of two dependent parts. First, the surveyor is required 'to follow in the footsteps of the original surveyor.'¹ To be accurate, the original surveyor's footsteps, recognizable in the form of marks and monuments, are not by themselves determinative unless given recognition in the description found in the operative² muniments of title. Accordingly, the surveyor's duty may be described as locating the boundaries that are described in the operative description(s). The second part of the surveyor's responsibility is to provide their client with a defensible professional opinion on the location of the boundary (i.e., original footsteps) communicated in a useful and understandable manner.

Reality often clouds this definition where lines of possession or occupation differ in location from the record lines. The situation that often confronts a surveyor is where the record line, as established by monuments or measurements obtained from the operative descriptions, does not coincide with the occupation lines (fences, walls, cultivation line, etc.). Where the lines of occupation differ from the record boundary, the doctrines of adverse possession, estoppel, practical

¹ Rivers v. Lozeau, 539 So.2d 1147, 1151 (Fl.App. 5 Dist.1989); Tyson v. Edwards, 433 So.2d 549 (Fla.App. 5 Dist. 1983); McKinley v. Hilliard, 248 Ark. 627, 454 S.W.2d 67 (1970).

² The term 'operative' is used to differentiate between those documents that do not have any authority by themselves to establish the boundaries. It would be improper to say the boundaries are those defined by the recorded deeds because many recorded deeds are written by persons without title to the land they purport to convey. In other cases, surveyors prepare inaccurate or erroneous plans that are recorded. Certainly these documents should not be determinative of the boundary location by the fact they are recorded. Consequently, the term 'operative' refers to those documents that emit from a grantor or other authority that had both the title and power to fix a boundary at a particular location and therefore operate to create an authoritative boundary.

location, acquiescence, or unwritten agreement could cause the title or ownership to coincide with the lines of occupation. Consequently, a few surveyors take upon themselves the task of analyzing the extent, nature, and history of possession to determine if ownership should conform to the lines of occupation rather than the record lines. If satisfied, these surveyors monument the lines of occupation as the ownership boundary. In defense of monumenting the lines of possession, there are countless stories of surveyors who have devoted considerable time and resources in an attempt to locate the boundary described in the records only to see the courts seemingly ignore their opinion and adopt the lines of occupation or possession as the boundary. The question then is whether a surveyor should take on the responsibility of showing lines of possession as the ownership boundary when the surveyor is fairly convinced such is the case.

There are several arguments offered for the position that the surveyor should take it upon themselves to recognize the lines of occupation as the boundaries to the property. First, such actions are relatively easy, inexpensive, and straightforward. Monumenting long standing lines of occupation generally follows recognized equitable principles without forcing the client to resort to costly litigation. In many cases, people have assumed the lines of occupation to be their boundaries. As a result, there is often less controversy where lines of occupation are monumented as the boundaries. The client often wants the bottom line, the end result. After paying the surveyor several thousand dollars, the client does not want to face the prospect of seeing an attorney and commencing litigation. Without question, lines of occupation are often held to be the boundaries where circumstances dictate.

It follows that in addition to some surveyors, many members of the Bar and

other real estate oriented professions feel that surveyors could and should avoid disputes by expanding their services (or at least their communications) to a determination of where the ownership boundary exists. A great deal of confusion, delay, and disharmony can often be avoided if the surveyor makes the ultimate determination that the occupation line is the ownership line and shows the occupation line as the boundary. In other words, the surveyor avoids confusion and problems by not publishing as yet undisclosed and unobtrusive problems that arise when there is a difference between the location of the record boundary and the location of the lines of occupation.

Given these reasons and others, it is often hard for some surveyors to accept that a surveyor is without authority and may be liable for failing to disclose where the lines of occupation differ from the location of the boundary as established by the operative records. The surveyor must understand that in these cases the procedure and who applies the law is just as important as the facts and circumstances used in establishing the boundary. Courts often quote “where the boundaries are is a question of fact, what are the boundaries is a question of law.” It is the distinction between fact and law that requires lines of occupation be litigated in order to be recognized as the boundaries.³ The surveyor, as a fact finder, ought not to and can not decide questions of law. Stated in other words, a surveyor is well within their purview in sifting the facts and applying rules of construction to opine the record boundary is at a certain location and the occupation line at another location — but the surveyor should avoid deciding the ownership boundary is at the occupation boundary or that certain improvements

³ Another method that is also recognized and preferred is where all the parties in interest join together in deeds that recognize the occupation lines as the common boundary. In such cases the occupation lines become the record lines by operative records.

across the building set-back line or boundary are there by parol license or may be maintained by some equitable doctrine.⁴ (It should be made clear that an attorney, well versed in the law, is in no better a position to decide on their own motion when the occupation lines are to be treated as the boundary.)

By way of explanation, consider a related example of a police officer who has just witnessed a person commit a heinous felony which the officer knows without question deserves the death penalty and will probably result in the death penalty. Would the police officer be justified in shooting the person without provocation on the basis of saving the State considerable time, expense, trouble, and resources only to have the same result (death by execution) occur at some later time? The police officer is trained in criminal law, deals with it on a daily basis, and is licensed to carry a firearm — surely the officer is prepared to carry out the eventual court decision. Nevertheless, the obvious answer if justice is to be preserved is that the police officer may not shoot the person without provocation. Furthermore, the prosecuting attorney, after examining all the facts, is in no better position than the police officer in executing a death sentence. Regardless of the overwhelming evidence and certainty of punishment, the procedure of trial must be followed and the law applied by the court.

What must be realized is that where the lines of occupation differ from the boundary as located by the record, the marketability of the title is brought into question. Marketable title is defined as title free and clear from reasonable doubt as to matters of law and fact and is not one clouded by an outstanding contract, covenant, interest, lien, claim of possession, or mortgage sufficient to form basis of

⁴ The following quotation has probably been used in the vast majority of recent Maine Law Court cases but often denies explanation from laypersons. Hence the reason for this statement.

litigation.⁵ Consequently, title which exposes a person to litigation is not "good and merchantable" or marketable if the danger of litigation is apparent and real, not merely imaginary or illusory, which may be apprehended upon the basis of some fact or truth which can be ascertained with reasonable certainty.⁶ Consequently marketable title is title that is reasonable free from claim by another.⁷ Where the occupation lines differ from the record lines the title is not marketable.⁸

The surveyor has a responsibility and the client has a right to be informed where there is a difference between the record boundary and other potential claims evidenced by fences or the boundary location described in the neighbor's deed. The practitioner's portrayal of line of occupation as the boundary may prevent concern and worry but the simplistic portrayal does not cure a problem simply by non-disclosure of the problem. Because there are conflicting boundaries and improvements, ownership is questionable, subject to dispute, and the marketability of the title is put into doubt. The surveyor has a duty to prepare opinions and communications that are objective and truthful for the client and reasonably foreseeable third parties.⁹

To summarize the surveyor's responsibility, the surveyor should not take it upon themselves to apply equitable doctrines and determine when the lines of occupation are the lines of ownership and show the occupation lines as the boundary.

⁵ West, Inc. v. Meadowgreen Trails, Inc., 913 S.W.2d 858 (Mo.App. E.D.,1995); First American Title Co. of El Paso v. Prata, 783 S.W.2d 697 (Tex.App.-El Paso, 1989); Lieb v. Roman Development Co., 716 S.W.2d 653 (Tex.App.-Corpus Christi, 1986); Marshall v. Hollywood, Inc., 224 So.2d 743 (Fla.App. 1969);

⁶ Stafford v. Bryan County Bd. of Educ., 466 S.E.2d 637 (Ga.App.,1995);

⁷ Vandervort v. Higginbotham, 634 N.Y.S.2d 800 (N.Y.A.D. 3 Dept.,1995)

⁸ There is a "reasonableness" standard that must be applied. A fence one foot off from the record boundary surrounding a 500 acre farm will not make the title to the farm unmarketable. However the same difference between the fence and record boundary around a one-quarter acre residential lot will likely make the title unmarketable.

⁹ Codified in the Rules by the Maine Board of Licensure for Professional Land Surveyors, Chapter 5, § 2.A.2.c.