Demystifying Land Boundaries, Surveys, and Easements

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A. Types of Land Surveys and How to Read Them

1. What is a survey?

A survey is a visual depiction of measurements. In addition, 'to survey' means the surveying activity including taking field measurements, preparing evidence, taking notes, reviewing data and forming opinions about the data.

2. Types of surveys

Several types of surveys are available, including boundary, land title, improvement location, and as built surveys. Topographic surveys are often used when construction is contemplated on a property.

a. ALTA Survey

The most common type of survey that is used in commercial transactions in current practice is the ALTA survey which is a survey prepared according to the "minimum standard detailed requirements" adopted by the American Land Title Association and the American Congress on Surveying and Mapping, and the National Society of Professional Surveyors. An ALTA survey typically shows where the boundaries are located, easements and locatable exceptions appearing on a title commitment for the property, major improvements located on the property, and utilities and access serving the property. In addition to the usual types of items shown on these surveys, there is an optional items table that includes such additional items that can be requested such as showing the location of highways and major street intersections, flood zone designations, measured height of buildings, and parking areas and numbered spaces, in addition to other items.

b. Boundary Survey

These surveys are often used in residential transactions and when putting in a fence or making other improvements to property. It is not as comprehensive as an ALTA Survey, but it is far better than a "spot survey". Research is often done of surrounding tracts and requires field work and location of monuments. Improvements, roadways and easements are located.

c. Surveyor's Real Property Report (SRPR) (i.e., "spot survey")

Not as reliable or thorough as a boundary survey, this type of survey is often ordered in the standard residential real estate purchase or refinance. It is a location of the improvements and a cursory check for encroachments. These are not to be used for commercial properties.

3. What to Look for When Reviewing the Survey

Once the survey is received, it is critical in any transaction for the attorney to review the survey with an eye towards inclusiveness of items shown on the title commitment, and observing issues that were unknown prior to the survey being performed. It is helpful to have a checklist available that is either customized for a particular type of transaction or a general one that can be used with any type of property or project, in order to make sure that all the bases are covered. Some of the more important aspects of survey review include the following:

a) The survey and the title commitment should conform; the legal description should match what is shown on the title commitment and the various encumbrances, appurtenant easements, and other matters appearing on the title commitment should all be properly shown on the survey.

b) The survey should be reviewed for additional matters that do not appear on the title insurance commitment, such as additional easements not appearing on the title binder, insuring that there is access as expected by the purchaser involved, that all utilities are present on the

property, that there is sufficient parking, that there are or are not appurtenant easements to the property needed for utilities, that no structures encroach over the property line or into any easements.

c) That the survey shows the correct number of improvements with the correct addresses. In looking at a survey, it is important to check the survey information including the scale, the north arrow, the legend, if any, the date the field work was completed, updated and the map drawn, the certifications and the surveyors seal and signature.

d) *Improvements/No Encroachments*. In connection with improvements that appear on the property, the survey should be reviewed for the location of the buildings and other improvements. Of particular importance is to make sure that no building or other improvements encroach onto or off of the property. In addition, it is important to make sure that there is no encroachment over a setback line or into easements. In addition, other types of encroachments into easements or encroachments onto or off of the property that should be reviewed include fences, parking areas, sheds, signs, etc. If an encroachment is of a permanent nature, this can create serious problems for the purchaser and should be taken care of by a grant of an easement or monetary compensation before the closing of the transaction. If there are encroachments of small or movable structures that are not too expensive to remove, these encroachments are of less concern and often the title company will insure over them.

e) *Easements*. Any easements that appear on the title commitment should be located on the survey. It is also important to have copies of the easement documents for review. In connection with utility easements, if underground utilities are located on the property, the surveyor, if requested to do so, can review plans of the utility company to determine where the

easements are located. Otherwise, they can hire companies with special equipment to detect where the utilities are located.

In addition to easements located on the property, appurtenant easements which benefit the property should also be shown on the survey. Sometimes, it will be necessary to obtain an appurtenant easement in case a utility runs off the property without any apparent supporting easement. If this is the case, it must be created and the adjoining owners will need to grant it. Sometimes, it becomes apparent from the survey that there is an appurtenant easement that does not appear on the title commitment. It is not unusual for a title company, once the order is placed on a particular parcel of property, not to include an appurtenant easement on the title commitment. If this happens, it is important that the survey be discussed with the title company in connection with researching the title to the appurtenant easement.

Sometimes an easement will appear on the survey that is not shown on the title commitment. Perhaps a gravel road across the property has been observed and placed on the survey by the surveyor. It is important for the attorney to review these sorts of items with the title company to make sure that an easement is created or that it is taken into account in the title insurance policy. Other matters that ought to be recognized by a surveyor and shown on a survey might be a possible prescriptive easement or right of way that is unrecorded affecting the property. This may only be apparent from a visual inspection of the property by the surveyor. If such an easement is discovered, it should be thoroughly investigated and proper documents to validate it be drafted.

Sometimes an easement appearing on the title commitment does not affect the property and the surveyor will be able to determine this and the attorney can then request deletion from the title commitment.

As mentioned above, in connection with encroachments of improvements onto a property or over a property line, the easement areas should also be carefully followed for encroachments lying within them. In connection with title insurance matters, some encroachments are not extremely risky or would be inexpensive to remove and a title company is likely to insure over them. However, more permanent items, such as a swimming pool lying in the middle of a utility easement crossing the property would be another matter and likely need more significant measures to deal with removing them.

f) *Access and Parking*. Another very important item to consider in dealing with property transactions is the access to the property. One of the basic coverages under the ALTA forms of title insurance is insurance coverage that a property has legal access. A survey showing access on a public street usually satisfies the question. A survey showing access by way of a private roadway creates issues that need to be investigated to make sure that there is access from outside the immediate area. A private roadway must connect to a public right of way at some point. Also, the attorney must make sure that any kind of private road agreement is properly drawn for the protection of all abutting property owners. It is not uncommon, however, to find that a property has been transferred that ends up being landlocked because a survey was not performed or because of an error in creating the legal description over the years.

If access is by an appurtenant easement, when ordering title insurance, you should make sure that you have title insurance coverage for the appurtenant easement. Typically, the title company will show the appurtenant easement as a second parcel on the Schedule A of the title insurance policy.

In addition to access issues, depending on the type of property involved, it may be important to show the parking areas in the survey. Often in connection with a commercial

transaction, the local zoning authority will require a certain number of parking spaces in order to satisfy its zoning requirements. This would also be necessary to be shown on the survey in connection with trying to obtain an ALTA zoning endorsement.

g) *Utilities.* Any review of a survey should also include a review of the utilities servicing a particular property. Easements that are designated for utility purposes, for example on a plat, should be reviewed and the various utilities contacted to ensure that they are servicing the property. Sometimes a utility does not have an easement upon which to support its services. If this is discovered, it is important to make sure that an easement is obtained or that one is granted.

h) *Certification and Other Matters*. The review of the survey should also carefully make sure that the survey certification is properly made to the parties that were on the initial order and that the items that were placed on the order for specification in the survey have been included. In addition, you want to make sure that the certification states that an actual on the ground survey was performed and the date of the survey and any updating work.

After the survey has been totally reviewed, it is necessary to do a list for the surveyor and possibly for the title company in connection with correcting any discrepancies between the survey and the title commitment. Once the thorough review and checklist have been completed with all discrepancies resolved, the attorney can be satisfied that he has provided a resolution to all title and survey issues possible in a proposed transaction.

B. Types of Legal Descriptions and How to Read Them

a) "*Metes and Bounds" Legal Descriptions*. Starting with the legal description, it is important to follow the "metes and bounds description" (meaning measurements and boundaries). The review should start at the point of beginning of the survey which is typically where the first bearing proceeds from after the point of beginning. The first bearing relates to a

previously established line, perhaps a section line or a subdivision line, or a road). The description then follows the property boundaries along the courses and distances shown on the survey back to the point of beginning.

It is important that the description closes. The ALTA/ACSM certification assumes that there is closure in legal descriptions. (There are various forms of software available that will review a legal description to make sure that it closes.) Oftentimes legal descriptions are created by non-surveyors including attorneys, title officers and real estate agents who know enough about real estate and/or have enough information to be able to properly create a legal description. One who creates a legal description of the "south one-half of lot 1" usually will not have too much trouble if they know what "lot 1" looks like. However, it is important if not critical to have a surveyor prepare a correct metes and bounds legal description.

Typically, a surveyor in the field will attempt to locate previously set monuments establishing the boundaries of a piece of property. Some older legal descriptions use boundaries of old fences, "the old oak tree", or rivers. Also, previously, some of the tools used were not exactly accurate. These included metal chains that stretched and contracted with the weather. (Older legal descriptions sometimes refer to "chains" and "links" as measurements.)

b) Rectangular System/ Government System Description

Another type of legal description is based on the rectangular system or government system which was adopted by the Continental Congress in 1785. Legal descriptions of this type are fairly common, especially in parts of the Southeastern United States. They are based on portions of the sections in a certain township and range with reference to a particular meridian. There are 36 sections in one square mile for a total of 640 acres. Each section is typically divided into further quarters and quarter quarter sections.

If you are reading or reviewing a legal description that is based on the rectangular system (the township and range type) it is oftentimes easier to work backwards through the legal description to locate where you are.

c) Subdivision Legal Description

A third type of legal description is based on the subdivision of land. Most real estate attorneys have been exposed to a legal description such as "Lot 5 in block 4 of Pleasant Hills Plat 2, a subdivision in Fulton County, Georgia, according to the plat recorded in Plat Book 10 page 5 of the Fulton County records." The subdivision name refers to a recorded subdivision plat that is recorded in the county recorders office. Typically all of the easements roadways and utility easements are shown on the subdivision plats in connection with the approval process that typically occurs in the county where the subdivision is established.

C. Identifying Boundary Discrepancies, Encroachments, and Setback Lines

The legal description on the survey should be the same as the legal description in the title commitment. The legal description and the title commitment generally come from the last vesting deed on the property. If there are differences between those legal descriptions, it is critical to determine those reasons for such differences because the seller of a tract of land that is described in a manner different than the deed where he purchased the property can create significant problems for the seller.

Sometimes there are differences in the deeds used by surveyors to create the measurements on surveys. Sometimes the measured call is different than the deed call. There are any number of reasons why there would be discrepancies in the legal descriptions including that the surveyors may have either made typographical error, or started the description in a different place than on

the title commitment. Regardless, it is important for the attorney to determine which is correct and have the surveyor reexamine and explain any discrepancies.

In addition to checking that the legal description on the face of the survey is the same legal description that appears on the commitment, it is important that the metes and bounds description should be followed around the boundary of the property and back to the point of beginning, paying attention to the calls to make sure that the distances and the directions are accurate. Often, there are reversed calls or other typographical errors.

If adjoining property owners dispute the location of a common property boundary, the first step is to look at surveys used to create the legal descriptions. If the legal descriptions and surveys conflict, the property owners should ask their surveyors to review the surveys and the chains of title. It may be that a call or transfer was missed somewhere in the chain of title and is causing the current problem. The surveyors may be able to work together to resolve the conflict before the property owners have to resort to litigation. The best-case scenario in this case: the surveyors can work it out. More often than not, however, the surveyors will be unavailable.

a) Rules of Survey Priority

When the surveyors are not available to resolve measurement conflicts in surveys, the courts will apply rules of survey priority.[1]

Survey Order of Priority

Natural Monuments
(rivers, creeks, shoreline, old trees)

Artificial Monuments

[1] Martin v. Patton, 225 Ga. App. 157, 157-59, 483 S.E.2d 614, 617-18 (1997).

(iron pin, stake, fence)

Course and Descriptions

References to Acres

b) Case Studies.

i. *Dover v. Higgins*. What happens when the natural monuments referenced in the survey no longer exist years later? This was the case in *Dover v. Higgins*. In *Dover*, Dover acquired property that was described by identifying all contiguous parcels of land bordering it.[2] One of the contiguous parcels was the Patterson parcel, which was described in a 1918 deed through a series of calls based on monuments that existed in 1905.[3] When Higgins and Pepper obtained a deed to the Patterson parcel, they brought a quiet title action seeking to establish the boundary line between their parcel and Dover's tract.[4] The jury was left to interpret the calls in the Patterson deed, which included "the rock corner on the public road, the creek, the mouth at the creek's branch, and the rock corner below the mill."[5] The Court of Appeals held that the jury must weigh the evidence and determine the location of the ancient markers. "When there is conflicting evidence concerning the location of a monument upon which a boundary line is based, the jury is authorized to fix the boundary in accordance with a survey that presumes the location of the

[2] 287 Ga. App. 861 (2007).
[3] Id. at 862.
[4] Id. at 863.
[5] Id. at 864.

contested monument."[6] In that case, the jury was justified in finding that the survey prepared by the Higgins/Pepper surveyor established the correct boundary line.

ii. *KDS Properties, Inc. v. Sims*. When a survey establishes corners but lines connecting the corners are not marked, a straight line is presumed. However, a marked crooked line will not be overruled.[7]

D. Easement Essentials: Types, Creation, Issues, Termination

An "easement" is the right of an owner of one parcel of land to use the land of another for a special purpose.[8] Utility easements and rights of way (driveways) are common examples of easements. An easement that transfers an interest in the land must be in writing to satisfy the statute of frauds.[9]

a) Appurtenant Easement vs. Easement In Gross

An appurtenant easement runs with the land; an easement in gross is a personal right that does not run with the land.[10] Without sufficient language in the deed or recorded instrument, parties may inadvertently limit an easement as a personal right rather than one that runs with the land for the benefit of all future owners. The construction of language in a deed reserving an easement right as personal or appurtenant is a question for the court rather than a jury[11] and depends upon the terms of the grant, the nature of the right, the surrounding circumstances, and the parties' intent.[12] However, the law favors appurtenant easements over easements in gross.[13]

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[6] Id.
[7] 234 Ga. App. 395, 397, 506 S.E.2d 903, 906 (1998).
[8] Brown v. Tomlinson, 246 Ga. 513, 272 S.E.2d 258 (1980).
[9] Barton v. Gammell, 143 Ga. App. 291, 238 S.E.2d 445 (1977).
[10] Barton v. Gammell, 143 Ga. App. 291, 238 S.E.2d 445 (1977).
[11] Feckoury v. Askew, 244 Ga. 128, 259 S.E.2d 70 (1979)
[12] Yaali, Ltd. v. Barnes & Noble, Inc., 269 Ga. 695, 506 S.E.2d 116 (1998).
[13] Id.

Thus, where a right to pass over land is given for ingress and egress, the courts generally construe the grant as one for an appurtenant easement, rather than for an easement in gross in the absence of express language to the contrary.

b) What is Necessary to Create an Express Easement?

The express grant of an easement, like the conveyance of other interests in land or contracts for their sale, must contain language sufficient to designate with reasonable certainty the land over which it extends.[14] It is generally sufficient to identify the whole tract of land owned by the grantor over which the easement passes.[15] Notwithstanding, the grant of an easement containing an indefinite description will be upheld where its location has been established by consent of the parties.[16]

c) Easement or License or Lease?

An easement is distinguished from a lease in that it involves no occupancy of the premises.[17] A license is distinguishable from an easement in that it is a mere permissive use, generally revocable.[18] In addition, owner acquiescence means there is no "adverse" use and the use is merely a revocable license, not an easement by prescription.[19]

d) Unrecorded Easements and Prescriptive Rights - Notice

Generally, an unrecorded agreement regarding an easement is valid between the parties to the agreement regardless of whether it is recorded.[20] When an easement is properly recorded, the world has constructive notice of the easement whether or not they have actual notice and future

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[14] Dyer v. Dyer, 275 Ga. 339, 566 S.E.2d 665 (2002).
[15] Lovell v. Anderson, 242 Ga. App. 537, 530 S.E.2d 233 (2000).
[16] Barton v. Gammell, 143 Ga. App. 291, 238 S.E.2d 445 (1977).
[17] Southern Ry.Co. v. Wages, 203 Ga. 502, 47 S.E.2d 501 (1948).
[18] Barton v. Gammell, 143 Ga. App. 291, 238 S.E.2d 445 (1977).
[19] Eileen B. White & Associates, Inc. v. Gunnells, 263 Ga. 360, 434 S.E.2d 477 (1993).
[20] City of Statham v. Diversified Dev. Co., 250 Ga. App. 846, 550 S.E.2d 410 (2001).

grantees will take the property subject to the easement.[21] If unrecorded, the easement is merely a personal contract between the parties unless there is some other form of notice of the easement.[22] Land previously burdened with an easement is freed from the easement by a subsequent conveyance of the land if the purchaser takes without notice of the easement and purchases the property for value.[23]

For example, in *Rome Gas-Light Co. v. Meyerhardt*, 61 Ga. 287 (1878), the Georgia Supreme Court held that "[w]hether a purchaser of land through which a gas company had run its pipes by consent of a former owner, took subject to the easement or not, depends upon whether he had notice thereof at the time of the purchase, or had notice of fact sufficient to put a reasonable man on inquiry."[24] In that case, the Supreme Court decided that the purchaser's notice of the easement was a question of fact for the jury.[25] Similarly, in *Hopkins v. Virginia Highland Associates, L.P.*, 247 Ga. App. 243 (2000), the Georgia Court of Appeals reversed summary judgment in favor of the purported easement holder for underground sewer lines where (1) the easement was mis-indexed; and (2) the sewer lines were buried, and therefore were not open and obvious.[26] Typically, whether there are facts sufficient to give anything other than record or actual notice are issues of fact for the fact finder.[27]

e) What Constitutes a Prescriptive Easement?

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[21] Security Union Title Ins. Co. v. RC Acres, Inc., 269 Ga. App. 359, 604 S.E.2d 547 (2004).
[22] City of Statham v. Diversified Dev. Co., 250 Ga. App. 846, 550 S.E.2d 410 (2001).
[23] Webster v. Snapping Shoals Elec. Membership Corp., 176 Ga. App. 265, 266 (1985).
[24] Id.
[25] Id.
[26] Id. at 247.
[27] Hopkins, 247 Ga. App. at 246.

An easement may also be created by prescription. The Georgia legislature has codified the requirements for prescriptive easement at O.C.G.A. § 44-9-1. Pursuant to statute, a party claiming a private right of way easement by prescription must prove:

a) Public, continuous, exclusive, uninterrupted use for **seven** years or more accompanied by a claim of right for a private right of way and 20 years or more of adverse use for "wild" or unimproved land;
b) The use must be adverse rather than permissive
c) private way does not exceed twenty feet in width, and that it is the same twenty feet originally appropriated; and
d) prescriptive user has kept the private way in repair during the period of use.[28]

With respect to establishing the prescriptive use period, note that weekend only use of a private right of way and has been found to be sufficient, *Lee v. Collins*, 249 Ga. App. 674, 547 S.E.2d 583 (2001), as has seasonal use of a private way for seven years.[29] As to the space restriction, the width of the roadway, not the width of use by the prescriber, is the determinative factor.[30] Finally, the repair requirement does not mean that user must make unnecessary repairs; instead, the purpose of repairs requirement is not so much the repairs but the notice which is given of adverse use by the repairs.[31] In *Simmons v. Bearden*, the prescriptive user's removal of dead trees and limbs from a road "from time to time" were insufficient repairs to put landowner on notice for purposes of creating a private right of way of the road by prescription.[32]

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[28] Moody v. Degges, 258 Ga. App. 135, 137, 573 S.E.2d 93, 95 (2002); Norton v. Holcomb, 285 Ga. App. 78, 83, 646 S.E.2d 94, 99 (2007).

[29] Anneberg v. Kurtz, 197 Ga. 188 (1944).
[30] Revocable Trust of Timothy W. Griffin v. Timberlands Holding Co. Atlantic, Inc., 328 Ga. App. 33, 761 S.E.2d 458 (2014).
[31] GDOT v. Jackson, 322 Ga. App 212 (2013).
[32] 234 Ga. App. 81 (1998).

Note that prescription **cannot** run against:

- The state or its political subdivisions, whether held for governmental or proprietary purposes;[33]
- A minor during his minority;[34]
- A prisoner during incarceration[35];
- A mentally ill person;[36]
- An unrepresented estate during its first 5 years;[37]
- A remainderman during the life estate;[38]
- A grantor cannot prescribe against his grantee.[39]

f) Termination of easements

Easements may be terminated only by operation of law or by the express terms of the instrument granting the easement.[40] "The law does not favor the extinguishment of easements, and an easement acquired by grant is not extinguished merely by nonuse; there must be clear, unequivocal, and decisive evidence of an intent to abandon the easement."[41]

> Stated otherwise, where a right of way or other easement is acquired by grant or deed, no duty is thereby cast upon the owner of the dominant estate thus created to make use thereof or enjoy the same as a condition to the right to retain his interest therein, and the mere non-use[ ] of such an easement for a period however long will not amount to an abandonment. The mere fact that one does not immediately begin to exercise his right of use under an easement, or that he delays doing so for a number of years, would not

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[33] Glaze v. Western and Atl. R.Co., 67 Ga. 761 (1881), Grand Lodge of Ga., Indep. Order of Odd Fellows v. City of Thomasville, 226 Ga. 4, 9, (1970).
[34] O.C.G.A. § 44-5-170.
[35] O.C.G.A. § 44-5-170.
[36] O.C.G.A. § 44-5-170.
[37] O.C.G.A. § 44-5-173.
[38] Fish v. Tate, 132 Ga. 256 (1909), Ham v. Watkins, 227 Ga. 454, 457 (1971).
[39] Sweat v. Arline, 186 Ga. 460 (1938).
[40] Eagle Glen Unit Owners Ass'n, Inc. v. Lee, 237 Ga. App. 240, 241, 514 S.E.2d 40, 42 (1999).
[41] Sermons v. Agasarkisian, 323 Ga. App. 642, 645, 746 S.E.2d 596, 599 (2013).

> occasion a loss of the easement. His right being complete, he could not be deprived of it except by express abandonment, or by such conduct as would be tantamount to the same.[42]

"Where an easement of way has been acquired by grant, the doctrine of extinction by nonuse does not apply; and mere nonuse[] without further evidence of an intent to abandon such easement will not constitute an abandonment."[43] "Although intent to abandon an easement often is an issue for the factfinder, the issue can be resolved on summary judgment if there is not clear, unequivocal, and decisive evidence of intent."[44]

"In interpreting an express easement,[45] the rules of contract construction apply. The construction of a contract is a question of law for the court. The cardinal rule of construction is to ascertain the parties' intent."[46] "Arriving at this intention requires consideration of the whole instrument, the contract, the subject matter, the object, the purpose, the nature of restrictions or limitations, the attendant facts and circumstances at the time of making the instrument, and the consideration involved."[47] A limitation on the duration of an easement is also interpreted in light of the parties' intent.[48] Given that Georgia law does not favor the termination of easements, an easement's provision providing for its termination and reversion to the grantor must be strictly construed.[49] Where "a developer sells lots according to a recorded plat, the grantees acquire an

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[42] 905 Bernina Avenue Cooperative, Inc. v. Smith/Burns LLC, 342 Ga. App. 358, 371, 802 S.E.2d 373, 384 (2017).
[43] Brown v. Sapp, 351 Ga. App. 352, 353, 829 S.E.2d 169, 171 (2019).
[44] Id.
[45] An express easement, also known as an easement acquired by grant, is an easement "expressly agreed upon by contract between a landowner and another[.]" 905 Bernina Avenue Cooperative, Inc., 342 Ga. App. 368, 802 S.E.2d at 382 (citing Pindar's Ga. Real Estate Law & Procedure § 8:17 (6th ed. 2004)).
[46] Crystal Farms, Inc. v. Road Atlanta, LLC, 302 Ga. App. 494, 496 690 S.E.2d 666, 668 (2010).
[47] Id.
[48] Id.
[49] Id.

easement in any areas set apart for their use, and that easement is an irrevocable property right," that will automatically pass to successors in interest.[50]

[50] Sermons, 323 Ga. App. at 646, 746 S.E.2d at 599.