

BOUNDARY DISPUTES

I. FINDING THE SOLUTION TO UNRESOLVED BOUNDARIES.

II. HANDLING RIGHT OF WAY PROBLEMS

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I. FINDING THE SOLUTION TO UNRESOLVED BOUNDARIES

Generally.

Robert Frost once said that “good fences do good neighbors make”. It is most often true. However, when the fence purports to describe a boundary and it’s in the wrong place, things are often not so neighborly. Fences are among a variety of ways that have been used to delineate the division between adjoining properties. Sometimes they are used as the boundary line and described as such. Other times they are placed subsequently to the division of property, to serve as a visual, if not legal divider. There are other ways to define the confines of particular properties. Boundaries are often mapped. They are described by metes and bounds. They are fixed by reference to markers or points. All of these methods are believed to be effective. Many times they conflict.

A boundary is defined as: “Every separation, natural or artificial, which marks the confines or line of division of two contiguous properties. Limits or marks of enclosures if possession be without title, or the boundaries or limits stated in title deed if possession be under a title.” *Black’s Law Dictionary*, Fifth Edition. Boundaries may be natural, such as rocks, trees and rivers. They can be artificial, such as iron pins, merestones, monuments or fences.

Today, it is the norm for purchasers and lenders to require surveys. Title Companies will not insure boundaries without a survey. The computer and other scientific advances have made surveying a more exacting science. Unfortunately, the incidence of boundary line errors and disputes has not abated with the advent of better

science. When the issue over ownership is joined, it is often determined by resort to criteria other than surveys.

Boundary disputes arise out of many situations. A non exclusive list includes: a survey for a new purchase discloses encroachment by an abutter; the erection of a fence or the placement of a hedge causes a neighbor to reexamine the boundaries; the abandonment of an old road raises issues of ownership under the road; and a zoning application alerts neighbors to property line issues. These disputes can be resolved in a number of ways.

The first thing is to identify the problem. What may appear to be an issue may not be. If you think there is an encroachment, get a survey. Review the title report or policy to see what it says about easements and rights of way. Read the conflicting descriptions in light of the survey and title reports.

If it is determined that there is a problem, there are evaluations which must be made to determine how to rectify the problem. Boundary line agreements can be negotiated. Areas can be deeded. Quiet title actions can be used to establish the lines. In any situation, there are guides for the resolution of the issues.

Deed Descriptions.

It is, generally, held that where a deed description is clear and unambiguous, it will be given effect. In such a case, it is unnecessary to look to the intent of the parties to a conveyance. *McCullough v. Waterfront Park Association, Inc.*, 32 Conn. App. 746 (1993). However, there are often two competing unambiguous descriptions. When that occurs, a pecking order of criteria has developed, almost like the game rock, paper scissors. However, where the calls for the boundaries are inconsistent, generally the

order of review is (a) to natural objects or landmarks; (b) to artificial monuments (both natural and artificial monuments are referred to as fixed monuments); (c) to adjacent boundaries; and (d) courses and distances. 12 *Am. Jur. 2d Boundaries* § 61.

However, where it is obvious that there has been a mistake, sometimes an inferior call will prevail over a superior one. 12 *Am. Jur. 2d Boundaries* § 72. In such cases, course and distance will prevail over volume. 12 *Am. Jur. 2d Boundaries* § 73.

Fixed Monuments.

Connecticut follows these general rules although there is less distinction between natural and artificial monuments. For the purpose of describing land, monuments are defined as physical objects which are permanent. They may be natural or artificial and even if they have disappeared may still be utilized if their former location can be ascertained through extrinsic evidence. *Koennicke*, supra. A monument, when used in describing land, is “any physical object on the ground which helps to establish the location of the line called for,” whether it be natural or artificial. *Koennicke*, supra, 11-12, citing *Delphey v. Savage*, 227 Md. 373, 374-75, 177 A.2d 249 (1962). “It is well settled as a rule of the construction of deeds that ‘[w]here the boundaries of land are described by known and fixed monuments which are definite and certain, the monuments will prevail over courses and distances.’” *Koennicke v. Maiorano*, 43 Conn. App. 1, 10, (1996) (quoting *Frank Towers Corp. v. Laviana*, 140 Conn. 45, (1953)); *Velsmid v. Nelson*, 175 Conn. 221, 227, 397 A.2d 113 (1978); *Russo v. Corideo*, 102 Conn. 663, 672, (1925).

“The monuments which control courses and distances are those to which the conveyance itself refers. A reference to the adjoining land of the grantor as a boundary cannot be treated as describing a monument intended to control the dimensions stated

because of the existence of a fence, which is not mentioned in the deed.” *Kashman v. Parsons*, 181 (Conn. 1898). In *Delphay*, the court noted that, as in contracts or wills, the intention of the parties governs the interpretation of deeds and that is why “monuments named in deeds are given precedence over courses and distances, because the parties can see the tree, stone, stake, pipe or whatever it may be, which is referred to in the deed, but would require equipment and expect assistance to find a course and distance.”

Adjacent Boundaries.

As a general rule, the boundary of an adjacent property may be considered a monument. *Koennicke v. Maiorano*, 43 Conn. App. 1 (1996). However, that boundary must itself be fixed and definite. *Marshall v. Soffer*, 58 Conn. App. 737 (2000); *Wallingford Rod & Gun Club, Inc. v. Nearing*, 19 Conn. Sup. 414. Issues arise where both sides of the contested boundary purport to be established by monument or rely on courses and distances established by survey. It is, then, necessary to determine which deed and related courses control. In those cases, it is important to determine the first deed in the chain. The first conveyance between two parties of a particular parcel of land that is recorded governs over later conveyances. *Conn. Gen. Stat. § 47-10*; *Law v. Sullivan*, No. CV0300897145, 2003 WL 21235430, at *1 (Conn. Super. Ct. May 19, 2003); See *Wheeler v. Young*, 55 A. 670, 672 (Conn. 1903).

Therefore, if there has been a subdivision of property, and two of the subdivided lots are disputing a boundary, it is necessary to establish the boundaries of all of the lots, from the description of the first lot. That first lot will, generally front a street for a specific distance. The other three lines will be the initial basis for the adjacent lots and subsequently, to those lots that adjoin those and each other. This rule is consistent with

Connecticut's recording statute, *Conn. Gen. Stat.* § 47-10, which puts all on notice of what is stated in recorded documents; and sets priorities based on the time of recording. "Under our recording system a deed duly recorded is constructive notice to all the world; and the law conclusively presumes that every person interested has knowledge, not only of the deed, but of its precise language." *Beach v. Osborne*, 50 A. 1019, 1021 (Conn. 1902) (quoting *Hamilton v. Nutt*, 1868 WL 922 (Conn. Feb. Term 1868); See Law, 2003 WL 21235430, at *6;

Maps and Surveys.

The common belief is that surveys are dispositive of the areas that they describe. However, there are often differences between surveys of the same and adjoining parcels. When a deed references a map for recourse to a more particular description therein, the map becomes a part of the deed and is incorporated by reference therein. *CG.S.* § 7-31; *Schwartz v. Murphy*, 74 Conn. App. 286 (2002). When the map is not referenced in the deed the issue of whether or not to accept the conclusions therein is a question of fact for the court. *Simmons v. Addis*, 141 Conn. 738 (1954). Where the conflicting deed descriptions are indefinite, then a map will control. *Mastronardi v. Infante*, 34 Conn. App. 584 (1994)

Issues arising between conflicting surveys are generally subject to the same rules as are conflicting deed descriptions. First are permanent and ascertainable monuments then lines and angles. 12 *Am. Jur. Boundaries* § 61, citing *Newfound Management Corp. v. Sewer* (DC VI) 885 F. Supp. 727. Where the calls are inconsistent, you start with marked corners, then natural objects, adjoining property and courses and distances. 12 *Am. Jur. Boundaries* § 61, citing *Powell v. Reid*, (KY) 519 SW2d 388.

It should be noted, when dealing with surveys which are not referenced in the deeds, that they may be admissible to show what they claim, but the weight to be given them is for the court to decide.

Water and Watercourses.

Boundary issues relating to water and water courses could be an entire topic. There are, however, some general rules that relate to water courses as boundaries. In Connecticut, most of the issues are on lakes. Most lakes in Connecticut are man made. In the case of a boundary on a man made pond or lake, a grantee is presumed to have taken title to the center line of the original stream that was dammed to form the lake. *Mad River Co. v. Pracney*, 100 Conn. 466 (1924). However, where a deed, clearly, conveys only to the shore of the lake or pond, then the boundary is the high water mark. *McCullough supra*. At 751; *Mihalcz v. Woodmont*, 175 Conn. 535, 539 (1978).

Suffice it to say, that any description bordering on a shore, on the banks of a river, on a sound, etc. is likely to result in a fluctuating boundary. In such a case, the other calls of a description would be used to establish the property. *Armstrong v. Wheeler*, 52 Conn. 428 (1885).

Acquiescence and Adverse Possession.

Acquiescence and adverse possession are really the opposites of each other. A boundary acquiesced in for fifteen years cannot be restored. *Perry v. Pratt*, 1863 WL 783, at *1. “Acquiescence in the use and development of an area by a landowner is defined as a consent to the boundary as claimed by an adjoining owner and can estop the acquiescing landowner from pursuing a claim of ownership. The acquiescence must

occur under circumstances that indicate an assent to such a use.” *Marshall v. Soffer*, 58 Conn. App. 737, 744 (2000). Assent may be reasonably inferred and is as irrevocable as if expressly stated in words. *DelBuono v. Brown Boat Works, Inc.*, 45 Conn. App. 524, 533 (1997), cert. denied; *Lowendes v. Wicks*, 36 A. 1072, 1079 (Conn. 1897). “Assent is a necessary inference from acquiescence, and estoppel was the necessary consequence of assent.” *Id.* at 1079.

Conversely, adverse possession is open and notorious use, for fifteen years, under a claim of right in derogation of the rights of others. (citations omitted). The situations and cases that have arisen in this area are almost always fact determined. The law is clear, the facts are not always so. Suffice it to say, that in boundary disputes, adverse possession is frequently the defense used in the resultant litigation.

Adverse Possession may be interrupted by acts which are inconsistent with the adverse nature of the possession or with acts which recognize the superior title of another. *Allen v. Johnson*, 79 Conn. App. 740 (2003). (See also the effect of the marketable title act on Adverse Possession. *C.G.S.* § 47-33d.)

The Marketable Title Act.

The Marketable Title Act, *C.G.S.* § 47-33b et seq. can extinguish an interest or an easement. It requires a renewal of an encumbrance within forty years after a conveyance of the title to the subject property, the “Root of Title” *C.G.S.* § 47-33c. This is significant in the case of easements. To continue or revive the interest, either a subsequent transfer must specifically identify the interest *C.G.S.* § 47-33d; or a notice, in proper form, is recorded during the forty year period. *C.G.S.* § 47-33f. Among the exceptions to the erasure of an interest is where an easement which is evidenced by

something physical or observable. *C.G.S. § 47-33h*. Interestingly, the physical evidence need not be observable. *C.G.S. § 47-33h*.

Generally, a surveyor will look at old maps and will likely be able to find any physical evidence of a buried monument, conduit etc. All the more reason to have a survey done.

Manners of Resolution.

There are a number of obvious ways to resolve disputes. The parties can get together and hire a surveyor, agreeing to accept his findings. If they can't agree to accept the surveyor's findings, they may still agree to the survey. However, that survey may end up as evidence in a subsequent proceeding. If the parties are able to agree on a boundary, they may draft and record a boundary line agreement. For recording in the land records. Care should be taken to have the clerk, marginally, note the volume and page on the original deeds. If indexed properly it should be in the chain of title of each property, but the notation helps. If there are mortgages on the property, the mortgagees will need to consent. They have the conditional legal title to the parcels. The marginal notes should be placed on the mortgages also.

Where the parties are unable to agree, a quiet title action is the proper way to enlist the courts' aid.

Zoning Issues.

Zoning issues are, in some ways, peripheral to other resolutions of disputes. Subdivision maps are generally referred to in the conveyances of lots in the subdivision and are therefore, dispositive of the matters shown thereon, including the boundaries shown. The sequence of conveyances in the subdivision is important to the

interpretations given to deeds that are in question. Also, the subdivision map is recorded and is therefore notice to the world of the matters contained therein C.G.S§ 10.(citations omitted).

Zoning is also implicated in matters of encroachment. For instance, where a property owner place stairs on the property line resulting in an encroachment. The court refused to order the stairs removed because the reconstruction of the stairs in the appropriate spot would result in a violation of the local building code. *Kelly v. Thomas*, 66 Conn. App. 146, 157 (2001).

II. HANDLING RIGHT OF WAY PROBLEMS.

Abandonment and Discontinuance.

Though lumped together, abandonment and discontinuance are different. Discontinuance required the following of statutory procedures, while abandonment can be by non use or other evidence of intent to cease use.

In the context of boundary disputes, issues often arise as to the ownership and rights in roads or ways. One party claims to own to the centerline of an abandoned road while the other claims to own the whole road or right of way. A Plaintiff, claiming ownership to the center line of a road, must prove, by a preponderance of the evidence, that the road was, in fact, a highway dedicated to public use and accepted by the public. This is because, at common law, a grant of land abutting a private road is not presumed to own to the center line. *Chaput v. Clark*, 26 Conn. App. 785, 789 (1992) There is no presumption of ownership to the centerline of a road unless it was an accepted, abandoned road, dedicated to public use. “The issues of dedication and acceptance are both questions of fact for which the plaintiff carries the burden of proof.” *Timber*

Harvesting, Inc. v. Ouellette, No. CV 9250736S & CV9250369S, 1994 WL 60031, at *1 (Conn. Super. Ct. February 9, 1994). The burden of proof is by a preponderance of the evidence. *Id.* at 3.

"A highway may be extinguished [1] by direct action through governmental agencies, in which case it is said to be discontinued; or [2] by nonuse by the public for a long period of time with the intention to abandon, in which case it is said to be abandoned." *Mackie v. Hull*, 69 Conn. App. 538, 547, (2002), cert. denied, 806 A.2d 1055 (Conn. 2002), on remand to No. CV980078427S, 2003 WL 352966 (Conn. Super. Ct. Jan. 15, 2003) (quoting *Greist v. Amrhyn*, 80 Conn. 280, 285, (1907)).

Even when a road or highway is abandoned, the owners abutting that abandoned road retain a right of way over the abandoned road to the nearest street or highway. *C.G.S. § 13a-55; Cohen v. City of Hartford*, 746 Conn. 206 (1998). This, even though the abutters to the abandoned or discontinued road are presumed to each own to the center line of the roadway (citations omitted).

Therefore, even where an owner believes that it has acquired title to an abandoned road, an easement remains in favor of those who abutted that road.

Municipal Powers.

In addition to the authority to discontinue highways, it has been held that municipalities have the authority to close portions of a road without discontinuing or abandoning. *Cohen, supra; Pizzuto v. Town of Newington*, 174 Conn. 282 (1978) (interpreting *C.G.S. § 7-194 (8)* now *C.G.S. § 7-148 (C)*).

Prescriptive Rights.

Easement rights, just as ownership rights, may be acquired by hostile use. The requirements are the same as for adverse possession. *Peterson v. Rancke*, 140 Conn. 202 (1953). As with adverse possession, each case is dependent on its own factual basis.

Other issues.

Right of way issues can arise out of other factual situations. For instance, easements by necessity can arise from the lack of access by an adjoining owner. These can create issues for property owners who did not anticipate access over their property.

Right of way matters are subject to the Marketable Title Act *C.G.S. § 47-33b et seq.*, previously discussed. Similarly, they are affected by the Recording Statute. As discussed under the Boundary Dispute topic, references to maps, contained in the documents creating the rights of way, are dispositive of the matters shown thereon. (see discussion *supra*).

The discussion of monuments, courses and distances and calls is equally applicable to the placement of easements and rights of way.

In summary, right of way issues can arise in the context of boundary issues, ownership issues and access issues. The land records do not always afford an easy resolution of the problem. Neither do surveys always disclose the problem. If the matters can not be worked out by agreement, recourse to the courts may take the form of a quiet title action, a request for injunctive relief or an action to prevent surcharge (where applicable).