

SURVEY ISSUES

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HOUSEKEEPING

- **New for this month** – your phones will be automatically muted by the host/moderator. This will allow for less disruption and noise, and an improved recording of the webinar.
- If you have any questions for the speaker, please use the online chat feature.
- If you have a more complicated question, or one that may require more discussion, please wait until the end of the webinar when your phones will be unmuted.

- **Note:** PowerPoint and audio for the October “Spooky Claims 2008” webinar is now available at www.stewarttexas.com
- For **Escrow Officer** Credit please email password and attendees names to ken.wrider@stewart.com for certificate (Please do this as soon as possible. Certificates will not be produced after the start of our next webinar)
- **Attorneys** e-mail bar card number to Ken Wrider for CLE credit
- Send to your training administrator if applicable
- We are now recording!

WHO SETS STANDARDS

- Texas Board of Professional Land Surveyors
- Texas Society of Professional Surveyors
- ALTA/SCM

TBLS STANDARDS

- Effective Sept 1, 1992, as amended
- Protection of the Public
- Unofficial Standards since 1946 (ACSM)
- Condensed version of TSPS 1A standards
- Signed and Sealed means the standards were followed

SURVEYOR'S RESPONSIBILITY

- Surveyor must do all research necessary to do a good survey
- He can contract the work out but he remains liable for: **the accuracy the sufficiency**

TITLE COMPANY'S LIABILITY TO THE SURVEYOR

- Title Company has NO liability to the Surveyor
- Unless the surveyor pays the title company as an independent contractor
- Working for the surveyor

QUALITY CONTROL

- Instruments
- Regularly inspect and adjust
- Test against reliable standards
- Computer programs verified
- Procedures for side shots
 - Require transverse angles be turned a certain way and a set number of times
- Never mismatch prisms
- Keep records of procedure

WORK TO BE DONE

- Contract, letter or understanding or work order describing services
- Before work is started
- Sets out need for certification contract is required before the Surveyor can claim a lien

PRECISION

- TBLS Rule 663.15 --Corner Monuments in a Texas city positional tolerance of: 1:10,000+0.10' - Professional standards stay within the +0.10
- 10 minutes of error over 100" =0.10'
- Short lines (150 to 200 ft) make tolerances hard to achieve

RULE 663.5 REQUIRES THE HIGHEST DEGREE OF INTEGRITY

- no one else can dictate work practices
- +0.10 rule is designed to give Surveyor some buffer for minor errors
- accommodates minor disturbances of the monuments
 - deals with short lines
- when added to each course, makes precision borderline
- angle precision is about 20 seconds, with 0.10 at 1000 could be off by 40 seconds

EXAMPLES OF TOLERANCES

- Apply to all corners relative to each other, includes diagonals
- 1 second over 1 mile is 2/100's foot
- "more or less" to surveyor with accurate standards means
- no material differences above or below the figure stated
 - 5000 feet distance can mean either **4999'** or **5001'** and still be accurate
- Acres cannot be accurate to less than 1/10 ac. If needed, then the area should be shown in square feet

SENIOR RIGHTS

- Senior property rights must be honored before the dignity of calls can be considered
- Senior property rights usually require the surveyor to review the field notes field with the General Land Office
- the earliest dated field notes are senior
- when there are conflicts between field notes, the earliest dated notes are senior
- Senior rights establish the survey lines

PATENTED LAND ISSUED BY THE REPUBLIC OF TEXAS OR THE STATE OF TEXAS

- Title Land was issued by the Spanish or Mexican governments

Senior Rights for tracts inside an established survey dates on which the tracts were created determine senior rights

DATE DEED WAS DELIVERED IS THE DATE OF CREATION OF THE TRACT

- How do you prove delivery 20 to 50 years after the fact?
- Date of recording is a gamble, but who will have better information?

SENIOR RIGHTS ALWAYS WIN. SENIOR LINE BECOMES AN HONORED MONUMENT

- Actual monument of senior survey = win
- Good evidence of monuments =win
- Some evidence of monuments = course and distance used to create boundaries

LOTS IN A RECORDED SUBDIVISION HAVE EQUAL RIGHTS

- All are simultaneously senior
- Lots sold without remainder are equal
- Perimeter of subdivision can be junior to adjoiners

RECENT DEEDS DO NOT DETERMINE JUNIOR-SENIOR RIGHTS!

- Must go back to the original documents
- Originally monumented lots and blocks cannot be changed by a later surveyor

RADIAL SURVEYS

- Occurs when surveyor stands in the middle of the tract and measures the lines from there
- Bad practice!
- Open ended traverses since nothing is tied together
- No redundancy of calls
- Misses easements and encroachments if the lines are not followed
- Can be used as a check, but not a way to do a survey

KNOWLEDGE BY THE SURVEYOR

- The surveyor is presumed to know the law of boundaries and the law of evidence, and, when he agrees to locate a written conveyance on the ground, he agrees to locate it in accordance with the laws governing how written conveyances should be located. (*Evidence and Procedures for Boundary Location, 2d Edition*, p. 22 thanks to Ken Gold, RPS for this reference)

ADJOINERS

- **TBPLS Rule 663.16(b).**
- Appropriate deeds and/or other documents including those for adjacent parcels shall be relied upon for location of the boundaries
- All major surveying texts agree with this rule
- TBPLS Rules are enforceable by disciplinary action, fines suspension, & loss of license

MONUMENTATION

- Surveyor must establish or find a physical monument
- Rule 663.17(a)
- Set at sufficient depth
- retain stable and distinctive location
- size to withstand deteriorating forces
- appropriate materials

RULE 663.17(b)

- Refer to the monuments on the survey plat
- Show whether found or set
- Identify the type of monument

CERTIFICATION

- TBPLS Rule 663.18
- Seal and Signature minimum required
- Clients can request additional certification
- Plat of survey with metes and bounds description is required for title insurance purposes, signed and sealed with some certification dealing with matters excepted under Area and Boundary exception

TSPS: CATEGORY 1A IS SUFFICIENT CERTIFICATION

- ALTA/ACSM is OK if it states that the Minimum Detail
- Requirements and the Accuracy Standards have been followed
- Statement by surveyor "easements, rights of way, overlapping of improvements and encroachments are as shown" is Ok

USE OF PRIOR SURVEYS

- P-2 says that for basic refinance transactions, the title company must use a survey that is less than 7 yrs old
- For ALL transactions, a title company may use a survey of ANY age provided that it can obtain a T-47 affidavit showing no changes.

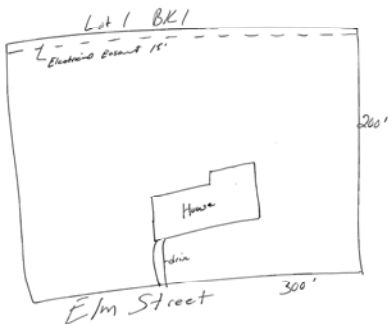
USE OF PRIOR SURVEYS P2

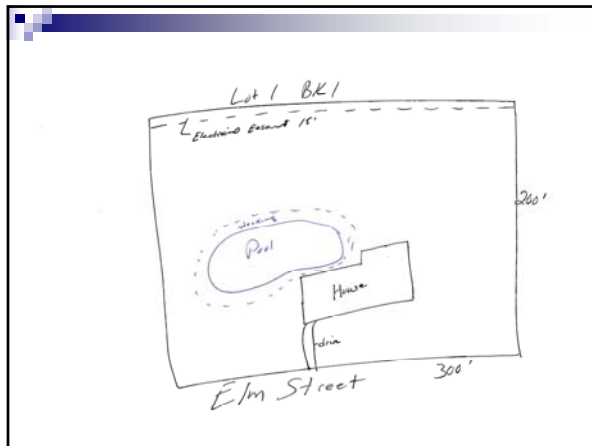
- What if the T-47 needs to have changes explained?
- It depends on what the changes are and your common sense.

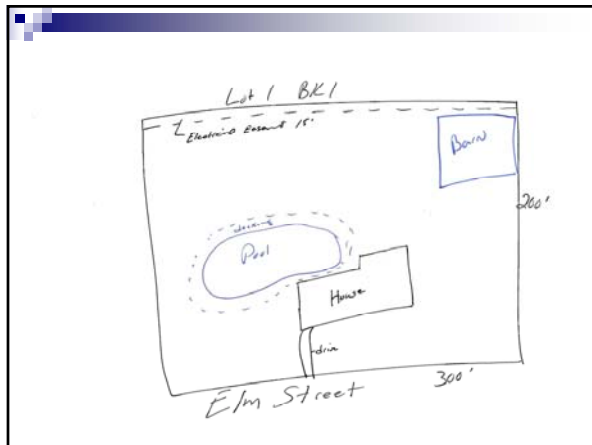
USE OF PRIOR SURVEYS P2

- If you are in a city lot and the changes are marked on the survey in a place where they could not affect any internal or external boundaries, ok to take the T-47 and a marked up survey.

USE OF PRIOR SURVEYS P4







WHAT ABOUT COPYRIGHTS?

- What is a copyright?
- It is a right that an author of original material has to keep others from using that materials as their own.

REVERSED CALLS

- Are reversed calls always grounds to reject a survey?
 - No
 - But it is always grounds to question the surveyor

REVERSED CALLS

- The issue is with the process
 - Turning the angles 2-5 times
 - Averaging the readings
 - Continues around the perimeter
 - Every close is a forced close
 - Where are the cumulative errors
 - When you know this the survey may be ok

WHAT ABOUT COPYRIGHTS?

- What is the title company using the survey for?
 - To make underwriting risk decisions about matters affect boundaries of property

WHAT ABOUT COPYRIGHTS?

- Is the title company claiming that it did the survey?
 - No
- Is the title company claiming that it owns the survey?
 - No

WHAT ABOUT COPYRIGHTS?

- Can a survey even be copyrighted?
 - Almost assuredly the answer to that question is also no
 - 2007 U.S. Dist. LEXIS 72872, *; 84 U.S.P.Q.2D (BNA) 1551; Copy. L. Rep. (CCH) P29,440
 - THE CITY OF NEW YORK, Plaintiff, -against- GEODATA PLUS, LLC, Defendant.
 - 03-CV-3560 (DLI) (VVP)
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
 - 2007 U.S. Dist. LEXIS 72872; 84 U.S.P.Q.2D (BNA) 1551; Copy. L. Rep. (CCH) P29,440

WHAT ABOUT COPYRIGHTS?

- "To qualify for copyright protection, a work must be original to the author." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991). In *Feist*, the Supreme Court provided extensive guidance concerning the definition of "original" in this context: Original, as the term is used in copyright, means only [1] that the work was independently created by the author (as opposed to copied from other works), and [2] that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. Id. (internal citations omitted). Accordingly, physical and historical facts are not original because they "do not owe their origin to an act of authorship," and thus cannot be copyrighted. Id. at 347.

WHAT ABOUT COPYRIGHTS?

- **Darden v. Peters, 402 F. Supp. 2d 638 ; upheld Darden v. Peters, 488 F.3d 277, 2007**
- Plaintiff also argues, as he did in each of his appeals to the Copyright Office, that Maps are inherently copyrightable. Plaintiff cites a number of cases that found maps to be [**12] worthy of copyright protection, including *Mason v. Montgomery Data, Inc.*, 967 F.2d 135 (5th Cir. 1992), and *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739 (2nd Cir. 1998). The Copyright Office correctly found Plaintiff's argument inapposite. The *Mason* decision was an infringement action in which the Fifth Circuit Court of Appeals found that certain maps met the minimum level of creativity required by *Fleish*, based on significant changes made by the author. 967 F.2d at 145. Similarly, in *Streetwise Maps* the Second Circuit Court of Appeals found that a series of maps was made copyrightable as a result of depictions and colors added by the author. 159 F.2d at 748. Both cases represent a conclusion that the particular maps at issue satisfied the originality requirement; they do not imply that the Copyright Office must approve registration of any and all maps.

WHAT ABOUT COPYRIGHTS?

- **Stone v. Perpetual Motion, LLC, 87 Fed. Appx. 51 , 2004**
- Viewing the evidence in the light most favorable to Plaintiff, no reasonable juror could find substantial similarity of ideas and expression in the *Adventures* and *Good Dirt* maps. After the nonprotectable [**4] elements of the maps are filtered out, there is not substantial similarity. To be sure, the *Adventures* maps and the *Good Dirt* maps cover trails in the same territory. However, the *Good Dirt* maps generally offer a "zoomed in" and bare-bones perspective; the *Adventures* maps offer a distant view filled with many more details of the terrain. Although the maps have several basic design features in common, "it is well-settled that *HNG* copyright of a map does not give the author an exclusive right to the coloring, symbols, and key used in delineating boundaries of and locations within the territory depicted." *Hamilton*, 583 F.2d at 4

WHAT ABOUT COPYRIGHTS?

- Can the owner of the property or other person mark changes on the plat of survey?
 - Yes
 - T-47 Affidavit is the document that allows the title company to bring the survey up to date. If there are any changes set out on the T-47, the parties with knowledge can show the changes on the survey
 - They are not claiming that they created the survey; only that they are showing changes that exist on the ground

MAIN POINTS OF T-47

- It should be completed by the affiant in their handwriting
- Title company personnel should look at the information and act upon that information as necessary
 - Use common sense as we discussed earlier

WHAT ABOUT MINERAL INTERESTS?

- After May 1, 2008, the T-19.1 covers damage to existing or future buildings from exercise of mineral rights.
- How do we give intact T-19.1 when there are outstanding mineral interests?

WHAT ABOUT MINERAL INTERESTS?

- Surface waivers
- City Zoning ordinances
- Well site designations in plats
- Railroad commission rule
 - Effectively, 5 acres or less cannot have a well drilled on it.

RULE §3.37 STATEWIDE SPACING RULE

- **RULE §3.37 Statewide Spacing Rule**(a) Distance requirements.
- (1) No well for oil, gas, or geothermal resource shall hereafter be drilled nearer than 1,200 feet to any well completed in or drilling to the same horizon on the same tract or farm, and **no well shall be drilled nearer than 467 feet to any property line**, lease line, or subdivision line; provided the commission, in order to prevent waste or to prevent the confiscation of property, may grant exceptions to permit drilling within shorter distances than prescribed in this paragraph when the commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property.

T-19 AND T-19.1

- $467' \times 467' = 218089 \text{sq}/43560 \text{sq} = 5.007 \text{ ac.}$
- So, unless you have some indication (like a well shown on a survey) that the RRC has given special permission, it is safe to issue the intact T-19 series whenever you tract is less than 5 acres

WHEN IS A NEW SURVEY REQUIRED?

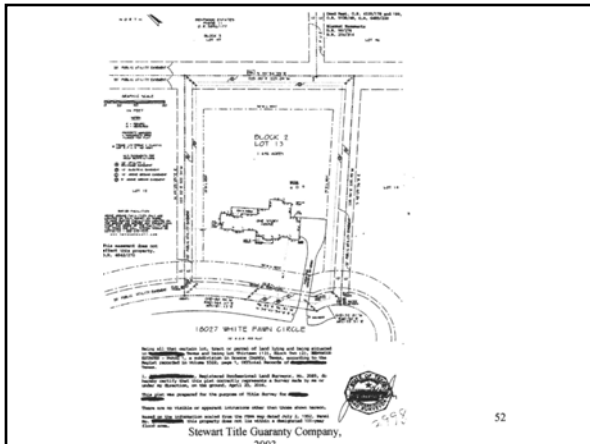
- When the existing legal description is more than 10 yrs old ...NO
- When the existing legal description is more than 25 yrs old ...NO
 - There is no absolute time for needing a new survey

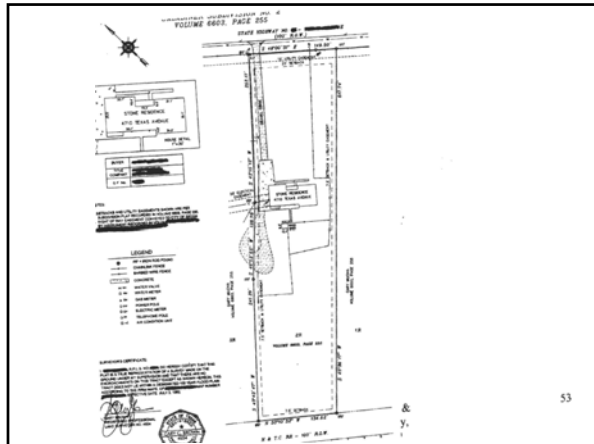
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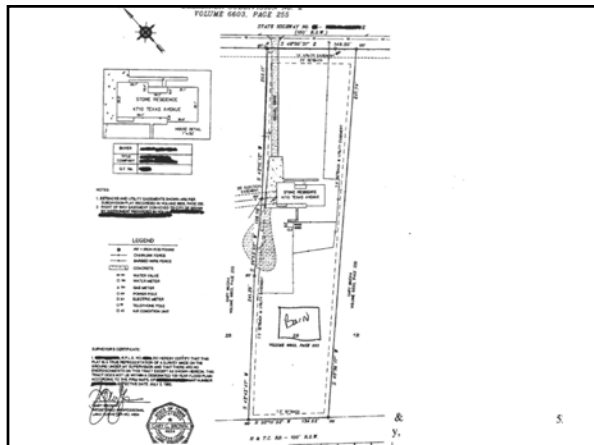
- No one can sign a T-47... Yes
- Anything new has been added to the yard... it depends on what it is and where it is!
- The survey has a copyright notice... No
- The survey is certified to a specific transaction... No, it is still evidence of a survey
- The property is larger than X acres ... No

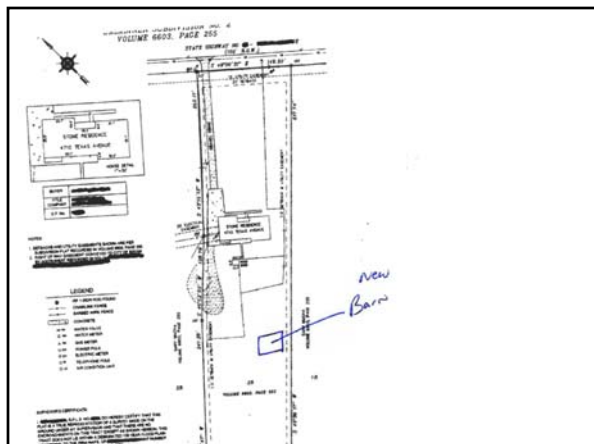
WHEN IS A SURVEY REQUIRED?

- To insure an access easement
- When there have been improvements added close to a boundary
- When a larger tract is being subdivided
 - May even need a plat if new tract is less than 10 acres
- When the contract or lender requires









THANK YOU!

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- **Attorneys** email bar card number to Ken Wrider for CLE credit
- **Next Texas TIPS Online** December 18, 2008, "Process Flows – Reviewing and Streamlining Procedures" by Jennifer Goodman
- **Questions/Comments?** Email fred.schraub@stewart.com
- www.stewarttexas.com for presentation materials within 5 business days of the webinar
