

16

Boundary and Adjoining Property Issues

- I. Introduction §16.1
- II. Surveys §16.2
- III. Rights and Duties Controlled by Boundaries
 - A. Introduction §16.3
 - B. Trees and Other Natural Boundaries §16.4
 - C. Driveways §16.5
 - D. Roads and Highways §16.6
 - E. Party Walls §16.7
 - F. Fences §16.8
 - G. Light and Air Easements §16.9
 - H. Lateral and Subjacent Support §16.10
- IV. Ownership of Waterfront Parcels §16.11
- V. Determining Boundaries
 - A. Contracts and Conveyances §16.12
 - B. Adverse Possession §16.13
 - C. Acquiescence §16.14
 - D. Property Adjacent to Public Roads §16.15
 - E. Conflicts in Descriptions and Surveys §16.16
- VI. Means for Resolving Property Disputes
 - A. Boundary Agreements §16.17
 - B. Affidavits Regarding Title Issues §16.18
 - C. Licenses for Encroachment §16.19
 - D. Easements for Encroachment §16.20
 - E. Corrective Deeds §16.21
 - F. Surveys §16.22
 - G. Title Insurance §16.23
 - H. Arbitration §16.24
 - I. Agreements §16.25
 - J. Litigation §16.26

Forms

- 16.1 Certification of Survey
- 16.2 Easement for Light, Air, and Unobstructed View
- 16.3 Notice of Claim of Title
- 16.4 Boundary Agreement
- 16.5 Affidavit of Adverse Possession
- 16.6 License for Encroachment

16.7 Easement Maintenance Agreement for Shared Driveway

I. Introduction

§16.1 Property boundaries are generally taken for granted. When a purchaser looks at a piece of property, a quick review of the site usually establishes the expected boundaries—a fence, a hedge, or some other natural point of demarcation. In most transactions, the boundaries are either confirmed or rejected by reviewing title insurance and a survey, which together show where the boundaries are, and any encumbrances. However, in spite of this relatively inexpensive means of setting boundaries, they are too often ill-defined and lead to conflicts between neighbors. Quite often, it simply does not seem worth the time or trouble to quibble over whether or not the driveway is totally on one side of the property line, how precise a party wall agreement is, or what the arrangements for the joint use and maintenance of a driveway or parking lot are. Consequently, these issues often wind up being handled by attorneys because no one acted to resolve the issue when the issue arose or a transaction occurred that disclosed the problem.

The boundary problem may become known when a party does due diligence leading into a transaction. The survey and title insurance may disclose an encroachment such as a driveway crossing the property line, whether it be the neighbor's driveway crossing on to the parcel being purchased or the driveway of the parcel being purchased crossing over into the neighbor's property to reach the public street. In this manner driveways, fences, swimming pools, parking lots, and other encroachments may be disclosed. The best approach is to have the problem cured before there is a closing. However, in some instances parties discover the problem or address the problem too late during the due diligence and don't want to delay an otherwise important closing or miss a deadline for a closing. They then close leaving the encumbrance in place to be addressed at a later date. Hopefully it can be addressed with little difficulty, but that may not be the case.

In other instances, boundary issues are not even discovered during a transaction. The knowledge of the issue arises later while the party is using its property. For example someone may buy a lakefront parcel of property and expect, from reviewing the survey and title insurance, that no one from a back lot has any right to cross the property or expect that they are crossing to the lake on an adjacent walkway and that they will restrict their rights to use the beach to that walkway area. They may later find the people using the beach on their shoreline or walking across the property. What often results is an argument over whether or not many years of use have entitled these people to some further right to cross the parcel or use the beachfront.

Similarly, where there are cross-driveway easements a purchaser may simply presume that the rest of the interaction between the neighbors is copacetic and that each party simply uses its own parking lot. On the contrary, the purchaser may discover that the neighbor has been encroaching on the use of the parking lot and the parcel being purchased for many years and claims some right to continue that use. A further example might be a party wall or an easement for which the presumption is that when it is time for maintenance and repair or resurfacing, the

parties will simply share in some proportionate amount. However, when it is time for the action to happen, there may be disputes over who will actually schedule the work, whether or not it should be done at that time or at some later date, or who will pay for the work. The first act of an attorney in transactions like these is to try to address the matters during the due diligence leading up to a closing. That is when all the parties are most highly motivated to produce a mutually acceptable result and perhaps even pay to ensure that the issue is resolved. If the problem arises outside of the context of a transaction, it becomes a question of trying to deal with and negotiate with all of the parties at hand to reach a reasonable solution.

This chapter will address how boundary disputes arise, the rights and duties controlled by boundaries, how boundaries are created, and resolution of disputes over boundaries and adjoining property.

II. Surveys

§16.2 Surveys have four main functions in most real estate transaction:

1. providing an adequate legal description
2. fixing boundaries in relation to adjoining property and structures
3. confirming the access to the property
4. disclosing and graphically locating easements, encroachments, structures, or other matters that affect the use of a parcel

A survey certified to the buyer should be a prerequisite to every real estate transaction, whether a sales transaction, a financing transaction, an option, or a lease. Boundary issues are just as important for tenants as for purchasers and mortgagees. There is no obligation to provide a survey in a real estate transaction; it must be negotiated. Even if the negotiations are not successful in getting the seller or landlord to pay for a survey, the party acquiring the interest should obtain one.

The party acquiring an interest should always request that the survey be current to within a designated number of days of closing. The survey should show the boundaries of the property to be acquired; the location of all easements, rights-of-way, and other recorded encumbrances; and all improvements, structures, roads, and paths on the premises. The surveyor should receive a copy of the title commitment, and the title insurance company should receive a copy of the survey so that they may cross-reference to ensure that their findings match. A review of the survey in conjunction with a title insurance commitment will help to avoid title, boundary, and possession problems.

The survey should be certified to the party acquiring the interest, any financing entity involved in the purchase or lease, and the title insurance company. Since an attorney often orders the survey, the survey might be certified to that firm as well. The certification may be in one of several different forms. If you are making up a certification for the surveyor to use, you might do it in a manner such as that shown in form 16.1. That might suffice for a residential parcel of property. How-

ever, for any commercial transaction and for any residential transaction of higher value, it is probably more appropriate to request an ALTA/ACSM certification as explained in §2.15. It is also important to remember to go through the lists of items to be shown by the survey and certification and list those in schedule A in ordering the ALTA/ACSM survey. This will provide a certification covering all of the various encumbrances such as improvement setback lines, parking lots, driveways, and other matters that the parties will want to know as part of the transaction. To accept less than such a comprehensive certification could leave an unknown issue that will become a problem later.

Each successive party acquiring a subsequent interest in the property should receive a new certified survey. Surveys do vary, and a subsequent survey may reveal an error in or a conflict with an earlier survey. Further, any prior survey is certified to a different party, and a successive party will not have any right to rely on it. If you want your client to have the right to rely on a survey for purposes of the surveyor's liability if there is an error, you must have the survey certified to your client so that there is a privity between your client and the surveyor.

Many people think that a title insurance commitment prevents boundary conflicts. However, a title insurance commitment only shows recorded documents. It does not show a prospective acquirer where the boundary lines of the property are actually located in relation to structures, easements, and other encumbrances. For example, a survey might reveal that the boundary line is 10 feet shy of a public right-of-way or the body of water that the property was thought to adjoin. A title insurance commitment does not show any locations. It only lists matters of record title. Whether the property has access to that public right-of-way or the waterfront can be crucial to a transaction. Only a survey will show those types of facts.

As with anything else, a survey is not a foolproof solution for all disputes. Surveys can be erroneous. They can also lack information that is unknown to a surveyor. However, a certified survey by a reputable surveyor, reviewed in conjunction with a title insurance commitment can go far in disclosing many of the conflicts that can cause boundary disputes.

III. Rights and Duties Controlled by Boundaries

A. Introduction

§16.3 As a prelude to discussing the determination of boundaries, it is important to recollect why they are important. The most obvious reason is that they demarcate the property that is to be purchased, sold, financed, or leased and that will be controlled by the purchaser or tenant. However, other rights and duties can arise as a result of a boundary. Some of these are examined in §§16.4–16.10.

B. Trees and Other Natural Boundaries

§16.4 A tree, a row of trees, or a line of bushes are common informal indicators of boundaries in residential settings. *See Walters v Snyder*, 239 Mich App 453, 608 NW2d 97 (2000). These natural markers are also common sources of dispute, particularly in residential settings. *Id.*