



# The Importance Of Surveys In Real Estate Transactions A Mortgage Officer's Viewpoint

BY CORINNE D. LEON, B.A., LL.B.

*This paper was prepared for the Association of Ontario Land Surveyors. Miss Leon is a Solicitor, Real Estate, Legal Division, Canadian Imperial Bank of Commerce.*

## DISCUSSION

### 1. What is a Survey?

A survey is a graphically accurate representation of the original boundaries of a parcel of land. As such, it is essential to the conveyance of both residential and commercial real property, because it establishes the extent, i.e. the size and shape, and location of the parcel of land. It is a document which "(confirms) the location and accuracy of the paper title" (**Law of Real Property**; Anger and Honsberger, p. 1122) and is therefore important not only to the purchaser but to the mortgagee (lender) as well, since the extent and quality of title should be unequivocally established if the mortgagee finds itself in the position of having to exercise its remedies under the mortgage.

It is important to note that a survey is completely independent of the written metes and bounds description of the land in the deed/grant. It is the written description of the land which must coincide with the true location of the original boundaries in the survey and not the other way around. If the written description is at odds with the description in the survey, then it is the written description which is wrong and it is the survey which prevails. (Anger and Honsberger, p. 1125.)

Therefore, although a surveyor is trained to "establish a boundary for the first time", (**Bar Admission Course 1983-84**; updated 1985-86; I. de Rijcke/L. Petzold, Chapter 10 p. 269, "(t)he major portion of a surveyor's work is in re-establishing boundaries," and he must "re-establish the boundary on the ground in the location where it was first established and not where it was necessarily described, either in the deed or on a plan". (**The Survey and the Real Estate Transaction**, L. Petzold p. 2.) This is based on the principal that "once established, the boundaries become the true and unalterable boundaries of the roads, lots, lanes and blocks. Any re-survey of these boundaries becomes an exercise in retracement." (**Bar Admission Course** p. 270.)

In retracing these original boundaries, a surveyor must consider the best evidence available which is the evidence "about which man is least likely to make an error". (L. Petzold p.2.) The four types of evidence considered are:

1. Natural boundaries.
2. Original monuments (i.e. surveyor's monuments).
3. Evidence regarding the original position of the monuments if they no longer exist (e.g. fence).
4. The measurements in the written description of the land in the deed/grant.

Since the written description of the land is the evidence of last resort, it is clear why a survey prevails over a written description if there is a conflict between the two and why a survey is so important.

### 2. Why is a Survey Necessary?

In establishing extent of title, a survey can also disclose unregistered claims against the property, such as prescriptive easements and potential claims of adverse possession (Anger and Honsberger, p. 1122) and whether there are any encroachments on the land or whether structures on the land encroach onto adjoining properties (p. 1099). For a mortgage company the issue of encroachments is particularly important, especially with respect to commercial property because the security for the advancement of funds is the property itself and it is crucial that the physical characteristics of the land, represented by the survey, correspond to the paper description of the land. This way the mortgage company (and the purchaser) can be assured that what they believe is being conveyed is in fact being conveyed.

A survey also allows a purchaser's solicitor to determine if the property complies with zoning and set back restrictions and other municipal requirements. (Anger and Honsberger, p. 1100.)

"The survey therefore will determine if:

- (a) the boundaries agree with the theoretical deed lines;
- (b) there is a misdescription;
- (c) there is a possibility of adverse possession", (L. Petzold p. 7)
- (d) there are any encroachments; and
- (e) there is compliance with zoning and other municipal requirements.



### 3. Types of Surveys

There are four types of surveys: a plan of subdivision, a reference plan, a building location survey and a plan of survey.

A plan of subdivision "is a fully monumented first establishment of lot lines" (L. Petzold, p. 5). It is a formal document which is registered on title and results in the opening of a new abstract index under the Registry Act or a new parcel register under the Land Titles Act.

"A reference plan is a 'graphic description' and is extremely useful to eliminate the convoluted metes and bounds descriptions that were used in the past and to give a visual portrayal of the lands." (L. Petzold, p. 5.) It is a more informal document than a plan of subdivision as its purpose is to simplify the description of the lands to be conveyed and is therefore only deposited not registered on title.

The surveys most commonly associated with residential and commercial realty are, the plan of survey and the building location survey.

The plan of survey is the fully monumented survey (i.e. all four corners of the property have official Ontario Land Surveyors' monuments driven into the land to establish the extent of the property) which accurately locates and defines the extent and quality of title.

The building location survey is similar to a plan of survey, except that on a building location survey, only one corner of the property is required to be monumented, whereas all four corners must be monumented on a plan of survey.

The amount and type of information which a building location survey should show is prescribed in a set of standards established by the Association of Ontario Land Surveyors (**Bar Admission Course** p. 275) and even though a building location survey is not fully monumented, it is still a valid survey and can be relied upon to show any existing encroachments, compliance with municipal zoning requirements and "the differences, if any, between the boundary described in the deed for a parcel and the existing boundary on the ground". (**Bar Admission Course**, p. 275.)

Therefore, a building location survey is as valid and reliable as a plan of survey. However, if both types are available, preference should be had for the plan of survey as it is fully monumented.

The written certificate or mortgage survey is also a type of survey, but it is now defunct and should no longer be relied upon or used in any form whatsoever. It was originally created to be used only in conjunction with the refinancing of property. As it was not based on a true survey of the land but merely "on a visual inspection of the property with a statement to the effect that there was a house situate on the property and that there were no encroachments," it "could not clearly address extent of title, misdescription or adverse possession" (L. Petzold, p. 5).

However, despite this deficiency, the certificate was being used "as a survey to certify title in . . . real estate transaction(s)" (L. Petzold, p. 5) and as a result of this "serious misuse of the certificate, its preparation has been discontinued by Ontario Land Surveyors and surveyors further will not re-issue copies of old certificates" (L. Petzold, p. 5). These certificates therefore can no longer be requested and should not be relied upon nor updated. It is important to note that these certificates were sometimes referred to as building location surveys, but this was a misnomer and they are in no way related to the valid building location surveys presently in use.

### 4. Updating a Survey

A survey should also be up-to-date. In this regard "an up-to-date survey is one which shows the property as it is at the present time, regardless of when the survey was prepared. It does not necessarily mean a survey of current vintage, although obviously a recently dated survey will be more readily accepted as accurately depicting the property and its structures." (Anger and Honsberger, p. 1125-26.)

The survey must be brought up-to-date if alterations, improvements or additions are made to the property. It is important to note that a survey can only be updated by its author. If this cannot be done, a new survey should be obtained.

### CONCLUSION

The importance of obtaining a plan of survey when dealing with real property cannot be over emphasized. In a recent decision of the Manitoba Queen's Bench, **Lac Mortgage Company Ltd. v. Tolton**, January 29, 1986 reported 38 Man. R. (2d) 249, a mortgage company sued a solicitor when it was discovered that a building had not been built on the property for which the company had advanced the mortgage money. Mr. Justice Gerald Jewers found the solicitor negligent, not simply because he failed to advise the company to obtain the certificate, but because he failed to advise his mortgagee client "of the danger of advancing mortgage monies without a building location certificate" (38 Man. R. 249 at 253) "which would have put the location of the house virtually beyond doubt" (at 252). The solicitor was held liable to the plaintiff mortgage company for the damages flowing from this failure.

(Note: The term "Building Location Certificate" in Manitoba is equivalent to "Plan of Survey" in Ontario.)

### SUMMARY

A survey is an integral part of a real estate transaction because it establishes the extent (i.e. size and shape) and location of the property in question. It ensures that the physical characteristics of the land correspond to the written description of the land and therefore that the land believed to be involved in the transaction is the land actually involved. If the survey and written description do not correspond it is the description which is incorrect and it is the survey which will prevail.

A survey also discloses the possibility of adverse possession, any encroachments and if there is compliance with zoning and other municipal by-laws. There is also recent case law attesting to "the danger of advancing mortgage monies" without a survey.

There are two types of surveys in common use for residential and commercial transactions; the plan of survey and the building location survey.

The plan of survey is fully monumented while the building location survey has only one corner that is monumented. Both are equally valid surveys and can be relied on to show the existence of easements, encroachments, compliance, etc. However, it is preferable to use a fully monumented plan of survey, instead of a building location survey, if available.

"A survey can only be brought up to date by its author. If this cannot be done, a new survey should be obtained."

No reliance whatsoever should be placed on written certificates or mortgage surveys (sometimes mistakenly

referred to as building location surveys) if they are produced in satisfaction of a request for survey, as they are not based on an accurate survey of the premises but only on a visual inspection. They were never meant to be used to certify title and are no longer produced by the Association of Ontario Land Surveyors and should not be accepted whether updated or not.

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