

# Title Insurance Companies Waive Resurveys

BY DAVID F. RICE III AND LARRY SCARTZ (Reprinted with permission)

Land surveyors have traditionally been involved in real estate transactions that involve mortgages in Virginia and many other states. This appears to be changing, at least in Virginia. In recent years, homeowners have increasingly requested copies of old surveys, and it was our policy to provide courtesy plats (plans) until we discovered how they were being used.

In our area, it is now common to allow homeowners to sign a survey "affidavit", stating in part that the homeowner has an old survey, has inspected the premises and "certifies" or swears "under penalty of perjury" that the drawing is correct and that no improvement have been made since the survey. It is important to note here that mortgage inspections are not commonly accepted by lenders and title companies in our jurisdiction. Our plats have to reflect improvements generally not shown on inspection maps and detailed drawings of encroachments of fences, driveways, retaining walls, etc. This puts the homeowner in a position of certifying the location of constructed improvements, generally dimensioned down to a tenth of a foot.

It is difficult to determine who conceived of these owner affidavits. In speaking with lenders and title company representatives, it is clear that this is a marketing gimmick. The end users of mortgage surveys are lenders and title companies, and 99 percent of the time the homeowner pays for the survey. Then why get rid of survey updates? The answers can be more complex, but here is our reasoning. The aforementioned entities do not make any money on surveys; however they do shed a lot of liability by having them. Surely this practice was analyzed as a way to shed cost and liability. The homeowner takes on the liability for the survey and the title company is able to advertise cheaper fees. Needless to say, any negative consequences of this practice are not advertised.

First of all, this practice is land surveying without a license. It does not

matter if you go field-to-plat or plat-to-field, swearing or certifying to the accuracy of a survey is surveying. Second, it is not fair to those involved. The homeowners who are persuaded to sign these so-called affidavits do not have a way to determine if the original work is correct, much less a way to identify a change or an error. Laymen will not generally know what a survey should contain, or if the old survey meets current standards. It also puts a non-licensed person in a position of lying to save money. This last practice is especially damaging to adjoining owners.

*"It does not matter ... swearing or certifying to the accuracy of a survey is surveying."*

In Virginia, our Architects, Professional Engineers and Landscape Architects Board has referred the matter to the attorney general's office, but no further action has been taken. We have received a lot of input from surveyors in this and other jurisdictions, but none seem to have a solution.

One bright spot is Florida, where the board has acted in a prompt manner by convincing the state's attorney that this is land surveying, and the state's attorney has curtailed the process, with minor allowances.

Another possible remedy to this situation is to convince state insurance commissioners that title companies are crossing the line between title insurance and casualty insurance. The title insurance company is issuing risk-based insurance by not doing all that is reasonable and prudent to ensure for themselves, and for the insured, that there are no survey defects. Certainly it is not reasonable to say someone is healthy based on a physical they had five years ago.

This seems to be the best argument. It has been mentioned by surveyors from

numerous jurisdictions, but we do not know of a state that has made this distinction yet.

A brief list of problems we have encountered that may negatively affect subject premises include:

- \* Flood zones change. It is possible for properties to be redesignated in or out of the 100-year flood.
- \* Monumentation can be set erroneously and over time have improvements constructed to them. Without an update, the errors will propagate for years.
- \* Someone who builds an encroaching fence or non-conforming structure does not want an updated survey. This can be damaging to all parties involved.
- \* Millions of Americans, directly or indirectly, invest in secondary mortgage markets. It is not fair for their interest to be secured by homeowner-certified surveys.

Recently our county government implemented an ordinance to make all construction have grading plans that were to be sealed by a surveyor or an engineer. This was promptly rescinded, and now anyone can prepare grading plans. This county is in the Chesapeake Bay watershed, and has several major creeks to the Potomac River. It seems a shame that we will spend millions of tax dollars on environmental protection and cleanup, yet not make the people who benefit monetarily from development spend a few hundred dollars to protect our resources in advance.

Along this same line, it is not the job of the state's attorneys, insurance commissioners and land surveyors to control, regulate and educate title companies and lenders that our greatest natural resource - our property - should not be taken so lightly as to be surveyed by anyone other than a licensed professional?

