

March 23, 2012

**SENT VIA EMAIL AND U.S. MAIL**

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**RE: Requirement to File Record of Survey in Conjunction with Easements**

Dear Dave:

This letter will serve as a follow up to the Memorandum of Gary Duke dated January 16, 1998 giving his legal opinion as to whether the monumentation of an easement requires the filing of a record of survey. In Mr. Duke's legal opinion, this monumentation of an easement does not require the filing of a record of survey. You asked me to research this topic and give my opinion regarding this issue.

I disagree with Mr. Duke's opinion as detailed below. After reviewing relevant statutes, legal definitions and case law, it is my opinion that relevant California statutes require the filing of a record of survey showing the monumentation of an easement in the same way as it is required for other property rights pursuant to Cal. Business & Prof. Code § 8762, et al. Set forth below is the step by step analysis and reasoning for my conclusion.

**1. How is property defined? Is an easement considered property? Yes an easement is considered property and a property right.**

**Property** is defined as "that which is peculiar or proper to any person; that which belongs exclusively to one." *Black's Law Dictionary* (6<sup>th</sup> ed. 1992) pg. 1216. Property is defined by California statute as "the ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others." California Civil Code § 654. See **Exhibit A**.

"It [property] extends to every species of valuable right and interest, and includes real and personal property, **easements**, franchises, and incorporeal hereditaments, and includes every invasion of one' property rights by actionable wrong."

*Black's Law Dictionary* (6<sup>th</sup> ed. 1992) pg. 1216.

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From these authorities, it is clear that the law considers an easement to be property. Furthermore, a **property right** is defined as “a generic term which refers to any type of right to specific property whether it is personal or real property, tangible or intangible.” *Black’s Law Dictionary* (6<sup>th</sup> ed. 1992) pg. 1218.

2. **What types of property exist under the law? – Real property and personal property.**

There are two kinds of property – **real property and personal property**. “Property is either: real or immovable; or, personal or movable.” *Black’s Law Dictionary* (6<sup>th</sup> ed. 1992) pg. 1217 (citing California Civil Code § 657). See also **Exhibit B**, copy of Cal. Civil Code § 658.

- a. **Real property** is defined as “land, and generally whatever is erected or growing upon or affixed to land. Also rights issuing out of, annexed to, and exercisable within or about land.” *Black’s Law Dictionary* (6<sup>th</sup> ed. 1992) pg. 1218. Real property includes not only land but also things firmly attached to or embedded in land. Mallor, Barnes, Bowers & Langvardt, *Business Law – The Ethical, Global, and E-Commerce Environment* (McGraw-Hill 14<sup>th</sup> ed. 2010) pg. 613. Buildings and other permanent structures thus are considered real property and the owner of a tract of real property also owns the air above it, the minerals below its surface, and any trees or other vegetation growing on the property. *Id.*
- b. **Personal property** is defined as “in a broad and general sense, everything that is the subject of ownership, not coming under the denomination of real estate.” *Black’s Law Dictionary* (6<sup>th</sup> ed. 1992) pg. 1217.

3. **Does the legal definition of land include easements? Yes.**

“In the most general sense, comprehends any ground, soil or earth whatsoever; including fields, meadows, pastures, woods, moors, waters, marshes and rock.” *Black’s Law Dictionary* (6<sup>th</sup> ed. 1992) pg. 877.

“In its more literal sense, “land” denotes the quantity and character of the interest or estate which a person may own in land.” *Black’s Law Dictionary* (6<sup>th</sup> ed. 1992) pg. 877.

“**Land**” may include any estate or interest in lands, either legal or equitable, as well as **easements** and incorporeal hereditaments.” *Black’s Law Dictionary* (6<sup>th</sup> ed. 1992) pg.

877. The words “real property” are coextensive with lands, tenements and hereditaments. Cal. Civil Code § 14.

**4. Are the terms “land” and “real property” used interchangeable? Yes.**

**“The term “land” may be used interchangeably with “property”; it may include anything that may be classed as real estate or real property.”** *Black’s Law Dictionary* (6<sup>th</sup> ed. 1992) pg. 877.

**5. What is the legal definition of an “easement”?**

An **easement** is defined as “a right of use over the property of another. . . . A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner . . . An interest in land in and over which it is to be enjoyed, and is distinguishable from a “license” which merely confers personal privilege to do some act on the land.” *Black’s Law Dictionary* (6<sup>th</sup> ed. 1992) pg. 509.

Easements may be acquired by grant, reservation, prescription or implication (easement by prior use or easement by necessity). Mallor, Barnes, Bowers & Langvardt, *Business Law – The Ethical, Global, and E-Commerce Environment* (McGraw-Hill 14<sup>th</sup> ed. 2010) pg. 619-620.

**A transfer of real property passes all easements attached thereto unless expressly excepted by terms of the deed.** *Bartholomae Corp. v. W.B. Scott Inv. Co.* (1953) 119 Cal. App. 2d 41. See also California Civil Code § 1104 (what easements pass with property); California Civil Code § 801 (servitudes attached to land – called easements). See **Exhibits C and D.**

**ANALYSIS:**

An easement is considered to be a real property right that transfers with the real property unless it is expressly excepted by the terms of a deed. We know that litigation can result from misunderstandings about whether easements exist and where they exist. Therefore, it is in the public’s best interest, as a matter of public policy, that easements are accurately depicted on survey maps upon completion of a field survey and, when discrepancies arise, it is equally important that surveyors file records of survey in the

same way that they would to denote any other property right such as boundary lines.<sup>1</sup> This commitment to file a record of survey is consistent with previous Board opinions relating to the establishment of points or boundary or property lines by field survey. The monumentation of points or lines (boundary or property) requires the filing of a record (either corner record or record of survey). The type of record is dependent upon the nature of the line established. Lines which appear on any subdivision map, official map, or record of survey previously recorded or filed may be suitable for a surveyor to file a corner record. In other instances, the monumentation of a point or line (boundary or property) may be ineligible for filing a corner record and may strictly require the filing of a record of survey. The establishment (by field survey) of a property line or boundary line, whether monumented or not, which demonstrates any of the elements described in California Bus. & Prof. Code § 8762 (b) (1-5) will required the mandatory filing of a record of survey.

California Business and Professions Code § 8726 states in relevant part:

“A person, including any person employed by the state or by a city, county, or city and county within the state, practices land surveying within the meaning of this chapter who, either in a public or private capacity, does or offers to do any one or more of the following:

- (c) Locates, relocates, establishes, reestablishes, or retraces any **property line or boundary of any parcel of land, right-of-way, easement, or alignments of those lines or boundaries.**

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<sup>1</sup> 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 enclosure if possession be without title, or the boundaries or limits stated in title deed if possession be under a title.” Black’s Law Dictionary (6<sup>th</sup> ed. 1992) pg. 186.

- a. **Natural Boundary** – “Any formation or product of nature which may serve to define and fix one or more of the lines inclosing an estate or piece of property.” Black’s Law Dictionary (6<sup>th</sup> ed. 1992) pg. 186.
- b. **Private Boundary** – “An artificial boundary set up to mark the beginning or direction of a boundary line.” Black’s Law Dictionary (6<sup>th</sup> ed. 1992) pg. 186.
- c. **Public Boundary** – “A natural boundary; a natural object or landmark used as a boundary or as a beginning point for a boundary line.” Black’s Law Dictionary (6<sup>th</sup> ed. 1992) pg. 186.

- (e) By the use of the principles of land surveying, determines the position for any monument or reference point which marks a **property line, boundary**, or corner, or sets, resets, or replaces any monument or reference point.”

[emphasis added] See **Exhibit E**.

It is clear that subsection (c) of Section 8726 first calls out property lines and/or boundaries of any parcel of land **including the property lines for** rights-of-way, **easements** or alignments. In Section 8726(e), when discussing the determination of the position of any monument which marks a property line, boundary, etc., it is clear that the property line or boundary includes those lines for easements. Easements are real property rights. Subsection (e) simply doesn’t list out all of the types of property rights because it has already done so in subsection (c) to include easements. There is no need to list easements again in subsection (e). This would be redundant.

California Business & Professions Code § 8762 is part of the same Professional Land Surveyors Act as Section 8726. The sections of any “Act” are to be read together. Pursuant to California Civil Code § 13:

**“Words and phrases** are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or **are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition.**”

[emphasis added]. See also *Ransome-Crummey v. Woodhams* (1916) 29 Cal. App. 356 (stating word or phrase given a particular scope or meaning in one part or portion of law is to be given the same scope and meaning in other parts or portions of law); *Wallace v. Payne* (1925) 197 Cal. 539 (stating that in the interpretation of particular words, phrases or clauses in statute or constitution, entire substance of the instrument or that portion thereof which as relation to subject matter under review should be looked at, to determine the scope and purpose of the particular provision of which such words, phrases, or clauses form a part); *Carter v. Stevens* (1931) 211 Cal. 281 (stating that words of a statute must be given meaning that is germane to the subject matter of the legislation and consistent with rational deductions, rather than meaning that would create absurdity); *Johnstone v. Richardson* (1951) 103 Cal. App. 2d 41 (stating that words used in a statute must be construed in context, keeping in mind the nature and purpose of the statute).

Each section builds upon the others. For examples, definitions found in early sections of a particular act are not repeated again and again in other sections. This would be

inefficient, redundant and confusing. Instead, any particular Act is to be read as a whole, drawing on definitions from earlier sections to interpret later sections.

California Business & Professions Code § 8762(b) states in relevant part:

“Notwithstanding subdivision (a), after making a field survey in conformity with the practice of land surveying, the licensed land surveyor or licensed civil engineer **shall** file with the county surveyor in the county in which the field survey was made a record of the survey relating to **land boundaries or property lines**, if the field survey discloses any of the following:

- (1) Material evidence or physical change, which in whole or in part does not appear on any subdivision map, official map, or record of survey previously recorded or properly filed in the office of the county recorder or county surveying department, or map of survey record maintained by the Bureau of Land Management of the United States.
- (2) A material discrepancy with the information contained in any subdivision map, official map, or record of survey . . .
- (3) Evidence that, by reasonable, analysis, might result in materially alternate positions of lines or points . . .
- (4) The establishment of one or more points or lines not shown on any subdivision map . . .
- (5) Points or lines set during the performance of a field survey . . . “

See **Exhibit F**.

Requiring a record of survey for these discrepancies or the establishment by field survey regarding property lines or land boundaries includes the property lines or boundaries of the property rights of an easement. Because Section 8726(c) states that “**property line or boundary**” includes those for easements, Section 8726 (e) need not redundantly repeat that property lines or boundaries include those for easements. Similarly, the reference to land boundaries or property lines in Section 8762 is also meant to include easements as defined earlier in Section 8726(c). Once defined, it is simply not necessary to list all the types of property lines or boundaries to be included – easements are clearly listed in Section 8726(c). The Act is meant to be read as a whole. Additionally, Section 8765 (record of survey is not required) **does not** mention or exempt easements from the record of survey requirement. If the California Legislature had intended to exclude

easements from the mandatory filing requirements of Section 8762, the Legislature would have listed easements as excluded in Section 8765. Section 8765 is silent to any such exemption. See **Exhibit G**.<sup>2</sup>

Furthermore, since the intention of the record of survey is to (1) put the public and future owners on notice of all boundaries and property lines established by field survey; (2) memorialize the public's reasonable reliance on a land surveyor's established and/or monumented property lines or boundary lines; (3) preserve evidence relating to boundary lines or property lines and; (4) acknowledge that easements are important real property rights defined by, in relation to and composed of property lines, it does not make logical sense that the legislature would have intentionally excluded easements in Section 8762. Why would they do so? This defeats the objective of Section 8762.

Please contact me if you like any further research or analysis on this topic.

Very truly yours,

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Enclosures

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<sup>2</sup> Similarly, Section 8726(c) states "locates, relocates, establishes, reestablishes, or retraces any property or boundary . . ." Section 8762(b)(4) states "the establishment of one or more points or lines . . ." In this case "establishment" is used to encompass "locates, relocates, establishes, reestablishes or retraces. . ." Again, this is consistent with the principles stated in California Civil Code § 13.