

THE LEAGUE OF

california surveying organizations

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Port of Long Beach, 925 Harbor Plaza, P.O. Box 570, Attn: Robert Seidel

SOUTHERN REGION

Long Beach, CA 90801

September 7, 2012

County Engineers Association of California
Surveyor Policy Committee
Mr. Steven Steinhoff, Chair
1100 K Street, Suite 101
Sacramento, California 95814

Re: Record of survey requirement for monumenting easements

Dear Mr. Steinhoff:

In 1998, Mr. Gary Duke Esq., attorney for the Board for Registration of Professional Engineers, Land Surveyors and Geologists prepared an opinion stating that a Record of Survey was not required under the Business and Professions Code for monuments set on an easement boundary. In 2012, Mr. Dave Woolley, PLS received an opposing opinion from Lisa D. Herzog, Esq. challenging the validity of the one prepared by Mr. Duke. In July of this year, the Land Surveyor Technical Advisory Committee (LS TAC) requested that the Board of Registration ask Mr. Duke to review his previous opinion and revise it if necessary. To our knowledge, this has not yet occurred. Mr. Woolley attended our meeting in Santa Barbara in August and requested that the League prepare a position paper on the subject which is the reason for this letter.

Since the League of California Surveying Organizations cannot offer its opinion in a position paper due to the limiting of such activities by its Constitution, we are writing you to request that your Committee review the materials attached at your next regular meeting in November. The goal of your review would be for CEAC to provide comments to the Board of Registration in the hopes that those comments will be considered by Mr. Duke in his analysis. We believe that the issues identified affect many of the CEAC constituents and your comments may assist in clarifying this matter and allow more consistent surveying practices across the State. Hopefully, any comments you may have would reach Mr. Duke prior to him finalizing his opinion, should the Board request that he revisit the issue. Thank you in advance for your cooperation and if you need further information, please feel free to contact us at any time.

Very truly yours,

Michael B. Emmons
Secretary

Attachments: Opinion – Duke (1994)
Opinion – Herzog (2012)

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Memorandum

JAN 21 9 15 24 83

To: HOWARD BRUNNER, PLS
Land Surveyor Consultant
Board of Registration for Professional Engineers
and Land Surveyors

Date: January 16, 1998

Telephone: (916) 445-4216
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From: Department of Consumer Affairs
Legal Office

Subject: Monumentation of an Easement and Record of Survey Filing Requirements

This is in response to your request for an opinion regarding the applicability of the Professional Land Surveyors' Act in the above referenced matter. I regret the press of business has prevented a more prompt response. Specifically, you posed the following question:

Question

Does the monumentation of an easement require the filing of a Record of Survey?

Conclusion

The monumentation of an easement does not require the filing of a Record of Survey.

Analysis

The Professional Land Surveyors' Act regulates the practice of land surveying in this state by restricting the practice of land surveying to those persons qualified and licensed to engaged in that profession. (Bus. & Prof. Code § 8725.)

The practice of land surveying is defined at Business and Professions Code section 8726 as follows:

"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:

(a) Locates, relocates, establishes, reestablishes, or retraces the alignment or elevation for any of the fixed works embraced within the practice of civil

engineering, as described in Section 6731.

(b) Determines the configuration or contour of the earth's surface, or the position of fixed objects thereon or related thereto, by means of measuring lines and angles, and applying the principles of mathematics or photogrammetry.

(c) Locates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries.[Emphasis added.]

(d) Makes any survey for the subdivision or resubdivision of any tract of land. For the purposes of this subdivision, the term "subdivision" or "resubdivision" shall be defined to include, but not be limited to, the definition in the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) or the Subdivided Lands Law (Chapter 1 (commencing with Section 11000) of Part 2 of Division 4 of this code).

(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.]

(f) Geodetic or cadastral surveying. As used in this chapter, geodetic surveying means performing surveys, in which account is taken of the figure and size of the earth to determine or predetermine the horizontal or vertical positions of points, monuments, or stations for use in the practice of land surveying or for stating the position of geodetic control points, monuments, or stations by California Coordinate System coordinates.

(g) Determines the information shown or to be shown on any map or document prepared or furnished in connection with any one or more of the functions described in subdivisions (a), (b), (c), (d), (e), and (f).

(h) Indicates, in any capacity or in any manner, by the use of the title "land surveyor" or by any other title or by any other representation that he or she practices or offers to practice land surveying in any of its branches.

(i) Procures or offers to procure land surveying work for himself, herself, or others.

(j) Manages, or conducts as manager, proprietor, or agent, any place of business from which land surveying work is solicited, performed, or practiced.

(k) Coordinates the work of professional, technical, or special consultants in connection with the activities authorized by this chapter.

(l) Determines the information shown or to be shown within the description of any deed, trust deed, or other title document prepared for the purpose of describing the limit of real property in connection with any one or more of the functions described in subdivisions (a) to (f), inclusive.

(m) Creates, prepares, or modifies electronic or computerized data in the performance of the activities described in subdivisions (a), (b), (c), (d), (e), (f),

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(k), and (l).

Any department or agency of the state or any city, county, or city and county which has an unregistered person in responsible charge of land surveying work on January 1, 1986, shall be exempt from the requirement that the person be licensed as a land surveyor until the person currently in responsible charge is replaced.

The review, approval, or examination by a governmental entity of documents prepared or performed pursuant to this section shall be done by, or under the direct supervision of, a person authorized to practice land surveying."

The extent to which a person is engaged in any of the activities delineated in Business and Professions Code section 8726 determines whether or not they are required to hold a professional land surveyor license. In the present circumstance, subdivisions (c) and (e) of Section 8726, appear to be applicable. In relevant part, an "easement" is defined to be an interest in land permitting "a right of use over the property of an other" according to Black's Law Dictionary (1979).

The monumenting of an easement involves the practice of land surveying to the extent that a person "[l]ocates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries." (Bus. & Prof. Code § 8726(c).) Or, in the alternative, the monumenting of an easement constitutes the practice of land surveying to the extent that the setting of permanent markers or monuments for an easement involves the "use of the principles of land surveying" in determining 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. (Bus. & Prof. Code 8726(e).)

Although the monumenting of an easement clearly falls within the restricted practice of land surveying, such monumentation does not trigger the mandatory Record of Survey filing requirements of Business and Professions Code section 8762. Although an easement is an interest in real property, the mandatory Record of Survey filing requirements are only applicable to a "survey relating to land boundaries or property lines." It is noteworthy that the term "easement" is not specifically referenced in Section 8762. This contrasts with the inclusion of that term in the list of activities identified in subdivision (c) of Section 8726 for purposes of defining land surveying. That subsection employs the terms "property line or boundary" as well as "easement" and "right-of-way." Consequently, if the Legislature intended to include the monumentation of an easement in the mandatory filing requirements of 8762, it would have

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employed that term as it did in defining the practice of land surveying. in 8726. Consequently, the monumentation of an easement does not likely fall within the meaning of either "land boundaries or property lines" as those terms are used in Business and Professions Code section 8762.

I trust this is responsive to your request.

DERRY L. KNIGHT
Deputy Director
Legal Affairs


By GARY W. DUKE
Staff Counsel

March 23, 2012

SENT VIA EMAIL AND U.S. MAIL

David E. Woolley
D. Woolley & Associates
2832 Walnut Avenue, Suite A
Tustin, California 92780

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* (6th 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 (6th ed. 1992) pg. 1216.

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* (6th 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* (6th 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* (6th 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 14th 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* (6th 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* (6th 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* (6th 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* (6th 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* (6th 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* (6th 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 14th 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.¹ 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.**

¹ 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 (6th 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 (6th 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 (6th 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 (6th 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

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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**.²

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,

Lisa D. Herzog
Attorney/Writer/Editor
Harbinger Analytics Group

LDH:lh

Enclosures

² 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.