

In accordance with § 2.2-4002.1 of the Code of Virginia, this proposed guidance document conforms to the definition of a guidance document in § 2.2-4101.



Virginia Board for Architects, Professional Engineers, Land Surveyors,
Certified Interior Designers, and Landscape Architects (APELSCIDLA Board)

PROPOSED GUIDANCE DOCUMENT:

Property lines along public roads without recorded fee simple right of way

Adopted July 15, 2020

Effective upon conclusion of the public comment period required pursuant to Va. Code § 2.2-4002.1

Applicable Regulations

18VAC10-20-370.B. Minimum standards and procedures for land boundary surveying practice. Research Procedure. The professional shall search the land records for the proper description of the land to be surveyed and obtain the description of adjoining land(s) as it pertains to the common boundaries. The professional shall have the additional responsibility to utilize such other available data pertinent to the survey being performed from any other known sources. Evidence found, from all known sources, including evidence found in the field, shall be carefully compared in order to aid in the establishment of the correct boundaries of the land being surveyed. The professional shall clearly identify on the plats, maps, and reports inconsistencies found in the research of common boundaries between the land being surveyed and the adjoining land(s). It is not the intent of this regulation to require the professional to research the question of title or encumbrances on the land involved.

18VAC10-20-370.C. 4. Minimum standards and procedures for land boundary surveying practice. Minimum Field Procedures. Monumentation. As a requisite for completion of the work product, each land boundary survey of a tract or parcel of land shall be monumented with objects made of permanent material at all corners and changes of direction on the land boundary with the exceptions of meanders, such as meanders of streams, tidelands, lakes, swamps and prescriptive rights-of-way, and each such monument, other than a natural monument, shall, when physically feasible, be identified by a temporary witness marker. Where it is not physically feasible to set actual corners, appropriate reference monuments shall be set, preferably on line, and the location of each shall be shown on the plat or map of the land boundary.

Issue

Solving any boundary retracement problem requires two elements: the written intention of the parties and the physical evidence that documents or witnesses the written intention. What is the surveyor to do when the road is a prescriptive right?

This guidance document highlights the generally acceptable practices for surveys along prescriptive roads. There are many of these roads in Virginia. Prescriptive easements arise from continuous use of a particular area for a particular purpose for a requisite period with knowledge and acquiescence of the owners. These easements are thought vested in the public interest for purpose and right-of-passage over the way.

Background

Surveying after someone placed monuments 15' from the centerline of the traveled way along a prescriptive easement road can raise questions. Did they intend to sever the 15' strip? Did they record a plat of survey, and metes and bounds description where they reference those as an offset to the centerline?

Consider the Virginia Administrative Code provides that prescriptive easement roads need *not* be monumented (18VAC10-20-370.C.4).

Do we treat found, called pipe along the sidelines as offsets to the true corners? Under closer inspection of the chain of title for the property, we often find no mention of intention to dedicate fee simple right of way. The property likely passed multiple conveyances using such description which patently severs the subject property from the area of the prescriptive easement. How then is best to handle the severed strip and the property fronting the road?

Provided there is no affirmative fee simple dedication on record, accepted rules of law for reconstruction of intent, namely, that "called for" natural monument overrides an artificial monument,¹ thus center of traveled way overrides the set pipe if the deed calls the road as the boundary. Also provided the metes and bounds description clearly indicates a property not including the road, and is whole and complete upon its face, the deed description can be interpreted primarily in two ways using existing case law as guidance.

More recent roads and streets are likely conveyed to the municipality. Dedication of platted streets conveys in fee simple to the municipality upon plat recordation after July 1, 1946 when the (state) Subdivision Code authorized the action of automatically conveying fee of rights-of-way of duly approved subdivisions to the municipality. (For further information, see Code of Virginia § 15.2-2265. Recordation of approved plat as transfer of streets, termination of easements and rights-of-way, etc.)

¹ "Where the description in a deed is not ambiguous, but certain and complete, there is no occasion to resort to extrinsic evidence to ascertain the intent of the parties as to the land intended to be conveyed," (Ault v. Clark, 112 N.E. 843 (1916)). Assume the strip may not have conveyed. The preferred solution is cleaning the chain of title. This may be the most advantageous solution when working toward a fee simple dedication for expanding the road. Cleaning the title of uncertainties by using eminent domain condemnation on the severed strip, via a plat styled for *Heirs and Assigns of <name of Last Known Owner>*, and/or *Owners Unknown* is an effective solution allowing any interested parties to come forward yet, still gaining fee simple title for the City, County, Town, or Commonwealth. This solution should be undertaken in consultation with the municipality.

The prescriptive right of way roads in VDOT Secondary Street System Maintenance are often referred to as “Byrd Act Roads.” This misnomer generally refers to roads not dedicated in fee simple. Nothing within the act guides the surveyor on how to delineate the existing roads. The Byrd Act is legislation from Virginia Acts of Assembly, VA 1932, which provided relief to counties for road construction and maintenance. It created the Secondary System of Highways, and passed whatever title and interests in public roads, held by participating counties to the Commonwealth. However, in 1932, almost all roads were by common use, prescriptive. Counties generally held no title interests to the roads at that time.

Board Guidance

Surveyors often retrace property boundaries abutting public roads with no recorded fee simple right of way. These roads are often described as **prescriptive right of way** or **prescriptive easement** and are normally 30’ wide. The following shall apply to the location of the property line along these roads:

Based on the recorded descriptions the surveyor shall determine when the road is the controlling monument, as in this example: “*along the Ox Road, the following courses, N 27 1/2° W, 9 poles.*”

Generally, calls for the center of the road, along the road, or similar phrases indicate the monument is controlling. In those cases, the center of the road is the boundary.

When there is evidence of an old road scar or the current road having been in a different location, a determination of whether to use the current road or the old road location shall be made based on the preponderance of the evidence and information that can be obtained. The property line shall be established using the center of one road location or the other.

Under no circumstance shall the property line be established as 15’ from the center of the road without recorded fee simple dedication for public road purposes.

Surveyors often retrace property boundaries abutting public roads with no recorded fee simple right of way where a previous survey has mistakenly established the property line as being 15’ off the center of the road. The following shall apply with regard to the location of the property line along the road in such situations:

Unless there is evidence to the contrary, the assumption shall be made that the intent was not to sever or create a parcel 15’ wide along the road. Further, the assumption shall be made that the “grantor is presumed to intend to convey the largest bundle of rights he or she possesses.”² The new survey shall go to the center of the center of the road or old property line location as described previously.

² In absence of a “clearly and expressly reserved legal title,” (Smith v. Smith, 622 A.2d 642 (1993)) assume the grantor conveyed the full bundle of rights they held, not intending to hold back a strip. Inconsistencies and uncertainties are “resolved in favor of the grantee as long as such a construction does not violate any apparent intention of the parties to the transaction.” Rohner v. Niemann, 380 A.2d at 552. (Id.) and “a conveyance of title to adjacent property served by an easement is presumed to pass title to the center line of the easement. 12 Am.Jur.2d Boundaries §§ 22, 38, 54 and 55 (1964). (Id.) This approach assumes the title passed with each conveyance and likely is sufficient for successive conveyances not submitting property to an act of subdivision, nor a fee simple dedication for an expansion of the road.

Surveyors should be aware of the statute, administrative code, case law, and agency guidance for solving boundaries involving public roads without recorded fee simple right of way. There are several resources in the references below with which the practicing surveyor should be familiar.

References

Ault v. Clark, 112 N.E. 843 (1916)

Code of Virginia, 2020, Title 15.2. Counties, Cities and Towns, Chapter 22. Planning, Subdivision of Land and Zoning, § 15.2-2265. Recordation of approved plat as transfer of streets, termination of easements and rights-of-way, etc. Retrieved from: <https://law.lis.virginia.gov/vacode/title15.2/chapter22/>

Code of Virginia, 2020, Title 33.2. Highways and Other Surface Transportation Systems Chapter 1. Definitions and General Provisions, § 33.2-105. Evidence as to existence of a public highway. Retrieved from: <https://law.lis.virginia.gov/vacode/title33.2/chapter1/section33.2-105/>

Smith v. Smith, 622 A.2d 642 (1993)

Spainhour v. Huffman, 237 Va. 340, 377 S.E.2d. 615; 1989 Va.

Survey Manual, Virginia Department of Transportation, 2019. Retrieved from: http://www.virginiadot.org/business/locdes/survey_manual.asp

Virginia Administrative Code, 2020, Title 18. Professional and Occupational Licensing, Agency 10. Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects, Chapter 20. 18VAC10-20-370. Minimum Standards and Procedures for Land Boundary Surveying Practice. 2018, Retrieved from: <https://law.lis.virginia.gov/admincode/title18/agency10/chapter20/section370/>

Ward v. Harper, 234 Va. 68, 70, 360 S.E.2d 179, 181 (1987)

The Virginia Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects will be taking public comment on this proposed guidance document. A 30-day comment period will begin on August 31, 2020.

If you wish to comment on the proposed guidance document, you may do so via the Town Hall website or you may submit written comments so that they are received no later than September 30, 2020 to:

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