

Surveys and Adverse Possession

Surveys vs. Visual Inspections. Most buyers do not order a survey before purchasing a home. Some visually check corners for survey pins in the ground, but again, most do not. When borders and boundaries are already identified by the location of pre-existing fences, bushes, trees, lines of occupation and maintenance, most purchasers accept what they see “on the ground” as being the land they are acquiring.

Similarly, sellers typically do the same thing, representing that the land they have been using and occupying is what they intend to convey to their buyers.

Deed Descriptions vs. Lines of Occupation. At closing, the consideration is paid, and a deed is signed and delivered to the buyer, thus representing the consummation of the transaction. However, the deed contains a legal description, which, unless the property is located in a subdivision, is usually written in “metes and bounds” i.e. in distances, angles and directions. For example:

Real property in the County of XXXXX, State of Oregon, described as follows:

Lot 600 of the plat of MOUNTAIN ACRES NO. 3 located in the Southeast One-Quarter of Section 12 of Township 1 South, Range 2 West, Willamette Meridian, City of XXXXX, YYYYYYY County, Oregon, being more particularly described as follows:

Beginning at the northeast corner of said Lot 600, also being on the westerly right-of-way line of SW 12th Avenue (28.5 feet from the centerline); thence along said westerly right-of-way line (with a radial bearing of South 67°13'22" East) with a radius of 428.50 feet, delta of 9°31'23", length of 71.22 feet, and a chord of South 18°00'57" West 71.14 feet to a line parallel with and 10.50 feet southerly of the south line of said Lot 300; thence along said parallel line, North 87°12'28" West 97.13 feet to the southerly extension of the west line of said Lot 600; thence along said southerly extension and said west line, North 02°47'22" East 68.64 feet to the northwest corner of said Lot 600; thence along the north line of said Lot 600, South 87°12'38" East 115.81 feet to the Point of Beginning.

Except to an experienced title examiner or surveyor, this description might as well have been written in Greek. Homebuyers and sellers rely upon the evidence they see on the ground in determining what they are buying or selling; the legal description in their deed means little.

Example. It is only where the lines of use and occupation vary from the legal description, that problems arise. Say for example, Parcel X was owned consecutively by three separate sets of families spanning 25 years, from 1995 to 2020. The first owner lived there for 12 years (1995-2007); the second for three years (2007-2010), and the current owner (Mr. McCoy) for ten years (2010-2020). During that time, they all possessed up to the same monuments, trees, fences and other lines of occupation.

But in July 2020, the owner of the adjoining land on Parcel Y, Mr. Hatfield, commissioned a survey which revealed that the fence on Parcel X enclosed six feet of his land on Parcel Y. In other words, the fence “encroached” onto Parcel Y by six feet (the “Disputed Area”). The survey was based upon the legal description in Mr. Hatfield’s deed, with the boundaries and corners located on the ground with markers.

Mr. Hatfield immediately concluded that the offending fence had to go. If the survey said this was his land, per the legal description in his deed, then *By Golly*, he was going to reclaim it. So he tore the fence down, moved the pile of posts and boards onto Parcel X, and constructed a temporary wire fence where the survey said the original boundary line was. Then he posted “No Trespassing” signs on the fence, warning against intruders.

Summary of Legal Rights. Needless to say, the Owner of Parcel X, Mr. McCoy, was very upset, and went to his attorney to find out his legal rights. Here is what his lawyer told him:

1. Assuming that the first owner: (a) had an honest belief that he owned Parcel X, which he had been using and occupying; (b) that that belief had an objective basis and was reasonable; (c) that all of the other elements of ORS 105.620(1)(a) and (b)¹ were satisfied; and (d) he could establish this by clear and convincing evidence, title by adverse possession vested in the first owner after 10 years of use and occupancy, i.e. 2005.
2. Since title vested in the first owner in 2005, assuming the two subsequent conveyances were by good and sufficient deeds, they conveyed not only the land described in those successive deeds, but also to the Disputed Area, through adverse possession by the first owner.
3. Since the current owner of Parcel X, Mr. McCoy, now legally owned the Disputed Area,

¹ **105.620 Acquiring title by adverse possession.** (1) A person may acquire fee simple title to real property by adverse possession only if:

(a) The person and the predecessors in interest of the person have maintained actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years;

(b) At the time the person claiming by adverse possession or the person’s predecessors in interest, first entered into possession of the property, the person entering into possession had the honest belief that the person was the actual owner of the property and that belief:

(A) By the person and the person’s predecessor in interest, continued throughout the vesting period;

(B) Had an objective basis; and

(C) Was reasonable under the particular circumstances; and

(c) The person proves each of the elements set out in this section by clear and convincing evidence.

(2)(a) A person maintains “hostile possession” of property if the possession is under claim of right or with color of title. “Color of title” means the adverse possessor claims under a written conveyance of the property or by operation of law from one claiming under a written conveyance.

(b) Absent additional supporting facts, the grazing of livestock is insufficient to satisfy the requirements of subsection (1)(a) of this section.

(3) As used in this section and ORS 105.005 and 105.615, “person” includes, but is not limited to, the state and its political subdivisions as created by statute.



when Mr. Hatfield came over and tore down the existing wooden fence, he had committed a trespass. He had no right to remove the fence, and if it was owned by Mr. McCoy, Mr. Hatfield was liable for the destruction of the property.

4. As for the recent Hatfield survey, which purportedly identified the common boundary line shared with Mr. McCoy, it would be superseded by a court's decision holding that the Disputed Area was now owned by Mr. McCoy based upon his predecessor's acquisition of title through adverse possession in 2005. Each successive conveyance after 2005 would include ownership of the Disputed Area, even though it was not expressly stated in their deeds, and even though it was not depicted on the Hatfield survey.
5. Remember, that when title by adverse possession vests in a party other than the owner who originally acquired the land under their deed, the public record does not disclose the event. It happens in a vacuum, so to speak. So when a dispute arises, the public record needs to be corrected if an agreement results in a boundary line moving. There are different ways to do this, but they all require mutual consent of the warring neighbors. If no agreement can be reached, the matter has to be resolved in court. However, since ORS 105.620 does not carry with it a right of attorney fees to the prevailing party, using the court system to resolve adverse possession claims is not very cost-efficient. Many times, the parties spend more money in attorney fees than the disputed area is worth.

Conclusion. Surveys perform a useful and helpful role in the conveyance of real property. However, they are not typically performed every time title to residential property is transferred. This means that when manmade boundaries are mistakenly placed, built, or grown, at locations that are inconsistent with the legal description in the owner's deed, subsequent use and occupation to the incorrect boundary will normally take precedence over the legal description in that deed – *so long as the adverse possessor had a good faith belief they owned the land in question, and that belief had an objective basis and was reasonable.*