

Where Should My New House Go? Using Surveys to Avoid Legal Entanglements

Reid Wilson
December 16, 2024

Publication 2429



Surveys are the eyes and ears of a landowner. They help identify potential legal issues before work begins on a new home or an addition to an existing home. Think of them as a legal insurance policy that says an improvement to a piece of property is properly located.

The science of surveying was once more of an art and less precise because of the lack of high-tech instruments available today. Mistakes are made and are most painful in expensive areas when land is in high demand and every foot (or inch) is worth fighting for. Sometimes in older areas, multiple surveys conducted over the years resulted in multiple, conflicting survey pins. Other times, the surveyor reported evidence of disturbed pins or of monuments used in prior legal descriptions but that no longer exist, such as specified trees, rocks, or other physical features. A current survey will show these situations so the owner is aware of the disputes and can either cure them or simply accept them.

Key Takeaways

- Surveyors' specialized training ensures accuracy in identifying land/improvements location and facilitates solving conflicts and encumbrances.
- Surveys are a crucial legal insurance policy, ensuring improvements are properly placed and compliant.
- A survey plat details land features, easements, flood zones, and boundary conflicts, essential for making informed decisions.
- Prioritize a certified American Land Title Association (ALTA) or Texas Society of Public Surveyors (TSPS) survey for reliability and avoiding pitfalls of outdated or incomplete surveys.

While the idea of reducing project costs by skimping on the survey is tempting, be careful: doing so could create major headaches. In some cases, a completed structure might have to be removed, could be uninsurable, couldn't be used for loan collateral, or could have severely diminished marketability.

Survey Says

A survey is a graphic depiction of land and its legal encumbrances and improvements based on a physical inspection and various levels of title examination. Only the surveyor can precisely locate structures on the site and areas subject to legal claims like easements and restrictive covenants, or areas subject to ownership dispute. A survey drawing is sometimes called a "survey plat," but it is not a plat in the sense of a "subdivision plat," which is a government permit filed in the real property records as a requirement to developer to divide land.

So what does a survey identify about the piece of property? A lot.

Easements. Easements are legal rights that a third party holds to use someone else's land for a specified purpose (usually for the benefit of specific, adjacent piece of land owned by the third party), such as access, utilities, drainage, signage, landscaping, or parking. These types of easements are called "appurtenant" as they attach to the benefited land. Structures are typically limited or prohibited within those areas. Pipeline easements are similar, but float independently of specifically benefited land, and instead benefit the easement holder. These types of easements are called easements in gross.

Easements may be for private or public use. Public-use easements are often called dedications and may occur by subdivision plat or separate instrument. A public-use easement for the benefit of the "public" (rather than for a specific governmental entity) is controlled by a city if within a city; otherwise, it's controlled by the county.

Most easements are express easements created by a written, recorded document that should be referenced in a title commitment and are straightforward to plot on a survey. These easements typically "run with the land" benefited by the easement and inure to the benefit of the owner of that land, even if not specifically assigned. An easement's use, scope, and location are determined by the surveyor's review of the document, and the location is added to the survey. Some easements are equitable (unwritten) easements, created by a court applying equitable considerations, such as:

- Necessity for access (usually required to be a continuing necessity),

- implied consent by actions of the parties,
- implied intent due to prior existence of a road when a larger tract is divided, or
- by prescription (legal rights gained from ten years continuous, open and obvious use).

Most implied easements are based on conditions observable by a surveyor's inspection and will be shown on the survey (such as a roadway or drainage ditch or fenced area), and they may require a higher level of surveying expertise to describe. The existence of roads, ditches, utilities, pipelines, and other physical features for which there is no express easement could give rise to an equitable easement. Thus, items should be shown on a quality survey, and their existence warns a buyer of potential legal hazards.

Restrictive Covenants (aka Deed Restrictions). These are legal rights that a third party holds to limit how another owner may use his or her land, usually for the benefit of land owned by the third party (almost always located in the same area).

Examples include required setbacks from boundaries or streets, height limits, pervious area, size of structures, landscaping, tree protection, signage limits, lighting limits, architectural control, and permitted/prohibited uses.

A surveyor will review the documents listed in the title commitment and show any required setbacks or areas with special restrictions on structures on the survey plat.

Flood Zones. Government policy discourages development of habitable structures within certain flood zones, primarily the "flood way" (where water typically flows in storm events) and the 100-year floodplain (area which has a 1 percent likelihood of flooding in any year). Certain insurance and loans are not available to structures in these areas, or, if they are available, they require unfavorable terms. No one should build habitable structures in these zones. Their marketability is compromised.

Encroachments/Protrusions. When improvements from land being surveyed extend over a boundary line or into an easement or setback area, that is called an encroachment. Encroachments should be shown on a survey, with specific dimensions showing the extent of encroachments.

Encroachments are usually at risk of having to be removed. Sometimes encroachments can be solved by written recorded agreement specifically permitting the encroachment to remain, but they're usually subject to requirements not to rebuild or expand them. Protrusions are the same as encroachments, but they come onto the surveyed tract from adjacent tracts. Fences are common problems, and older

fences, which rarely are constructed with surveyor guidance, routinely encroach/protrude.

Topography. For a fee, a surveyor may show the geographic character of the land surface on a survey with lines showing the gradations of the land (in one-, two-, five-, or ten-foot increments). These surveys are important for developing hilly land, determining proper building sites, and maintaining proper drainage.

Trees. For a fee, a surveyor may show trees, not only by location, but by size and type. Some cities regulate removal of certain trees (usually only large, healthy, native, or other desirable trees) and may charge fees in lieu of compliance. Surveyors assist in calculating these fees and locating trees that the owner wishes to preserve and protect during construction activities.

Minerals/Drill Sites. For a fee, a surveyor can locate what portion of a tract is subject to outstanding mineral reservations or designated drill sites provided as part of an agreement that otherwise waives the mineral owners' rights to access the surface of the land to explore for and extract minerals. Typically, no structures are permitted within a drill site.

Boundary Conflicts. Occasionally (and more so with older developed urban and rural land), the deeds for abutting tracts have conflicting legal descriptions with overlapping claims, and sometime tracts are separated by oddly shaped (and unusable) pieces of land for which there is no documentation of ownership. Often these small intervening tracts can be resolved by applying the "strips and gores" legal doctrine to imply that each owner gets one half of the intervening tract. The best example for use of this legal doctrine is to eliminate an intervening strip of land originally intended to be a public road but that was never accepted by a local government, nor was it improved. Title is deemed split between the adjacent lot owners.

Survey Dos and Don'ts

- The importance of hiring a highly qualified, thorough surveyor can't be overstated. They require special training and experience, and they must be licensed. The surveyor should be a member of the TSPS and follow TSPS' standards of practice. There are also separate (and equally acceptable) standards adopted by ALTA, which are commonly used nationwide. Surveyors are easy to find, but, while any licensed surveyor has the stamp of approval of the State of Texas, best practice is to ask for a referral from a knowledgeable real estate broker, attorney, title company, or contractor.

- Do not accept an old survey except in extenuating circumstances. Not only is there a gap in time for new problems to arise not shown on a prior survey, but the landowner will not have any claim against the surveyor if they make a mistake. Why? Because the old survey is addressed to the previous landowner, not to the current one.
- Do not accept a boundary-only survey. This is the simplest, cheapest, and fastest survey, but it's also of minimal benefit except for completely vacant land.
- Ask for either an ALTA or TSPS specification survey (TSPS Category I-A Condition II is especially recommended). If the surveyor says that is, in their professional opinion, overkill for a particular project, the landowner should ask what he believes is typical and appropriate. The landowner can decide whether to reduce the scope of the survey to achieve reasonable cost and timing considering the type and size of the transaction. The survey plat must be certified to the agreed standard. If the site is not level, the additional cost of a topographic survey could be appropriate.
- The survey plat should be certified to the landowner, the title company, the lender, and the seller, if applicable. That way each of them may rely on the survey as an intended beneficiary. The surveyor, his or her company, and their professional errors and omission policy (assuming they have one) stand behind this certification. Ask if they have insurance. If they don't, beware.
- Beware of unfair liability limitations, such as a statement that any claim against the surveyor is limited to recovery only of the amount paid for the survey. That is unfair and unacceptable. The landowner doesn't want to work with that surveyor unless he or she removes the limit.
- Ask for a quote and shop, if appropriate. Surveyors are used to giving quotes. Remember that there will be an upcharge for speed.
- Be sure the surveyor uses a current title commitment. Landowners will probably need to provide the title commitment or surveyors will add a fee for doing title work themselves (which is not unusual for commercial surveying). A survey without a title commitment is only half a survey. As part of every land purchase, a title commitment will be issued by the title company handling the purchase transaction. Use that title commitment. Be sure the title commitment is ordered early as possible. Landowners should not let anyone stampede them into accepting a survey not based on a title commitment.

- Consider purchasing survey coverage from the title company for an additional premium (15 percent up-charge). Landowners need to be sure they understand the extent of the additional coverage.
- Be sure the flood zone is shown or a certification is added indicating the land is outside a flood zone.
- If the land is inside a city, ask the charge for checking the zoning and subdivision platting ordinances of the city to determine current zoning classification and building setbacks and including those on the survey plat. This is a valuable service that will yield important information, and it is highly recommended.
- Review the survey carefully (and don't assume others will do it). If necessary, landowners should ask their real estate broker or title company closer for assistance or make an appointment to meet with the surveyor (there may be a charge, as a surveyor's time is valuable) or a real estate attorney. In short, landowners should trust their instincts: if it doesn't look right, it could be a big problem. Get professional assistance.
- Landowners should never allow themselves to be pushed to decide too quickly. If necessary, negotiate for more time to obtain a proper survey and to review it.

Signed, Sealed, Delivered

When the survey is complete, it should be stamped with the surveyor's seal showing their license number; signed; certified as to the standard applied; and addressed to the landowner, title company, buyer, and lender, as applicable.

The survey is a valuable document and should be saved electronically. Surveyors die, go out of business, or become unavailable, and landowners will need that survey as long as they own the land. 📌



Reid Wilson (rwilson@wcglaw.net) is a board-certified commercial real estate attorney with Wilson, Cribbs & Goren P.C. of Houston, a fellow of the American College of Real Estate Lawyers and a Counselor of Real Estate. He has a long-standing relationship with the Center through the commercial seminar offered jointly by the Center and the South Texas College of Law.

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