surveyors & law

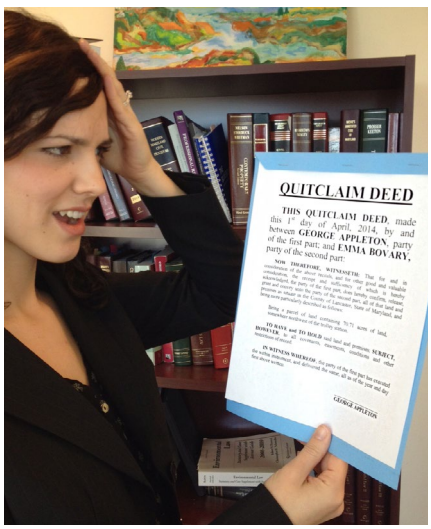
The Owner of the Property Is?

One aspect of my law practice has always fascinated me, and that is: The process which one must go through in order to determine the *true owner* of a parcel of land. It may sound easy—but it is not. What has brought me to write this particular article is an inquiry from one of my favorite clients who raised a concern with me as to whether it is proper for her, or her "guys" in the field, to tell someone who may or may not have an ownership interest in a certain parcel of land.

Often times one sees surveyor's certifications on plats and surveys with language that purports to identify the owner of the land which has been surveyed, without any credible qualifying language with respect to the source of that information. Telling or writing that someone owns a parcel of land, when in fact he does not, can have severe consequences.

Over many years there has developed in the law the action of "slander of title," which is defined as a false and malicious statement, oral or written, made in disparagement of a person's title to real property, causing pecuniary loss. The purpose of this article is not to get into the minutia of how one would need to prove a slander of title case, but only to make the reader aware of the liability of giving an opinion on the ownership of a certain tract of land, without knowing all of the facts and law which would actually determine the true owner.

It has been written many times that the surveyor must be careful to avoid offering a legal opinion; the surveyor is a collector of fact, not a judge or jury, and his duty is only to apprise his client of the presence of such



facts as may be revealed by his survey—sorry for mainly using only masculine pronouns in this article. Based upon these said principals, the surveyor should never render an opinion as to who may own a certain parcel of land, either as it is shown by the latest recorded deed, or by alleged adverse possession.

It is a given that the average person (including land surveyors) believe that in order to determine the person, or entity, which may "own" a parcel of land, all that needs to be done is to look at the name of the grantee as written in the current deed, or the tax information on a website. If that were true there would be little reason to examine the public records for an established period of time in order to determine the true owner of the parcel, and to learn what encumbrances may affect the parcel. The length of time for that examination is set by statute in some jurisdictions, and in others there is an established "rule of thumb" by custom, with a sixty year period being commonplace. Therefore, to give any opinion on the ownership of a parcel of land, within some reasonable degree of certainty, each document pertaining to the parcel in the chain of title, during the prescribed period of time must be examined—ignoring for the moment what "unwritten rights" may exist, with those documents being found not only in the land records (the easiest source to first review), but in the equity (including domestic relations), law, judgment, wills, plat, patent, criminal, trust, miscellaneous petitions, and tax records, among others, that make-up the vast body which are collectively referred to as the "public records." It may be fair to state that most land surveyors have not been adequately trained, or have been given the time, to examine all of these "public records," and then conclude who may "own" a certain tract of land.

In an Indiana case, the court award damages to a landowner for slander of title for comments made by his neighbor, who admitted to making statements that he, rather than the landowner, owned a disputed area of land. In a Maryland case a landowner filed a claim seeking compensatory and punitive damages for malicious interference with contracts and damages for slander of title because his neighbor claimed ownership of a parcel of land in dispute by virtue of the title deeds, and also by virtue of adverse possession for the statutory period. In an Illinois case it was decided that the wrongful filing of a document which casted a cloud upon another's title was held to be such an act of publication as to give rise to an action for slander of title; and in another similar case the defendant was sued for slander of title when he had recorded a quitclaim deed,

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knowing it to be frivolous, in order to cast a cloud on the title.

As stated so often in many well-respected treatises on title boundaries, a land surveyor cannot decide who owns a tract of land—the surveyor's responsibility is only to locate the land in accordance with written descriptions, and to possibly delineate such apparent unwritten and possible rights that someone other than the record owner may have in the land.

A recorded deed may be "good evidence" of the ownership of a parcel of land, but the true test of "ownership" is determined by who has the better "title" to the land, which is not always that easy to determine, and certainly it cannot be determined by the land surveyor. Just because some deed or tax record may list a certain person as the "owner" of a parcel of land, that does not necessarily mean that that person has the "title" to the parcel, and thus may not be the "true owner"! Surveyors can never think that "title" is synonymous with a particular deed, or some other form of a written instrument. By common definition of the term, when referring to real estate, "title" generally means that a person has the right to the ownership, or the right to the possession of the land—as often written it is "the union of all the elements which constitutes ownership."

Often times surveyors are lead astray by making the assumption, in drafting a "surveyor's certification" or an "owner's dedication," that the only manner in which the legal title, and thus ownership, passes to a person is by the execution and recordation of a deed. Today, with the magic of the internet and its many websites, anyone with a keyboard can be lead to believe that he can determine who "owns" a parcel of land—ignoring, of course, the many errors that often times can exist on these websites, and in flawed documents that are found in the public records. But such internet research does not necessarily give one the correct answer.

Title can often pass by the concept known as "operation of law," *without the requirement for a recorded deed.* Some examples of title passing, or the title being altered, without the benefit of a recorded deed are: **(i) joint tenancy**—upon the death of a joint tenant, the surviving joint tenant become the full owner; **(ii) tenants by the entirety**—once an absolute divorce is decreed between parties owning real estate as such tenants, the parties thereafter own the real estate as tenants in common; **(iii) life estates**—when the life tenant dies, the title is vested in the remaindermen—whoever they may be; **(iv) estates**—depending on state law, title to a decedent's real property may pass directly to the heirs - whoever they may be, or the devisees upon decedent's death, without going through probate, and with the personal representative (the executor) never having an interest in the reality; **(v) adverse possession**—an adverse possessor acquires the fee simple title to a property at the moment of time when all of the elements of this common law action have been met, without any court action ever having taken place; **(vi) easement**—the title to the area of an easement which has been abandoned will vest in the owner of the servient estate, free of the easement; **(vii) possibility of reverter**—the failure of a special limitation in a deed which results automatically in the reversion of an estate to the original grantor in fee simple absolute, without the need for an entry upon the land by the grantor; **(viii) failure of a condition subsequent**—when an event gives rises to a right of entry, and in that case the grantor does not obtain a fee simple absolute until he actually enters and retakes the land, as for example, when property is described in an ancient deed with a provision that simply states that the property can "only be used for school house purposes"; and **(ix) escheat**—upon the intestate death of the owner of land, and without any legal heirs, the land directly passes to the state.

Land surveyors should never give an opinion (written or oral) as to who "owns" a tract of land, as that is beyond the scope of the surveyor's licensing laws. Any statement made by a surveyor giving the name of the "owner" of such land must always be done with great caution, and that statement must be clearly shown with a caveat that it is completely dependent upon information as expressed in a creditable source, like a court order, a title insurance policy based upon a reliable and full title examination, or such other similar document, and not be just the surveyor's determination. ■

Jim Demma is a Maryland licensed professional land surveyor and has practiced law in both the State of Maryland and the District of Columbia for more than 30 years. His extensive practice has included land use & development, real estate contracts and titles, condominiums, easements, land patents, boundary disputes, and all matters that touch and concern the land.