

Preparing a Survey Report Encroachments, Overlaps and Gaps

In my previous article [February 2008], I discussed reporting opinions on the location of corners and boundaries. In this article, I will discuss how surveyors can communicate encroachments, gaps and overlaps in a survey report.

Major encroachments and overlaps are ordinarily shown on the plat to ensure clients are made aware of them and emphasize their importance and impact on the client's property. Yet, there are numerous situations where encroachments, overlaps, and gaps can only be reported or reported in detail in a survey report or separate communication to the client.

Typically, gaps do not need to be reported on the plat if they can be identified and explained in the survey report. Gaps often provide the client with an opportunity to perfect title to the gap in their favor. Hence, there is some motivation to keep the presence of a gap confidential. It is much easier to keep information on a gap confidential when it is identified in the survey report rather than disclosed on a plat—especially where the plat has to be recorded or will be given to third parties.

Overlaps and encroachments are often identified only in reports where the encroachment or overlap is so minor that reporting their disclosure on a plat

would give the encroachment or overlap more credibility or cause the client more concern than warranted by the situation. Given the litigious nature of many people at this period in time, all encroachments and overlaps, no matter how minor, should be reported to the client. Yet, common sense and prudence suggest that the reporting should be done in a manner that will not cause undue concern or panic with the client.

Some typical situations often encountered by surveyors where the encroachments or overlaps are minor include: 1) The neighbor's utility line, extending between the neighbor's house and pole at the road, crosses a corner of the client's property. 2) One deed calls for a straight line and the adjoining property calls for the boundary to follow a feature such as a fence, wall, ridge, stream, etc., and the feature meanders back and forth across the straight line by some small amount. 3) A minor or temporary encroachment such as a garden plot, burn barrel, paper box, etc., is across the boundary.

In some cases, a client may want (or the surveyor believes) the encroachment, overlap, or gap should remain confidential. While surveyors do not

have the privilege of keeping communications confidential, it is far easier to keep information that is disclosed in a report confidential as opposed to the situation where the same information were to be shown on a plat—especially in jurisdictions where plats are required to be recorded.

This situation could arise where the client is discovered to be encroaching on the neighbor or have the junior title in an overlap. If the client is in possession of the overlap or the client is encroaching, the client may wish to perfect their title by adverse possession or prescription, in the case of easements. Even in cases where the client has a superior claim, the client may not always want to begin litigation, confront a neighbor, or make the neighbor aware of an encroachment or overlap simply because the client does not want or is not ready to begin a conflict with their neighbor.

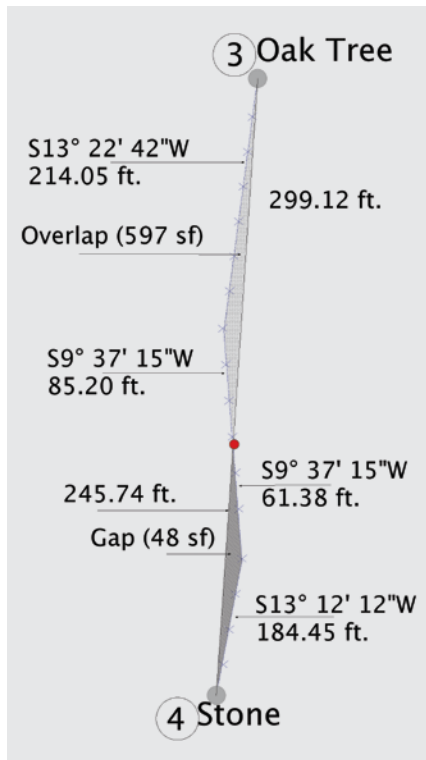
Finally, the surveyor may want to use the report to expand, explain, or discuss the encroachment, overlap, or gap that has been identified on the plat. A plat can become cluttered and lose its clarity if the surveyor places numerous notes and extensive explanations on the plat.

>> By Knud E. Hermansen, PhD, LS, JD

A useful format for disclosing encroachments, overlaps, and gaps is to: 1) identify the location, 2) describe the extent, 3) discuss the basis, 4) explain the ramifications, and 5) suggest one or more courses of action the client can take.

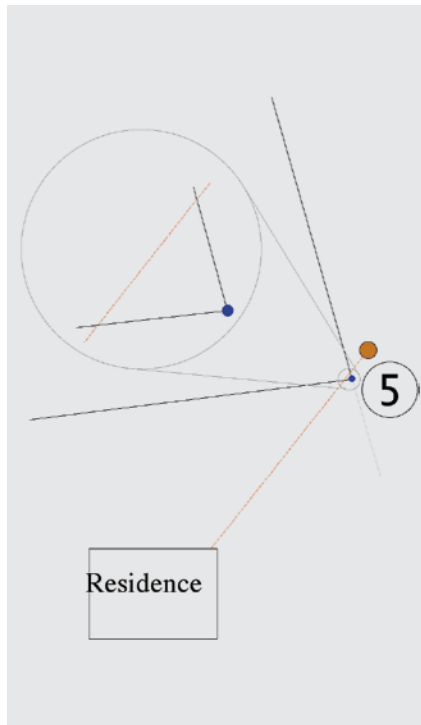
Consider the following examples:

OVERLAP & GAP, BOUNDARY 3



Between boundary 3-4 there exist an apparent overlap and gap as shown in the figure above. The overlap and gap result from your deed description for boundary 3-4 which states: "...marked oak, thence S2 $15^{\circ} W$, 543 feet to a stone..." and your neighbor's description for the boundary which states: "...planted stone, thence N2 $30^{\circ} E$, 545 feet, following a fence, to a red oak..." Your neighbor's deed was the first conveyance that was recorded without notice of an earlier conveyance from a common grantor and may have senior title to the overlap. The title to the gap is more likely than not retained by the common grantor and resides with the common grantor or his assigns or successors-in-title. While these gaps and overlaps are minor and would not concern me if I were in your stead, you may take action to meet your own satisfaction. If you have questions on the ramifications or dealing with this gap or overlap, you should consult an attorney experienced with real estate problems.

ENCROACHMENT AT CORNER 5



An apparent encroachment exists near corner 5. The figure locates and describes an encroachment by a utility line benefiting your neighbor's residence. The apparent encroachment is composed of a utility line going from utility pole #315-5 (along Parker Avenue) to the northeast corner of the neighbor's house.

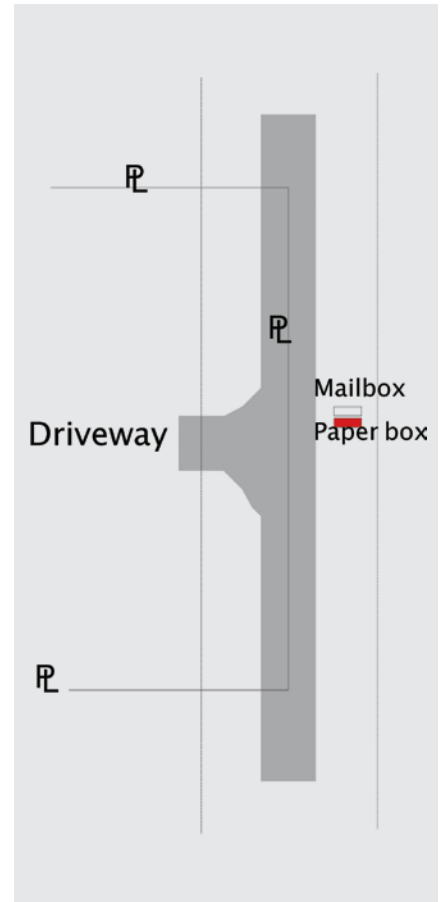
A diligent search of the public records failed to reveal an easement or recorded license for the utility line. A letter to the utility company seeking information on the line has gone unanswered.

If the utility line has or is allowed to exist for a time period in excess of 20 years, the neighbor may have the right to maintain the utility line without license or permission.

At this time, it is not known if verbal permission was given to construct the line (i.e., parol license). The apparent encroachment is minor. Asking the neighbor to remove the utility line may cause the neighbor significant expense and/or initiate a dispute with the neighbor.

Should you wish to pursue this matter or have questions on the apparent encroachment's ramifications to your title, you should consult with an attorney experienced with real estate problems.

ENCROACHMENT PAPER BOX



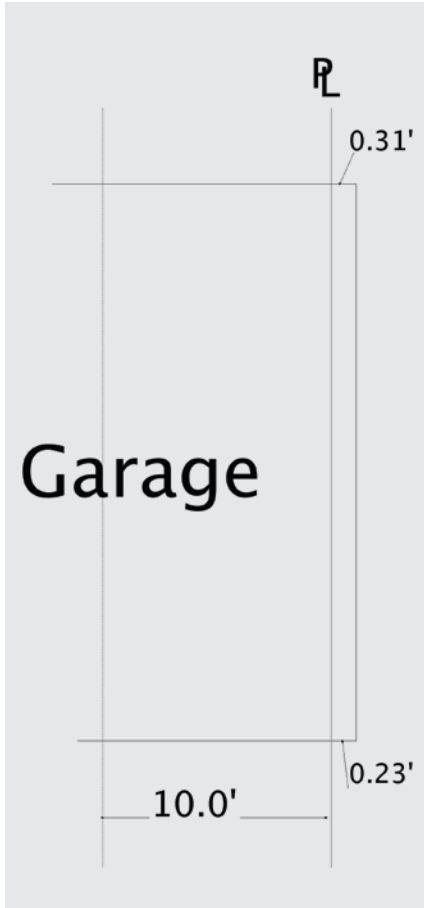
Your paper box is located next to your mailbox across from your driveway on your neighbor's property. Records indicate that your title only extends to the center of the public road. Court decisions have suggested that private property permanently placed within the public road easement is only allowed in limited cases by permission of the public or where the owner of the private property owns the fee title (or has permission of the fee owner) and the permanent fixture does not prevent the safe use of the easement by the public.

This situation is so common as to seldom be noticed or attract the attention or ire of the neighbor.

My experience suggests that this situation may be safely ignored in almost all cases. The location of the paper box, maintained long enough (i.e., 20 years), will likely ripen into a right subject only to the public easement.

If you have questions on the encroachment of your paper box on your neighbor's property, you should consult with an attorney experienced in real estate matters.

ENCROACHMENT GARAGE



Your garage encroaches onto the neighbor's property as shown in the diagram. In addition, the garage is within the building setback area established by the current zoning for your municipality. I have no information on how long your garage has existed or under what conditions it was built in its location. These could be relevant factors in determining a course of action to take.

In regard to the possible encroachment of the garage onto your neighbor's property, experience suggests you have three options: 1) First you can do nothing. If the encroachment is maintained long enough under the right conditions, the right to maintain this encroachment on your neighbor could ripen in your favor. 2) You can remove the encroachment from the neighbor's property. 3) You can obtain your neighbor's consent, license, easement, or title to maintain the encroachment. You should consult with an attorney before taking any action or non-action suggested above.

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The building setback distance is established by the town zoning ordinance. Building setback distance is established to prevent fire from spreading through a neighborhood. Many structures that existed prior to the enactment of the ordinance are exempt. Your structure may be exempt depending on its age or a previous owner may have obtained a variance. Additional information will be required in order to determine if the structure is exempt from current setback restrictions.

Structures that are illegally located within the building setback are subject to removal, fines, or both. In some situations, a nominal fine or obtaining a variance will put aside the problem if it exists.

Ordinarily, zoning infringements are not discovered until the transfer of the property (if then). My experience suggests that town enforcement of zoning violations is passive rather than active. In other words, violations are only enforced when brought to the attention of the municipal enforcement agent. In most cases, reporting is done by a disgruntled neighbor.

You should consult with an attorney experienced in real estate regarding this situation.

As the examples illustrate, the report can provide the client with considerably more information than portrayed on a plat.

Surveyors that commonly use survey reports often spend a great deal of time preparing a good explanation for the first time the situation is encountered. Thereafter, the surveyor can reuse much of the narrative previously written when the same or similar situation is encountered in the future. Accordingly, the surveyor that has another client with a structure encroaching on the neighbor will be able to quickly adapt the former explanation into the survey report for the present client. *A*

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Financing options

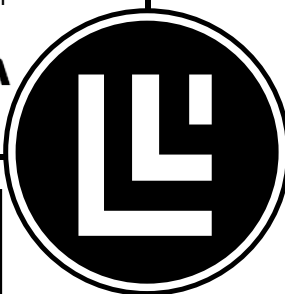


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