

WHY CAN'T I USE AN "OLD SURVEY" ON THIS DEAL?

By Garry Abrahamson

This question has to be number one on the list of the ten most frequently asked questions regarding the use of old surveys. There are many reasons for why an old survey *shouldn't* be used, but as to why you *can't* use a particular survey comes down to basically two:

1. There have been changes on or to the property since the last survey.
2. The original survey was copyrighted.

Probably the easiest way to explain the first item is to use the guidelines used by those friendly folks who close your deals at the local title companies.

1. Your copy of the old survey must be legible, signed and sealed by a registered surveyor in the State of Texas.
2. You must also have an affidavit of "no changes to the property" from the current owner. The person signing the affidavit must have personal knowledge of the property. (Check with your title company on this one, because some title companies limit this to the original purchaser for whom the survey was done.)

OK, so far, so good. The questions seem to crop up regarding the "no changes to the property" part of the affidavit. You know the old saying "when all else fails, read the directions" don't you? Right. So let's look at what the affidavit in lieu of a new survey has to say about changes.

From the date of the survey you are going to use, to the date on the affidavit, "Owners have not granted any easements over, under or across our property nor have Owners made any additional improvements either to the real property or the existing improvements which would alter the dimensions of the improvements as shown on the Survey, and that any and all repairs to existing fences and improvements have followed the same lines as shown on the survey." Folks, that means that any change at all in what was on the original survey means you need a new one. Have doubts? Read on.

"Owners understand that the term "additional improvements" includes such things as fences, pools, spas, carports, decks, patios, portable buildings, sheds, outbuildings, gazebos, wall planters, room additions or extensions, or any other improvement which has become attached to the real property or other improvement." Pretty clear so far, right? But wait, there is more. Improvements aren't limited to just the owner's property. If the neighbor next door does some major renovations, construction, or replaces the fence, and they abut your owner's property a new survey may be required.

Having said all the foregoing, I must put in my two cents worth. For your own financial well being, I would strongly recommend that any realtor using old surveys take that old survey in hand and walk the subject property to make sure that any changes weren't missed by the signer of the affidavit. Seeing the survey and affidavit for the first time while going through the paperwork at the closing is not a good thing. My office has received many a panicked phone call from a closer who just discovered that there had been changes made and a new survey was needed "yesterday." And always remember, what we might discover while *doing* the survey may well *undo* you deal.

The more controversial item of the two may well be the copyright issue. There isn't time or space to fully explain all the implications of copyrighting a survey and its subsequent reuse. It is a legal issue best left to attorneys, but I will leave you with a quote from a letter to the Texas Society of professional Surveyors written by Eric B. Meyertons, a copyright attorney.

"Based on the information set forth above, (a reference to the preceding pages of his letter to T.S.P.S.) it is our opinion that surveys will be found to be copyrightable works, and that the surveyors will be deemed to be the owners of the copyrights in and to such works. We understand that numerous entities are involved when a survey is used, and therefore in most instances copies of a survey will be made when a survey is reused. If such copies are made, then it is our opinion that such copies would infringe the surveyors' copyrights in and to the surveys. In the event of such infringement, the surveyor will be able to recover actual damages, and any profits of the infringer that are attributable to the infringement that are not taken into account in computing the actual damages. If the surveyor registered his/her copyright prior to the I infringement, then the surveyor can also elect to recover statutory damages, and can potentially recover attorneys fees."

It is my understanding after talking to T.S.P.S. Legal Counsel, that a majority of Texas Survey Companies, including ours, *is* registering their work with the U.S. Department of Copyright in Washington, D.C.

Therefore, it might be prudent to always check that old survey for a copyright statement, and if you find one, take the ethical highroad and recommend to your client that a new survey is needed.