So, a survey that refers to obscure GIS data understood only by other surveyors and engineers will not enhance the clarity of the description or the certainty required. Similarly, a survey that describes property on the basis of lines of possession alone, and a description where the surveyor has prepared the survey or map without deference to prior deeds and descriptions, is likely to be defective.

So, DON'T shy away from creating a new description when the old one clearly does not meet current standards, but DO know the rules.

By the way, knowing the rules enunciated in Pauquette v. Ray (supra) also provides a basis to decide what's right as between conflicting descriptions and surveys. Also, applying the rule often answers the question: "Which description should I use?" Now, when I answer: "Use the one that's right!" you know how to figure out which one that is!

Point of Beginning Rule Number 5:
A "Point of Beginning" is different from a "Point of Commencement!"

Many attorneys treat Points of Commencement and Points of Beginning interchangeably, but, by custom, they signify entirely different points. A "Point of Beginning" signifies the first point touching the property to be described. It is typically followed either by other calls that describe, in succession, the courses that form the boundaries of the parcel, and return to the "Point of Beginning," or, for "Center-line" descriptions, the courses that form the center-line of a parcel of an expressed width on each side of the centerline. (I will discuss in greater depth, in other articles, the various types of descriptions commonly used, and how to identify and choose the best type for a given purpose).

A "Point of Commencement," on the other hand, does not touch on the property to be described. Rather, a Point of Commencement typically starts some distance from a Point of Beginning, but starts at a fixed and locatable point (the "Point of Commencement") and then proceeds to describe a pathway to the Point of Beginning. An example of a Point of Commencement would be:

> Commencing at the intersection of the centerlines of East Jefferson Street and South Warren Street, and proceeding thence northerly along the centerline of South Warren Street a distance of 100.00 feet to the Point of Beginning, and proceeding thence . . . ".

As should be apparent, then, a Point of Commencement is intended to serve a different purpose. Notice also though, that, in the above example, the property could have been described without using a Point of Commencement. Instead of a call to the Point of Commencement, we could simply have a Point of Beginning like:

> Beginning at a point on the centerline of South Warren Street, 100.00 feet northerly, measured along said centerline, from its intersection with the centerline of East Jefferson Street, and proceeding thence . . .".

In other words, it is normally the better practice to avoid wordiness, without compromising precision, whenever possible, and to save the use of "Points of Commencement" for those circumstances where it really will contribute to clarity.

A clumsier device that seeks to accomplish the same intent is to identify a point as a "Point of Beginning," but then describe a pathway to a "True Point of Beginning." But, now that you know the custom, do as the Romans do!

Much more may be said about where to begin, but that's enough food for thought for one day. Next time, I will address such questions as:

"Clockwise, or counter-clockwise?"
"Judicious use of boundary calls,"
and, "How much is too much?"

I also hope to help you break some bad habits, like describing property with reference to itself.

In the meantime, I welcome your comments, questions, suggestions, and even your disagreements, because some of what is stated here is simply my opinion. I would like to see this forum turn in to a discussion, among real property professionals, through which we can all gain expertise.

Please visit my Good Deeds Blog at www.nysrealpropertylaw.com

ATTORNEY ADVERTISING

Good Deeds

Legal Tips of the Trade in Real Estate Transactions

September 2013 Volume 1, Issue 1

BOUSQUET HOLSTEIN PLLC

Gilbert M. Hoffman, Esq.

Gil is of counsel to the firm in the areas of transactional real estate, title law, title insurance, real estate development, financing, leasing, title and boundary disputes, easements and oil and gas leases. He joins Bousquet Holstein PLLC from Chicago Title Insurance, where he was a Vice President and spent 27 years working on commercial and industrial real property and title matters, including wind and nuclear power facilities, cogeneration plants, pipelines and transmission lines. He has extensive experience working with industry and land owners solving problems in complex title matters. With the introduction of High Volume Hydraulic Fracturing technology to New York State, he has devoted considerable time to developing title and underwriting standards for the title insurance and banking industries, and finding ways to integrate mortgage and owner's title insurance products to minimize the real property impacts of oil and gas leasing and to facilitate real property transactions.

Recent Experience

- Closed $900 million transfer of nuclear power plants on Lake Ontario.
- Closed financing and land transfers for $435 million Shopping Center expansion.
- Testified as expert witness in commercial boundary dispute.
- Certified title to 35 mile electric transmission line, including lands under water.
- Supervised title examination for $20 million transfer of oil and gas rights
- Certified title for 88 turbine wind farm.

Dear Colleagues:

As every real estate practitioner knows, real property transactions have become increasingly complex. Sometimes, when dealing with changes wrought by regulation, taxation, environmental issues and tight money, we lose sight of the basics, things like the preparation of deeds, legal descriptions, and the like. Even so, these "basics" can become critical if your client becomes embroiled in a title or boundary suit, where subtle wording differences can mean the difference between winning or losing, with hundreds of thousands of dollars at stake.

I hope to create a series to address some of these basics. For many, this will be a light "read," and will hopefully serve as a refresher, something you may wish to share with a paralegal or assistant. For some of us, though, this series may fill in some technique gaps, and help to hone our transactional skills.

I also hope for feedback, to create an open dialogue. In that regard, examples, war stories, arguments and disagreements are all welcome. By sharing our combined knowledge, we all contribute to raising the bar and improving the level of real property practice, and, in the course of doing so, we just might save a client (and ourselves) from the negative consequences of an instrument crafted without attention to detail.

So, please enjoy this inaugural edition of "Good Deeds," and let me hear from you with suggestions for future deed-related topics.

Regards,

Gil Hoffman
Bousquet Holstein PLLC
315.701.6489
ghoffman@bhlawpllc.com
Blog address: www.nysrealpropertylaw.com

Please visit my Good Deeds Blog for more articles and real estate tips.
www.nysrealpropertylaw.com

ATTORNEY ADVERTISING

Where to Begin...

As anyone who has ever penned an article knows, the greatest difficulty can be agonizing over where to begin. For lawyers describing real property though, there are certain conventions or recommended practices to guide us with Points of Beginning, and, if we follow them, our work product is clearer, and our colleagues will respect our ability to "do it right." Not doing it right, on the other hand, is kind of like driving on the right side of the street – in London.

So, let's go over some concepts concerning the "Point of Beginning":

Point of Beginning Rule Number 1: Don't use one if you don't need one!

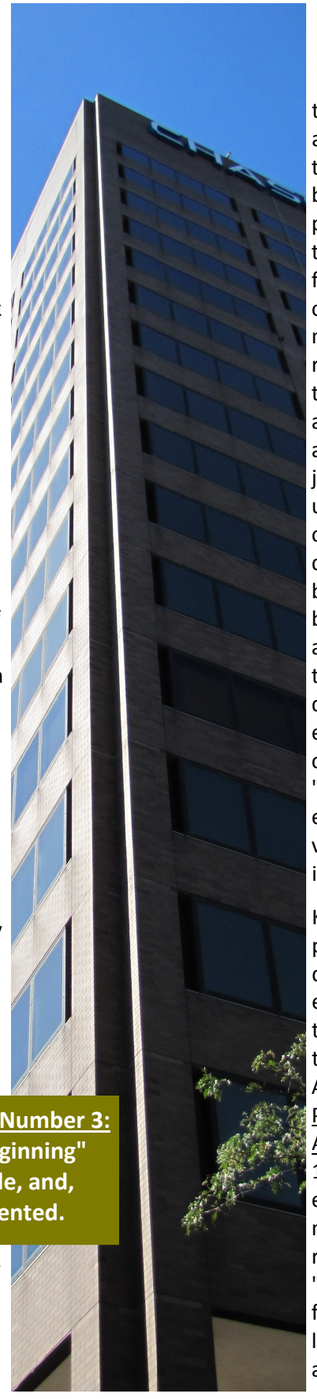
Legal descriptions take many different forms, and not all of them need a "Point of Beginning." For example, in many parts of New York State, and, especially in counties that historically maintained a "numerical" or "block" index for real property records, it is customary to describe real property located within a subdivision with reference to a map filed in the county clerk's or recorder's office. Such a description might read:

> ALL THAT TRACT OR PARCEL OF LAND situate in the Town of Smith, County of Jones and State of New York,
> Being part of Farm Lot No. 73 in said Town, and being more particularly described as being Lot No. 88 of the Missing Acres Tract, according to a map of said Tract made by Way Lost, L.S., dated May 1, 2013 and filed in the Jones County Clerk's Office on May 2, 2013 as Map No. 9,444.

As you can see, such a description may briefly and accurately describe the property, without ever mentioning a Point of Beginning. Much more can be said about these "sublot" or "numerical" descriptions, and not all of it is good, but that's a topic for another day. One rule that probably should not wait for another day, though, is this:

Point of Beginning Rule Number 2: If the map to be referred to is not a matter of public record, don't refer to it.

If the map to be referred to in a legal description is not a matter of public record, as by filing or recording, the description making reference to the unfiled or unrecorded map is deficient. We often see proposed legal descriptions that make reference to a newly completed, and as-yet unfiled map of survey. Often, the map is intended to be filed, but sometimes it doesn't make it to record. The map might be rejected because it fails to comply with the stringent requirements of RPL Section 333-a, et seq., or with local requirements, or, it may be decided to revise the map before filing it. Whatever the reason, if the map referred to is not a matter of record, reference to it in the legal description is to be avoided. Title examiners who see the map reference will invariably attempt to retrieve a copy of the map, because if it shows setback lines, easements, restrictions, etc., those would be "matters of record" a title company will be charged with knowledge of. Not finding them would then result in an exception to title. Also, if the description consists of ONLY the lot on the map, and the map is not of record, the description fails for vagueness. In such cases, it is better to employ a "metes and bounds" description, without reference to the map. If the map needs to appear, such as for clarity or to indicate or disclose some unusual condition of the property, attach a copy of the map to the instrument of conveyance, following the procedure described in RPL section 333-b.



Point of Beginning Rule Number 3: Choose a "Point of Beginning" that is fixed, locatable, and, preferably, monumented.

Describing real property with the adequacy needed for conveyancing means being able to identify from the legal description, with a high degree of certainty, the location and boundaries of the property with reference to its surroundings. In furtherance of that objective, a well-monumented point of reference contained in the legal description will assist future owners, attorneys, surveyors and judges in more accurately understanding the intent of the parties. Also, if a dispute arises or if boundary litigation becomes necessary, there are accepted practices that courts follow in determining boundaries, especially when there are conflicting "calls" (descriptive elements) as between various deeds and other instruments, and surveys.

Knowledge of the priorities applied to these different descriptive elements is fundamental to drafting descriptions that will withstand attack. A relatively recent case, Pauquette v. Ray, 58 A.D.2d 950 (3d Dep't, 1977), contains a clear explanation of the majority and New York rule:
". . . resort is to be had first to natural objects or landmarks, next to artificial monuments, then to adjacent boundaries, then to courses and distances, and lastly to quantity". In other words, descriptive calls to natural objects occupy the highest order of priority, followed by artificial monuments, etc. Of course, adherence to the above rule can be accomplished without the *Point of Beginning* being a natural or artificial monument, but the objectives of clarity and certainty are best achieved if the Point of Beginning is a natural or artificial monument. Otherwise, an interpretation of the description, backtracking from the monument referred to, may be necessary to locate the Point of Beginning, a process that is arduous and time-consuming.

Also, many secondary market purchasers of home loans have established detailed requirements for what may and may not be in legal descriptions utilized in security instruments and title policies. In order to comply with Freddie Mac standards, for example, "The beginning point should be established by a monument located at the beginning point or by reference to a nearby monument". (Freddie Mac Single Family Seller/Servicer Guide, Vol. 1, Ch. 40.1 (a) (1)). Of course, the Guide also refers to and allows "Lot and block" descriptions (referred to as "Sublot, block, or numerical descriptions" in Rule No. 1 supra).

Point of Beginning Rule Number 4: If the Existing property description is vague or indecipherable, create a new one.

Title standards, both the "official" NYSBA version, and those introduced with the advent and growth of secondary mortgage market (via loan purchasers such as Fannie Mae, Freddie Mac, SONYMA, etc.), have become considerably more precise than they were 10 or 20 years ago. Also, the value of urban and suburban property has increased over the same period. These factors militate against the application of a purely local standard, often resulting in the need for greater precision in describing real property. Consequently, the legal description and the Point of Beginning that were acceptable a few years ago, may not meet current standards. When confronted with such an issue, i.e., an antiquated Point of Beginning or legal description, scrap it, and create a new one. Utilize a surveyor if need be to describe the subject property with greater accuracy.

Remember, though, that a surveyor's description should itself be decipherable, and should NOT be written so as to describe a greater interest or more or less property than a mortgagor or grantor owns or intends to convey.

Continued on back...