



White Paper

Ground Leases/Leasehold Estates and the Surveyor

Author: David E. Woolley, PLS
Executive Board Member, LSACTS
December 3, 2010

LSACTS White Paper 2010-004

Table of Contents

- I. Introduction**
- II. Creation of Leases**
 - A. Creation of a Lease – Landlord/Tenant Relationship
 - B. The Statute of Frauds Regarding Leases
 - C. Distinction Between Ground Leases and Other Commercial Leases
 - 1. Ground Leases as Financing Instruments
 - 2. The Authority of the Parties To Enter Into Ground Leases
 - 3. Advantages and Disadvantages of Ground Leases for Landowners
 - 4. Advantages and Disadvantages of Ground Leases for Tenants
 - D. Recording the Memorandum of Lease
 - E. The Importance of an Accurate Legal Description of the Property
- III. Roles of Professionals in Ground Lease Drafting**
 - A. Attorneys
 - B. Real Estate Brokers, Real Estate Appraisers, and Financial Lenders
 - C. Surveyors
 - D. Engineers, Contractors, Architects, and Land Use Planners
 - E. Insurance Representatives and Title Companies
- IV. The Surveyor’s Professional Obligations**
 - A. Legal Descriptions
 - B. Records of Survey
- V. Conclusion**
- VI. Practice Tips For Surveyors**
- VII. Disclaimers**
- VIII. Appendix A**

Mission Statement

To promote the public’s perception of land surveying and to support all efforts by Professional Land Surveyors to elevate the stature of the profession. As an advisory organization, our purpose is to research, summarize, debate, and publish our findings on various topics relating to the principles and applications of the Professional Land Surveyors Act and the California Subdivision Map Act.

Adopted: June 12, 2009

I. Introduction

Airports, ports and harbors, universities, states and the federal government often enter into long term leases of particular real properties. Many times, these entities cannot sell a particular real property due to statutory or regulatory restrictions. Therefore, in order to generate revenue from these properties and to put them to economic use, these entities choose to enter into long term leases with private tenants – sometimes for as long as 99 years. It is not unusual for land owned by American Indians to be subdivided with long term leases. Although unusual, private land holders also enter into these types of long term leases.

These long term leases are typically called “ground leases” or “ground rents” and often involve vacant land, upon which a tenant is permitted (or required) to build improvements such as structures/buildings, parking lots, landscaping, etc. Friedman, Garcia & Hagarty, *California Practice Guides: Landlord Tenant* (Rutter Group, 2009) § 7.1. The improvements located on real property associated with these ground leases are often held under separate ownership by tenants, while the land itself is owned by the landlord. For example:

A governmental entity may own a piece of land at an airport. This governmental entity may lease the land to a private company. That private company may, in turn, build a structure on that land and use the building itself, or they may lease the building to yet another private company. The long term lease for the land is known as the ground lease. The lease for the interior building space placed on the land is a separate lease all together and is not labeled as a ground lease. The term of the ground lease will typically be more than 30 years because anything less would make the financing of improvements (severable improvements owned by the tenant) impractical.

The ground lease will often provide that, upon expiration or termination of the ground lease, all improvements become the property of the landlord without payment, free and clear of all liens, and in good condition. Unlike many other leases, ground leases usually involve property that is either initially completely unimproved, minimally improved, or in need of rebuilding. Friedman, Garcia & Hagarty, *California Practice Guides: Landlord Tenant*, supra, at § 7.16. Because the tenant is usually constructing and paying for the initial improvements or the renovation of existing ones, the tenant usually requires certain ownership rights in the structures built or renovated by the tenant. *Id.* Ultimately, however, the improvement becomes the

landlord's property by the end of the lease unless the landlord requires that the improvement be removed. *Auerbach v. Assessment Appeals Bd. No. 1 for County of Los Angeles* (2006) 39 Cal. 4th 153, 162-163, 45 Cal. Rptr. 774, 779-780.

The ground lease concept is a valuable tool for the real estate development community. Developers use ground leases to take advantage of tax benefits and financing options. Tenants use ground leases to avoid the need to obtain upfront capital (down payment for a mortgage loan) for the purchase of a piece of real property. Additionally, landlords typically have decreased management responsibilities with a ground lease arrangement.

Nevertheless, there are other costs associated with ground leases. Tenants entering into ground leases must pay for the hard cost of improvements (professional architectural design fees and construction costs) and related soft costs (permits, entitlements, title insurance and professional fees for surveyors, engineers, and lawyers). As a general rule, the long term nature of the ground lease allows the ground lessee to amortize their investment costs for improvements over the life of the ground lease – still making this arrangement profitable and advantageous to the ground lessee.

II. Creation of Leases

A. Creation of a Lease – Landlord/Tenant Relationship

The most common method of creating the relationship of landlord and tenant is by an agreement of the parties to the terms of a lease. *California Real Estate Law and Practice* (Matthew Bender, 2008), § 151.01, pg. 151-3. No particular words are necessary to create a lease, provided that the agreement shows the intention of the lessor to dispossess himself of the property and to grant the lessee the right to enter and possess the designated premises in subordination to the lessor's title, for a fixed consideration and period of time. *Id.* (citing *Timm v. Brown* (1947) 78 Cal. App. 2d 609, 616).

A landlord tenant relationship may also be formed by operation of law, even without an enforceable written agreement between the parties. *Id.* Examples include occupations of land pursuant to (1) an oral agreement that is invalid under the statute of frauds (requiring a writing); (2) a proposed lease that is never executed by both parties; (3) an ineffective conveyance or an agreement to convey; or (4) permission of the owner without reservation of rent or agreement as to the term of the occupation. *Id.*

B. The Statute of Frauds Regarding Leases

Under the legal concept of the “statute of frauds,” an agreement to lease real property for more than one (1) year is invalid unless the agreement or a note or memorandum representing the agreement is in writing and signed by the parties. *Id.* at § 151.02, pg. 151-4 (citing Cal. Civil Code § 1624(c)) [emphasis added]. To satisfy the statute of frauds, the memorandum of agreement for a lease must contain all of the essential and material parts of the lease to be executed, and in particular, it must contain these three essential elements:

1. An adequate description of the property to be leased;
2. A definite term, including designation of when the term begins; and
3. A definite amount of rent and the time and manner of its payment.

Id. at pg. 151-5.

C. Distinctions Between Ground Leases and Other Commercial Leases

A commercial ground lease is often defined as a lease of land (typically unimproved) that:

1. Has a relatively long term (e.g., from 50 to 99 years);
2. Makes all expenses of the property the obligation of the tenant (e.g., taxes, repair and maintenance expenses, insurance costs, and financing costs; and
3. Allows for the tenant to finance construction of the project on the land by either leasehold financing or so-called “fee subordination” financing.

Continuing Education of the Bar, *Ground Leases* (2nd ed. Dec. 2009) § 1.2.

In California, there are some statutory limitations on the terms of certain leases ¹ including:

¹ These statutory limits apply to the lease term as initially stated in the ground lease and as extended by the grant of options to renew. Friedman, Garcia & Hagarty, *California Practice Guides: Landlord Tenant*, supra at § 7.11.

1. Property owned, managed or controlled by a municipality ordinarily cannot be leased for a term greater than 55 years (Cal. Civil Code § 718). The term can be extended for up to 99 years if the municipality follows specific statutory procedures (Cal. Civil Code § 719);
2. Property owned by a municipality may not be subject to a mineral lease exceeding 35 years (Cal. Civil Code § 718);
3. Any lease of tidelands or submerged lands granted to any city by the State of California may not exceed 66 years (Cal. Civil Code § 718);
4. Mineral, oil and gas leases on non-municipal property may not exceed 99 years (Cal. Civil Code § 718(f));
5. A lease for agricultural or horticultural purposes cannot exceed 51 years (Cal. Civil Code § 717);
6. The lease of town or city lots is limited to a maximum of 99 years. This restriction typically applies to commercial, including retail and property leases. (Cal. Civil Code § 718) See *Shaver v. Clanton* (1994) 26 Cal. App. 4th 568, 576;
7. The California Department of Parks and Recreation may lease state park system property for any compatible use up to a maximum of a 10 year term – longer terms must be approved by the Legislature, or in certain urgent situations, by the Public Works Board (Cal. Pub. Res. Code § 5003.17).

Friedman, Garcia & Hagarty, *California Practice Guides: Landlord Tenant*, supra at § 7.10.

1. Ground Leases As Financing Instruments

Ground leases are really both leases and financing instruments. Continuing Education of the Bar, *Ground Leases*, supra at § 1.2. Ground leases differ substantially from other types of commercial leases (such as leases for space in shopping centers and office buildings) because of the long-term nature of ground leases and their financing provisions. *Id.* Tenants who enter into single-user ground leases do so usually to construct improvements on the premises and then conduct their business. Typically these are retail tenants such as supermarkets, drugstores and restaurants. *Id.* at §1.4. These types of ground leases are frequently lease “pads” or “outparcels” in a shopping center or other type of commercial project. *Id.*

2. The Authority of the Parties To Enter Into Ground Leases

Before finalizing a ground lease, both parties must confirm that the other has the authority to enter into the ground lease. *Id.* at § 3.12. If the property to be leased is owned by an

entity (i.e. a corporation or partnership), the tenant should evaluate the landowner's formation and organizational documents and confirm that they have the authority to bind the entity to the lease. *Id.* A tenant should also consider obtaining a preliminary title report from a title company to confirm record fee-title ownership of the premises and should consider obtaining a leasehold policy of title insurance to protect against title matters that could divest the tenant of their leasehold. *Id.*

Commercial ground leases include provisions covering the state or quality of title and title insurance similar to provisions found in purchase and sale agreements. *Id.* at § 4.8. The state-of-title provisions in a ground lease usually either spell out the state of title upon execution of the ground lease or set forth a procedure to determine and agree on the state of title. *Id.* A ground lease tenant normally requires title insurance to insure the tenant's leasehold interest. *Id.* at § 4.11. The American Land Title Association (ALTA) formerly offered a special leasehold policy form to insure the vestee of a leasehold estate under a lease, a sale-leaseback, or a fee-leasehold severance transaction, but it was discontinued in 2001. *Id.* at § 4.12. Currently, the ALTA extended coverage owner's policy with a leasehold endorsement is commonly used in California to insure leasehold estates. *Id.*

The long-term nature of the ground lease requires that the landlord evaluate the tenant's financial stature and extended ability to perform the tenant's lease obligations (i.e., the tenant's ability to pay the rent and run a successful commercial enterprise to generate funds to pay the rent).

3. Advantages and Disadvantages Of Ground Leases For Landowners

There are four basic advantages for the landlord to enter into a ground lease rather than selling the property. These advantages include the following:

1. A ground lease landlord may avoid paying a substantial income or capital gains tax that the landlord would have to pay if the property were sold;
2. A ground lease allows the landowner to retain long-term ownership of the property while putting the property to current productive use. Some owners of property (e.g., certain trusts and governmental agencies) are legally prohibited from selling property that they own, whereas there may be no legal constraints to entering into a long-term ground lease;
3. A ground lease and a successful project on the leased land produces uninterrupted, passive income stream to the landlord; and

4. A ground lease can provide an effective mechanism for the landlord to exert significant control over the development of the ground lease premises.

Id. at § 1.7.

There are some disadvantages of a ground lease to the landowner including:

1. The anticipated economic benefits from the ground lease are directly tied to the success of the project developed on the premises;
2. Rent received by the landlord is ordinary income for federal and state income tax purposes (sale proceeds typically taxed as capital gains);
3. Ground lease execution does not typically result in a large cash payment to the landlord (as compared to a sale);
4. A ground lease landlord assumes the risk of losing the leased property or having to satisfy the loan obligation if the ground lease requires the landlord to encumber the landlord's fee interest for the tenant's financing and the tenant defaults on the loan, resulting in foreclosure of the property; and
5. As the fee owner, the landlord may be liable to governmental agencies for tenant actions that violate applicable laws and to third parties for hazardous substances causes by the tenant and/or exposure to tort claims for personal injury and property damage.

Id. at § 1.8.

4. Advantages and Disadvantages Of Ground Leases For Tenants

A ground lease is frequently used by the tenant as a mechanism to achieve the equivalent of a financed acquisition of fee ownership. *Id.* at § 3.6. When a prospective buyer is unable to obtain reasonable institutional or third party financing (or when the landowner is unwilling or unable to sell), a ground lease can provide the tenant with the means to acquire a long-term interest including the right to improve the land. *Id.* A tenant in a ground lease usually wants the broadest rights to use the premises, similar to those of a fee owner, which may include the right to pursue zoning changes, entitlements, permits, approvals, and other long-term development goals. *Id.* at § 3.7. Tenants may require a due diligence period to evaluate the land and its potentials and restrictions before executing a lease. *Id.*

For a tenant, there are three basic advantages to ground leases over purchasing real property for commercial use. These include:

1. A ground lease eliminates the initial land acquisition costs (purchase price and closing costs). There may also be deferment of ground lease rent until a project is completed and ready for business;
2. A ground lease provides income tax advantages because ground rent is deductible, whereas only the interest portion of loan payments are deductible; and
3. A ground lease is often used to affect certain borrowing techniques such as “sale-leaseback” arrangements².

Id. at § 1.9.

There are also disadvantages to the tenant including:

1. Long term lease costs often exceed the cost of purchasing a property;
2. Tenants have less flexibility under ground leases because of particular lease terms such as permitted uses, initial construction of improvements, assignments and subletting and alterations;
3. If the project is not successful, the landlord may be less flexible regarding working out an alternative financial arrangement as compared to an institutional lender;
4. Because the property reverts back to the landlord upon termination of the ground lease, at some point during the term of the lease, the project begins to decrease in value and ultimately becomes unsalable and financing may become impossible to obtain;
5. A tenant may encounter financing difficulties in a ground lease in which the primary financing is “leasehold improvement financing”³; and
6. In most transactions, any existing loan encumbering the landlord’s fee interest in the premises must be paid off immediately before the ground lease can be entered into.

Id. at § 1.10.

² In a “sale-leaseback” arrangement, one party sells a property to a buyer and the buyer immediately leases the same property back to the seller.

³ “Leasehold improvement financing” is defined as all alterations, renovations, and repairs to leased facilities that increase the value of the property, make it more useful, or lengthen its life. Businessfinance.com

D. Recording The Memorandum Of Lease

A lease is recordable because it is an instrument affecting title, or possession of, real property. California Government Code §§ 27280, 27288. A ground lease does not need to be recorded in order to be effective or binding and often parties do not record the entire ground lease because of the cost of recording the entire ground lease and its exhibits and because the parties may not want to publicly disclose the terms of the ground lease. Continuing Education of the Bar, *Ground Leases*, supra at § 3.24. Instead, the parties may choose to record a Memorandum of Lease or Short-Form Lease to provide record notice of the existence and contents of the lease. *Id.* A Memorandum of Lease for a ground lease must include (1) an accurate legal description (California Business and Professions Code mandates the description is prepared by a Professional Land Surveyor, unless a specific exemption applies); and (2) basic lease information such as the identity of the parties to the lease. *Id.* at § 3.25. The Memorandum of Lease should also include commencement information, any options to extend the lease, purchase the property, rights of first refusal and any use restrictions or exclusive use rights to the premises. *Id.*

E. The Importance Of An Accurate Legal Description Of The Property

In order to avoid title problems, it is essential that a ground lease contain an accurate description of the property. An inaccurate land description, especially in the event of an overlap of title, can lead to future litigation claims for damages such as negligent misrepresentation, breach of written contract, breach of fiduciary duty, unjust enrichment and others. As a management tool, the land owner may not be realizing the full potential profit in the event the description provides a gap between properties.

The legal description in a ground lease must impart constructive notice to a third party as to boundary lines of the premises. *Id.* at § 3.26. To avoid encroachment issues, overlapping covenants, conditions and restrictions (CC&Rs), difficulties with easements, rights-of-way, prior recorded encumbrances, and other similar issues, the description of the premises must be accurately stated in the ground lease document. *Id.* This description could be a reference to an existing legal parcel such as a recorded subdivision map, a separate legal parcel, a legal parcel independent of existing legal parcel lines, or a metes and bounds description created by a survey. *Id.* Additionally, it is critical to describe access and to include access endorsement coverage in the tenant's title insurance policy as there may be barriers to access to the premises that may be discovered only from a review of the title itself. *Id.*

A classic example of problems arising from an inaccurate land description is the scenario where the owner purchases and takes possession of real property including a fixture (building) with the intention of leasing it under a long term ground lease. After a lengthy negotiation of the ground lease, the subject land and building are inspected and surveyed and the owner lessor and tenant lease discovers that the building encroaches substantially onto an adjoining property owned by someone else. In this scenario, it could take years to resolve this encroachment problem resulting in lost revenue to the land owner/ground lessor and (potentially) to the lessee. This entire situation is avoided if, prior to purchase, the initial land was properly surveyed on the ground - in hindsight a nominal upfront cost compared to the lost revenue associated with a building encroaching onto an adjoining property and possible resulting litigation costs.

It is often necessary for a tenant to obtain a current survey of the premises by a licensed surveyor or civil engineer.⁴ *Id.* at § 4.17. A survey will ascertain the accurate acreage of the premises, the existence of encroachments, and the location of easements, set-back lines, and boundaries of the premises. *Id.* Most lenders will also require a survey in order to obtain a lender's extended coverage American Land Title Association (ALTA) title insurance policy. *Id.* A tenant must ascertain the lender's land title survey requirements (including the form of the surveyor's certificate) and obtain the lender's approval of the surveyor to be used. *Id.* A form survey provision to a ground lease is attached to this White Paper as **Exhibit A**.

In addition, with many ground leases, the tenant is required to obtain land use entitlements for the construction and use of the intended project. *Id.* at § 4.21. Examples of common entitlements include:

1. Complying with the California Environmental Quality Act (CEQA);
2. Rezoning;
3. Confirming that the premises constitute a legal parcel or the lease is exempt from the Subdivision Map Act (California Gov. Code §§ 66410-66499.37)⁵;

⁴ Engineers licensed after 1982, having a license number greater than 33965 are not allowed to prepare legal descriptions unless licensed as a Professional Land Surveyor.

⁵ The Subdivision Map Act requires a final subdivision map or a parcel map for any division of land. A sale, lease, or encumbrance of only a portion of a larger parcel triggers application of the Act. *Id.* at § 4.23. The Act prohibits a sale, lease, or financing of real property for which a final map or a parcel map is required unless the required map is first recorded. *Id.* Pursuant to California Government Code § 66424, "Subdivision means the division, by any sub-divider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest

4. Obtaining a conditional use permit;
5. Obtaining governmental design review approval;
6. Entering into development agreements with governmental agencies;
7. Annexing of the premises into a governmental jurisdiction;
8. Forming a special assessment district; and
9. Obtaining any other governmental approvals and permits other than building permits.

Continuing Education of the Bar, *Ground Leases*, supra at § 4.21.

An ALTA/ACSM Land Title Survey (described above) should be ordered to protect all interested parties.

III. ROLES OF PROFESSIONALS IN GROUND LEASE DRAFTING

A. Attorneys

Potential tenants should consult with an attorney to draft a ground lease because of the lease's complexity and differences with other commercial leases, the financing provisions of the ground lease and the long-term nature of the ground lease. When drafting legal documents (including a ground lease), an attorney must follow the following ethical guidelines:

1. The attorney must act competently and only work within their particular practice areas;
2. The attorney must make appropriate disclosure and obtain necessary consents if representing multiple parties in preparing transaction documents; and
3. The attorney must be loyal to the client.

Id. at § 1.6.

B. Real Estate Brokers, Real Estate Appraisers and Financial Lenders

equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future. Property shall be considered as contiguous units, even if it is separated by roads, streets, utility easement or railroad rights-of-way. "Subdivision" includes a condominium project, as defined in subdivision (f) of Section 1351 of the Civil Code, a community apartment project, as defined in subdivision (d) of Section 1351 of the Civil Code, or the conversion of five or more existing dwelling units to a stock cooperative, as defined in subdivision (m) of Section 1351 of the Civil Code."

Real estate brokers are typically involved in ground lease transactions. Attorneys should encourage clients to consult with a qualified and experienced real estate broker if the attorney feels that the broker can offer information or services that would be helpful in consummating a ground lease transaction. *Id.* at § 1.20. Typically, a broker brings the landowner and the potential tenant together. The broker may participate (along with the attorney) in creating a letter of intent⁶ and may also be involved in ground lease negotiations. *Id.* An experienced broker in ground leases of similar properties in the same area may be able to advise the land owner or tenant on fair market value of the premises, cash flow analysis and other economic issues. *Id.*

Additionally, potential tenants and land owners typically consult a real estate appraiser in ground lease transactions to assist in determining rent and other economic terms of the lease and to establish fair market value of the property and rate of return on investment to the landlord. *Id.* at § 1.21.

If the tenant intends to finance their tenant improvements of the property, a lender should be consulted before a ground lease is signed to ensure that financing will be approved. *Id.*

C. Surveyors

Because a tenant's investment in a long term ground lease and contemplated development of the real property is substantial, the tenant and/or land owner should call upon a professional surveyor to make sure that property boundaries are correct in reflecting the parties' intentions. *Id.* at § 1.24. Surveyors may also assist tenants in dealing with issues arising from the Subdivision Map Act, California Government Code §§ 66410-66499.37. *Id.*

Surveyors are also necessary to prepare the legal description of the entire property, including the portion to be leased. Surveyors should determine the accuracy and relationship of the property description of the parent parcel as well as its relationship to the adjoined parcels.

⁶ A letter of intent is a written instrument in which the landlord and the prospective tenant set forth a summary of the fundamental business terms of the proposed ground lease. *Id.* at § 1.25. A letter of intent usually does not contain all of the provisions necessary to constitute a definitive lease agreement; rather, the letter of intent is best viewed as a starting point for subsequent lease negotiations. *Id.* The parties to a letter of intent usually intend it to be non-binding and will include language to that effect in the actual letter of intent. *Id.* Even if the letter of intent states that it is non-binding, however, the court may also examine the parties' course of conduct as evidence of whether they intended the letter of intent to actually be binding. *Id.* (citing *City of Santa Cruz v. MacGregor* (1960) 178 Cal. App. 2d 45 (wherein the court, relying on parties' partial performance after executing a letter of intent, held that the letter was binding even though it expressly required the parties to execute a formal lease and a lease was never executed.)

The surveyor should state the legal description's land area and include an affirmative statement that the parcels held are contiguous and that no gaps or overlaps are present to accommodate the corresponding ALTA insurance endorsements. Furthermore, an owner or lessee should request the surveyor to set monuments and file a record of survey accurately depicting the property. Note, however, that the surveyor cannot file the record of survey until after the lease or memorandum of lease (includes the subject parcel's legal description) has been recorded into the official records.⁷ There is another opinion Business and Professions Code, Section 8762 (b) (4) allows the surveyor to file prior to recording the lease. The surveyor is advised to discuss this with the County Surveyor prior to submittal. As with all real property legal descriptions, an "on the ground survey" including existing topography and land title documents (easements, access, etc.) should be the basis for that legal description.

D. Engineers, Contractors, Architects and Land Use Planners

A tenant or landlord should also have the proposed ground lease construction provisions reviewed by a civil engineer and/or architect before execution. *Id.* at § 1.23. These individuals should review construction, preparation of plans, installation of fixtures and deadlines to make sure these provisions are reasonable and can be accomplished in the time allotted. *Id.* Engineers, architects, land planners and land surveyors should work together during the due diligence period (before lease agreement signed or property purchased) to insure that proposed improvements meet the criteria established by California ordinances, regulations and statutes. The ground lease improvement provisions should also be reviewed by a licensed general contractor.

E. Insurance Representatives and Title Companies

Proposed ground lease provisions dealing with indemnification, exculpation⁸, destruction and insurance should be reviewed by both the tenant's and the land owner's insurance representatives (as well as attorneys) to make sure that these ground lease provisions are complete, accurate and protect the party's interests. *Id.* at § 1.24. The title officer should explain to all parties the benefit of having a land title survey in connection with the policy.

⁷ Business and Professions Code § 8762 (b) (5) "...or other instrument of title recorded in the county recorder's office are not shown on any subdivision map, official map or record of survey."

⁸ "Exculpation" is defined as clearing from alleged guilt or fault. merriam-webster.com

A title insurance company will determine whether the prospective tenant/lessee is dealing with the actual legal owner of the property who will be subject of the ground lease and also determine if the property is subject to any prohibitive development problems (such as liens, easements, encumbrances, etc.). The resulting title insurance policy insures the ground lease tenant's right of possession of the property for the term of the ground lease. Inclusion of a proper title insurance policy should also be included in lease negotiation process and the property owner and ground lease tenant (as well as their respective counsel), should negotiate the necessary endorsements to protect the parties involved.

IV. The Surveyor's Professional Obligations

A. Legal Descriptions

Writing land/legal descriptions suitable for a conveyance is under the purview of the professional land surveyor pursuant to Chapter 15, Division 3 of the California Business and Professions Code § 8726(1). There are some exceptions (exemptions) regarding who may write land/legal descriptions as defined in Chapter 15, Division 3 of the Business and Professions Code § 8730 (c) et. al. Writing a land/legal description, without the benefit of a field survey, in some instances, may be both acceptable and practical. Nevertheless, if a description is based on a field survey and that same field land survey discloses any item described in subdivision (b) of California Business and Professions Code § 8762, the surveyor is legally obligated to file a record of survey. Copies of California Business and Professions Code §§ 8726, 8730 and 8762 are attached to this paper as **Exhibit B**.

B. Records of Survey

In the event that a surveyor observes, through completion of a field survey, that there are encroachments on, under, over or near a particular piece of land owned by the State of California, that land surveyor is professionally obligated to file a "record of survey" pursuant to California Business and Professions Code § 8762 (b)(3) (and likely Sections 8762(b)(4) and 8762(b)(5)). It is common for a public/governmental land owner, such as a harbor or port authority, to have the State of California, (under the jurisdiction of the State Lands Commission) designated as the adjoining land owner in the form of "tidelands". A land surveyor may also file a record of survey if the surveyor discovers and documents any encroachments on public/governmental owned real property built by an adjacent landowner. An encroachment, not

properly reported and documented may turn into a claim for a property right⁹. Also a reminder, when determining mean high tide the County Surveyor is required to submit a copy of the survey to the State Lands Commission (Pursuant to the Government Code, Title 3, Division 2, Part 3, Ch. 11, Article 1).

V. Conclusion

An entire team of professionals is needed to properly construct a ground lease that is both accurate and protects the interests of the landlord/owner, tenant and the adjoining property owners. Professional land surveyors are an integral part of that team. Surveyors must view their obligations in determining accurate property legal descriptions in accordance with their obligations pursuant to the California Business and Professions Code, keeping in mind the long term nature of the lease. A professional surveyor is also required to file a record of survey in the layout of severable improvements relative to lines of title that have not been previously filed as included on a prior subdivision map, official map or previous record of survey. In establishing ground leases by field survey (where there are no improvements constructed), a surveyor is required to file a record of survey.¹⁰

Furthermore, although a surveyor is not legally required to set monuments, best practices dictate that the surveyor should still set these monuments for practical reasons. Conversely, if the surveyor is laying out improvements requested by the owner (lessor) and there are no title lines established, a record of survey is not required. This second scenario is common when surveying within the interior of airports, piers, harbors and ports.

These conclusions are partially predicated on the nature, terms and duration of a ground lease. An argument can be made that telecommunication cell towers are exempt from some requirements for several reasons - even though most have a field survey. This exemption relates

⁹ California Code of Regulations, Title 16, Division 5, § 404.2, Responsible Charge-Professional Land Surveying, (a) (3) (b) “Examples of questions to be answered by the land surveyor ... could relate to criteria for ... analysis of evidence related to written and unwritten property rights...”.

¹⁰ California Business and Professions Code § 8762 (b) (5) , which references “...other instrument of title recorded...”. Surveyors have hypothesized other instruments of title to be exclusive to fee title only. There is no basis for this hypothesis, which would include all instruments of record subject to a field survey, even when specifically exempted by the Subdivision Map Act pursuant to Section 66412; said subdivision exemptions do not exempt the surveyor from the Business and Professions Code (see Subdivision Map Act, Section 66498.6).

to the short term of the lease (generally 3-6 years) and the fact that the cell towers are not filed as a title document. Nevertheless, if the surveyor encounters any triggers such as material discrepancies, alternate positions or material evidence not appearing on any map as specifically listed in California Business and Professions Code § 8762, a record of survey would still be required for the title lines. Also, a surveyor is required to file a record of survey for a cell tower if any physical features of the cell tower are tied to a boundary line that becomes an established boundary by physical ties to physical features. Finally, a surveyor may consider filing a record of survey as a risk management tool if the cell tower equipment was constructed close to a boundary line because an encroachment may be actionable by the adjoining property owner.

The California Legislature is charged with protecting citizens through enacting statutes that will protect the public. Many important laws that govern the practice of land surveying are contained in Chapter 15, Division 3 of the California Business and Professions Code. Creating and maintaining ground leases is comparable to other land divisions and is governed by the California Business and Professions Code regulating professional land surveyors. Boundary determinations require a professional licensed surveyor to be highly skilled, accurate and meticulous in his/her work in order to produce an accurate survey. Failure to file a record of survey will constitute “negligence per se” by the licensed surveyor. California Code of Regulations, Title 16, Division 5, § 419 (e) (C) (2) specifically states:

“Negligence in the practice of professional engineering and/or land surveying: . . . (4) Failure to file a record of survey and/or corner record in the practice of professional land surveying”.

Noncompliance with the applicable statutory requirements constitutes negligence per se by the licensed surveyor. As this White Paper reports, in the course of a field survey, the professional licensed land surveyor is required to and must file a record of survey on a ground lease for the protection of the parties involved as well as pursuant to the licensed surveyor’s own statutory obligations.

VI. Practice Tips For Surveyors

1. Boundary Determination and State Plane Coordinates:

A property owner with large holdings should determine the extent of the entire property held. A boundary determination completed to a high level of accuracy and completeness allows the property owner to make wise planning decisions based on facts and also avoid liabilities and gaps in revenue streams associated with inaccurate property titles.

The initial cost of a complete and accurate land survey is certainly wise when considering the potential litigation costs of a boundary dispute. An accurate land survey will yield a return on investment over time. A proper and accurate survey should be tied to the state plane coordinate system allowing future surveyors to create accurate property descriptions of large parcels without having to perform a field survey for each subsequent parcel. Nevertheless – a note of caution with this approach. Writing property legal descriptions (from external parcel lines that were surveyed independently) may produce gaps and overlaps and invalidate the efficiency of using a coordinate system to describe parcels. The same caution holds true if the lines described were not based on the same epoch during a survey utilizing GPS equipment. Therefore, all surveys reporting state plane coordinates system must be in compliance with the California Public Resource Code, Sections § 8801-8819.

2. Title Insurance

The property owner/lessor and the tenant/lessee should purchase an ALTA title insurance policy and an accompanying accurate and complete ALTA/ACSM Land Title Survey for all ground leases thereby protecting both parties from certain title defects. Experienced and ethical surveyors should be hired to complete these ALTA surveys. The parties should select a surveyor based on qualifications rather than merely by picking the lowest bidder to complete the survey. Furthermore, a competent and qualified surveyor should be required to carry several million dollars in errors and omissions insurance prior to contract engagement.

3. Surveyors and Record of Survey

Surveyors may argue that a record of survey is not required in a specific situation – and sometimes, in limited situations, theoretically, this may be true. Nevertheless, in order to protect themselves from entering into a ground lease with boundary line problems and encroachments, the parties should ask the surveyor to commit (in writing) any of their reasons for any purported exemption to the California Business and Professions Code that requires a record of survey in the situations described above. A prudent surveyor always notes the nature of the lines¹¹ on the record of survey (i.e. lease line, easement line) so as not to confuse title or assessments. In addition to showing the nature of these lines, the prudent surveyor also addresses (by way of a note) that the exemptions to the Subdivision Map Act are not applicable and affirmatively notes the California Business and Professions Code § 8762.5.

¹¹ Pursuant to California Business and Professions Code, Section 8764 (g).

Furthermore, in order to protect themselves from unethical and inexperienced surveyors, the parties should solicit survey proposals from several firms – examining their qualifications and references. The parties should not just automatically pick the cheapest survey. A surveyor who is not in compliance with relevant California statutes can offer surveying services at a substantial discount – this should be a red flag for those parties seeking land surveying services. Inaccurate surveys without the requisite record of survey are certainly cheaper to produce but they can lead to future expenses vastly exceeding the initial cost of the record of survey.

VII. Disclaimers

The information contained in this document is the proprietary and exclusive property of the Land Surveyors Advisory Council on Technical Standards except as otherwise indicated. No part of this document, in whole or in part, may be reproduced, stored, transmitted, or used without the prior written permission of the Land Surveyors Advisory Council on Technical Standards. The information contained in this document is subject to change without notice.

David Woolley is a licensed surveyor with over 23 years of experience in the field. Mr. Woolley is not an attorney. As such, nothing in this article may be construed as offering any legal advice. The article is for basic informational purposes only and does not contain legal advice or legal opinions by the author or his staff. Any substantive legal questions should always be addressed to the reader's competent licensed legal counsel. As such, Mr. Woolley is not and cannot be liable for offering any legal advice or opinions in this informational article.

LSACTS Executive Board Members

David W. Ambler, PLS

Robert Lee McComb, PLS

Michael S. Butcher, PLS

Michael J. Pallamary, PLS

Sean C. Englert, PLS

Lawrence A. Stevens, PLS

Gary L. Hus, PLS, CFEDS

D. Ian Wilson, PLS

Gregory P. Hopkins, PLS

David E. Woolley, PLS

Casey Lynch, PLS

Contact Us

Web: www.lsacts.com

1 of 8 DOCUMENTS

DEERING'S CALIFORNIA CODES ANNOTATED
 Copyright (c) 2009 by Matthew Bender & Company, Inc.
 a member of the LexisNexis Group.
 All rights reserved.

* THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED THROUGH CH. 3 OF*
 THE 2009-2010 REG. SESS., CH. 12 OF THE 2009-2010 2d EX. SESS., EFF. 5/21/09,
 CH. 25 OF THE 2009-2010 3d EX. SESS., THE GOVERNOR'S REORGANIZATION PLAN #1 OF
 2009, EFF. MAY 10, 2009, & PROP. 1F APPROVED, EFF. MAY 20, 2009

BUSINESS & PROFESSIONS CODE
 Division 3. Professions and Vocations Generally
 Chapter 15. Land Surveyors
 Article 3. Application of the Chapter

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal **Bus & Prof** Code § **8726** (2008)

§ **8726**. "Land surveying"

A person, including any person employed by the state or by a city, county, or city and county within the state, practices land surveying within the meaning of this chapter who, either in a public or private capacity, does or offers to do any one or more of the following:

(a) Locates, relocates, establishes, reestablishes, or retraces the alignment or elevation for any of the fixed works embraced within the practice of civil engineering, as described in Section 6731.

(b) Determines the configuration or contour of the earth's surface, or the position of fixed objects above, on, or below the surface of the earth by applying the principles of mathematics or photogrammetry.

(c) Locates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries.

(d) Makes any survey for the subdivision or resubdivision of any tract of land. For the purposes of this subdivision, the term "subdivision" or "resubdivision" shall be defined to include, but not be limited to, the definition in the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) or the Subdivided Lands Law (Chapter 1 (commencing with Section 11000) of Part 2 of Division 4 of this code).

(e) By the use of the principles of land surveying determines the position for any monument or reference point which marks a property line, boundary, or corner, or sets, resets, or replaces any monument or reference point.

(f) Geodetic or cadastral surveying. As used in this chapter, geodetic surveying means performing surveys, in which account is taken of the figure and size of the earth to determine or predetermine the horizontal or vertical positions of fixed objects thereon or related thereto, geodetic control points, monuments, or stations for use in the practice of land surveying or for stating the position of fixed objects, geodetic control points, monuments, or stations by California Coordinate System coordinates.

(g) Determines the information shown or to be shown on any map or document prepared or furnished in connection with any one or more of the functions described in subdivisions (a), (b), (c), (d), (e), and (f).

(h) Indicates, in any capacity or in any manner, by the use of the title "land surveyor" or by any other title or by any other representation that he or she practices or offers to practice land surveying in any of its branches.

(i) Procures or offers to procure land surveying work for himself, herself, or others.

(j) Manages, or conducts as manager, proprietor, or agent, any place of business from which land surveying work is solicited, performed, or practiced.

(k) Coordinates the work of professional, technical, or special consultants in connection with the activities authorized by this chapter.

(l) Determines the information shown or to be shown within the description of any deed, trust deed, or other title document prepared for the purpose of describing the limit of real property in connection with any one or more of the functions described in subdivisions (a) to (f), inclusive.

(m) Creates, prepares, or modifies electronic or computerized data in the performance of the activities described in subdivisions (a), (b), (c), (d), (e), (f), (k), and (l).

(n) Renders a statement regarding the accuracy of maps or measured survey data.

Any department or agency of the state or any city, county, or city and county that has an unregistered person in responsible charge of land surveying work on January 1, 1986, shall be exempt from the requirement that the person be licensed as a land surveyor until the person currently in responsible charge is replaced.

The review, approval, or examination by a governmental entity of documents prepared or performed pursuant to this section shall be done by, or under the direct supervision of, a person authorized to practice land surveying.

Added Stats 1939 ch 41 § 1. Amended Stats 1941 ch 834 § 1.5; Stats 1961 ch 2225 § 1; Stats 1983 ch 625 § 4, ch 760 § 4; Stats 1985 ch 670 § 1; Stats 1987 ch 805 § 3; Stats 1988 ch 817 § 1; Stats 1990 ch 1226 § 2 (AB 3395); Stats 1991 ch 350 § 1 (AB 427); Stats 1995 ch 579 § 2 (AB 1566), effective October 4, 1995, operative January 1, 1996; Stats 2006 ch 760 § 6 (SB 1849), effective January 1, 2007.

Amendments:

1941 Amendment:

Substituted the section for the former section which read: "Land surveying comprises all or any combination of the following practices:

"(a) The making of such observations and measurements as will determine the relative positions of points, areas, structures or natural objects on the earth's surface, or related thereto.

"(b) The surveying of areas:

"(1) For their correct determination and description and for conveyancing.

"(2) For the establishment or reestablishment of land boundaries.

"(3) For the platting of lands and subdivisions.

"(4) For the setting of reference or other monuments to perpetuate such observations, measurements and surveys."

1961 Amendment:

Added "or photogrammetry" in subd (d).

1983 Amendment:

(1) Amended subd (a) by substituting (a) "the" for "any property line or boundary of any parcel of land or any road, right-of-way, easement," after "retraces"; and (b) "Section 6731" for "Chapter 7, Division 3 of this code"; (2) added subds (b) and (c); (3) redesignated former subds (b) and (c) to be subds (d) and (e); (4) deleted former subd (d) which read: "(d) Determines the configuration or contour of the earth's surface or the position of fixed objects thereon or related thereto, by means of measuring lines and angles, and applying the principles of trigonometry or photogramme-

try."; (5) added the comma after "resets" in subd (e); (6) redesignated former subs (e)-(i) to be subs (f)-(j); and (7) substituted "subdivisions (a), (b), (c), (d), (e), and (f)" for "subsections (a), (b), (c), (d) and (e)" in subd (g). (As amended by Stats 1983, ch 760, compared to the section as it read prior to 1983. This section was also amended by an earlier chapter, ch 625. See Gov C § 9605.)

1985 Amendment:

Added (1) ", including any person employed by the state or by a city, county, or city and county within the state," in the introductory clause; (2) the second sentence of subd (d); and (3) the second paragraph.

1987 Amendment:

In addition to making technical changes, added (1) subd (k); and (2) the last paragraph.

1988 Amendment:

(1) Added subd (k); and (2) redesignated former subd (k) to be subd (l).

1990 Amendment:

Added subd (m).

1991 Amendment:

(1) Made technical changes in subs (c) and (d); and (2) added subd (f).

1995 Amendment:

(1) Deleted "such" after "replaces any" in subd (e); (2) added the second sentence of subd (f); and (3) substituted "the" for "such" after "surveyor until" in the second paragraph.

2006 Amendment:

(1) Amended subd (b) by (a) substituting "above, on," for "thereon"; (b) substituting "below the surface" for "related thereto, by means"; and (c) substituting "the earth by" for "measuring lines and angles, and"; (2) amended subd (f) by (a) adding "fixed objects there on or related thereto, geodetic control" after "vertical positions of"; and (b) adding "fixed objects, " after "position of"; and (3) added subd (n).

Historical Derivation:

Stats 1933 ch 506 § 1a, as amended Stats 1935 ch 775 § 1.

Note

Stats 1988 ch 817 provides:

SEC. 3. Nothing contained in this act is intended to restrict the ability of a local agency to use nonlicensed persons to perform administrative or business activities related to land surveying.

SEC. 4. The amendment in Section 1 of this act is declaratory of existing law and is not intended to restrict the scope of practice of registered professional engineers within their respective scope of practice.

SEC. 5. The amendment in Section 1 of this act is declaratory of existing law and is not intended to restrict the practice of persons licensed to practice law in California, nor is it intended to be applicable to persons licensed pursuant to Part 6 (commencing with Section 12340) of Division 2 of the Insurance Code, nor to persons licensed pursuant to Part 1 (commencing with Section 10000) of Division 4 of the Business and Professions Code, so long as those persons engage in the respective practice of their profession, but who may coordinate work pursuant to subdivision (k) of Section 8726 of the Business and Professions Code.

Stats 1990 ch 1226 provides:

SEC. 3. The amendments made to Sections 6731, 6731.1 and 8726 by this act are intended to recognize a media change from a paper-based system to a computer-based system and are not intended to expand the regulated scope of practice of engineering or land surveying services.

The amendments to Sections 6731, 6731.1, and 8726 of the Business and Professions Code contained in this act are not intended to restrict the activities of an entity possessing a license or certificate under Chapter 1 (commencing with Section 12340) of Part 6 of Division 2 of the Insurance Code.

Stats 1995 ch 579 provides:

SECTION 1. This act shall be known and may be cited as the Omnibus Local Government Act of 1995.

The Legislature finds and declares that operating costs can be decreased by reducing the number of separate bills affecting related topics by consolidating these bills into a single measure. Therefore, in enacting this act, it is the intent of the Legislature to consolidate several minor, noncontroversial statutory changes relating to public agencies into a single measure.

SEC. 21. If any provision of this act or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 22. All sections of this except Sections 19 and 20 shall become operative January 1, 1996.

Cross References:

Photogrammetry: B & P C §§ 8775 et seq.

Rules for construing description of lands in conveyances: CCP § 2077.

Subdivision Map Act: Gov C §§ 66410 et seq.

Registered professional forester not authorized to practice land surveying: Pub Res C § 758.

Collateral References:

Cal. Legal Forms, (Matthew Bender) §§ 28B.01, 28B.22[3], 30C.01, 30C.10[4].

Forms:

Suggested forms are set out below, following notes of decisions.

Attorney General's Opinions:

Preparation of maps, whether by aerial or ground photogrammetry, as constituting land surveying for which license is required. 16 Ops. Cal. Atty. Gen. 60.

Functions of surveying, mapping and computing carried on in connection with leveling agricultural crop land as not constituting practice of land surveying. 19 Ops. Cal. Atty. Gen. 55.

Photogrammetric mapping contracts as calling for activities within the scope of this section. 23 Ops. Cal. Atty. Gen. 86.

Improvement plans for a subdivision constituting design documents may not be signed by licensed land surveyor. 58 Ops. Cal. Atty. Gen. 430.

Hierarchy Notes:

Div. 3, Ch. 15 Note

NOTES OF DECISIONS

1. Applicability

1. Applicability

Contract to furnish photogrammetry contour maps did not involve land surveying which could only be done by licensed surveyor or civil engineer, where, among other things, ground control work was exclusively for, an integral part of production of aerial photograph and photogrammetry. Hill v. Kirkwood (1958, Cal App 3d Dist) 161 Cal App 2d 346, 326 P2d 599, 1958 Cal App LEXIS 1740.

SUGGESTED FORMS

Contract of Employment of Land Surveyor--Location of Disputed Boundary Line

Contract of Employment of Land Surveyor--Provision--Surveyor To Utilize Original Government Surveys

Contract of Employment of Land Surveyor--Provision--Surveyor's Notice to, and Request for Assistance from, Parties

Contract of Employment of Land Surveyor--Provision--Preparation of Map by Land Surveyor

DEERING'S CALIFORNIA CODES ANNOTATED
Copyright (c) 2010 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH 2009-2010 EXTRAORDINARY SESSIONS 1-5, ***
7, AND 8, AND URGENCY LEGISLATION THROUGH CH 733 OF THE 2010 REGULAR SESSION
AND CH 3 OF THE 2009-2010 6TH EXTRA SESSION

BUSINESS & PROFESSIONS CODE
Division 3. Professions and Vocations Generally
Chapter 15. Land Surveyors
Article 3. Application of the Chapter

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Bus & Prof Code § **8730** (2010)

§ **8730. Persons exempt from license requirement**

The following persons are not required to be licensed under this chapter:

(a) Officers and employees of the United States of America, practicing solely as those officers or employees, except when surveying the exterior boundaries of federal lands in this state.

(b) Insofar as he or she acts in the following capacity:

(1) Any state, county, city, city and county, or district employee directly responsible to a licensed land surveyor or registered civil engineer.

(2) Any subordinate to a land surveyor or civil engineer licensed or registered as required by the laws of this state insofar as he or she acts as a subordinate.

(c) Any officer or employee of an electric, gas, or telephone corporation, as defined in Sections 218, 222, and 234, respectively, of the Public Utilities Code, with annual revenues of twenty-five million dollars (\$25,000,000) or more, whenever he or she prepares a legal description of an easement for utility distribution lines and service facilities, provided the following conditions are met:

(1) Each description identifies the corporation that prepared the description and states that it was prepared pursuant to this exemption.

(2) Each corporation has in its employ, or on contract, an individual authorized to practice land surveying who shall be responsible for establishing criteria for determining the qualifications of technical specialists preparing those legal descriptions, specifying the format and information to be shown on maps or documents containing those descriptions, and capable of answering questions regarding the preparation of those descriptions.

(d) Any state, county, city, or city and county public safety employee investigating any crime or infraction for the purpose of determining or prosecuting a crime or infraction. This exemption shall not permit a public safety employee to offer or perform land surveying as defined in Section 8726 for any purpose other than determining or prosecuting a crime or infraction.

HISTORY:

Added Stats 1939 ch 41 § 1. Amended Stats 1941 ch 834 § 5; Stats 1985 ch 670 § 2; Stats 1990 ch 1520 § 1 (AB 4138); Stats 1999 ch 125 § 1 (AB 1341).

NOTES:

Amendments:

1941 Amendment:

Substituted subd (b) for former subd (b) which read: "(b) In so far as he acts in such capacity, any subordinate to:

"(1) Any State, county or city officer.

"(2) Any other land surveyor or civil engineer licensed or registered as required by the laws of this State.

"(3) Any land surveyor or civil engineer exempted from licensing under this chapter or registration under Chapter 7 of Division III of this code, relating to civil engineers."

1985 Amendment:

In addition to making technical changes, added ", except when surveying the exterior boundaries of federal lands in this state" in subd (a).

1990 Amendment:

Added subd (c).

1999 Amendment:

Added (1) "persons" after "The following" in the introductory clause; (2) "city and county," in subd (b)(1); and (3) subd (d).

Historical Derivation:

Stats 1933 ch 506 § 13.

Cross References:

"Responsible charge of work": B & P C § 8703.

"Subordinate" to land surveyor: B & P C § 8705.

Collateral References:

Cal. Legal Forms, (Matthew Bender(R)) §§ 28B.01, 28B.22.

Hierarchy Notes:

Div. 3, Ch. 15 Note

LexisNexis 50 State Surveys, Legislation & Regulations

Land Surveying

DEERING'S CALIFORNIA CODES ANNOTATED
Copyright (c) 2009 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

* THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED THROUGH CH. 3 OF*
THE 2009-2010 REG. SESS., CH. 12 OF THE 2009-2010 2d EX. SESS., EFF. 5/21/09,
CH. 25 OF THE 2009-2010 3d EX. SESS., THE GOVERNOR'S REORGANIZATION PLAN #1 OF
2009, EFF. MAY 10, 2009, & PROP. 1F APPROVED, EFF. MAY 20, 2009

BUSINESS & PROFESSIONS CODE

Division 3. **Professions** and Vocations Generally
Chapter 15. Land Surveyors
Article 5. Surveying Practice

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Bus & Prof Code § **8762** (2008)

§ **8762. Records of surveys; Filings**

(a) Except as provided in subdivision (b), after making a field survey in conformity with the practice of land surveying, the licensed surveyor or licensed civil engineer may file with the county surveyor in the county in which the field survey was made, a record of the survey.

(b) Notwithstanding subdivision (a), after making a field survey in conformity with the practice of land surveying, the licensed land surveyor or licensed civil engineer shall file with the county surveyor in the county in which the field survey was made a record of the survey relating to land boundaries or property lines, if the field survey discloses any of the following:

(1) Material evidence or physical change, which in whole or in part does not appear on any subdivision map, official map, or record of survey previously recorded or properly filed in the office of the county recorder or county surveying department, or map or survey record maintained by the Bureau of Land Management of the United States.

(2) A material discrepancy with the information contained in any subdivision map, official map, or record of survey previously recorded or filed in the office of the county recorder or the county surveying department, or any map or survey record maintained by the Bureau of Land Management of the United States. For purposes of this subdivision, a "material discrepancy" is limited to a material discrepancy in the position of points or lines, or in dimensions.

(3) Evidence that, by reasonable analysis, might result in materially alternate positions of lines or points, shown on any subdivision map, official map, or record of survey previously recorded or filed in the office of the county recorder or the county surveying department, or any map or survey record maintained by the Bureau of Land Management of the United States.

(4) The establishment of one or more points or lines not shown on any subdivision map, official map, or record of survey, the positions of which are not ascertainable from an inspection of the subdivision map, official map, or record of survey.

(5) The points or lines set during the performance of a field survey of any parcel described in any deed or other instrument of title recorded in the county recorder's office are not shown on any subdivision map, official map, or record of survey.

(c) The record of survey required to be filed pursuant to this section shall be filed within 90 days after the setting of boundary monuments during the performance of a field survey or within 90 days after completion of a field survey, whichever occurs first.

(d)

(1) If the 90-day time limit contained in subdivision (c) cannot be complied with for reasons beyond the control of the licensed land surveyor or licensed civil engineer, the 90-day time period shall be extended until the time at which the reasons for delay are eliminated. If the licensed land surveyor or licensed civil engineer cannot comply with the 90-day time limit, he or she shall, prior to the expiration of the 90-day time limit, provide the county surveyor with a letter stating that he or she is unable to comply. The letter shall provide an estimate of the date for completion of the record of survey, the reasons for the delay, and a general statement as to the location of the survey, including the assessor's parcel number or numbers.

(2) The licensed land surveyor or licensed civil engineer shall not initially be required to provide specific details of the survey. However, if other surveys at the same location are performed by others which may affect or be affected by the survey, the licensed land surveyor or licensed civil engineer shall then provide information requested by the county surveyor without unreasonable delay.

(e) Any record of survey filed with the county surveyor shall, after being examined by him or her, be filed with the county recorder.

(f) If the preparer of the record of survey provides a postage-paid, self-addressed envelope or postcard with the filing of the record of survey, the county recorder shall return the postage-paid, self-addressed envelope or postcard to the preparer of the record of survey with the filing data within 10 days of final filing. For the purposes of this subdivision, "filing data" includes the date, the book or volume, and the page at which the record of survey is filed with the county recorder.

Added Stats 1939 ch 41 § 1. Amended Stats 1939 ch 524 § 1; Stats 1941 ch 834 § 9; Stats 1949 ch 1028 § 7; Stats 1974 ch 1065 § 1; Stats 1980 ch 676 § 20; Stats 1983 ch 142 § 1; Stats 1984 ch 943 § 1; Stats 1994 ch 26 § 219 (AB 1807), effective March 30, 1994; Stats 1996 ch 872 § 2 (AB 3472); Stats 2000 ch 678 § 3 (SB 1563); Stats 2002 ch 1013 § 67 (SB 2026); Stats 2003 ch 607 § 39 (SB 1077).

Amendments:

1941 Amendment:

Substituted the section for the former section which read: "After making a survey in conformity with the practice of land surveying, the surveyor or civil engineer may file with the county surveyor in the county in which the survey was made, a record of such survey. Within one hundred eighty (180) days after the establishment of points or lines, the licensed land surveyor or registered civil engineer shall file with the county surveyor in the county in which the survey was made, a record of any such survey, relating to land boundaries or property lines:

"(a) Which is based in whole or in part on evidence not appearing on any map or record previously recorded or filed in the office of the county recorder, county clerk or municipal or county surveying department.

"(b) Which discloses a material discrepancy with the record so appearing or with the records of the General Land Office of the United States.

"(c) Which discloses evidence that, by reasonable analysis, might result in alternate positions of lines or points.

"Any record of survey filed with the county surveyor shall after being examined by him be filed with the county recorder."

1949 Amendment:

Substituted "Bureau of Land Management of the United States" for "General Land Office of the United States" at the end of subd (a).

1974 Amendment:

Added "or physical change" after "Material evidence" in subd (a).

1980, 1983 Amendments:

Routine code maintenance.

1984 Amendment:

(1) Amended the introductory clause of the second paragraph by (a) substituting "After making a survey in conformity with the practice of land surveying," for "Within 90 days after the establishment of points or lines"; (b) deleting the comma after "was made"; and (c) substituting "if the survey" for "which"; (2) amended subd (a) by substituting (a) "subdivision map, official map, or record of survey" for "map or record"; and (b) "or county surveying department, or map or survey record maintained by" for ", county clerk, municipal or county surveying department or in the records of"; (3) substituted subs (b), (c), and (d) for former subs (b), (c), and (d) which read: "(b) A material discrepancy with the record.

"(c) Evidence that, by reasonable analysis, might result in alternate positions of lines or points.

"(d) The establishment of one or more lines not shown on any such map, the positions of which are not ascertainable from an inspection of the map without trigonometric calculations."; (4) added subd (e); (5) added the third through fifth paragraphs; and (6) added the commas after "surveyor shall" and after "or her" in the last paragraph.

1994 Amendment:

The amendment made no change.

1996 Amendment:

(1) Added "field" before "survey" wherever it appears in the first and second paragraphs; (2) deleted "without trigonometric calculations" at the end of subd (d); and (3) amended subd (e) by (a) substituting "the performance of a filed survey" for "a survey" in the first paragraph; and (b) adding "field" before "survey" both times it appears in the second paragraph.

2000 Amendment:

(1) Added "properly" after "recorded or" in subd (d); (2) substituted "the time at which" for "such time as" in the first sentence of the fourth paragraph; and (3) added the sentence of the last paragraph.

2002 Amendment:

(1) Added subdivision designations (a) and (b); (2) substituted "licensed surveyor or licensed" for "surveyor or" in subd (a); (3) substituted "licensed" for "registered" after "land surveyor or" in the introductory clause of subd (b) and wherever it appears in subs (d) and (e); (4) redesignated former subs (a)-(e) to be subs (b)(1)-(b)(5); (5) added subdivision designations (c)-(f); and (6) added subd (g).

2003 Amendment:

(1) Amended subd (a) by adding (a) "Except as provided in subdivision (b),"; and (b) "field" after "in which the"; (2) added "Notwithstanding subdivision (a), in subd (b); (3) redesignated former subds (d) and (e) to be subds (d)(1) and (d)(2); (4) substituted "subdivision (c)" for "this section" in the first sentence of subd (d)(1); (5) redesignated former subd (f) and (g) to be subds (e) and (f); and (6) substituted "with the county recorder" for "by the county surveyor" in the last sentence of subd (f).

Historical Derivation:

Stats 1933 ch 506 § 11.3, as added Stats 1935 ch 775 § 9.

Cross References:

Survey of lands divided by county line: Gov C § 27552.

Survey and preparation of final map after approval of tentative map: Gov C § 66456.

Collateral References:

Cal. Legal Forms, (Matthew Bender) §§ 28B.01, 28B.22[3].

Attorney General's Opinions:

Land surveyor contracting for his services with the Federal Government as required to comply with this section. 3 Ops. Cal. Atty. Gen. 334.

Survey map filed with County Recorder pursuant hereto may show lines thereon which do not represent existing boundary or property lines. 18 Ops. Cal. Atty. Gen. 110.

Prohibition against recording record of survey until it has been filed with, and examined and approved by, county surveyor. 30 Ops. Cal. Atty. Gen. 119.

Filing date of record of survey. 34 Ops. Cal. Atty. Gen. 42.

City or county may not require field survey to be performed or record of survey to be filed for lot line adjustment which involves creation of new points or lines not shown on any subdivision map, official map, or record of survey, position of which are not ascertainable from inspection of subdivision map, official map, or record of survey without trigonometric calculations. 77 Ops. Cal. Atty. Gen. 231.

A city or county may not require a field survey to be performed or a record of survey to be filed for a lot line adjustment which involves the creating of new points or lines not shown on any subdivision map, official map, or record of survey, the position of which are not ascertainable from an inspection of the subdivision map, official map, or record of survey without trigonometric calculations. 77 Ops. Cal. Atty. Gen.

Hierarchy Notes:

Div. 3, Ch. 15 Note

NOTES OF DECISIONS

1. Generally

1. Generally

In a mandamus proceedings by surveyor to compel county surveyor and county recorder to accept record of survey of tract owned by petitioner's employer, court properly ruled that employer should be joined as petitioner if he desired to

have adjudication on question whether map of its property, prepared in accordance with Land Surveyors' Act should be filed for recordation. *Thomasson v. Jones* (1945, Cal App) 68 Cal App 2d 640, 157 P2d 655, 1945 Cal App LEXIS 811.

In a mandamus proceeding by surveyor to compel county surveyor and county recorder to accept record of survey of tract, petitioner, as mere employee of owner, has no direct interest in matter entitling him to relief. *Thomasson v. Jones* (1945, Cal App) 68 Cal App 2d 640, 157 P2d 655, 1945 Cal App LEXIS 811.