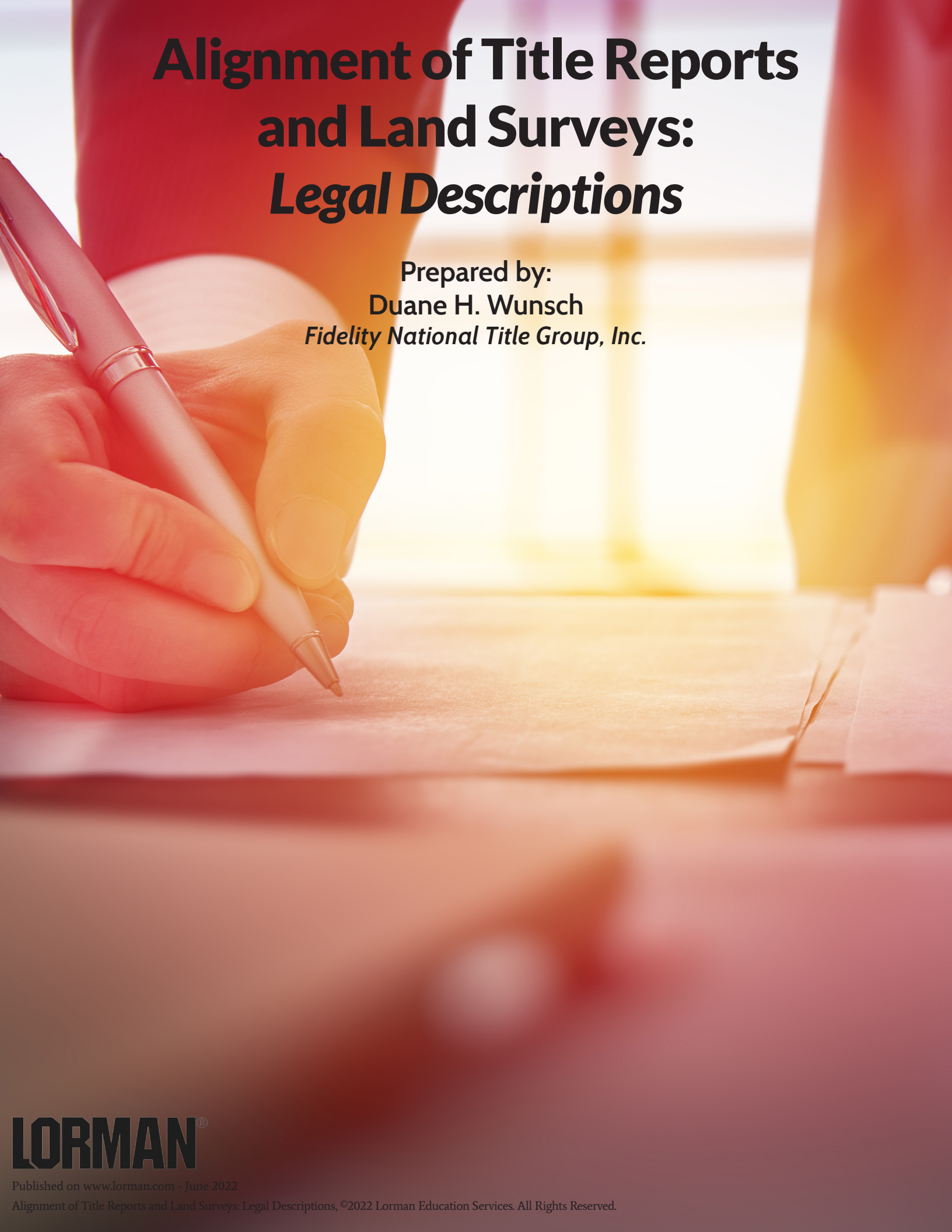

Alignment of Title Reports and Land Surveys: *Legal Descriptions*

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I. LEGAL DESCRIPTIONS

A. Historical Background

1. Statute of Frauds

Transfers of real property are subject to the Statute of Frauds, which provides that no action shall be brought upon real estate contracts unless the agreement or some memorandum thereof shall be in writing and signed by the person sought to be charged or by his authorized agent. Though the statutes vary considerably, all but two states have codified one or more versions of the Statute of Frauds. The following is an example of a Statute of Frauds.

> Agreements required to be in writing
>
> Every agreement, promise, or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent if such agreement, promise, or undertaking:… 10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting. or leasing of any real estate or interest therein…
>
> N.Y. Gen. Oblig. Law § 5-701(a)

The Statute of Frauds applies to conveyances, including deeds, mortgages, and easements by express grant as well as contracts for the purchase of an interest in real estate. Thus, deeds, mortgages, and conveyances generally will not be accorded validity unless they contain a description of the property thereby conveyed. But not any description will do. To satisfy the Statute of Frauds, the conveyance's description must meet minimal criteria, and these criteria are objective, not subjective to the grantor or the conveyance's drafter. Thus, the description that refers to the structure that occupies the land's surface, though accurate, rather than the land itself is insufficient, and will be insufficient to describe the land. Similarly, a description consisting of the words "all my land, wherever located," though sincerely meant, is vague, and barring unusual circumstances will not suffice. The Statute of Frauds also applies to contracts for the purchase of real estate or "executory contracts", which will not be discussed here. The drafting or preparation of conveyance descriptions is time-worn practice where convention,

not experimentation, prevails, and where familiarity with local practice, not novelty or linguistic digression, is rewarded.

There are many examples of documents that were drawn by individuals who lacked proficiency in the requirements of the Statute of Frauds. Parties who prepare conveyances or who examine titles must assure that they are familiar with the applicable laws and concepts that apply to the conveyance's description.

2. American Colonies and the Southwest

   Twenty states, which include all of the original thirteen American colonies, were not a part of National Land System created by the federal Ordinance of 1785. Land division patterns in the twenty older states as a result tend to be more variable than those in other states. Rectangular systems, though not entirely uniform, were used in several New England states before the Revolutionary War. The objective of these parcels was to furnish the settler with a tract small enough to permit easy access from the farthest part to the town-meeting place. In the Southwest, the sources of land titles were from Spain, Mexico, Texas, and the United States, the descriptions for which were a type of metes and bounds. When the Texas gained independence from Mexico and the United States acquired Mexican territory, the United States agreed to recognize Spanish and Mexican land titles, leaving intact the property descriptions. Post-1848 titles created as the result of patents issued by the United States were based upon rectangular systems.

3. United States Land Survey

   a. A uniform sectionalized, rectangular land system

      The method of surveying and describing real estate depends entirely upon local, historical events that are beyond the scope of this discussion. Of general interest to states other than the original American colonies and parts of the Southwest, a sectionalized land system was first developed in the Northwest Territory – the present-day states of Ohio, Indiana, Illinois, Michigan, and Wisconsin, and followed by similar government surveys in the remaining states. Congress provided that the Northwest Territory should be divided into townships, that townships were to be six miles

square, and that townships were to contain thirty-six sections, each one-mile square. A north-south line, known as the *principal meridian*, was devised so that it was possible to divide the Northwest Territory into a series of north-south lines six miles apart. The territory was divided into numerous six-mile wide north-south strips or "ranges," which were numbered consecutively. States in the Northwest Territory were also divided using east-west lines six miles apart, beginning at a line known as the *baseline*. The intersection of the principal meridian and the baseline is known as the *initial point*. Once the baseline was located, the bbaselinewas extended east and west on a true parallel of latitude, standard quarter-sections then being established alternatively at intervals of 40 chains (1/2 mile) and standard township corners being placed at intervals of 480 chains (6 miles). At intervals of 24 miles north and south of the baseline, lines known as *standard parallels* were run east and west from the principal meridian. Standard parallels were liens established in a manner identical with that prescribed for the baseline

Problems were encountered by the land surveyors who located the range lines on the ground at the time of the government survey.

> Due to the curvature of the earth, these north-south lines converge as they are extended toward the North Pole. In order to keep the lines as nearly six miles apart as possible, the lines were laid out for a distance of 60 miles, then stopped and moved over so that they were again six miles apart. This resulted in some sections, particularly those located on the western side of the township, being larger or smaller than 640 acres. In extreme cases parts of such sections were divided into government lots.

James B. MacDonald and J.R. DeWitt, I Wisconsin Practice 100 (1973).

The result of the sectionalized government survey (Exhibit 6) is that it is possible to know the approximate surface area of sections and quarter sections, and the approximate dimensions of sections and quarter sections without having had the benefit of a contemporary land survey. The original

government land survey maps are usually available for inspection in the office of the county register of deeds.

In sparsely populated rural areas, legal descriptions that consist of sections (640 acres), quarter sections (160 acres) or quarter-quarter sections (40 acres) are commonplace. Many of these descriptions consist of nothing more than quarter-quarter sections in the original government land survey. For example, "The Southwest 1/4 of the Southeast 1/4 of Section 12, Township 36 North, Range 4 West" describes a tract of approximately 40 acres of land that has not been subdivided beyond the government land survey. Although the description lacks any specification of surface area and a perimeter, the description is sufficiently specific to meet the requirements of the Statute of Frauds when included in the conveyance.

The sectionalized land survey systems introduced by act of Congress and surveyed by government surveyors vary considerably. "A California surveyor would be lost if he tried to apply California methods within Ohio, Louisiana, or Florida. Even between states within the Northwest Territory, there are differences applicable at different stages of development." Curtis M. Brown, Boundary Control and Legal Principles, §1.17, 31 (2d. ed. 1969). The sectionalized land survey systems left pre-survey communities as they found them: Occupation lines, once formed, remain unsymmetrical as they are, to the present day.

b. Unwarranted assumptions about the government land survey

For all its value, it is important to appreciate the limitations of the original government land survey. When property boundaries are surveyed or drawn, land surveyors and drafters that make assumptions in preparing legal descriptions fail to ascertain the inherent approximations that the government land survey includes, and therefore provide wrong findings or erroneous opinions concerning the boundary measurements. In some instances, boundary disputes have occurred as a direct result of these unwarranted assumptions.

i. False assumption: "The angle of the east-west and north-south town lines is always 0 degrees, 0 minutes, 0 seconds."

When the call "thence west…" appears in a description, surveyors have not always agreed whether the call means west parallel with the section line, or alternatively North 0 degrees, 0 minutes, 0 seconds West. In the event that the legal descriptions are prepared by surveyors having opposite viewpoints, the description in the deeds of the adjoining parcels will ultimately overlap one another.

ii. False assumption: "All quarter-quarter sections are 1,320 feet in length."

The government land survey was designed to accomplish a division of lands into quarter-quarter sections that were measured approximately 1,320 feet from east to west and from north to south, but not exactly so. Land surveys have occasionally been prepared on the false assumption that the quarter-quart section was 1,320 feet in length, with the result that a new description after it appeared in a recorded deed, caused an overlap with an adjoining deed. For example, the surveyor assumed, without finding the actual length of the quarter-quarter section line, that the "The East ½ of the Northwest ¼ of the Northeast 1/4" could be revised by substituting the description: "The East 660 feet of the Northwest ¼ of the Northeast 1/4." However, in the event that the actual length of the quarter-quarter section line is 1,308 feet rather than 1,320, an overlap of 6 (1,320 minus 1,308 = 12; 12 divided by 2 = 6) feet all along the boundary line of the adjoining parcel will have been inadvertently created by the new description.

iii. False assumption: "The centerline of the public highway is always the section line."

Although the centerline of the highway is sometimes the section line, this is not always the case. If it is wrongly assumed without locating the section corners that the section line is the centerline of the highway and a new description is based on this assumption, the description will either overlap that of the adjoining parcel or

alternatively, a gap between the two parcels will have been created.

B. Metes and Bounds Descriptions

A metes and bounds description (Exhibit 7) is a description that is not described by reference to a lot or block shown on a map but is defined by starting at a known point and describing, in sequence, the lines forming the boundaries of the property. Curtis M. Brown, Boundary Control & Legal Principles 355 (1969).

> "Metes" means to measure or to assign by measurement and "bounds" means the boundary of the land or the limits and extend of a property. "Metes and bounds descriptions" may be distinguished from "metes descriptions" and "bounds descriptions."
>
> Bounds descriptions are perimeter descriptions, but they do not have a direction of travel: "All of that land bounded on the north by Thelma Len; bounded on the south by Roger River; bounded on the west by the land of Thomas L. Brown; and bounded on the east by the land of Ruth Almstead." The sequence of the reciting the bounds is immaterial; the description has no mandatory direction of travel.
>
> Metes descriptions are perimeter descriptions described by measurements, have a direction of travel, and recite no bounds (adjoiners). Often a metes description is included with the common usage of the terms metes and bounds.
>
> Curtis M. Brown, Boundary Control & Principles 10 (1969).

C. Surface Area Descriptions

In rural areas in which an agrarian economy once was or is predominant, land values derived value from the quantity of surface area. Legal descriptions contained in many recorded conveyances referred to surface area only, not metes and bounds.

> Example: "One acre in the Northwest corner of the Northeast ¼ of the Southeast ¼ of Section 26…"

Surface area descriptions, though only a rough approximation of the land conveyed, were once commonplace. They continue to be

valuable in those areas where land tracts are large, principally in the northern half of the state, because they enable the title searcher to distinguish, with what little available descriptions and maps exist, the seller's land from the land of adjoining owners. For example, if the seller acquired the title by means of a deed stating "The South 20 acres of the Northwest ¼ of the Northwest ¼," and there is a deed conveying property in the same quarter section to an adjoining owner that stated: "The North 20 acres…" the title searcher is reasonably assured unless the county mapping indicates that the quarter section contains fewer than forty acres, that the seller's land is free from any overlapping conveyance on the part of the adjoining owners.

When the description of the seller or a predecessor in title is of surface area type, it is necessary to determine whether the description is sufficiently definite so as to describe the land and whether the description can be reconciled with the descriptions for adjoining lands of others. If the description is vague and indefinite, a new land survey together with correction deeds may be required. There have been several reported decisions involving the validity of conveyances that contained such descriptions.

Example:

"The southeast corner of the southeast quarter of section 34." "Manifestly that describes nothing… There can be no such construction where there is nothing to locate except a corner without dimensions." Morse v. Stockman, 73 Wis. 89, 40 N.W. 679 (1888).

D. Land Division Instruments

1. Land divisions recognized by state law

Depending upon the state, there are often different types of property descriptions, each subject to statutory imperatives concerning their content (Exhibit 8). Plats are geometric versions of a property description that, until the plat was creative, was in narrative form only. To most viewers, a plat, owing to its graphic or spatial features, offers a more easily understandable rendition of the description of real estate than a narrative description. However, plats, depending upon the state, constitute both a representation on paper of an actual location on the ground and a unit of subdivision recognized by the statute

of the state that restrict or regulate land divisions. State statute laws may recognize any number of plat-related land division devices that entail document format, vehicular access, approval by government departments or agencies, and filing in the public land records. Because statute laws concerning what such stylized plats shall contain vary considerably, standards and criteria that pertain to statutory plats are beyond the scope of this discussion.

2. Reference to a future subdivision plat

Where after having entered into a purchase agreement the seller, due to a change in circumstance, intended to keep the vacant lots and undertake development themselves, the purchaser filed suit seeking specific performance and damages. The purchase agreement providing for the sale of vacant land described the land as follows:

> Property Tax Parcel Nos.: to be assigned at final plat approval
>
> (Whatcom County)
>
> Street Address: XXX East Bakerview, Bellingham Washington 98226
>
> Legal Description: Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18 of Karen's sub-division which is currently located at 1711, 1785 & 1795 East Bakerview.

Under Washington law, a contract or deed for the conveyance of land must refer to a document that includes the lot numbers, block number, addition, city, county, and state. The question was whether this reference to Karen's Subdivision, which is a preliminary plat, is sufficiently specific to satisfy the statute of frauds. Although the purchaser prepared a curb cut map and site-specific plans for the homes it intended to develop and offered these plans as evidence that both parties clearly knew the lots which were intended for sale under the purchase agreement, these documents did not contain a legal description and did not remove the purchase agreement from the statute of frauds, and as a result, the purchaser was not entitled to reformation of the contract and specific performance. The court remanded the case for further proceedings on the claim for

damages. Tercel Corp. v. Rasmussen, 145 Wash. App. 1035 (No. 59007-3-1 July 7, 2008) (unpublished).

3. Consequences of failure to comply with subdivision laws

Conveyances that effectuate the subdivision of land without first complying with applicable state laws and local land division ordinances pose varying consequences for the parties to the conveyance. For example, the California Subdivision Map Act provides: "Any offer to sell, contract to sell, sale or deed of conveyance made contrary to the provisions of this chapter is a misdemeanor, and any person, firm or corporation, upon conviction thereof, shall be punishable by a fine of not less than twenty-five dollars ($25) and not more than five hundred dollars ($500), or imprisonment in the county jail for a period of not more than six months, or by both such fine and imprisonment." Where the land division resulting from the deed to the insured violated the California Subdivision Map Act and the Los Angeles County Subdivision Ordinances, the title insurer that issued an owner's policy of title insurance insuring the purchaser was not obligated to indemnify the insured because of a policy exclusion that excluded loss arising from "Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulation." Nishiyama v. Safeco Title Ins. Co., 85 Cal.App.3d Supp. 1, 149 Cal.Rptr. 355 (1978).

E. Condominiums

1. Property that qualifies for condominium form of ownership

A condominium has been described as airspace that has, unlike other parcels in which the titleholder is in theory the owner of the land and airspace above from the center of the earth to the high heavens, both upper and lower horizontal boundaries. Statute law provides for the subdividing of property as a condominium, without restricting what use is to be made of the property. Therefore, a condominium form of ownership could conceivably be made of residential property, commercial office

buildings, private storage areas, parking structures, and recreational parks. Though it is by definition a cubicle of airspace that need not have a lower boundary that extends to the ground, the declarant must have successfully acquired the fee simple title to the underlying ground, and a condominium constructed on the land of another is subject to the rights of others or invalid. For example, the condominium is not valid if it is constructed on lake bed. State v. Trudeau, 139 Wis. 2d 91, 408 N.W.2d 337 (1987). Some states have also rejected the condominium form of ownership for marinas that are known as "dockominiums," that is, airspace above and/or below the surface of navigable waters. ABKA Ltd. Partnership v. Dep't of Natural Resources, 2002 WI 106, 255 Wis. 2d 486, 648 N.W.2d 854 (2002).

2. Criteria

A cubicle of airspace, because it cannot constitute a valid condominium unit unless it is described by condominium declaration that meets minimal statutory criteria, is more discerning than other units of land division. Title insurers, before insuring condominium units will therefore require that an examination of the condominium declaration be made for various matters mandated by applicable statute. Although statutes vary, such requirements may include, for example, that the condominium plat (Exhibit 9) contain certain minimum detail and the condominium declaration contain the following:

- The condominium name and address, which must be unique in the county and include the word "condominium."

- A description of the land on which the condominium is located, together with a statement of the owner's intent to subject the property to the condominium declaration.

- A general description of each unit, including its perimeters, location, and any other data sufficient to identify it with reasonable certainty.

- A general description of the common elements together with a designation of those portions of the common elements that are limited common elements and the unit to which the use of each is restricted.

- The percentage interests appurtenant to each unit.

- Statement of the purposes for which the building and each of the units is intended and restricted as to use.

- The percentage of votes by the unit owners which shall be determinative of whether to rebuild, repair, restore, or sell the property in the event of damage or destruction.

- Signatures by all of the owners of the property, and any first mortgagee of the property or the holder of an equivalent security interest in the property.

- If the declaration was amended, signatures by the aggregate of the votes required for an amendment.

3. Garage and parking areas, other amenities

   Condominiums usually consist of both a unit and common elements, the latter which are areas shared by the unit owner with other unit owners. In many cases, the unit owner will have an exclusive right to certain of the common elements that are owned in common by all unit owners but entitled to be occupied and used exclusively by one unit owner. Known as limited common elements, such areas may include patios, balconies, roof areas, parking spaces, garages, storage areas, wine cellars, and boat slips. Whether a deed that conveys the title to a unit also effectuates the conveyance, transfer, or assignment, whether by express terms or by implication, the limited common elements of the grantor depends upon state law, the operative condominium document,s and the four corners of the conveyance.

   A related question is whether title insurance is available to a purchaser of a condominium unit seeking to obtain coverage to the effect that the purchaser also has exclusive rights in the amenities possessed or claimed by the seller. The answer will depend upon the terms of the operative condominium documents, the chain of title, and the extent to which the recordation of a conveyance of the amenities imparts constructive notice on purchasers.

F. <u>Riparian Descriptions</u>

Beneath all seas, lakes and rivers is a sub-surface or submerged bed. Two important but very different questions arise when evaluating the title to land on waterfront or flowed by bodies of water: (1) Who holds the title to the bed of the waters, and (2) who has rights in the bed, the waters, and the airspace over the waters? State law governs both questions.

Two important aspects of examining littoral titles and riparian titles make them unique:

- The history of the body of water, and not the name by which the body of water is designated (e.g. "*Lake* Pepin") is controlling upon the question who holds the title to its bed. Ne-Pee-Nauk Club v. Wilson, 96 Wis. 290, 71 N.W. 661, 662 (1897). Contrary to its name, a "lake" may actually be a widening in a river or an impoundment of waters as the result of a dam.

- The fact that an unbroken chain of title comprised of deeds or conveyances describing a lakebed parcel exists does not necessarily mean that the grantee of the latest deed is in fact the owner of the land described.

1. Types of waters

Resolving who holds the title to the bed and who has rights in the bed, waters and airspace depends on several factors, including whether the body of water is a natural lake or navigable river/stream. Although natural seas, lakes, and rivers/streams are the most commonplace types of bodies of water, they are not the only types. To use one state, Wisconsin, as an example, that illustrate laws that apply to boundaries:

a.. Natural Lakes

The State of Wisconsin holds the title to all-natural lake beds in trust for the public. State v. McDonald Lumber Co., 18 Wis. 2d 173, 118 N.W.2d 152 (1962).

b. Natural Lakes Where Water Level Raised by a Dam

Where the water level of Lake Mendota was raised by several feet as the result of a dam, though the dam is an artificial structure, which greater increased the depth, the extent and the

breadth of the waters of the lake, a post-dam tax deed purporting to convey a part of the submerged lake bed was void, and the public has the right to navigate such expanded waters the same as though the waters had always remained in that condition. Mendota Club v. Anderson, 101 Wis. 479, 78 N.W. 185 (1898).

c. Rivers and Tributaries

The private upland owner owns to the thread of the stream, subject to rights of the public in the stream that are incident to navigation. Jones v. Pettibone, 2 Wis. 308 (1853). This rule includes the right to separately sell title to the submerged land of the river bed. Bright v. Superior, 163 Wis. 1, 156 N.W. 600 (1916). Although in contrast to lakes, the State of Wisconsin does not hold the title to stream beds, the State public trust responsibility nevertheless extends to the bed of the stream and land under navigable waters. Diana Shooting Club v. Husting, 156 Wis. 261, 272, 145 N.W. 816 (1914).

d. Wetlands

Wetlands can be either navigable or non-navigable in character. The title to non-navigable wetlands is vested in the upland owner, not the State. Therefore, State trust responsibility does not extend to non-navigable wetlands. Rock-Koshkonong Lake Dist. v. State Dept. of Natural Resources, 350 Wis. 2d 45, 833 N.W.2d 800, 2013 WI 74 (2013). To permit the State, in its trust capacity to claim title to the beds of non-navigable marsh and swamplands along rivers would be without authority and lead to disastrous results. Illinois Steel Co. v. Budzisz, 115 Wis. 68, 90 N.W. 1019 (1902).

e. Artificial Lakes and Ponds

Bodies of water constructed on a site that lacks any natural water and that result from digging and grading, or from the excavation of sand, gravel, or rock, such as quarries, and that ultimately become filled with water can be characterized as lakes. The right to use an artificially constructed lake as well as the right to the bed of the lake are incidents of ownership that are vested exclusively in the owner of the fee upon which the artificial lake is located. Mayer v. Grueber, 29 Wis. 2d 168, 176,

138 N.W.2d 492 (1965). Where the land under the water of pond was conveyed by a deed that described the land by metes and bounds to the grantee, the owner whose land adjoined the pond acquired no title to the bed of, or the waters of, the pond. Skalitsky v. Consolidated Badger Co-operative, 252 Wis. 132, 31, N.W.2d 153 (1948).

f. Mill Ponds

Though the public may have acquired the right to use the waters of a mill pond created when a dam was constructed that impounded the waters of a stream, the title to the bed of the pond remains in the private owner and does not become vested in the State. Haase v. Kingston Co-operative Creamery Asso., 212 Wis. 585, 588, 250 N.W. 444, 445 (1933).

2. Lines

State law determines which line forms the line that divides the title of the upland private landowner from the title of the sovereign or State. Counsel, real estate brokers, land surveyors, and title companies, if not the parties, should be conversant with the term that describes the line or lines. In Midwestern states that comprise the former Northwest Territories, these lines include:

a. Ordinary high-water mark

The point on the bank or shore up to which the presence and action of the water are so continuous as to leave a distance mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics. Polebitzke v. John Week L. Co., 163 Wis. 322, 158 N. W. 62 (1916).

b. Ordinary low-water mark

The line or level at which the waters of the lake usually stand when free from disturbing causes. Proprietors of land on the shore of a pond or lake hold down to low-water mark. Mariner v. Schulte, 13 Wis. 692 (1861).

c. Bulkhead line

Any municipality may establish a bulkhead line by ordinance subject to Department of Natural Resources approval. §30.11,

Wis. Stats. A bulkhead line is not the natural shoreline, but a line legislatively established by a municipality that differs from the natural shoreline. It is distinguished from existing shoreline and from low and high-water marks onshore. State v. Land Concepts, Ltd, 501 N.W.2d 817, 177 Wis.2d 24 (Ct. App. 1993), rev. den. 505 N.W.2d 139.

d. Meander line

A traverse of a body of water created for the purpose of determining the size and location of the body of water. Meander lines, although they often appear on land surveys and plats, do not constitute the actual boundary line between private landowners and the State. Natural lines of the boundary, if they exist on the ground, will be given greater weight than the meander line. Brown v. Dunn, 135 Wis. 374, 115 N.W. 1097 (1908).

3. Which line forms the legal boundary between the State and the private owner?

a. Natural lakes, artificial lakes, rivers, and flowages

The identity of the owner of the bed or submerged land underwater depends upon the water body's classification. The legal title to the beds of all-natural lakes is held by the State of Wisconsin in trust for the public. In contrast, the beds of artificial lakes, ponds, and quarries are held by the private owner whose deed's description encompasses the water, not by the State. Mayer v. Grueber, 29 Wis. 2d 168, 138 N.W.2d 197 (1965). The legal title to the beds of rivers, creeks, and streams is held by the private riparian owner whose deed description encompasses the riverbed, not by the State. (Where the river, by virtue of having been designated abound within the deed's description, forms a boundary between two owners, the boundary is the thread, which is not necessarily the river's main channel or midway point between opposite shores.) The titles to flowages and millponds, transitional water bodies consisting of a natural channel and an artificially flowed upland surface, are usually but not always held in private ownership of the proprietor that constructed the dam. (When the dam is removed and the water recedes, the private owner's title returns to the thread free from any public rights.)

b The ordinary high water mark

Regardless whether it is a natural lake, river, or flowage, the perimeter of all-natural navigable bodies of water are characterized by a sinuous line that contrasts, if not clashes, with conventional property boundary lines, the ordinary high water mark. The ordinary high water mark defines the uppermost inland reach of the State's title in trust for the public. State v. Trudeau, 139 Wis. 2d 91, 408 N.W.2d 337 (1987). The ordinary high water mark is an elevation line that although elusive of delineation on the ground and reduction to metes and bounds expression, has particular importance concerning property boundaries separating the dominion of the private owner from that of members of the public and the State.

c The ordinary low water mark

Private landowners whose lands adjoin Wisconsin lakes possess their own lake-ward, downward thrust of ownership to the ordinary low water mark, another elevation line that, particularly on the Great Lakes and Lake Winnebago where wind action denudes the beach of terrestrial vegetation, is markedly lower than the ordinary high water mark. Therefore, throughout the calendar year, the State and the private landowner have shared rights in the same land, namely, a largely indeterminate strip of land of varying width between the actual water level, and the ordinary high water mark. Beach, though not a legal term, is the word that best describes this indeterminate strip. The private landowner shares the beach with the members of the public and the State throughout the calendar year, but on any given day, depending upon wind and hydrological conditions, the landowner and the public enjoy an exclusive right to occupy different, ever-changing portions of the beach.

During periods of high water the riparian ownership represents a qualified title, subject to an easement in favor of members of the public to occupy the land, while during periods of low water it ripens into an absolute ownership as against all the world, with the exception of the public rights of navigation and with those rights no interference will be tolerated. Therefore, a member of the public walking along the beach of Lake Winnebago was not trespassing if the on which he walked was covered by water. Doemel v. Jantz, 180 Wis. 225, 229, 193 N.W. 393, 395 (1923).

d Does the private owner have greater rights in a river bed than in a lake bed?

In Wisconsin, the State holds the title to the lakebed in trust for members of the public. Rock-Koshkonong Lake Dist. v. State Dept. of Natural Resources, 350 Wis. 2d 45, 833 N.W.2d 800, 2013 WI 74 (2013). Rights in the beds of rivers, streams, and creeks are different from rights in the bed to natural lakes: The private upland owner holds a fee simple title to the submerged riverbed to the thread of the river or stream. "This court has laid down one rule for running water, and another for lakes and ponds. In the former case, the riparian owner owns to the thread of the current; in the latter, to the water line." Ne-Pee-Nauk Club v. Wilson, 96 Wis. 290, 71 N.W.661 (1897).

Although the private upland owner holds fee simple title the thread of the stream, the same state public trust responsibility that extends to the bed and waters of natural lakes nonetheless extends to the bed of the stream and land beneath navigable waters. Diana Shooting Club v. Husting, 156 Wis. 261, 272, 145 N.W. 816 (1914). If in fact, the State's public trust extends to the beds beneath and waters in both natural lakes and rivers, is there any practical difference in the rights of the private upland owner in the bed beneath the water if the body of water is a river rather than a natural lake? Wisconsin courts have ruled in several cases that there is a distinction between rights in the beds of streams and rivers and rights in the beds of natural lakes.

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