When an Easement is not an Easement

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All surveyors are familiar with the ALTA/ACSM land title survey, commonly known as the "ALTA" survey. As you know, Table A of the 1999 land title survey standards is a listing of "optional survey responsibilities and specifications." This listing includes such things as a flood zone designation, land area, and location of utilities.

I was recently asked to review a land title survey of some vacant commercial property in Northern Illinois. The surveyor performed a land title survey pursuant to a contract with the owner of the land, a major real estate developer. The owner specified in his contract that the surveyor need not disclose the location of utilities as set forth in item 11 of Table A of the survey standards. Accordingly, the surveyor's field crew failed to locate and disclose a storm sewer line that cut through the land. After the buyer reviewed the survey and signed the contract to purchase the property, he discovered the storm sewer line and realized that he would be unable to build his proposed building on the property because of this sewer. The buyer now wishes to back out of the contract. The surveyor contacted me and asked me if I thought that he had a duty to show the storm sewer line and if his survey was defective. Although it appears that the survey is not in error, this situation and my resultant analysis is perhaps worthy of consideration by surveyors.

To understand my conclusion that the surveyor had no duty to show the storm sewer line, one must first understand the correlation between paragraph 5(h) of the body of the survey standards and item 11 of Table A of these standards.

Paragraph five of the standards includes this preamble: "The [plat of survey] shall contain, in addition to the required items already specified above, the following information:" A series of lettered sub-paragraphs follows this introduction; paragraph 5(h) reads in part as follows: "Observable evidence of easements and/or servitudes of all kinds, such as those created by roads; rights-of-way; water courses; drains; telephone, telegraph, or electric lines; water, sewer, oil or gas pipelines on or across the surveyed property and on adjoining properties if they appear to affect the surveyed property, shall be located and noted. . . . Surface indications, if any, of underground easements and/or servitudes shall also be shown."

Table A includes these instructions: "[If an item is checked], the following optional items are to be included in the ALTA/ACSM LAND TITLE SURVEY: [emphasis in original]." Item 11 reads in part as follows: "Location of utilities . . . existing on or serving the surveyed property as determined by: (a) Observed evidence. . . manholes,

catch basins, valve vaults or other surface indications of subterranean uses; wires and cables (including their function) crossing the surveyed premises. . . ."

At first glance it appears that these two portions of the survey standards conflict in that they seem to address essentially the same thing--utility easements. But inconsistent provisions in a document should be construed together and reconciled, if possible. See, e.g., *Law v. Kent*, 384 Ill. 591, 52 N.E.2d 212 (1943). Therefore, further study is necessary in order to determine what the representatives of the American Land Title Association and the American Congress on Surveying and Mapping intended when they drafted these survey standards.

Paragraph 5(h) refers to "easements and/or servitudes." By definition an easement is the right of one party to use the land of another party. For example, a storm sewer might be termed an easement in gross. *Black's Law Dictionary* defines an easement in gross as "not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another. . . ."

The Merriam-Webster dictionary defines "servitude" as "a right by which something (as a piece of land) owned by one person is subject to a specified use or enjoyment by another." Thus, the concept of a servitude also involves the right of one person to use someone else's land. *Black's Law Dictionary* contains a similar (but lengthier) definition.

It seems, then, that this characteristic--the right to use the land of another--is the distinguishing and defining difference between paragraph 5(h) of the body of the standards and item 11 of Table A. That is, whenever a surveyor performs a survey, he or she is obligated pursuant to paragraph 5(h) to disclose all "easements and/or servitudes"--that is, any and all observable evidence on the land of someone else's use or interest in the land. Examples of this would be a neighbor's driveway that burdens a portion of the land; utility wires that cross the rear of the land as they travel across adjoining property, bringing electricity to neighboring buildings; and a storm sewer, *but only if that storm sewer benefits land owned by someone other than the landowner of the property in question, because only then would the storm sewer be an easement or servitude.*

Another example might present an even clearer distinction. Consider a residential lot. Utility poles and wires run across the rear of the lot and other lots in the subdivision. A "drop line" runs from the utility wires to the house on this lot, thus providing utilities to the home. Similar drop lines provide electrical service to the neighboring homes.

If a surveyor is asked to perform a land title survey of this house, and if this surveyor is not instructed to include any optional Table A information on his plat of survey, the surveyor would still have an obligation to show the utility poles and wires on his survey. The reason for this is because the surveyor is still bound by paragraph 5(h); these utility

poles and wires are clearly in the nature of an easement. The surveyor would not, however, have to show the drop line running from the utility wires to the house, as that drop line does not represent a interest that is being used by another party. It exists solely for the benefit of the landowner.

On the other hand, if item 11 of Table A has been checked off, the surveyor *will* have to show this drop line, as this line clearly is a "wire and cable crossing the surveyed premises," as set forth in item 11.

In the present example, the issue is: does the storm sewer exist *solely* for the benefit of the landowner? If so, it is not by definition an "easement and/or servitude," and thus need not be disclosed on a land title survey in which item 11 of Table A is not checked off. In my situation, the land in question is still owned by a developer, who put the storm sewer in to service the lots in the industrial park. To date, though, he has not yet sold off any of the lots. Therefore, the storm sewer is not an easement or servitude; the surveyor wins, albeit barely.

Interestingly enough, a similar situation was addressed in the December 2002 issue of the *Wisconsin Professional Surveyor*, the magazine of the Wisconsin Society of Land Surveyors. Gary Kent, President of the American Congress on Surveying and Mapping, writes about a surveyor who failed to show a manhole on his land title survey. In subsequent litigation the plaintiff argued that the surveyor should have shown the manhole because of paragraph 5(h). The surveyor countered by arguing that pursuant to his contract, he was not required to disclose item 11 information on his plat of survey.

Mr. Kent comes to the same conclusion that I independently arrived at. He writes that paragraph 5(h) and item 11 address two different issues. He states that "under 5(h), a manhole is clearly 'observable evidence of an easement and/or servitude' unless further investigations were to reveal that it was not. For example, a manhole for a storm sewer that drains a parking lot to on-site detention might very well not be evidence of an easement."

Finally, he concludes with a very appropriate distinction: "It is an aside that as *evidence of a sewer*, the manhole did not have to be shown on the survey because Table A item 11 was not included. But as *observable evidence of an easement* under paragraph 5(h), it did have to be shown." [evidence in original.]

Gary Kent's example, of course, while illuminating, is distinguishable from the present situation. Mr. Kent writes about a manhole that was observable evidence of an *easement*--that is, someone else's interest or use in the property in question. But in my example, there is no such evidence of an easement--rather, the storm sewer is used solely by the owner of the land. Because this storm sewer is not an easement or servitude, it did not have to be shown on the land title survey, as it did not fall within the four corners of paragraph 5(h).

On the other hand, if this storm sewer serviced other land not owned by the landowner, then my case would be directly analogous to the example set forth in this surveying magazine. The storm sewer then would be in the nature of an easement. As such, it would have to be shown on the survey.

So what can surveyors learn from this episode? As there may be times when what appears to be an easement may not be an easement, it seems to me that surveyors of commercial or industrial properties or large tracts of vacant or residential land should make sure that their field crews understand the fine distinction between paragraph 5(h) and item 11. If in doubt, it would probably be best for the surveyor to show any and all possible evidence of utilities on his or her plat of survey.

In the alternative, should the surveyor show a note on the plat of survey, explaining that pursuant to contract, some or all evidence of utilities is not disclosed on the plat? Probably not. Mr. Kent (who was called as an expert witness), indicates that the case was settled out of court. It appears that the surveyor paid damages--even though the surveyor's plat included this caveat: "No certification is made as to the locations of underground utilities such as, but not limited to, electric, telephone, cable TV, gas, water, sanitary and storm sewers. Only above-ground visible features are shown. Other utilities may exist of which [surveyor] has no knowledge."