

Old Fences, Uncertain Neighbors

Reinhart Real Estate attorneys regularly counsel clients regarding land acquisitions. Whether a client is purchasing land on which to locate a commercial enterprise, expand its agribusiness operations, develop residential properties, or implement any other use of real estate, Reinhart's Real Estate attorneys can provide the necessary legal advice—and practical guidance—to ensure that the acquisition meets the client's goals and expectations. Last month, the Supreme Court of Wisconsin delivered a decision that Reinhart's attorneys will consider as they assist clients in their real estate transactions.

There is an axiom that states "good fences make good neighbors." In the Supreme Court of Wisconsin's decision in *Northrop v. Opperman*, 2011 WI 5, the Court issued a version of that adage that could be interpreted as "old fences make uncertain neighbors." For Reinhart's clients and potential clients, the decision highlights the importance of a physical inspection of real estate prior to its acquisition.

In *Northrop*, the Court concluded that if a boundary line cannot be determined from a deed and an original monument or marker, then other evidence may be considered to set that boundary line. The facts of the *Northrop* case are complex and include an historical review of surveys and boundaries dating back to the late 19th century. The evidence demonstrated that the adjoining land owners and their predecessors in interest had long considered their boundary line to be the center line of a road—"Henn Road"—that ran, roughly, between their parcels. Ancient and inconsistent surveys, and indefinite legal descriptions of the boundary contained in deeds, failed to bring certainty to the location of the boundary. A survey conducted in 2005, however, cast doubt on the historically accepted assumption that the center line of the road comprised the true boundary line. The new line identified in the 2005 survey resulted in one property owner apparently losing significant acreage and the adjoining property owner gaining significant acreage. A lawsuit ensued. The trial court formally set the boundary line as the center line of Henn Road.

The Supreme Court affirmed the trial court's conclusion and, in doing so, expressly cast doubt on the reliability of surveys in identifying a boundary line:

Henn Road is the landmark that was laid out closest in time to the original government survey. The records of [litigation in the early

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1900s regarding this boundary]...provide supporting evidence that Henn Road was reputed to lie on the boundary line and that the center line of Henn Road has been relied upon by the property owners in the area as the boundary line for many, many years. Finally, as stated in *City of Racine [v. Emerson, 85 Wis 80, 55 N.W. 177 (1893)]* **resurveys may be unreliable as evidence of a boundary line.**

Northrop, 2011 WI 5, ¶ 53 (emphasis supplied).

In reaching this decision, the Court relied heavily on a number of what it described as "fence/survey" cases in which the Court previously had addressed and resolved cases where a "boundary fence" did not lie along the boundary as determined by a survey.

Practically speaking, *Northrop* raises two considerations. First, the kind of boundary setting that the Court approved in *Northrop* is available only where legal property descriptions or original markers are too imprecise or do not exist, such that the Court must resort to other evidence to identify the "true" boundary. Therefore, the holding in *Northrop* would not lead to a ruling that a fence, even one that adjoining landowners considered to be their "true" boundary, establishes a legal boundary where original markers or a precise property description clearly demonstrate that the true boundary lies elsewhere.

Second, where a property description or an original marker are indefinite or absent, *Northrop* holds that physical landmarks and common understandings of boundary locations may prove more persuasive than a "state of the art" survey in convincing a court regarding a true boundary line.

In the context of acquiring land, therefore, the buyer should ensure that the property he or she is acquiring is adequately described and/or can be described in relation to original markers or monuments. If a precise description or original markers are not definitive, a survey may be helpful in trying to discern the true boundary line, but a physical inspection of the property is essential. Walk the property—and often surveyors can and do note significant physical features of the land such as fences—and assess whether any physical features arguably could be considered to have been placed in order to mark a boundary. Further due diligence, including interviewing neighboring property owners regarding any such physical features, adds to the information available for analysis. However, one should approach this due diligence with caution so as not to unnecessarily alert potential future neighbors that they may have a claim to more property than



they currently believe they own.

Every property acquisition presents different terrain, topography, and other features, and each must be analyzed independently to ensure that you are in fact acquiring all of the property you intend to purchase, free from potential claims by neighboring landowners that the "real" property line is in an unexpected location.

Reinhart's Real Estate attorneys are familiar with all aspects of the due diligence process inherent in land acquisition transactions, including the holding in the Northrop case. Moreover, if you find yourself in a boundary dispute, [Reinhart's Real Estate attorneys](#) are capable problem-solvers who can work with you to find the right path to resolution, in or out of court. Reinhart stands ready to assist you in your land acquisition and dispute resolution needs.

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