



**By Joel Leininger, LS**

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## Practical Location

**W**e continue our examination of boundary doctrine by exploring the topic of *practical location*. Practical location is defined as the location of the grant as inferred from the subsequent acts of the parties to the deed. A flavor of extrinsic evidence, it plays a major role in certain types of retracements, despite little mention of it in our boundary literature.

A couple of hurdles must be overcome before this type of evidence can be considered. First, the deed itself must have latent ambiguities as to the location of the land. (Remember, patent ambiguities void the deed outright; latent ambiguities—those anomalies uncovered only after analysis, invite extrinsic evidence to assist in deed interpretation.) The terms of unambiguous deeds cannot be varied by practical location or any other influence without subsequent transactions between the parties. (Or court action, of course.) Permitting otherwise would obviate committing the transaction to writing in the first place. Second, tangible evidence of the parties' actions must exist to incorporate into our work.

### Right-of-Way Plats

In the November issue, I mentioned a retracement some years ago wherein the task was to reproduce interstate highway right-of-way lines. I am sure this varies from state to state, but in Maryland prior to the 1980s, few right-of-way monuments were set pursuant to road takings (not the fault of the surveyors involved, of course, but likely the result of non-surveyors in those departments considering the cost of post-construction surveys to be a waste of budget). A numbered

right-of-way plat was prepared depicting the centerline of the taking, along with various offsets to the outer right-of-way lines, sundry drainage easements and the like, all referenced to the centerline. The deed conveying the land to the government contained no description, but merely called the numbered plat and incorporated it by reference. This is all very proper. Some of the plats even mentioned permanent monuments tied to the centerline aforesaid, although I never encountered any. The older title lines were sketched in on the plat, but no geometric relationship between the old lines and the new lines was

tion, as long as they were constructed by one of the parties afterward (and acquiesced to by the other). Essentially, the theory rests upon the premise that parties do not contract to do one thing and immediately do something else. State highway departments ordinarily do not acquire land to build a road in one spot and then build it in another. The same can be said for public works of any stripe. The improvement locations thus are strong indications of acquisition intent. Delving into the theory a bit further would reveal estoppel overtones as well, but for our purposes the intention approach fits nicely.

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specified. (I should note here that current highway department practice in my state mandates that geometric relationships between the old and new lines are specified in detail—ironically creating another potential wrinkle, but that is a topic for another day.)

Ordinarily, a plat that calls for no monuments and which has no ties to older title lines would present a significant retracement problem. Indeed, absent a link between paper and field, there is no way to place the new taking on the ground.

However, the doctrine of practical location delivers the goods. This doctrine allows us to consider the original improvements as evidence of the transac-

### Interstates

For interstates (and other heavy construction improvements), this gambit refocuses our field search efforts from “hard evidence” (iron pipes, stones, and so forth) and possessory evidence (fences, etc.) to identifiable elements which still exist from the original construction plans. If the original construction conformed to the design, and if the design was in accord with the acquisition document (the plat), then the original construction must be in accord with the plat. Usually this requires study of the construction plans in addition to the right-of-way documents to learn the intended relationship of the various

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improvements to the centerline. The improvements, then, become the monument memorializing the right-of-way location.

Analysis of this type requires careful judgment and an understanding of the likely precision of the construction. Bridge piers, for instance, are typically built to a higher tolerance than drainage swales. Therefore, in selecting the construction elements we must bear in mind the likely construction tolerance and weight accordingly. (This, incidentally, is one of the few cases where I believe it is appropriate to incorporate a least squares analysis in retracement.) In my experience, one can achieve satisfactory results using this method.

I once was required to retrace a parcel that abutted a six-lane interstate, the improvements of which were an elevated road 50-60 feet in the air on a gentle horizontal curve. No monuments were called for in the acquisition documents, and, in fact, the documents anticipated future ramps generally parallel to the centerline that were never built. The roadway itself was supported by sets of giant concrete piers set at specific deflections to the centerline. By using the bridge plans which referenced each set of piers to the centerline, we were able to relate the physical piers—and thus the centerline of construction—to our work. The right-of-way line fell into place.

Without the doctrine of practical location, however, a retracement of the interstate limits would have been out of reach.

### **Not for Every Case**

But this is not a cure-all. Practical location, as for all forms of extrinsic evidence, cannot be used to alter the clear terms of the deed. Only to the extent that clarification is needed, can it clarify. It cannot be used, for example, as justification for reducing a plat radius of 5,729.58 feet to 5,500.00 feet because the latter radius matched the constructed improvements. For reasons explained at length in earlier essays, extrinsic evidence is not competent to redefine the terms of the grant. Furthermore, subsequent improvements to the constructed work (later widening of an interstate, for example), cannot be considered evidence of the original transaction.

For those situations demanding it, however, practical location can be the silver bullet. *A*