

GOOD DEEDS

Legal Tips of the Trade in Real Estate Transactions

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BOUSQUET HOLSTEIN PLLC

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RECENT EXPERIENCE

- Closed \$900 million transfer of nuclear power plants on Lake Ontario.
- Closed financing and land transfers for \$435 million Shopping Center expansion.
- Testified as expert witness in commercial boundary dispute.
- Certified title to 35 mile electric transmission line, including lands under water.
- Supervised title examination for \$20 million transfer of oil and gas rights.
- Certified title for 88 turbine wind farm.
- Closed the largest acreage transaction in recent Jefferson County, NY history.

Dear Colleagues,

In my last newsletter article "Where to Begin . . ." I began a discussion of some of the conventions concerning "Points of Beginning" in Legal Descriptions. The discussion was far from exhaustive, and much more can and should be said.



However, in an attempt to treat as many of the topics related to the preparation of good deeds as is possible, I decided it was time for me to be "Moving On. . ." to the next part of a "Metes and Bounds" description, that is, the convention of proceeding "clockwise". (By the way, those of you who answered "Clockwise" to the question I posed at the end of the last article, get 1 point; those of you who answered "It depends" are probably recent law school graduates – either way, you get 2 points)! If you answered "counter-clockwise", deduct 1 point.

Beyond that rule though, we can begin a discussion of some of the other elements of deeds, and of "Legals" in general (as we Title Guys and Gals refer to them). After all, there are many elements to a deed, and the Legal is just one of them. (More will be said about the other elements of a good deed in the future).

As always, I welcome your comments, suggestions, war stories, disagreements, etc., in keeping with the goal of all of us preparing Good Deeds.

Regards,

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www.nysrealpropertylaw.com

MOVING ON...

In my inaugural edition of "Good Deeds," I discussed a number of ways in which lawyers use (and sometimes misuse) language to identify the "Point of Beginning" in a legal description¹. The article pointed out that there are customs by which to identify Points of Beginning, and began discussing some legal description customs, or "rules" related to Points of Beginning:

- Rule Number 1: Don't use one if you don't need one;
- Rule Number 2: If the map to be referred to is not a matter of public record, don't refer to it;
- Rule Number 3: Choose a "Point of Beginning" that is fixed, locatable, and, preferably, monumented;
- Rule Number 4: If the existing property description is vague or indecipherable, create a new one; and
- Rule Number 5: "A Point of Beginning" is different from a "Point of Commencement!"

GETTING AROUND

There are many parts to a "Metes and Bounds" Legal Description, and the Point of Beginning is only one of them. Having correctly identified a Point of Beginning, it is necessary to describe the route of traverse around the various boundaries of the parcel of land being described, and, with a few exceptions, then to return to the Point of Beginning, in

order to accurately describe a "closed" polygon.

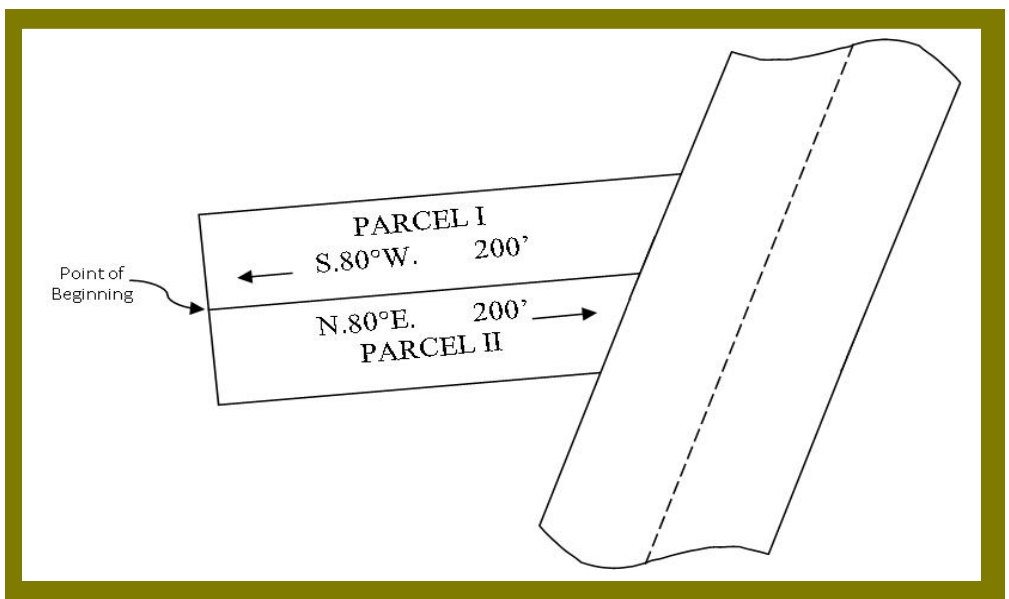
So, your sharpened pencil is poised at the Point of Beginning, and you want to describe the first line – thus your first dilemma: which way do you go? The surveyor provided a map showing bearings and distances (collectively referred to as "courses"), but you have at least two choices to describe that first line: you could proceed clockwise around the parcel, or counter-clockwise. What to do?

POINT OF BEGINNING RULE NUMBER 6:

Given the opportunity to do so, proceed clockwise around the parcel being described. Remember, every line has two bearings. For example, a line with a bearing of North 45 degrees East, can also be correctly described as South 45 degrees West. In the diagram

below, the course "N. 80 degrees East, a distance of 200.00 feet" is the same line as "S. 80 degrees West, a distance of 200.00 feet." As to Parcel I below, that line bears S. 80 degrees W., but as to Parcel II, the same line bears N. 80 degrees E, in each case proceeding clockwise from the Point of Beginning.

So, don't hesitate to convert a bearing depicted on a survey proceeding in one direction around a parcel to the opposite direction, if doing so will permit you to describe the parcel by traversing in a clockwise manner around it. Why did the surveyor describe the course going the other way? Perhaps the line is part of the description of another, contiguous parcel, and the course traverses clockwise in that other parcel (as was the case in the diagram below); or, well, the possibilities are endless



¹ See www.nysrealpropertylaw.com

Following Rule Number 6, though, your description will be more predictable, and, more importantly, more easily plotted.

Perhaps you noticed that Point of Beginning Rule Number 6 isn't really a "Point of Beginning" Rule at all. It is a departure from the Point of Beginning.

Well, we can't stay on the Point of Beginning forever if we want to get anyplace! Perhaps I have crossed the line, but Rules are made to be broken. There will be circumstances when following rules will create more problems than they could ever solve. If confronted with such a situation, use your judgment. The goal, after all, is to "be able to identify from the legal description, with a high degree of certainty, the location and boundaries of the property with reference to its surroundings"². If you have to violate a rule in order to solve a different problem, and the description you select achieves the goal, so be it!



DESCRIPTION **RULE NUMBER 1:**

If Rules are made to be broken, Laws are not! A Legal Description generally begins with language like "ALL THAT TRACT OR PARCEL OF LAND, situate in the Town of

Smith, County of Lake and State of New York . . ." . When describing multiple parcels in the same instrument though, the "Town" and "County" language is frequently left out of the subsequent descriptions, perhaps something like "ALL THAT TRACT OR PARCEL OF LAND,

beginning at a point. . . .", leaving out the names of the Town and County.

If you attempt to record a deed or mortgage of one of those subsequent parcels without the Town and County designation, and you're lucky, the County Clerk will notice the omission and reject the instrument instead of recording it. Then, the consequences are limited to having to have the instrument corrected and recorded (assuming you have the cooperation of the parties executing the instrument), hopefully before anyone records a different deed or mortgage to the same property, and before the

instrument, if a mortgage, exceeds the 30-day perfection window between creation and perfection of a security agreement³. If you are less lucky and the omission is overlooked by the county clerk, and the deed or mortgage is recorded, you may find yourself living in a Fool's Paradise. Well, at least you have someplace to live, unlike your clients, who now have NO PLACE TO LIVE!

One reason, of course, is the Recording Act, which requires that Every instrument presented to said clerk for record, and requiring to be indexed under [the Recording Act]... shall have included therein, in the description of the premises a designation of the town in said county in which the land affected by the instrument lies . . . And a record of the instrument shall not be effectual by way of notice to bona fide purchasers or encumbrancers in respect to any land situated in any town of said county not so designated [emphasis added]⁴

Hey, it's the Law! And, it's also a convenient defense when enforcement is sought. To summarize Rule Number 1, a legal description must name the Town and County where the property is located.

Continued on back...

² See Point of Beginning Rule Number 3.

³ See Section 547(e)(2) of the Bankruptcy Code.

⁴ See Real Property Law Section 316-a(4)

The other reason is that in a bankruptcy scenario, a mortgage not perfected within 30 days of its creation can sometimes be avoided as a preferential transfer, because the transfer will be deemed to have been taken place at the time of perfection, and Bankruptcy Code Section 547 provides that

... the trustee may avoid any transfer of an interest of the debtor in property. . . . made on or within 90 days before the date of the filing of the petition

And further provides,

... a transfer [of real property] is made . . . at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time

Late perfection can lead to a bankruptcy trustee avoiding the transfer or lien as being preferential vis-à-vis creditors, with serious consequences for your lender or purchaser. Instead of paying the Lender, the trustee may use loan payments from the debtor to pay other creditors!

What does all of this mean? Well, among other things, it means legal descriptions must name the town and county where the real property is located, or we risk having the instrument rejected by the county clerk, or worse, suffering a failure of title or the loss of lien priority. As for other possible consequences, I will leave those to your imagination.

I hoped to get to "how much is too much" and "judicious use of boundary calls," in this edition, but that would definitely be too much for now! Instead, I promise to try to touch on those topics next time.

In the meantime, let me say again that I truly appreciate your comments, questions, suggestions and disagreements, in order that we may all gain and grow in our professions. I was gratified by the many comments I received. If you want your comment to be included in the blog, be sure to post it on the website rather than sending me an email.

www.nysrealpropertylaw.com

**UNTIL NEXT TIME,
KEEP UP THE GOOD
DEEDS!**

IMPORTANT:

Beginning soon, these articles will appear only on my website, www.nysrealpropertylaw.com.

Be sure to subscribe, so you will be notified when future posts are published. Its free, easy, and a reliable way to be sure you keep up with all the commentary. Best of all, when you grow tired of me or it, you can easily "unsubscribe".

ON A FINAL NOTE

Many of you are by now aware of New York's new Non-Profit Revitalization Act of 2013, which will be effective this July 1st. The Act has implications for conveyances, leases and mortgages of real property, with which we all should become familiar.

For example, Types "A", "B", "C" and "D" have been eliminated, and replaced by "charitable" and "Non-charitable". Also, many corporate meetings may be "noticed" and conducted using various electronic media, and corporate integrity rules have been strengthened vis-à-vis conflicts of interest and audits. For charitable NFP's, Supreme Court approval has been eliminated for some conduct, requiring only Attorney General approval instead.

As to real property transactions involving less than substantially all assets, a simple majority will sometimes suffice, in lieu of the super-majority required under current law.

My firm recently issued a Legal Alert about this new legislation, which may serve as a primer to highlight some of the features of the law. Feel free to review this important announcement which can be found on our website at:

www.bhlawpllc.com

(The link is on the homepage, under Articles and Alerts, posted January 7, 2014, or you can find it posted on my blog.)