VantagePoint

**By Wendy Lathrop, LS, CFM**

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# Watch Your Language

If we as surveyors sometimes find the language of deeds murky, imagine the misunderstandings among laypeople–many attorneys included.

Recent clients had to defend themselves against new neighbors claiming a right to cross my clients' property, based upon recycled language in my clients' deed and an erroneous tax map. By record title, my clients owned a landlocked parcel, physically abutting a right-of-way but conveyed by a deed stating their land was "subject to" it, along with a reference to another right-of-way that did not touch or benefit their land and had become part of a public road in 1935.

Skipping over the details of how such a situation occurred, we will pick up at a point when Mr. and Mrs. Client had been living in peace for 29 years, at which point Mr. and Mrs. New Neighbor moved in next door. Within six months the New Neighbors began stirring up the neighborhood and instituted a suit to cross the Clients' land. But the area they wanted to cross wasn't part of the Clients' land. The 1910 deed named as the basis of the New Neighbors' suit also was not on the Clients' property, although it was clearly headed "Deed of Right Of Way" as recorded in the County Hall of Records. That right-of-way was a determinable easement to serve a much larger landlocked tract of which the Clients' land was eventually the remainder, while all other portions fronted on public roads. But that named deed stated that it would terminate on the creation of other access to public roads, which occurred in 1925 when part of that same right-of-way was purchased in fee by the local government to form another public street that gave frontage to the original large landlocked tract.

Changing tack (but not amending their complaint), the New Neighbors moved on to a 1923 deed as the basis of their presumed rights. They hinged their arguments on one particular phrase: "excepting and reserving a right-of-way." And that is the phrase we will examine in this article.

*Exceptions* are interests that one owns and holds back from a transaction: "I will sell you all of my land EXCEPT one acre along the road." *Reservations*, however, create rights for the first time, and need not be exercised immediately. Think in terms of "I reserve the right to change my opinion upon the disclosure of additional facts."

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Taken strictly, the words *exception* and *reservation* mean two completely different things. But they have unfortunately been used incorrectly and nearly interchangeably for decades or longer, and even used together as in the "excepting and reserving" clause that has instigated suits not only here but also across the country under many different circumstances. What can that phrase possibly mean?

Here is where we apply the Four Corners Doctrine to our work as professional surveyors. We must look at the entire document to discern the intent of the parties from the intrinsic evidence. We cannot pick and choose which pieces we like best just because they suit our (or our client's) purposes. And so the phrase "excepting and reserving a right-of-way" must be taken as a whole rather than zeroing in on the word *excepting* as retaining unmitigated fee rights in a particular strip of land (as the New Neighbors' so-called expert did).

When there is a transfer of real property interests in fee, it must be presumed that the grantees are not restricted in their exercise of full use of that land other than respecting easements to which their new acquisition may be subject, zoning regulations, and similar restrictions. Granted that there are a few random deeds that may prevent a parcel from being used as a tavern or other specific use, or specify the fee is to last only as long as the land is used for a public library, or convey a life estate that must be exercised in a manner that preserves the rights of the future owners when that life estate expires. But generally, acquisition of fee title allows the grantee to use the land in any manner desired that does not harm the public. Therefore, no words specifying a particular use appear in (non-determinable and non-defeasible) fee conveyances.

In the phrase "excepting and reserving a right-of-way", a very specific use and

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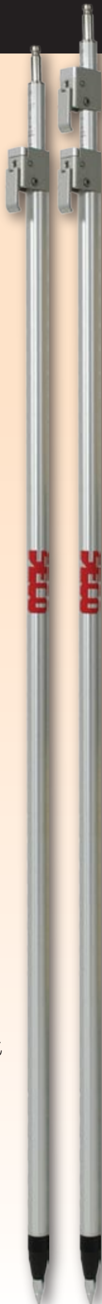


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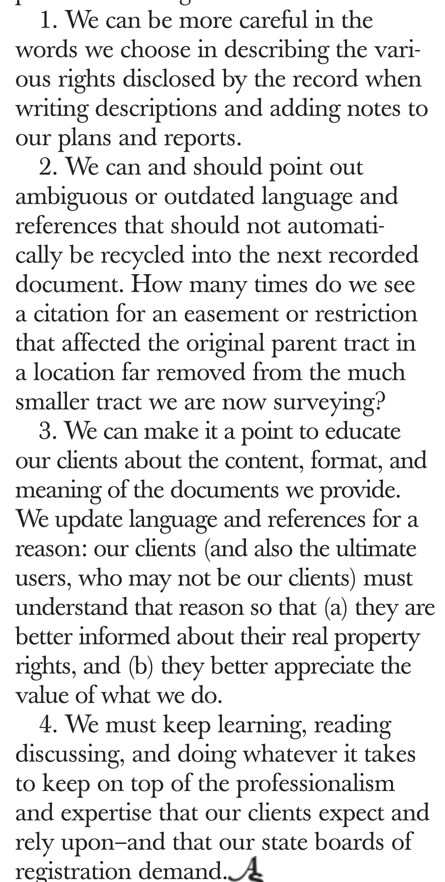
purpose is named. Therefore the phrase indicates a reservation of easement rights, not exception for full fee title. *Black's Law Dictionary* contains an entry for "except right-of-way":

*"Recitals 'less the right of way' and 'except right of way' in granting clause of deed have well-defined accepted certain and unambiguous meaning by which grantor conveys entire interest in servient estate and at same time expressly recognizes and acknowledges dominant estate."* [citation omitted]

The New Neighbors' attorney listened to me read this definition from the stand after also explaining reservations and exceptions, and then stated, "But there is no entry for 'excepting and reserving a right-of-way', is there?" Parsing words in this manner before a judge who had a hard time understanding basic real property terminology made my job difficult, and we won't know for some time whether or not I was successful in my endeavors. In part, the situation is complicated by the fact that this is Chancery Court, meaning a court of equity where the laws can sometimes be bent to come up with a "fair" outcome.



Here's what we as surveyors can do to prevent such litigation:

1. We can be more careful in the words we choose in describing the various rights disclosed by the record when writing descriptions and adding notes to our plans and reports.
2. We can and should point out ambiguous or outdated language and references that should not automatically be recycled into the next recorded document. How many times do we see a citation for an easement or restriction that affected the original parent tract in a location far removed from the much smaller tract we are now surveying?
3. We can make it a point to educate our clients about the content, format, and meaning of the documents we provide. We update language and references for a reason: our clients (and also the ultimate users, who may not be our clients) must understand that reason so that (a) they are better informed about their real property rights, and (b) they better appreciate the value of what we do.
4. We must keep learning, reading discussing, and doing whatever it takes to keep on top of the professionalism and expertise that our clients expect and rely upon–and that our state boards of registration demand.