

# Survey Says...A Summary Guide to Registering Torrens Boundaries & Boundary by Practical Location

By Katie Wahlberg & Scott Lucas

*Olson, Lucas, Redford & Wahlberg, P.A.*

This article discusses the Torrens system generally and describes the process by which boundary lines can be registered in a Torrens proceeding, both at the time of an initial registration and in a later proceeding after a property owner's title (or the neighbor's title) has been registered Torrens. Registered property is not immune to claims against it based on the doctrine of boundary by practical location which is also discussed.

## *Distinctive Characteristics of Torrens Title*

The Torrens system of determining interests in real property is an alternative to abstract property ownership. "Under the abstract system, documents evidencing marketable title may be found in recorded documents or by material outside the recording system. . . . the prospective purchaser of real property looks at recorded documents to determine marketable title of record." *Hersh Properties, LLC v. McDonald's Corp.*, 588 N.W.2d 728, 733-34 (Minn. 1999). In contrast, interests in Torrens property are determined – in fact, established – by a court. *Id.*

There are certain distinctive characteristics of property that has been registered under Minnesota Statute Ch. 508. Specifically, "[t]he purpose of the Torrens system [is] to create a title registration procedure intended to simplify conveyancing by

eliminating the need to examine extensive abstracts of title by issuance of a single certificate of title, free from 'any and all rights or claims not registered with the registrar of titles.'" *Hersh Properties, LLC v. McDonald's Corp.*, 588 N.W.2d 728, 733 (Minn. 1999). This adjudication relieves a purchaser of the need to conduct certain due diligence, such as investigating documents of record and inspecting the property itself: "Under the abstract system, documents evidencing marketable title may be found in recorded documents or by material outside the recording system . . . the prospective purchaser of real property looks at recorded documents to determine marketable title of record . . ." *Id.* at 734.

Property owners can derive a benefit from the Torrens system; the purchaser of Torrens property does not have to pay for an expensive abstract to ascertain

the quality of title, but may simply consult the certificate of title:

Under the Torrens system, time-consuming and expensive title searches, which characterize the abstract system, are alleviated because the purchaser of Torrens property may, subject to limited exceptions, determine the status of title by inspecting the certificate of title.

*In re Collier*, 726 N.W.2d at 804.

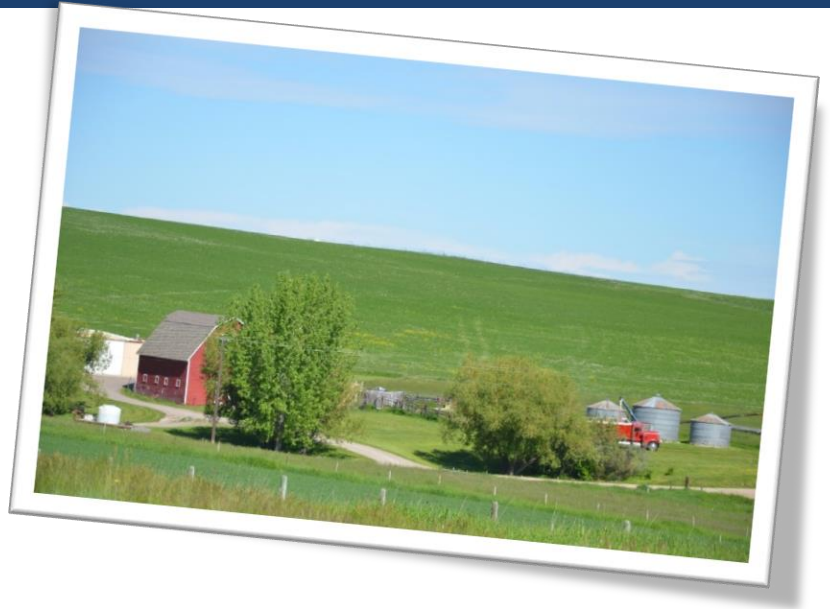
When one purchases Torrens property, then, they take subject only to “the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar.” Minn. Stat. § 508.25. The Torrens statute provides that every person “who receives a certificate of title in good faith and for a valuable consideration shall *hold it free from all encumbrances and adverse claims . . .*” *Id.* (emphasis added).

The most significant exceptions to this rule are “certain rights or encumbrances subsisting against,” or existing at the time of the issuance of, the certificate of title, which by law do not need to be listed at memorials on the certificate of title. *Id.* The Minnesota Court of Appeals has referred to them as “seven exceptions that encumber Torrens property in spite of their failure to appear on the last certificate of title.” *In re Collier*, 726 N.W.2d at 802 n. 1 (emphasis added).

These exceptions are:

- (1) liens, claims, or rights arising or existing under the laws or the Constitution of the United States, which this state cannot require to appear of record;
- (2) the lien of any real property tax or special assessment;
- (3) any lease for a period not exceeding three years when there is actual occupation of the premises thereunder;
- (4) all rights in public highways upon the land;
- (5) the right of appeal, or right to appear and contest the application, as is allowed by this chapter;
- (6) the rights of any person in possession under deed or contract for deed from the owner of the certificate of title; and
- (7) any outstanding mechanics lien rights which may exist under sections 514.01 to 514.17.

Minn. Stat. § 508.25.



To the extent that ownership can be established by possession, certificates of title are made more unreliable. Consistent with that, Minn. Stat. § 508.02 prohibits adverse possession (but allows for practical location of boundaries), as it provides that “[n]o title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered.

Whether property is abstract or Torrens affects more than where documents are recorded, or who examines title. It also impacts on issues such as whether possession of the property will mature into ownership. Recent cases and a statutory change in Minnesota not only illustrate how complex these issues can be, but have impacted on how they will be resolved.



# Registering Your Boundary

The Torrens Act provides for the judicial determination of boundaries either at the time of the initial registration (Minn. Stat. § 508.06) or subsequent to an initial registration (Minn. Stat. § 508.671).



## @ Initial Registration of Property

During the initial registration of land, the applicant decides whether to seek to have one or more the boundary lines registered. See Minn. Stat. § 508.06, subd. 11. While pursuing a judicial determination of the boundaries will require additional cost to the applicant, there may be a variety of reasons to have the boundary lines adjudicated in the proceeding and marked with judicial landmarks. Possibly the most common reason for pursuing a registration of the boundaries is where there is a known dispute with an adjoining property owner or discrepancy in the location of a common boundary. The applicant submits their survey with the application to the Examiner of Titles.

## After Property Is Already Registered Torrens

Under Minn. Stat. § 508.671, the owner of registered land may apply to have all or some of the boundary lines judicially determined. The owner of unregistered land may also file a petition under Minn. Stat. § 508.671 as long as the boundary to be determine “affects one or more adjoining parcels of registered land.” Minn. Stat. § 508.671 sub. 1. The applicant must identify (1) the adjoining landowners (names and post office addresses); and (2) the legal description of the adjoining land impacted by the boundary determination, in order for the examiner to identify who must be notified of the proceedings and served with a land summons. Minn. Stat. § 508.671 sub. 1. A copy of the petition is recorded and entered as a memorial on the petitioner’s certificate of title and on the certificates, if any, of other property impacted.

With the Petition, the owner submits a survey prepared by a licensed land surveyor showing the correct location of the boundary line (or lines) to be determined. Minn. Stat. § 508.671 sub. 1. Rule 211 of the Minnesota General Rules of Practice also provides the procedural process for establishing the boundaries. Rule 211 requires that applicant to have the property surveyed by a registered land surveyor

and submit the survey to the examiner of titles. The local examiner will let the petitioner know of any changes or revisions that the examiner requires to be made to the petitioner’s survey. The county examiner may have a number of requirements that the surveyor must include on the survey, including compliance with various 2016 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys.

Upon submission of the petition, it is then referred to the examiner of titles who examines the petition and issues an Examiner’s Report in the manner provided for the reference of initial applications for registration.



## Not So “Neighborly”...

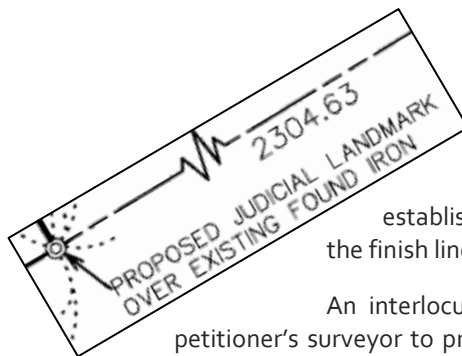
Notice of the proceeding is given to all interested persons, as identified in the Examiner’s Report, by the service of a summons in the same form as service of a summons in an



initial application proceeding. Minn. Stat. § 508.671 sub. 1. In other words, in a proceeding subsequent ("PS") action seeking a judicial determination of boundaries, the neighboring property owners are served with a land summons. In addition, any mortgage lenders or other parties having an interest in the impacted properties are served and given the opportunity to object.

When there is a contested matter (e.g., the neighboring property challenges the petitioner's claimed boundary line), the matter is heard before the Examiner of Titles or by the District Court. The petitioner will seek to have the matter referred to the district court for judicial assignment and further proceedings. Though a district court judge is initially assigned to the case, the parties named in the PS may agree to have the dispute referred to the examiner of titles to hear the matter.

Once a determination on the merits has been made (e.g. survey A wins over survey B), the non-prevailing party has the right to appeal the decision. While the next step, after a determination has been made, is to proceed with an interlocutory order to locate the proposed JLM locations, the prevailing party may wait until the appeal period has run. Alternatively, a court may order the prevailing party to wait to move ahead with the next steps until the appeal period has expired.



## INTERLOCUTORY ORDER – Proposed JLM Placement

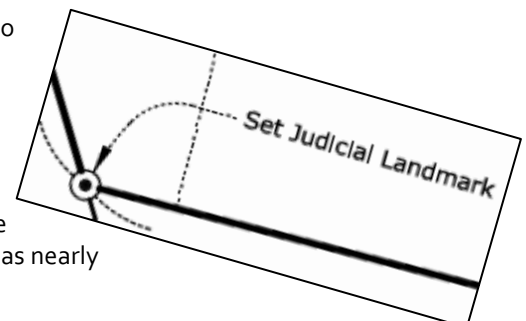
Once a determination is made on the merits (e.g. met burden of proof to establish the location of the boundary line), Minn. Stat. § 508.671 provides steps to follow to reach the finish line (i.e. a judicial determination of boundary memorialized on the certificate(s) of title).

An interlocutory order is issued, often by stipulation or agreement by the parties, ordering the petitioner's surveyor to prepare a plat of survey, which includes the proposed location for the judicial landmarks ("JLMs") to be placed. As provided in the Minnesota Rules of General Practice, Rule 211, "before any final adjudication of registration, the court by order shall fix and establish such boundaries and direct the establishment of 'judicial landmarks' in the manner provided by Minnesota Statutes, section 559.25." There are statutory requirements as to what the survey must show and the county's examiner of titles may have additional requirements upon her/his review.

## FINAL ORDER – Setting of Judicial Landmarks

Once the survey showing the proposed location of the JLMs is approved by the examiner, the surveyor physically sets the JLMs and prepares a final plat of survey with a certification on the survey itself that the JLMs have been placed. Minnesota Statute § 559.25 provides:

The judgment shall locate and define the boundary lines involved by reference to well-known permanent landmarks, and, if it shall be deemed for the interest of the parties, after the entry of judgment, the court may direct a competent surveyor to establish a permanent stone or iron landmark in accordance with the judgment, from which future surveys of the land embraced in the judgment shall be made. Such landmarks shall have distinctly cut or marked thereon "Judicial Landmark." The surveyor shall make report to the court, and in the report shall accurately describe the landmark so erected, and define its location as nearly as practicable.



Minn. stat. § 559.25 (emphasis added).

Once the final plat of survey is filed, an order is issued to direct the registrar of titles to receive a copy of a plat of survey and show the judicial determination of boundary as a memorial on the relevant certificates of title.

In the decree of registration entered, and in certificates of title thereafter issued, the description of the land will contain appropriate reference to such "judicial landmarks." In other words, the certificates of title for the impacted properties will include memorial that the boundary (or boundaries) have been adjudicated and JLMs have been established.



*boundaries applies to registered land whenever registered. Section 508.671 shall apply in a proceedings subsequent to establish a boundary by practical location for registered land.*

## BOUNDARY BY PRACTICAL LOCATION— TORRENS PROPERTY

Torrens property is not subject to claims based on adverse possession. Why should Torrens title property be treated differently? The Court of Appeals has answered the questions squarely: The purpose of the Torrens law is to establish an indefeasible title which is immune from adverse claims not registered with the registrar of titles and to assure that the property can become encumbered only with registered rights and claims. *Petition of McGinnis*, 536 N.W.2d 33, 35 (Minn. Ct. App. 1995). Though Torrens property is protected from adverse possession and prescriptive easement claims, registered property remains subject to claims based on boundary by practical location:

No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, *but the common law doctrine of practical location of*

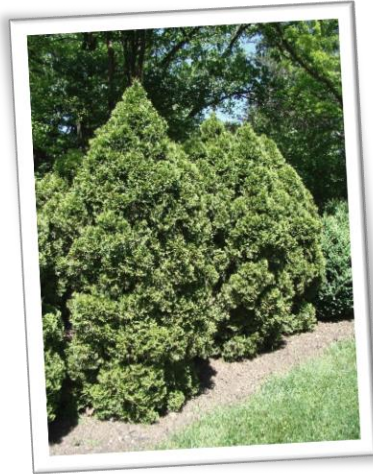
Minn. Stat. § 508.02 (emphasis added). The statute is retroactive—it applies to actions filed before codification in 2008. *Ruikkie v. Nall*, 798 N.W.2d 806 (Minn. Ct. App. 2011); *see also Hebert v. City of Fifty Lakes*, 744 N.W.2d 226 (Minn. 2008). Minnesota statute specifically allows landowners to establish boundaries based on the common law doctrine of practical location which applies to registered land whenever registered. Minn. Stat. § 508.02. *See In re Jacobson*, 2013 WL 5878252, at \*2 (Minn. Ct. App. November 4, 2013) ("registered land is not protected from the common law doctrine of boundary by practical location."). *See also* Minn. Stat. § 508.25 specifying a certificate holder's rights against adverse claims.

There are three means of claiming boundary by practical location ("BPL") – by acquiescence, agreement, and estoppel:

Ordinarily, in order to establish a practical location of a boundary line it must appear (1) the location relied on was acquiesced in for the full period of the statute of limitations; or (2) the line was expressly agreed upon by the parties and afterwards acquiesced in; or (3) the party barred acquiesced in the encroachment by the other, who subjected himself to expense which he would not have done if there had been a dispute as to the line.

*Romanchuk v. Plotkin*, 9 N.W.2d 421, 427 (Minn. 1943).





## BPL: ACQUIESCENCE

To establish BPL through acquiescence, a person must show by evidence that is clear, positive, and unequivocal that the alleged property line was "acquiesced in" for a sufficient length of time to bar a right of entry under the statute of limitations,

which is 15 years in Minnesota. *Britney v. Swan Lake Cabin Corp.*, 795 N.W.2d 867, 872 (Minn. Ct. App. 2011) (citing Minn. Stat. § 541.02). The acquiescence required is not merely passive consent but "conduct from which assent may be reasonably inferred." *Id.*

The *Britney* Court noted that the type of acquiescence required to establish boundary by practical location must be something beyond mere passive conduct on the part of the owner of the property being claimed. Some conduct evidencing assent was required:

In the present case, appellant argues only that it has established a boundary by practical location by way of acquiescence. The acquiescence required is *not merely passive consent but conduct from which assent may be reasonably inferred*. *Engquist v. Wirtjes*, 243 Minn. 502, 507–08, 68 N.W.2d 412, 417 (1955) (affirming no-practical-location finding absent evidence that disseized or predecessors recognized or treated a fence as a division line, or that disseizor or predecessors used the disputed

land); *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. Ct. App. 1987) (no practical location by acquiescence when disseizor does not use disputed area for statutory period, even though disseized "tacitly consented" to boundary by failing to dispute a sightline).

795 N.W.2d at 872.

When adjoining landowners occupy their respective premises up to a certain line that they both recognize and acquiesce in for 15 years, a Court may determine they are precluded from contesting that boundary line. *Amato v. Haraden*, 159 N.W.2d 907, 910 (Minn. 1968); see Minn. Stat. § 541.02 (stating 15-year limitation on real-estate actions). In *Soland v. Evert*, the Minnesota Court of Appeals reviewed the evidence of an old pasture fence to support a boundary by practical location claim asserted:

Acquiescence requires actual or implied consent to some action by the disseizor, such as construction of a boundary or other use of the disputed property, and acknowledgement of that boundary by the disseized party for an extended period of time. *Engquist v. Wirtjes*, 243 Minn. 502, 507–08, 68 N.W.2d 412, 417 (1955); *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. Ct. App. 1987). To demonstrate acquiescence in a boundary location, the line must be "certain, visible, and well-known." *Beardsley*, 52 Minn. at 546, 54 N.W. at 742.

*Soland v. Evert*, No. A11-100, 2011 WL 6015170, at 5 (Minn. Ct. App. Dec. 5, 2011)(unpublished).

## BPL: EXPRESS AGREEMENT

A party must prove two elements in order to establish a boundary by practical location through an express agreement: (1) the existence of "an express agreement between the landowners to set an exact, precise line; and (2) acquiescence in the agreement for a considerable period of time. *Ruikkie v. Nall*, 798 N.W.2d 806, 818 (Minn. Ct. App. 2011).

An express agreement requires more than unilaterally assumed, unspoken and unwritten mutual agreements corroborated by neither word nor act; rather, the parties must engage in "a specific discussion identifying the boundary line or a specific boundary-related action." *Id.* Caselaw does not require a formal agreement. Such a formal agreement would be a contractual basis for setting a boundary, not a *practical-location* basis. Because this agreement is not an actual contract, acquiescence in the agreed-upon boundary must be for a "substantial period of time," although not necessarily the full 15 years required under the acquiescence theory. *Id.* See *Beardsley*,





54 N.W. at 743 (nine years following survey and establishment of fence); *Cnty. of Houston v. Burns*, 148 N.W. 115, 115 (Minn. 1914) (almost ten years following survey and establishment of fence).

## BPL: ESTOPPEL

Boundary by estoppel is established by showing that a "party whose rights are to be barred ... silently looked on with knowledge of the true line while the other party encroached thereon or subjected himself to expense which he would not have incurred had the line been in dispute." *In re Jacobsen*, 2013 WL 5878252, at \*2 (Minn. Ct. App. 2013). Estoppel requires knowing silence on the part of the party to be charged and unknowing detriment by the other.

Though all three means involve possession, the Minnesota Supreme has noted that boundary by practical location is "independent of adverse possession." *Enquist v. Wirtjes*, 68 N.W.2d 412, 417 (Minn. 1955).

BPL is different from adverse possession. "The claimant must show he had actual, exclusive, open, continuous and hostile

possession of the real property in question for a period greater than 15 years. If he has, he has become the owner of the property involved and the court confirms that ownership." *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972). And, one need only show that the use was sufficiently "open" to give notice to a reasonable owner, not that the owner actually had notice or acquiesced:

The claim of right must be exercised with the knowledge of the owner of the servient estate, i. e., actual knowledge or a user on the part of the claimant of such character that knowledge will be presumed.

*Naporra v. Weckwerth*, 226 N.W. 569, 571 (Minn. 1929) (emphasis added).



...not merely passive consent but conduct from which assent may be reasonably inferred

## REQUIRES "ACQUIESCENCE"

While the application of boundary by practical location may seem clear as mud, there are many cases that have analyzed the doctrine of BPL under a variety of facts resulting in numerous cases that are instructive in evaluating whether the Examiner of Titles and the District Court Judge will agree (or disagree) with a claim of BPL.

**BPL Based on Fence:** In *Soland v. Evert*, the Court of Appeals deferred to the district court's credibility determination and affirmed its determination that various property owners and their predecessors acquiesced to an old hog pasture fence as the true boundary line and determining that the claimant owns the disputed property by BPL. 2011 WL 6015170 (Minn. Ct. App. 2011). In *Soland*, there was no dispute about the fact that from 1947 to 1973, both sides of the fence line maintained hog pastures; the fence was treated as the boundary and the owners did claim or use the property on the other side of the fence.

**No BPL Based on Fence:** In *Wojahn v. Johnson*, the MN Court of Appeals found the trial court was justified in finding the evidence insufficient to show clearly and unequivocally that a landowner recognized a fence to be a dividing line between the adjoining parcels for over 15 years. 297 N.W.2d 298, 305 (Minn. 1980). The Court acknowledged that although the record contained evidence of the existence at one time or another of the alleged boundary fence, the Court found there was much evidence that the fence was deteriorating and in disrepair at various times in the past. There was also conflicting testimony of the purpose of the fence and concluded that the evidence was too amorphous to support a finding of a boundary line by practical location.

**BPL Based on Plow Line:** In *Roehrs v. Rasmussen*, the MN Court of Appeals found that farmland plow lines established the practical location of the boundaries between the fields because they reflected the abutting owners' consistent intent to trace the two presently disputed boundary lines directly between the accepted end points of each. 2010 WL 1850796, at \*3 (Minn. Ct. App., 2010) Because the



**Katie L. Wahlberg**

[katiew@olson-law.com](mailto:katiew@olson-law.com)



**Scott M. Lucas**

[scottl@olson-law.com](mailto:scottl@olson-law.com)

Olson, Lucas, Redford

& Wahlberg, P.A.

7401 Metro Blvd., Ste. 575

Edina, MN 55439

(952) 224-3644

[olson-law.com](http://olson-law.com)



uncontested trial testimony established that the plow lines have always run directly from the field driveway to the post and from the post to the fence line, we deem the fact that the plow lines might have varied slightly from year to year to be legally inconsequential.

**No BPL Based on Mow Line:** In *Slindee v. Fritch*, the MN Court of Appeals reversed the district court and agreed with one of the landowners that there was no express agreement to establish the mow line as the boundary line and that the mow line is too irregular and imprecise to constitute a boundary. 760 N.W.2d 903, 910 (Minn. Ct. App. 2009). The mow line in that case was too ambiguous to establish the boundary even if the parties had agreed generally to rely on it. Even if there had been some basis to treat the mow line as a marker evidencing an attempted boundary agreement, a title-transferring boundary agreement must also establish an "exact, precise line." *Id.*

**BPL Based on Known Encroachment:** The MN Court of Appeals in *In re Wells Fargo Bank, N.A.* agreed with a district court's determination to realign the property boundary under the doctrine of practical location by estoppel when the owner bought property knowing of an encroaching septic and driveway and even negotiated a discount for the property from a lender post-foreclosure that was unaware of the encroachment. 2016 WL 3582593, at \*4 (Minn. Ct. App. 2016).

**No BPL Based on Known Encroachment:** The MN Court of Appeals *Watkins v. Patch* agreed with a district court's determination that the party asserting BPL failed to provide evidence of direct conduct, as opposed to mere passive consent, from which assent could be reasonably inferred. 2013 WL 3491175 (Minn. Ct. App. 2013). Besides arguing that the neighbor acquiesced in the gravel road as the boundary line because they knew about the garage, concrete slab, and shrubs on the land in dispute and did not object, the court concluded that the claimant did not present any evidence of conduct on the part of respondents from which to infer that they acquiesced in the new boundary line.

## CONCLUSION

The Torrens system offers the advantage of simplifying the examination of title from an abstract to a single certificate of title and brings the advantage of precluding an adverse possession or prescription easement claim down the road. And while the process of having boundaries judicially determined has its own complexities, it can provide resolution in the face of disputes as to what the survey says (or should say).

*\*These materials are intended for informational purposes only and not for the purpose of providing legal advice. You should consult an attorney to obtain advice with respect to any particular issue.*