

# Mentoring Mondays, 13 Sep 2021

## *Conflicting Title Elements: Rules of Construction*

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*Home | Mentoring Mondays | Rules of Construction*

*password: monday\_roc*



Typos in original Powerpoint. Corrected version uploaded Mon 13 Sep 10:00 am CDT



## The original *Spice Girls*?

### **Man beaten to death with spice grinders**

DHAKA, Bangladesh (AP) — Five women armed with heavy spice grinders and iron rods surprised a sleeping man and beat him to death over a land dispute, a newspaper said Thursday.

The women, aged 18 to 45, attacked the man in his hut near Dhaka late Wednesday and he died a few hours later, the newspaper Ittefaq said.

Their family had been engaged in a long-standing dispute with the man over about a half-acre of land, Ittefaq said.

## Learning Objectives

How parcels and boundaries are created  
Where the Rules of Construction come from  
What are unwritten rights  
How gaps and overlaps are handled  
The Statute of Frauds and why it matters  
Description interpretation issues: Ambiguities;  
Controlling/informative terms  
Written intent conflicts

## **Just enough to be dangerous...**

A ~40 slide Powerpoint doesn't make you a description interpretation expert. This material is a general overview with a lot of caveats because it is based on common law.

Common law can vary between jurisdictions; must be familiar with your area. Often there is no definitive solution to a re-establishment problem, only the "best" given the circumstances.

Changing evidence even a little can dramatically affect the conclusion. Research is key, including a title search back to parcel beginnings and parcel evidence.

Consider all reasonable alternatives and why they do or don't apply.



# I. Parcel Creation

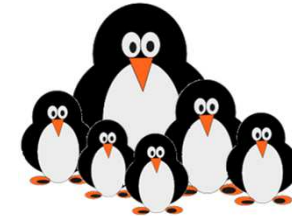
## A. What, Why?

### *Parent-Child*

At least one new boundary

Possible shared boundaries

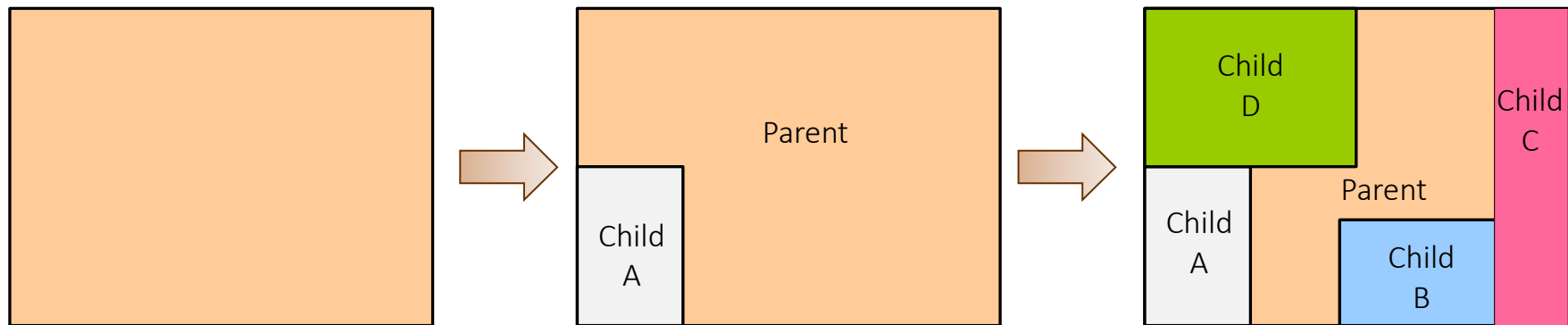
Multiple children, multiple new boundaries – how do they relate?



### *Family analogy*

Child inherits characteristics from parent

Parent must provide for child



# I. Parcel Creation

## B. Processes

*How boundaries are created affect:*

Description type

How are gaps and overlaps handled

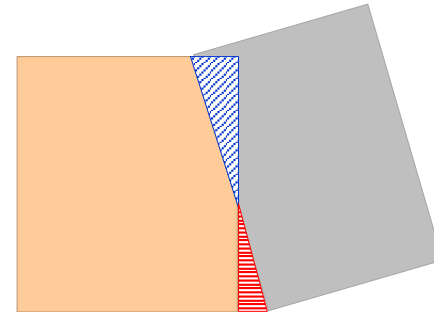
### Boundary creation

Establishes boundary once and forever.

Creates adjoining relationship

Location is “without error.”

Creates evidence framework for later re-establishment.

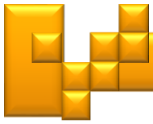


### *Creation methods*

Simultaneous

Sequential

Combination

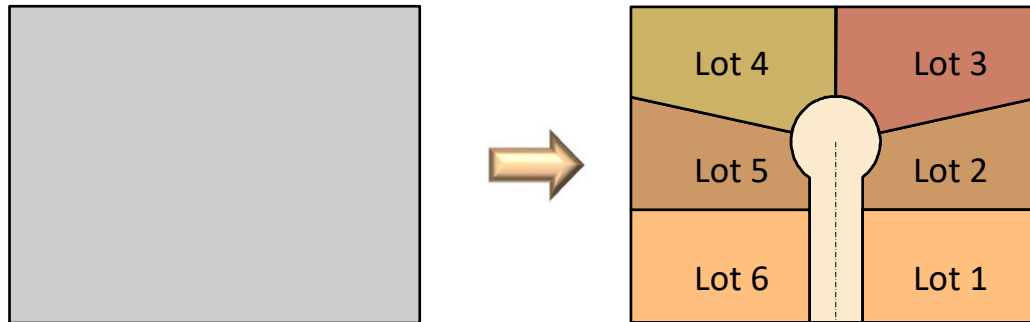


# I. Parcel Creation

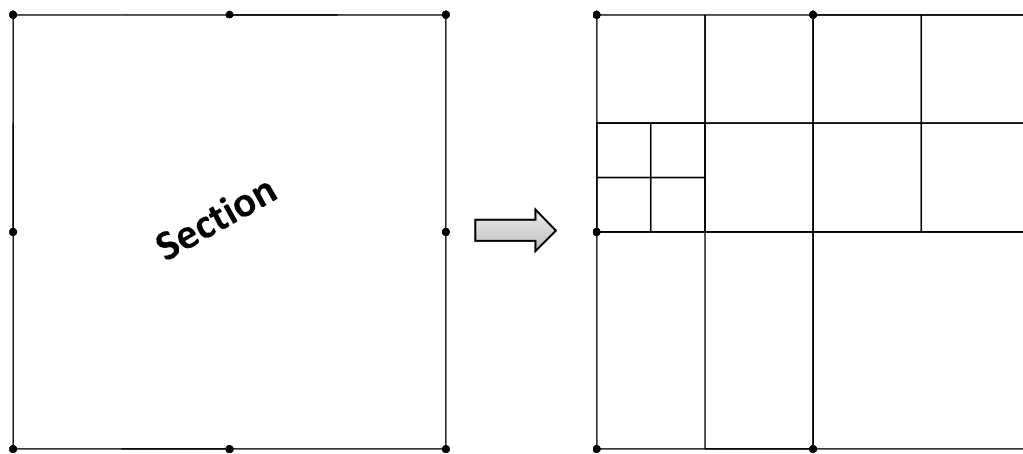
## B. Processes

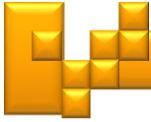
### 1. Simultaneous

Boundaries created at the same time by the same legal instrument.  
Have equal standing - no Sr-Jr relationships.



*Description types*  
Lot and block  
Aliquot part





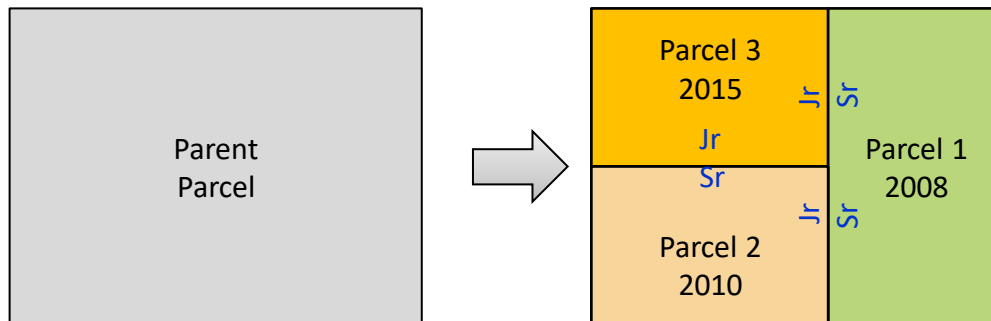
# I. Parcel Creation

## B. Processes

### 2. Sequential

New parcels created independently from same parent over time.

Earlier created boundaries have precedence (senior) over later created ones (junior).



*Description types*  
Metes  
Bounds  
Metes and Bounds





# I. Parcel Creation

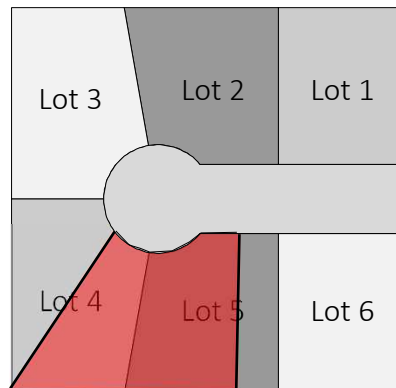
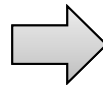
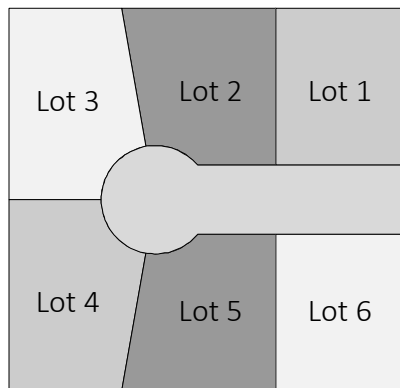
## B. Processes

### 3. Combination

New parcels created by combination of simultaneous and sequential processes.

New boundaries can have characteristics of either or both.

Senior-junior standing may or may not exist

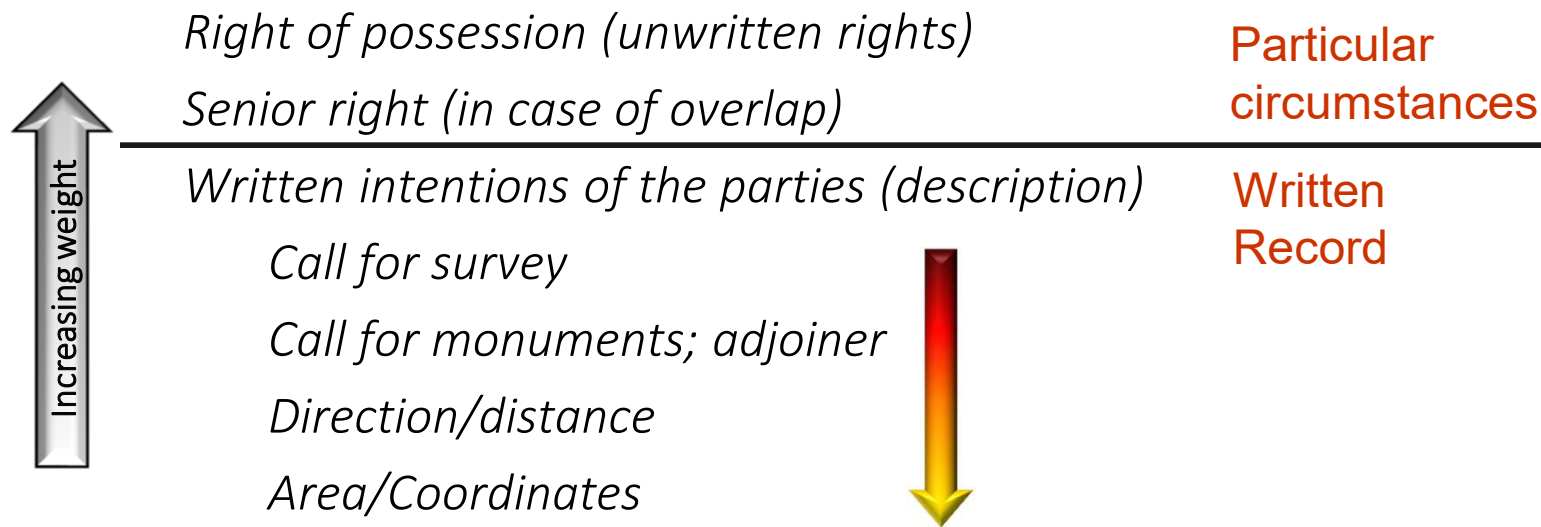


New parcel is part of Lot 4  
and part of Lot 5

*Description type*  
Quasi-metes and bounds;  
“of”

## II. Rules of Construction (RoC)

Evaluation framework (aka *Order of Importance of Conflicting Elements*)



If elements conflict, RoC indicates their relative weight

Not strict; guidelines

Description wording can change order

If higher elements are lost, lesser elements carry greater weight.

## II. Rules of Construction (RoC)

### A. Right of Possession: Unwritten Rights

*Based on adjacent owners actions/inactions*

Ownership departs from description

Doctrines

Adverse possession

Prescription

Oral agreement

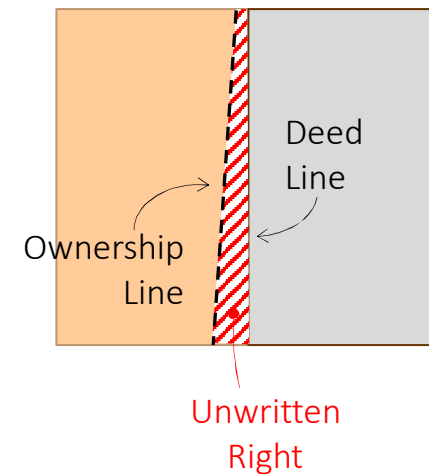
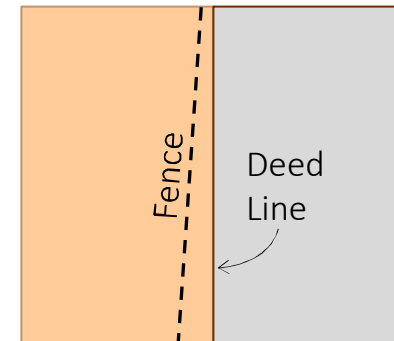
Equitable estoppel

Recognition and acquiescence

Ownership determined by courts

Surveyor doesn't have authority

Map deed and use (encroachment) lines



## II. Rules of Construction (RoC)

### B. Senior Right: Gap or Overlap

#### *Precedence establishment*

Once boundary is created, Sr-Jr relationship is established and doesn't change unless boundary is legally removed.

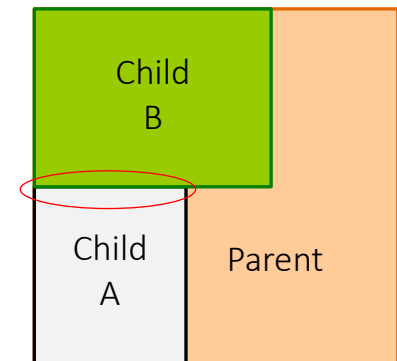
Is a **boundary** attribute, not an **owner** attribute

Child inherits parent's Sr-Jr standing along shared boundaries.

Parent is junior to children – parent must provide.

≥2 adjoining children from common parent-  
overlap/gap potential

Resolution depends on how parcels are created





## II. Rules of Construction (RoC)

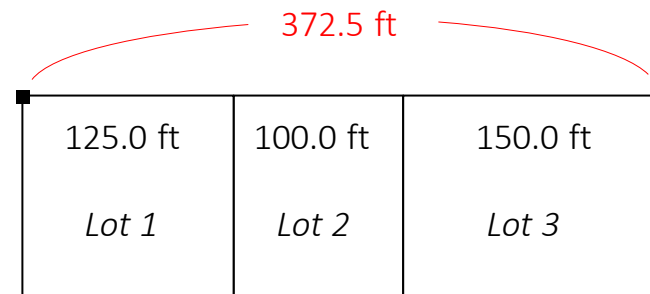
### B. Senior Right: Gap or Overlap

#### 1. Simultaneous

Parcel boundaries have equal standing: no sr-jr rights

Excess or deficiency proportioned between found original corners

Subdivision



$$\text{Lot 1: } W = (372.5/375.0) \times 125.0 = 124.2 \text{ ft}$$

$$\text{Lot 2: } W = (372.5/375.0) \times 100.0 = 99.3 \text{ ft}$$

$$\text{Lot 3: } W = (372.5/375.0) \times 150.0 = 149.0 \text{ ft}$$

$$\checkmark 372.5 \text{ ft}$$

USPLS

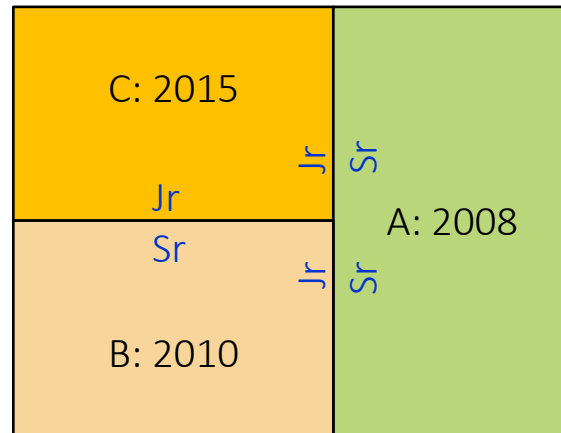
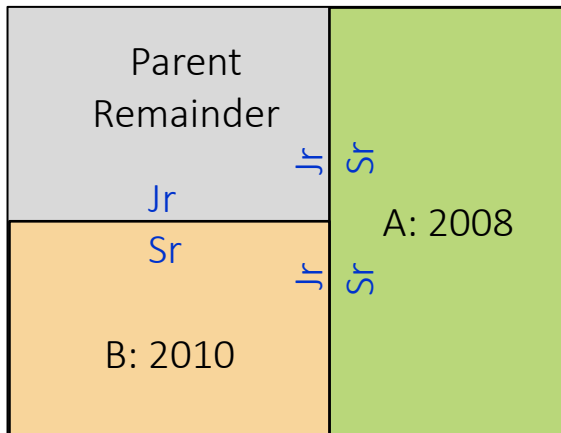
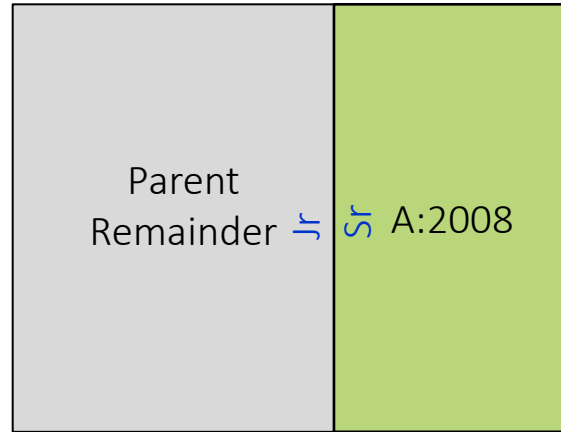
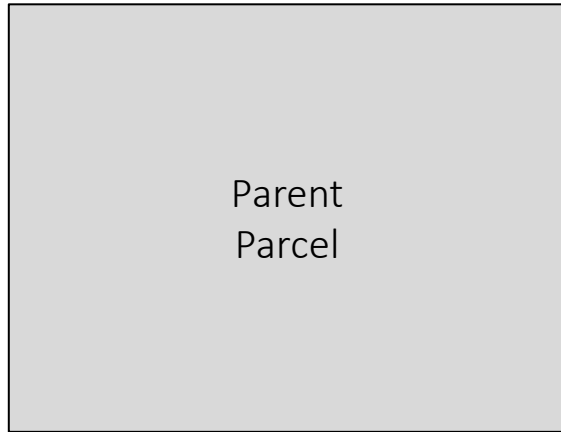
Single or Double Proportionate Measurement

# II. Rules of Construction (RoC)

## B. Senior Right: Gap or Overlap

### 2. Sequential

Earlier created boundaries have higher standing than later boundaries

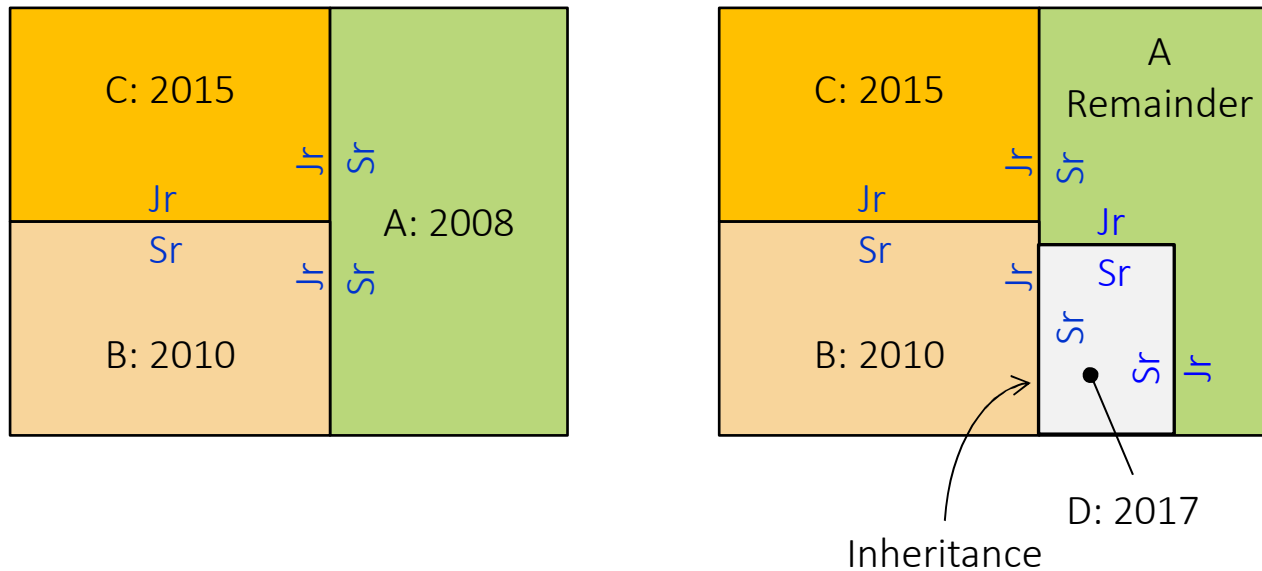


# II. Rules of Construction (RoC)

## B. Senior Right: Gap or Overlap

### 2. Sequential

Child inherits parent's sr-jr relationship along shared boundaries



Parcel D description might call Parcel B as adjoiner **but** Parcel D is senior by inheritance.

## II. Rules of Construction (RoC)

### B. Senior Right: Gap or Overlap

#### 2. Sequential

Along sr-jr boundaries:

- Sr parcel protected in case of an overlap - the junior parcel yields.
- If excess, gap is parent remainder.

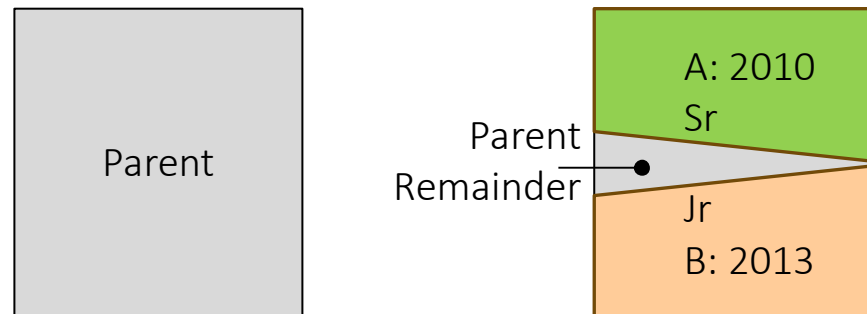
Touchy situation: Give to one parcel or other or split between?

*Obviously* original intent wasn't for a gap to exist.

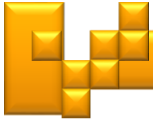
“The question is not what reasonable men intended to convey but what they in fact described in the contract or memorandum.”

*Wiegand v. Gissal, 28 Wis. 2d 488, Wis. Supreme Court 1965*

The gap was not conveyed.







## II. Rules of Construction (RoC)

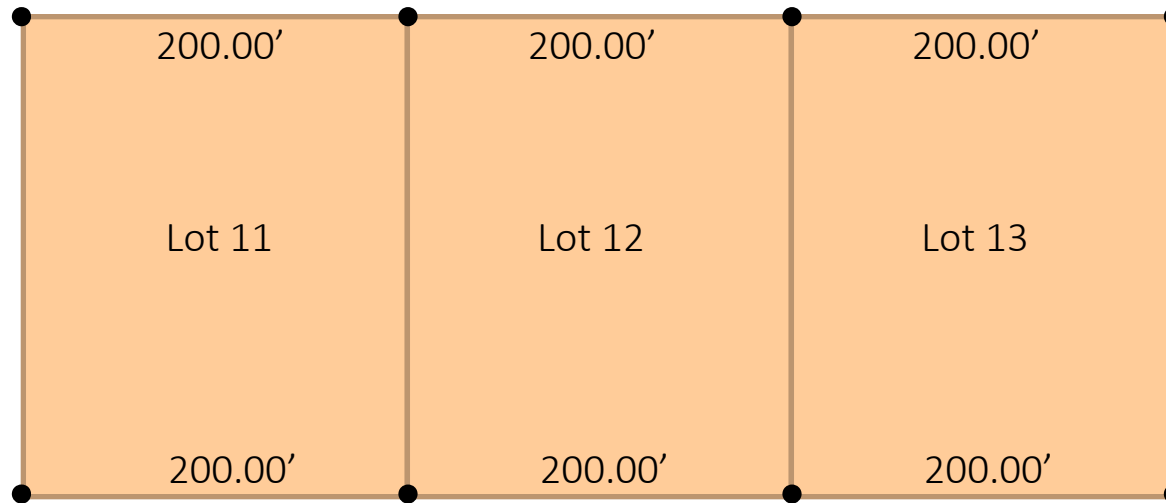
### B. Senior Right: Gap or Overlap

#### 3. *Combination*

Parcel boundaries may or may not have sr-jr relationships

Example:

Subdivision: simultaneous, no sr-jr relationships



## II. Rules of Construction (RoC)

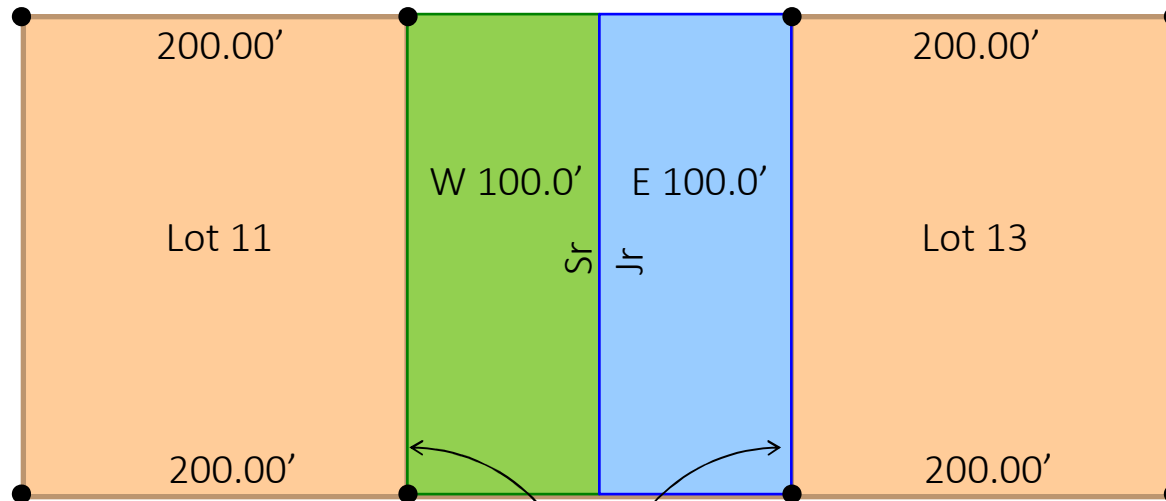
### B. Senior Right: Gap or Overlap

#### 3. Combination

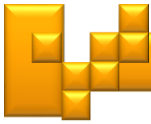
Parcel boundaries may or may not have sr-jr relationships

Example:

Sequentially: “West 100.0 ft of Lot 12” later “East 100.0 ft of Lot 12”



No sr-jr relationships  
along these lines.



## II. Rules of Construction (RoC)

### B. Senior Right: Gap or Overlap

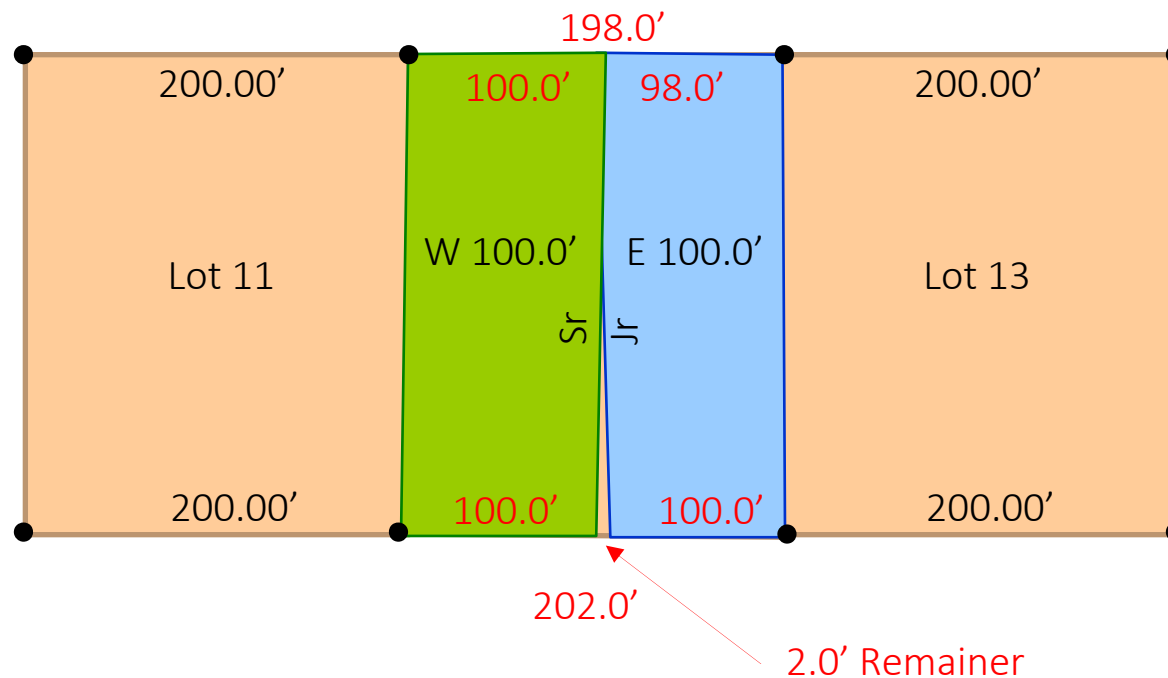
#### 3. Combination

Parcel boundaries may or may not have sr-jr relationships

Example:

Sequentially: "West 100.0 ft of Lot 12" later "East 100.0 ft of Lot 12"

Resurvey: Deficiency on N, excess on S creates 2.0 ft remainder



## II. Rules of Construction (RoC)

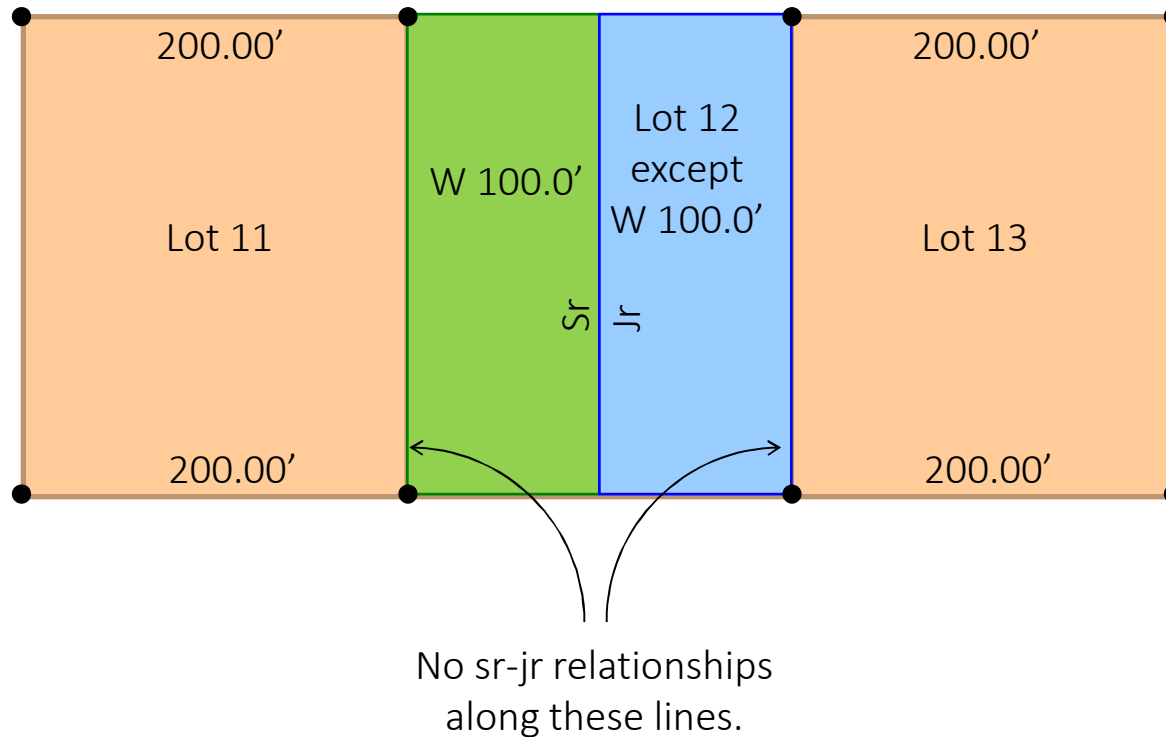
### B. Senior Right: Gap or Overlap

#### 3. Combination

Parcel boundaries may or may not have sr-jr relationships

Example:

Instead: "West 100.0 ft of Lot 12" later "Lot 12 except West 100.0 ft"





## II. Rules of Construction (RoC)

### B. Senior Right: Gap or Overlap

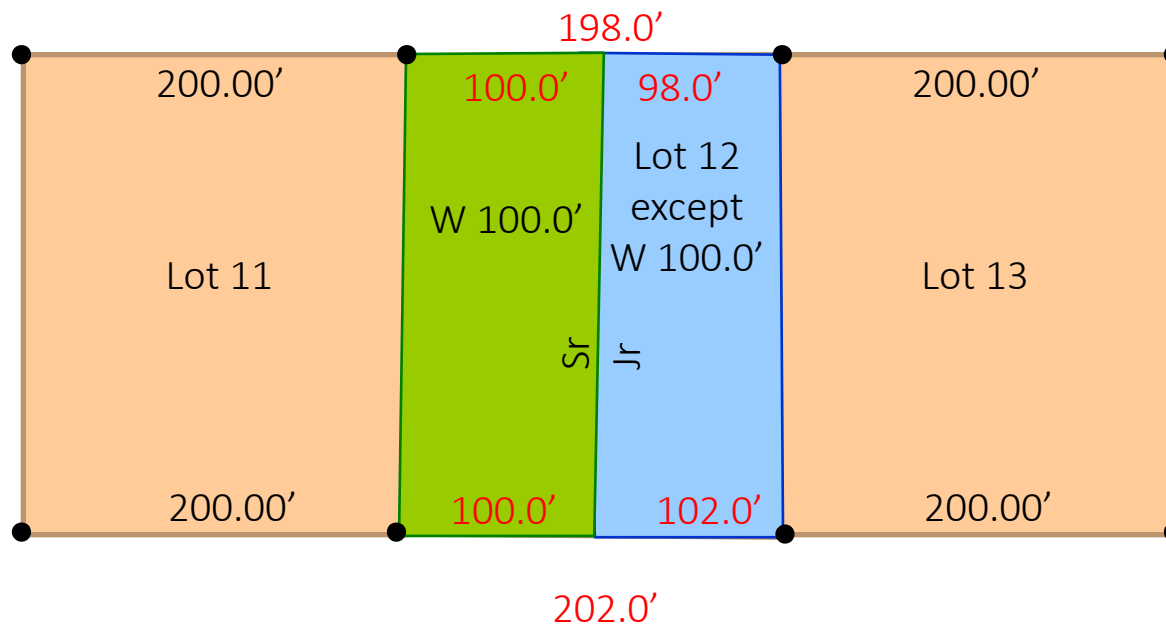
#### 3. Combination

Parcel boundaries may or may not have sr-jr relationships

Example:

Instead: "West 100.0 ft of Lot 12" later "East 100.0 ft of Lot 12"

Resurvey: Deficiency on N, excess on S to junior parcel



## II. Rules of Construction (RoC)

### C. Written Intent

#### 1. Background

##### a. Statute of Frauds (SoF)

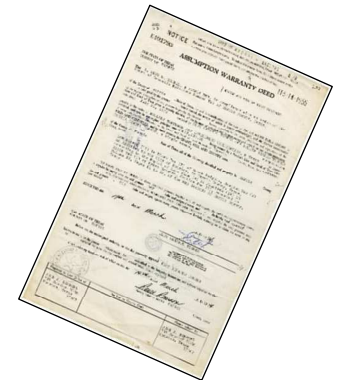
Contract must be in writing to be valid.

- All terms included
- Prevents contradiction by action or word
- Interested third parties can interpret



Deed is a contract for property conveyance

- Description defines physical extent and rights transferred
- Written intent



What about *unwritten* rights?



Courts do not view unwritten rights as title *transfer* but instead as title *clarification*.

## II. Rules of Construction (RoC)

### C. Written Intent

#### 1. Background

##### b. Description Interpretation

Simultaneous: references to map or plat

Unless errors on map, intent relatively clear

Sequential or Combination: *narrative* descriptions

Greater conflicts potential

- Archaic terms, “ancient” measurements

“Commencing at a point 20 rods 19 links North of a point that is 26 links East of the East side of the steel tube at the Northeast corner of the wagon bridge...”  
(1992)

- Written by non-surveyors

“Commencing at the West 1/4 corner of Section 9; thence N80° 29ft 17in. East, 2781.62 ft; thence S89° 11ft East, 177.84 ft;...” (1996)



Surveyor must follow common law principles to interpret & apply description

## II. Rules of Construction (RoC)

### C. Written Intent

#### 1. Background

#### c. Controlling and Informative Terms

Controlling: defines course termination and/or path

Key words: to, along, parallel, perpendicular, with, continuing...

Identify a condition

Informative: all other terms, help identify controlling term(s)



“..thence North 38 degrees West 139.6 feet **to** an iron stake...”

Go to and end at the iron stake (*to*);

Monument higher element, dist & dir yield if conflict.

“...thence southwesterly **along** said high water mark **to** an iron stake...”

Course follows topographic feature (*along*)

and ends at an iron stake (*to*);



## II. Rules of Construction (RoC)

### C. Written Intent

#### 1. Background

#### d. Ambiguities

##### (1) Extrinsic evidence

Physical and parol evidence outside the description.

Cannot be used to change description terms, only help explain.



##### (2) Ambiguity Types

Ambiguity: when something can be *reasonably* interpreted more than one way. Introduces confusion.

Common in descriptions written by non-surveyors.

## II. Rules of Construction (RoC)

### C. Written Intent

#### 1. Background

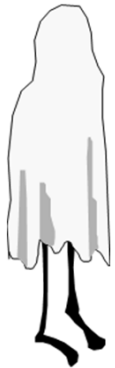
#### d. Ambiguities

#### (2) Ambiguity Types

#### (a) Latent

Hidden, not apparent until application.

“Commencing at a point  $84 \frac{1}{4}^{\circ}$  East of the center of Section Seven (7); being station "A" having bearing tree viz; a black oak 14 inches in diameter, South  $6^{\circ}$  East 57 links distant, (said black oak being North  $84 \frac{3}{4}^{\circ}$  East,  $24 \frac{7}{25}$  rods of Stephen A. Thayer dwelling house),...”  
(1999)



May need extrinsic evidence to reconstruct location

## II. Rules of Construction (RoC)

### C. Written Intent

#### 1. Background

#### d. Ambiguities

#### (2) Ambiguity Types

#### (a) Patent

Obvious, immediately apparent

“... thence S55° 55ft 20in West, 15.36 ft;” (1999)



Mistake in original contract.

Mistake must be found and applied where it occurred.

Correction instrument

## II. Rules of Construction (RoC)

### C. Written Intent

#### 2. *Call for survey*

Some boundary creations are based on survey and monumentation

USPLS: survey before sale

Subdivision plat: map and monument before sale

Survey & map are primary evidence of intent.

Typical for simultaneously created parcels.

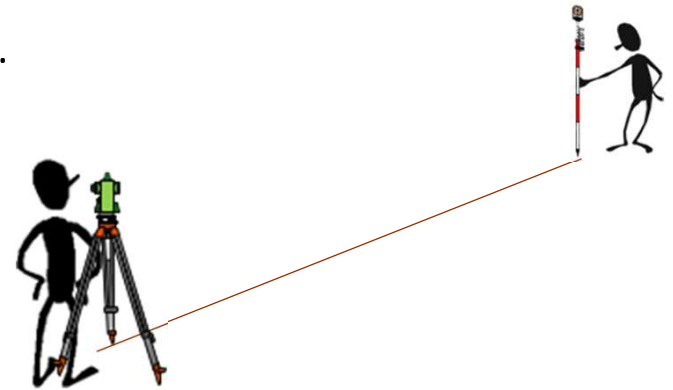
#### 3. *Monuments and Corners*

##### a. Monument v Corner

Corner: legal location; dimensionless

Monument: physical feature used to mark a corner

Monument is corner surrogate, if it controls



## II. Rules of Construction (RoC)

### C. Written Intent

#### 3. *Monuments and Corners*

##### b. Monument

###### (1) To control over lesser elements

Must be

- Called in description
- Identifiable
- Undisturbed

Can control

- Direction and termination
- Direction only; termination controlled by higher element

###### (2) Accessories

When established at original monument placement, are considered part of the monument.



## II. Rules of Construction (RoC)

### C. Written Intent

#### 3. *Monuments*

##### b. Monument

###### (3) Disposition: Location certainty

- Existent (Found): position can be identified by original mon/acc or acceptable physical & parol evidence. Location is certain.
- Obliterated: no traces of original mon/acc, but position can be re-est beyond reasonable doubt using physical & parol evidence.
- Lost: Insufficient evidence to re-est beyond reasonable doubt. Must resort to measurements to surrounding corners.



## II. Rules of Construction (RoC)

### C. Written Intent

#### 3. *Monuments*

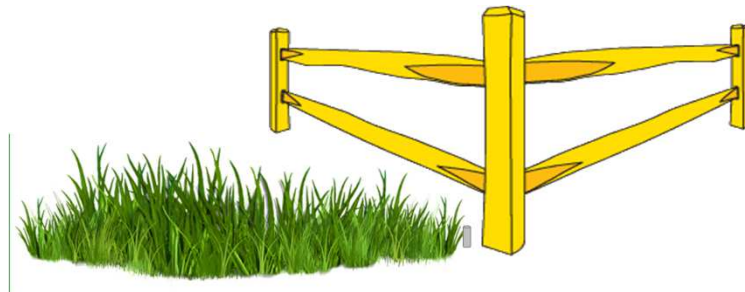
##### b. Monument

###### (4) Corner by Common Report

Location based on reputation

- Reasonable location
- Accepted by all affected parties
- Location can't be disproved

Avoid using this location justification. Based on unwritten rights.  
Evidence collection and evaluation.



## II. Rules of Construction (RoC)

### C. Written Intent

#### 4. Measurements

##### a. Distance and Direction

Inferior to a controlling monument

Control if:

- Monuments not called
- Called monuments are lost

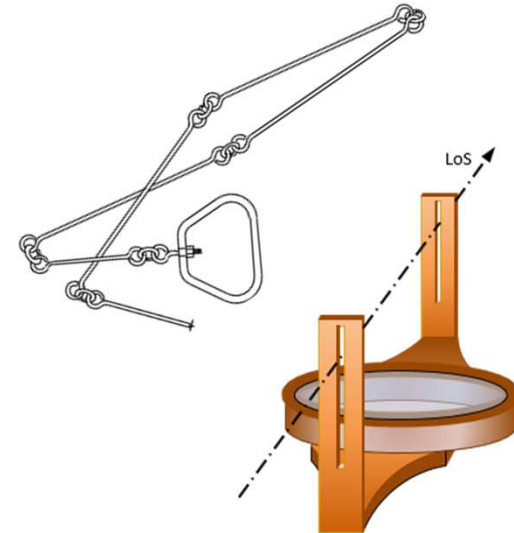
Direction basis? Can recreate in field?

How numbers are written convey magnitude and implied accuracy.

“North, 200 ft”

How close to north? Distance to 100 ft, 10 ft, 1 ft?

“...thence  $S88^{\circ}16'52''W$ , 0.30 feet to the existing east line of Section 1, T5N, R9E; thence  $S00^{\circ}18'01''W$ , 0.01 feet along said east line of Section 1;...” (2002)





## II. Rules of Construction (RoC)

### C. Written Intent

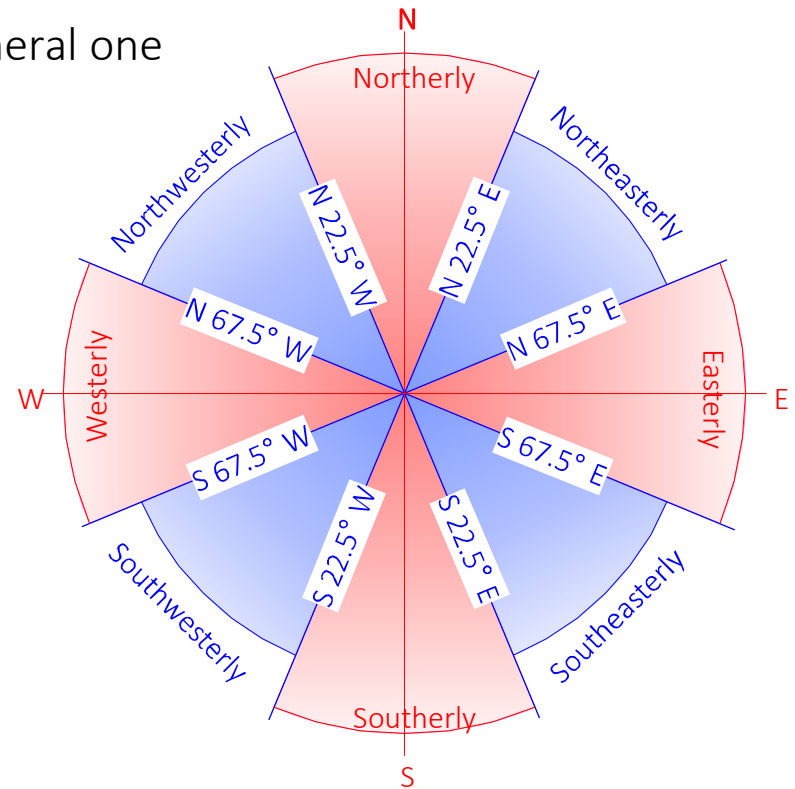
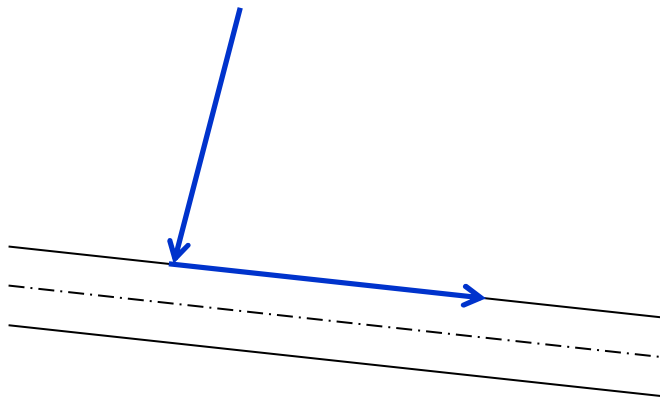
#### 4. Measurements

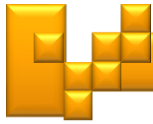
##### b. General directions

Informative term

A range of directions for each general one

“...to the northerly sideline of Maple Drive; thence easterly along said sideline...”





## II. Rules of Construction (RoC)

### C. Written Intent

#### 4. Measurements

##### c. What's a conflict?

Last two courses "... thence S18°20'W, 283.2 ft to a 1/2-inch iron pin;  
thence 220 ft back to the point of beginning."

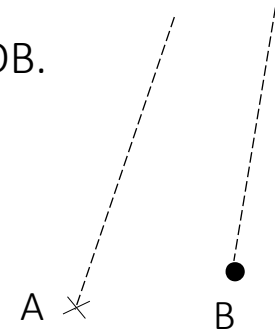
All corners have been recovered until last one before POB.

No mon evidence at S18°20'W, 283.2 ft, pt A.

1/2-inch iron pin at S17°50'10"W, 285.72 ft, p B.

A & B ~3 ft apart.

POB to pt A is 220.5 ft, to pt B 224.52 ft.



Are dist and dir to pt B "too far" from record dir and dist?

Can lower elements control over higher elements?

Does pt A fit closing line better than pt B?

Is B-POB dist within the uncertainty of the 220 ft call?

How much must elements differ to conflict with each other?

Extrinsic evidence?





## II. Rules of Construction (RoC)

### C. Written Intent

#### 5. Area/Coordinates

##### b. Coordinates

Coordinates, even with GPS, are derived quantities.

Historically have either not been included or were informative.

Times changing':

“...thence Northerly 487 feet, more or less, to GPS waypoint, Lat. 43.828655, Long. -90.661033; thence Northwesterly 296 feet, more or less, to GPS waypoint, Lat. 43.829424, Long. -90.661390; thence Westerly 298 feet more or less, to GPS waypoint, Lat. 43.829516, Long. -90.662515;...” (2005)

No higher element calls.

Controlling terms: *to* GPS waypoint

Coordinate questions

Units? Accuracy? Datum/adjustment?

## II. Rules of Construction (RoC)

### C. Written Intent

#### 6. *More or less*

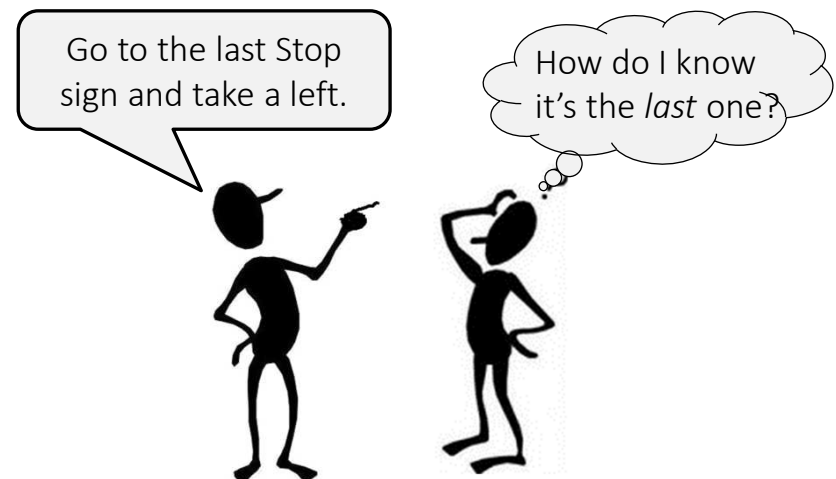
Indicates an element has unknown certainty.

The element is informative

Similar terms: *approximately, plus minus, ±, about*

*“...thence running in an Easterly and Southeasterly direction along the South and Southwesterly line of private road that is used by the grantee herein a distance of about 28 rods; thence...” (2001)*

Need extrinsic evidence



## II. Rules of Construction (RoC)

### C. Written Intent

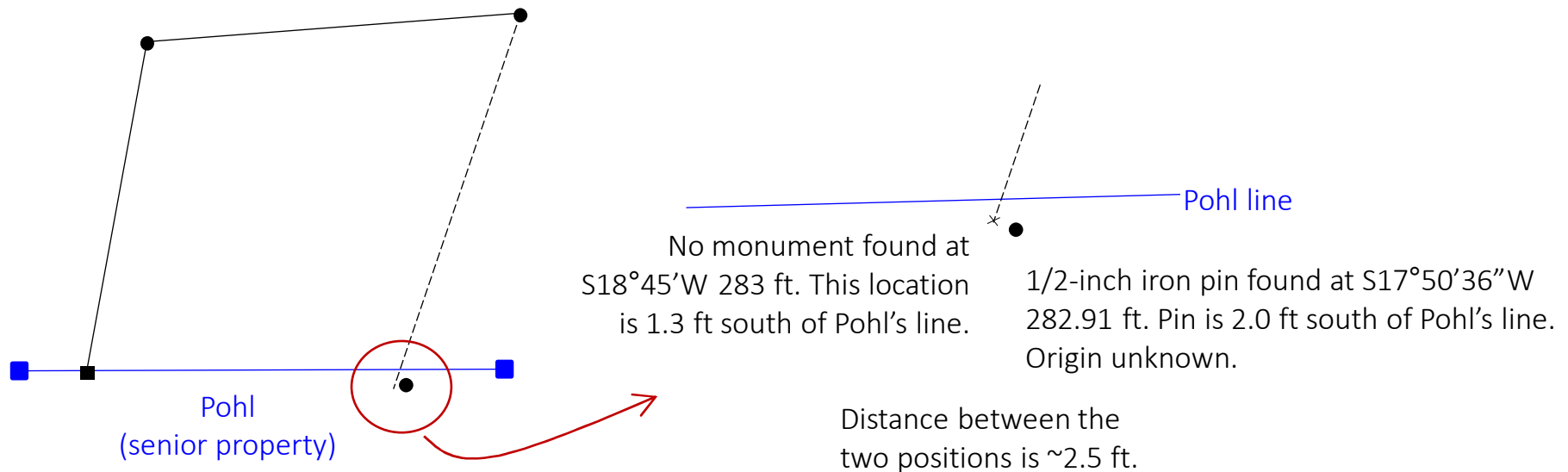
#### 7. *Conflicting Title Elements*

“...Beginning at a 1-inch diameter iron bar in the north line of the Pohl property; thence N10°20′E 241 ft to a 1/2-inch iron pin; thence N85°35′E 267 ft to a 1/2-inch iron pin; thence S18°45′W 283 ft; thence back to the point of beginning”

First two courses found with no issues. Diagram shows third course situation.

How to run in last two courses?

Assume no extrinsic evidence available.



## II. Rules of Construction (RoC)

### C. Written Intent

#### Short answer

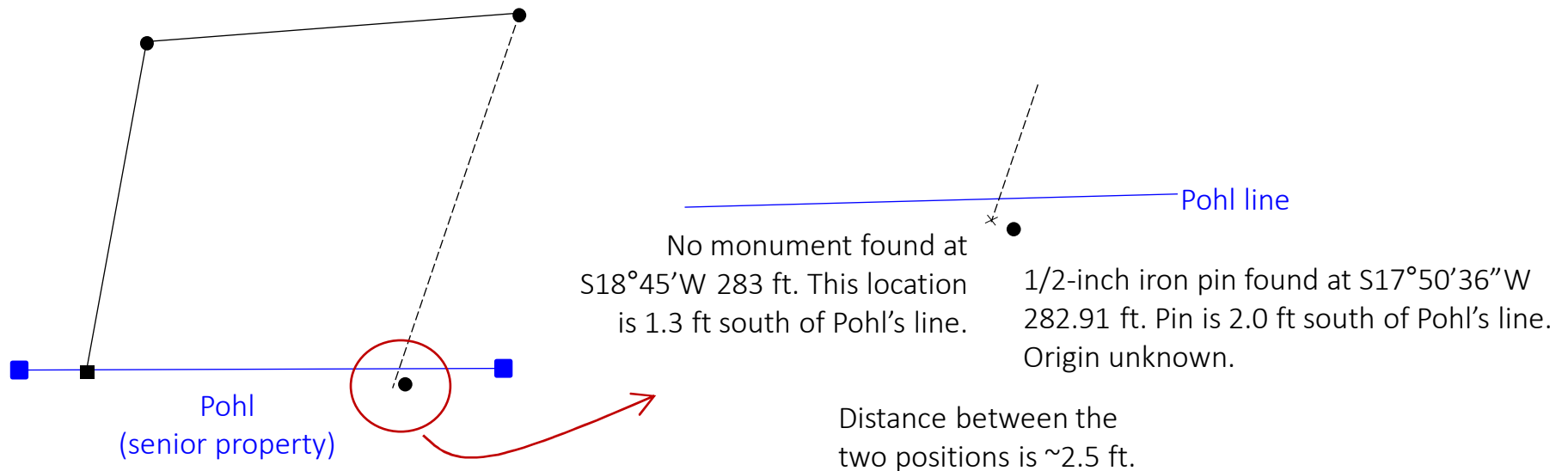
Proceed at record  $S18^{\circ}45'W$ ,  $\sim 281.7$  ft, to Pohl's line and stop. Monument not called for, so it can't control. Neither can the 283 ft distance since that would violate Pohl's senior right.

#### Longer answer

Although we are looking for the termination of the third course, we can check the next course to see if it provides any additional informative terms, such as a distance back to the POB. In this case it doesn't but if it did that *might* help.

Regardless, we know the third course must stop at Pohl's senior line.

Does the monument have a controlling role? Why is it there? Accept because it's like the others?  
Accept by Common Report?



## II. Rules of Construction (RoC)

### C. Written Intent

#### Longer answer continued

Are  $S17^{\circ}50'36''W$  & 292.91 ft w/in uncertainty of record  $S18^{\circ}45'W$  and 283 ft? Brng might not, but the dist is. Does that mean because distance fits that the bearing yields and the monument controls direction?

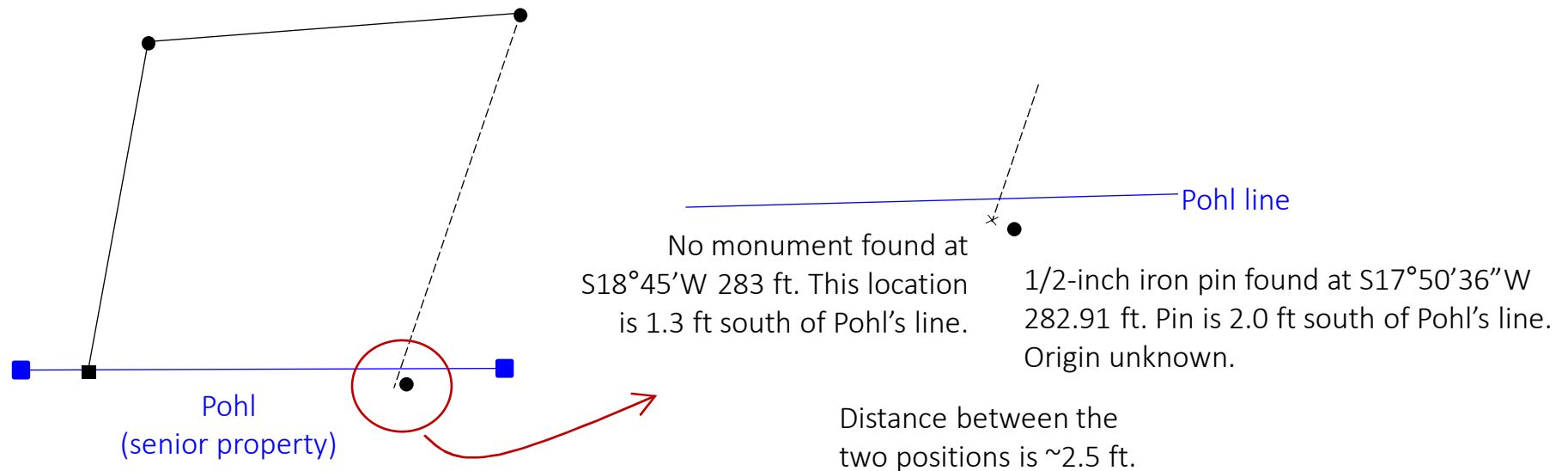
Without a monument call, that's a tough sell.

Monument might be a potential unwritten rights ownership corner and line, but that's not for the surveyor to decide.

Maybe a reason the monument exists, but nothing in the description gives it authority.

What sources of extrinsic evidence should be investigated?

*Always* identify plausible alternatives and explain why they aren't acceptable.





## Learning Objectives

How parcels and boundaries are created  
Where the Rules of Construction come from  
What are unwritten rights  
How gaps and overlaps are handled  
The Statute of Frauds and why it matters  
Description interpretation issues: Ambiguities;  
Controlling/informative terms  
Written intent conflicts

Questions?

