IN THE SUPREME COURT OF THE STATE OF ALASKA

RAY M. COLLINS and **CAROL J. COLLINS,** Appellants, v. **DAVID W. HALL** and **MARGARET R. HALL,** et al, Appellees.	)	Supreme Court No. **S-16795**

Superior Court Case No. JU-14-00771 CI

APPEAL FROM THE SUPERIOR COURT, STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU
THE HONORABLE PHILLIP PALLENBERG, PRESIDING

APPELLANT'S REPLY BRIEF

Joseph W. Geldhof
Alaska Bar Association # 8111097

Law Office of Joseph W. Geldhof
2 Marine Way, Suite 207
Juneau, Alaska 99801
Telephone: (907)723-9901 [Mobile]
E-mail: joeg@alaskan.com

Attorney for Appellants,
Ray and Carol Collins

Filed in the Supreme Court
this _____day of March, 2018

Marilyn May, Clerk

By: _____
Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

AUTHORITIES PRINCIPALLY RELIED UPON

State Statutes

AS 40.15.010. Approval, Filing, and Recording of Subdivisions. Before the lots or tracts of any subdivision or dedication may be sold or offered for sale, the subdivision or dedication shall be approved by the authority having jurisdiction, as prescribed in this chapter and shall

be filed and recorded in the office of the recorder. The recorder may not accept a subdivision or dedication for filing and recording unless it shows this approval.

AS 40.15.320. Monuments. (a) In a subdivision with five or fewer lots, the existence of at least a 5/8 inch by 24 inch rebar and cap monument at controlling exterior corners of the subdivision shall be established by the surveyor.
(b) In a subdivision of more than five lots, each interior corner shall be monumented with at least a 5/8 inch by 24 inch rebar and cap.
(c) If a monument of record does not lie on the parcel or tract boundary, the plat shall reflect a boundary survey and tie to a monument of record.

Regulations

11 AAC 53.680. Monumentation requirements (a) In a subdivision with five or fewer lots, the monuments required to be established at controlling exterior corners include each angle point, each point of curvature, and any point on the subdivision exterior boundary that is more than 1,320 feet from a monument. Each monument at each controlling exterior corner must consist of a minimum 5/8-inch by 24-inch rebar with a minimum two-inch diameter aluminum cap. For monuments that are

(1) set by a survey under this subsection,

(A) the surveyor shall stamp the cap with the corner identification, year set, and surveyor's registration number, and shall orient this information so that it may be read when the reader is facing north; and

(B) if both the cap and the pipe are nonferrous metal, the surveyor shall permanently attach additives with magnetic qualities at both the top and bottom of the monument; or

(2) recovered, the surveyor shall

(A) certify that the existence of controlling exterior corners of the subdivision has been established in the field; and

(B) show the current condition, description, and markings of all recovered monuments.

(b) In a subdivision of more than five lots, each corner to be monumented must include each angle point and each point of curvature in the boundary of each lot in the subdivision. The surveyor shall monument each interior corner with a minimum 5/8-inch by 24-inch rebar with a plastic or aluminum cap bearing the surveyor's registration number.

(c) A surveyor who finds monuments and accessories in a disturbed condition shall make sufficient ties to existing monuments of record to properly control the field location of the parent parcel boundaries. The surveyor shall return disturbed monuments and accessories to the original position and condition as nearly as possible or replace them so as to perpetuate the position.

History: Eff. 7/5/2001, Register 159

Authority: AS 40.15.320

AS 40.15.370

AS 40.15.380

11 AAC 53.900. Definitions

(51) "parent parcel" means the original tract from which a parcel is being created by subdivision;

(52) "replat" means the redelineation of one or more existing lots, blocks, tracts, or parcels of a previously recorded subdivision or other survey that involves the change of property lines or, in the case of a vacation, the altering or eliminating of dedicated streets, easements, or public areas.

History: Eff. 3/27/80, Register 73; am 7/5/2001, Register 159

Authority: AS 38.04.045

AS 38.05.020

AS 38.05.035

AS 40.15.330

AS 40.15.370

APPELLANT'S REPLY ARGUMENT

The essential issue in this dispute revolves around two conflicting surveys for adjoining lots in the Colt Island Subdivision in Southeast Alaska delineated as ***Plat 75-11***. The Collinses believe the boundary lines of their property is consistent with the intention of the subdivision owner and developer and consistent with the work of the original surveyor who established monuments delineating ***Plat 75-11*** in 1975. The Halls contend a survey of their property completed in 2012 is controlling and supersedes the survey work completed in 1975.

The source of the difference between the boundaries relied on by the Collinses compared to the Halls contention of what the boundaries should be is the "point of beginning" used by the respective surveyors when delineating the subdivision property lines on Colt Island. The surveyor retained by the Halls in 2012 used a point of beginning for the survey of the Halls' lot that was inconsistent with the point of beginning the original surveyor of the Colt Island subdivision used in 1975 to establish the subdivision boundary lines on Colt Island.

The Halls acknowledge the source of the discrepancy between their 2012 survey and the Collins's boundary survey stems from which "point of beginning" is applied to render a determination as to the validity of the competing surveys. [***Appellee's Brief*** at pg. 7]. Unquestionably then, the "point of beginning" [1] for the Halls' survey commenced from a different starting point compared to the boundary survey relied on by the Collinses.

---

[1] Nomenclature in the field of surveying is not always precise. A clarification of terminology is in order. In the current case, the term "point of beginning" has been widely used to refer to the witness rocks used by the various surveyors when completing their respective surveys. The actual point of beginning for the surveys is not necessarily identical to the "point of beginning" location from which they commenced the actual layout of the boundaries, *i.e.*, the "witness corner" used to locate the first meander corner from which the surveying actually proceeds.

The evidence at trial illustrates the original surveyor of ***Plat 75-11*** settled on a point of beginning for his survey when he established the plat in 1975. J.W. Bean ("Bean"), the original surveyor of the Colt Island subdivision, located a faint "X" in a rock face near the shore of Colt Island in 1975 and used this "X" rock as his point of beginning in order to begin the lay out of ***Plat 75-11***. The Halls concede as much. [***Appellee's Brief*** at pg. 7].

The Halls' 2012 survey, typically referred to as ***Survey 2012-32*** [Exh. J9; Exc. 14 (Appellants], was produced by R&M Engineering and was signed by surveyor Mark Johnson. Johnson's survey lays out boundary lines for the Halls property (and implicitly for the entire Colt Island subdivision), in a manner that shifts the Halls' lot and every lot and feature of the Colt Island subdivision to the south and west compared to Bean's original plat. The shift in the boundaries for the Halls' lot and the implicit shift in the entire Colt Island subdivision stems from surveyor Johnson's use of a different point of beginning for his 2012 survey compared to Beans 1975 survey work. The Halls acknowledge this deviation by Johnson. [***Appellee's Brief*** at pg. 6].

The Halls advance the notion that Johnson's use of the "WCMC 1 S 1755" point of beginning in 2012 for their survey instead of the "X" point of beginning used by Bean when he established ***Plat 75-11*** in 1975 is acceptable because Johnson's point of beginning was established by Fred Dahlquist, a surveyor Halls claim is the "original surveyor." [***Appellee's Brief*** at pg. 14]. Fred Dahlquist's original survey of Colt Island in its entirety is referred to as ***U. S. Survey 1755***. [Exc. 1 (Appellants)].

Whether the "WCMC 1 S 1755" location used by surveyor Johnson as his beginning point when preparing Halls' survey in 2012 was actually established by Fred Dahlquist in 1927 was the source of some testimony and argument during the trial. Regardless of whether or not Fred

Dahlquist actually established the "WCMC 1 S 1755" monument in 1927, there is no question Bean did not commence the layout of ***Plat 75-11*** from this point in 1975. [2] Bean started at the faint "X" located in a rock close to where the "WCMC 1 S 1755" rock inscription was first seen around the year 2000. [Tr. 322]. Bean was clear during his testimony he didn't see the "WCMC 1 S 1755" carved in the rock in 1975 and instead used the faint "X" as his point of beginning for ***Plat 75-11***. [Tr. 122].

From a factual and legal perspective the issue of who the original surveyor is for ***U.S. Survey 1755*** or ***Plat 75-11*** is simple. Dahlquist was and remains the original surveyor of ***U. S. Survey 1755***, the survey completed in 1927 in order to transfer Colt Island from the federal government to the original recipient of the land, Albert Forsythe. [Exc. 1 (Appellants)]. And there is no question about who the original surveyor of ***Plat 75-11*** was in 1975 – J.W. Bean. [Exc. 2 (Appellants)].

The Halls entire argument about the point of beginning conflates the identity of Bean and Dahlquist and attempts to reconcile this issue by asserting Dahlquist is the original surveyor, not "Mr. Bean, as argued by Collinses." [***Appellee's Brief*** at pg. 14]. Collinses have never argued, either at trial or on appeal, that Dahlquist is the original surveyor of ***Plat 75-11***. The Collinses believe Dahlquist was the original surveyor of ***U.S. Survey 1755*** and that Bean is the original surveyor of ***Plat 75-11*** and that each surveyors' work must be given proper consideration.

---

[2] As a matter of law, Bean was not absolutely required to commence the layout of ***Plat 75-11*** from the beginning point Fred Dahlquist used in 1927. Counsel has not provided any authority for such a proposition. Bean's task as a surveyor was to delineate the Colt Island subdivision within the established boundaries of ***U. S. Survey 1755***, a task Bean accomplished. As a matter of sound surveying technique, Bean endeavored to locate the point of beginning (MC 1), used by Dahlquist in 1927; Bean believe he found this point of beginning and laid out ***Plat 75-11***. Thirty-seven years later, surveyor Johnson substituted a different point of beginning while surveying for the Halls.

Bean's ***Plat 75-11***, including the monumentation he established in 1975 delineating the boundaries of the Colt Island subdivision, exists and must be considered. ***Plat 75-11*** is a subdivision of ***U.S. Survey 1755***. The subdivision Bean laid out in 1975 is wholly contained within the uplands conveyed by the United States government in 1927. Bean selected a point of beginning from which to commence his preparation of ***Plat 75-11*** in 1975 that he believed was consistent with the survey work conducted by Fred Dahlquist in 1927. [R. 000764; Tr. 297].

Bean believed in 1975 he had located a witness corner established by Dahlquist in 1927 when he found the faint "X" Dahlquist had apparently left on a rock face on the northwest corner of Colt Island. Dahlquist had, following sound surveying technique, created various witness corners on Colt Island in order to locate the first meander corner for his 1927 survey.

Dahlquist's location of the Meander Corner 1 ("MC 1"), designated in his 1927 survey was not done randomly. Dahlhquist located the point he designated MC 1 in reference to a known monument on Admiralty Island, a monumented point designated as ***USLM 1285***. Dahlquist located his MC 1 point for ***U.S. Survey 1755*** in 1927 at a point he believed reflected the mean high tide line [Exc. 109 (Appellees)], a location prone to wave action and possibly erosion; phenomenon that would make permanent monumentation difficult if not impossible. Accordingly, Dahlquist established a way to find his 1927 MC 1 point. To do so, Dahlquist established a witness corner that would allow for relocation of the original MC 1 for ***U.S. Survey 1755***. Actually, Dahlquist established three witness corners on Colt Island in order to locate the first meander corner specified by ***U.S. Survey 1755*** but two were established by notches or blazes in trees [Exc. 109 – 110 (Appellees)], and apparently gone by 1975 when Bean was preparing the Colt Island subdivision. [Tr. 42]. As a result, Bean endeavored to find the "cross +" Dahlquist

indicated he cut into a piece of bedrock near the location of the MC 1 point indicated on ***S 1755***. [Exc. 110 (Appellees)].

Bean's use of the faint "X" rock as a witness corner he believed was created by Dahlquist in 1927 was consistent with Dahlquist's survey. Using Dahlquist's field notes and applying the methodology specified by Dahlquist [Exc. 109 – 110 (Appellees)], Bean located what he believed was Dahlquist's MC 1, or the actual point of beginning for Dahlquist's ***S 1755*** survey. [3] Bean then established ***Plat 75-11*** within the boundaries of Colt Island deeded by the federal government to Albert Forsyth in 1927. Bean's determination of the MC 1 location on Colt Island was derived from the "X" rock he found in 1975 and his preparation of ***Plat 75-11*** is based on this surveying work.

By failing to use Bean's "X" rock for the beginning point of his survey in 2012, surveyor Johnson committed surveying error. The application of Johnson's improper use of a point of beginning that deviates from Bean's point of beginning causes a shift in all the Colt Island properties. Once his survey was recorded, litigation ensued.

The mischief here and one apparent source of confusion by the trial court is that Johnson used a beginning point for ***Survey 2012-32*** (the survey delineating the Halls' property) that commenced at a survey point Bean used as a reference for a "2004 tidelands survey." [***Id.***; Appellees Exc. 14]. Surveyor Johnson's selection of a reference point Bean used for the 2004

---

[3] Bean's location and use of the faint "X" rock and his application of Dahlquist's field notes to locate what he believed was Dahlquist's location of the 1927 MC 1 point in survey ***U.S. Survey 1755*** is revealing. The bearings taken from Bean's MC 1 established in 1975 to ***USLM 1285*** are identical to Dahlquists; surveyor Johnson's bearings from the point of beginning he used on Colt Island for the Hall's survey to the known monument (***USLM 1285***), show a different bearing, a phenomenon that was summarily dismissed by the trial court. [Exc. 71-72]. Appellees apparently agree the bearing of Bean and Dahlquist's MC 1 from Colt Island to ***USLM 1285*** are identical [Exc. 116 – 118 (Appellees)].

tidelands survey and use of that reference point as his beginning point for the Halls' survey was misplaced and inappropriate as a matter of sound surveying technique. Bean's use of an obvious rock bearing the notation "WCMC 1 S1755" in 2004 as a reference point for an independent tidelands survey is absolutely not controlling of the survey beginning point issue in the boundary dispute between the Halls or the Collinses.

Johnson's misapplication of the "WCMC 1 S1755" survey tie point Bean used for a tidelands survey completed in 2004, and his decision to use this tidelands reference point as his initial point of beginning in 2012 where he worked on survey ***2012-32,*** is incorrect for determining the boundaries for any of the Colt Island subdivision lot lines, trail designations or other boundaries on Colt Island. The correct use of the "WCMC 1 S1755" reference point Bean used in 2004 is related to tidelands survey, not the long-established upland boundaries delineating the Colt Island subdivision and used by property owners, including the Halls, for decades.

The boundaries established for the tidelines survey designated ***ATS 1620*** [Exc. 114 (Appellees)], invoked by Halls [***Appellee's Brief*** at pg. 14], compared to the upland boundaries established by ***Plat 75-11*** are mutually exclusive. Put another way, the existence of the "WCMC 1 S1755" and use by Bean as part of a tidelands survey in 2004 doesn't alter Beans initial selection of a point of beginning for ***Plat 75-11***.

Surveyor Beans' use of the rock designated "WCMC 1 S1755" as a reference point (or what is sometimes called a "tie" point), in 2004 for the tidelands survey cannot, as a matter of law, obliterate his use of the "X" rock the Halls concede he used in 1975 when Bean established ***Plat 75-11***.

The survey work for ***Plat 75-11*** originates at the "X" and any subsequent survey of ***Plat 75-11***, including ***Survey 12-32***, must also commence at this original point of beginning, not at a

new point of beginning used for an unrelated tidelands survey prepared in 2004, roughly 30 years after ***Plat 75-11*** was established using Bean's "X" rock as a beginning point. [4]

The trial court's adoption of the "WCMC 1 S1755" rock surveyor Bean used in 2004 as a reference point while completing his tidelands survey, and the trial court's substitution of this reference point as a new point of beginning for determining the Colt Island subdivision boundary lines instead of the "X" rock Bean used in 1975 to establish ***Plat 75-11,*** is a legal mistake. The obvious negative legal consequences of the judiciary sanctioning a different point of beginning compared to the actual original point of beginning are significant. Allowing a subsequent surveyor to substitute a different point of beginning for a subsequent survey will obviously supersede the previously established boundaries and destroy repose.

The negative impacts that are likely to follow from affirmation of the trial court's misapplication of the rule on using the original point of beginning will be significant. First, the entire body of law in Alaska with regard to surveying and title to property in Alaska will be in flux if the court adopts a rule that subsequent surveys are not required to adhere to previously surveyed and monumented parcels. Secondly, a decision affirming the trial court's findings and conclusions will inevitably perpetuate property confusion and community chaos on Colt Island,

---

[4] Appellees make much ado about "unrecorded" surveying work in a strained effort to diminish Bean's actual surveying work and the long reliance by Colt Island subdivision property owners on ***Plat 75-11***. [***Appellee's Brief*** at pg. 15]. Three obvious points bear on this argument: First, ***Plat 75-11*** was recorded in 1975. Secondly, until 1999, statutory provisions governing the establishment of plats in Alaska did not require actual surveys or recording. [Tr. 162]. Third, irrespective of whether a survey was completed for each and every lot on Colt Island prior to the present, actual monumentation was established for various lots and trails on the island in a satisfactory manner that allowed for the sale, development and use of the properties delineated by ***Plat 75-11***. The argument by the Halls about "recording" would elevate the act of recording as being paramount over actual monumentation by ignoring reality and common sense. The Halls argument here would convert Alaska into some sort of contemporary "race-to-the-recorders" jurisdiction in a manner reminiscent of the days when a race to the recorders office to perfect a staked mining claim was common.

as the trial court acknowledged. Both of these undesirable outcomes can be avoided by adopting a rule of law adhering to the time-tested standard requiring subsequent surveys to "follow in the footsteps" of previous survey, *i.e.*, adhere to the point of beginning used by the original surveyor instead of substituting a different point of beginning.

In furtherance of their argument that the trial court's rulings and findings should be affirmed, Halls ask this court to overlook sensible survey doctrine and ignore long-standing judicial precedence. Essentially, Halls argue their position with regard to the survey and boundary dispute should be affirmed because their surveyor was more "accurate" than the Collinses surveyor.

This formulation by the Halls – that this dispute is a contest about accuracy instead of a determination based on survey work completed in 1975 and relied on for decades – was adopted by the trial court as Halls point out in their brief. [***Appellee's Brief*** at pg. 8]. Not surprisingly, the Halls agree with the trial court's conclusion with regard to this "accuracy" argument but the fundamental legal problem with the Halls' position and the court's adoption of "accuracy" reasoning is neatly expressed via the Halls characterization of the trial court's holding: "The superior court held that the rock engraved with "WCMC 1 S 1755" was the monument created by Mr. Dahlquist in 1927, and that Mr. Bean made a mistake when he used the faint "X" in the 1970's [Exc. 152-55].

Here is the essence of this dispute from a legal perspective. The trial court found Johnson's 2012 survey, ***2012-32***, more "accurate" even though it didn't start from Bean's "X" – the point of beginning Beam used for ***Plat 75-11*** in 1975. This determination by the trial court elevates a subsequent finding of "accuracy" over obvious reality and will inevitably lead to chaos

and litigation over property boundaries all over Alaska if this so-called "accuracy" test is adopted as a rule of law.

As a matter of sound surveying technique, the duty of a surveyor to conform to prior survey work by "following in the footsteps" of the original surveyor is settled. [5] The expert witness called by the Halls in this dispute in a written report [Exc. 137 (Appellees)], entered into evidence at trial properly set the correct surveying standards, as follows:

> **Original Lines and Monuments**: "Once a lot, street, or block line within a subdivision is established by the original surveyor and the land is sold in accordance with original plat, the lines originally marked and survey are unalterable except by resubdivision." [6] "No subsequent surveyor has the authority to 'correct' any errors that are found. To do so would wreak havoc on possession, structures, and other improvements with the subdivisions. Neighborhoods that have enjoyed a long history of peace will be thrown into total disorder." [7] "No rule that has been adopted to accomplish that end is more firmly established than that course and distances are controlled by marked and fixed monuments." [8]

Surveyor Bean was the original surveyor of Plat 75-11. Bean completed his survey work for the developer of the Colt Island subdivision in 1975. The subdivision plat was recorded, monuments were placed in the ground on Colt Island to facilitate the construction of trails, demarcation of lots and other activities necessary to develop Colt Island. Trails were built

---

[5] *See generally*, ***Following the Footsteps***,http://ohiosurveyor.org/wp-content/uploads/2016/01/PLSO-Following-the-Footsteps.pdf (addressing survey retracement standards, etc.), Donald A. Wilson, Land Boundary Consultant, 2016.

[6] *Citing*, Section 12.10, Principle 9 – ***Brown's Boundary Control and Legal Principles***, 7th Edition, Robillard & Wilson, 2014.

[7] ***Id.***, page 395.

[8] ***Id.***, page 396, quoting from ***Morris v. Jody***, 216 Ky. 593 (1926).

according to the monumentation designated by Bean's ***Plat 75-11***. Lots were sold based on ***Plat 75-11***. Cabins were constructed on Colt Island based on Plat 75-11. All of this development activity took place according to ***Plat 75-11***, a plat that was created and monumented from a point indicated by surveyor Bean as the "X" rock, not the Halls "WCMC 1 rock.

The trial court's adoption of the "WCMC 1 S 1755" rock as the more accurate point of beginning for subsequent surveys, including the Halls' survey completed by surveyor Mark Johnson, is wrong and deviates from the surveying technique standards discussed in the learned treatises, above. The court's reliance on the wrong rock as the point of beginning as being more "accurate" is exactly the kind of correction to an original plat the surveying treatises specify should be avoided.

The original plat on Colt Island is "unalterable except by resubdivision." [9] The trial court's adoption of a new point of beginning for the Halls ***2012-36*** survey as being more "accurate" ignores sound principles long-used by surveyors. Bean was the original surveyor who completed ***Plat 75-11*** delineating the Colt Island subdivision. The point of beginning Bean used in 1975 to lay out the subdivision must control. Utilization of the point of beginning surveyor Johnson elected to use in 2012 is wrong as a matter of survey technique and amounts to a *de facto* replat of the Colt Island subdivision in a manner that is inconsistent with statutory and regulatory provisions in Alaska governing the replat of established subdivision. [10]

---

[9] [Exc. 137 (Appellees)]; *see also,* **11 AAC 53.900 (51) & (52)** (State of Alaska, Department of Natural Resources definition of "parent plat" and "replat" addressing redelineation of one or more existing lots for the original tract from which a parcel is created by subdivision.

[10] *See generally,* **AS 40.15.010, *et seq.;*** *see also,* **11 AAC 53, *et seq.***

The standards for surveying support the Collinses contention that Bean's "X" rock point of beginning for ***Plat 75-11*** control this boundary dispute. So does long-established case law. The case of ***Diehl v. Zinger*** [11] is highly relevant and applicable to this dispute, providing sound guidance on how to resolve the dispute between the Collinses and the Halls in a manner that will prevent an eruption of further litigation among other Colt Island property owners or create property right chaos throughout Alaska.

The ***Diehl*** case, if not quite the alpha and omega of legal reasoning applicable to the Colt Island boundary dispute at issue in the current case, provides a highly useful construct for a just resolution. ***Diehl*** resolved a property boundary dispute in Detroit, Michigan based on the contention that a later-in-time survey that was more "accurate" could supplant a previous survey conducted years before. Similar to the situation on Colt Island, a subsequent surveyor elected to use a different point of beginning to commence the later-in-time survey. Not surprisingly, the use of a different beginning point by the subsequent surveyor in Detroit resulted in different boundaries as well as significant consternation, litigation and eventually an appellate decision that still serves as a fine rule of law. At the heart of the ***Diehl*** decision is the concurring opinion of Chief Justice Thomas Cooley. [12] In the concurring opinion authored by Justice Cooley and joined by two other members of the Michigan Supreme Court first sets out a fact pattern related to the dispute that is remarkably similar to the Colt Island dispute. The surveying controversy in

---

[11] 39 Mich. 601 (1878).

[12] Thomas Cooley is noteworthy for a number of reasons. A distinguished 19th century jurist, Cooley served as Chief Justice of the Michigan Supreme Court for 25 years and was the Dean of the University of Michigan Law School from 1871 until 1883. Cooley was also appointed to serve on the Interstate Commerce Commission by President Grover Cleveland. A portion of Cooley's extensive legal writings and other accomplishments can be found at: https://en..wikipedia.org/wiki/Thomas M. Cooley

Detroit stemmed from the subdivision of a parcel of land by Thomas Campau in 1850 and recorded in 1851. Improvements and street access were made according to Campau's survey.

The litigation in ***Diehl*** stemmed from a new survey. The new surveyor, after searching for the original survey stakes and finding none, proceeded to take measurements according to the original plat and drove new stakes shifting the boundaries of the existing platted subdivision. [13] Cooley and the Michigan Supreme Court did not uphold the subsequent survey. The court in ***Diehl*** observed that "[n]othing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors." [14] Cooley and the court then noted "if all the lines were now subject to correction on new survey, the confusion of lines and titles that would follow would cause consternation in many communities." [15] Cooley anticipated the harm that would follow from allowing for "corrections" to prior surveys by pointing out: "...the mischiefs that must follow (from corrections) would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. [16]

The concurring opinion by Cooley in ***Diehl*** carefully lays out the appropriate legal test a court should use when confronted with boundary disputes relying on differing monuments. This concurring opinion is sometimes referred to as the "Cooley Doctrine," a portion of which has been adopted in Alaska. [17]

---

[13] *See generally*, ***Diehl*** at 604.
[14] ***Id*** at 605.
[15] ***Id.***
[16] ***Id.***
[17] *See generally*, ***Lee v. Konrad***, 337 P.3d 510, 520 (Alaska 2014), adopting a portion of the Cooley Doctrine under the rubric of the "doctrine of boundary by acquiesce.

Writing for the majority in ***Konrad***, Chief Justice Stowers reviewed one aspect of the Cooley Doctrine pertaining to resolving boundary disputes, recapitulated a portion of the doctrine under the term "boundary by acquiescence" and resolved the dispute. Based on the facts in ***Konrad***, the court's adoption of portion of the Cooley Doctrine according to the term boundary by acquiescence made abundant sense. But the Cooley Doctrine has other elements related to resolving boundary disputes that are highly relevant to the Colt Island dispute that warrant further review of ***Diehl***.

In ***Diehl***, Justice Cooley set out what amounts to a three-step process for evaluating conflicting survey claims. Not surprisingly, Cooley's principles embody the common-sense approach used by surveyors, namely that subsequent surveyors should endeavor to follow in the footsteps of previous surveyors. Cooley's analysis of the Detroit surveying dispute notes the first step when conducting a resurvey of an existing parcel is to locate the original monumentation delineating the property. Or, as Cooley states in ***Diehl,*** the subsequent surveyor should "have directed his attention to the ascertainment of the actual location of the original landmarks set my Mr. Campau." [18] The holding in ***Diehl*** I specifies if the original monumentation are discovered "they must govern." [19] If the original monuments "are no longer discoverable, the question is where they were located..." [20] Cooley then concluded with the third part of the Cooley Doctrine analytical structure that "long practical acquiescence of the parties concerned" should be regarded as an agreement as to boundaries "even if located erroneously." [21]

---

[18] ***Diehl*** at 604
[19] ***Id.*** at 605.
[20] ***Id.***
[21] ***Id.*** at 606.

The decision making construct set forth by Justice Cooley here is obvious. The first step is to locate and find the monumentation and survey points used by the original surveyor. Secondly, if the monuments are missing, then the subsequent surveyor is required to ascertain "where they were located." [22] And third, if the boundaries can be established by "long practical acquiescence, (the portion of the Cooley Doctrine expressly adopted by the Alaska Supreme Court in ***Lee vs. Konrad***), then the boundaries can be settled accordingly.

Whether or not the Halls "acquiesced" to the boundaries of ***Plat 75-11*** is an arguable point. The trial court found that the Halls had not acquiesced to the boundaries surveyor Bean platted and monumented in 1975. [Exc. 158 & 162 (Appellees)]. This determination by the trial court is curious, given the tangible construction of Totem Pole Trail, a right-of-way established in 1975 that has defined one side of the Halls property for 37 years prior to Mark Johnson's completion of survey ***2012-32***.

Irrespective of the trial court's decision regarding the acquiescence theory, the first two prongs of the Cooley Doctrine are relevant and should control the outcome of the Colt Island dispute. [23]

In 1975, based on ***Plat 75-11***, surveyor Bean and the developer monumented the Colt Island Subdivision, including the lots eventually owned by the Halls and the Collinses. The trial court abundantly acknowledged this monumentation. [Exc. 16 (Appellants); Exc.156 (Appellees) at lines17 - 25]. So did Mark Johnson, the Halls surveyor was obviously aware of

---

[22] ***Diehl*** at 605.

[23] An amplification of the practical policy reasons underlying the application of the rule of law in ***Diehl***, expressed by Justice Cooley, can be found in ***Judicial Functions of Surveyors*** and a companion monograph by Herbert W. Stoughton, PhD. addressing Justice Cooley's article is included in ***Appellant's Excerpt of Record***, pages 97 -103.

Bean's Colt Island subdivision monumentation. [24] Randy Davis, another witness for the Halls at the trial noted the existence of monumentations delineating ***Plat 75-11*** as prepared by surveyor Bean. [***Appellee's Brief*** at 15, footnote 15]. Even counsel for the Halls acknowledges surveyor Bean located "control points that Mr. Bean placed (on Colt Island) in the 1970's..." [***Appellee's Brief*** at pg. 13]. All of which supports a finding that surveyor Bean did indeed place "control points" and other monumentation delineating ***Plat 75-11*** on Colt Island in 1975, monumentation that was used by the developer and property owners (including the Halls and the Collinses), for decades. The control point monuments Bean established and still exist. One only need refer to the Halls survey, ***2012-32***, for confirmation that Bean's monuments exist, just as they have since 1975. Bean's monuments are clearly noted on Mark Johnson's survey and designated as "secondary" monuments.

All of which begs the question: What accounts for the dramatic shift of the ***Plat 75-11*** boundaries surveyed by Bean compared to the boundaries for the Halls as surveyed by Johnson? As the Halls expert witness John Bennett noted surveyor Johnson recovered "four existing secondary monuments" established by Bean delineating the Halls property and that Bean's monuments "represent lot lines for Lot 15 (Halls), that are estimated to be 17-feet to the north and 18-feet to the east of the "Hall" plat survey." [Exc. 126 (Appellees) at point "6"]. This shift in the boundaries for the Halls lot and the entire Colt Island subdivision compared to Bean's ***Plat 75-11*** monumentation is the result of Johnson's use of a point of beginning that deviated from the survey point of beginning Bean used in 1975. The shift that results from Johnson's use of the incorrect "WCMC 1 R 1755" point of beginning instead of the "X" rock

---

[24] *See, e.g.,* Johnson's incorporation of Bean's "secondary" monumentation in his ***2012-32*** survey [Exc. 14 (Appellants)].

Bean actually used and results the boundary shift for the entire Colt Island subdivsion, a shift that is wrong as a matter of survey technique and inappropriate as matter of law.

Surveyor Johnson apparently knew the survey he produced for the Halls in 2012 was problematic. Johnson never set foot on Colt Island, instead relying on two technicians who completed limited field work on Colt Island according to his direction from his office in Juneau. When apprised that the surveying points for the Halls did not jibe with the existing Bean monuments recovered on the island, Johnson directed his technicians to merely place spikes on the four corners of the Halls' lot as designated by survey ***2012-32***; two of these spikes, the ones adjacent to Totem Pole Trail were buried. The directive to use buried nails instead of proper monumentation of the Halls' lot in 2012 is inconsistent with Alaska legal standards for surveyors. [25]

In effect, Johnson's ***2012-32*** survey is essentially nothing more than an improper paper survey that was improperly monumented that when recorded clouded title to the entire Colt Island subdivision and precipitated litigation. The trial court's decision concluding that Johnson's survey was more accurate because it commenced from a point of beginning that was supposedly superior to the actual point of beginning Bean used in 1975 is wrong as a matter of law and at the core of this appeal.

Affirmation of the trial court's determination – essentially that subsequent surveyors may elect to complete and top file a new survey of existing property boundary lines by ignoring previously established and relied on monuments set by the original surveyor – will cause chaos and confusion on Colt Island and throughout Alaska.

---

[25] *See, e.g.,* **AS 40.15.320** (requiring monumentation "with at least a 5/8 inch by 24 inch rebar and cap"); *see also*, **11 AAC 53.680**.

Amazingly, the trial judge was aware of the inherent problems that would likely flow from the court's decision to substitute a new point of beginning for the Colt Island subdivision. As the trial court declared during the recitation deciding the case: "I think that the recording of the R&M survey (Johnson's for the Halls), which itself shows two different sets of property lines, I would anticipate could cause problems even for property owners whose property isn't shown on the survey and create a cloud on their title, because it shows two separate sets of property lines." [Exc. 146 (Appellees)].

The trial judge correctly anticipated the negative consequences of the trial court's decision to apply a new point of beginning for surveys of the Colt Island subdivision. The problem in this case is the trial court substituted the wrong point of beginning for the survey dispute instead of adhering to the actual point of beginning used by the original surveyor of ***Plat 75-11.***

Not surprisingly, the Colt Island community has been thrown in chaos. Property boundary repose has been clouded, as predicted by the trial judge. Absent a curative appellate determination requiring surveys of Colt Island to be completed according to the initial point of beginning used by the original surveyor of ***Plat 75-11***, further litigation will inevitably erupt.

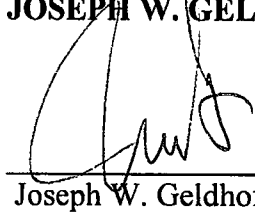
The court's reliance on Bean's use of the "WCMC 1 R 1755" as a tie point in the context of preparing a tidelands survey (***ATS 1680***), as somehow controlling and superseding the use of the "X" rock as a point of beginning for ***Plat 75-11*** is a mistake of law. Justice Cooley set out the correct surveying and legal path necessary to resolve these sorts of disputes in 1878 in the course of settling a dispute that shares much in common with the contemporary Colt Island boundary fight.

Conclusion

For the reasons Cooley and the Michigan Supreme Court found persuasive 140 years ago, and in order to perpetuate the thoughtful and litigation-free development future of Alaska in manner consistent with sound surveying technique, this court should overturn the trial court's substitution of a new point of beginning for ***Plat 75-11***. The court should remand this case for such additional proceedings necessary to protect the vested property rights of each and every property owner of the Colt Island subdivision, including the Halls, according to and dilineated by ***Plat 75-11*** and the covenants applicable to the Colt Island subdivision as established in 1975.

DATED this 27th day of March 2018, at Juneau, Alaska.

LAW OFFICE OF
JOSEPH W. GELDHOF



Joseph W. Geldhof
Alaska Bar # 8111097