



vantage point

Being a Good 3-D Neighbor



Ownership of land runs to the highest point in the heavens to the center of the earth—or so we are generally informed as we surveyors begin our studies of real property characteristics. However, that vast expanse of ownership does not equate to full possession when it comes to such things as allowing airplanes and satellites cross the skies above us; some aspects beyond an owner's full control. Neighbors above and below us have rights, too.

Many of us are familiar with the various aerial easements established for each airport based on the type and speed of aircraft permitted to land there. Trapezoidal runway protection zones are primarily meant to protect people and objects on the ground in the event of a crash, while obstacle free zones and object free areas protect the aircraft. Communities hosting airports must attune their zoning and land use codes to the Federal Aviation Administration regulations, and turn down applications for variances that would encroach into those easements.

Structural heights are affected by other easements, including those to harvest solar energy. States require solar easements to be in writing (for enforceability under the Statute of Frauds), but communities need to address heights and setbacks in their own codes to avoid shadow encroachments into those easements. Yes, lawsuits have been won when a neighbor's spite fence blocked solar panels.

In urban areas, party walls are a fact of life, and they aren't always completely vertical. Over time, some lean. At what point does that leaning become an encroachment? New York statutes of limitation provide a year for initiating an action for damages to remove a party wall encroaching by six inches, and two years

if under six inches. A written appurtenant encroachment agreement can acknowledge joint ownership and duties of repair and maintenance. But beware of lax parties to the agreement who ignore increasing lean and impending disaster.

Below ground, limits to how much water we can draw from an aquifer below surface ownership depend upon the state in which the land is situated. One tapped spring can provide a bottled water company hundreds of thousands of gallons weekly, causing locals to protest when their own drinking water access is affected. Is the commercial draw a reasonable use, does it relate to ownership of the ground on which the spring is located, or is the amount of water that can be taken otherwise regulated?

21 states follow what is referred to as "the reasonable use rule", which limits a landowner's use of water to those uses having a reasonable relationship to the use of the overlying land (meaning that the absolute ownership is modified to except wasteful and off-site use). 12 states reserve groundwater ownership to the State, which can allocate its rights, with first allocation having first rights per "the prior appropriation rule." 8 states acknowledge the surface owner as having all rights to the water below, in accordance with "the absolute dominion rule." 6 states maintain that the State holds water in trust for its citizens, with the courts holding authority to allocate that water, per "the correlative use rule." Just 3 states prescribe taking only a "reasonable share" of groundwater under "the restatement of torts rule," meant to protect small well owners. Under this approach, water withdrawals are not to interfere with others' rights by lowering the water table or by interfering with water bodies that depend on ground water to exist.

3-D neighbors can be amicable or difficult. In southwestern Pennsylvania near the West Virginia border, Ryerson Station State Park (opened in 1967) is suffering the effects of its subgrade neighbor, CONSOL Energy, which owns the mineral rights below the park. While no one has the right to prevent CONSOL from accessing its subsurface rights, subsidence from mining resulting in destruction of streams (and drained dry as a result) and leakage through cracks in a subsiding dam have been the focus of litigation over the last four years. In January 2017, the judge of Pennsylvania's Environmental Hearing Board ordered a temporary halt to work under a Department of Environmental Protection permit issued for longwall mining (to extract coal in long panels from beneath State Park) until an appeal to the mining permit can be heard. The opposing sides are arguing "environment" versus "jobs", with the existence of the nearly 1200 acre Park depending upon the balance.

Our profession helps clients identify the setbacks of buildings from front, side, and rear lot lines, and determine the necessary offsets of septic systems from property lines and streams. That's a lot of side to side maneuvering. We do concern ourselves with elevation below the ground surface when it comes to determining the level of lowest floors above Base Flood Elevation. We don't generally become involved deeper or higher than that, but perhaps we should be more aware of the three dimensions to any real property interest. ■

Wendy Lathrop is licensed as a Professional Land Surveyor in NJ, PA, DE, and MD, and has been involved since 1974 in surveying projects ranging from construction to boundary to environmental land use disputes. She is a Professional Planner in NJ, and a Certified Floodplain Manager through ASFPM.