

# Chapter 4

## SURVEY REQUIREMENTS AND RAMIFICATIONS

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## CHAPTER 4

### SURVEY REQUIREMENTS AND RAMIFICATIONS

#### 401 SURVEY REQUIREMENTS OF THE ACT AND THE REGISTRAR-GENERAL

This Chapter sets out the basic survey and plan requirements of the Strata Titles Act, 1988 and those of the Registrar-General to enable the deposit of a strata plan and the issue of certificates of title for the units and common property. The requirements given here are directed for the information of the developer and conveyancer. Surveyors and Survey Drafting firms should consult the **Manual of Survey Practice, Volume 1** for more comprehensive details.

#### 402 THE OUTER BOUNDARY SURVEY

The Strata Titles Act, 1988 provides for the boundaries of the land to be delineated on the strata plan.

A Strata Application must be preceded by a fully certified survey plan of those boundaries. This is a mandatory requirement of the Registrar-General and the purpose is to ensure that the site is correctly defined before the scheme is under way. The outer boundary survey will ideally be completed and approved by the Lands Titles Registration Office prior to construction of the scheme. The requirement for an outer boundary survey can be dispensed with if there is already in existence a suitable plan, filed or deposited in the Lands Titles Registration Office, that is less than two years old. A survey older than this may be used if the surveyor is able to update the plan as regards survey marks (eg., replace those that are missing, etc) and occupations in red on a print of the plan and certify the changes as being correct. Use of this provision should not be taken for granted and enquiries must be made at the survey examination area of the Land Services Group.

← SEE 5.5 (3)(d)  
← SEE PARA 21.2,  
MANUAL OF  
SURVEY PRACTICE,  
VOL 1

← SEE SURVEYORS  
INFORMATION  
BULLETIN No.8

#### 403 MANNER OF LODGEMENT OF OUTER BOUNDARY SURVEY

The outer boundary plan is lodged in the Lands Titles Registration Office in the same manner as any other survey. On lodgement, it is allotted a Filed Plan number (prefix code FP) and when approved is only used to update the data on certificate(s) of title for the land if a strata application does not eventuate. The FP number must ultimately be shown in the appropriate box in the Panel on the Site Plan, Sheet 1 of the Strata Plan. It should be noted here that the filed plan is certified correct pursuant to the Survey Act, 1992, whereas the certification given by a surveyor on the Site Plan is a certification required under the Strata Titles Act, 1988 and relates to the delineation of the structure rather than that of allotment measurements and placement of survey marks.

#### 404 SURVEY PROVIDES AN EARLY PROBLEM DETECTION STRATEGY

An outer boundary survey is necessary to determine the boundaries of the land prior to any construction or demolition work, to identify problems and hence take appropriate action to eliminate them.

The timing of this survey is important as legal impediments, which may result in a serious delay to the deposit of the plan in the Lands Titles Registration Office, may be detected too late.

# STRATA FACTS

## SURVEY REQUIREMENTS AND RAMIFICATIONS - CHAPTER 4

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(404) Problems that may be detected at the outer boundary survey stage include:

1. An encroachment on the strata site by an adjoining building which may need the following action;
  - A plan of division and subsequent transfer of the land on which the encroachment occurs,
  - A letter of acknowledgment from the registered proprietor of the adjoining land that he/she is aware of the encroachment and its consequences and does not intend to take appropriate action to rectify the situation,
  - Grant an appropriate easement prior to proceeding with a strata application or pursuant to Section 17b of the Strata Titles Act at the time of deposit of the plan (either way, the applicant will need to know of the problem).

Note that an easement is not appropriate if the footings of the building form part of the encroachment. In this case, land division may be necessary.

2. Boundary definition problems may be difficult to resolve or the land may be part of a confused survey area (which may involve the rather lengthy resolution processes of an alignment pursuant to Section 308 of the Local Government Act or remedy pursuant to Sections 50 and 51 of the Survey Act, 1991). The surveyor engaged for the outer boundary survey can give advice on this possibility.
3. The location of easements that may need to be dealt with in the strata plan.
4. The time taken to examine a survey plan may be several weeks depending on backlogs and is an important consideration.
5. Easement appurtenances may exist as regards portion only of a certificate of title or where more than one certificate of title or allotment is included in a plan and an easement is appurtenant only to one or some of them. ← SEE PARA 816
6. Dominant easement rights may exist over public streets or streets that are laid out in a plan of division and which are not public within the meaning of the Local Government Act, 1934. ← SEE PARA 808  
The Registrar-General has the power to extinguish such rights on request in an application or at his/her own initiative. Consent of the dominant and servient owners is required in either case. Use of this provision is discussed in Chapter 8.
7. Access to part of the site may not be lawful. ← SEE PARA 817

**It is often evident that a problem resulting in a serious delay to the deposit of a strata plan is caused by the developer seeking the services of a licensed surveyor far too late. It is wise to have a survey completed prior to any site demolition, otherwise evidence of occupation of the site may be difficult to define.**

# STRATA FACTS

## 405 THE ROLE OF THE SURVEYOR

The role of the surveyor is basically as follows:

- To define the boundaries of the land on which the scheme will stand,
  - To determine the boundaries of the units and common property after construction has been completed,
  - To advise the developer of the effect of the scheme on existing easements,
  - To identify encroachments either by structures of the scheme onto adjacent land or by adjacent structures on the scheme,
- and
- To prepare the plan.

## 406 STRUCTURE MUST BE COMPLETE PRIOR TO FINAL SURVEY

It is essential that the structure is substantially complete and virtually ready for occupation before the final survey measurements are taken and the plan finalised for lodgement. Some of the complaints that have been received by the Lands Titles Registration Office as regards the incorrect delineation of unit/common property boundaries or of the failure of a plan to disclose some part of the structure, can be related to the premature preparation of the plan. This has occurred where the developer has made an alteration to the design after the surveyor has completed his/her duty. It can be seen, therefore, that the line of communication between the surveyor and the developer must not close until the plan has been deposited in the Lands Titles Registration Office and certificates of title for the units and common property have issued.

← SEE ALSO PARA'S  
407 & 411

It would therefore be prudent for the surveyor to resist any undue pressure from the developer and others to give his/her final certification until the structure is complete. The surveyor must use personal judgement as to when certification can be given with confidence. Where a complaint lies against the surveyor, he/she may be liable for costs to amend the plan.

## 407 DETERMINATION OF UNIT AND COMMON PROPERTY BOUNDARIES

The surveyor usually accepts the responsibility of determining the precise nature of the boundaries of units and common property of the scheme as it is he/she who must survey the site and prepare the plan. Surveyors are therefore advised to liaise carefully with the developer and the conveyancer to ensure that the most appropriate boundary in each case is defined on the plan.

← SEE S.5, RPA,  
CHAPTER 6  
GENERALLY AND  
SS.7(3)(d) &  
12(3)(c)(ii)

This duty includes the precise determination of which part of the structure must be a unit, a unit subsidiary or common property and to display them on the plan with other information such as the disposition of easements, the extent of any encroachments, the numbering of Units and the designation of common property areas for licensing/lease purposes (where necessary). Chapter 6 deals specifically with boundaries of units and common property and their determination.

← SEE ALSO PARA'S  
408 TO 412 FOR  
RESPONSIBILITIES  
OF SURVEYOR &  
CONVEYANCER

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(407) It is most important that the surveyor confer with the building contractor as regards the numbering of the Units as many cases have been reported to the Lands Titles Registration Office where units have been numbered on the plan in reverse order to that shown on the doors of the Unit.

This may result in the purchaser of the unit receiving a certificate of title for a Unit other than that purchased.

In these regards, the surveyor must maintain a line of communication with the conveyancer who will prepare the application, the developer, the building contractors and the planning authorities (council and the Development Assessment Commission).

### 408 SURVEYOR'S CHECKLIST

Some of the things a Surveyor should be on the look out for in order to protect his/her interests and those of his client are as follows: E.g.;

1. Encroachment on the land by structures erected on adjoining property,
2. Encroachment of structures of the proposed strata building onto adjoining land,
3. Easements both dominant and servient that may effect the application.
  - Right of way over streets that should not be attached to units (consultation with the developer and council in this case should be considered),
  - An easement that may need to be varied in position due to the nature of the scheme,
  - The physical extent of easements appurtenant to the land,
  - Appurtenances to portion of the subject land,
4. Delineation of all common property items such as sheds, barbecues, swimming pool, visitor car parking area etc,
5. Unit numbering to be consistent with those on the unit doors.

← SEE CHAPTER 8  
GENERALLY

← SEE PARA 808

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## 409 CONVEYANCER'S CHECKLIST

This and following paragraphs are directed at the conveyancer's responsibilities to the outer-boundary plan only. There may be other matters that must be considered after the final survey of the scheme is completed.

## 410 PRIOR SEARCH OF REGISTER IS ESSENTIAL

The conveyancer must conduct a search of the register book at the time of instruction to a licensed surveyor to survey the outer boundary of the land to be strata titled, for it is now that legal impediments to the title that may seriously delay the project should be identified and rectification processes commenced.

## 411 LINES OF COMMUNICATION WITH SURVEYOR, ETC, ESSENTIAL

It is of great benefit to all involved if a strong line of communication between the conveyancer and surveyor is established. The completion of the outer boundary survey will mark the time when problems in need of resolution by the conveyancer must come to his/her attention if delays to deposit of the plan are to be avoided.

← SEE PARA'S 406 & 407

## 412 POSSIBLE PROBLEM AREAS

At the outer boundary survey stage the conveyancer should look for the following possible problem areas:

1. **Servient easements** that may need to be extinguished from the title. Note that there have been instances where the whole of the land is subject to a right, the dominant tenement of which either cannot be identified or the owner of which is unknown. The Strata Titles Act sets out a procedure that can be taken to overcome the problem, but time is an important element to consider.

← S.90a, RPA AND S.17a, STA

2. **Dominant rights** are often a problem for the following reasons:

- It is not always desirable to carry them on to be held appurtenant to the units. In this case they may need to be either extinguished or expressly excluded in the strata application, pursuant to S.36 of the Law of Property Act 1936),

← SEE PARA 909

- An appurtenance exists only to portion of the land in the plan.

It is not usual practice to allow this situation to remain as it could be argued that over-burdening of the rights will occur.

The Registrar-General will need to be convinced in writing that all efforts to either extinguish the rights or to extend them over the whole of the land, has failed before the plan will be deposited.

- Implied common law rights may be the only form of access to the units. In this case a council may have to be convinced that the access is legitimate and the plan can be approved. Where such rights occur the council may require the road to be made to a required specification to enable it to be declared a public road under the Local Government Act, or to provide a safe and convenient access to the site.

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- (412) ■ Where access is by way of a private road the question of whether the addition of further users to the right may over-burden the easement and bring about a legal action by the servient owner, arises.

Figure 14 shows an example of what has occurred on more than one occasion. The problem usually arises when more than one certificate is included in an application and only one has an easement appurtenant to it. In this example, a right of way is attached to the certificate of title immediately adjacent to a private road and is signified by those parts of the plan marked "X".

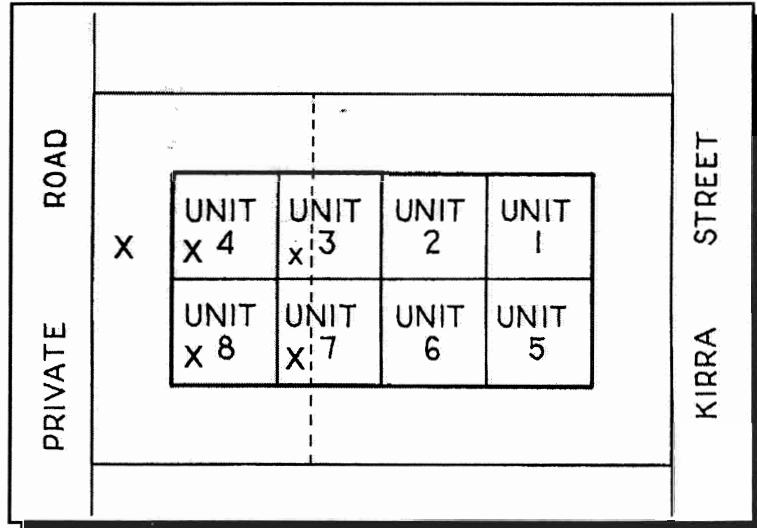


Figure 14 STRATA SHOWING APPURTENANCE

The owner of the servient right may object to the use of the private road by the owners of Units 1, 2, 5, 6 and portion of Units 3 and 7. Legal advice should be sought when this occurs. If the conveyancer is not legally qualified, legal advice from a solicitor is recommended.

- Encroachments on the site by structures on adjoining premises may require some action. This will depend on the degree of encroachment. If only very minimal the two owners may decide to take no action or, where agreeable, to invoke a correction to boundaries pursuant to Section 223j of the Real Property Act. If the encroachment is serious, a land division may be necessary to adjust boundaries. An adjoining owner may not co-operate and an action under the Encroachments Act may be necessary or an application to the Registrar-General pursuant to Section 223a of the Real Property Act, could be considered. Either way, early determination of the problem is advantageous to all parties as the matter may need to be resolved in the Supreme Court. ← SEE PARA 930

Both Sections 223a and 223j can only be used if the encroachments are long standing.

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- (412)      ■      Where more than one certificate of title is involved in the outer boundary, the conveyancer must ensure that registered estates and interests, trusts, appurtenances, etc, registered in respect of them are identical. This need not mean that two different and adjacent owners cannot combine and make application for the deposit of a single strata plan.      ← SEE PARA 933
- Leases over portion of the land in the site are often a problem when they are required to subsist after deposit of the plan. They are usually registered in respect of a portion of the land that is to become a unit. In this case the conveyancer must determine whether the lease, which may have a different boundary description to the unit, will be carried forward over the whole or portion of the unit as the case may be. The advice of the surveyor must be sought as it may be necessary for him/her to make a certification in this regard. Keep in mind that it is possible for a lease to describe boundaries to the centre line of walls and the strata plan will, by the Act, relate boundaries to the inside faces of walls.
- Implied trusts and inherited trusts created pursuant to statute. These are discussed in Para's 413 to 418.

## 413 IMPLIED EASEMENTS AND TRUSTS

Land in a certificate of title may have dominant or servient rights or privileges that are implied at Common Law and have matured by public user. Implied rights are not registered as such on a certificate of title and are usually only obvious to those expert enough to identify them.

The right may be recognised on a title diagram or on a plan by its delineation and name. Eg., by the words "right of way", "road", "private road" or by a brown colour wash. Brown is the recognised colour used to signify access in land records. There will be no reference to the rights in the recital of the title.

Reservations may be signified by the words "reserve", "church", "cemetery", "drain", "drain reserve", "easement", etc. Each designation would imply a specific land use right or trust.

## 414 IDENTIFYING IMPLIED RIGHTS

Prior to the Town Planning and Development Act, 1920 streets and reserves did not vest in a council and remained in private ownership. Section 31 of the Town Planning Act, 1929 and Section 101 of the Real Property Act, 1886 both provided for plans to be deposited in the Lands Titles Registration Office delineating streets and roads that remain in private ownership. These provisions were repealed in 1966 and 1982 respectively.

Common Law principles indicate that where a plan sets out streets and reserves that remain in private ownership and have not vested in a council (as public in the case of a street), the owners of land within that plan have a right of user implied for the intended purpose of the land.

Eg, a street would imply a right of access and a reserve a right to use the land as a reserve.



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(414) Figure 15 shows part of an actual plan of division deposited in 1878 showing private roads giving common law rights of access.

Interpretation of Common Law is extremely complex and advice from a solicitor is advisable where land, the subject of a strata application, relies on a common law right for access or is subject to an implied trust as a reserve.

In the latter case, the land may not be capable of being strata titled without legal resolution

The developer will have to seek professional advice as to whether an implied right or trust is an impediment in the title that may make it difficult to strata title.

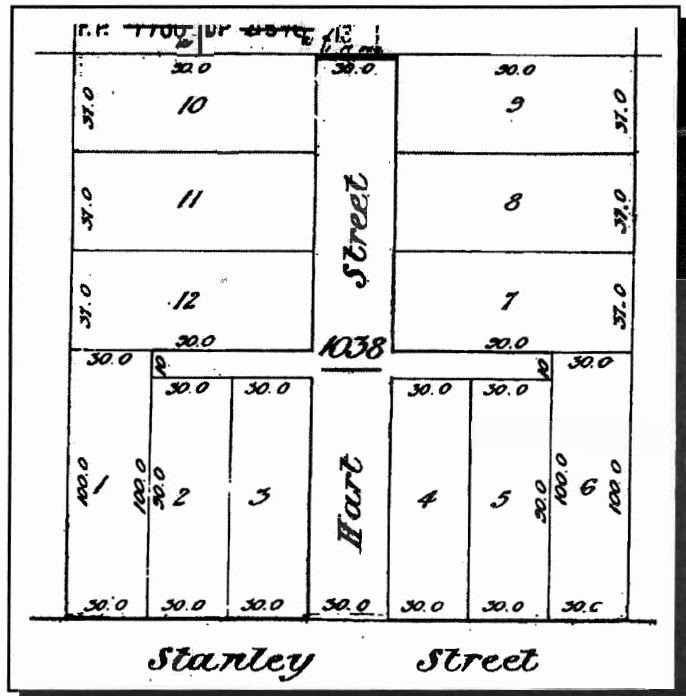


Figure 15 PLAN SHOWING IMPLIED RIGHTS

### 415 EXAMPLE OF IMPLIED RIGHTS

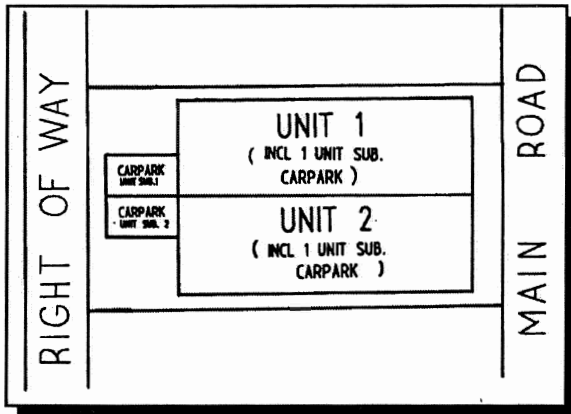


Figure 16 UNREGISTERED ACCESS

Figure 16 shows a situation sometimes encountered that causes problems in both strata and land division applications.

The land abuts a public street on the East and a strip of land designated as a right of way (for access) on the West. The right is not public and remains in private ownership. Units 1 and 2 are dependant on the Right of Way for access purposes

In this situation, it may be difficult to convince a council, or the purchaser of a unit, that access to the Carports Unit Subsidiaries 1 and 2 and adjacent common property, is legal as the right is unregistered on the certificate of title.

### 416 IMPLIED TRUST PROBLEM - CASE HISTORY

Similarly, a situation may occur where either a portion or the whole of an allotment is subject to an implied trust. In Figure 17 below, the area marked "Reserve" is an allotment in a plan of division deposited in the Lands Titles Registration Office which has remained in private ownership. There appears to be no reason to prevent an owner of land marked reserve from alienating to land (see *British Bank of Australia & Evans' Transfer (1899, 21 A.L.T. 148)*).

Where land, such as that shown in Figure 17 becomes the subject of a strata application, the area of the plan comprising the area of the reserve will remain designated as such.

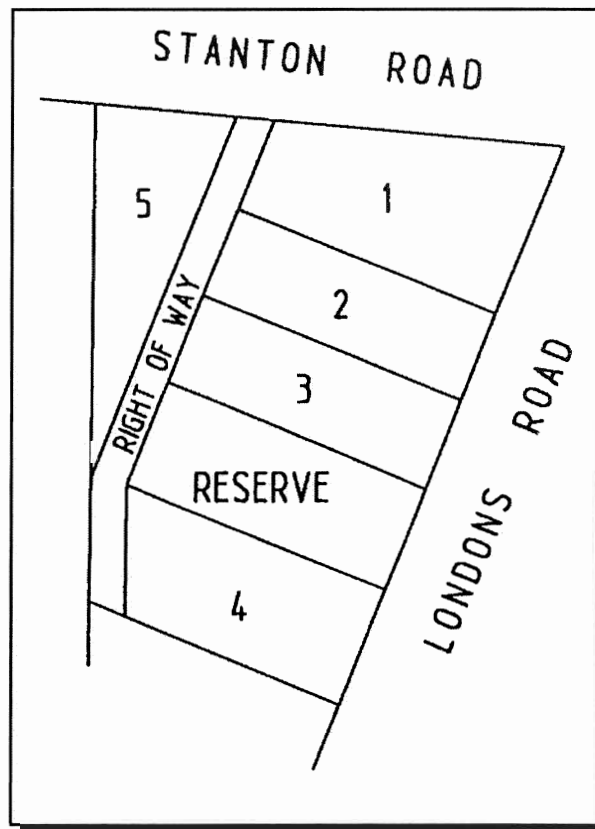
#### CASE HISTORY

A situation has occurred where a strata plan has been deposited showing portion of the common property as "reserve" (having been set out in a plan of division prior to 1920). It was found that prospective purchasers of units were reluctant to enter into a contract to purchase until convinced that local residents would not claim any right to use the land. No one was willing to give this assurance.

The Registrar-General has no power to remove reference to the implied trust.

Where disputes or doubts arise as to the effect on the scheme of the designation of land within the plan as reserve, the matter may need to be resolved in the Supreme Court. Advice from a solicitor is recommended when a situation similar to this is encountered.

However, this should be the responsibility of the developer and the problem should not be burdened upon the strata corporation.



**Figure 17 PLAN SHOWING AN IMPLIED RESERVATION**

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### 417 TRUSTS AND CONDITIONS CREATED BY STATUTE

Land in a land grant or a certificate of title originating from a land grant may be subject to a trust or a condition created by the Crown Lands Act, 1929. These may appear in the form following:-

"In. Trust to permit and suffer the land (or some specific portion) hereinafter described to be used at all times as a Hall", (etc.).

Other instances may require the land to be held for Marine and Harbours, Railway Land, School Reserve purposes.

The Public Maps of the State held by the Surveyor-General may also show a designated land use by showing the words of the trust with or as the land description. Eg., "Cemetery Reserve".

Land may also be subject to a condition that may not be suitable for the purposes of the Strata Titles Act. A condition may obligate a grantee to erect a residence of not less than a stated value before a certain date or use the land for residential purposes only.

Land subject to such trusts and conditions are often sold without due consideration of the affect on a purchaser. Applications to divide land, subject to such a trust, into allotments or units will require an application to be made to the appropriate Regional Office of the Department of Environment and Natural Resources for removal of that trust. For land in the metropolitan area, application should be made to the Crown Tenure Unit at the Department's Adelaide Office.