

Marking Boundaries: DRED v. Dow

The NH Supreme Court handed down an opinion this morning interpreting [RSA 472](#), relating to resolution of boundary disputes. The case is [New Hampshire Department of Resources and Economic Development v. E. Milton Dow and E. Milton Dow d/b/a Dow Sand and Gravel](#), 148 N.H. 60 (2002).

The opinion is most interesting for its stern interpretation of the statute, with a finding that where all statutory conditions for memorializing a boundary line agreement have not been met, then the agreement is void and unenforceable. The important sections of RSA 472 are sections 1, 3, and 4.

RSA 472:1 says that where there is a dispute as to location of a boundary and monuments are absent, the adjoining property owners "may establish said line by agreement in the following manner, and not otherwise."

RSA 472:3 reads: "The line agreed upon shall be surveyed and established by courses and distances, and suitable and permanent monuments shall be placed at each end and at each angle of the boundary so agreed upon."

RSA 472:4 states that such agreements shall be in writing, and describes at length how they are to be recorded and noted in the registry of deeds.

Briefly, the facts: the current owners' predecessors couldn't find the boundary, and had a survey done in 1973, which was recorded as part of a subdivision plan. They executed an agreement in 1974 and recorded it. The agreement did not refer to the survey, but the court found that immaterial, as the location and dimensions of the line in the agreement matched the same in the survey. At issue is the fact that permanent boundary markers were never set (as required by RSA 472:3), pursuant to the line established by both the agreement and survey.

The court found the presence of mandatory language ("shall") in RSA 472:3 and the concluding statement, "and not otherwise," in RSA 472:1 to be dispositive of the case.

In an opinion written by Justice Dalanis, the court concluded "Having considered RSA chapter 472 as a whole, we interpret it as conditioning the validity of a boundary line agreement upon satisfying all of the statutory formalities. To otherwise uphold a boundary line agreement as valid would eviscerate the statute, rendering its mandatory language meaningless. We will not construe the statute in such a manner. While we recognize that this construction could create an unfavorable result in some cases, we will not 'redraft legislation to make it conform to an intention not fairly expressed therein.'" (citations omitted)

There may be ample evidence to locate the boundary exactly where the now-invalid 1974 agreement places it, but that will be the subject of a quiet title action on remand to superior court.

Short lessons:

1. "Shall" means do it, or else.
2. Anyone who owns property subject to a boundary agreement had better check to make sure that monuments were set, or get them in the ground now. Being a municipality gives you no added credibility in court on this issue.

Ben Frost, OSP, July 17, 2002