UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

LIGHT WAVES, LLC,

Plaintiff,

v. **Case No. 3:24cv138-TKW-HTC**

FIRST AMERICAN TITLE INSURANCE COMPANY,

Defendant.
_____/

ORDER ON SUMMARY JUDGMENT MOTIONS

This case is before the Court based on the parties' motions for summary judgment (Docs. 34, 42). Upon due consideration of the motions, the responses (Docs. 39, 45), the replies (Docs. 40, 48), and the 10,000+ pages of evidence submitted by the parties (attachments to Docs. 38, 41), the Court finds that Plaintiff's motion is due to be denied and Defendant's motion is due to be granted.

Facts

In December 2020, Plaintiff contracted to purchase a beachfront house in Santa Rosa Beach (the Property). Plaintiff's lender required a survey, so the closing agent designated by Plaintiff hired a local surveying company, Voelker Surveying, LLC (Voelker), to survey the Property.

Voelker prepared a standard "boundary survey" of the Property in accordance

with the Florida surveying rules. A PDF copy of that survey (the Voelker Survey) was emailed to the closing agent before closing. The closing agent forwarded the survey to Plaintiff's principal, Aaron Zack.

The Voelker Survey graphically depicted the improvements on the Property in relation to the property lines. It also included notations that the Property "is subject to zoning setbacks and restrictions of record" and that Voelker "made no attempt to physically locate underground features such as footings and other underground improvements."

The Voelker Survey clearly depicted encroachments along the western property line. The encroachments, which were primarily attributable to the elevated deck on the west side of the Property, extended between 0.3 feet (3.6 inches) and 0.5 feet (6 inches) onto the neighboring property.[1]

The western edge of the deck was supported by four wooden pilings. The pilings were not visible when the Voelker Survey was conducted because they were fully encased in stucco columns.

Mr. Zack did not ask any questions about the encroachments shown on the Voelker Survey despite seeing the arrows and measurements along the western property line. The only question he asked was whether the survey showed the

[1] Appendix A to this order includes an enlarged portion of the Voelker Survey showing the encroachments along the western property line.

property line going to the water's edge, which it did.

Defendant provided Plaintiff a Commitment for Title Insurance before closing. The Commitment included a "Standard Survey Exception" excepting from coverage "[a]ny encroachment … affecting the Title that would be disclosed by an accurate and complete land survey of the [Property]." After the Voelker Survey was completed, that exception was replaced with the "Special Survey Exception" quoted below.

Plaintiff closed on the Property on February 25, 2021. The following week, on March 2, Defendant issued an Owner's Policy of Title Insurance (the Policy) to Plaintiff.

The Policy insured against loss or damage sustained or incurred by Plaintiff for specified covered risks, including encroachments affecting title. The Policy included numerous exceptions, including:

- the Special Survey Exception, which excepted loss from "any encroachments as shown on [the Voelker Survey]."
- Exclusion 1(a), which excepted loss from "[a]ny law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting [or] regulating" the use of the land or improvements on the Property.
- Exclusions 3(a) and 3(d), which excepted loss for "[d]efects, liens, encumbrances, adverse claims, or other matters" created by the insured or created after the date of the policy.

Plaintiff made substantial renovations to the Property after closing, including demolition and expansion of the western deck.[2] The location of the pilings supporting the deck were not moved during the renovations, but the columns surrounding the pilings were modified such that the tops of the pilings are now visible. Although the pilings were not moved, the deck expansion increased the encroachment onto the neighboring property by up to 1.7 feet because the renovations were based on the original 1993 plans for the Property and, unbeknownst to the contractors doing the renovations, the pilings had been moved slightly from their original locations when the deck was reconstructed in 2005 after it was destroyed by Hurricane Dennis.

Mr. Zack claimed to have first learned about a potential encroachment or setback issue in June 2022 when Plaintiff applied to Walton County for a pool construction permit. Thereafter, in December 2022, Plaintiff hired Butler & Associates to survey the Property.

That survey (the Butler Survey) depicted several encroachments along the western boundary of the Property, including encroachments by all four of the pilings

[2] Plaintiff claimed in pre-suit communications with Defendant that "there have been no post-policy modifications to the Subject Property that affect the subject encroachment," and it made similar allegations in the amended complaint. *See* Doc. 10 at ¶¶15, 20, 31. However, as reflected in Appendix B to this order, the photographs in the record clearly show (and Plaintiff now admits) that claim was false because extensive post-closing modifications were made to the western deck.

supporting the renovated western deck. From north to south, the pilings encroached 0.01 feet,[3] 0.07 feet, 0.29 feet, and 0.10 feet onto the neighboring property.[4]

After receiving the Butler Survey, Plaintiff filed a claim for coverage under the Policy. Defendant denied coverage because (1) the Special Survey Exception excepted coverage for the encroachment since it was depicted on the Voelker Survey, and (2) Exclusions 3(a) and 3(d) excepted coverage for the encroachments created or expanded by Plaintiff's post-closing renovations to the western deck.

In 2025, during the pendency of this case, Defendant hired Mike Bartholomew of Atwell, LLC to prepare a survey of the Property. Like the Butler Survey, the survey prepared by Mr. Bartholomew (the Atwell Survey) depicted several encroachments along the Property's western boundary, including one piling (the second-most southerly) that extended 0.14 feet onto the neighboring property.[5]

It is undisputed that at least one of the four pilings (the second-most southerly) encroaches onto the neighboring property, but there is a dispute about the extent of the encroachment—the Butler Survey measured it at 0.29 feet (about 3½ inches) and

[3] The Butler Survey appears to show the northernmost piling entirely on the Property and 0.01 feet from the western property line, but Butler's corporate representative testified that all four of the pilings encroached onto the neighboring property.

[4] Appendix C to this order includes an enlarged portion of the Butler Survey showing the locations of the columns in relation to the western property line.

[5] Appendix D to this order includes an enlarged portion of the Atwell Survey showing the locations of the columns in relation to the western property line.

the Atwell Survey measured it at 0.14 feet (less than 2 inches). The encroachment shown on the Voelker Survey in the area where that column is located is larger than either of those measurements at 0.5 feet (6 inches).[6]

Mr. Bartholomew—the only expert disclosed in this case—opined that the Voelker Survey "shows" the encroachment of the pilings onto the neighboring property in accordance with applicable surveying rules because (1) it graphically depicts the western edge of the improvements on the Property with offset lines and arrows, and (2) any of the encroaching pilings are "between the West Boundary and the extreme west edge of the improvements." The record contains no contrary evidence on these points.

Procedural Background

In March 2024, Plaintiff filed suit against Defendant in state court asserting claims for declaratory judgment, breach of contract, and bad faith. Defendant timely removed the case to this Court based on diversity jurisdiction.

After the case was removed, Plaintiff filed an amended complaint omitting the premature bad faith claim and reasserting the claims for declaratory judgment

[6] Voelker's corporate representative testified that the 0.5-foot encroachment is attributable to a stucco feature above the columns along the bottom edge of the deck that "go[es] to about the … second column from the [south]," which is a further north than what it appears in pictures. The record contains no contrary evidence.

(Count I) and breach of contract (Count II). *See* Doc. 10. Defendant answered the amended complaint, *see* Doc. 14, and the case proceeded to discovery.

In March 2025, two days before discovery closed, Plaintiff requested leave to file a second amended complaint to narrow its claims to the encroachment of the pilings. The Court denied leave to amend because, at that stage of the case, the more appropriate way to narrow the issues in dispute was "through stipulations or summary judgment briefing, not an untimely amendment of the pleadings." Doc. 30 at 5.

The parties thereafter filed motions for summary judgment. The motions are fully briefed. Oral argument was not requested and is not needed. *See* N.D. Fla. Loc. R. 7.1(K). Thus, the motions are ripe for rulings.

Standard of Review

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue of fact is "material" if it would change the outcome of the litigation, and a dispute about a material fact is "genuine" if the evidence is such that it could lead a reasonable factfinder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party and draw all reasonable

inferences in that party's favor. *Pennington v. City of Huntsville*, 261 F.3d 1262, 1265 (11th Cir. 2001). The Court's role at the summary judgment stage is not to weigh the evidence, but rather to "conclude whether [the evidence] is so one-sided that the result of any trial is inevitable." *Turner v. Phillips*, 2022 WL 458238, at *4 (11th Cir. Feb. 15, 2022). Thus, when ruling on a motion for summary judgment, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." *Anderson*, 477 U.S. at 252.

The same standards apply when reviewing cross-motions for summary judgment, although the party in whose favor the evidence must be viewed depends on which motion is being considered. Thus, when considering Plaintiff's motion, the Court must view the evidence in the light most favorable to Defendant, and when considering Defendant's motion, the Court must view the evidence in the light most favorable to Plaintiff. That said, cross-motions for summary judgment can be an indication that there are no material facts in dispute.[7] *See United States v. Oakley*, 744 F.2d 1553, 1555-56 (11th Cir. 1984).

[7] Notably, in this case, neither party argues that the other party's motion for summary judgment should be denied because there are material facts in dispute. Rather, each party relies on the same basic facts to argue that it is entitled to judgment as a matter of law.

Analysis

The parties' motions are effectively cross-motions for summary judgment on Count I, at least with respect to the issue of whether the Policy covers the encroachment of the pilings onto the neighboring property.[8] Thus, the Court will address that count first.

Count I – Declaratory Judgment

It is undisputed that certain improvements on the west side of the Property encroach onto the neighboring property, and the parties agree that the Special Survey Exception in the Policy excludes coverage for encroachments that are shown on the Voelker Survey. Thus, resolution of Count I boils down to whether the encroachments that are still at issue (i.e., the pilings) are "shown" on the Voelker Survey. If they are, then they are not covered under the policy; if they aren't, then they are covered.

"Under Florida law, insurance contracts are construed according to their plain meaning." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532

[8] Plaintiff only seeks summary judgment as to the encroachment of the pilings, and in response to Defendant's motion for summary judgment as to all of the encroachments described in the amended complaint, Plaintiff did not argue that any of the other encroachments (e.g., expanded deck, gas meter, etc.) are covered under the Policy. Thus, Plaintiff has abandoned any claim based on the other encroachments. *See Resol. Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("[G]rounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned."); *Schwarz v. Bd. of Supervisors on behalf of Vills. Cmty. Dev. Dists.*, 672 F. App'x 981, 983 (11th Cir. 2017) ("We agree with the district court that Plaintiffs waived these claims by failing to address them in their summary judgment response ….").

(Fla. 2005). Thus, "if a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Id.* (quoting *Hagen v. Aetna Cas. & Sur. Co.*, 675 So. 2d 963, 965 (Fla. 5th DCA 1996)).

Here, there is nothing unclear or ambiguous about the Special Survey Exception's exclusion of coverage for "any encroachments as shown on [the Voelker Survey]."[9] The Policy defines "encroachment" to include "existing improvements located on the [covered property] [that extend] onto adjoining land," and the dictionary defines "show" to mean to "cause or allow to be seen" or "display." *The American Heritage Dictionary of the English Language* 1623 (5th ed. 2016); *accord* Doc. 40 at 3 ("The term 'shown,' as defined by Merriam-Webster, means: 'to cause or permit to be seen.'"). Thus, it follows that the Special Survey Exception excludes from coverage existing improvements on the Property that are displayed on the Voelker Survey and can be seen extending onto the neighboring property.

That plain language interpretation of the Policy begs the question as to how a survey must display encroachments so they can be seen. The answer to that question

[9] This exclusion tracks §627.7842(1)(a), Fla. Stat., which provides: "If a survey meeting the standards of practice for surveying required by the Department of Agriculture and Consumer Services and certified to the title insurer by a registered Florida surveyor has been completed on the property within 90 days before the date of closing, the title policy may only except from coverage the encroachments, overlays, boundary line disputes, and other matters which are actually shown on the survey." The surveying rules promulgated by the Department of Agriculture and Consumer Services are codified in Chapter 5J-17 of the Florida Administrative Code, and the "standards of practice" are in Rules 5J-17.050, -17.051, -17.052, and -17.053.

is in the Florida administrative rules governing surveys and the expert surveyor testimony in the record of this case.

Fla. Admin. Code R. 5J-17.052(5)(a) provides that the "[l]ocation of fixed improvements pertinent to the survey shall be graphically shown upon the map and their positions shall be dimensioned in reference to the boundaries, either directly or by offset lines." The Voelker Survey complied with this rule because it graphically depicted and dimensioned the location of the western extent of the Property's improvements in relation to the western property line, both directly (with arrows and measurements) and by offset lines. The survey also complied with the portion of the rule governing "boundary inconsistencies" because it graphically depicted the extent to which the improvements extended onto the adjoining property. *See* Fla. Admin. Code R. 5J-17.052(3)(c) ("All apparent physical use onto … adjoining property must be indicated, with the extent of such use shown or noted upon the map." (emphasis added)).

The fact that Mr. Zack did not understand or appreciate the significance of the measurements and offset lines shown on the survey is immaterial. *See, e.g., Tarin v. Sniezek*, 942 So. 2d 458, 461 (Fla. 4th DCA 2006) (explaining in the context of a boundary dispute that a party's failure to read or understand a survey is not a defense). Indeed, each surveyor whose testimony is included in the record agreed that the use of offset lines and arrows like those on the Voelker Survey was the

proper way to depict encroachments on a survey and to communicate that information to the public.

The Court did not overlook Plaintiff's argument that the Voelker Survey did not comply with Rule 5J-17.052(5)(a) with respect to the pilings because they are "fixed improvements" and are not specifically shown on the survey. However, each surveyor who was asked about that issue agreed that the surveying rules do not require every improvement within the perimeter of the structure (like the pilings) to be specifically depicted on the survey—particularly where, as here, the improvement is not even visible when the survey was conducted.[10] Instead, a standard boundary survey is only required to show the extent of the improvements on the property in relation to the property boundary. Thus, it was sufficient for the Voelker Survey to depict the furthest extent of the improvements on the survey as it did.

It is undisputed that the pilings do not encroach onto the neighboring property any further than the extent of the encroachment shown on the Voelker Survey. That being the case, the encroachment of the pilings was adequately "shown" on the Voelker Survey in accordance with the applicable surveying rules.

[10] On this issue, Mr. Bartholomew (the only expert witness in this case) explained that "interior portions of fixed aboveground improvements that are not visible to the eye … are not typically … depicted on … surveys" and that there is no surveying rule that requires interior features (such as the encased pilings) to be depicted on a boundary survey.

That conclusion is not undermined by the fact that the pilings themselves are shown on the Butler Survey and the Atwell Survey because (1) a specific purpose of those surveys was to determine the location of the pilings, and (2) the condition of the Property when those surveys were conducted was different than it was when the Voelker Survey was conducted in that the pilings were no longer fully encased in stucco columns and their tops were visible. Moreover, the surveyors who conducted those surveys both testified that the level of detail provided in those surveys is more than what is required for a standard boundary survey like the Voelker Survey.

Finally, the Court did not overlook Plaintiff's argument that the Voelker Survey violated Rule 5J-17.052(3)(d) because it did not show or note the failure to locate the pilings supporting the western deck. That rule, however, is inapplicable because it concerns "foundations" that are "beneath the surface," and the pilings extend well above the surface. Moreover, the survey complied with that rule with respect to the underground portions of the pilings because it included a notation that the surveyor "made no attempt to physically locate underground features."

In sum, although there is a factual dispute about the number of pilings that encroach onto the neighboring property and the extent to which each piling encroaches, it is undisputed that none of the pilings depicted on the Butler Survey[11]

[11] Although Mr. Bartholomew was critical of some of the measurements on the Butler Survey that resulted in it showing encroachments by all of the pilings (rather than only the second-most southerly piling), the Court is required to view the evidence in the light most favorable to

encroach further than the western extent of the encroachment graphically depicted on the Voelker Survey. That being the case, the encroachment of the pilings is "shown" on the Voelker Survey and Defendant is entitled to summary judgment on the only encroachment still at issue in Count I (the pilings) based on the Special Survey Exception in the Policy.

Count II – Breach of Contract

"For a breach of contract claim, Florida law requires the plaintiff to … establish: (1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009) (citing *Friedman v. N.Y. Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008)). Here, there is no dispute that the parties have a valid contract (the Policy), and the question of whether Defendant materially breached its obligations under the Policy boils down to whether Defendant correctly denied coverage for the encroachment caused by the pilings.[12]

Plaintiff at this stage of the case and accept the encroachments shown on the Butler Survey as being correct.

[12] The parties' summary judgment briefing does not address the issue of damages, but the record does not appear to include any evidence on that issue. For example, although the amended complaint alleged that "a proper cure for this matter would include procuring a sufficient portion of the adjacent lands so as to resolve the problem," the record does not include any evidence of the cost of such a procurement, and at most, Defendant would only have to procure a strip of land that was wide enough to include the pilings (about 3½ inches according to the Butler Survey), not the additional encroachment (more than 1½ feet) caused by Plaintiff's post-closing deck expansion. The Court did not overlook Mr. Zack's testimony that Plaintiff's damages consist of the full amount spent purchasing and renovating the Property, but there is no basis in law or the Policy for Plaintiff to recover those damages from Defendant.

The Policy clearly and unequivocally excludes coverage for "any encroachments … shown on [the Voelker Survey]," and as discussed above, the pilings are "shown" on that survey because it is undisputed that they are within the area of encroachment graphically depicted on the survey in accordance with the applicable surveying rules. Thus, for the same reasons that Defendant is entitled to summary judgment on Count I of the amended complaint, it did not breach its obligations under the Policy and is entitled to summary judgment on the claim in Count II of the amended complaint.[13]

Conclusion

In sum, for the reasons stated above, it is **ORDERED** that:

1. Plaintiff's motion for partial summary judgment (Doc. 34) is **DENIED**.

2. Defendant's motion for summary judgment (Doc. 42) is **GRANTED**.

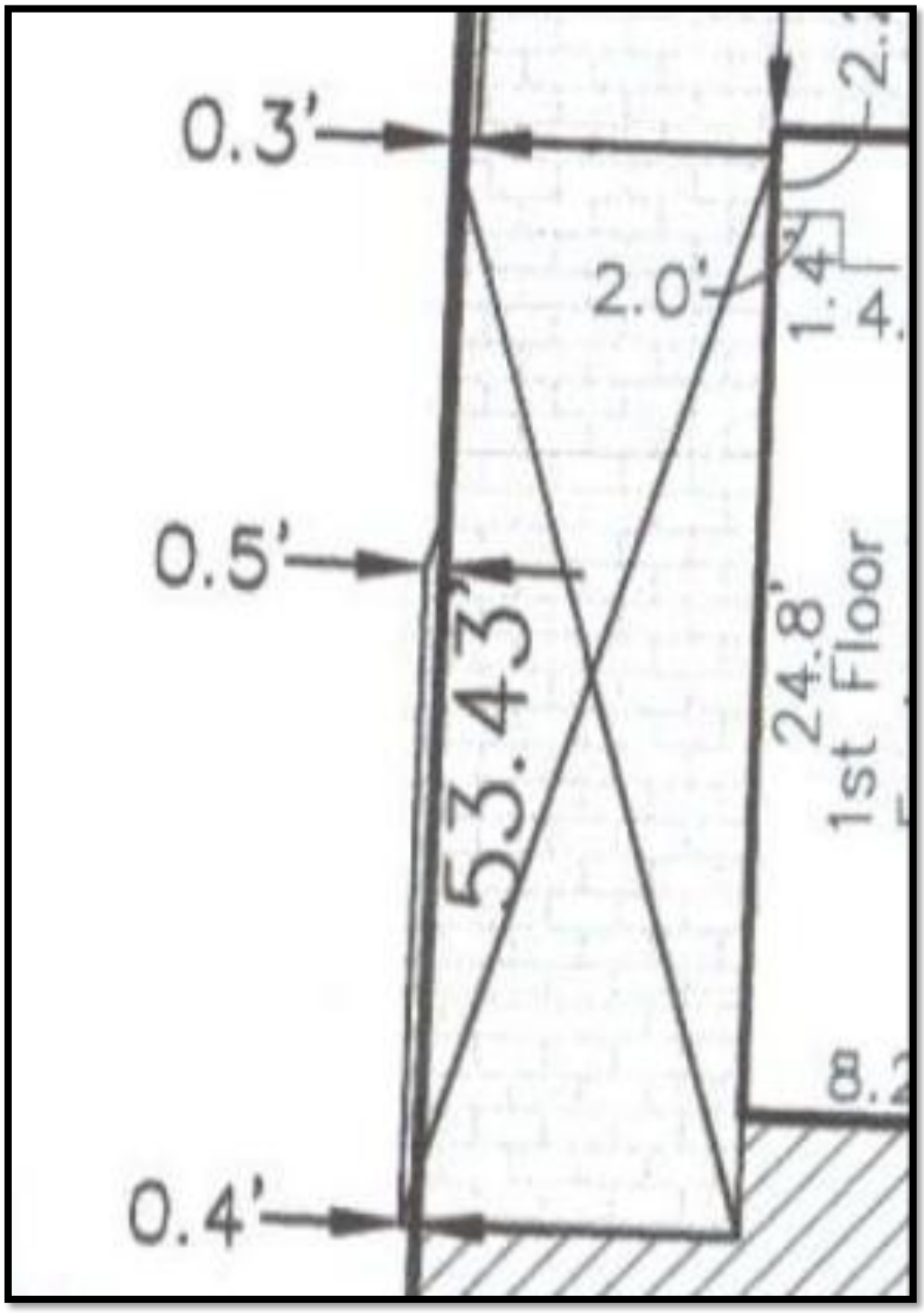
3. The Clerk shall enter judgment in favor of Defendant and close the file.

[13] Defendant also argues that it did not breach its obligations under the Policy insofar as Plaintiff's claims were based on the encroachments caused by the post-closing expansion of the deck and/or setback violations, but Plaintiff expressly abandoned those claims in its summary judgment briefing. *See* Doc. 45 at 35 (stating that "Plaintiff's claim is focused on the pilings that support the deck," not any encroachment related to the deck); *id.* at 37 ("Plaintiff has made no claim that coverage was triggered because of an[y] setback violation."). That said, for the sake of completeness, even if these claims had not been abandoned, the Court agrees with Defendant that they would be barred by Exclusions 1(a), 3(a), and 3(d) in the Policy.

DONE and ORDERED this 23rd day of September, 2025.

T. KENT WETHERELL, II
UNITED STATES DISTRICT JUDGE

Appendix A



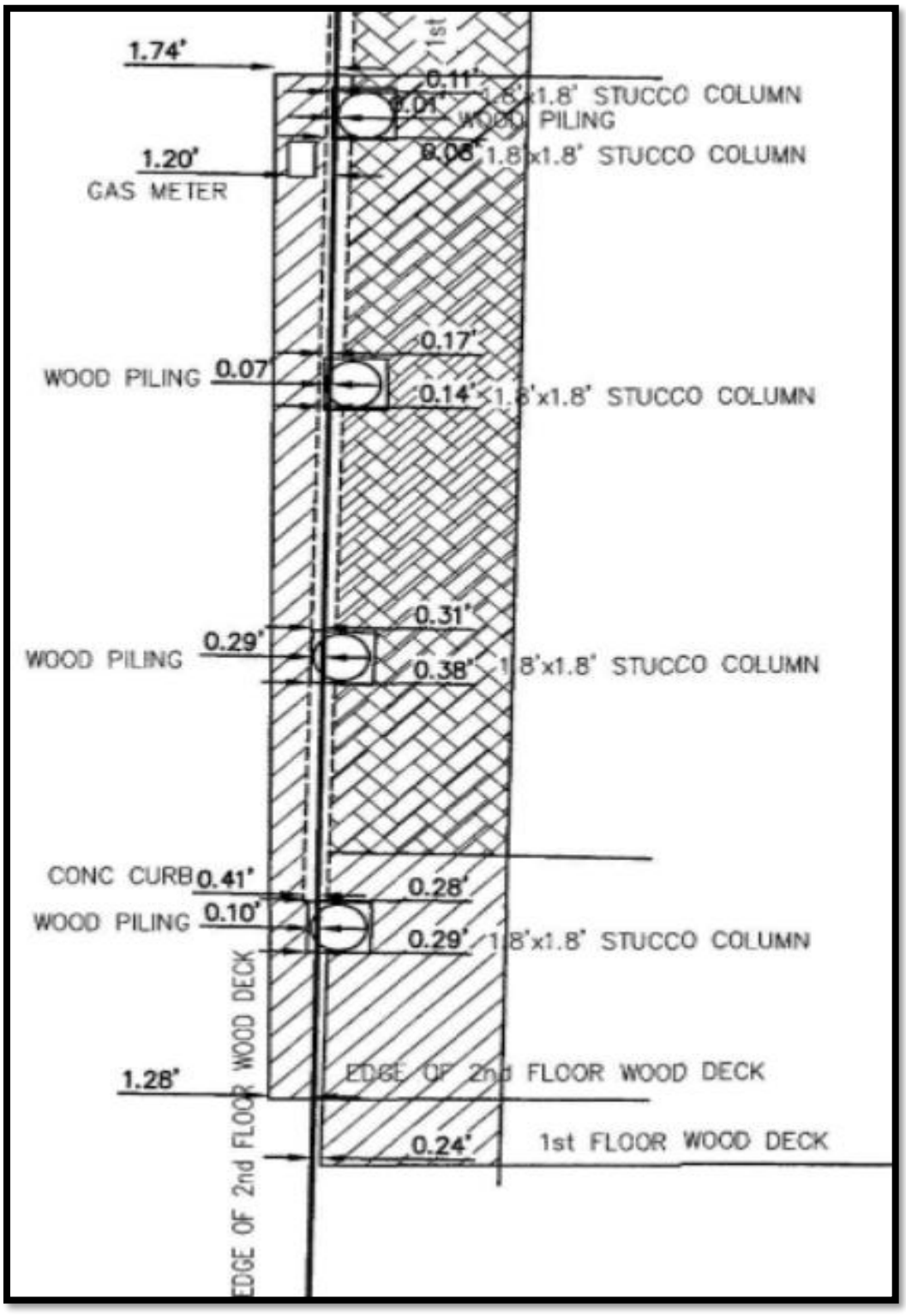
Excerpt from Voelker Survey (Doc. 41-1 at 9)

Appendix B

Western deck – before closing and renovations (Doc. 41-3 at 327)

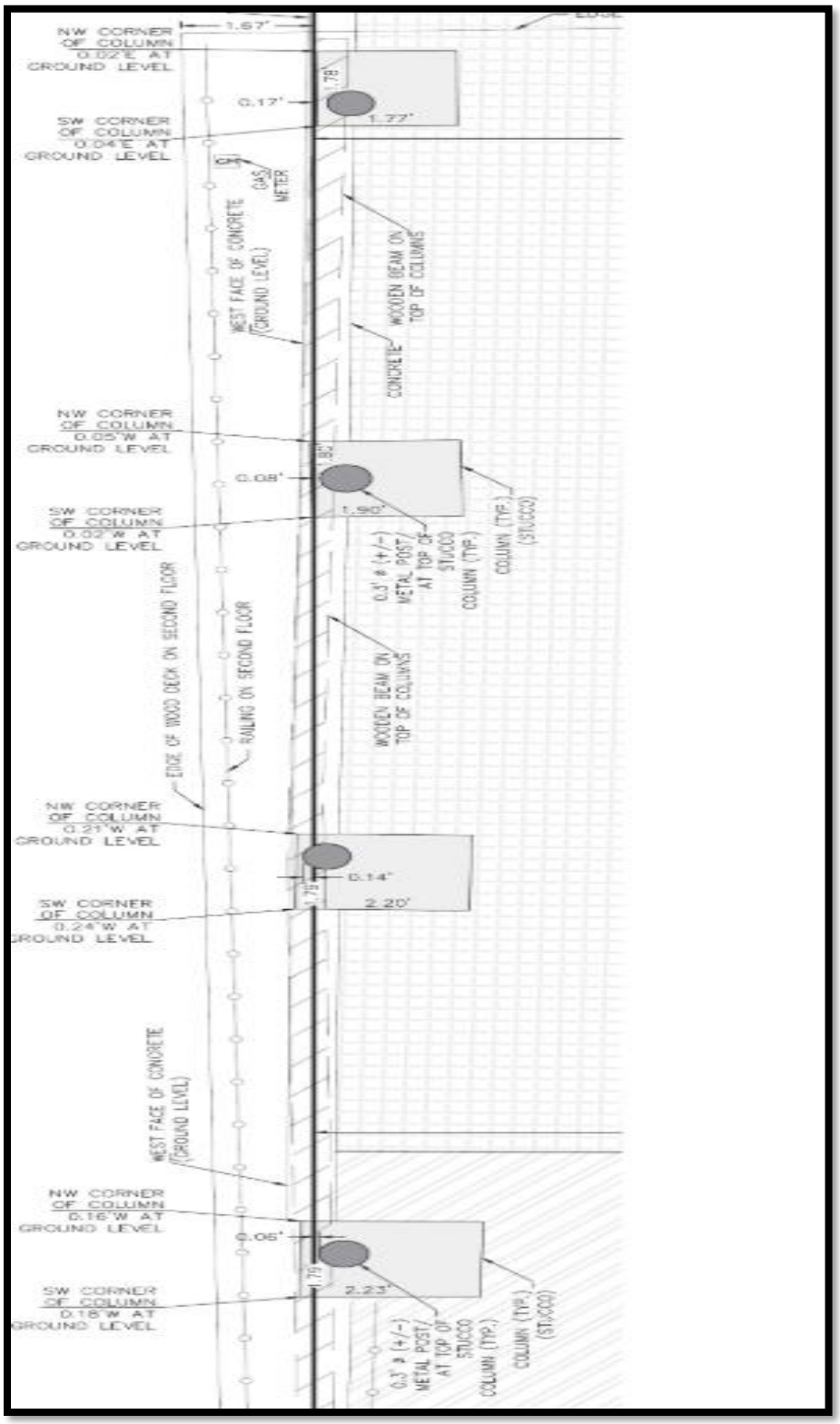
Western deck – after post-closing renovations (Doc. 41-16 at 126)

Appendix C



Excerpt from Butler Survey (Doc. 41-16 at 130)

Appendix D



Excerpt from Atwell Survey (Doc. 41-2 at 18)