

Stay Off My Easement!

By Dale S. Alberstone

Most easements contemplate a shared use of an owner's property. In other words, not only may the neighbor who acquires the easement be allowed to use the adjoining owner's land, so too is the owner allowed to use the surface of his own land where the easement is located.

If the owner were barred from using his own land across the easement area, such that only the neighbor could access and enjoy it, that arrangement would, for all practical purposes, constitute a transfer of title to the owner's property. Thus, does an easement exclude an owner from using his own land? Or, must the holder of an easement share his use with the landowner?

Whether an easement may be deemed "exclusive" to the neighbor (i.e., only the neighbor can use the land), or "non-exclusive" (i.e., meaning that the neighbor's use is shared with the owner's use), has been a grey area of the law for many years. Although there have been a handful of cases that have suggested that an exclusive easement is allowable, on October 23, 2008 the California Court of Appeal, in a case entitled Gray v. McCormick, put the issue finally to rest by holding that **it is legally permissible for an easement to be exclusive.**

Nature of an Easement

For our purposes, an easement is the right of one party (usually an adjoining property owner) to use the land of another over an extended period of time. An easement establishes a property right in the easement user's favor, as contrasted with merely a license to use someone else's property, such as parking a car in a commercial lot or holding a basketball ticket in a sports arena.

Paying to park a vehicle in a lot and possessing a ticket to sit in a seat at a sporting event does not create a property right in the underlying land. An easement, on the other hand, does establish a right in the property.

Upon creation, most easements "run with the land," meaning that when a neighbor sells his property, each successive owner of the neighbor's real estate acquires the easement.

I have not conducted a scientific study to determine the most prevalent types of easements.

However, it is my educated guess based on drafting hundreds of easements over three decades as a lawyer, that the most common easements are those for utility companies, followed by private easements for ingress and egress, such as shared driveways.

Creation of Easements

The two types of easements most frequently encountered are "express" easements and "prescriptive" easements. Express easements are those created by a deed or other written instrument in which the owner of land specifically grants an easement to his neighbor (or others), typically for shared or common usage of the owner's property.

An easement by prescription is created not by a written document, but merely by adverse and hostile use of an owner's land for a continuous period of five years without the owner granting permission for that use.

With that as a background, we now come to the focus of this article.

Can an Easement Be Exclusive?

Yes. As noted above, an "exclusive" easement bars the owner from use of his own land. It also

empowers the neighbor to initiate legal process to exclude the owner therefrom.

Under the newly released decision in Gray v. McCormick, the Appellate Court has now definitively ruled that an express easement (i.e., one that is granted by the owner to the neighbor in writing) may be exclusive.

In Gray, the recorded documents purported to give the adjoining neighbor an exclusive easement for access, as well as ingress and egress, over a 16-foot wide, by 90-foot long, strip on the owner's unimproved land.

The two properties were located among multi-million dollar luxury homes in upscale Coto de Caza, in Orange County. From time to time, the owners of the land burdened by the easement used the easement area for passage of their horses and for transportation of horse manure to and from stables in their backyard.

The neighbor, objecting to any use by the owners, filed suit to bar all further use of the easement area by the owners. After much discussion about the nature of an easement, the Court of Appeal determined that if the instrument creating the easement is clear and unequivocal, **an exclusive easement is allowable under California law**. Thus, the Court concluded that the owners were precluded from making any use of the surface of the easement area, even though they owned it. Only the adjoining neighbor was allowed to use the easement area.

While an exclusive easement may be created by a written document, it almost never can be created through a prescriptive easement. (I say "almost never" because there is limited authority to create an exclusive prescriptive easement involving a public water system.)

The clearest example of the Court rejecting the concept of an exclusive easement arising by prescription is Silacci v. Abramson (45 Cal.App.4th 558), which involved a backyard fence erected between two adjoining residential properties.

There, the neighbor fenced in 1600 square feet of undeveloped land behind his backyard across the owner's property. That fencing completely excluded the owner from use of his own land. The Court found that the notion of an exclusive prescriptive easement (which as a practical matter, would completely prohibit the true owner from using his or her land), has no application to simple backyard disputes.

In reaching that conclusion, the Court observed that an easement is merely the right to use the land of another for a specific purpose, and an easement acquired by prescription is one which arises by adverse use over a period of 5 years. But as the Court noted, an easement does not create ownership of another's land.

By entirely fencing out the true owner from his property, the Court found that the neighbor's acts perverted the classical distinction in real property law between ownership and use. Thus, the Appellate Court determined that a neighbor cannot acquire an exclusive easement on an owner's property merely by long-term prescriptive use.

I should point out, however, that if a neighbor also pays the real property taxes on the easement area that he is claiming, title to the land will pass to the neighbor by adverse possession. Of course, in this day and age, rarely does a neighbor pay any portion of the property taxes of the adjoining owner's property.

Conclusion

What is important to know is that easements may be exclusive if they are created by a written instrument. Under such circumstances, the neighbor can completely exclude the owner from use and enjoyment of the surface of the easement area of the owner's land.

However, in the context of prescriptive easements, they almost never can be exclusive. In fact, if the neighbor completely excludes an owner from his own land for a 5 or more year period, the neighbor does not acquire any easement at all. It is only where the neighbor shares the use of an owner's land for the statutory period without the owner's consent, that the neighbor may obtain an easement by prescription.

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Mr. Alberstone has been awarded an AV rating from Mardindale-Hubbell, which is a registered certification of Reed Elsevier Properties, Inc. An AV rating reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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