

How to Handle Boundary Encroachments **by Dale S. Albertstone, Esq.**

Among the most common of real estate problems confronting apartment owners are boundary line encroachments. These consist of fences, walls, gates, buildings, garages, driveways and other physical monuments which one property owner, either intentionally or unintentionally, constructs on an adjoining owner's property. Such structures constitute both an illegal trespass and an encroachment at the time of their placement.

Unfortunately, an owner might not even realize that his neighbor has encroached on his property. Most title policies are of no help in determining just where the property lines lie. The standard policy of title insurance (known as a C.L.T.A. policy) includes a copy of the assessor's parcel map, but without a surveyor's planting of stakes or markers in accordance with the legal description, an owner can never be certain where his property ends and his neighbor's begins. To compound the problem, the neighbor's predecessor-in-interest may have performed the construction years previously in such a manner that it now visually appears that the structure itself (such as a block wall or redwood fence) demarcates the actual location of the boundary line. Without a survey, or surveyor tags being placed along the true boundary line, an owner generally cannot determine if his neighbor's structure is encroaching.

The problem is exacerbated by a law which states that if a visible encroachment persists for more than five years, and it was erected without the permission of the property owner, the neighbor may acquire a permanent right to forever continue the encroachment. This is known as a prescriptive easement and bars the owner of the real property from removing the structure on his land or otherwise relocating it back to the actual boundary line.

Readers may recall from my prior articles in AOA Magazine that the elements necessary to establish a prescriptive easement are:

1. The encroaching structure must be open and visible (in law, we refer to it as "notorious").
2. The structure must have been erected or maintained adversely and/or in a hostile manner to the property rights of the true owner of the land upon which the structure encroaches,
3. The encroachment must have existed for a continuous period of at least 5 years, and
4. The structure must not have been consented to by the owner of the adversely affected property during the 5-year period.

The interesting phenomenon of a prescriptive easement is that it is acquired by an encroaching party even without any written document being signed. Indeed, the very essence of a prescriptive easement is that it arises merely by hostile use over the statutory period without any paperwork to document it. The etymology of "prescriptive" is from Latin and denotes the following: "pre" meaning "before," and "script" meaning a "writing." In other words, the word origin suggests that a "prescriptive" easement is an easement created before a writing exists.

In fact, the only type of writing which conclusively confirms the creation of a prescriptive easement is a judgment issued by the Court. Until a litigation is commenced and prosecuted through completion, a prescriptive easement will not become a part of a title policy nor can it be determined that the easement runs with the land and passes its benefit and burden to successor neighbors and owners.

While most property rights can only be created or transferred by a written document, such as a deed, certain other types of easements may occasionally be created without written documentation. For example, an easement by “balancing relative hardships” may be established if a neighbor innocently erects, at substantial expense, an encroachment on an owner’s property, particularly in cases where the owner observed the construction but took no action to stop it. In order to protect against the loss of property rights which yield to easements, owners of apartment buildings (as well as other kinds of real property), should undertake the following action:

1. If there is any doubt as to the actual location of one’s property boundaries, hire a surveyor to stake the actual boundaries or embed tags in the ground. Also, have the surveyor prepare a survey map for future reference. Individuals purchasing property that have not closed escrow might upgrade their standard policy of title insurance (by paying an additional premium) to obtain an extended A.L.T.A. policy which depicts the actual boundary lines and shows all encroachments as established by a current survey.
2. Consult real estate counsel to evaluate any encroachment and the applicability of the various statutes and judicial decisions to the owner’s property. Counsel can advise the owner as to what his rights and obligations are, and how quickly he must act in order to avoid losing rights to portions of his property.
3. If the property owner does not object to the encroachment, he should deliver a letter to the neighbor stating that the trespass and encroaching structure are with the owner’s permission. In addition, he should have the neighbor countersign the letter, and if possible, include a provision that states that the neighbor will remove the structure promptly upon any future request by the owner to do so.
4. If an objectionable encroachment is found to exist, notify the neighbor to remove it forthwith. If he refuses to do so, consider filing suit to have the court compel its removal. The longer an encroachment is present, the less likely it is that the court will order it to be abated. The statute of limitations for trespass is three years even though a prescriptive easement is not established until the encroachment has been present for at least 5 years.
5. Consider removing the structure yourself if it can be done without a breach of peace (e.g., the neighbor is absent when the owner’s fence company excavates it).

If you are a neighbor who has encroached upon another’s property for more than five years, you might wish to file your own suit to perfect the easement. Only a court (not a title company, surveyor, county assessor or other individual or entity) can officially declare the existence of a

prescriptive easement. Once the easement has been judicially established, you, as the encroaching neighbor, may freely transfer the easement concurrently with your conveyance of the property to a new buyer.

Real property rights are among the most cherished possessions which Americans own. The legislature and courts want to be certain that individuals tend to those rights and care for their property. If they do not, there are procedures in the law where adjoining owners can acquire portions of those rights through the doctrine of prescriptive easements. As first declared in 1872 in Civil Code Section 3527, “The law helps the vigilant before those who sleep on their rights.”

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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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