

## **Prescriptive Easements: Revisited** by Dale S. Alberstone

Over the years I have authored a number of articles for AOA members pertaining to prescriptive easements. Not only is it a body of law which I find particularly interesting, but it is also one that has a great amount of practical application to all property owners, not the least of whom are owners of apartment buildings.

In many respects, the law of prescriptive easements is well settled, but despite that fact, the California Court of Appeal issues several new judicial opinions about prescriptive easements each year. The most recent of those was that decided on July 16, 2008 entitled, Grant v. Ratliff.

Before discussing the issues raised in that decision, let us review the nature of a prescriptive easement.

### **Naure of a Prescriptive Easement**

In general, an easement is a right to use and enjoy another owner's land, typically in common with the owner. While most easements are created by recorded deeds, surprisingly, some may be established without any written record at all. Such is the nature of prescriptive easements.

Over time, the tenants of the neighboring building may acquire a prescriptive easement in favor of their own landlord/building owner.

The elements necessary to acquire an easement by prescription are “open and notorious use of another's land, which is continuous and uninterrupted for 5 years and adverse to the land's owner.” This is a direct quotation out of the Grant case, although it does not stand for anything new.

The reference to “open and notorious” is an archaic way of simply saying that the use over the 5-year minimum period would be visible to anyone who cared to look.

The two perplexing aspects of the elements, however, are the meaning of the word “adverse” and how one goes about proving that a use was in fact “adverse.”

### **Adverse: Defined**

Adverse typically means the hostile use of another's land, generally with the intent to use it as one's own property, and against the consent of the true owner. “Adverse” is sometimes used interchangeably with “hostile.”

Regardless of whether the use is intended by a third party (typically, a trespasser) to be adverse or hostile, many cases are successfully defended by the landowner by proving at trial that the use was with the owner's consent. In fact, consent by the owner is typically a complete defense to the creation of a prescriptive easement.

The Grant case involved complex facts, but when boiled down to their essentials, consisted of a situation where the alleged adverse users were the landowner's sons traveling to and from their former family home. The Court found that the sons' use of the road was not adverse, but was, rather, a matter of family accommodation.

Other prior cases have discussed the fact that prescriptive easements may be defeated by showing that an adjoining landowner allowed the user to traverse the owner's land as a neighborly accommodation.

Thus, where the owner allows the use of his own property as a family or neighborly accommodation, courts decline to find the creation of an easement by prescription even if the user intended his use to be adverse and hostile to the owner's property.

### **Proof of Adverse Use**

The other problematic area of "adverse" use deals with the issue of whether or not a long, uninterrupted use somehow constitutes a presumption that the use was adverse.

In a 1948 Supreme Court case (Obanion), the high court considered whether a presumption of adverseness arises from open, notorious and long term continuous use. It then concluded that no such presumption exists.

However, in a 1984 case (Warsaw), the Supreme Court stated that "continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence."

Grant, sought to reconcile those two apparent contradictory holdings, while ultimately concluding that there is no public policy presumption that long time usage of another's land creates a presumption satisfying the "adverse" element.

Further, Grant went on to hold that a party seeking to establish an easement by prescription must satisfy the court by a relatively high standard that such an easement exists. Specifically, Grant held that the claimant must prove by "clear and convincing evidence," the existence of all the elements, including adverse usage.

### **Implications of a Prescriptive Easement**

Under early English common law (from 1066 through at least the 13<sup>th</sup> Century), ownership to land was conveyed by the property owner standing on his land, scooping up some dirt, and then handing it to the proposed new owner, while verbally affirming that title to the land was then transferred.

The American doctrine of the Statute of Frauds provides that most interests in land, and particularly ownership thereof, cannot be transferred verbally. Instead, the owner must sign something in writing which documents the conveyance.

Prescriptive easements are one major exception to the Statute of Frauds, as mere long-term usage, together with satisfaction of the other elements, will establish an easement

without any written memorialization of its existence.

Thus, cautious and prudent owners who observe someone else using their land without permission should promptly stop that occurrence. There are many ways that could be handled, such as erecting a wall or fence or by simply calling the police to arrest the trespasser.

Alternatively, the owner may have no objection to the use, but to err on the side of caution, should document his or her permission by a written letter or other memorandum which he or she delivers to the user. Verbal permission is sufficient, but written authorization is better since recollection of oral conversations are not as precise or compelling in court as reference to a written document.

In the context of apartment building ownership, prescriptive easements may arise from the tenants of a neighboring building, whose vehicles are too wide to remain confined to their own driveway, driving along the subject owner's abutting driveway. Over time, the tenants of the neighboring building may acquire a prescriptive easement in favor of their own landlord/building owner. The owner whose land is encroached upon should either provide formal written notice to the neighboring owner that such driveway encroachments are with permission, or, alternatively, erect fencing along the boundary separating abutting driveways so as to prevent further usage.

One aspect of usage which an apartment owner typically does not need to be concerned about is the presence of outside third parties who come to visit the owner's tenants. Such visitors generally do not adversely use the owner's property or possess any hostile intent. Instead, the owner and his tenants implicitly grant permission to such visitors. Consent defeats the claim of adverse use.

Before concluding my column this month, I want to bring to mention one other recent case which has nothing to do with apartment ownership, but is fascinating nonetheless. Bandana v. Quality Infusion, decided July 31, 2008 by the California Court of Appeal, involved a juror who applauded after hearing the judge's instruction that if a witness deliberately testifies untruthfully about one aspect of a case, the jury may choose not to believe anything the witness said.

While the Court determined that it was improper for the juror to clap her hands, it recognized that the demonstration did not prejudice either party in the case, and that the ultimate verdict would not be set aside. The court concluded with a profound observation: "The jury system is fundamentally human, which is both a strength and a weakness. . . . We must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic."

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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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