

Creation of an Equitable Easement by Dale S. Alberstone, Esq.

Readers may recall from my December 2008 discussion in AOA Magazine [*Stay Off My Easement!*] that 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 visible use of an owner’s land for a continuous period of five years without the owner granting permission for that use.

A third type of easement, which is the subject of this month’s column, is a judicially created easement which arises out of equity even though nothing is in writing and even though the owner may have verbally granted permission for the use during the five year statutory period.

Equitable Easements

Believe it or not, when certain elements are met, the Superior Court has the power to grant a neighbor an easement over an adjoining owner’s land pursuant to the court’s equitable jurisdiction under a doctrine known as “Balancing Relative Hardships.” Such an easement may be for a building encroachment or for ingress and egress.

One of the foundational cases for that doctrine was decided in 1952 in Christensen v. Tucker. There, the California Court of Appeal set forth the factors that the trial court must consider in determining whether an owner should be granted an injunction restraining a neighbor from using the owner’s land. Easements for “movement” on another’s land generally arise in favor of a neighbor along an actual or makeshift driveway across the owner’s property to enter or exit the neighbor’s property.

In an encroachment context (such as where a portion of a building is constructed by a neighbor on a small portion of another’s land), Christensen explained the factors for acquisition of an equitable easement:

1. The encroachment must not be the result of the neighbor’s willful act of knowing encroachment, and ordinarily should not be the result of the neighbor’s negligence. (Good faith reliance on a survey negates willfulness and negligence.)
2. The court will weigh the owner’s conduct to ascertain if he in any way contributed to the encroaching situation.
3. The owner of the land encroached upon will not suffer irreparable injury by the trespassing structure.
4. The hardship to the encroaching neighbor by granting an injunction (i.e. preventing the neighbor from stopping the owner from demolishing the encroaching portion of the structure) must be greatly disproportionate to the hardship caused to the owner by the continuation of

the encroachment.

The holding of the Court in Christensen may also be applied to roadways, even though roadways are not usually considered to be building structures. Also, while a roadway on an owner's property may not have been installed by the neighbor, its use by the neighbor for driveway ingress and egress is sufficiently similar to a building encroachment as to empower the court to grant an equitable easement under appropriate circumstances.

That was illustrated in Linthicum v. Butterfield which was decided by the Court of Appeal on April 2, 2009, and is the most recent case to affirm the continued viability of such equitable easements. In that case, Mr. Linthicum bought a parcel of land which his neighbor had used since 1969 as a roadway and which constituted the only roadway access to the neighbor's property.

Linthicum purchased his property in 2000. Some time thereafter, Linthicum filed a lawsuit against the neighbor for an injunction to prevent the neighbor from further using the roadway. The neighbor filed his own cross-complaint to quiet title to the easement, that is, to have the court determine that he should be awarded an equitable easement which would allow him to continue to use the owner's roadway.

During trial, the Superior Court made a site inspection of the two properties, and thereupon concluded that the roadway was the only access to the neighbor's parcel.

The trial court also determined that leaving the roadway in place would not affect Linthicum's plans to fully develop his property.

Finally, the court balanced the catastrophic loss to the neighbor should the injunction be granted, against no or insignificant loss to Linthicum should the injunction be denied.

The trial court then upheld the neighbor's claim to an equitable easement to the roadway and denied Linthicum's request for injunctive relief. The Court of Appeal upheld the lower court's decision.

Also significant in the case is that the Court of Appeal explained that when a trial court creates an easement by denying an injunction, the plaintiff (i.e., there, the property owner) is ordinarily entitled to damages. However, the court determined that Linthicum failed to introduce credible evidence at trial of the amount of the damages which the easement would cause him. (Actually, that was not the fault of Linthicum, but rather, his counsel. His lawyer failed to present the proper evidence of the financial impact that the roadway would have on the diminution in value of Linthicum's property.)

Other cases are in accord with the Linthicum decision, including one which I personally handled entitled Field-Escondon v. DeMann (204 C.A.3rd 228). In that case, the owner of certain property in Tarzana, California sued my client to remove an underground sewer line which ran

beneath and across the owner's property. The Superior Court granted my client a prescriptive easement. However, the Court of Appeal explained that because the sewer pipe was not visible (i.e., because it was buried several feet underground), the proper nature of the easement was one established by balancing the relative hardships of the parties, rather than an easement by prescription.

In my case, the trial court found that there was no other way to install the sewer pipe than across the owner's property, and because the hardship to my client if it had to remove the sewer would be greatly disproportionate to the limited injury to the owner of the land if the pipe remained, an equitable easement was proper. As with Linthicum, the owner's counsel failed to introduce credible evidence showing the diminution of value of his land if the pipe stayed, and therefore, my client was granted the easement without having to pay any money for it.

Conclusion

To me, I have always found the topic of easements to be fascinating. Certainly, it is a field of law which requires a great amount of careful legal analysis when an easement is claimed to be created in any fashion other than by a written instrument.

Perhaps the most important advice I can offer to owners who observe an encroachment or trespass on their property is to take immediate action to terminate the violation or have the court enjoin it. Otherwise, over time the usage of that property may ripen into an enforceable easement, whether it be by prescription or an equitable theory.

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 32 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

Mr. Alberstone has been awarded an AV rating from Mardindale-Hubbell. An AV rating, registered through Reed Elsevier, 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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