

Driveway Encroachments And Disputes **by Dale S. Alberstone, Esq.**

Owners of older apartment buildings often find that the width of their driveways are too narrow to accommodate today's SUVs, trucks and other large vehicles. In order to traverse the driveway from the front to the rear, tenants often have to drive their cars beyond the edge of the concrete or asphalt, and along the land owned by the next door neighbor. The neighbor's property abutting the driveway may be grass, dirt or even low shrubs. The wheels of the vehicles driven by the tenants trample the neighbor's land out of necessity, simply because their behemoths are too wide for the driveway.

This scenario may lead to unpleasant confrontations and accusations. Both property owners have legitimate interests to protect. The apartment owner and his tenants need to have adequate ingress and egress along the driveway. If the driveway is too narrow to be functional, tenants may move to other buildings. Conversely, the next door neighbor, understandably, wants to prevent the other's tenants from souring his land.

Depending on the nature and duration of usage, courts have acknowledged various rights, and have provided various remedies, for both property owners.

Rights of the Driveway Owner and His Tenants

If the driveway owner's tenants have driven upon a portion of the neighbor's land which abuts the driveway for a period of more than five years, the driveway owner (as well as his tenants so long as they live in the owner's building) may acquire a prescriptive easement, and thereby a lawful right, to continue such usage into the indefinite future. Under the prescriptive easement doctrine, an owner, who either personally or through his tenants, makes use of a neighbor's property in an open and notorious (i.e., visible) fashion, continuously, in a hostile manner for a period of five years, will acquire such an easement.

Once the easement has been acquired, the neighbor (who owns the encroached upon land) has no right to interfere with future vehicular usage of his land by either the driveway owner or the tenants. For example, in Warsaw vs. Chicago Metallic Ceilings, Inc. (35 C.3d 564), the California Supreme Court found that plaintiff's 40-foot wide driveway was inadequate to accommodate certain very large big rig trucks which carried material to and from plaintiff's loading dock. From 1972 until 1979, the trucks had to drive upon a portion of the defendant's ground immediately adjacent to the driveway. Since the usage was open, notorious, continuous and adverse for a period of five years, a prescriptive easement was recognized.

Incidentally, the Court determined that the trespassing company did not have to pay the encroach-upon neighbor any money in exchange for the easements. Prescriptive easements never require payment for their acquisition.

Establishing the existence of such an easement can only be accomplished through litigation. Absent a Superior Court judgment quieting title to an easement, there is no

way to prove its existence.

Following trial, if the Court determines that an easement exists, it will usually issue a restraining order against the neighbor from interfering with future vehicular use on his land. The Court does that by signing a permanent injunction document which bars the owner of the land from stopping the owner of the driveway, or his tenants, from driving upon the abutting land. The injunction also prevents the owner of the abutting land from erecting any fence or other barrier which would impair such usage. If the neighbor then violates the injunction, he can be incarcerated for contempt of court.

Once an easement has been acquired (whether or not litigation was filed), it may be transferred from one owner to the next as it is a property right which passes with the conveyance, as well as inheritance, of the land. But until a judgment is rendered by the Superior Court, there is no way to perfect (i.e. prove) the existence of the easement, even though it is transferred to the successor owner. Also, no title company will issue a policy of title insurance insuring the existence of the easement absent a judicial decree.

Rights of the Adjoining Neighbor

The single most effective defense available to the adjoining owner of the land is "consent." The defense of "consent" means that the neighbor gave his permission, usually as a neighborly accommodation, to allow the driveway owner and/or his tenants to come upon his land when they drive their vehicles. So long as the usage during any portion of the five-year period is with the consent of the neighbor, no prescriptive easement can be acquired.

Remarkably, and contrary to common sense, if a neighbor routinely objects to the usage during any portion of the five-year period, but does nothing to physically stop it, a prescriptive easement will be acquired upon the lapse of five years, whereas if the neighbor consents to the usage, no easement is acquired.

Thus, a neighbor who notices that vehicles are driving along his property should promptly engage in one or more of the following actions:

- 1) If the usage is acceptable to the neighbor, the neighbor should deliver a letter to the property owner, as well as to the tenants, consenting to the usage. A similar letter should be sent not less frequently than once every 12 months to reaffirm the consent.
- 2) If the usage is unacceptable, the neighbor should erect a fence or other barrier to prevent further trespasses.
- 3) If a physical confrontation is likely to occur, the neighbor should call the police department to eschew imminent harm. Generally, the police will not intervene in a dispute which merely involves vehicular usage, with no likelihood of physical harm to a person. They view this as a civil issue rather than a criminal problem.
- 4) The neighbor may file litigation seeking restraining orders and injunctive relief to

prevent further usage.

Conclusion

The law of prescriptive easements has been recognized in California since before the turn of the 20th century. It is a well established legal doctrine which, over a period of five years, may alter property rights between two adjoining owners. If a resolution cannot be swiftly achieved between owners, they should each promptly seek competent legal advice.

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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