

Drawing the Line

Written by Lucky
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Among the most vexing problems in the real estate arena are those involving property lines. Though these disputes frequently involve relatively small dollar amounts, they can fester into personal vendettas, especially when the principals are residential neighbors.

A common scenario involves a property owner constructing a fence. The neighbor does not object. Later it comes to light-often when the property is sold-that the fence is on the wrong side of the property line. In the meantime, the encroaching property owner has made use of the area by building a shed or some other improvement.

When such disputes arise, several legal doctrines may apply.

Applicable Doctrines

Adverse possession and prescriptive easements enable a party to acquire rights to another's property through "open and notorious" use that is hostile to the true owner and continues uninterrupted for five years.

Adverse possession requires the payment of real estate taxes (Cal. Code. Civ. Proc. § 325), which usually makes it inapplicable for boundary disputes involving a portion of a larger property. In contrast, a party claiming prescriptive rights need not pay real estate taxes. However, prescriptive easements are generally limited to nonexclusive rights, such as when both parties have use of a common access road.

Over the past two decades, courts in California have refused to grant "exclusive" prescriptive easements that prohibit use of the land by its true owner. (See *Mehdizadeh v. Mincer*, 46 Cal. App. 4th 1296 (1996).) These doctrines rarely solve the problem created by an innocently encroaching neighbor.

Agreed Boundaries

Owners also may resolve boundary questions amicably under California's "agreed boundary" doctrine. When the actual boundary line truly cannot be ascertained, the owners can agree to one in good faith.

Agreed boundaries come into play when legal records do not provide a reasonable basis for fixing the boundary. That may occur when "records never existed, were destroyed, are inaccurate, or when the natural features or surveyors' monuments or corners have changed or vanished." (*Mesnick v. Caton*, 83 Cal. App. 3d 1248, 1256-1257 (1986).)

The agreed boundary doctrine, intended to prevent litigation, can only be invoked under limited circumstances and cannot be used as a means of divesting an unconsenting landowner of his property (*Armitage v. Decker*, 218 Cal. App. 3d 887, 903 (1990)).

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Good Faith Improvements

In cases where a party mistakenly improves another's land, the California Legislature has tried to balance competing interests. The Good Faith Improver Act (Cal. Code Civ. Proc. §§ 871.1-871.7) protects the owner of the land upon which the improvement was constructed against any pecuniary loss but seeks to avoid enriching the owner unjustly at the expense of the good faith improver.

A court also may create an equitable easement if three requirements are met: (1) the encroachment must be innocent; (2) the adjoining owner must not suffer irreparable injury; and (3) removal of the improvement will cause hardship to the encroacher that is greatly disproportionate to that suffered by the adjoining owner. The court may also require payment of consideration for the encroaching use (*Hirshfield v. Schwartz*, 91 Cal. App. 4th 749, 756 (2001)).

As a practical matter, a competent survey by licensed professionals is the best way to prevent a dispute. Also, buyers should consider purchasing extended title insurance that provides coverage for unknown encroachments.

No Self-Help

When a boundary dispute arises, it is unwise for either of the owners to attempt a remedy on his or her own. Self-help is a legal no-no (*Allen v. McMillion*, 82 Cal. App. 3d 211 (1978)). And given the fact that litigation will be expensive and emotionally draining, sound strategy usually dictates that compromise is the best approach.

In attempting to reach a mutual resolution, the nonencroaching owner may consider granting a revocable license to allow a limited use of the property. Alternatively, the parties may consider a lot line adjustment, whereby the encroaching owner either pays a sum of money to the true owner or conveys a different portion of their own property in exchange for the area subject to the encroachment. Lastly, in the event a boundary cannot be ascertained through other means, the parties may avail themselves of the agreed boundary doctrine.

With good counsel and creative problem solving, neighbors can save money and spare themselves unnecessary duress.

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