

FEATURE ARTICLE

IS THE GRASS REALLY GREENER ON THE OTHER SIDE? A PRIMER ON PROPERTY BOUNDARY DISPUTES FOR THE LAND USE PRACTITIONER

By Ronald L. Richman and Peter C. Clancy

In property boundary disputes, one is more likely to hear “what’s yours is mine” rather than “what’s mine is yours.” The most common property boundary disputes fall into six general categories: (1) adverse possession; (2) prescriptive easement; (3) abandonment of an easement; (4) extinguishment of an easement; (5) agreed-upon boundary doctrine; and (6) good faith improver of land doctrine.

This article is not intended to serve as an exhaustive or definitive essay on property boundary disputes. Rather, this article is being presented as a primer for those who should be familiar with the general legal concepts driving property boundary disputes.

**Adverse Possession**

To acquire title to real property from the record owner by adverse possession, the following elements must be proved by the party seeking title: (1) actual possession; (2) open and notorious use; (3) continuous and uninterrupted use for five years; (4) use and possession hostile and adverse to the true owner’s title; (5) under color of title or claim of right; and (6) payment of taxes. *California Maryland Funding, Inc. v. Lowe*, 37 Cal.App.4th 1798, 1803 (1995).

**Actual Possession**

The term “actual possession” is defined as: an appropriation of the land by the claimant such as will convey to the community where it is situated visible notice that the land is in his exclusive use and enjoyment; an appropriation manifested by either inclosing it, or cultivating it, or improving it or adapting it to such uses as it is capable of.

*Alcares v. Vece*, 14 Cal.4th 1149, 1167 (1997), citing *Lofstad v. Murasky*, 152 64 (1907).

**Open and Notorious**

The term “open and notorious” means use of land in open view and with the full knowledge of the record owner. *Southern Pacific Transportation Company v. Dept. of Toxic Substance Control*, 44 Cal.App.4th 1160, 1216 (1996).

“Open and notorious” use may be satisfied if the adverse use of the property can be *easily and readily seen*. See *Wood v. Davidson*, 62 Cal.App.2d 885, 888-89 (1944) wherein the Court of Appeal found that defendants’ adverse use of the spring water at issue was “open and notorious” because the plaintiff could easily and readily see that the defendants were diverting the water from plaintiff’s land to defendants’ ditches, gardens and crops. *Id* at 888-89.

Yet, in *Furtado v. Taylor*, 86 Cal.App.2d 346 (1948), despite what may have appeared “easily and readily seen,” the Court of Appeal found that defendant’s adverse use of an irrigation ditch for ten years by filling in the irrigation ditch in and planting crops, was not open and notorious. Defendants never asserted to anyone their right to use a portion of the ditch for cultivation nor did they assert to anyone any claim that they were the owners of the land free from the easement.

**Continuous and Uninterrupted Use for a Period of Five Years**

Adverse use and possession of the disputed land must take place for a period of at least five years. However, the adverse use and possession need not

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emanate from the same owner(s) if there is privity among successive owners. Privity is defined as follows: It is possession not title which is vital...Privity may exist where one by agreement surrenders his possession to another in such manner, that no interruption or interval occurs between the two possessions without a recorded conveyance, or even without writing of any kind if possession is transferred.

See *Sorenson v. Costa*, 32 Cal.2d 453, 464 (1948).

### Use and Possession Hostile and Adverse to True Owner's Title

The terms "hostile" and "adverse" mean that a party's use and possession of disputed land must be adverse to the record owners, unaccompanied by any recognition, express or inferable from the circumstances, of the right to the disputed land by the record owners. *California Maryland Funding, Inc. v. Lowe*, 37 Cal.App.4th 1798, 1806 (1995); *Buic v. Buic*, 5 Cal.App.4th 1600, 1605 (1992).

### Color of Title or Claim of Right

"Color of Title" arises when the adverse user, in good faith, occupies the property in reliance upon a defective instrument. See *Estate of Williams*, 73 Cal. App.3d 141, 147 (1977) wherein the court describes "color of title" as: founded on a written instrument, judgment or decree, purporting to convey the land, but for some reason, defective.

"Claim of Right," on the other hand, is not based upon a written instrument, judgment or decree. Rather, it is created only when the land has been protected by a substantial inclosure or when the land has been usually cultivated or improved. Cal. Code Civ. Proc. § 325; *Thompson v. Dypvik*, 174 Cal.App.3d 329, 339 (1985); *Tract Development Service, Inc. v. Kepler*, 199 Cal.App.3d at 1374, 1386-87.

"Substantial enclosure" may occur when the property is enclosed by a fence. *Alcares v. Vece*, *supra*, at 14 Cal.4th at 1167 (1988). See also *Abar v. Rogers*, 23 Cal.App.3d 506, 511 (1972) wherein the court held that the construction of a barbed-wire fence and corrugated iron fence around the property constituted a "substantial inclosure,"

"Land usually cultivated or improved" may occur when something has been done to the land. In *Rideout v. Covillud*, 39 Cal.App. 417, 419 (1919) the court held that that the lots at issue were "usually cultivated or improved" on the grounds that (1) the lots

originally constituted a slough; (2) the lots were later filled with sand up to the street level; (3) one of the lots was used as a dump; and (4) eventually the lots were filled with sand, brought up to grade and converted from a sump or cesspool into residential lots.

In *Adams v. C.A. Smith Timber Co.*, 273 F.652 (9th Cir. 1921), the court rejected the argument that the mining property at issue had been improved, finding that a small herd of cattle grazing on the land and a garden on a portion of the land did not constitute an improvement upon the land. In further support of its finding, the court also noted that there was no fence or enclosure upon the grounds.

Further, not surprisingly, a sign placed on the property does not constitute an improvement upon the property sufficient to satisfy the element of "usually cultivated or improved." See *Landini v. Day*, 264 Cal. App.2d 278, 282 (1968).

### Payment of Taxes

A claimant asserting a claim based on adverse possession has the burden to prove that either the property at issue was not assessed or, if taxes were assessed, he or she paid them. *Mesnick v. Caton*, 183 Cal.App.3d 1248, 1260 (1986).

In certain circumstances, a claimant need not prove that he or she paid property taxes on the disputed strip of land. California law provides that when a claimant has visibly shown occupation of disputed land by the construction of buildings, valuable improvements or fences, the claimant is entitled to the *inference* that the assessor did not base the assessment on the record boundary as described in the respective deeds of trust but instead, based the assessment on the land improvements *visibly possessed by the parties*. This inference is sufficient to establish the element of the "payment of taxes" *Price v. Reyes*, 161 Cal. 484, 489-490 (1911).

In *Frericks v. Sorenson*, (1952) 113 Cal.App.2d 759, despite the fact that plaintiffs and defendants paid property taxes in accordance with the descriptions in their respective deeds, the Court of Appeal held that plaintiffs were nevertheless deemed to have paid taxes on the disputed strip of land.

In support of its holding, the court found that: (1) plaintiffs were in possession of the disputed strip of land; (2) plaintiffs and their predecessors made substantial and expensive improvements to the disputed strip of land; (3) defendants never objected to the improvements; and (4) defendants never objected to

plaintiffs and plaintiffs' predecessors' possession of the disputed strip of land. See also *Drew v. Mumford*, 160 Cal.App.2d 271 (1958).

### Prescriptive Easements

A prescriptive easement is distinguished from adverse possession as follows:

Adverse possession is a means to acquire ownership of land...By comparison, an easement is merely a right to use the land of another. With an easement, the owner of the burdened land is said to own the servient tenement, and the owner of the easement is said to have the dominant tenement.

*Silacci v. Abramson*, 45 Cal.App.4th 558, 562 (1996).

The elements necessary to establish a prescriptive easement mirror the elements necessary to establish title by adverse possession, except that payment of taxes is not necessary in order to acquire a prescriptive easement. *Otay Water District v. Beckwith*, 1 Cal.App.4th 1041, 1045 (1991).

In *Otay*, the court defined the scope of a prescriptive easement as follows:

The scope of a prescriptive easement is determined by use through which it is acquired. [Citations omitted]. [T]he only limitation [on future use of a prescriptive easement] is imposed by the use made...during the statutory period. [Citations omitted]. Once a prescriptive easement has been acquired, the location and extent of its use is determined by the use experienced during the prescriptive period.

*Otay* at 1047.

The parties' respective rights to an easement were defined in *Mehdizadeh v. Mincer*, 46 Cal.App.4th 1296, 1307-08 (1996) as follows: An easement defines and calibrates the rights of the parties affected by it. "The owner of the dominant tenement must use his or her easements and rights in such a way as to impose as slight a burden as possible on the servient tenement. [Citations omitted]." The owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement.

Unlike adverse possession, when the adverse user claims an exclusive right over the disputed property, it is well established law in California that one can-

not acquire an *exclusive* prescriptive easement over residential property. With an easement, the property is "shared." *Id.* at 1308, *Silaccci, supra*, 45 Cal.App.4th at 564.

### Abandonment of an Easement

An easement, whether by grant or agreement, may be terminated by abandonment by the easement holder. However, in order for an easement to be abandoned, the easement holder must indicate a clear intent to abandon the easement. *Tract Development, supra*, 199 Cal.App.3d at 1384. In *Tract Development*, the Court of Appeal defined the parameters for abandonment as follows: Abandonment hinges upon the intent of the owner to forgo all future conforming uses of the property, and there must be conduct demonstrating that intent which is so decisive and conclusive as to indicate a clear intent to abandon.

When an easement has been created by grant, as opposed to prescription, the Court of Appeal noted that: An easement created by grant is not lost by mere nonuse, no matter how long, and may be lost by abandonment only when the intention to abandon clearly appears.

In *Tract*, the disputed property was a right-of-way. Defendants alleged that the plaintiffs had abandoned their easement over the right-of-way because the prior owners of the right-of-way planted trees on it and obtained an easement to use another portion of land as a right-of-way. The Court of Appeal dismissed defendants' claim of abandonment on the grounds that the trees planted on the right-of-way may well have indicated nothing more than the property owners' intent not to use the right-of-way until some time in the distant future, for example, when further lots were developed.

### Extinguishment of an Easement

Extinguishment of an easement is quite different from abandonment of an easement. An easement will only be extinguished "when use of the easement has been rendered essentially impossible." *Reichart v. Hoffman*, 52 Cal.App.4th 754, 767 (1997). Further, extinguishment of an easement will exist only where the owner of the easement performs or authorizes an act that *permanently* prevents the use of the easement.

The Court of Appeal in *Reichart* further defined the parameters of extinguishment of an easement as follows:

We have not located any case in which an easement was extinguished in the absence of evidence that the owner of the dominant tenement had performed or authorized an act which resulted in a physical change which prevented continued use of the easement without imposing a severe burden on the servient tenement.

*Reichart* at 768.

It cited examples of cases in which an extinguishment of an easement *was not merited*: (1) the planting and maintenance of a hedge across an easement did not merit extinguishment of an easement, and (2) building of a rock wall with a gate in it did not merit extinguishment of an easement. *citing McCarty v. Walton*, 212 Cal.App.2d 39, 45 (1963) and *Crimmons v. Gould*, 149 Cal.App.2d 383, 390 (1957), respectively.

In *Tract Development* the disputed property was a right-of-way in a subdivision. Defendants alleged that the easement over the right-of-way was extinguished by a fence blocking not only public access to the right-of-way, but the other subdivision property owners' access to the right-of-way. *Tract Development* at 1386.

Although the Court of Appeal recognized that it is possible for an easement obtained by grant to be lost by prescription, the court further recognized that such use of the easement must be so adverse to the rights represented by the easement to support extinguishment of the easement.

"Such use of the easement that is so adverse to the rights represented by the easement" occurred when the owner of the servient tenement erected and maintained buildings for five years on part of a right of way. *citing Glatts v. Henson*, 31 Cal.2d 368 (1948).

In *Masin v. LaMarche*, 136 Cal.App.3d 687 (1982), the easement at issue was extinguished by: (1) tying a heavy rope, anchored by two posts, across the access easement; (2) the placing a timber barricade in the middle of the easement road; (3) using the entire easement road for storage, including the placement of a green utility trailer, other timber and building materials.

In *Ross v. Lawrence*, 219 Cal.App.2d 229 (1963), the easement was extinguished when: (1) defendants blocked off an easement road by constructing a curb and retaining wall ten feet into the 50 foot easement; (2) defendants built apartment houses adjacent to the

curb and retaining wall; and (3) defendants caused their vehicles and their tenants' vehicles to be parked well within the easement, thus completely blocking off the easement.

When the holder of an easement does not need to use the easement, occupation of the easement by the servient owner (the owner upon whose land the easement is situated) is not sufficient to extinguish the easement. *Scruby v. Vintage Grapevine, Inc.*, 37 Cal. App.4th 697 (1995).

In *Scruby*, defendant Vintage Grapevine, Inc., the owner of the servient tenement, encroached upon portions of a 52-foot wide access easement that were not necessary for ingress and egress by the holder of the easement. The easement owner, Scruby, sued for an injunction against the encroachment. The Court of Appeal ruled that the owner of the servient land could maintain its encroachment. However, the court recognized that this would not serve to *extinguish* any of the easement rights that had been granted:

No *pro tanto* extinguishment of the granted easement results from this decision which determines the Grapevine's current use of a portion of the easement does not interfere with Scruby's right of ingress and egress to their property as presently developed.

Thus, when the holder of an easement does not need to use it, its occupation by the servient owner is not sufficient to cause it to be extinguished.

### Agreed-Upon Boundary Doctrine

In order to acquire land under the agreed-upon boundary doctrine, the claimant must prove by a preponderance of the evidence each of the following elements: (1) an uncertainty as to the true boundary line; (2) an agreement between prior owners of the adjacent parcels fixing the boundary line; and (3) acceptance and acquiescence in the agreed boundary line for five years. *Mehdizadeh, supra*, at 46 Cal. App.4th at 1302-03.

When a claimant fails to prove that the prior owners of the neighboring properties agreed to resolve a boundary dispute and further, when legal records exist which provide a reasonable basis for fixing the boundary, the agreed boundary doctrine does not apply. *Mehdizadeh* at 1303; *Bryant v. Blevins*, 9 Cal.4th 47, 53-54 (1994).

In *Bryant*, a barbed-wire fence was constructed dividing the parties' respective properties. However, the barbed-wire fence was not the deeded boundary



line between the two properties. The trial record was silent as to “when, or why, the fence was built.” The Court found that although the presence of the fence for a substantial period of time suggested a lengthy acquiescence to the fence and the location of the fence, the agreed-upon-boundary doctrine was not applicable because there was no uncertainty as to the true property boundary line and there was no agreement between the neighbors as to the location of the fence or that the fence would denote the boundary between the respective properties.

### Good Faith Improver Doctrine

California Code Civil Procedure (CCP) § 871.1 defines a “good faith improver” as follows:

As used in this chapter, “good faith improver” means: A person who makes an improvement to land in good faith and under the erroneous belief, because of a mistake of law or fact, that he is the owner of the land. (b) A successor in interest of a person described [above].

The good faith improver doctrine is essentially an equitable remedy. The good faith improver statute, CCP §§ 871.1-871.7, allows a court to effect such an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties, as is consistent with substantial

justice to the parties under the circumstances of the particular case.

California Code Civil Procedure § 871.5 outlines the remedies available for a good faith improver of land.

Courts have granted different types of relief, both equitable and monetary, depending on the circumstances. In *Tremper v. Quinones*, 115 Cal.App.4th 944, 950-51 (2004), the good faith improver who planted a crop of cacti was allowed to remove the cacti, however, the improver was required to pay opposing counsel’s reasonable attorneys’ fees and costs incurred in the action. In *Okuda v. Superior Court*, 144 Cal.App.3d 135, 141 (1983) a good faith improver seeking equitable relief as well as monetary relief was entitled to record a *lis pendens* [a notice of action against real property] against the property upon which the improvement was situated. In *Powell v. Mayo*, 123 Cal.App.3d 994, 999 (1981) a good faith improver is entitled to monetary compensation for the costs of the improvements.

### Conclusion

This article highlights for the land use practitioner the most common property boundary disputes encountered in real property litigation.

As to the question: “Is the grass really greener on the other side,” it all depends upon the perspective, *i.e.*, that of the landowner or the claimant seeking right or title to the landowner’s property!

**Ronald L. Richman** is a shareholder at Bullivant Houser Bailey PC in its San Francisco office. Mr. Richman is a senior trial attorney with over 20 years experience litigating, arbitrating and mediating complex civil and general business disputes. Mr. Richman’s trial experience includes representing landowners and developers in multi-party real estate/boundary/easement disputes.

**Peter A. Clancy** is an associate at Bullivant Houser Bailey PC in its San Francisco office. Mr. Clancy’s practice includes business litigation and real estate litigation. Mr. Clancy is licensed in both California and Nevada and maintains a practice in both states.

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