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Boundaries: The Straight Line Part II

By David Hamerslough

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This month's article reviews a number of other myths related to boundaries.

Myth No. 2: The fence or other barrier will remain in place because it was constructed based upon an agreement reached between the property owners. This is what is referred to as the "agreed boundary doctrine." While the doctrine of agreed boundary remains a viable legal theory in California, it is one that is difficult to establish. It requires a dispute or uncertainty over a boundary line, an agreement to either erect a fence or other barrier or leave one in place as the agreed-upon boundary, and an inability to otherwise establish the actual boundary between the properties. This last component refers to the ability to determine the boundary by survey or some other more precise manner. The burden of proving all of these elements is on the party seeking to establish the fence as the boundary line. In short, while the theory remains a viable one, it is becoming increasingly disfavored because of the ability to establish boundary lines by other more precise means than oral agreement.

Myth No. 3: Question IIC(2) in the Transfer Disclosure Statement does not require the seller to affirmatively state that a fence or other feature is shared with another property when it is open and obvious. While a buyer must exercise reasonable care to observe open and obvious conditions, it is always safer to disclose them even if it is repetitive. The real issue is that this question, like others in the Transfer Disclosure Statement, is really multiple questions covering multiple subjects. It is important for the seller to focus on all of the questions or subjects covered in a specific question, not only the first or second ones referred to in a series of subjects.

Myth No. 4: An owner of property can do whatever he wants on his own property. There are a

number of ways the use of our property is regulated. Covenants, Conditions and Restrictions, zoning and land use laws, and deed restrictions regulate at times how our property can be used. A buyer should review all of the foregoing before removing contingencies. A property owner should also review this material before undertaking any project or activity to see if it is regulated or prohibited.

Another way the use of property is regulated is by the law of nuisance. A nuisance is an activity conducted on one person's property that violates the quiet use and enjoyment of another person's property. This can result from noise transmission or transmission of fumes or noxious smells through the air or if we use or enjoy our property in a way that causes harm to our neighbor.

Liability for the flow of surface water is another example of how use of property can be impacted. Property owners can be liable if they redirect or channel the flow of water in such a way that it causes harm to a neighbor's property. This can occur when improvements are constructed or landscaping takes place. California has adopted a rule of reasonable use. The issue that a court will examine is the reasonableness of the parties' conduct. This includes not only the party who has constructed the improvements or installed the landscaping but also the conduct of the property owner impacted by these activities. While the impact on the property owner is not necessarily required to take affirmative action to protect his or her property from the flow of surface water, they must attempt to mitigate any harm that may require affirmative action, depending on all the circumstances. The best way to avoid this type of problem is to hire qualified professionals before undertaking any improvement or landscaping that may impact the flow of water off a property. Geotechnical engineers and civil engineers are the professionals most likely to be qualified to provide this assistance.

Myth No. 5: An owner of property has an absolute right to air, light, or an unobstructed view. As a general rule, a landowner has no natural right to air, light, or an unobstructed view. With rare exceptions, the obstruction of light, air, and view is not a nuisance except that an excessively high fence might be considered a nuisance. A prescriptive easement for light and air across the land of another is also not recognized by California law. The creation of an easement for light, air, or a view requires an express agreement between two property owners. Such an easement can also be created by a grant or reservation in a deed or other instrument or by the creation of an equitable servitude by appropriate covenants, conditions, and restrictions. Such an easement, including one preserving views, may also be regulated or impacted by local ordinances.

In one instance, a party does have the right to control the height of a neighbor's trees, i.e., when that party has installed solar collectors as part of a solar-energy system. California has enacted legislation to promote solar energy. One component of that law is that a person can protect the sunlight used by solar collectors by preventing adjacent trees from shading more than 10% of the collectors between 10:00 a.m. and 2:00 p.m. If a tree offends in this regard, the offended owner can file a complaint with the City Attorney or District Attorney, who can require the offending tree to be removed within 30 days. Otherwise, the best way to preserve sunlight for purposes of a solar system is to reach an express easement agreement with any neighbor whose property or use thereof may impact the solar system.

In conclusion, the best way to avoid these issues is to investigate and analyze them with the assistance of appropriate professionals before starting any project or construction.

Myth No. 6: In any dispute involving real property, the winning party always recovers attorneys' fees. In California, a party recovers their attorneys' fees only when they are the prevailing party and there is a written agreement which provides for the reimbursement of attorneys' fees to the prevailing party or there is a law which awards attorneys' fees to one party. Generally, for all of the subjects that have been covered in this article, the prevailing party does not have a right to recover attorneys' fees. It is therefore important to understand what your rights are and have them thoroughly evaluated before spending a significant amount of money, let alone time and energy, fighting with your neighbor over any of the foregoing subjects.

In conclusion, the San Mateo/Santa Clara County Advisory discusses many of these issues. If you are representing a buyer or seller, have them review the Advisory, as it may assist the seller in preparing disclosure documents and will certainly assist a buyer in identifying and evaluating issues that may come up during the transaction. My advice to you as a broker or agent is to familiarize yourself with all of these issues, have your client identify what issues or concerns they may have, and, where appropriate, document any discussions, evaluations, and decisions that are reached by the client.

Laurie and I had two very challenging real estate rights issues that we were advised were going to be difficult to prevail on. The RHRC team engaged with us and helped us understand our rights and prevailing position. RHRC were thoughtful advocates for us from the beginning to conclusion of our cases. We feel fortunate to know we will always be able to call on the firm in the future and that they are our legal counsel.

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The California law firm of Rossi, Hamerslough, Reischl & Chuck provides legal representation to real estate and business clients throughout Silicon Valley and the San Francisco Bay Area including San Francisco, San Jose, Palo Alto, Los Altos, Los Gatos, Menlo Park, Gilroy, Hollister, Santa Cruz, Santa Clara, Aptos, Monterey, Carmel, Salinas, Morgan Hill, Saratoga, San Francisco County, Santa Clara County, Santa Cruz County, San Benito County, Alameda County, San Mateo County, Monterey County, and Contra Costa County.