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## Boundaries: The Straight Line

By David Hamerslough

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Most of us think we know where the boundaries are for our property. Over time, we rely on and feel more confident that our fences, vegetation, trees, wood or rock walls, or other monuments define what we own and, therefore, what we can do within the confines of those barriers. Our convictions on these subjects, or assumptions, are usually only challenged when one of these barriers needs to be replaced, typically because of some damage to it, or a neighbor's desire to do something with their property. This article examines some of the myths and practical problems when this occurs.

**Myth No. 1: Fences, vegetation, walls, etc., are the boundaries between properties, especially when they have been in place for a long time.** The only way to confirm that one of these barriers represents the actual boundary line is to obtain a survey. A survey of a typical residential property runs between \$1000 and \$3000 (with an additional cost of approximately \$3000 if a record of survey map is recorded), depending upon the number of property lines being evaluated. In a residential context, the fact that property has been utilized and controlled by one party over a long period of time based upon the existence or erection of a fence, etc., does not give that party a permanent right to continue to utilize and control it. If the parties cannot resolve the issue, a court will decide where the boundary line is based upon testimony from surveyors for both property owners. Please remember that surveying is part science and part interpretation of that science. Surveyors often disagree on the property line based upon what starting point is used.

The court's determination of the boundary based upon the testimony of a surveyor does not necessarily end the matter. Most boundary disputes typically include an assertion of easement rights. The most

common claim is one of a prescriptive easement. In a residential context, this usually arises because of longstanding enclosure and/or use of a property by a fence or some type of barrier. Many people believe they can maintain this status quo permanently by asserting a prescriptive easement.

Since the mid-1990s, California law has not recognized that a property owner has exclusive rights to the property of another in a residential context merely because of longstanding enclosure of it by some type of fence or barrier. California law will not grant an exclusive prescriptive easement, which is essentially what happens when a claim is based upon the utilization or control of another property by a fence or other barrier.

Two other concepts are often raised in these types of disputes. The first is adverse possession. While an easement is the right to use someone else's property, ownership of the property is the result when one establishes a claim by adverse possession. The elements for establishing an easement as well as adverse possession are identical with one exception. Both require that the property of another has been used for a minimum of five years and in a certain manner. Adverse possession also requires that you have paid taxes on the property that has been used. In this area, taxes are typically assessed based upon lot number. It is therefore difficult to demonstrate that one has paid property taxes on another's property, even if it looks as though it is part of the property because of a fence or other barrier. For this reason, a successful claim for adverse possession is very rare.

The other type of easement that is often asserted in boundary disputes is an equitable easement. Equitable easements are often claimed when a structure or retaining wall encroaches on another property or when it is necessary to cross another's land to gain access to a property. As a general rule, an encroaching structure or retaining wall would have to be permanent and significant, and removal thereof would have to result in a greater degree of hardship to the encroaching party than to the property owner. Where access is required, typically an equitable easement will be granted only where a property would otherwise be landlocked. California law does not generally recognize the concept of an equitable easement regarding encroachments such as fences, walls, vegetation, landscaping, steps, and lighting because to do so would effectively negate the actual property owner's right to use his property.

In order to assert an equitable easement, the party seeking it must be innocent or not have negligently caused the encroachment to exist. Once this requirement is met, a court then balances the equities and decides which party would suffer the most if the encroachments were to remain in place or were removed. The court has broad powers to craft a remedy that may require that compensation be paid, that the encroachments be removed, and that any continuing right to encroach cease upon sale of the property, or any number of other resolutions.

The bottom line is, if you are a buyer or a property owner, don't assume that fences, etc., represent the property boundaries or have a permanent right to remain in place. Be sure to obtain a survey, inquire into the history of the fences and the use of any driveways or roadways, attempt to determine whether there have been any disputes or issues regarding these subjects, and determine if any neighbor has a survey or

any other information relevant to these subjects. Having done all that, if there is any issue or doubt, it is best to attempt to negotiate a resolution. If a resolution is reached, document it in writing and record those documents so they show up in the chain of title. It is also advisable to obtain title insurance. You may also have to obtain the consent of any lender who holds a deed of trust against the property. That may require the addition expense of providing the lender with an appraisal demonstrating that the loss of any property does not adversely impact the value of their security interest.



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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.

*Albert "Rocky" and Laurie Pimental, President of Global Markets and Customers, Seagate Technology*

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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.*

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