

# **Prescriptive Easements in California**

By Lou Segreti, Mike Whitton and Andy Puls

## **Introduction**

Imagine discovering one day that your neighbor, a complete stranger, or even the public at large has acquired the right to use part of your property without paying you a dime. Through what is known as a prescriptive easement, over a period of time others could gain the right to access, cross, or otherwise use a portion of your land without your consent. The rationale behind prescriptive easements is that long-time users of property can acquire a legal interest at the expense of property owners who have slept on their rights.<sup>1</sup>

## **Elements of a Prescriptive Easement**

In California, a user of land may establish a prescriptive easement by proving that his or her use of another's land was: (1) continuous and uninterrupted for five years; (2) open and notorious; and (3) hostile.<sup>2</sup>

The first two requirements are relatively straightforward. "Continuous" use means that the use occurred over a five-year period on occasions necessary for the convenience of the user. In some circumstances, even occasional or seasonal use is sufficient.<sup>3</sup> For example, one court granted a prescriptive easement over a road that was used to access hunting grounds only during hunting season.<sup>4</sup>

Use of property is "open and notorious" when it provides actual or constructive notice to the owner.<sup>5</sup> This means only that the use of the land is sufficiently visible that anyone who bothered to view it would be able to discover it. Generally, the use will be considered "open and notorious" so long as it is not hidden or concealed from the property owner.

In most cases involving prescriptive easements, the most difficult element to prove is hostility. A use of land qualifies as "hostile" if it is done without the permission of the owner. Whether the use of land qualifies as permissive can be a fact-intensive inquiry. Some older cases also focus on whether the use was made under a "claim of right," which was sometimes interpreted as requiring proof of subjective intent on the part of the trespasser. However, the modern view rejects this additional "state of mind" requirement and looks simply to whether the owner has consented to the use of the property.<sup>6</sup>

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<sup>1</sup> Restatement (Third) of Property: Servitudes § 2.17 cmt. c (2000).

<sup>2</sup> *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570-72; *Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 449-50.

<sup>3</sup> *Weideman v. Staheli* (1948) 88 Cal.App.2d 613, 616 [occasional use sufficient]; *Harrison v. Bouris* (1956) 139 Cal.App.2d 170, 173 [used no less than 10 times per year].

<sup>4</sup> *Twin Peaks Land Co. v. Briggs* (1982) 130 Cal.App.3d 587, 592.

<sup>5</sup> *Connolly v. McDermott* (1984), 162 Cal.App.3d 973, 977; see also *Hails v. Martz* (1946) 28 Cal.2d 775, 778.

<sup>6</sup> *Aaron v. Dunham* (2006) 137 Cal.App.4th 1244, 1249 ['adverse use' means only that owner has not expressly consented to use]; *Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 447 [claim of right simply means that property was used without permission of landowner; claimant need not believe he or she is legally entitled to use of easement]. See 16-91 Powell on Real Property § 91.05[1][a] [defining 'hostile' as term of art referring to acts, not

## Ways to Prevent Prescriptive Use

Perhaps the most important thing for a property owner to understand about prescriptive rights is how to prevent them from being acquired in the first place. There are several ways to ensure that a trespasser's use of land does not mature into a prescriptive easement.

Somewhat counterintuitively, often the best way to keep someone from gaining an adverse interest in your property is to give them permission to use it. The traditional method in California is to post a sign on the property that reads as follows: "Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code."<sup>7</sup> The signs may be posted either at each entrance of the property or at intervals of 200 feet or less along its boundaries.<sup>8</sup> If the signs are removed by trespassers or otherwise, they must be replaced at least once per year.<sup>9</sup> While this approach prevents acquisition of prescriptive rights, the drawback is that the property owner is publishing permission to pass, and therefore might actually encourage rather than prevent third parties from using it.

To prevent the *general public* from acquiring an easement, owners of coastal properties (land that lies within 1,000 yards of certain coastal waters) have the additional option of recording a notice of consent pursuant to California Civil Code, section 813. Significantly, however, recording such a notice will not prevent an *individual* trespasser's prescriptive rights from ripening unless the notice is also served on a specific individual by registered mail.<sup>10</sup> Here again, the drawback is that the coastal property owner must allow the public to access the land in question. Owners of non-coastal properties do not need to record a notice of consent to prevent the general public from acquiring an easement in their land because there is already statutory protection under California Civil Code section 1009 preventing public easements/implied dedications over non-coastal land.

A third option is simply to provide express permission to the individual(s) using the land. Here, however, the property owner can later run into problems proving the use was permissive rather than hostile. To minimize risks, property owners should obtain and record a written agreement from each person using the property (including successors to the original user(s)) stating that: (1) any use of the owner's property is by permission of the owner only; and (2) such permission is subject to revocation by the owner at any time in the owner's sole and absolute discretion.

A fourth option is to physically prevent or interrupt any adverse use of the property by constructing a gate, wall or other barrier, or continuously monitoring adverse use. The downside to this approach is that interruption of the five-year period requires that the prescriptive use *actually terminate*. In other words, simply constructing a fence, changing a lock, or erecting a wall will not prevent the acquisition of a prescriptive easement if the adverse user picks the lock,

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state of mind, and noting that despite some troublesome early cases, hostility does not imply animosity, ill will, or bad faith].

<sup>7</sup> Cal. Civ. Code § 1008.

<sup>8</sup> *Id.*

<sup>9</sup> See *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201, 229.

<sup>10</sup> Cal. Civ. Code § 813.

climbs the wall, or hops the fence. Additionally, the construction of the physical obstacle could conceivably be used as evidence by the trespasser against the owner of the property that the use was, in fact, not permissive.

### **An Emerging Pitfall: Equitable Easements**

Even if a property owner successfully prevents a trespasser from gaining prescriptive rights in his or her property, in some cases the trespasser may nevertheless be entitled to an equitable easement. An equitable easement may exist where (1) use of the property qualifies as “innocent,” and (2) the court balances the relative hardships of the parties and finds that the burden associated with loss of use by the trespasser is substantially greater than the hardship to the owner caused by the continuance of the easement.<sup>11</sup> “Innocent” merely means that the party is acting with a good faith belief that they have a right to maintain the easement. That belief can be based on reasonable reliance on the property owner’s acts or inaction, or even a justified belief in an existing prescriptive right!<sup>12</sup> Thus, a user of land who “just misses” perfecting easement rights via prescription (by, for example, failing to establish the element of hostility) might still acquire an *equitable* easement in the very same property.<sup>13</sup>

### **Scope**

Finally, understanding the potential scope of a prescriptive (or equitable) easement further underscores why its prevention is important. Once an easement is established, courts may allow an increase in the *degree* of the use of the easement.<sup>14</sup> Permissible increases in degree of use might include the number of people using the easement, provided the increase in use was a reasonably foreseeable development.<sup>15</sup> In contrast, courts rarely allow changes in the *manner* or *type* of use of the easement.<sup>16</sup> Thus, for example, most courts would probably not allow pedestrian use to increase in scope to vehicular use.

### **Conclusion**

Prescriptive easements can arise in a wide variety of circumstances, and the law views every piece of real property as unique.<sup>17</sup> Thus, property owners should diligently monitor their property

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<sup>11</sup> *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1008; *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 262.

<sup>12</sup> *Brown Derby Hollywood Corp. v. Hatton* (1964) 61 Cal.2d 855, 859-860 [finding that acts of defendant, who insisted that he had prescriptive right to build on land, could be innocent if based on good faith belief in prescriptive or other existing right].

<sup>13</sup> See, e.g., *Miller v. Johnston* (1969) 270 Cal.App.2d 289, 303-08; *Field-Escandon v. DeMann* (1988) 204 Cal.App.3d 228 at pp. 237-39; *Linthicum*, at 265-66; *Tashakori*, at 1008.

<sup>14</sup> *Hill v. Allen* (1968) 259 Cal.App.2d 470 [expanding scope of prescriptive easement created over road by 1 residence to include use by up to 25 residences].

<sup>15</sup> *Id.*, at 484.

<sup>16</sup> *Bartholomew v. Staheli* (1948) 86 Cal.App.2d 844, 849-850 [prescriptive user who gained easement rights over road for farming purposes could not thereafter use road to reach nudist colony and pleasure resort].

<sup>17</sup> *Reese v. Wong* (2001) 93 Cal.App.4th 51, 57.

and carefully consider all available options for protecting and enforcing their real property rights.<sup>18</sup>

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<sup>18</sup> The comments and opinions expressed in this article are intended for informational purposes only and do not constitute legal advice. You should not act or rely on any information contained in this article without first seeking the advice of an attorney.