Neighbor Disputes

"Love thy neighbor" is not always easy

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Introduction

"Neighbor disputes can become more bitter than many divorces, and unlike the case for many ex-spouses, disputing neighbors may remain right next door to each other for a long time after the dispute is over...."

Disputes between neighbors over land boundaries, intrusions over boundaries, tree roots and branches, water intrusions, and nuisances which one neighbor accuses another neighbor of can be among the most unpleasant of life's experiences. They can become more bitter than many divorces, and unlike the case for many ex-spouses, disputing neighbors may remain right next door to each other for a long time after the dispute is over, present for each other at each morning's walk out the front door to pick up news-

papers or unload the garbage.

disputes are decided in these neighbor battles rather than get tied down in the "legal-ese" of the rules used for decisions.

Adverse Possession and Easements by Prescription

"Squatter's Rights"

> ***"In essence under the 'Adverse Possession' doctrine the intruder can gain full ownership of land by using or occupying it in a very noticeable manner for the sole benefit of the intruder and without the landowner's permission for 5 continuous years and by paying the property taxes due on the occupied portion of the land."***

On first impression, the fact that American courts allow a landowner's rights to exclusive ownership and use of his or her land to be reduced or limited by someone who has the raw opportunistic gall to enter that land and start to occupy or use it seems, in fact very "UNAmerican"or "socialist" if not downright inviting to criminals. In one explanation I have heard of the history behind the "adverse possession" and "easement by prescription" doctrines which lie behind such a court-permitted situation, centuries ago in England some very large landowners left portions of their land untilled, and these often became occupied by ambitious as well as hungry people. The English courts sympathized with these "go-getters" and felt that their aggressive ambition was better for the economic progress of society than the "laid back" large landowner inertia, and thus were born the concepts of "adverse possession" and its cousin the "easement by prescription".

With "adverse possession" the intruder can gain full ownership of land by meeting 5 requirements with somewhat exotic labels:

> **FIRST ELEMENT**: use under "claim of right or color of title".
>
> (This simply means that the property was used without the permission of

Also, the legal rules which govern who will "win" many neighbor disputes can be very hard to predict because

— the decisions can be based on very ancient hardened and "technical" rules and are not necessarily "logical",

— AND/OR the decisions can be based on which of the disputing neighbors acted "reasonably", which, like beauty, can be very subjectively "in the eye of the beholder" -- that is, a judge or jurors.

Moreover, the determination of who has acted "reasonably" is generally made on what lawyers call a "fact-specific basis" which means, again using "lawyer speak", that "each case turns on its own facts." In other words, the outcome of one lawsuit does not create a clear line permitting easy prediction of what a judge or jury will decide in dealing with another lawsuit involving what appear to be similar facts.

> ***"Lawyers who have handled neighbor disputes never cease to be amazed at the 'sub-text' or underlying independent emotional issues and motives of so many of these disputes which are being aired by the 'pretext' of a dispute over 'legal rights'...."***

And lawyers who have handled neighbor disputes never cease to be amazed at the "subtext" or underlying independent emotional issues and motives of so many of these disputes which are being aired by the "pretext" of a dispute over "legal rights" (what a court would order in a lawsuit). For example, a fight over whether or not one landowner's tall bushes must be cut down to return some "view" to another neighbor often may be fueled by the fact that the owner of the bushes failed to invite the bush-challenging neighbor to the back yard wedding of the bush owner's daughter. Often only skilled attorneys or a skilled mediator can get to the bottom of what on the surface has become a legal battle involving evolving rules and slippery facts.

So, here is one more area of legal disputes which recommends itself to efforts at negotiation by skilled lawyers oriented toward solving problems or to the aid of a mediator acting as the "wise village elder."

What follows is a brief overview of some typical types of neighbor disputes and very brief and over-simplified discussions of applicable legal rules, merely to give the reader some impressions of where and how the "battles" are fought. I have chosen to give an overall "feel" for how

the owner of the land.)

SECOND ELEMENT: "actual, open, and notorious use" of the possessed property constituting reasonable notice to the true owner.

(Meaning that the use must be sufficiently open, visible, and attention get ting to impart "actual notice" to the owner of land being used by the intruder or "constructive notice" (meaning a court will feel the owner of the land if acting at all reasonable should have noticed the intrusion).

THIRD ELEMENT: possession, occupation, or use which is "adverse and hostile" to the ownership of the owner of the land being intruded upon.

(Meaning that the use by the intruder was not permitted by the owner of the land being intruded upon but instead the use was clearly for the sole benefit of the intruder – this phrase does not call for physical combat between the landowner and the intruder, and in fact such combat could make the intruder or the landowner or both face criminal charges, and the intruder could face a suit by the landowner for "trespass" onto the landowner's land).

FOURTH ELEMENT: "continuous occupation and use" for at least 5 years. (The use need not be every hour or every day; it must be at a frequency customary for the kind of use the intruder is claiming--for example, every Summer month for a right of way to a vacation home if such homes are customarily used once or twice a month each Summer)

FIFTH ELEMENT: payment of all taxes assessed against the property during the 5 year period.

In essence the intruder can gain full ownership of land by using or occupying it in a very noticeable manner for the sole benefit of the intruder and without the landowner's permission for 5 continuous years and by paying the property taxes due on the occupied portion of the land.

"With an 'easement by prescription', in contrast to 'adverse possession', the intruder can gain the

permanent right to use an owner's land in the specific limited ways the intruder has been using it BUT NOT full ownership and unlimited uses of the land."

With an "easement by prescription", in contrast to "adverse possession", the intruder can gain the permanent right to use an owner's land in the specific limited ways the intruder has been using it (as a roadway, to plant crops, to carry a water pipe), BUT NOT full ownership and unlimited uses of the land, by meeting only the first four of the above listed requirements needed for adverse possession (all except the payment of property taxes on the land). In essence, by merely using the land in particular ways in a very noticeable manner for 5 continuous years.There is no requirement for the intruder to pay property taxes due on the occupied portion of the land probably because the court will not award the intruder with full ownership and unlimited uses of the land.

The requirement for both adverse possession and an easement by prescription that the intruder use the land in a very noticeable manner for a certain period of time is based on the early courts' desire to provide conditions for a fair warning to any minimally diligent landowner that his or her land was being occupied without the landowner's consent and so the landowner had the chance to go to court to get an order for the intruder to be ousted from that land as a"trespasser"

In California today the ancient doctrines of adverse possession and easement by prescription and the benefits they offered to land intruders are being gradually eroded by the recognition by added California courts that we live in a society very different from "Merry Olde England.".

With respect to adverse possession, property taxes are now imposed on a block of land owned by a landowner, not upon portions of that block of land, so unless the landowner is paying none of the tax due on the entire parcel it is impossible for someone to establish that the intruder is paying some portion of property taxes allocable to a particular section of a parcel. So, establishing adverse possession is possible only for an intruder who pays the property tax on the entire parcel indicated on a tax assessor's map for five continuous years while the landowner failed to pay any part of this tax for that period.

As to an easement by prescription, California courts are recognizing that the "Merry Olde England" atmosphere of rich idle landowners and hungry enterprising upwardly

mobile peasants is not to be found in the suburbs, but instead we often find middle class neighbors with an intruding neighbor trying to get the opportunity to plant some flowers in his landowning neighbor's property. So the courts are narrowing the ability of an exploiter to get a permanent right to use his neighbor's land by the easement by prescription doctrine.

In fact, courts are tending to rely on a relatively new doctrine of "balancing of equities" to decide if permitting the continued intruder uses harms the victim landowner far more that it alleviates a need of the intruder. If the uses of the continued intruder harms the victim landowner's enjoyment of the landowner's land far more that it alleviates a need of the intruder then the court may rule in favor of the victim landowner. Obviously this doctrine, like the question of whether one lawsuit party or the other has acted "reasonably", is, once again like beauty, very subjectively "in the eye of the beholder" -- that is, in the view of a judge or jurors.

There are some other ways in which the owner of one parcel of land can claim an easement or right of use involving neighboring adjoining land without the consent of the owner of the adjoining land, but these do not occur very frequently and so are not covered in this article.

Also the owner of one parcel of land can obtain an easement or right of use over adjoining land or even distant land by arranging for a written contract with the owner of the used land.

Trees and Bushes

> ***"Bear in mind the 'fertile soil' for disagreements over trees and bushes which are based on very subjective feelings of neighbors and quite possibly a very subjective and hence unpredictable resolution by a court."***

Here again is an area with very ancient and "technical" rules. Before I present a few of these, bear in mind the "fertile soil" for disagreements over trees and bushes which are based on very subjective feelings of neighbors and quite possibly a very subjective and

hence unpredictable resolution by a court. For example, a long time upper neighbor's beloved citywide panoramic view being destroyed by a thriving growing tree on the the lower tree-loving neighbor's land -- so the upper neighbor's "breathtaking panoramic view" is being ruined by the lower neighbor's fostering of the lower neighbor's "woodsy country experience." Or, one neighbor's "inspiring Cathedral of trees" represents to the other neighbor a fire hazard and endless tasks of raking and debris removal.

Here are some "rules" governing trees and shrubs, given here with some generalization:

1. If a tree trunk originates entirely on one person's property, that person owns the tree, regardless of where the tree's roots or branches exten

2. Even if only a small portion of a tree trunk lies upon one neighbor's property with the bulk of the trunk lying on another neighbor's property, both neighbors equally own that tree, so neither neighbor has the right to "unreasonably" injure or destroy that tree;

3. Overhanging branch issues. When a tree is rooted partly or even entirely on one neighbor's land but its branches overhang ("encroach upon") an adjoining owner's land, the adjoining owner may resort to "self-help" to cut the branches (instead of first getting the tree owner's permission or court permission) BUT the adjoining owner may not cut these beyond the extent of the overhang, AND may only cut the branches if this is "reasonable" AND ONLY if damage to the health of the tree from such cutting is not reasonably foreseeable.;

   The negative consequences to the adjoining landowner who resorts to self help with resulting damage to the tree (or trees) can be quite serious:

   (i) liability for loss in sale value of the land on which the tree(s) was located;

   (ii) liability for costs of restoring or replacing the tree(s); this can include not only "objectively measured" costs (tree(s) replacement cost on the market plus labor costs to plant new tree(s)) but also "subjectively measured" costs (the unique pleasure or value of that tree(s) to the owner of the land on which the tree(s) was located);

(iii) double the damages under elements (i) and (ii) if the adjoining landowner's harmful actions to the tree(s) was negligent or mistaken– a court must reward double damages when called for;

(iv) triple ("treble") the damages under elements (i) and (ii) if the adjoining landowner's harmful actions to the tree(s) was intentional – a court may in its discretion reward triple damages when called for; alternatively, the owner of the land on which the tree was located may seek "punitive damages" from a court (damages to "teach a lesson" to the tree damager);

(v) possible reimbursement of the attorney fees of the landowner by the adjoining landowner where the tree(s) was located if the land was being cultivated for crops or used to raise livestock;

(vi) possible reimbursement of the attorney fees of the landowner by the person hired by the adjoining landowner to do something to the tree(s) if that person performed work required a California contractor license but the person did not have this license;

4 Extended or "encroaching" tree(s) root issues. A similar rule to the overhanging branch cutting rule applies --When a tree(s) is rooted entirely on one neighbor's land but its roots extend into ("encroach upon") an adjoining owner's land, the adjoining owner may resort to "self-help" to cut the roots on the adjoining owner's land (instead of first getting the tree(s) owner's permission or court permission) BUT the adjoining owner may only cut the roots if this is "reasonable" AND ONLY if damage to the health of the tree(s) from such cutting is not reasonably foreseeable.;

Nuisances

"A 'nuisance' to one person may be another person's 'lifestyle', 'religious practice', 'cultural tradition', or 'innocent fun', and so trying to decide what activities are 'unreasonable' or 'indecent or 'offensive' often becomes a question placed in front of a judge or jury

with the decision being unpredictable."

Let's start with some definitions of this very broad topic.

- The definition of a **nuisance** under California law may be summarized as anything
  - — damaging to human health (including manufacture or keeping of illegal drugs);
  - — "indecent or offensive to the senses";
  - — something that blocks the use of another person's property;
  - — something that interferes "with the comfortable enjoyment of life or property".
- A **public nuisance** is defined as one which affects an entire neighborhood or community or large group of persons.
- A **private nuisance** is defined as any nuisance that affects only one other aperson or a limited number of other persons.

Actions or conditions challenged in court as nuisances by the suing person or "plaintiff" against the "defendant" perpetrator include (•) music or other sounds considered too loud or disturbing, (•) sights or odors considered unpleasant even if not harmful to health (cooking odors, sexual or violent conduct thrust upon bystanders), etc.

Of course, a "nuisance" to one person may be another person's "lifestyle", "religious practice", "cultural tradition", or "innocent fun", and so trying to decide what activities are **unreasonable** or **indecent** or **offensive** often becomes a question placed in front of a judge or jury with the decision being subjective and hence unpredictable..

The perspective of guilt or liability for creating a nuisance becomes very hazy when the question takes place in a building shared by different apartment dwellers or condo owners, when the activities of the nuisance causing person (loud noise from walking around in a unit) would not even be noticeable were it not for the poor construction of the building (poor sound proofing between walls or floors) by the building contractor

Thus the liability for the actions of the nuisance causing person becomes entangled in the question of whether one or more third persons (in other words, the builder of the building) ought also to be liable for failing to carry out the third persons' obligations properly so as to have avoided the nuisance problem. A judge or jury might well find themselves walking along with Alice in Wonderland in trying to make a decision in favor of the nuisance causing person or the suing victim or the third person whose proper work would have eliminated the impact of the "nuisance" on the suing victim.

The remedies for a private nuisance are:

1. Bringing a lawsuit seeking money damages for loss of value of the property adjoining the nuisance and/or seeking a court order (**injunction**) that the perpetrator of the nuisance stop it;

2. Self-help action by the adjoining landowner (an **abatement**) in the form of removing or if necessary destroying the nuisance condition so long as such action (•) does not cause "unnecessary injury" and (•) does not result in a "breach of the peace"-- in other words, does not result in physical combat over removing versus preserving the nuisance condition, and is preceding by "reasonable notice" of intent to enter the land where the nuisance originates if the nuisance is caused by a failure to act rather than a taking of action by the owner of the land where the nuisance originates.

Someone seeking relief from a nuisance may also have protections based on county or city ordinances and building codes.

The concept of "nuisance"and the challenges and remedies for any nuisance are applied in neighbor disputes involving fences, surface water overflows, soil slide movements or loss of foundation support, discussed below, and many other kinds of neighbor disputes beyond the scope of this article.

Rights and Obligations Regarding Water

Surface Water Overflows

"Upper landowners must exercise reasonable care in the use and maintenance of their property to avoid

liability to lower landowners, while lower landowners must take reasonable precautions to avoid or reduce any actual or potential injury to their property."

Liability of an upper level landowner for damage from surface water flowing downhill to a lower level landowner is governed by the measure of whether only one owner or both ownersacted "reasonably". The rule, as stated in a ruling by a California court, is:

1. If the upper landowner is "reasonable" and the lower landowner is "**UNreasonable**," the upper owner wins.

2. If the upper landowner is "**UNreasonable**" and the lower landowner is "**reasonable**," the lower owner wins.

3. If BOTH the upper and lower owners are "**reasonable**", the lower wins also.

The upper landowner has the burden of proving to the court who was acting reasonably.

Stated another way, the rule is that upper landowners must exercise reasonable care in the use and maintenance of their property to avoid liability to lower landowners, while lower landowners must take reasonable precautions to avoid or reduce any actual or potential injury to their property.

Once again, the standard of which person acted "reasonably" rears its head, summoning lots of attorney time in fact-gathering and preparing arguments.

Rights among neighbors to use of water, whether the source is a river or stream or underground water, are determined by a complex set of rules which are beyond the scope of this article.

Rights and Obligations Regarding Soil or Foundation Support

Landslides to Lower Homes
Home Slides Due to Loss of Soil Support

> ***"When soil or foundation support lawsuits arise, the 'party guest list' can include not only the neighboring landowners but also prior owners of either property, architects, contractors and engineers ...."***

Liability of an upper level landowner for damage from earth movement downward to a lower landowner, or liability of a lower or same-level landowner for removing or reducing soil support resulting in sagging or collapse of a home relying on such support, is (in broad and general terms) governed by similar principles to those governing rights and obligations of adjoining landowners regarding surface water overflows. The owner whose land condition is causing the problem is expected to act "reasonably", using "ordinary care and skill" to prevent the problem or minimize it, and the owner whose property is being adversely affected by the problem faces an obligation to act "reasonably" to mitigate or minimize the damage to the suffering landowner's property

The California legislature has enacted a law intended to safeguard against liability for a landowner who takes actions affecting the support of that landowner's soil upon an adjoining landowner, including giving advance notice of intended action to the adjoining landowner and giving the adjoining landowner time to take steps to head off the dangers from loss of the soil support, but the safeguarding steps are spelled out in terms of "reasonableness" and use of "ordinary care and skill". So the now-educated reader will easily note that these supposedly "safe harbor" rules for the action-planning landowner do not provide clear-cut comfort.

The obligations to prevent damage to land from a soil slide or soil support problem can be continuous and pass from the original "perpetrating" owner of the problem-causing land that created the condition threatening the potential of damage, to a later purchaser of that problem causing land who fails to take steps to maintain protections from such damage.

When soil or foundation support lawsuits arise, the "party guest list" can include not only the neighboring landowners but also prior owners of either property, architects, contrac

tors and engineers who worked on either property and are argued to be responsible for creating the problem or failing to head it off, even lenders who got involved in overseeing any work leading to the problem, and of course the companies providing insurance coverage to any of these individuals or entities.

Fences OTHER THAN Fences Marking Off Neighbor Land Boundaries

> ***"Many neighbor disputes also involve fences or rows of trees or bushes not because these demarcate a disputed boundary line but because the fences or tree or bush rows otherwise raise the ire of an on-looking neighbor...."***

Since many neighbor disputes involve disputes over land boundaries (who owns a slice of land among "**adjoining landowners**" -- landowners who live next to each other) or uses or "**encroachments**" by one landowner onto land which is undisputably owned by his or her neighbor, such disputes often involve the placement of "**boundary fences**". However, many neighbor disputes also involve fences or rows of trees or bushes not because these demarcate a disputed boundary line but because the fences or tree or bush rows otherwise raise the ire of an on-looking neighbor -- for example, this neighbor feels that the structures or greenery are offensive in appearance or block a treasured view.

Fence or Tree Size As Regulated by Local Governments

The State of California does not have any statutes or court decisions barring fences or trees, etc.

However, many county and city governments in California do have such laws restricting heights of fences or trees, etc., and otherwise protecting views from being blocked. Generally a landowner cannot sue to force the owner of the offending fence or trees, etc. or other view impediments to remove these unless the suing landowner can demonstrate that these cause some special injury to his property. But the city or county creating these laws can enforce them in court, so the offended landowner can bring the offending fence or trees, etc. to the attention of the county or city building code or zoning code enforce

ment agency.

Fence or Tree Size As Regulated by Homeowner Associations in Condominium Projects and Other Privately Planned Developments

Many homeowners now live in condominiums or other residential developments governed by restrictive rules placed within or verbally tied to their home deeds as "**covenants, conditions, and restrictions**" or "**CC&Rs**", which prohibit any homeowner from constructing structures or growing trees or bushes that obstruct views of other homeowners, and these rules are supposed to be enforced by "**homeowner associations**" governing the condominium project or residential development. An unhappy homeowner can seek enforcement of the CC&Rs prohibition by notifying and then going before the homeowners association at a hearing, and the homeowners association can order the offending homeowner to remove the blocking structure or tree, etc. and sue that homeowner if he or she fails to obey the homeowner association's order. And, if the homeowners association fails to give such an order or follow up with a court suit, then the unhappy homeowner can sue both the offending homeowner and the lackadaisical homeowners association. However, before bringing such a suit the unhappy homeowner must attempt to seek relief from the homeowners association under the procedures providing for this in the CC&Rs. And, the unhappy homeowner must seek relief by resorting to a "**mediation**"proceeding with the offending homeowner if the latter person cooperates in this (mediation being a way to attempt a voluntary solution to the dispute by use of a (hopefully) wise "**mediator**" whose sole goal is to help the disputing parties reach a solution that ends their dispute before starting a lawsuit or going through trial on a lawsuit).

Spite Fences

A "**spite fence**" is a fence built by a landowner which interferes with an adjoining landowner's full enjoyment of the adjoining landowner's property and whose usefulness to the builder is overshadowed by the builder's "malice" motive -- that is, a motive solely to annoy the adjoining landowner or occupant of adjoining land. A row of trees or tall bushes planted back away from from blocking views or blocking sunlight, except for the "**spite fence**" law discussed below.

a property line but blocking the on-looker's treasured view can in some circumstances be

regarded as a spite fence.

A court determination of whether the fence builder's motive in erecting the fence or row of trees or bushes was "**malicious**" will depend on the collection of facts the builder and the adjoining landowner present to the court and obviously will be based on the judge's or jury's subjective interpretation of these facts, including whether the conduct of the fence builder and surrounding facts hints at spiteful intent by the fence builder, the height and pleasing or nonpleasing appearance of the fence, and whether any usefulness of the fence to the fence builder seems subordinate and incidental to what appears to be the builder's overriding spiteful intent.

The adjoining landowner can challenge the spite fence by bringing a lawsuit treating the fence as a form of nuisance and seeking the remedies for nuisance claims described above.

Rights to Unobstructed Sunlight or Views or Air Flow

However, as in the case regarding nuisance claims, the deprived or soon-to-be deprived landowner may have protections based on county or city ordinances and building codes providing rights to views, or based on rights created in rules binding each owner in a condominium association ("covenants, conditions, and restrictions", already mentioned above, to which each condominium owner binds himself/herself when they take ownership of a condominium in the condominium association project). See the discussion above on regulation of the height or size of fences and trees, etc. by homeowner associations of condominiums and other privately planned homeowner developments.

And, while the California State government does not have a general rule prohibiting the blocking of sunlight, it does have laws which may get to the same result--namely, laws prohibiting interference with collection of solar power or wind power. Also, county and city governments may have rules on this.

Beneath the Surface--The "Roots" of Many Neighbor Disputes

As I mentioned at the beginning of this article, lawyers who have handled neighbor

disputes never cease to be amazed at the "sub-text" or underlying emotional causes of so many of these -- unrelated, even irrational but powerful motives lying beneath the surface of the legal arguments being made by lawyers in a lawsuit. Often only skilled attorneys or a skilled mediator, seeking solutions rather than continuing strife, can get to the bottom of what on the surface has become a legal battle involving rules which may be undergoing changes by the courts, hazy "reasonable behavior" tests, hard-to-establish facts or facts involving "scientific" or nonscientific issues differing with each dispute, and a court-imposed cure by a "judgment" that rarely deals with the underlying causes of the neighbor-to-neighbor strife.